DISABILITY IMAGINATION(S)

FROM EQUALITY IN SPITE OF DIFFERENCE TO EQUALITY THROUGH DIFFERENCE

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> Think what it would be
> to have a work conceived from outside the *self*,
> a work that would let us escape
> the limited perspective of the individual ego,
> not only to enter into selves like our own
> but to give speech to that which has no language […].
>
> (I. Calvino, "Six Memos for the Next Millennium – Multiplicity")

> [D]o we position ourselves on the side of colonizing mentality?
> Or do we continue to stand in political resistance with the oppressed,
> ready to offer our ways of seeing and theorizing, of making culture […].
> This choice is crucial. It shapes and determines our response
> to existing cultural practice and our capacity to envision new,
> oppositional, aesthetic acts.
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> (B. Hooks, "Race, Gender, and Cultural Politics")

I. INTRODUCTION

According to Calvino, one of the most difficult – yet, unavoidable – challenges literature has to face is its «ancient desire to represent the multiplicity of relationships, both in effect and in potentiality», which would allow to obtain (and therefore, to offer) «a manifold and multifaceted vision of the world»[1]. In his perspective, this is necessary in order to achieve a fuller knowledge of reality.

Once the so-called "liberal myth" and the deeply ideological nature of its apparently neutral and abstract model – essentially based on assimilation and exclusion –

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[1] I. Calvino, "Six Memos for the Next Millennium: Multiplicity", Cambridge, 1988, 112.

had been identified and demystified, the law had to deal with multiplicity, a process that is still very much on-going.

With the appearance of "material life"[2] and of new, unexpected[3] subjects gradually, yet increasingly demanding visibility, recognition and, most importantly, their «right to have rights»[4], a radical re-thinking of political and institutional structures, as well as of the existing juridical categories, which are openly inspired in liberal principles, had become urgent.

Critical theories played (and still play) a key role in this respect, both by deconstructing the liberal paradigm and by elaborating alternative representations of reality and subjectivities, in contrast with traditional ones from a symbolic, cultural, political and institutional point of view. Their theoretical suggestions, and the related struggles for civil rights, represent a demand for recognition, equality in the differences, equal dignity and fundamental rights' ownership and effectiveness. As such, they must be given a central role in legal thinking, due to the urgent nature of the above-mentioned matters.

This paper represents an attempt to widen the scope of juridical thinking, by elaborating on the theories and notions developed by *Disability Studies*[5], *Women's Studies* and *Gender Studies* on the issue of the emerging disabled subjectivity[6].

This choice is influenced by Calvino's work. In his lecture on *multiplicity*, the author emphasised the importance of conceiving a work outside the "*self*" in order to escape the perspective of the *individual ego* and to give speech to *that* which has no

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[2] L. Mengoni, "La tutela giuridica della vita materiale nelle varie età dell'uomo", in L. Mengoni, "Diritto e valori", Il Mulino, 1985, 123-145; V. Marzocco, "*'Dominium sui'*. Il corpo tra proprietà e personalità", Editoriale Scientifica, 2012.

[3] The expression "unexpected subject" is taken from the Italian feminist Carla Lonzi. See C. Lonzi, "La donna clitoridea e la donna vaginale", in C. Lonzi, "Sputiamo su Hegel. La donna clitoridea e la donna vaginale e altri scritti", Scritti di Rivolta Femminile, 1974, 78, 101.

[4] See H. Arendt, "The Origins of Totalitarianism", Harcourt, 1951, 296.

[5] For a theoretical framework of this critical theory, in its various components, see: M. Oliver, "The Politics of Disablement", The MacMillan Press, 1990; T. Shakespeare, "Disability Rights and Wrongs", Routledge, 2006; D. Pfeiffer, "The Philosophical Foundations of Disability Studies", *Disability Studies Quarterly*, Spring 2002, 22, 2, 3-23; C. Thomas, "Sociologies of Disability and Illness. Contested Ideas in Disability Studies and Medical Sociology", Palgrave MacMillan, 2007; N. Watson *et al.* (eds.), "Routledge Handbook of Disability Studies", Routledge, 2012.

[6] For the purposes of this paper, we will use "disabled" and "with disabilities" in an interchangeable way.

language[7]. In this paper, the liberal paradigm will be deconstructed through the voice of a new *subject* (instead of Calvino's *object*), namely, the disabled one.

For a long time, the philosophical and political debate has been focusing on the disabled individual merely as the *object* of paternalistic discourses based on exclusion. The right to a full *subjectivity* has been denied to anyone suffering from any type of disability. As a result, individuals with disabilities have not been able to enjoy full social inclusion and have been deprived of their fundamental rights.

II. REGULATING THE BODY:

CONFINEMENT STRATEGIES THROUGH AND AGAINST THE LAW

Persons with disabilities represent a deviation from the norm. The "normal", according to Foucault, works as a regulating and excluding mechanism: it creates human hierarchies by establishing a number of dualisms, whereby "typically human" characteristics (the positive pole of the dichotomy) exist in contrast with characteristics linked to a "lack of humanity", which justify the confinement to a "subaltern" position[8].

