RECOGNITION THROUGH HUMAN RIGHTS

Irene STRAZZERI

Dott.ssa., University of Foggia, Università degli Studi di Foggia Facoltà di Lettere e Filosofia via Arpi, 155 - 176 71100 Foggia, Italy, E-mail: i.strazzeri@unifg.it

Abstract:

The category of "Recognition", as intersubjective dimension of social interaction, seems to have application in the microsociological field only. Here it has both cognitive and pragmatic meaning. From the cognitive standpoint "recognition" refers to the ability to identify an object.[1] At a pragmatic level it concerns individuals' expectation to have their own values recognized by others.[2] In the public space the intersubjective dimension of recognition makes the idea of equality among people problematic, to the extent it claims respect for difference. Quoting Amartya Sen about the relationship between social justice and citizenship, today we are dealing with the questions "Equality of what?" and "Recognition of what?".[3] In the current debate about citizenship, we find an increasing effort to elaborate a normative and prescriptive ideal, able to satisfy claims both of redistribution and recognition.[4] In my opinion it is crucial to reintegrate the theory of recognition within the political-public sphere of European citizenship, as a civic space in which the dynamic of confrontation among different cultural perspectives takes place and new subjects claim the full recognition of their identity.[5]

Key words: *identity, recognition, multiculturalism, citizenship, normativity.*

1. Towards a Social Science of Norms

The present project has the aim to expand, in terms of social theory, the normative-regulatory ideal of a universal codification of fundamental rights. In our age - increasingly marked by wider forms of cultural, social and political interdependence and, at the same time, by an emergence of so-called "particularisms" – human rights are characterized as a supporting framework for a public ethic implying the assumption of a universalistic logic. Therefore, their foundation, articulation and development require a fusion of extremely diversified disciplinary horizons. Only within an *inter-scientific* perspective[6] –

[1] P. Ricoeur, Parcours de la Reconaissance, Editions Stock 2004.
[2] A. Honneth, Kampf um Anerkennung. Grammatik sozialer Konflikte, Suhrkamp Verlag, Frankfurt am Main 1992.
[3] A. Sen, Commodities and Capabilities, North Holland, New York 1985.
[4] N. Fraser-A. Honneth, Umverteilung oder Anerkennung. Eine poltisch-philosophische Kontroverse, Suhrkamp Verlag, Frankfurt am Main 2003.
[5] K. Eder, B. Giesen, European Citizenship between National Legacies and Postnational Projects, Oxford university press 2001.
[6] E. Morin, Introduction à la pensée complex, Prix éditeur, Paris 1993.

whose borders range from political philosophy to cultural anthropology, from general theory of law to sociology, genetics and ecology – human rights are likely to work as constitutive elements of the legitimization of political organizations, both at national and international levels[7], participating, as positive rights officially recognized by internal regulations as well as by the international community through set juridical deeds, in the current debate on normative answers which can meet the challenges posed by pluralistic modern societies and their institutional orders. A proposal made by the philosopher Axel Honneth takes on a central position in the debate today. Reasoning on the structural nexus between the dignity/integrity of the individual, inspiring principle of the codification of fundamental rights since the Universal Declaration of Human Rights, and on Recognition (Anerkennung), understood as a founding praxis for the moral infrastructure of human interactions[8], he provides a reconciliation of moral and modern law, through a generalization of the results of social conflict, caused by the experience of contempt and underestimation common to many people.[9] Our goal, therefore, will take the shape of an attempt to define some normative implications of the theory of recognition on the process of foundation and institutionalization of fundamental rights. Before undertaking such a course of research, because of the above mentioned interscientific needs, we thought it proper to provide, in the first part of our study, a preliminary epistemological statement on the dialectic governing the virtuous circuit: juridical system vs. social system, juridical action vs. social action, living law vs. effective law, within the more complex problems of the relation law-society. For a representation of such a complicate dynamic, we can refer to the heated controversy which arose among the founders of the sociology of law, particularly between Eugen Ehrlich, representative of the school of free law and Hans Kelsen, representative of juridical formalism of the Vienna School.[10] Whereas for the first the sociology of law means a scientific theory of law, for the latter social action and juridical action not only differ, they are structured following separate and distinct epistemic regimes, so that *"understanding something juridically can only mean understanding something as law."*[11] In any case, we can state that, from their respective viewpoints, they were both right, the first wanting to relativize the normative absoluteness of the latter, the latter wanting to found an integrally autonomous normative science. Certainly, analyzing this problematic question, never solved and perhaps not ever solvable, between social change and juridical change, has not the aim to identify a chrono-logic *prius* against which we can decide whether the law is a variable dependent or independent on society, rather it has the aim to verify, through a plausible epistemological rearrangement, organized following theoretical and

[7] P. Baldassare, Diritti umani e legge dei popoli, Paper presented at the International Conference "Human Rights and International Order" 26th May 2001, Biblioteca Comunale Ariostea, Ferrara, Pubblicazioni Centro Studi Per la Pace, www.studiperlapace.it

[8] Honneth, Obcit, 1992, p. 38.

