

## **Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?**

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*Rights play a crucial role in shaping identity by organizing the recognition of self by others and by legal and social institutions. For Hegel, legal rights lead to an abstract type of recognition based on the universality of the law. The concreteness of the person, alongside the respect bestowed by legal recognition, calls for the acknowledgment of honour and esteem. Human rights move in this direction, by validating both the similarity of claimants with abstract humanity and their difference and uniqueness. But law's necessary generality cannot meet the demands for the full recognition of the postmodern self with its polymorphous desires and its complex struggles for recognition as a unique individual.*

### HEGEL'S THEORY OF RECOGNITION

The voluminous literature on rights has paid scant attention to the role legal rights play in constructing identities. Legal philosophers discuss classifications of rights, the internal consistency of rights discourse, the social effects of rights or the goods rights guarantee. But on the subjective side, the operative assumption is that rights express, uphold, and guarantee pre-existing characteristics, their task typically being to promote free will. The characteristics, elements, and traits of human personality exist prior to rights and other public institutions, which are treated as tools facilitating the public expression of pre-formed and complete selves. These assumptions are part of liberal theory's impoverished view of the subject as a closed and monological entity and, of the social bond as an atomocentric collection of individuals whose relations to each other are external, superficial, and interest-driven.

The shortcomings of the liberal theory of rights have been attacked from many perspectives and in particular by American critical legal scholars. Critical academics have faced some difficulty in reconciling their

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occasionally scathing theoretical critique of rights with the practice of radical lawyers who, consistently and often successfully, mobilize rights discourse to protect the underprivileged and oppressed. This conflict has been in strong evidence in the writings of critical race theorists and exemplified in Patricia Williams's statement that rights are 'a symbol too deeply enmeshed in the psyche of the oppressed to lose without trauma and much resistance'.<sup>1</sup> In seeing rights as 'symbols' which have important psychological effects, Williams invites us to abandon the liberal theory which approaches rights as external to the self and to examine the ways in which rights are 'enmeshed' in the psyche. It is possible that by changing focus and emphasizing the constitutive role of rights in building human identity, the apparent conflict between critical theory and practice will disappear.

For rational natural law, the tradition that led to the great declarations of right of the eighteenth century, human rights aim to acknowledge and protect the central and immutable characteristics of human nature. These attributes may differ from philosopher to philosopher, from the need for self-preservation in Hobbes to rational freedom and moral responsibility in Kant, but their uniform and absolute character makes them universal, establishes the priority of rights over duties, and determines the content of legal rights. While this approach has a number of followers in moral and legal philosophy, particularly amongst contemporary social contractarians, the social theory of subjectivity owes more to Hegel's critique of Kant's conception of morality and of the person as separate from others and the world. Indeed, the theories of recognition, central to identity politics and communitarian political philosophy and, as misrecognition, to Lacanian psychoanalysis, are direct descendents of Hegel's understanding of identity-formation. The first part of this essay aims at introducing the concept of recognition by placing it within the general framework of the Hegelian dialectic before moving to an examination of its specific legal elements and of its contemporary relevance for human rights.

Kant's *Critiques* gave philosophical expression to the modern obsession with the separation between subject and object and between self and the world. Hegel's main task was to heal this rift and to reclaim the unity of existence. The early German romantics had tried to overcome the separation by successively prioritizing one or the other pole. Hegel's answer was more radical: the split was internalized and historicized and the fragmentation of modernity was seen not a catastrophe but as a necessary stage in the odyssey of spirit or reason towards its own self-consciousness. For Hegel, thought, consciousness, and the spirit are active forces, caught in a continuous struggle, in which the spirit fights its own alienation in the external world, recognizes objectified existence as its own partial realization, and returns to

1 P. Williams, *The Alchemy of Race and Rights* (1991) 165.

itself through its negation, acknowledging history as the process of its gradual realization.

People, institutions, art, work, morals, religion, and all aspects of social existence follow a similar trajectory. The struggle between principles, forces, and forms of life moves history forward. Its dialectical character means that in each of its concentric stages, a force or institution and its underlying principle is 'sublated', both negated and retained by its opponent. The institution of family, for example, and its central value of care for its members treated as unique individuals, is transcended – both preserved and overcome – by that of civil society with its emphasis on formal relations amongst legal persons treated as abstract right-holders. The dialectical absorption and overcoming moves the historical process in a spiral-like fashion towards the final stage, the state of ethical life or *Sittlichkeit*. The key oppositions of modernity are not catastrophic conflicts therefore but dynamic expressions of the ongoing struggle which defines existence, determines human consciousness, and makes history the process in which the spirit (or reason) realizes itself as history's underlying principle. From the perspective of the final stage or the end of history, the spirit looks back and sees history not as a random sequence of events but as the unfolding of a progressive trajectory leading to the overcoming of conflict. Philosophy follows a parallel trajectory, eventually merging with the first, which gradually comes to recognize that history is the incarnation of reason.

When Hegel turned to the normative field, he argued, against Kant's moral and legal formalism, that freedom and ethical life are intrinsically linked. In ethical life, the final stage that entered the historical scene with the modern state, morality and legality are finally reunited into an organic whole and become the state's institutional manifestation. All previous normative systems, from the Greek city-states to the absolute monarchy, with its limited legal protections, were partial stations on the road to the final reconciliation of ethical life. Subjectivity too, Hegel believed, is created through a struggle amongst people for the reciprocal recognition of their identity. This struggle led to social divisions and hierarchies, which culminated in the creation of a class of masters and of slaves and only with the modern overcoming of the master/slave relationship can the complete human person come to life.

Hegel's *Philosophy of Right*<sup>2</sup> presents the movement to reason's historical incarnation as a tripartite progress which assumes explicitly legal form. Abstract, formal right gives way to the morality of Kantianism (*Moralität*), which is finally transcended by ethical life. In the first stage, rights have formal existence but no determinate content and legal personality, the key organizing concept, exists only in the abstract. Law and morality express the immediate and undifferentiated unity of universal principles and, as a result, human will is free but its only action is to relate self to itself and thus create a

2 G.W. Hegel, *Philosophy of Right* (1967, tr. T.M. Knox).

person who lacks concrete characteristics and does not relate to others. This abstraction is the legal subject, a pure logical cipher, whose only role is to be abstract support of universal norms and only quality, to possess legal rights and duties. 'Man' is a legal subject but the kernel only of an embodied human being.

The passage from formal right to morality involves the incomplete differentiation and concretization of the abstract subject. At this stage, the person stands before the world and becomes aware of her or his freedom and, gradually, the bare universality of legal personality and formal right develop into individual subjectivity. The person now realizes that not only she is free to act on the world through her rights but that freedom is her essence. The recognition emerges when, in relating to herself as the bearer of universalizable rights, she discovers an inner space of freedom and moral responsibility. But the good, the universal end of ethics, cannot remain internal to conscience; it must be realized in the world. Kantian moralism however does not allow the inner life of good intentions and the world to communicate. The moral conscience, with its universalism and cruel disregard for human emotions and needs and, universal freedom, the authentic form of the good, face each other as two alien and unconnected forces. Humans must act according to universal maxims but the categorical imperative creates an abstract morality which has no content and cannot provide concrete guidance. Its command is to follow and apply the empty form of the universal. As the young Hegel showed, any maxim can be universalized without contradiction and anything can be justified in the abstract.<sup>3</sup> If the abstract legal person is the kernel of the concrete human, the Kantian subject is its external-only shell. To move from that to the unique individual, the 'concrete universal', legal mentality must be complemented with emotional care.