In fact, such subaltern subjects occupy a variety of social positions, depending on their degree of divergence from the standard paradigm: the more an individual's identity diverges from the norm, the farther this individual will be from the space of inclusion[9].

However, while the complex combinations of individual characteristics often play a decisive role in a person's social position, this paper will not focus on a critique of

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[7] I. Calvino, "Six Memos for the next Millennium: Multiplicity", cit., 122.

[8] "Subaltern" is a term developed within the so called "Subaltern Studies", the famous critical theory born to challenge the *legacy of colonialism*, and then expanded to comprehend other people who are marginalised by dominant western culture, like immigrants, women, etc. Among others, see G. C. Spivak, "Can the Subaltern Speak?", in C. Nelson, L. Grossberg (eds.), "Marxism and the Interpretation of Culture", University of Illinois Press, 1988, 271-313.

[9] The famous "basement metaphor" used by Kimberlé Crenshaw in her intersectional approach is very clear in explaining how the various differences interact to marginalized and exclude those people who diverge from the norm. About the metaphor, see K. W. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", *The University of Chicago Legal Forum. Feminism in the Law: Theory, Practice and Criticism*, 1989, 139-167, in particular 149, 151, 152. For a better understanding of "intersectionality", see K. W. Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color", *Stanford Law Review*, 1991, 43, 6, 12-41

intersectionality, but rather on the relationship between included and excluded subjects. We will assume that the binary opposition devised by Foucault can be spatially represented by the relationship between an "outside" and an "inside". In this dichotomy, being "inside" (i.e., falling within the norm) means having access to the space of inclusion and to the relevant rights. This paper assumes that individuals with disabilities are denied access to the space of inclusion (and to the fundamental rights) due to their lack of normality.

In fact, the experience of individuals with disabilities is somewhat similar to that of other excluded groups: as it is known, a surreptitiously normative concept of *normality* – and consequently of identity – has been determining, for centuries, the social roles of individuals (male, western, Christian, heterosexual, bourgeois, able-bodied, etc.) and non-individuals (non-male, non-western, non-Christian, non-heterosexual, non-bourgeois, non-able-bodied, etc.), who were forced to identify with such roles as if they were *natural*. More recently, however, this allegedly unitary notion of identity has been the object of criticism on part of those who deny the unity and stability, or even the very existence, of a single identity.

In the specific case of disabled individuals, their "lacking something" has been justifying (*de facto*, and in some cases *de jure*) the attribution of a partial subjectivity, which ended up turning into a non-subjectivity. This "lack" has been conventionally identified with missing one or more limbs, having a mental disability, lacking legal capacity or the ability to act independently, or with the inability to function like a "normal human being". In the past, this resulted in a comparison being drawn with the concept of "monstrosity" and, as a consequence, in these individuals being perceived as radically and irreparably different[10].

Two of the confinement strategies employed to establish a clear and indisputable definition of disability have become more relevant in recent history: spectacularization and subjection to ridicule on one side, and institutionalisation on the other. These strategies may be seen as opposite, yet complementary, techniques aimed at excluding,

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[10] See R. Bogdan, "Freak Show: Presenting Human Oddities for Amusement and Profit", Chicago University Press, 1988; more recently, Id., "Picturing Disability: Beggar, Freak, Citizen and Other Photographic Rhetoric", Syracuse University Press, 2012; R. Garland Thomson, "Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature", Columbia University Press, 1996.

controlling and ultimately eradicating diversity from society. Disability is thus seen as a disease, as deviation from the rule (or norm)[11]. Moreover, it is seen as an individual characteristic that does not belong to the public sphere and must be hidden, unless it can be reinterpreted (and therefore controlled, defused) as a – generally grotesque – artistic performance, so that any risk of "contamination" is avoided[12].

In this respect, law – in its various incarnations – has historically taken on a prominent role, although a relationship between the juridical sphere and a unified notion of "disability" can be said to have existed only from the beginning of the 19th century onwards. Around that time the category of the "disabled" was *created* by governments within the context of the Welfare State, which envisaged a *work-based* distributive system alongside a *need-based* system covering, amongst others, disabled individuals[13].

Exclusion strategies aimed at disabled subjects are thus closely linked with the development of a specific body of laws: as it is known, both the displaying and hiding of a number of diversities, which today fall within the spectrum of disability, has historically been regulated by the law. Law, being a social practice, could hardly avoid acknowledging the beliefs regarding disability that were (and are) widespread in any specific cultural context.

The first confinement technique, i.e., the artistic displaying and spectacularization of disability, is historically represented by the *freak show*, a primary example of the link between the juridical sphere and images of monstrosity and radical otherness. *Freak shows* consisted in the exhibition of biological rarities, which until the mid-19th century were considered as *wonders*[14], and then, for at least a century, more frequently as *monsters*. The extreme deviation of the *monstrum* from the notion of human being made the audience

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[11] See G. Canguilhem, "Le normal et le pathologique, augmenté de Nouvelles réflexions concernant le normal et le pathologique", Puf, 1966.