[9] Ibid.

[10] A detailed Analysis of the Controversy between Kelsen and Ehrlich on the pages of "Archive für Sozialwissenschaften und Sozialpolitik" see the Presentation by A. Febbraio , tr. it., Milan 1976, pp. XXXIV-XXXIX.

[11] Ibid. p. 51.

methodological assumptions from the sociology of knowledge, the essential and mutual integration between a general theory of norms and the sociology of law. In the perspective of a "social science of norms" which we propose, we can legitimize our claim to establish a useful inter-penetration between juridical and sociological points of view, between logical and historical condition, between a philosophical-social theory, centred on the struggle for recognition, and the foundation, articulation and development of fundamental rights. We intend to connect the research on the consequences of law, as a regulator of social life with the assumptions of a sociological theory intersubjectively founded. We will refer, in particular, to the theory of communicative action and to the related *telos* of understanding,[12] to recognition as a praxis constitutive of human identity and dignity[13] and to the conflict as a potential moralizer of society. The understanding, recognition and conflict constitute the moral infrastructure of social interaction, the scheme by which social action is mormatively coordinated. An encounter as well as a wished fusion between a social science of normative deeds and an intersubjective approach to social theory will be represented as an attempt to overcome the impasse reached by Max Weber, with his image of disenchantment about the world following the process of political cleansing and of technical neutralization of the law.[14] The contradiction is clear when we consider that Weber himself demonstrated to what extent the juridical culture, and thus the sociality of the norm, contributed and still contributes to the belief in legality and is a condition for the recognition of its legitimacy. His research on law and state, by assuming that every social phenomenon may be explained on the basis of the behaviour of individual actors, [15] implies that the individuals' legal obedience may be founded on a system of representation which produces an acceptation of the norm.[16] Highlighting the sociality of norms, their heteronomy rather than their autonomy from an assumable moral infrastructure of social interaction, fixed in the practices of understanding, recognition and conflict, implies a need to detect and decode institutionally even those spontaneous forms by which a society organizes itself in order to defend its own organic and symbolic survival. This means translating the emergent needs, related to the spheres of ethical intersubjectivity, into "a new grammar of the forms of life" [17] whose articulation corresponds to the vindication, foundation, institutionalization and, above all, the protection of human rights: the relations of social life already contain moral norms which are capable of normative foundation. Such was the fundamental insight of Hegel's philosophy of law: rendering the universal principles of justice into the form of a legitimization of those social conditions under which the subjects can mutually perceive, in the others' freedom, the precondition of their individual self-fulfilment. [18] Thus, we

[12] J. Habermas J, Theorie des kommunikativen Handelns, Bd. II, Suhrkamp Verlag, Frankfurt am Main 1981.
[13] Honneth, Obcit, 1992, pp. 34-47.
[14] M.Weber, Wirtschaft und Gesellschaft, Tubingen, 1922, in particular vol. I, Chap. I, pp. 11-38.
[15] M. Weber, Gesammelte Aufsatze zur Wissenschaftslehre, Mohr, Tubingen 1922.
[16] Weber, Obcit, vol. I, pp. 212-213.
[17] Habermas, Obcit, 1981, vol. I., p. 1072.
[18] A. Honneth, Leiden an Umbestimmtheit. Eine Reaktualisierung der hegelschen Rechtphilosophie, Philip Reclam jun. GmbH & Co., Stuttga rt 2001.