Formal right and abstract morality are finally absorbed, cancelled, and transcended in the third moment of *Sittlichkeit*. The abstract good and human conscience, which were kept apart from the world by morality, now come together and are realized in the actions of concrete individuals. Unlike the coercive law of Kantian freedom, ethical life is the living good practised and experienced by each citizen. This living law constrains 'subjective opinion and caprice'<sup>4</sup> with minimum need for external sanctions and makes virtue 'reflected in the individual character.'<sup>5</sup> Autonomy becomes real only when it is embodied in political institutions and universal laws which give content to reason, shape our personality, and give substance to our moral duties. Unlike the abstract universality of right and the formal subjectivity of morality, in ethical life 'right and duty coalesce, and by being in the ethical order a man

3 G.W. Hegel, *System of Ethical Life* (1802–3) and *First Philosophy of Spirit* (1805–6) (1977, tr. H.S. Harris and T.M. Knox) and *Natural Law* (1975, tr. T.M. Knox).

4 Hegel, op. cit., n. 2, p. 105.

5 id, pp. 107, 109.

has rights in so far as he has duties, and duties in so far as he has rights.’<sup>6</sup> Ethical life integrates the universal and the particular, makes freedom concrete, unites subject and object, is and ought, content and form. This is then the movement of the spirit in history: from right to morality to ethical life in the domain of morals and from family to civil society to state in institutions. The progress is full of internal and external contradictions, of conflicts turns and tribulations, which are gradually absorbed in the inexorable march of the spirit towards its own self-consciousness.

Hegel followed a similar approach when he turned to the examination of the person. What makes his analysis of particular interest to critical legal theory is that legal forms and institutions play a crucial role in shaping personality. For Hegel, relationships between self and other are crucial for the construction of both self and of community. The self is not a simple, stable entity fully identical with itself which, once formed, then goes into the world and builds relations with others from a position of self-sufficiency. While Descartes and Kant had presented consciousness as a solitary entity confronting the outside world, Hegel insists that self is constituted reflexively and is radically dependent on the action of others. The struggle for recognition is the key ethical relationship or the main form of practical intersubjectivity. Moral conflicts, personal disputes, and social antagonisms are partial expressions of this struggle, which creates the agreements and reciprocity necessary for the socialization and the individuation of the subject. My identity is constructed through the recognition of my characteristics, attributes, and traits by others, both other persons and what we may call, following Lacan, the Big Other, the various social and legal institutions which determine the parameters of our existence. Lack of recognition or misrecognition undermines the sense of identity, by projecting a false, inferior or defective image of self. This acknowledgement of the vital contribution others make to the constitution of self reconciles us (or alienates us in case of non-recognition) with the world. In this sense, recognition is a mode of socialization. But the other’s recognition of my identity makes me also aware of my specificity and difference from all others and thus helps my individuation.

Hegel’s starting point is that the ego as self-consciousness is a creature of desire. Desire reveals a fundamental lack in the subject, an emptiness in the self that must be filled through the overcoming of external objects. Desire makes me realize that I am missing something to be complete and makes me aware of my difference from the object, the not-I. Behind all types of desire a deep dialectic is at work: embodied human life depends for survival on the external world and, as a result, part of the self is always outside itself and the otherness of objecthood is already launched in self. Hegel’s philosophy aims to integrate all aspects of social existence in a historical march, presented as

6 *id.*, p. 109.

the realization of spirit, which overcomes alienation and unites the humanity and the world, the finite and the infinite, freedom and fate. Human history moves towards a 'total integrity',<sup>7</sup> in which the opposition between self and other will have been overcome and the external reality which determines us contains nothing alien or hostile. Integrity will be achieved only when our dependence on the external world is dialectically negated, in other words, when humanity is at home in its environment.

For Hegel, self creates itself in a continuous struggle to overcome the foreignness of the other. The immediate self suffers from the delusion of self-sufficiency under which the difference from others is absolute and must be negated through the arrogation of absolute sovereignty. The other is treated as inferior and inessential, of lesser value and importance than self. Indeed, the first reaction of the desiring self when faced with the other is to seek immediate satisfaction and heal the split between subject and object by negating the object. The desire for food, for example, negates the otherness of the foodstuff by eating it. But once hunger and desire are met, self is thrown back to his illusory self-identity, which does not differentiate humans from animals. Human desire is not addressed towards an object, however, but towards another self-consciousness. The next step for self is to accept that he depends on the other but to keep the relation between self and other external. The two consciousnesses know they need the other's desire and recognition but believe that they can forgo or force it through the exclusion, marginalization or subjugation of the other. Here desire is totally narcissistic, the other is only the foil in a quest for unreciprocated prestige, typically evident in the relationship between master and slave.

Mutual recognition is the third step, which completes and overtakes the first two. Now the other is accepted both in her identity and her difference from self and, as a result, self discovers himself as integrally related to the other. The other's recognition and desire allows self to see himself reflected in another self and create a nexus of links and dependencies that affect all aspects of both selves. Recognition works if it is mutual. I must be recognized by someone I recognize as human; I must reciprocally know myself in another. When full mutual recognition operates, the two selves stand in a relationship in which the self-understanding of each passes through the other and the relationship of each to the other depends on the self's self-relation.

Recognition is both a phenomenology of identity and a theory of knowledge. I can only become a certain type of person, if I recognize in the other the characteristics of that type which are then reflected back onto me. I cannot change myself therefore without changing the other and changes in the other who stands in recognition of me change the self too. As epistemology, recognition, by assuming the object to be another subject, turns knowledge into a process of cultural mutuality and exchange, and self-

7 C. Taylor, *Hegel* (1977) 148–50.

knowledge into self-exploration and self-control through the understanding of the other.

Liberal philosophy, however, in its attempt to glorify the individual, denies our dependence on the world, artificially erases the traces of otherness, and imagines self as identical with itself. The illusion of self-identity has been promised in a number of ways. Law promotes the idea that self stands at the centre of the world, fully in control of himself, clear about his motives and in possession of his rights, which allow him to enter into instrumental relations. The delusion of self-identity is only a palliative, however, for the painful but inescapable realization that we depend on the other and are determined by the outside world. Full self-consciousness is the 'unity of oneself in one's other-being'. Identity embraces both being for oneself and being for another and is achieved by accepting self as the 'identity of identity and non-identity'.<sup>8</sup> The self-conscious subject, created through the other's desire, retains the separation from the other as one part of his identity and recognizes himself both in the other and in his difference from her. In this sense, self-consciousness both negates the split between self and other and preserves it. The self can never be self-identical: he is an amalgam of self and otherness, of sameness and difference.

Identity is therefore dynamic, always on the move. It is an ongoing dialogue with others, which keeps changing the image others have of myself and re-drawing my own self-image. Significant others, parents, close relatives, intimate partners, and friends are the primary interlocutors. This dialogical construction of identity through the (mis)recognition of others extends to further interlocutors, from the secondary audience of acquaintances and colleagues all the way to strangers in the street who fleetingly but crucially become collaborators, foes or victims, in our struggle for recognition. But while recognition takes the form of a conversation, this is a 'distorted' dialogue, the opposite of the Habermasian 'ideal speech situation' between free and equal speakers. When aspects of my self-image are not recognized by others, the conversation turns into an often violent conflict, typically in the case of hate speech and hate crime.