[12] This idea of disability is widespread from the Enlightenment onwards. Previously, the confluence of the images related to the monstrosity (and disability) in the sphere of the extraordinary had contributed to give the "monster" a sacred character. Those bodies that were divergent from the norm and that were performed, were considered God's signs, expressions of radical otherness and, at the same time, objects of awe and wonder, not of a public blame. See D. Wilson, "Signs and Portents: Monstrous Births from the Middle Age to the Enlightenment", Routledge, 1993.

[13] D. Stone, "The Disabled State", Temple University Press, 1985, 18-21.

[14] Cfr. R. Garland Thomson, "*Freakery, Cultural Spectacles of the Extraordinary Bodies*", New York University Press, 1996, 4.

feel entitled to question the very humanity of the individual performing in front of them[15].

The cultural change that led to disability no longer being associated with monstrosity, and to the former becoming the object of study of medicine, took place from the late 1930s. Until then, anyone with physical defects was simply considered a *freak*. The distance between the audience (the observer) and the *freak* (the observed) was the central element of a *freak show*. This distance was never neutral: the spatial separation represented and emphasised the scientific and social separation that existed between the included and the excluded, that is to say, between the normal and the non-normal. The performance stage, with its aestheticising function, was the only space that was actually accessible for those individuals who were not allowed to freely inhabit the public space, due to their radical deviation from the norm.

Quite inevitably, law had to deal with the existence of these shows, and had to take a stand with respect to the creation and delimitation of a public space specifically dedicated to the display of differences that were perceived to be *radically* "other". These shows were first allowed, and then forbidden, as a result of *ad hoc* regulations. The motivations indicated in the relevant verdicts showed the importance of cultural influences on the juridical sphere. It is interesting to note how the judicial bodies, while recommending that individuals with unusual bodies should have the right to have a job, established that *freak shows* were the *only* places where these people could actually find employment[16].

After a period of relative absence, *freak shows* have recently reappeared, albeit with a different meaning, which has been described as postmodern[17]. Not unlike the spectacularization of drag and the re-appropriation of the term "queer" by the non-heterosexuals, as a way to criticise the so-called "heterosexual paradigm" and to claim a full subjectivity for themselves (along with the relevant rights)[18], several individuals with

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[15] Cfr. S. Stewart, "*On Longing.* Narratives of the Miniature, the Gigantic, the Souvenir, the Collection", Duke University Press, 1993, 108.

[16] Cfr., for example, 229 Cal. App. 2d 667 (1964); 267 So. 2d 817 (Fla. 1972).

[17] R. Adams, "Freaks and the American Culture Imagination", University of Chicago Press, 2001, 1.

[18] We use the expression "non-heterosexual" to encompass the whole panorama LGBTQI. On the relationship between *drag* and *queer*, and on the use of parody as means of protest, see the classical J. Butler, "Gender Trouble: Feminism and the Subversion of Identity", Routledge,

disabilities have tried to undermine the "able-bodied paradigm" by reintroducing the *freak show* in order to reaffirm the dignity of individuals who do not conform to the criteria of able-bodiedness.

In this perspective, disabled bodies appear as transgressive because, in spite of any form of recognition, acceptance or inclusion, they impose alternative rules operating alongside the dominant ones (which are based on liberalism's political anthropology)[19]. The stage is thus turned from a place of confinement and exploitation into a freely selected space where the performer is allowed to express his or her subjectivity. The stage, therefore, takes on a political meaning and allows the performer to demand an active presence in the world. The performance space grants a degree of visibility that disabled individuals have been seeking for centuries.

While this aspect seems undeniable, the return of the *freak show* also lends itself to a different interpretation. Can this sort of spectacularized display of one's difference really help reach the desired objectives, or does it merely reaffirm the unbridgeable gap between those who are "normal" and those who are "different" (and who, onstage, perhaps are no longer exploited but are nevertheless confined)?

The same verdicts stating that *freak shows* are the *only* place where job offer and demand for persons with disabilities will ever meet reveal a tendency to describe a phenomenon (disability) as merely an individual matter. As a result, the affirmation of a "different" (non-able-bodied) subjectivity in the public space is not permitted, as this subjectivity can only express itself within clearly defined boundaries. The deviation from the anthropological assumptions of much past and current liberal thought seems to imply, by definition, the impossibility of any form of inclusion other than those based on the charitable solidarity of the able-bodied. Disabled persons, after all, are not fully productive for most of their lives, do not possess a strong rationality (in the Kantian

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1990. One of the most famous Italian representatives of the *queer philosophy* is Lorenzo Bernini. See L. Bernini, " Apocalissi *queer*. Elementi di teoria antisociale", Ets, 2013.