can infer that the very subjective rights do not belong to the individuals in the first place, but they are due to those social forms of being that manifest themselves as basic social assets. The forms of intersubjectivity which can have the value of essential conditions in order to achieve some individual freedom in the hypothesis of normative reconstruction are: communicative interaction, recognition, the struggle to assert one's own individuality. The meaning of *communicative action*, according to Habermas, refers to "*the interaction of at least two subjects capable of action who (by verbal or extra-verbal means) establish an interpersonal relation*" trying, within the communicative process, to "*coordinate by common consent their personal plans for action and, therefore, their personal actions*"[19]. The elements distinguishing communicative action from any other type of action, are a preliminary willingness to understand each other, that is to "*recognize mutual reasons of validity and truth on principle*"[20] as well as the use of the medium of language, which instinctively implies, for its intrinsic nature, the "telos" of understanding. Language, as a medium to reproduce an individual, besides his culture and society, enables him to affirm his own identity and to become responsible for his actions. Disturbances, at this level of reproduction, emerge as crisis and misrecognition of one's own subjective identity. The subjective world, in fact, assumes not only that a subject must have competence in language and action, it also implies a previous intersubjective recognition of his moral autonomy. Only through a mode of interaction which enables a relationship with the other based on mutual recognition, on the principle of equal demands of validity and criticizability, we can characterize social interaction as communicative interaction. Such intersubjective forms of recognition give structure to the moral autonomy of the subjects needed in order to direct communicative interaction towards the aims of understanding or, in the absence of those assumptions, towards that influence typical of instr umental action. Honneth hypothesizes that the intersubjective practices of recognition of *love* (where the subject, feeling himself loved, acquires confidence in himself, in the possibilities of his body), of *law* (where, thanks to the obligation binding the subject to others, he learns to understand himself as an individual who has certain rights, to understand his personal actions as expressions of an individual's identity and integrity respected by others) and of *solidarity* (when an individual acquires respect for himself according to a sympathetic approval of his personal plans for life), are constitutive for the affirmation of an individual's identity and dignity, and are the foundation of an individual's moral autonomy.[21] Therefore, the unfolding of communicative rationality in the form of emancipating perspectives for the actors, as opposed to the domain of instrumental reason, re-includes the normative value of recognition. Honneth's speculation identifies the fundamental praxis of social relations in a situation of conflict due to contempt and misrecognition, as a *violation of physical integrity* (for example, sex abuse and torture), *loss of rights* (marginalization and slavery) and *humiliation* (social devaluation of the so-called "alternative" lifestyles). In this perspective, the

[19] Habermas, Obcit, 1981, vol. I, p. 157.
[20] Ibid.
[21] A Honneth, Obcit, 1992, pp. 118-126.

struggle for recognition, in Honneth's opinion, becomes an intersubjective condition of personal integrity, able to found a *formal* concept of ethicality.[22] Through a theoretical model that will strictly connect identity to demands of intersubjective recognition, the conditions of a non-distorted communication to an "ideal community of recognizers" and misrecognition to the struggle to obtain denied recognition, we intend to outline an intersubjective approach to social theory which may be fully functional in representing the processes by which social action spontaneously coordinates itself in a normative manner. But, what results will this have on the juridical production? In what way understanding, recognition and conflict, as devices of normative coordination of social reality, can contribute to broaden the discourse on fundamental rights from a sociological point of view? The old querelle we have recalled, on the unity of law, the way in which law actually lives, has not only the aim to remove the surreptitious dichotomy between reality of *law* and its *ideality*, it also embraces the different positions on the matter on a common basic assumption: a complete acceptation of the *positiveness of the juridical norm* in overcoming every remainder of the doctrine of Natural Law. If the practices of mutual recognition, a spontaneous creation of shared spaces for discussion, the motivational factors which drive an individual to take an active part in political struggles, do represent intersubjective instances constitutive of an individual's identity, dignity and integrity, they must be established and thus positivized as inviolable, inalienable intersubjective human rights. In order to avoid any obstacle in the connection between social and juridical change, the intersubjectivity of an individual's rights should be accompanied by a juridical protection of the relations of recognition, by a promotion as well as incentives to communicative social situations, by a solid and binding approval of life projects which can be an alternative to those already existing. Of course, the process of codification of fundamental rights cannot be limited to the course going from society to law and from law to society; for this reason, the second part of the present will deal, through more historical support, with the problems connected to the "fact of pluralism".

2. Pluralism, Identity and Recognition

The ethical and identitive pluralism which characterizes complex societies leads us to regard such a perspective as a significant condition of identitive uncertainty,[23] which gives rise to highly urgent questions, based on a problematic connection of the relation between identity and demands of recognition. The tendencies towards globalization on the one hand, and the increasing need of rooting on the other, seem to challenge either the meaning of the traditional domains of recognition, mostly defined in terms of ethnic and cultural homogeneity, or the validity of those theoretical-normative models aimed at identifying prospects of resolution to such problems. The crisis of the

[22] A. Honneth, Anerkennung und Missachtung. Ein formales Konzept der Sittlichkeit, tr. it., Rubettino, Soveria Mannelli, 1993, Presentation by Alessandro Ferrara.
[23] S. Veca, Dell'incertezza. Tre meditazioni filosofiche, Feltrinelli, Milano, 1997.