Our 'dialogue' with the Big Other of legal and social institutions is even more limited. It usually takes the form of a monologue in which aspects of self are recognized or not. Our ability to negotiate, to answer back or to ask for greater or different recognition is restricted if not non-existent. An influential presentation of the recognition given by the law has been offered by Louis Althusser in his essay 'Ideology and Ideological State Apparatuses'.<sup>9</sup> Althusser describes the way subjects identify themselves as a kind of ideological calling or 'interpellation'. He allegorically uses a common street scene, in which someone goes about his business when he is

8 G.W. Hegel, *The Phenomenology of Spirit* (1977, tr. A.V. Miller) 140.

9 L. Althusser, 'Ideology and Ideological State Apparatuses' in *Lenin and Philosophy and other Essays*, ed. L. Althusser (1971, tr. B. Brewster) 127–88.

suddenly called from behind. As the person turns around and sees that a policeman is calling him, he accepts the terms by which he is hailed, responds 'Here I am' and stops. In so doing, he occupies the place ascribed to him by the personified law and identifies with the distorted recognition (as a suspect, a criminal, a subject) offered.<sup>10</sup> Ideological subjection, recognition and identification are linked in this allegorical scene with the law: the subject turns to face the law, aligns itself with its commands and this way acquires his identity. But we can literalize the story: the law is not just a symbol for social institutions and their ideological operation but their first and foremost expression. I have discussed elsewhere how the free legal subject depends for his or her existence on a relation of subjection or submission to the law. This subjection was presented in medieval political theology as a relationship between 'a *sublimus* chosen to command and *subditi*, who turn towards him to hear the law'.<sup>11</sup> In modernity, subjection is internalized and gives rise to the sense of freedom. From this perspective, the typical subjection to the law takes the form of a person hailed by the police officer who turns around, recognizes that he is called to his identity, and responds like any good lawyer who understands police powers, 'Here I am officer but I have my rights and your powers are limited.'

Legal recognition as subjection must supplement therefore the Hegelian tale of interpersonal reciprocal recognition. Without this corrective, the sophistication of dialectics remains inadequate and can be criticized for excessive idealism and lack of historical sensitivity, the very criticisms of neo-Kantian legal philosophy from which Hegel departed. To this extent, this essay is the first part of a wider argument.<sup>12</sup> It concentrates on interpersonal relations and the contribution rights make to the project of identity formation. Legal and human rights are the institutional tokens of our identity, important weapons in our struggle for recognition. Recognition helps establish interpersonal bonds and build individuality through sociality; rights are bargaining chips in our negotiations of identity. But the dialogue of the social partners in which we contribute to the construction of the identity of self and other takes place always against the monologue of legal subjection.

## LEGAL RECOGNITION AND PERSONALITY

Law is a major contributor to the social process of recognition. Legal recognition is one of the three main forms of mutual acknowledgement, the middle stage between love and ethical life or solidarity. All three are ethical

10 For commentary on Althusser's classical theory of 'interpellation' see S. Žižek, *The Sublime Object of Ideology* (1989) 1–2 and throughout, and J. Butler, *The Psychic Life of Power* (1997) ch. 4.

11 C. Douzinas, *The End of Human Rights* (2000) ch. 8, at 218.

12 The second part of *The End of Human Rights* is an attempt to understand the process under which freedom presupposes subjection to the law.



ways of recognizing the other and creating self; they help constitute different types of identity. But they are not mutually exclusive. Hegel claims that each is associated with a different historical and institutional stage: love with family, legal recognition with the pre-welfare state bourgeois society of his time, and full recognition with what he calls the ethical state. From the viewpoint of the subject, however, these are overlapping layers of the self.

First, love. Its primary terrain is the family. In a loving relationship, the lover negates his isolation and independence but regains a richer and more nuanced self through his partner. In a loving relationship, the self finds in his lover both himself and the other and finds the other in himself. Furthermore, each sees himself through the eyes of the other and understands the partner through the same ideas and emotions he uses to reflect on his own motives, desires, and actions. Similarly, family members are in a state of mutual dependency and affection and recognize each other as concrete persons, as mothers, daughters or sons with concrete needs and unique desires. We are in a continuous dialogue with our loved ones, imagined or real, and this creates our sense of uniqueness. Power plays a part in these conversations, to be sure, typically when our interlocutor is the father. But the metaphor of conversation gives a sense of the centrality of the other's presence in the constitution of self. This combination of autonomy and community, which lies at the centre of identity formation, can be sustained, however, only amongst the members of small and closely-knit units.

Legal recognition could not be more different. It is the effect of the operation of a legal system which enforces equally the universalizable interests of all. Legal personality is both a state of being and a stage in the history of political and legal institutions. In existential terms, it expresses self's ability to remove itself from family, social and cultural background, from all determinations that make it a concrete human being and to become abstract, indeterminate. It appears, first, in the Roman concept of the *persona* and becomes fully realized in the bourgeois society Hegel observed around him in nineteenth-century Germany. As *The Philosophy of Right* puts it,

[p]ersonality begins not with the subject's mere general consciousness of himself as concrete and in some way determined, but rather with his consciousness of himself as a completely abstract ego in which all concrete limitation and validity are negated and invalidated. In the personality therefore there is knowledge of the self as an object ... purely identical with itself.<sup>13</sup>

Legal personality is a type of recognition based on the minimum commonality of people. It places the individual:

in the form of universality, that I am apprehended as a universal person, in respect of which all humans are identical. A human being counts simply because he is human and not because he is Jew, Catholic, Protestant German, Italian, etc.<sup>14</sup>

13 Hegel, op. cit., n. 2, para. 35.

14 id., para. 209.

The personality of legal rights is therefore ‘thin’, an ‘empty unit’, a ‘mask only of character’. The legal person negates all the contingencies of existence, race, sexuality, colour or religion and acquires an individualistic, negative, and private concept of self. The negation of what makes self real opens the possibility of negating others and of creating a sphere of privacy, where the person is free to act without external impositions and to reject the offers and advances of others. The will of the legal person is negative; it relates to others through excluding them.

Legal personality comes to existence when private right becomes the basic building block of the modern law and society and replaces the ethical unity of family life with its exact opposite, subjective freedom. The law expresses the universal element of freedom, and right, the subjective element of law, allows legal persons to come together in exchanges, sales, and other deals which externalize their freedom.

[M]an is recognized and treated as a *rational* being, as free, as a person; and the individual, on his side, makes himself worthy of this recognition by overcoming the natural state of his self-consciousness and obeying a universal, the will that is in essence actuality will, the *law*; he behaves, therefore, towards others in a manner that is universally valid, recognizing them – as he wishes others to recognize him – as free, as persons.<sup>15</sup>

Personal freedom, the great achievement of modernity, released the individual to pursue his interests in a way that ‘the universal does not attain fulfillment or validity without the interest, knowledge and volition of the particular.’<sup>16</sup> Every belief system, tradition or ideology must be posited, it must become the object of reflection and adoption by people, opening itself to the form of the universal. But in the absence of the ethical links that characterize the family, the universal and the particular stay external: people come together out of need and are united superficially in their difference. Private interest, the difference of each from the others, defines this as a society of conflict and competition. The others are a means only to our self-interest. ‘Civil society is universal egoism and reciprocal exploitation ... persons are related to each other only in an external or contingent manner.’<sup>17</sup>

But how do legal rights contribute to the process of recognition? The example of property and contract can help us here. The possession and enjoyment of property enables the abstract personality to acquire specific characteristics, to objectify itself.

The self as abstract will claims to be essential reality, but the existence of external things, that is, objects, and our dependence on external reality contradicts this. The self, therefore, needs to appropriate external objects – it

15 Hegel, quoted in A. Honneth, *The Struggle for Recognition* (1995, tr. J. Anderson) 108.

16 Hegel, *op. cit.*, n. 2, para. 260.

17 R. Williams, *Hegel's Ethics of Recognition* (1997) 233.

must own property. The self becomes particularized and concrete, rather than abstract, through ownership. Potentiality becomes actuality.<sup>18</sup>

Property is a necessary moment in the struggle for recognition because the desire for objects is one aspect of the desire for others. When I take possession of an object, I externalize myself by placing my will in that object and so in the world. My will stops being abstract; it takes determinate existence. But simple possession is contingent, always threatened. Without recognition by others, possession cannot become actual and offer satisfaction. This is what the property rights achieve. Others recognize my rights in my possession on condition that I also recognize their property. My property is secure through the universal operation of the legal relationship. Property therefore leads to a form of interpersonal recognition, a type of intersubjectivity achieved through the medium of the object; others recognize me by acknowledging and respecting the existence of my will in the thing. The main aim of property therefore is to constitute 'subjectivity as intersubjectivity through the mediation of objectivity'. Property helps the recognition of legal personality in a dialectical process in which an individual is recognized by someone he or she recognizes as legal subject.<sup>19</sup>

Respect for the rights of others and the recognition of abstract humanity that underlines property becomes concrete in contract. The exchange of offer and acceptance allows the two wills to come together and create a common will, which leads to the passing of the object. Recognition now moves from the universal humanity of abstract right to the concrete embodiments of will, the exchanged objects of the contractual relationship. The possession and enjoyment of property identifies subject and object for another subject, while alienation, the third element, realizes the free will of the abstract person and turns her into a concrete individual through the recognition of another already recognized as subject. In the legal universe that Hegel describes, property is a pre-condition of the recognition of others. The right to property is the right to have rights and to be recognized as a (legal) person. Lack of assets not only leads to poverty and material hardship but also excludes people from universality and the recognition it bestows.