[19] F. Monceri, "La cittadinanza alla prova della 'disabilità' e confini del genere", in E. Bellè, B. Poggio, G. Selmi (eds.), "Attraverso i confini del genere", Università degli studi di Trento, 2012, 81-101, 93.

sense of the term) and therefore are not autonomous and independent[20]. This results, as mentioned above, in a removal from public space (which is, in this sense, necessary).

While these effects are achieved through the display and spectacularization of disability, they can also be obtained through the opposite strategy, based on the form of social control represented by institutionalisation[21]. The so-called "total institutions"[22] became systematically widespread from the early 19th century. Living in these places of confinement – or, according to the interpretation of the phenomenon given in this paper, non-places for non-subjects – could be described as being in a "permanent state of exception"[23], as these institutions are founded on the suspension of the ordinary rule of law, alongside the validation of paternalistic attitudes towards their inpatients[24]. This

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[20] Productivity, full rationality, autonomy and (or) independence, ability to equally participate in social life are among the key assumptions of liberal thought. In liberal societies, only the simultaneous presence of these elements grants an individual full inclusion. For instance, in his *A Theory of Justice*, John Rawls makes a series of markedly egalitarian claims that contain all of the above-mentioned elements. The American philosopher adopts a neo-Kantian perspective, whereby autonomy is defined as a form of rational self-legislation. The autonomous subject constructs its own identity on the basis of the notion of *double order of desires* developed by Frankfurt. The autonomous individual, basically, is the one who manages to attain independence from any passions, bonds and any form of conditioning, and who is capable of free and rational thought.

Clearly, relying on this anthropological assumption leads to identifying the autonomous individual with the model citizen, whose basic interests are reflected in the principles of a given society, because society is a cooperative venture for mutual advantage. This implies, by definition, that anyone who does not possess the characteristics of the rational and autonomous citizen cannot participate in the definition of the fundamental principles of society: «I shall assume that everyone has physical needs and psychological capacities within the normal range, so that the questions of health care and mental capacity do not arise» (J. Rawls, "A Theory of Justice. Revised Edition", The Belknap Press, 1999, 83).

For an extended critique of liberal anthropology, see E. Santoro, "Autonomy, Freedom and Rights. A Critique of Liberal Subjectivity", Springer, 2003.

[21] On this topic, see D. L. Braddock, S. L. Parish, "An Institutional History of Disability", in G. L. Albrecht, K. D. Seelman, M. Bury (eds.), "Handbook of Disability Studies", Sage, 2001, 11-68, especially 31, 39-42.

[22] The term "total institution" appears for the first time in the 1961 essay *On the Characteristics of Total Institutions*, written by Erving Goffman. By "total institutions" he means «a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life» (E. Goffman, "Asylums: Essays on the Social Situation of Mental Patients and Other Inmates", Anchor Books, 1961, xiii).

See also M. Foucault, "Histoire de la folie â l'âge classique », Gallimard, 1972; F. Basaglia, "L'istituzione negata", Einaudi, 1968.

[23] Although the term is used in a context different from the original – the Author originally refers to a continued state of exception of the Nazi State under Hitler's rule – it is clear, here, the influence of Agamben. See G. Agamben, "State of Exception", University of Chicago Press, 2005.

[24] In Italy, until the 1978 reform (when psychiatric hospitals were closed thanks to the so called "legge Basaglia", n. 180/1978), those who were interned in psychiatric hospitals were deprived of all civil rights. Nowadays, a similar situation is still present in different European

meant that these places were "forgotten" for a long time, and became theatres for frequent violations of human rights. Inpatients were frequently subjected to sexual abuse or other treatments violating their dignity, while women with mental disabilities were subjected to forced sterilisation. These practices were prescribed by the law and endorsed by the judicial system, yet they still take place today[25].

The relevance of this phenomenon lies, amongst other things, in its recent history: "total institutions" still exist today, with around 500,000 inpatients in Europe alone. In these institutions, the violations of human rights mentioned above still take place (in some cases, crossing the boundaries of these non-places and reaching the public space). From a regulatory point of view, these non-places where rights are suspended now appear to exist in stark contrast with the international conventions on human rights and in particular with the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) of 2006[26].

States, where many persons with disability (especially children) are housed in institutions and victims of violence and abuses. This is the reason why civil and institutional actors (like various movements for the rights of persons with disabilities, Council of Europe or United Nations) promote the right of persons with disability to live independently and be included in the community. On this topic see, for example, Council of Europe - Commissioner for Human Rights, "The Right of People with Disabilities to Live Independently and be Included in the Community, Council of Europe 2012, available at https://wcd.coe.int/ViewDoc.jsp?id=1917847.

[25] See L. Carlson, "Cognitive Ableism and Disability Studies: Feminist Reflections on the History of Mental Retardation", *Hypatia*, 2001, 16, 4, 124-146; E. F. Kittay, "Forever Small: The Strange Case of Ashley X", *Hypatia*, Summer 2011, 26, 3, 610-631.