consolidated model of nation-state defines the ground where this break becomes radical. Addressing the questions of identity, therefore, becomes compelling. A significant feature of modern identity, connected to the pluralistic shift in the basic structures of the political, social and cultural universe, is its intrinsic instability and its constant pursuit of confirmations on an interpersonal level. So as to better understand the nature of such questions, it may be useful to refer to the dialogical matrix of the process of identity construction, articulated in a constant comparison between the vision any individual has of himself and the identity ascribed to him from the outside, in contact with his other signifiers and with the structure of his society. Charles Taylor, pointing out the processual nature of the identitive question, defines identity as "*the vision an individual has of himself, of his own fundamental features*"[24] An individual, therefore, also needs an interpersonal dimension in order to be aware of himself as a human being, that is, a specific mode by which human nature becomes objectified in him, in a totally peculiar way, which can be understood in its uniqueness in comparison with the other and in a mutual recognition of their respective specificities. Contempt for the importance of recognition in the constitution of personal identity may harm the very formation of identity. An example is provided by historically humbled and despised groups, like colonized people or women, who have internalized the negative image attributed to them by society, so that they recognize themselves in the role conferred to them by the dominant culture thus losing any ability of opposition and resistance. Taking into account the interpersonal dimension, attaches significance to the connection of identitive question to the demands of recognition in a pluralistic context. Honneth, by focussing on the very close link between the processes of socialization and the relations of recognition, draws on Herbert Mead's social psychology to enact a "*naturalistic transformation of the Hegelian idea*". We know that, according to Mead, perception of the generalized other has such a prominence on the development of self-consciousness,[25] as to allow Honneth to use "me" with the meaning of "normative understanding of self".[26] This definition represents an attempt to establish an epistemic self-relation between the image an individual has of himself, not only with cognitive expectations, but also with normative anticipations stemming from his social context. But what happens when such normative anticipations come from a pluralistic context, where more chances in life and a variety of ethical conceptions are equivalent to a condition of identitive uncertainty and instability? In such instances, an individual tends to idealize the community where he is allowed to fulfil, or he can wish to fulfil, his personal aspirations; thus "*the practical goal of a broader liberty of action is linked to the counter-factual hypothesis of a broader recognition of rights*".[27] Therefore, the conflict between "I" and "Me", caused by the normative constraint of one's own context of belonging, and its resolution in an idealization of a normative character, increases the development of society, when this latter confers more

[24] J. Habermas, C. Taylor., Multiculturalism .The Politics of Recognition, Princeton University Press 1992, p. 9.
[25] G.H. Mead, Mind, Self and Society, University of Chicago Press, 1934.
[26] Honneth, Obcit, 1992, p. 93.
[27] Ibid.

rights to the individuals than the conventional relations of recognition do. We should not overlook the difficulty of an integration of the other generalized in a collective vision of the common good, in order to justify one's own values without hindering one's own autonomous fulfilment. Such trends and values must represent the historical-sociological foundation of any theoretical model of coexistence or solution to the problem of ethical integration in modern societies. Honneth's proposal represents a valid alternative to the viewpoints of both liberal and communitarian authors. [28] Faced with the fact of pluralism, the liberal model insists on the necessity to separate the ethical from the political levels; only within the first scope the members of society need to reach an agreement. Starting with C. Larmore's reflection, liberalism, in its neutral version, suggests a retreat to an ethically pure ground to build a political agreement, facing the heterogeneous identities of community members.[29] An exemplary model of political liberalism is Rawls' proposal of the *overlapping consensus*, implying an *indirect* agreement between the citizens on the fundamentals of a theory of justice, by which everyone should accept those principles for personal reasons, starting from his own worldview, without having to express the validity of such view, and thus securing his possibility to take part in a collective political reality.[30] Rawls' position has the merit to provide an effective criterion to distinguish between rational comprehensive doctrines – which give their consensus to the principles of the theory of justice and are, therefore, compatible with the fundamentals of a democratic state – and non-rational comprehensive doctrines, which do not accept those principles. The most relevant problem in this debate is, in our opinion, connected to the idea of neutrality of the state; an idea which does not seem to take into due account the demands of recognition and social visibility advanced by minority groups, condemning them to invisibility, what Honneth defines as *Leiden an Unbestimmtheit.*[31] Hence the need to identify an alternative approach, which may find expression in a democratic theoretical model sensitive either to identitive differences and problems or to the needs of political neutrality. State neutrality is an important feature also in Habermas' reflection, although it is a neutrality of a different nature. According to the Habermasean model, in fact, the political dialogue acquires ethical connotations thanks to the opening of spaces for a democratic dialogue, accessible to every citizen through a representative system founded on a constant flow of communication between the centre and the periphery. Habermas identifies a solution to the intercultural conflict, in a procedural consensus, which does not require any substantial agreement on values among the members of a given group, which can preserve its peculiarity in relation to them, it requires a consensus "*on the procedures related to a legitimate juridical output, to a legitimate exercise of power*". The impartiality of the institutions and the legitimacy of their decisions, are thus guaranteed by an equal possibility of participation in the arena of political dialogue granted to each citizen, who can regard himself, in this way, not only as a receiver, but even, and above all, as an