Contract represents therefore the minimum recognition offered by legal relations. The property contract symbolizes the birth of the subject. In conveyancing, the contractors not only exchange objects but they also recognize each other as separate and free and as possessors of rights and duties – in and through the contract they constitute one another as subjects. We desire objects not for their own sake but as means to the desire of and for other persons. Subjectivity is here constructed symbolically and the property contract has a little bit of magic. The contractors get their object of desire but on top they receive something more than they bargained for: they become recognized, they achieve the true desire of the other.

18 J. Schroeder, *The Vesta and the Fasces* (1998) 34.

19 *id.*, p. 23.

But even this more concrete recognition of conveyancing remains rudimentary and defective. Contractual convergence is contingent and transient. The other is not recognized as a unique individual but as an owner, as a legal person externalized in his property. It is as if people exist only in and through their property. Similarly, the contractual relationship is negative and impoverished: freedom can be expressed only through negating the advances of the other. Furthermore, once the contract has been signed and the exchange completed, the contractors return to their previous state of non-recognition, their identity reverts back to its pre-contractual state, their fleeting and superficial reciprocity disappears. People converge through property rights out of calculation and self-interest. Private rights have very little to do with principle and everything to do with utilitarian calculations of unrelated and often antagonistic personalities. Rights present the self in things and things become the bearers of the attributes of personality. Their greatest achievement, in organizing relations amongst strangers, is also their greatest limitation. The lack of interest in the concreteness of the other facilitates respect for their dignity, the universal attribute of humanity. But at the same time, private rights keep the two selves separate and independent, their reciprocal effect superficial, a surface event of no lasting consequence.

The main function of rights therefore is to help establish one part of the recognition necessary for the constitution of a full self. The imperative of rights is to be a person and to respect others as persons. In recognizing rights, the law gives the person dignity and by upholding contracts it makes dignity actual in the world. The interpersonal relation of right offers recognition of what is universal in every particular and a desire for the most abstract form of law.

We can conclude that the recognition of rights has three components. Rights presuppose a universalistic legal system under which people extend respect to each other because they are legal persons aware of the laws which create and protect rights. Secondly, the recognition of the other as legal person is the effect of the fact that she enjoys free will, moral autonomy and responsibility, and possesses legal rights. This type of recognition is typically called respect (for) human dignity.<sup>20</sup> Finally, legal recognition leads to self-respect, the realization that I, too, am capable of moral action and that, like others, I am an end in myself. Human dignity, self-respect, and respect for others are synonymous with the ability to make moral decisions and to raise legal claims. As Feiberg puts it:

respect for persons ... may simply be respect for their rights, or that there cannot be the one without the other. And what is called 'human dignity' may simply be the recognizable capacity to assert claims.<sup>21</sup>

20 'Right is the relation of human beings insofar as they are abstract persons. That action is contrary to right that does not respect the human being as a person, or which infringes upon its freedom. This relationship is ... negative in that it does not require that something positive be granted to the other, but only that he be allowed to be a person.' Hegel quoted in Williams, *op. cit.*, n. 17, p. 137.

21 J. Feinberg, *Rights, Justice and the Value of Liberty* (1980) 151.

Having rights is nothing more than the symbolic expression that one is equal in his or her freedom with everyone else or, what amounts to the same thing, that one is a legal subject.<sup>22</sup> If, according to Bob Dylan, to be outside the law you must be honest, according to Hegel, to be in the law, to be a subject, you must have rights.

## THE FAILINGS OF LEGAL RECOGNITION

Right as a relation between persons who recognize each other in some attribute or characteristic is created in the process of recognition. Private rights, in particular, lead to the recognition of the other as another person, someone carrying weight in his or her abstract capacity for freedom. But from another perspective, legal rights form a repertory of acceptable and available forms of recognition in a particular society and age, a collection of ways in which institutions are prepared to acknowledge publicly some and not other aspects of identity. Legal rights therefore have a dual role. As elements of our patrimony, as partial recognitions and expressions of our identity, they become key components in our negotiations and struggle with others, crucial aspects of interpersonal relations and public expressions of inter-subjectivity. But rights also form a key component of social recognition: they express the social and political balance of power which often promotes distorted versions of self and misrecognitions of identity. Legal rights are the interface between the intersubjective and the social or between conversation and subjection. As legal rights, they express the discipline of law, social determination, imposition, necessity. As legal rights, they are gambits in the dialogue of recognition, ways of presenting self to others, aspects of our openness to the world.<sup>23</sup>

Dialectic between self-image, the recognition of others and social and legal acknowledgment leads to the endless proliferation of rights. New group rights are claimed when their claimants' struggle for recognition fails, when the self-image of an individual or group mismatches the identity the current state of the law allows them to project. Rights claims are the result of inadequate or defective recognition. Hegel discussed three deficient types of recognition; the first exists between masters and slaves, the second appears

22 From a naturalist perspective, Jacques Maritain comes to a similar conclusion: 'The dignity of the human person? The expression means nothing if it does not signify that, by virtue of natural law, the human person has the rights to be respected, is the subject of rights, possesses rights'. (J. Maritain, *The Rights of Man and Natural Law* (1951, tr. D. Anson) 65.)

23 Charles Taylor in 'The Politics of Recognition' (in *Multiculturalism*, ed. A. Gutman (1994) 25–74) assumes that social conversation is free and equal and as a result loses the aspect of power and subjection so central to the operation of law and therefore of rights.

in the criminal activities of thieves and fraudsters, while the third is encountered in poverty.

The origins of the master and slave dialectic must be sought in the observation that when self desired a thing, it did not do so for its own sake but in order to make another self recognize its right to that thing and therefore its existence and superiority. But as a multiplicity of desires desired to be so recognized, their action turned into a war of all against all, where every self is a being for itself and every other is a being for the other. The universal struggle for recognition had to stop, before it led to global annihilation. Hegel assumes that one of the combatants must be prepared to fight to the end, to place his freedom and recognition higher than survival and risk his life. At that point, the other who values survival more than freedom accepts his superiority and surrenders. The one who risks his life for prestige becomes master, the other slave. The slave has subordinated his desire for recognition to that for survival. The slave recognizes the master but the master does not recognize the slave, he treats him as non-person, an object. This is the typically deficient process of recognition because it is unequal: one party recognizes the other but this is not reciprocated. It is this type of non-recognition that legal rights negate.

Legal recognition is fundamentally opposed to the inequality of slavery. The function of property rights is precisely to establish the minimum element of universality necessary for the full and mutual recognition of identity. But legal recognition suffers from a different deficiency: the legal person is far too abstract and the law offers an insufficient acknowledgement of concrete humanity. The inadequate respect generated by law motivates the criminal, and crime, incredibly, facilitates the move from abstract right to morality and eventually to the ethical state. Let us examine the respective positions of the two protagonists, the criminal and the victim.