[26] See artt. 15-18 of CRPD, concerning the freedom from torture or cruel, inhuman or degrading treatment or punishment and from exploitation, violence and abuse; the protection of the integrity of the person with disability; liberty of movement and nationality. It is important to stress that the main victims of such practices are women and children with disabilities. The former have been internationally recognized as subjects for the first time by the CRPD (art. 6).

On violence against women with disabilities, see the thematic study included in the Report of the Office of the United Nations High Commissioner for Human Rights, realized in March, 2012: http://www.internationaldisabilityalliance.org/sites/disalliance.e-presentaciones.net/files/public/files/Thematic%20study%20on%20the%20issue%20of%20violence%20against%20women%20and%20girls%20and%20disability.PDF.

At http://womenenabled.org/, is an interesting comparative study about the use of violence against women and girls with disabilities. See ORTOLEVA, Stephanie, LEWIS, Hope. Forgotten Sisters – a Report on Violence against Women with Disabilities. An Overview on its Nature, Scope, Causes and Consequences. 2012: http://womenenabled.org/pdfs/Ortoleva%20Stephanie%20%20Lewis%20Hope%20et%20al%20Forgotten%20Sisters%20-%20A%20Report%20on%20ViolenceAgainst%20Women%20%20Girls%20with%20Disabilities%20August%2020%202012.pdf.

Moreover, from a socio-cultural point of view, “total institutions” are a typical example of the contradiction inherent to the double mandate of the Welfare State: on the one hand, envisaging care and assistance for persons with disabilities, while on the other, prescribing the separate control of those who are identified with their own deficit, and as such confined outside the public space because they are considered a danger to themselves and others and a public scandal.

III. THE “MEDICAL MODEL” AND BEYOND: DISABILITY, OPPRESSION AND IDENTITY STRATEGIES

These confinement strategies rest on what, in the context of *Disability Studies*, is conceptualised as the “medical model”[27]. This notion sums up a heterogeneous mix of ideologies[28] that conceptualise disability as an exclusively individual matter. According to this model, which is based on Cartesian dualism, disability is a deviation from the norm resulting from a physical, intellectual or sensory deficit. As such, it affects exclusively the disabled person, limiting their range of daily actions, which include the ability to occupy a social role. The resulting cultural imperative demands that full functionality be restored, while at the same time points in the direction of an almost complete exclusion of the disabled person from the public space.

The “lack” ascribed to the disabled person, in fact, justifies from a medical point of view any corrective/rehabilitative intervention that could repair the defective body/machine. Such interventions are aimed at restoring the “typically human” operation that grants access to a status of “full humanity”, and with it, to a full enjoyment of rights. On the other hand, if the intervention on the body/machine is not possible or if it fails, the “lack” will legitimise all arguments leading to exclusion.

On violence against children with disabilities, see the various reports and campaigns published by Disability Rights International.

[27] Most of the times, “individual model”, “deficit model”, “medical model” are expressions used in the *Disability Studies'* literature in an interchangeable way, as referring to the same theoretical assumption. However, some of the most prominent *Disability Studies* representatives admitted that a “medical model” of disability does not exist; rather, we can speak of an “individual model”, where medicalization is the main component. Cfr. M. Oliver, Understanding Disability: From Theory to Practice, MacMillan, 1996, 31.

[28] Mike Oliver, Vic Finkelstein and Colin Barnes (three of the most famous and influent pioneers of the “social model” of disability) use the word “ideology” with a clear reference to historic materialism in general, and to Antonio Gramsci in particular. Indeed, since the early Seventies, Gramsci has become a landmark in the English Marxian debate.

From an economic point of view, the low productivity of the disabled individual when compared to the able-bodied worker justifies the exclusion from the labour market (and, as a consequence, condemns to poverty and social exclusion).

From a cultural point of view, values such as *compulsory able-bodiedness* and the *tyranny of perfection* reaffirm the liberal myth of the *hale and hearty* subject and contribute to the social discredit and exclusion (first and foremost, symbolic and cultural) of those who do not correspond to this ideal of perfection[29].

Finally, from a juridical standpoint, the "lack" and the economic and cultural exclusion often legitimise the individual's reduced legal capacity and lead to the promulgation of regulations inspired in a paternalistic logic rather than in the notion of empowerment[30].

The individual with disabilities fails to meet any of the standards that could grant her access to the benefits of full citizenship – which here is intended as the enjoyment of fundamental rights and social recognition – in today's western democracies.

The discipline of *Disability Studies* has developed alternative notions of disability, which do not focus on individual shortcomings, but on the structural power relations existing at the social level. These notions aim to demystify the liberal myth in its various articulations, by supporting the public recognition of disabled persons as an expression of human diversity, and the acknowledgement of disability as a form of social relation, rather than an individual matter. Moreover, they fuel the philosophical, political and juridical debate on the concept of inclusive citizenship and the enjoyment of rights. Such

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[29] R. McRuer, "Theory, Cultural Signs of Queerness and Disability", New York University Press, 2006; J. Morris, "Tyrannies of Perfection", *New Internationalist*, 1st July 1992, 16-17; M. Oliver, "The Politics of Disablement", cit.; C. Barnes, "Disabled People in Britain and Discrimination: A Case for Anti-Discrimination Legislation", Hurst & Co., 1991; C. Barnes, "A Legacy of Oppression: A History of Disability in Western Culture", in L. Barton, M. Oliver (eds.), "Disability Studies: Past Present and Future", The Disability Press 1997, 3-24; V. Finkelstein, "Attitudes and Disabled People: Issues for Discussion", World Rehabilitation Fund, 1980.