[28] A. Ferrara, a cura di, Comunitarismo e Liberalismo, Editori Riuniti, Roma 1992.
[29] C. E. Larmore, Patterns of Moral Complexity, Cambridge University, 1987.
[30] J. Rawls, Political Liberalism, Columbia University Press, 1993.
[31] Honneth, Obcit, 1992, p. 101.

author of the norms upon which social interactions come to be structured. [32] Authors close to communitarism may regard such a model as insufficient, in that it holds any individual's cultural identity merely as a personal element, which does not deserve recognition by the others. In contrast with the liberal model, therefore, the counter-model suggested by Taylor insists on two elements which a policy of recognition should promote: the importance of authenticity, i.e. the ability of the subjects to fulfil their personal projects of life, as opposed to autonomy, regarded as the ability of self-determination. [33] Taylor's model, however, lacks a normative criterion which may enable one to distinguish between those forms of identity which deserve recognition and those which should be discouraged. Can legitimate demands of recognition by a linguistic minority be regarded on the same level as those by a terrorist group? Can a democratic society admit, inside itself, cultures in open contrast with its democratic principles? Clearly, a demand of recognition is not sufficient to legitimize the need of recognition of identity as such. In order to decide in which cases it is legitimate to recognize a form of identity, we need a normative theoretical model of recognition. If the practices of understanding, recognition and conflict were established as institutional practices of regulation and participation in social life, it would be possible to reach a political agreement able to admit, inside and outside itself, ethical pluralism. If pluralism is seen as a condition of identitive uncertainty, in the division between certainty and uncertainty, we propose to take law as a theory, as a foundation upon which to build a model of coexistence: law, as an organized and stable system, and within the limits of an ever-changing context like a multicultural context, can provide predictability, thus certainty, to interpersonal exchange, mostly when, as in our hypothesis, it enforces human rights on the basis of those intersubjective social conditions constitutive of personal integrity. The legalization of the intersubjective social praxis should be matched by a conceptual representation of the harmony between social processes formative of norms and decisional processes, taking into consideration the space to be granted to democratic as well as to representative principles. Together with such a conceptual representation, the theory and the hierarchy of the sources of law should be re-thought. Today, an examination of the law leads to an assessment of the loss of sovereignty of the nation-state in response to the challenges of a global society, and to the need to find rules able to manage their interdependence. The emerging prospects, particularly the process of European integration, highlight that individual rights are no longer granted exclusively by a legislative activity, but also by a juridical valorization of those moral, ethical, juridical and value principles, "*which constitute the fundamental normative structures of society, legally escaping the willingness of the contingent political power*"[34] The last part of our research will focus on how the emergence of such values may constitute a valid approach to

[32] J. Habermas, Faktizität und Geltung, Suhrkamp, Frankfurt am Main 1992.

[33] C. Taylor, The Politcs of Recognition, in J. Habermas, C. Taylor., Multiculturalism…, pp. 66-68.

[34] G. Dogliani, Garanzie d'interdipendenza della magistratura in "Garanzia costituzionali e diritti fondamentali" Enciclopedia italiana, Rom, 1997, Volume collecting the Proceedings of the Conference Held in Rome, June 26-28 1996, in M. Vari, Globalizzazione, processo d'integrazione europea e tutela dei diritti fondamentali, VI Congress Ibero-american de Derecho Constitucional, 15-17 aprile 1998.

an assessment of the juridical-normative implications of the theory of recognition connected to the communitarian and supranational dimensions of fundamental rights. The discussion will result in an attempt to draw a theoretical-normative model based on recognition, able to influence the process of codification of human rights.

3. Recognition through Human Rights

We opened our discussion by characterizing human rights as a supporting structure of a morality implying the assumption of a universalistic logic. With "morality" here we mean the general order of moral practice, so that human rights operate as legitimating elements of public ethics, constitutively taking part in the legitimization of juridical-political organizations, both on a national and an international level. [35] From this perspective, the *ethical universal* expressed by human rights, interacts with the proposal of a formal ethic based on the normative value of recognition. The attempt to associate such problematic dimensions until they merge into one another, justifiable from the point of view of a social science of norms, must take into account the unsettled tension among those who maintain the unfeasibility of human rights on the one hand, and those who maintain their non-renounceability on the other. [36] This tension highlights a paradox: the wide approval human rights are met with in today's ethical and political landscape is matched by generalized violations of them, feeding on violence, destruction, cruelty, death, exploitation, abuse – thus the urgent duty to protect them; such violations are also connected to their instrumental use, biased interpretations, partial application.[37] We will consider how the anthropological-philosophical configuration of human rights is full of wide and controversial *aporias*, strongly expressed by the contradictions between including rights – excluding rights, relativism – universalism, citizenship – cosmopolitanism, as well as the gap between guarantee and directness of power effects.[38] Symptomatically, the *Universal Declaration of Human Rights* of 1948, has no direct juridical effect, but it shows an indirect normative yet pervasive valence, in the sense that the processes of positivization explain its extent.[39] As a result, an element contributing to define the moral dimension of human rights is that it is connected to that sense of validity which projects them beyond any positive ordering. Human rights are justified demands, concerning *every* human being, which require respect and protection. Such universal validity becomes a property which these rights share with moral norms[40], enabling, moreover, their discourse to display in advance *"criteria by which any offences, even if latent, to an*