A thief may be stealing to meet unmet material needs. But in the game of recognition, crime represents a much bigger stake. The 'universal will' (the legal system with its abstract legal relations and rights) coerces the 'individual will to power' (the particularity and concreteness of the individual) who uses the crime to bring forth those parts of his personality not yet recognized by the established legal order. The criminal may be offended by the abstraction of the legal rule and the disinterested uniformity in its application. To paraphrase Anatole France, the law in its majesty punishes equally rich and poor for stealing bread and sleeping under bridges. Insult may also be the result of the promise of formal equality followed by the lack of the material conditions necessary for the realization of rights. It may be fine to fight for the universal right to free speech and press, but for a starving farmer in a developing country the right to read the *Times* is not likely to be considered central to his family's well-being. The essence of criminality is therefore the criminal's demand to be recognized and respected as a concrete and unique individual. The criminal is the first

real human being, someone who understands how the universal works and who attacks the law for its inadequate recognition.<sup>24</sup>

On the side of the victim, legal rights have two kinds of concentric effects: the theft negates the owner's entitlement to his or her property but it also negates the wider recognition offered by the law. Victim and thief make two different claims: the damage or loss affects the property-owner partly in his or her external attributes and partly in his or her dignity. The thief's desire for recognition, on the other hand, makes him or her negate legality altogether. But the violence of the conflict teaches the parties important moral lessons, which help the law move forwards. Law's abstraction and formalism is shown as a type of disrespect that calls for greater sensitivity to social context and individual need and desire. Another type of disrespect stems from law's privileging of formal procedure over the material conditions of life and calls for a move towards greater substantive equality. At the same time, the criminal's attack on legal relations and on the recognition they support alerts people to their dependence on community and its institutions, makes them desire the universal as universal. Crime reveals that right is not just external and subjective but a necessary precondition of community, that it must become universal and objective.

Law's formalism becomes the ontological motive for its negation by the criminal, and one would expect that in turn crime would contribute to the dialectical overcoming of formal legalism. But Hegel did not take this step. The most complete type of recognition, Hegel discusses, is honour. Honour results from membership of corporations, guilds, trades or professions. These mediating institutions 'treat the individual in all his particularity not as a mere particular, but as a universal.'<sup>25</sup> Honour is now bestowed not immediately for what one is, as in antiquity or in the family, but for what one does, through membership, training, and recognition by one's estate. When honour incorporates and overtakes abstract legal personality, the self becomes complete, it acquires determinate social status. But the reverse is also true: a person without honour is derided, scorned, humiliated by others and, as a result, his or her own self-image suffers.

Thus in the corporation's concern for particularity the ethical element returns in civil society ... The family is the first level [of ethical life] in substantial form. The corporation is likewise an ethical society, but one that is unlike the family in that it no longer has nature and natural relations for its basis. The member of a cooperative exist in and through it. On the one hand they are active for themselves, and on the other hand they promote and further in their end and intention a universal, namely the cooperative itself.<sup>26</sup>

24 'The criminal is the first human being in Hegel's philosophy of right ... because he "injures right as right"', M. Theunissen, 'The Repressed Intersubjectivity in Hegel's Philosophy of Right' in *Hegel and Legal Theory*, eds. D. Cornell, M. Rosenfeld, and D. Carlson (1991) 27.

25 G.W. Hegel, *Vorlesung uber die Philosophie des Rechts* (1983) 205.

26 *id.*, pp. 201–2.

In the recognition of honour, people pursue their self-interest to the extent that it is consistent with that of other members. Legal relations are sublated into mutual recognition, in which individuals understand themselves as fully dependent on each other and, at the same time, as fully unique and particular. Self finds itself in the other and finds the other in self. Ethical existence unites the universal (the state and its law) and the particular (the citizen of legal recognition and honour). But this sublation of universal and particular takes place only in the limited environment of guilds and professions, typically in England in the Inns of Court. For the vast majority who cannot be raised to the dignity of 'concrete universal' through corporate membership, the overcoming of the recognition deficit of legal relations is neither promised nor signposted.

It is this difficulty that Axel Honneth, a Habermasian commentator of Hegel, tries to correct in his major work, *The Struggle for Recognition*. Honneth argues that the struggle for recognition is the key ethical relationship or the main form of practical intersubjectivity in the Hegelian system. Moral conflicts, personal disputes, and social antagonisms are partial expressions of this struggle, which creates the agreements and reciprocity necessary for both the socialization and the individuation of the subject. My identity is the result of the recognition of my characteristics by another. This acknowledgement of the other's vital contribution to the constitution of self exposes self to the action of the universal and reconciles her with the world. At the same time, the identity created through the other's recognition makes me aware of my specificity and difference from all others. This consciousness of uniqueness turns the subject against the world and re-kindles antagonism:

Since, within the framework of an ethically established relationship of mutual recognition, subjects are always learning something more about their particular identity, and since, in each case, it is a new dimension to their selves that they see confirmed thereby, they must once again leave, by means of conflict, the ethical stage they have reached, in order to achieve the recognition of a more demanding form of their individuality . . . the movement of recognition that forms the basis of an ethical relationship between subjects consists in a process of alternating stages of both reconciliation and conflict.<sup>27</sup>

Honneth, following the fashionable school of communicative ethics, sees conflict as an effect of normative pressures and personality as the outcome of normative investments. But this overinflation of normativity is seriously disappointed by Hegel's approach to legal relations. While the Hegelian edifice is inexorably moving in all its particulars towards the final historical stage, Hegel did not propose a new type of legal recognition for *Sittlichkeit*. Honneth admits as much: Hegel 'construes the transition to a state-based legal system quite schematically, as Kant had already done in his *Rechtslehre*'.<sup>28</sup> The ethical approach to legal recognition seems to fail at its most crucial

27 *id.*, p. 17.

28 Honneth, *op. cit.*, n. 15, p. 55.



moment, precisely when the expectation has been created that the earlier partial and formal conceptions of law and rights would be transcended by a more inclusive ethic of care. Without that move, legal relations and rights remain at their Kantian stage and formulation and are open to Hegel's devastating critique.<sup>29</sup> To redress this problem, Honneth supplements Hegel by introducing a third type of recognition, which he calls solidarity. A personality based on solidarity has all the elements of legal recognition but, it additionally enjoys social esteem, the recognition of its particular characteristics and qualities developed within its group and community. A society based on solidarity introduces economic and social rights into law and attempts to mitigate legal formalism by addressing real social needs and life-histories. For Honneth, German social-democracy is the closest approximation to Hegel's ethical state and can achieve the final and complete recognition of personality. We will examine these claims in the final part.

Poverty, finally, completes the inadequacy of legal recognition. Hegel argued that the necessary inequalities of capitalism lead inevitably to extreme poverty and social conflict. A society of riches must provide for those inescapably reduced to slave-labour and unemployment. This is because lack of assets in a society based on property makes the poor feel

excluded and shunned, scorned, by everyone . . . Self-consciousness appears to be driven to the extreme point where it no longer has any rights, and where freedom no longer has any determinate existence . . . Because the individual's freedom has no determinate existence, the recognition of universal freedom disappears.<sup>30</sup>

This formulation is of great importance. The abstract right to property, the potential to hold property, does not offer adequate recognition if, as a result of its non-actualization, the person cannot support his or her basic needs. This leads to a second valorization of theft:

Life, as a totality of ends, has a right in opposition to abstract right. If for example, life can be preserved by stealing a loaf, this certainly constitutes an infringement of someone's property, but it would be wrong to regard such an action as common theft.<sup>31</sup>

The abstract right must become concrete, the potential actual, for the recognition of rights to work. Poverty leads to lack of recognition by others and deprives the poor of respect. But the harm inflicted is even greater. The poor recognize themselves as free beings, but their material existence radically negates their sense of self-respect. As a result, they feel torn

29 Margaret Jane Radin reaches the same conclusion in relation to Hegel's approach to the person, which is 'the same as Kant's – simply an abstract autonomous entity capable of holding rights, a device for abstracting universal principles, and by definition, devoid of individuating characteristics.' (M.J. Radin, *Reinterpreting Property* (1993) 44.)