[30] In the wide realm of the various kinds and degrees of disabilities, mental disabilities pose interesting and hard challenges to the juridical regulation, especially in the field of legal capacity. For some interesting and sharp remarks, see C. Costantini, "La giuridificazione di infermità e disabilità. Profili comparatistici", *Comparazione e diritto civile*, 2011.

theories are gradually being implemented into the laws of a number of countries in the European Union as well as in international law[31].

These alternative notions of disability are summed up in the concept of "social model", an umbrella term comprising multiple theories on the meaning of disability[32]. The common element is represented by the overthrowing of the "medical model" and the publicisation of disability, which is the key element of the disability rights movement's political and juridical claims. The central element of the "social model" is the distinction between impairment and disability, whereby the former is intended as an individual characteristic, while the latter as a form of *oppression* against persons with any type of deficit[33]. Thus, the term "disability" comes to indicate a disadvantage, a restriction of activities originating from the configuration of contemporary societies, whose

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[31] Various documents take inspiration from this model. See, for example, the English *Disability Discrimination Act* (adopted in 1995, and replaced by the *Equality Act* since 2010), the *Americans with Disability Act* (1990), the *UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities* (1993) and the *UN Convention on the Rights of Persons with Disabilities* (2006).

[32] Pfeiffer identifies at least nine variants of the "social model": (1) social constructionist, (2) English social model, (3) impairment version, (4) oppressed minority (political) version, (5) independent living version, (6) continuum version, (7) human variation version, (9) discrimination version. Cfr. D. Pfeiffer, "The Philosophical Foundations of Disability Studies", 4-5.

[33] To fight the subaltern role played in almost every sphere of social life, in the Sixties disabled activists coin the slogan "Nothing about us without us", through which they claim their right to be present as active human beings in every place where decisions affecting disabled people's lives are taken. No policy should be decided by any representative, without full and direct participation of persons with disability. On this topic, see J. I. Charlton, "Nothing About Us Without Us: Disability Oppression and Empowerment", University of California Press, 1998.

In this first phase of disabled activism, the *Union of the Physically Impaired Against Segregation* (UPIAS) coins the distinction between "impairment" and "disability" in its famous 1976 Fundamental Principles of Disability. UPIAS states:

In our view, it is society which disables physically impaired people. Disability is something that is imposed on top of our impairments, by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society. It follows from this analysis that having low incomes, for example, is only one aspect of our oppression. It is a consequence of our isolation and segregation in every area of social life, such as education, work […]. (UPIAS, "Fundamental Principles of Disability", 1976, 4).

This distinction is subsequently taken up by the "social model" (fully theorized in the Eighties and, afterwards, object of criticisms and reformulations). At the core of the vindication is the idea that disability is neither related to a deficit, nor causally linked with it; rather, disability relies on the relationship between disabled people and able-bodied ones. Indeed, persons with disabilities are excluded from the various social contexts, as they represent a challenge to the dominant social values. They appear unfortunate, useless, different, oppressed and sick (see P. Hunt, "A Critical Condition, in Id. (ed.), "Stigma: The Experience of Disability", Geoffrey Chapman, 145-159, 146.

structure does not really take into account the needs of people with physical or mental impairments[34].

The "social model" clearly aims to overturn the segregationist ideology affecting disabled persons and to promote a change that could offer disabled individuals the opportunity to fully and actively participate in social matters, to enjoy an independent life and to be employed. This goal can be achieved by emphasising the link between disability and oppression, as well as through the promotion of civil rights and social visibility, which are claims for a notion of equality able to respect and value the various kinds of diversities.

In this sense, the claims of persons with disabilities, aimed at fighting against status inferiority, represent a criticism of a notion of equality mostly (if not exclusively) based on levelling out disparities of treatment linked to distributional unfairness. As a result of the latter, in fact, the *structural* dimension of these inequalities[35] goes unnoticed and underestimated, although «misfortunes punctually visit disadvantaged minority groups, but only as the result of well-disposed coincidence»[36].

In this perspective, recognising the specific nature of the struggles for civil rights and of disability critique is necessary, in order to be able to expose a cultural, political and juridical order characterised by an uneven distribution of power, whereby total inclusion is reserved to a specific group of people, and where it is up to those who are *already* included to determine which are the requirements needed to access the public space and to enjoy full rights and social opportunities.