[35] P. Baldassare, Obcit, 2001.
[36] Cfr. F. D'Agostino, Irrinunciabilità e irrealizzabilità dei Diritti dell'uomo, in "Archivio giuridico", CCVIII, 1988, pp. 98-102.
[37] P. Baldassare, Obcit, 2001.
[38] S. Vaccaro, Le aporie dei diritti umani, Arcojornal, 19/06/2003, http://www.arcojournali-unipa.it.
[39] C. Zanghì, Protezione internazionale dei diritti dell'uomo, in "Digesto delle discipline pubblicistiche", XII, Utet, Torino 1997, pp. 154-156.
[40] Habermas, Obcit, 1981, p. 202-222.

individual's demands can be detected and corrected."[41] As these criteria may stem from the normative coordination of social action (understanding – recognition – conflict) aimed at supporting a conception of moral autonomy extended towards a theory of intersubjectivity, we should identify the basic theoretical dimensions which constitute the concept of recognition, as an intersubjective form re-including both understanding and conflict, of which only one is the sphere of intersubjectivity.

In order to draw a theoretical-normative model of recognition which can be used on the domain of the codification of fundamental rights, we need to go beyond the normative character of the intersubjective sphere already privileged by Honneth, concerning exclusively the logic of foundation of individual rights. We must take into consideration the remaining theoretical dimensions of recognition, aimed at guaranteeing the institutionalization and applicability of subjective rights, that is the institutional goal and the temporal horizon where the diachronic and synchronic profiles of the needs of recognition become interwoven. [42] The suggestions contained in Honneth's reconstruction can be summed up to three main points: first, the intersubjective sphere implicit in the concept of recognition, discloses three different levels of sociality: *love, right, solidarity*. [43] The second point derives from the assumption, already present in Hegel and Mead, that the driving force of social change is a struggle through which the subjects endlessly try to broaden their rights intersubjectively guaranteed and to increase, in this way, the degree of their personal autonomy. [44] Finally, the general thesis that "*the reproduction of social life takes place under the imperative of mutual recognition.*"[45] On such premises Honneth intends to suggest a "formal concept of ethicality" escaping historical-cultural or ideological conditionings. It is here, however, that we find the weakness of the stimulating reconstruction, provided by Honneth, of the concept of *Anerkennung*. Facing the question of the meaning of a subject's ability to act autonomously, Honneth, following Thomas H. Marshall, demonstrates *factually* that the XVIII century saw the affirmation of liberal rights, the XIX century those linked to political participation; finally, that the XX century saw the emergence of social rights aimed at well-being. [46] But, what is lost along this "factual" way, is the indissoluble connection between the progressive enrichment of human rights, due to the intrusive paternalism of the forms of (political, juridical and economic) organization of our contemporary society with its dramatic division between "first" and "third world". Nevertheless, what is striking about the analysis made by a philosopher such as Honneth, is the very lack of a

[41] M. J. Perry, The Idea of Human Rights. Four Inquiries, Oxford University Press, New York - Oxford, 1998

[42] U. Pappagallo, Alle fonti del diritto. Mito scienza filosofia, Giappichelli, Torino, 2004, p. 224; see too U. Pappagallo, Su alcune nuove tendenze della filosofia politica e giuridica tedesca,l'ultimo contributo di Axel Honneth, Icocervo (2) 2003, http://www.filosofiadeldiritto./contributi/2003-2/Pappagallodottted2-03.htm.

[43] Honneth, Obcit, 1992, p. 101.

[44] Honneth, Obcit, 1992, p.105.

[45] Honneth, Obcit, 1992, p.114.

[46] Honneth, Obcit, 1992, p.141.

fundamental counter-factual criterion of judgement. [47] His attempt to start from the intersubjective assumptions of personal integrity to reach the universal normative conditions of a successful life must, in the end, include also the mode of recognition of a social solidarity which can be generated only by collective and shared purposes.[48] Therefore, as the present European case clearly shows, the problem lies in defining such "collective" and "shared" purposes. Whereas Honneth's contribution, with its different levels of analysis, is precious to grasp the intersubjective amount of recognition – in the above-mentioned horizon of love, law and ethics – it is significant that principles and categories giving voice to new juridical and political demands are vague. Besides the logic of foundation of subjective rights, at issue here are also the institutional weight and the temporal horizon which guarantee their translatability and realizablity in terms of positive law. That means that the progress from foundation to institutionalization of fundamental rights is not to be considered in an unidirectional sense, by assuming unsubstantial abstractions about a universally inviolable human nature, rather it has to be seen mutually and contextually, as origin, – the intersubjective sphere – and as transformation of law – the temporal horizon.

