RELATIONAL EQUALITY BEFORE POWER(S).
TOWARDS THE *SHIFTING PARAMETER*

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Equality is one of the most controversial concepts in the contemporary philosophical and legal debates. Alongside problems concerning its content, the critical theory scholars debate the neutrality associated to its abstract formulation. Indeed, traditional conceptions of equality do not make clear the asymmetrical positions of the individuals involved in the relation of equality, masking their content of domination and oppression and giving priority to those who have a position of power in the society. Conversely, critical theories focus on the weak part of the relation. Adopting the latter perspective, the Authors argue that, if we aim to obtain a conception of equality that is really sensitive to differences, we should turn those who hold the discredited, oppressed and discriminated positions into the parameter of equality.

I. INTRODUCTION

'Equality' is a contested concept that has been dominating legal and philosophical debates for centuries. The long-standing diatribe between those who claim equality and those who aim to endorse difference is inserted in this context: over time, various critical theories have unveiled the false neutrality entailed in the abstract and formal notion of equality that is expression of a 'coherent liberalism'[1] (Comanducci 2006, 397), and have called for the recognition of various kinds of difference.

Following the theoretical perspective underpinning the so-called *postmodern jurisprudence*[2], we argue that no Rawlsian *veil of ignorance* can and should come into play, when determining the legal treatment of the various social actors because, far from being

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1 Comanducci, Paolo. Le ragioni dell'egualitarismo. Discutendo con Letizia Gianformaggio. *Ragion Pratica*, 2006. 27: 387-398.

2 Various perspectives can be gathered under the 'umbrella term' called *postmodern jurisprudence*: e.g. *feminist*, *disability*, *queer*, *postcolonial*, *critical legal studies*, *multicultural theories* and the critique suggested by immigration law academics. On some of these perspectives see Minda, Gary. *Postmodern Legal Movements: Law and Jurisprudence at Century's End*, 1996, New York: New York University Press.

something abstract or metaphysical, individual differences (which are unstable and never properly defined) are a tangible and determining element in social relationships[3].

Therefore, we argue that – within the various critical theories – it is possible to identify the traces of a path, that aims to commend individual peculiarities, recognizing equal dignity to every identity and removing inequalities[4]. In what follows, we try to reorganize the different traces of this path, in order to pinpoint some arguments that shall allow us to take equality 'seriously'.

To this end, we will briefly summarize the debate about the different conceptions of equality and on the value of individual differences (par. 2). Then, we will move on to illustrate the concept of equality that shall emerge from the pinpointed traces, and that is obtained by *shifting* what traditionally works as parameter of equality. This is not an entirely new perspective then, nor is it untranslatable on a legal level: in the Italian system, for instance, what we define as a *shifting parameter* is – even though only in part – already a reality (par. 3.1 et seq.).

What we want to highlight is that, in our opinion, the concept of equality can be taken seriously only by adopting this *shifting parameter*, because it upholds the need of those individuals who are experiencing imposed vulnerability, subjugation, domination, discrimination, exploitation or slavery, better than the 'traditional' parameter does (par. 4).

II. WHICH KIND OF EQUALITY?

Considering its close link to justice, the notion of equality has a key role in the legal, as well as in the political and philosophical lexicon. However, even though this concept is of extreme importance – or perhaps because of that – it seems difficult to precisely

[3] It is widely known that, in the 'original position', future citizens do not yet know what part they will play in society: they have to design the principles which will govern their future society behind a veil of ignorance, which covers everyone's place in society, their class position, social status, natural assets, intelligence and strength. Relying on a fictional reasoning process, Rawls' theory can be methodologically considered ideal; on the contrary, critical theories adopt a 'bottom up' perspective, which evaluates concrete individuals and real experiences. In what follows, we also take concrete individuals as point of departure for the debate concerning justice and rights. For a comparison between the Rawlsian and the critical methodologies of inquiry, see Jaggar, Alison M. L'*Imagination au Pouvoir*: Comparing John Rawls's Method of Ideal Theory with Iris Marion Young's Method of Critical Theory. In *Feminist Ethics and Social and Political Philosophy: Theorizing the Non-Ideal*, Linda Tessman (ed.), 2009. Dordrecht: Springer, 59-66..