30 Hegel, op. cit., n. 25, pp. 194–5.

31 Hegel, op. cit., n. 2, para. 127.

between inside and outside, between the universality of personhood and the contingency of exclusion they experience. 'The poor man feels as if he were related to an arbitrary will, to human contingency, and in the last analysis what makes him indignant is that he is put into this state of division through sheer arbitrariness.'<sup>32</sup> The universal and the particular have been severed. The poor person is placed in the position of a radical particularity whose existence is challenged and excluded by the universal. This is the typical harm of defective recognition: a split between someone's self-image and the image that social institutions or others project upon that person.

## HUMAN RIGHTS AND RECOGNITION

These are the harms that the law both commits and tries to heal, through human rights. Indeed, we can approach the human rights movement as a continuing effort to negate the inadequacies of legal recognition. Civil and political rights, the first generation of human rights, lead to a very similar type of recognition to that of property rights. The right to the freedom and security of the person, the rights to fair trial, political participation, and free speech are expressions of the universal dignity bestowed to persons on account of their humanity. In this sense, all legal rights are human rights since their basic action is precisely to extend abstract recognition and respect to all. The main and quite substantial contribution of the modern legal system is to extend this type of recognition from private right and inter-subjective morality to the public domain.<sup>33</sup>

But the recognition implied in civil and political rights goes further than the respect and self-respect involved in ordinary legal rights. Community is both the background and effect of recognition. New rights create new ways of being in common and push the boundaries of community. The main consequence of the early declarations of natural and human rights was to reduce domination, the non-recognition typical in the master-slave relationship. Those given the civil and political rights of citizenship were recognized as equal not only in formal legal relations but also as regards political power. Political rights, in particular, express the mutual recognition of citizens as citizens; they recognize the constitutive role of recognition itself. Participation is the prime form of political rights, and in this sense, all rights can be seen as political rights, as an extension of the logic of participation to areas of activity not hitherto public.<sup>34</sup> But self-determination

32 Hegel, *op. cit.*, n. 25, pp. 194–5.

33 Indeed all positive legal systems, all codes and statutes create rights and depend for their operation on the existence of legal person owners of such rights.

34 The psychoanalytical approach accepts the subject-forming role of the other and of rights but is much more sceptical about the contribution of rights to the creation and expansion of community. See Douzinas, *op. cit.*, n. 11, chs. 11 and 12.

was initially restricted, as to subject, to white, male property-owners and, as to scope, to public life. The political history of the last two centuries is marked by the struggles to extend the recognition of citizenship to excluded groups from poor men to women to various minorities and non-nationals.

But formal political equality, like property rights, has been accompanied by oppression, the denial of self-development which takes various forms such as economic exploitation, social marginalization, cultural worthlessness, and violence.<sup>35</sup> Here the law suffers from two defects: first, formalism, the lack of concern for the material circumstances that allow the realization of rights (the defect revealed in poverty). Secondly, abstraction, the recognition of a non-substantial, a thin personality (the defect attacked in crime and redressed through honour). Both are instances of defective recognition, of a public image that seriously mis-matches people's self-image. Domination calls for greater participation, oppression for substantive equality. Taken together they aim to combat the inadequacies of legal recognition. Self-determination requires the expansion of democratic decision-making from politics to other areas of social life. Self-development requires the expansion of the principle of equality, from the formality of law and decision-making to an ever-increasing number of substantive areas of social life, such as the work-place, domestic life, the environment, and so on. Recognition now moves from the formal and universal to the different and specific, those characteristics which make people unique.

We can pursue this analysis in relation to all important developments in human rights. The struggles for political rights and for the introduction of the universal franchise aimed at removing the non-recognition between master and slave from public life and extending citizenship rights to groups such as the poor, women or ethnic minorities. Similarly, the right to self-governance, which characterized the decolonization process of the 1950s and 60s, and prefaced the main human rights documents of the period<sup>36</sup> extended collective political recognition from the excluded groups of the metropolis to whole nations and ethnicities in the developing world. In other cases, citizenship rights were expanded to new areas. Workers' rights extended the principle of participation to the shop floor and to some aspects of industrial management. Consumers' rights enlarged the decision-making bodies in education, health and other public utilities. Each extension enlarged either the number of people entitled to decide issues of public concern or the issues open to the logic of public deliberation and decision.

Citizenship is the local expression of universality. Political rights emerge out of the destruction of traditional communities and the undermining of the

35 I.M. Young, *Justice and the Politics of Difference* (1990) 56.

36 'All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' This is the first article of both the civil and political rights and the economic, social, and cultural rights Covenants adopted by the United Nations in 1966.

pre-modern body politic and these rights, in turn, accelerated the process. Mutual recognition has moved from the relations of love and care which predominantly characterized the pre-modern world to legal recognition, to the construction of identities through rights. If citizenship is the essence of universality, if community participation turns the abstract legal person into a socially recognized self, its essence is negative. It negates the closing down of the political space and 'sustains the moment of disembodiment, the groundlessness and the dislocation of power constitutive of democratic practice.'<sup>37</sup> But as Marx insisted, political community and citizenship are both the recognition of the universality of rights and of their denial, since rights support and are supported in turn by the inequalities of economy and culture. Secondly, citizenship is a limited universality which is exhausted within the confines of the nation-state and excludes the non-citizens, the foreigners, enemies without and within.

Using Iris Young's terminology, we can argue that the negative universality of political rights addresses the problem of domination but not of oppression. Oppression denies people's ability to decide what is the best life-plan for them and deprives them of the necessary means to carry it out. It does not allow its victims to be recognized as concrete and unique selves; it prevents the fulfilment of their aspirations and capacities.<sup>38</sup> Economic exploitation of the metropolitan poor through unemployment, breadline wages, poor health, and casualization, or of the developing world through unequal trade and crippling debt undermines and eventually destroys the possibility of self-development. When daily survival is the order of the day, all aspirations for social improvement or cultural expression are extinguished. The oppressed cannot enjoy or even aspire to the Aristotelian *eu zein*, the good and complete life that allows their personality to flourish and be recognized in its complex integrity.

## THE PARADOX OF IDENTITY AND RIGHTS

Can legal recognition become the full recognition of concrete identity as Honneth argues? The great achievement of legal rights was precisely to abstract all predicates and create the person without determination. As species existence, the 'man' of the rights of man appears without differentiation or distinction in his nakedness and simplicity, united with all others in an empty nature deprived of substantive characteristics. The universal 'man' of the Declarations and Conventions is an unencumbered man, human, all too human. As species existence all men are equal, because they share equally soul and reason, the *differentia specifica* of humans. But

37 J. Bernstein, 'Rights, Revolution and Community' in *Socialism and the Limits of Liberalism*, ed. P. Osborne (1991) 113.

38 See, generally, A. Gewirth, *Self-Fulfilment* (1998).

this equality, the most radical element of the classical Declarations had limited value for 'non-proper men' (that is men of no property) or for women and was denied altogether to those defined as non-humans (slaves, colonials, and foreigners).

The contemporary concept of human rights has moved a long way. Social and economic rights, a few rights for gays and lesbians, some for women and children, for minorities and indigenous people promise to fill the abstract legal person and to construct a strong recognition. But can we have a consistent concept of (human) right that transcends this minimum state of recognition that legal rights give? To answer this question we must analytically distinguish between the struggles for the adoption of new rights and individual claims for recognition. Let us start with group rights.