Alongside other critical theories, then, *Disability Studies* criticise the notion of equality "by approximation", which on the one hand expands the number of subjects who are granted protection and full social participation, but on the other hand is used by dominant groups to maintain the *status quo*, as the goals to pursue and the structure of

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[34] M. Oliver, Understanding Disability: From Theory to Practice, cit. p. 22. In other words, the restriction of activity is due to the mutual interaction between individualization and medicalization, both considered mechanisms of social control functional to the construction and strengthening of the anthropological model that is at the basis of capitalist societies (the healthy, able-bodied, efficient, productive subject).

[35] See I. M. Young, "Feminism and the Public Sphere. Asymmetrical Reciprocity: on Moral Respect, Wonder, and Enlarged Thought", *Constellations*, 1997, 3, 3, 340-363; Ead., "Responsibility for Justice", Oxford University Press, 2011; J. Tronto, "Caring Democracy: Markets, Equality and Justice", New York University Press, 2013.

[36] Dissenting opinion of judge Bonello, in *Anguelova* v. *Bulgaria* (2002) 38 EHRR 31 [O-13].

society itself are *determined* by its most powerful members. The inevitable consequence of this operation has been the positive evaluation of certain characteristics and the discredit of the opposite ones: as a matter of fact, the point of view of a dominant group has been taken as the standard for point-of-viewlessness, effectively turning the particular into the universal[37]. Writing about the (somewhat similar) condition of women, Catharine MacKinnon observed:

> Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure[38].

A similar argument may be made by those belonging to other excluded groups: the individuals who are *already* included, the falsely abstract subjects that are the concrete holders of power within society, establish *what is the meaning* of difference, *which differences* matter, and in relation to *which qualifying aspect*. The included, in fact, become *the* parameter for equality and for the creation of a society that is functional to their own requirements.

With a specific focus on disability, in *Frontiers of Justice* Martha Nussbaum suggests that this opposition comes into being right when the fundamental principles of society are established, through the unjustified merging of the subject establishing said principles and the subject who benefits from them. In other words, the reference standard is represented by the able-bodied, who define the fundamental principles of society. These principles are then somehow adapted, as far as possible, to the needs of the disabled[39].

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[37] Cfr. C. Mackinnon, "Toward a Feminist Theory of the State", Harvard University Press, 1989, 182.

[38] Ead., "Are Women Human? And Other International Dialogues", Harvard University Press, 2006, 34; G. Zanetti, "Amicizia, felicità diritto", Carocci, 1998.

[39] M. C. Nussbaum, "Frontiers of Justice: Disability, Nationality, Species Membership", Harvard University Press, 2006, 16.

This critique could be taken to the extreme by taking into account the postmodern interpretations, that challenge the very power of definition and classification held by the dominant group: if the able-bodied are the ones who establish what is "normal" in a specific historical and geographical contest, then it is their action – rather than the deficit in itself – that constitutes the basis for identifying the various types of disability. The disability, therefore, will be more or less serious according to a parameter (that of normality) that varies in space and time and, most importantly, far from being objective, is the result of a power held at the social level. This clearly shows the normalising effect of the power to define, as well as that of the concept of "normality" itself.

However, while this operation is undoubtedly effective from a symbolic and cultural point of view (the example of the *freak shows* is particularly fitting), it is problematic from a juridical standpoint. In fact, such a radical criticism ends up denying the very existence of a deficit in the individual. If we assume that physical limitation is a universal aspect of the human condition, which allows to differentiate individuals only based on the degree of their limitations, we may conclude that every individual has a deficit, to some extent, and that the notion itself of "persons with disabilities" is meaningless and should not even exist, because all individuals are, somehow, disabled. This reasoning, however, seems to deny the concept that is at the heart of struggles for civil rights, whose goal is precisely the public affirmation of the full dignity of persons with disabilities. From an ontological point of view, there *is* a deficit, and the fundamental issue is not its universalization, which would end up denying its existence, but its public recognition. The public recognition of disability emphasises the need to urgently acknowledge the requests of persons with disabilities as a matter of social justice, rather than the object of a paternalistic benevolence on part of the included, in the name of a solidarity that can no longer be thought of exclusively in moral terms[40].

It must be stated explicitly that disabled persons are in a position of *structural disadvantage* within society *because* of the difference generated by their impairment, which puts them in a worse position compared to able-bodied individuals. Only by doing this, will we be able to claim those rights that guarantee a real and full equality. In fact, when a

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[40] On the concept of solidarity and its juridical relevance, see B. Pastore, "Pluralismo, fiducia, solidarietà: questioni di filosofia del diritto", Carocci, 2007, 109-138.

difference that has been traditionally ignored or discriminated against is reclaimed as a value, it can gain the respect that is the foundation of its protection and juridical dignity[41].