[4] This link was already underlined by Aristotle and picked up, among others, by Finnis, Perelman, Ross, Kelsen, Hart, Rawls, Dworkin, Sen.

define 'what' it is, since the word 'equality' is ambiguous and unclear: it is an 'essentially contested concept'[5].

Furthermore, if we are to refer to 'legal equality', we are bound to run into additional uncertainties, leading to some doctrinal clashes. First, there is uncertainty about what its 'nature' should be: it has been described as a 'value', a 'regulatory principle', 'subjective law', 'public aim', 'justice parameter' and 'moral aspiration'.

Second, some believe it to be an empty notion[6], while others see it as a controversial concept lacking a unique and autonomous meaning, but instead relying on underlying notions of political, economical and social equality.[7]

Moreover, from an analytic point of view, it has been described as having a 'descriptive' value, by which it is possible to identify a class of equal subjects, and a 'prescriptive' one, which establishes how to treat those individuals pertaining to a specific group. The latter generally determines how legal equality is interpreted, also emphasizing its unbreakable link to justice[8]. This taxonomy, however, leads to new problems, such as the need to define the basic criteria underlying relations of equality or difference, in order to turn this abstract notion into a more concrete object.

In fact, even if different philosophical doctrines (such as egalitarianism, utilitarianism and even libertarianism) seem to recognize the central role of equality, there is disagreement on how to answer the question 'Equality of What?'[9]. Indeed, different schools of thought have answered in a number of ways to this question, adopting different parameters to link subjects and situations that, from an empirical point of view, will never be the same.

Furthermore, a political and juridical question that is far from obtaining a definite solution is the one about the compatibility (both from a theoretical and a practical point

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5 Gallie, Walter Bryce. Essentially Contested Concepts. *Proceedings of the Aristotelian Society*, 1956, 56: 167-198. Gianformaggio, Letizia. L'identità, l'eguaglianza, la somiglianza e il diritto. In *Eguaglianza, donne e diritto.* Letizia Gianformaggio (a cura di), 2005, 83-105. Bologna: Il Mulino.

6 Westen, Peter.. *Speaking of Equality. An Analysis of the Rhetorical Force of «Equality» in Moral and Legal Discourse*. 1990, Princeton: Princeton University Press.

7 Garzón Valdés, Ernesto. Some Reflections on the Concept of Equality, in A.I.C., *Principio di eguaglianza e principio di legalità nella pluralità degli ordinamenti giuridici*, 1999. Padova, 3-20.: Cedam. Mazzarese, Tecla. Eguaglianza, differenze e tutela dei diritti fondamentali. *Ragion Pratica*, 2006, 27: 410.

8 This link was already underlined by Aristotle and picked up, among others, by Finnis, Perelman, Ross, Kelsen, Hart, Rawls, Dworkin, Sen.

9 Sen, Amartya. Equality of What?. In *Tanner Lecture on Human Values*. Cambridge, 1980. Cambridge University Press, 197-220..

of view) between equality and freedom and, as a consequence, the need to choose between policies aiming to protect individual freedom first, and those that restrict it by introducing measures that can remove inequality. In this respect, the distinction between formal and substantial equality plays a key role. Today, substantial equality is seen, on one hand, as no longer inalienable (due to the economic crisis and the demise of the Welfare State) while, on the other hand, it is still considered as an attainable objective for public policies, as well as the ideal point of view from which to identify and adopt regulations that can erase all forms of discrimination.

Whichever the philosophical or political option selected, on a theoretical level there seems to be only one incontrovertible fact: the notion of equality assumes the existence of a dichotomous relationship (between two subjects, two groups of people, or an individual and a group of people). Equality, thus, implies the use of a parameter of comparison, which is identified in one of the two entities in the relationship. This parameter makes it possible to determine whether there is an equal condition or treatment or a discrimination.

How this parameter should be thought of and identified is the focus of fierce theoretical debate: the critical theories mentioned above have already extensively discussed and disclosed the faults of liberal equality, which have often led to assimilationist outcomes.