The *intersubjective sphere*, where we mean to place the demands stemming from a spontaneous normative coordination of social action, and the *historical-social horizon*, which can be characterized in terms of ethical and identitive pluralism, function as peripheral theoretical dimensions, in relation to the *logic of foundation and to the institutional goals*, on which they exert permanent pressures aimed at fulfilling the imperatives of integration and social justice. It remains to establish the normative criteria of recognition, fixed in a totally preliminary way in communicative rationality, to be used in order to organize a dialogue and a comparison between divergent demands, when those demands are compatible with a democratic conception of modern law. Finally, we propose, as a discriminating criterion, the inter-generational responsibility, i.e. the possibility, associable with the demands of recognition coming from the social world, so that the fulfilment of those demands can be normatively extended towards future generations.

We intend to provide a graphic representation of the model exposed, in order to fully show the intersection, the circularity and the recurrence in the progress from foundation to institutionalization of subjective rights, following, as it were, a "semantics of recognition". As in our argumentations we wish to establish some normative criteria, we feel the need to test the said model on the constitutional process of the European Union, so as to answer to the question of whether a European political identity is possible. The very destiny of the European political union is today linked with the recognition of fundamental rights as well as of their legitimacy. A normative universalism in fact, being able to merge the various elements into a solid supranational identity, can guarantee the legitimacy of its institutions. One of the main difficulties hindering the

[47] U. Pappagallo, Obcit, 2004, pp. 224.
[48] Honneth, Obcit, 1992, p. 208.

project of political unity of the E.U. is, actually, the *deficit of democracy* associated with its institutions, because the inadequacy of political regulations of transnational relations is itself a consequence of the relations of interdependence brought about by the globalization of markets. The real problem is not whether there will be a supranational level in Europe, rather what shape it may take. It is clear to what extent the identity of an evolving political body depends on the sense of shared self-government that citizens perceive they can fulfil in it, a sense that can be seen as a strong version of legality, because it is a moment of legitimacy. Whereas, on the one hand Habermas' answer to the inadequacy of political regulation of transnational relations, in terms of the extension of the democratic model beyond national borders, draws attention to the strength of a democratic state in filling the gaps of social integration starting from the citizens' political participation,[49] on the other, it does not solve the problem of how to juridical preserve the ethical plurality within the project of constitution of a political union. The major obstacle to European integration is actually the lack of a common cultural tradition, i.e. of a substratum of shared values. [50] The problems, in our opinion, should be addressed through a reformulation of the "language" of transnational rights[51], as a juridical landscape able to synchronize the demands stemming from a "world of life" no longer strongly integrated, rather, manifestly heterogeneous and plural. In our times of crisis of the normative state law, we witness the mutual implication of legislative law politically produced with the rights of individuals seen as a sort of pre-political equipment, escaping the mechanisms of democratic negotiation.

Whereas, on the one hand, this bears witness to the great vitality of rights, on the other, it has caused a reaction on the part of the state, defined by jurists as a "crisis of legislation", consisting in a pervasive and self-referential juridical overproduction. The crisis of legislation involves not only the modes of juridical production, associated with the dialectic majority-minority thought of for a world that moved following ideological contrapositions, too rigid for an application on contemporary societies characterized by ethical and identitive pluralism. It involves also its models of intervention on society, too rigid and unable to follow the roads, increasingly articulate and complex between public and private spheres. [52] The legislative crisis, in other words, reflects the parallel political crisis brought about by the difficulties individuals have in recognizing themselves in common goals and long-term projects. [53] Such legislative crisis goes together with a claim of a grammatical specificity of those "transnational rights", no longer subjected to national legislations, that can better meet the present demands. The very concept of citizenship, for example, straddling politics and law, has always worked within the nation-state, based on "*the*

[49] J. Habermas, Die Heinbeziehung des anderen. Studien zur politischen Theorie, Suhrkamp Verlag, Frankfurt am Main 1996, pp. 53-62.
[50] S. Dellavalle, Chi ha paura dell'Unione Europea? in "Teoria Politica", XIV, n. 1, 1998, p. 15.
[51] M.R. Ferrarese, Il diritto al presente. Globalizzazione e tempo delle istituzioni, Il Mulino, Bologna, 2002, pp. 135-185.
[52] A. Baldasssare, Globalizzazione contro democrazia, Laterza, Roma-Bari 2002.
[53] M.R. Ferrarese, Obcit, 2001, p. 137.