Using the terminology of semiotics, one can argue that the 'man' of the rights of man or, the 'human' of human rights functions as a floating signifier. As a signifier, it is just a word, a discursive element that is not automatically or necessarily linked to any particular signified or meaning. On the contrary, the word 'human' is empty of all meaning and can be attached to an infinite number of signifieds. As a result, it cannot be fully and finally pinned down to any particular conception, because it transcends and overdetermines them all.<sup>39</sup> But the 'humanity' of human rights is not just an empty signifier; it carries an enormous symbolic capital, a surplus of value and dignity endowed by the Revolutions and the Declarations and augmented by every new struggle for the recognition and protection of human rights. This symbolic excess turns the 'human' into a floating signifier, into something that combatants in political, social, and legal struggles want to co-opt to their cause, and explains its importance for political campaigns.

To have human rights, which in modernity is synonymous to being human, you must claim them. This claim attaches a demand for social recognition or legal protection to the floating signifier. A new right is recognized, if it succeeds in fixing a – temporary or partial – determination on the word 'human', if it manages to arrest its flight. This process is carried out in political, ideological, and institutional struggles. Typically diverse groups, campaigns, and individuals fight in a number of different political cultural and legal arenas such as public protest, lobbying or test-cases, to have an existing right extended or a new type of right accepted. The creative potential of language and of rhetoric allows the original rights of 'man' to break up and proliferate into the rights of workers, women, gays, refugees, and so on.

For the new claim to succeed, the claimants must assert both their similarity and difference with groups already admitted to the dignity of humanity; they must appeal both to the universal and the particular. First,

39 For a use of the psychoanalytical concept of 'overdetermination' in political theory see E. Laclau and C. Mouffe, *Hegemony and Socialist Strategy* (1985).

similarity; the new group claims that it shares the abstract characteristics of human nature, that it is a valid sub-group of humanity which should enjoy shared dignity and equality of treatment. Equality, despite the assertions of Declarations and Constitutions, is not given or obvious. It is a political construct, as Hegel and Marx argued, typically expressed through the law, as Kant saw. In this sense, equality before the law acquires its concrete meaning: it has nothing 'natural' about it. If anything, the main claim of the liberal-democratic tradition is that it can transcend social differences and accidents of birth and construct equality *against* nature. Rights-claims have therefore two aspects: an appeal to the universal but undetermined character of human nature. Secondly, the assertion that the similarity between the claimants and human nature, simply, admits them to the surplus value of the floating signifier and grounds their claim to be treated on an equal footing with those already admitted.

Second, difference. The shared dignity of legal personality and the community of citizenship are inadequate recognitions of concrete identity. I am a legal person and citizen but, more importantly, I may be a man or woman, straight or gay, black or white, English, African or Greek, Tory, Labour or anarchist, married or divorced, a teacher, miner or poet, an immigrant, refugee or staunch patriot, a Northerner or Southerner, a drinker, raver or teetotaller. But the claims to difference and the recognition of plural cultural identities are not happy companions of liberalism. As Amy Gutmann put it

one reasonable reaction to questions about how to recognize the distinct cultural identities of members of a pluralistic society is that the very aim of representing or respecting differences in public institutions is misguided . . . an important strand in contemporary liberalism . . . suggests that our lack of identification with institutions that serve public purposes, the impersonality of public institutions is the price that citizens should be willing to pay for treating us all as equal, regardless of our particular ethnic, religious, racial or sexual identities.<sup>40</sup>

The law, as Hegel argued, is drawn to the same and the universal and is ill-equipped to accommodate difference. This is the reason why the subjects of human rights have no female gender, and sexual orientation is not recognized as an unlawful ground of discrimination in human rights instruments. Difference remains a contested ground in liberal codes of human rights; social, economic, and cultural rights are commonly ring-fenced with statements that they are inferior to civil and political rights, non-justiciable, aspirations only, rather than hard rights. Human rights-claims, therefore, involve a paradoxical dialectic between an impossible demand for universal equality, initially identified with the characteristics of western man, and an equally unrealizable claim to absolute difference. Because the nature of western, white, affluent man cannot subsume under its universal

40 A. Gutmann, 'Introduction' in *Multiculturalism*, ed. A. Gutmann (1994) 4.

aspirations, the characteristics and desires of workers, women, racial or ethnic groups, and so on, the claims to specific workers', women's or ethnic rights arises. When they succeed, universality becomes a horizon continuously receding before the expansion of an indefinite chain of particular demands based on the particularity of the group.<sup>41</sup> But this success is always provisional and reversible, as the logic of liberal law tends to prioritize the universal over the general and the same over the different.

The argument for women's rights, for example, involves two apparently antagonistic claims: both that 'women are like men' and that 'women are different from men'. Women have been invisible to human rights for too long, initially because the feminine was seen as an inferior state that did not deserve the full dignity accorded to humanity. But the admission of women to the status of humanity (the action of similarity) without responding to the demands of difference is equally problematic. It assumes that by simply extending the rights of the representatives of humanity (white, well-off males) to women exhausts their claim. But as the feminism of difference has cogently argued, the universality of rights necessarily neglects the specific needs and experiences of women.<sup>42</sup> The concerns and claims of women cannot be subsumed under the universal entitlements of human nature, precisely because the feminine is the difference from equalizing humanity. Domestic and international law have had great problems in accepting, for example, the special nature of domestic rape or of rape and sexual assaults during war. The non-criminalization of marital rape was the result of non-admission of women to the status of the universal. As a result, the law treated women as inferior to men, as their property which could be subjected to brutal abuse with impunity. The non-inclusion of rape in war amongst the crimes against humanity was, on the contrary, the result of the non-recognition of the difference of women. The standard provisions of criminal law protecting universal bodily integrity from assaults are considered adequate protections from sexual violence. The special traumatic effect of sexual abuse is discounted and sexual violence equated with general violence, undermining the magnitude of the offence steeped in male power and female degradation.

In the struggle for rights, the rhetorical ruses of similarity and difference can be used to promote the most contradictory objectives. A claim to difference without similarity, can establish the uniqueness of a particular group and justify its demands for special treatment but, it can also rationalize its social or economic inferiority. Aristotle wrote that 'some men are free by nature and some are slaves ... From their birth some are marked out for subjection and others for rule.'<sup>43</sup> A Greek or Roman slave was seen as an

41 E. Laclau, *Emancipation(s)* (1996) ch. 2.

42 L. Irigaray, *Thinking the Difference* (1994, tr. K. Montin); *An Ethics of Sexual Difference* (1993, tr. C. Burke and G. Gill); *I love to you* (1996, tr. A. Martin).

43 Aristotle, *Politics* (1990, Loeb edn., tr. H. Rackham) I. I. 6.

*animal vocale*, a worker in the nineteenth century was treated as a 'cog in the machine' or disposable merchandise, a wife until relatively recently was the husband's chattel. In all these cases, empirical difference established and justified domination. More generally, the appearance of linguistic, racial, gender, and other differences has been used to uphold hierarchies and legitimize power imbalances.

The question therefore is not why but when, how and in relation to what attributes are 'women (not) like men'? Most human rights struggles adopt this form of timely, historical, and specific comparison and contestation. Their aim is to redefine the dominant way of understanding the relations amongst classes, groups, and individuals and, to this effect, rhetorical tactics and discursive argumentation are their main weapons. The cultural aim of anti-slavery and workers' and women's struggles was to rearticulate the relations between the free, the property owners or men (usually the three predicates coincided in the same part), and the slaves, the workers or women. The old hegemonical position claimed that the first groups related to the second on the basis of natural differences, that inequalities were the logical and necessary outcome of dissimilarities. The rebels and protesters, on the other hand, construed the relationship as one of inequality, of an immoral denial of similarities, and as illegitimate domination, the turning of differences into hierarchies.