Indeed, *postmodern jurisprudence* interprets law and rights as means to affirm a model of human being that presents itself as neutral only in theory: the principle of equality has been interpreted as a useful tool that – concealing the power relationships existing between subjects who occupy socially asymmetric positions – allows some (always the same) to maintain social power. In this way, equality is obtained through homologation and removal of difference.

In other words, for their critics, traditional conceptions of equality are referred to as a parameter that is neutral only in theory (while, in reality, it is male, white, middle-class, heterosexual, able-bodied, Christian): what we will from now on call the 'dominant subject'.

Indeed, traditionally, the principle of equality is to enable those in a position of disadvantage to *overcome* such disadvantage: equality is achieved in removing an *initial* discriminatory relationship to create a *new* one, where the position of the involved

subjects is symmetric[10]. What the mainstream narrative does not highlight enough, however, is the fact that subjects (or classes) in an asymmetric position *necessarily* find themselves in a *structural hierarchy of power*, in a domineering relationship created between the dominant (the parameter, the model) and the dominated subject (the one having to conform to the parameter)[11].

It is important to observe that these two subjects are not in a discriminatory relationship *by chance*, or *neutrally*: the asymmetry is present because, at a societal level, there is an asymmetric distribution of power, used by the *dominant subject* (individual or group) to keep an advantage and ensure the power that – *de facto* or *de jure* – she detains.[12]

Anyway, by ignoring the enslaving/oppressing dynamics, hiding the dominant subject's characteristics, not revealing those of the dominated subject and covering the role of power in maintaining the discriminatory relationship, traditional notions of equality fail to engage with the fact that the violation of the (legal) principle of equality is not only discriminating, but also downright *oppressing*.

Furthermore, as mentioned, a set of problems concerning the risks of homologation is strictly connected to the issue of the asymmetric distribution of power. The model that those aspiring to be included in the enjoyment of rights and the public space must conform to is far from neutral:

> Liberal equity requires, then, an equality, differences notwithstanding [...] but it contradicts its own neutral 'equality' premises, since individuals-members of group(s) or communities identified as 'canonical', as in dominants, do not need to sacrifice the specificity of their differences: their defining identity fits entirely, without any residual diversity, inside the public scene and setting[13].

10 Considering women's political-legal conquest, MacKinnon observes: «Equality, in this approach, merely had to be applied to women to be attained. […]The content of the concept of equality itself was never questioned. As if there could be no other way of thinking about it, the courts adopted that content from Aristotle's axiom that equality meant treating likes alike and unlikes unalike […]. Unquestioned is how difference is socially created or defined, who sets the point of reference for sameness, or the comparative empirical approach itself». (MacKinnon, Catharine. Reflections on Sex Equality under the Law, in 100 *The Yale Law Journal*, 1991, 1286-1287).

11 About the notion of 'dominion', cfr. Young, Iris Marion. Justice and the politics of difference. Princeton: Princeton University Press 1990. ; Young, Iris Marion.. Asymmetrical Reciprocity: on Moral Respect, Wonder, and Enlarged Thought. *Constellations*, 1997, 3: 340-363.

12 Young, Iris Marion. 1997. Asymmetrical Reciprocity: on Moral Respect, Wonder, and Enlarged Thought, s*upra*, note 11.

13 Zanetti, Gianfrancesco. *Amicizia, felicità diritto*. 1998, Roma: Carocci, 130 (our translation).

Essentially, the liberal notion of equality demands some sort of adjustment from the subject initially excluded from the enjoyment of certain rights, to a model represented by the subject who is dominant from a cultural, sexual, etc. point of view. Accordingly, this means that, *even in the relationship formed after the intervention of the principle of equality*, there still remains some sort of 'asymmetry', a 'residue' in the distribution of power. Indeed, the excluded struggle to obtain a full inclusion in the enjoyment of rights and in the public sphere, as they remain partially excluded, or included *by approximation*. It is not by chance, then, that Catherine MacKinnon asks, provocatively: «Why should anyone have to be like white men to get what they have, given that white men do not have to be like anyone except each other to have it?»[14].

As it should be clear, the question 'equal to whom?' sums up the perplexities that are still tied to this anachronistic representation of the concept of equality, which identifies in the dominant subject the parameter to match[15].