The attention to socio-cultural aspects, in their pre-juridical dimension, is the necessary prerequisite for obtaining equal rights. The mechanism that leads to the overlapping of the parameter of equality with either pole of the egalitarian relation, and ends up turning equality into an absolute concept – as pointed out by MacKinnon – comes into play at the social level. Equality, in other words, turns into *sameness*, that is to say an equality that assimilates. In this context, any deviations from the paradigm automatically lead to a devaluation of diversity, first on a social and then on a juridical level. Following this logic, equality and difference take on a surreptitiously "evaluative"[42] meaning. According to this reasoning, discrimination consists in the explicit exclusion of certain subjects from enjoying the rights and benefits of those who belong to a specific political community.

This mechanism can be applied to disability: the standard notion of difference allows to evaluate how much each type of disability deviates from the norm. In this perspective, disability turns into a non-ability, which can be mistaken for a non-normality. The latter, in turn, translates into a lack of normality and is then judged according to its deviation from able-bodied standards. When describing disability, for example, Tristam Engelhardt stated that «[t]o see a phenomenon as [...] a disability is to see something wrong with it»[43]. The term "wrong", which may appear not to constitute an evaluation in itself, in fact seems to represent a confusion between the descriptive and the evaluative dimension of equality denounced by critical theories and in particular by legal feminism.

However, at the same time, the evaluative difference may be intended as a peculiar characteristic and, as such, become an essential element of the claims of identity groups[44]. This would also lead to the juridical recognition of oppression, as

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[41] Cfr. L. Ferrajoli, "*Principia Iuris*", vol. I, Laterza, 2007, 801.

[42] L. Gianformaggio, "Eguaglianza, donne e diritto", edited by A. Facchi, C. Faralli, T. Pitch, Il Mulino, 2005, 37-39, 92-93.

[43] H. T. Engelhardt, "The Foundations of Bioethics", Oxford University Press, 1996, 197.

[44] L. Gianformaggio, "Eguaglianza, donne e diritto", cit., 204.

recognising the value of differences does not imply a rejection of equality, but rather demands that it is taken seriously. In the name of the equality of fundamental rights, this process requires that the *oppression* of individuals and groups be fought; that oppression, as well as discrimination – or rather, oppression *instead of* discrimination – be considered as a violation of the juridical principle of equality[45].

IV. IMAGINATION AND POWER:
CHALLENGES FOR THE NEXT MILLENNIUM

The above considerations are at the heart of the most crucial challenges for the law of the third-millennium, which has to deal with this kind of oppression. Oppression should be conceptualised in juridical terms, and should also be eradicated through the law. Law, therefore, should undergo a radical transformation, in order to rid itself of the assimilationist legacy of liberal thought.

It is important to note that oppression is no longer about the unified and unifying self Calvino referred to, and which he thought to be almost impossible to overcome. Instead, it refers to a multiplicity of "not-yet-fully-subjects" who, through *their own* voice, claim for themselves the right to be present, and with it, the enjoyment of the fundamental rights.

This is the meaning behind the claims that persons with disabilities have been making for a few decades now. These individuals want to be able to actively *rewrite* part of the principles and rules of society itself, in order to achieve full social participation on the basis of equality with those who are already included.

What is at stake, here, is the very meaning of inclusion or, in other words, the process whereby those who are currently excluded may recover their dignity. This can only happen if new needs emerging on a social level are taken into consideration, by establishing a «new balance of power»[46] that goes beyond formal equality. This means

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[45] *Ibidem*, 90 (our translation).

[46] G. Griffo, "Persone con disabilità e diritti umani", in Th. Casadei (eds.), "Diritti umani e soggetti vulnerabili", Giappichelli, 2012, 143-163, 150. If positions are to be "rebalanced", this means that there is an asymmetry of power. The relations between people with disabilities and those without disabilities, then, are perceived in terms of subordination and domination.

that third-millennium societies have to deal with, and assign value to, pluralism. Maybe, after the advent of postmodernism, not all the people agree with the idea that pluralism concerns the existence of multiple identities. However, it is now widely acknowledged the existence of a pluralism of "other" subjectivities. This awareness has thus determined the decline of the traditional subject (the solipsistic ego of liberalism) and stressed the inability of «coherent liberalism»[47] to acknowledge the claims of excluded groups.

In this process, law plays (and will presumably increasingly play) a key role in guiding the transition to an equal (juridical) value of differences. And this challenge will only be met once, in the field of law as well as the in societal realm, the importance of the power of imagination – or better, the «imagination in power»[48] – will be recognised and implemented.

See also Ruth Colker, who applies MacKinnon's anti-subordination perspective to disability: R. Colker, "When is Separate Unequal? A Disability Perspective", Cambridge University Press, 2009.

[47] On the «coherent liberalism», and on the analytic inconsistency of the evaluative notions of equality and difference, see P. Comanducci, "Le ragioni dell'egualitarismo", *Ragion Pratica*, 2006, 27, 387-398.

[48] A. Jaggar, "L'*Imagination au Pouvoir*: Comparing John Rawls's Method of Ideal Theory with Iris Marion Young's Method of Critical Theory", in L. Tessman (ed.), "Feminist Ethics and Social and Political Philosophy: Theorizing the Non-Ideal", Springer, 2009, 59-66.