particularistic demand of security, not on the universalistic demand of equality for people and of equal justice".[54] Consistently with a marked weakening of the traditional idea of state sovereignty, therefore, we can notice new juridical trends, the so-called "revolution of human rights", regarding the new supranational, as well as Europe-wide, dimension. We would like to highlight, through a description of these processes, the very idea that the incongruence between the primacy of legislation and the primacy of rights, derives from the diversity of the *temporal logic* that informs them, i.e., from a higher degree of harmony with the demands coming "from the present".[55]

In other words, in the first instance, the procedure serves to freeze the content, avoiding social elaboration and presenting it as a finished product; in the second instance, the procedure is a guarantee of open meaning, of incompleteness, of potential new elaborations, and is also subject to be questioned; human rights correspond to a pragmatic broadening of identity contents which, from time to time, are formed around specific needs of recognition. That is why we define the European constitution as "an unfinished project", taking on identities and related demands of recognition according to the ever-new versions into which they are translated as juridical expectations. The comparison between the theoretical normative model we have built on the concept of recognition and the European constitutional process, embodied in the "writing" of the Charter of the Basic Rights of the Union (Nice, December, 7th 2000), is intended to emphasize the problem of how the fundamental rights declared at Nice, pay for their freedom from politics, with an amount of precariousness that condemn them to an uncertain existence. Certainly, the Charter of Rights does not introduce a new form of European protection of fundamental rights, on the contrary, it simply contributes to juridical realities already consolidated within the states of the community. The birth certificate of the European constitutional process goes back to Stauder's sentence pronounced in 1969, in force of which the Court of Justice introduced into the communitarian regulations, by jurisprudential means, the protection of human rights, thus satisfying the needs of the national courts, which had no intention to sacrify the fundamental human rights in the name of a supremacy of communitarian over internal regulations.

As the protection provided by the Court of Justice cannot coincide closely with the protection granted by national constitutions, it was necessary to fill the institutional void by extending the sources of inspiration to the international treaties agreed upon by the member states, among which the European Convention of Human Rights (Rome, November, 4th 1950) is outstanding. The Nice Charter, therefore, is not to be seen as an absolute novelty; nonetheless, it is a creative work of inclusion-exclusion when compared to the Convention, meaning that what was included in the Charter should have a higher

[54] D. Zolo, La strategia della cittadinanza, a cura di, La cittadinanza. Appartenenza, identità, diritti, Laterza, Roma-Bari 1994, p. 14.
[55] M.R. Ferrarese, Obcit, 2001, pp. 140-145.

juridical value than what was excluded.[56] What strikes most is the absence of social formations: family, linguistic minorities, religious creeds, political parties, are neither listed among the subjects holders of the rights recognized by the Charter, or they are considered as collective projections of individual rights. There is, however, a recognition of totally new rights, whose protection is necessary following the scientific and technological developments, as in the case of reproductive cloning.

Leaving behind the traditional subdivision of subjective rights into civil, political and social rights, the Charter groups the various juridical situations around six fundamental values or principles, namely dignity (art. 1-5), liberty (art.6-19), equality (art.20-26), solidarity (art.27-38), citizenship (39-46), and justice (art.47-50). Through this value technique, avoiding patterns of a hierarchical matrix, all rights are placed on an equal plane in the name of the indivisibility of fundamental rights. [57] The Charter, in this way, may spontaneously become a parameter of reference not only to assess the legitimacy of institutional proceedings, but also to examine the conditions of admission of new countries, as well as to implement actions of cooperation for the development of third world countries. In the beginning, as we have seen, the protection of fundamental rights entered the community regulations thanks to the Courts of Justice, on the background of an absolute void of normative texts. It was only after a long while that the Treaties of Maastricht and Amsterdam provided specific political procedures for the assessment of serious violations of fundamental rights by member states.[58] In short, the provisions regarding fundamental rights contained in the treaties are few, scanty, coming after the creative activity of the Court of Justice and, therefore, inclined to refer to previous law. Thus, the contribution made by the Charter to the protection of fundamental rights should be placed on a plane of political debate, highlighting its political, therefore public, dimension. So far, the problem of the nature and of the juridical and political effectiveness of the Charter, for example, has not been permanently solved. We can safely state that the option of a minimalist text is to be regarded as an opportunity to preserve the vitality of the content of rights, whose phenomenology is referred, in the last instance, to the recognition of those normative demands deriving from the intersubjective practices which coordinate the plans for actions towards an actual universal of ethicality.

[56] R. Bifulco, M. Cartabia, A. Celotto, eds, L'Europa dei diritti, commento alla Carta dei diritti fondamentali dell'Unione Europea, Il Mulino, Bologna 2001.
[57] Bifulco, Cartabia, Celotto, İbid, pp. 16-18.
[58] Bifulco, Cartabia, Celotto, İbid, p. 16.