2.1. The *shifting parameter*

This question is linked to some criticisms that are present in three other famous questions, posed by Norberto Bobbio in writing about equality: the 'who', 'what' and 'how' of equality. Starting from normative data, these three questions should allow to determine: who has been historically entitled to the access to the public sphere 'as equal', which kind of rights they have been entitled to, and the related guarantees.[16] Nevertheless, these questions do not seem to tell anything about the «implicit political anthropology»[17] that still rules the normative identification of those people who have the full entitlement to the various rights and, therefore, a dominant position in the societal arrangement.

Indeed, even though at the international as well as at the national level various legal frameworks are gradually defining the 'who', 'what' and 'how' of equality in broader terms, the inclusion of *all* humans in the 'who' and the progressive determination of the content of 'what' and 'how' have not allowed a full equality yet. As many – for example,

14 MacKinnon, Catharine. 1991. Reflections on Sex Equality under the Law, *supra*, note 10.
15 This is the reason why the various critiques to equality enhance the peculiarities (or differences) of excluded groups. We should not forget, however, that this enhancement of differences is, in turn, based on an egalitarian ideal to reach equality *in* and *of* differences.
16 Mazzarese, Tecla. Diritti fondamentali. In *Atlante di filosofia del diritto*, vol. I, ed, Ulderico Pomarici (a cura di), 2012, Torino: Giappichelli, 178-217.
17 Mezzadra, Sandro, ed. *Cittadinanza. Soggetti, ordine, diritto*, 2004, Bologna: Clueb, 23.

postmodern jurisprudence or philosophers of law like Letizia Gianformaggio[18] – highlight, if all persons are equal, why is there still (legal) data implying that *some* are *more equal* than others? Why do those labeled as 'different' still struggle to have their equality and their rights recognized, not only at a social level, but from a legal point of view as well?

We start from these questions to suggest that the dilemma of the choice between equality and difference could be overcome by enhancing equality's relational dimension, which is still underestimated, in order to uncover the asymmetry of power hidden in discriminatory relationships.[19] Indeed, by rephrasing equality relationally, the weak subject of the relationship (the dominated one) shouldn't necessarily be questioning the dominating one ('in what should I be like you, to enjoy your rights?') in order to claim total inclusion. Instead, she would find in herself the parameter of evaluation, and her needs would be contemplated *ab origine* from her point of view. Therefore, the parameter of equality would become plural and shifting, because it would be located in the subject who, from time to time, would occupy the disadvantaged position.

This proposal could have relevant consequences not merely in the theoretical field, but also in the legal sphere, because it unavoidably calls in question those national and international legal documents that aim to identify differences and inequalities (historically considered by law as reasons for legal and political exclusion) to qualify them as insufficient reasons for a different, and detrimental, treatment of certain subjects. Indeed, beyond the strong normative nature of the (national and international) regulation postulate, linger, as a given, persistent discriminations based on differences and inequalities. Different treatments not only are reiterated in procedures, but often survive in law- and policy-making as well: think, for example, of anti-discrimination law. Every time a case of discrimination arises, the principle of equality intervenes in the relationship in which the discriminatory act was perpetrated, evaluating the condition of the discriminated subject (dominated) based on the condition portraying the *status* of the discriminating subject (dominant). Therefore, we can recognize a series of relationships

[18] Gianformaggio, Letizia. Eguaglianza e differenza sono veramente incompatibili?. In *Il dilemma della cittadinanza. Diritti e doveri delle donne*. 1993.

[19] Scott, Joan. Deconstructing Equality-versus-Difference: Or, the Uses of Post-structuralist Theory for Feminism. *Feminist Studies*, 1988, 14: 33-50. Minow, Martha. *Making All the Difference. Inclusion, Exclusion and American Law*, 1990, Ithaca: Cornell University Press. Koppel, Christine. *Perspectives on Equality: Constructing a Relational Theory*. 1998, Oxford: Rowman & Littlefield.

in which the 'dominated subject' (DS), victim of a factual or even normative discrimination, is compared to the one taken as a 'reference parameter' (RP), following the dichotomous hierarchy logic below:

1. Genre: male (RP) - female (DS)
2. Sexual orientation: heterosexual (RP) - homosexual (DS)
3. Nationality: citizen (RP) - migrant (DS)
4. Abilities: able-bodied (RP) - disabled (DS)
5. Social class: rich (RP) - poor (DS)
6. Somatic traits: white (RP) - rest of the world (DS)
7. Language: linguistic majorities (RP) - linguistic minorities (DS)
8. Religion: religious majorities (RP) - religious minorities (DS)

For some of the above-mentioned fields, shifting the parameter of equality would mean operating a great change in the conception (and perception) of those individuals belonging to oppressed groups. In some cases, it would probably imply the need for radical intervention on the normative documents used until now to remove discrimination. In others, this eventuality would not involve any change, since the legislator has already written the rules by taking in consideration the point of view (and needs) of the dominated subject or group.

If the parameters were to be shifted, there would not be a single subject or model to conform to in order to be included in the enjoyment of rights (and therefore of equality). On the contrary, the dominated subject would be, case by case, the parameter, so that her needs may be taken seriously. In this perspective, the subjects who are taken as a point of reference do not become new RPs (therefore, they do not acquire a dominant position and the related privileges), do not put those who previously were an RP in the DS position, but simply become visible on the legal sphere, starting from their specificities. And legal visibility as subjects is the necessary premise for the legal acknowledgement of each subject's needs.

In this way, the 'implicit political anthropology' mentioned above would disappear, replaced by an inclusive, pluralistic and non-hierarchical conception of human existence.

However, our proposal may be still subjected to criticism from those who share the most widespread cultural viewpoint. According to it, the achievement of equality implicitly

involves the adjustment to a model which usually coincides with the dominant subject. Indeed, following this perspective, someone could argue that, if we shift the parameter, we are compelled to assume the features of those subjects who, from time to time, are the dominant ones (for instance, by changing sexual orientation, asking for a residence permit, etc.).

This would be a misunderstanding of the proposal we are outlining. Redefining the parameter of equality taking as reference point the traditionally dominated subject, in fact, means to implement the principle of the «equal valorization of difference»[20]. It does not involve reversing the direction of the adjustment to any given model, even to subjects that, nowadays, are excluded from the full and effective ownership of rights. In fact, the idea of a relational notion of equality where the parameter is shifting does not suggest to replace a model with another, but brings to the dissolution of the assimilationist trend, since it involves the explosion of the single parameter: the plurality of models will permanently replace the single (and dominant) one. In the end, the question 'equal to whom?' would fall once and for all, replaced by 'equal why?', and the answer would be that we are to be treated as equals because we are all entitled to the same fundamental rights.[21]

III. THE *SHIFTING* PARAMETER IN ACTION: A 'LEGAL TEST'

As mentioned above, reinterpreting the principle of equality by adopting the *shifting parameter* is not an absolute first: many legal systems – included the Italian one – are sensitive to this point.

Nonetheless, on a theoretical level, its existence has not been made clear yet, at least in Italy. Therefore, there are no examples of the ways the parameter can be *systematically* translated on a regulatory level: it is still an exception, since the rule is to identify the parameter with the already included subjects. Nevertheless, the Italian legal system offers a number of interesting examples, which can be used to examine the practicality of the *shifting parameter* and, consequently, its legal applicability. While we

[20] Ferrajoli, Luigi. *Principia Iuris. Teoria del diritto e della democrazia. 1. Teoria del diritto*, 2007, Roma-Bari: Laterza. 795-797.
[21] Ferrajoli, Luigi.. *Diritti fondamentali. Un dibattito teorico*, Vitale, Ermanno (Ed.) 2001, Roma-Bari: Laterza. 7.

believe that – even if hidden – it is working in some branches of the legal system, in what follows, we try to give an account of its presence.

3.1. Disability and 'Universal Design'

Like in the wider global context, also in Italy a relatively recent cultural and legal path has led to the reinterpretation of the concept 'disability', whereby the disabled subject is generally no longer seen as merely requiring assistance. This change was followed by the adoption of a legislation inspired by the logic of the *shifting parameter*, at least in the sphere of accessibility, as expression of a wider process of innovation that has also involved the sociological sphere, where – since the Sixties – the voices of people with disabilities have gradually been more powerful.