The assertion of difference is what gives self identity, makes it a rich, complicated 'thick' personality. The differentiated characteristic, whether gender, ethnicity or sexuality, is put forward as a valid partial predication of universality, as one way of mediation between the universal and the particular. The distance between abstract human nature and the concrete characteristics of the group justifies their demand to differential treatment, which respects one aspect of their identity. If equivalence and equality result from political and legal action against abstract nature, the claim to difference reintroduces the particularity of concrete nature situated, localized, and context-dependent.

And here we reach the crux of the matter: once we move from group claims to the individual struggle for recognition, to the continuous conversation with others and social institutions which constructs our identity, the law will always fall short of a full recognition of identity. It may recognize aspects of my sexuality, ethnicity, and family position through the creation of some rights and protections. But the politics of difference will still remain wedded to the generality of certain positions, to that of being woman or gay rather than this woman or that gay. The law can only deal with universalities and generalities. A concrete identity, on the other hand, is constructed through the contingent and highly mutable combination of many positions, it is the outcome of a highly specific group of characteristics, only some of which are generalizable and shared with others. In relation to shared characteristics, human rights extend the recognition of esteem by turning the relevant group (women or gays) into



subjects of rights. Human rights and wrongs operate in the gap between the universal and the generalizable.

But most elements of identity remain immersed in personal history and background with its defining moments, turns, and traumas, with its combination of, amongst many others, gay sexuality, support for Arsenal and for the Tories. This combination is tested and recognized or not daily in an infinite number of encounters with others, as what is singularly myself: a creature of shared dignity and rights ensconced in citizenship and symbolized by the right to vote, but also of total idiosyncrasy and absolute difference exemplified by the uniqueness and unrepeatable epiphany of the face. This is a second crucial space, that between the general and the singular. Here the universalizing logic of the law always fails the uniqueness of the other.

The reference to the face and the other, introduces us to that aspect of identity which defies the dialectic of the universal and particular or of the same and the different. For Hegel, the honour bestowed by corporation membership introduces the individual to the ethical state. But in postmodernity, these associations, memberships, and belongings have proliferated immensely but, additionally, they are unable to create identity on their own. The struggle for recognition and the politics of identity are about creating self as a unique individual. The main elements of my identity, the building blocks of what I consider the 'real me' refer to a huge variety of positions, beliefs, and traits which have very little relationship with the shared dignity of legal rights and cannot be captured by the difference-promoting extensions of human rights. My identity is the shifting articulation of all these disparate elements or 'subject positions' which combine in various ways, occasionally and transiently under the direction of one particular element, on other times without any particular hierarchy. Concrete identities are constructed in psychological, social and political contexts, they are, in psychoanalytical terms, the outcome of a situated desire of the other. In this sense, claims for differentiation are initially constructed outside of the equalizing logic of the law.

Negotiating with others the potential or real conflicts of these positions is a main part of the individual politics of identity. In following my football team to an away game, for example, membership of the tribe of Arsenal supporters becomes the dominant characteristic. But when my fellow supporters start goading a player for his race, which happens also to be my race or, if their behaviour offends my ideological allegiances, then my two commitments come into conflict. In these cases, my loyalty to Arsenal or to the Tories becomes strained, if my party publicly and vociferously attacks my sexuality. I may try to forget the conflict by either rationalizing the behaviour of my fellows or by accepting that somehow my race or sexuality is problematic and by internalizing self-shame. In all these cases, my identity is created through the recognition of others who are involved in an actual or silent conversation with me about parts of my identity. Any relevant rights,

created by discrimination or hate speech law, will become important in negotiating my response to others and my own self-image. But often these conversations fail. As Charles Taylor puts it, 'what has come about with the modern age is not the need for recognition but the conditions in which the attempt to be recognized can fail.'<sup>44</sup> This failure may be the result of the withholding of recognition by our closest and most intimate. But the failure is often the result of one inevitable and many avoidable misrecognitions by legal institutions and rights.

## DESIRE, (MIS)RECOGNITIONS, AND RIGHTS

Human rights struggles are symbolic and political: their immediate battleground is the meaning of words, such as difference and equality or similarity and freedom, but, if successful, they have ontological consequences, they change radically the constitution of the legal subject and affect peoples' lives. Rights formalize and stabilize identities by recognizing and enforcing one type of reciprocal recognition. The law uses the technical category of the legal subject and its repertory of remedies, procedures, and rights to mediate between the abstract and indeterminate concepts of human nature and right and the concrete people who claim its protection. The legal subject mediates between abstract human nature and concrete selves. The legal validation of a contested category of rights, like women's rights, acts as the partial recognition of a particular type of identity linked to the relevant rights. Conversely, a person recognized as the subject of women's rights is acknowledged as a person of a particular identity, the bearer of certain attributes and the beneficiary of certain activities, and as the carrier of the dignity of abstract humanity. An individual is a human being, a citizen, a woman, a worker, and so on, to the extent that she is recognized as the legal subject of the respective rights, and her legal identity is constructed out of her bunch of rights. But she is also much more than that.

The abstract concept of human nature, which underpinned the classical Declarations, has been replaced in postmodern societies by the proliferating claims to new and specialist rights. Desire, the motor behind the struggle for recognition, has replaced human nature as the ground concept and has become the empty and floating signifier, which can be attached either to the logic of power and the state or to the logic of justice and openness. We moderns know only what we can make; the legalisation of desire means that, as postmodern, we can now 'make' ourselves by investing desire with legal significance. We are entitled to become legally what we believe we are, turn our self-image into our publicly recognized identity. The common complaint about the excessive legalisation of the world is precisely the inevitable

44 Taylor, *op. cit.*, n. 23, p. 35.

outcome of this endless legalisation of desire. Desire became the formal expression of the subject's relationship with others and the polity and was given initially limited legal recognition when self-development and fulfillment became a matter for law in the 1950s and 1960s. After that the multiplication of right-holders, the proliferation of claims, and the endless mutation of the objects of right was a matter of time, of letting language, politics, and desire do their work. Rights have become recognitions of a mobile desire, which turns a growing number of aspects of my identity into enforceable legal claims. As Arthur Jacobson puts it, for Hegel, the human species is under 'the erotic claim ... to fill the universe with every legal relation imaginable'.<sup>45</sup> This drive has become the major force of human rights. The greater my bunch of rights, the fuller the recognition of my identity by others. But at the same time, this type of recognition is forced, based not on the reciprocity of belonging to a family, corporation, group or community but on the alienating and coercive logic of the law. Legal form, whatever the content, has not changed its character so forcefully described by Hegel. 'To describe an individual as a 'legal person' is an expression of contempt', he declares.<sup>46</sup> This inevitable misrecognition follows the legal person of human rights.

But human rights do not just confirm or enforce certain universal personality traits. Their continuous extension to new groups and novel areas of activity indicates their deeply agonistic character. Their recognition goes to the heart of existence, addresses the fundamental other-appreciation and self-esteem of the individual beyond respect, and touches the foundations of identity. We are doomed or blessed to strive endlessly for concrete recognition of our unique identity. But the avoidable misrecognitions, the myriad instances of mismatch between the self-image of an individual or group and the identity the law and rights allow them to project, make law a necessary but inadequate and defective partner in the struggle for identity. A complete identity cannot be based on the universal characteristics of law but on the continuous struggle for the other's unique desire and concrete recognition. This is where Honneth's claim that human rights can bestow full mutual recognition and pacify social conflict fail. Human rights, like desire, are a battlefield with ethical dimensions. Social conflict may be occasionally destructive of the social bond, but it is also one step in the development of political and ethical forms of community. But the desire for the other, remains a step ahead of law. It keeps seeking greater formal recognition but, as soon as the claim for legal form has been granted, its achievement undermines the desire for the other. This intricate but paradoxical intertwining of identity, desire, and human rights is Hegel's lesson for postmodern jurisprudence.

45 A. Jacobson, 'Hegel's Legal Plenum' in Cornell et al., op. cit., n. 24, p. 114.

46 Hegel, op. cit., n. 8, p. 480.