Indeed, thanks to the *disability rights movement* and *disability studies*, disability has progressively ceased to be considered merely as an illness to cure, a deviance to correct, or a personal tragedy[22]. Rather, in recent years the focus has shifted on asking whether the physical and cultural environments take into consideration the needs of disabled persons, or whether they have been conceived without thinking of them, but instead by forcing them to adjust to the dominant subject[23]. According to *disability studies*, this misrepresentation of disability and the related lack of attention to the various issues concerning disability are caused by the existence of a fixed parameter, represented by the able-bodied person, who embodies the norm and is the point of reference in the creation of physical and cultural spaces. By theorizing disability as a kind of social oppression imposed on disabled individuals by an ableist society, *disability studies* maintain that disabled people are forced to fit the paradigm to conform to the norm. Otherwise, they will be excluded. To oppose the *status quo*, they celebrate their difference, and advocate that the point of view of persons with disabilities should be taken into consideration at the time of determining policies and legal treatments[24].

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[22] Even if these depictions of persons with disabilities share a negative perception of disabilities, they do not coincide.

[23] For a more detailed analysis of the theses that characterize the 'social model' of disability, cfr. at least Oliver, Mike. *Politics of Disablement*. 1990, London: MacMillan; Hasler, Frances. Developments in the Disabled People's Movement. In *Disabling Barriers Enabling Environments*, John Swain et al. (Eds.), 1993, London: Sage, 278-283.

[24] Their thesis echoes the *Theory of dependence* of Eva Kittay, who encourages the establishment of universal policies based on the point of view of the dependent subject and, especially, on that of persons with disabilities. See Kittay, Eva Feder. *Love's Labor: Essays on Women, Equality and Dependency*. 1998, New York: Routledge; Nussbaum, Martha. *Frontiers of Justice: Disability,*

On a legal level, the shift of paradigm (that is, the acknowledgement that persons with disabilities are subjects of rights, instead of care-recipients) has gradually led to the adoption of various legal documents specifically addressed to them, topped with the approval of the *UN Convention on the rights of persons with disabilities* (UNCRPD). The UNCRPD reaffirms the human rights of disabled people and signals a further major step in their attempt to become full and equal citizens. Indeed, it breaks away from a 'medical model' of disability that identified persons with disabilities by their impairments, something that was dominant in the former *Declarations on the rights of the disabled* (1971 and 1975) and, in some sense, also in the Standard rules on the equalization of opportunities for persons with disabilities (1993).

One of the most innovative concepts adopted in the UNCRPD is the one called 'Universal Design', which basically coincides with the *shifting parameter*. It is based on the idea that, if any and each urban item, public service or building is designed bearing in mind the needs of those with disabilities, then it will surely be suitable for those not requiring special features[25]. However, every State which has subscribed the CRPD not only has the obligation to avoid discrimination of persons with disabilities by adopting corrective measures for the inequality conditions they start off from, but must also actively engage in creating a society where this kind of remedies will not be necessary.

3.2. Parental leave

For quite some time now, Nancy Fraser has been suggesting that it is not reasonable to adopt the typical male attitude (identified with the so called *universal breadwinner* model) as a universal lifestyle[26], since this does not contemplate in the least the aspect of *care*. In other words, as suggested by Gianformaggio, if women were to conform to this model

Nationality, Species Membership. 2006, Cambridge (MA): Harvard University Press. See also Tronto, Joan. *Moral Boundaries: A Political Argument for an Ethic of Care*. 1993, New York: Routledge; Tronto, Joan. *Caring Democracy: Markets, Equality, and Justice*. 2013, New York: New York University Press.

[25] In this regard, the Italian regulation has been in the forefront also from the point of view of *disability studies*: see Marra, Angelo. Barriere architettoniche. *Enciclopedia del diritto. Annali*. 2011, IV: 191-214. However, some criticisms are still present: see *Rapporto dell'Osservatorio Nazionale sulla condizione delle persone con disabilità*, 2013.

[26] Fraser, Nancy and Axel Honneth. *Redistribution Or Recognition? A Political-Philosophical Exchange*. 2003, New York: Verso.

they would be conquering their own freedom built on someone else's slavery[27], delegating (like men do) the care aspects to others.

For Fraser, it would be better to adopt women's lifestyle as reference parameter, because it better brings together the drive to personal realization and the care and responsibilities towards others.

The *Caregiver parity* model, elevating care-sharing to a political standard, would request the conformation of the dominant parameter (the male one) to the needs (and existential routines) of the traditionally dominated subject (women) and not the opposite, like it usually happens. Women should no longer have to conform to the male paradigm anymore, since this is nowadays forcing them to resort to so-called 'conciliation policies', clumsily aiming to solve the daily difficulties they must face. Indeed, women still feel compelled to manage the needs and duties of family life and work-related tasks at the same time (hence the need for more child care facilities, part-time jobs and so on), in a situation in which public and private schedules and spaces are not redesigned. Adopting the *shifting parameter* and placing women as the reference subject, we would overcome the current system, forcing a role reversal. The obligatory parental leave regulation is going towards this direction, allowing fathers to be absent from work for the period of time that is necessary to satisfy the needs of the family unit, whenever there are newborns. Thus, for the first delicate postnatal months, the family management would not be the exclusive responsibility of the woman, fathers would acknowledge what the birth of a child entails, and there would not be unfair competition conditions between men and women at work. The regulation on paternity leave then already follows the *shifting parameter* logic, by recognizing that the model around which rules are made is different from the one traditionally used as a reference.[28]

3.3. Public healthcare, education and housing

Social rights are the clearest example of how the *shifting parameter* is already part of the current system, and of the history of the gradual affirmation of fundamental rights.[29] The

[27] Gianformaggio, Letizia. L'identità, l'eguaglianza, la somiglianza e il diritto, *supra*, note 5.174.
[28] Calafà, Laura (Ed.), *Paternità e lavoro*, 2007, Il Mulino: Bologna
[29] Casadei, Thomas. *Diritti sociali. Un percorso filosofico-giuridico*. 2012, Firenze: Firenze University Press.

rights to education, health, work, housing, for example, are built upon the needs of the dominated subject, who is not able to satisfy these prime needs autonomously.

In such cases the institutions guarantee that everyone receives what would otherwise be an achievement of the dominant subjects only. On one hand, it could be enough to simply state explicitly that social rights operate on the basis of a *shifting parameter*, which in this case coincides with the most vulnerable classes. On the other hand, it is necessary to check whether any exclusion mechanisms based on the permanent parameter are surviving in this field too. The regulation limiting access to council housing based on residence and citizenship, for example, subordinates the right to a house to the possession of certain characteristics (nationality *in primis*, through the criterion of citizenship) which are traditionally linked to the dominant subject.

3.3.1. A paradigmatic case: the right to education

The way the right to education is safeguarded, in current regulations is a clear example of the persistence of the traditional parameter even in the field of social rights. Public education requires the adoption of suitable educational policies aimed at promoting literacy/educating/training the entire the population. If the right to education is considered as universal, this means that everyone is required (and needs to be enabled) to educate themselves. In fact, every State establishes a minimum number of years of compulsory school attendance.

On a legal and practical level, however, only some children actually enjoy their universal right to education: those children fit the single parameter that has been employed until now to define equality and inclusion policies.[30] Indeed, foreigner children or children with disabilities − classic examples of traditionally 'excluded' children − are generally considered 'problematic cases' by educational institutions not quite knowing how to deal with them. For instance, the Italian political institutions occasionally go as far as considering going back to differentiated classes, a method still in use in many European countries[31].

[30] Minow, Martha. *Making All the Difference. Inclusion, Exclusion and American Law*. 1990, Ithaca: Cornell University Press.

[31] The fact of providing a separate education leads people to live segregated lives, marginal if compared to those of the included. On one hand, are those native able-bodied children (and then adults); on the other, are migrants and children (and then adults) with disabilities. Italy is the only European Country where disabled children have the right to attend ordinary

The model child around which, even now, the education system (specifically the Italian one) creates its educational projects has the characteristics of the dominant subject as mentioned above. Most of the times, any children who not correspond to this *identikit* are included only if schoolmasters arrange specific school policies, aiming at ensuring the 'integration' of the excluded subjects. Such policies are usually aimed at helping these children blend, where possible, with the reference parameter. Ultimately, the goal is to have everyone study and learn like the already included 'average child' studies and learns.

However, the universal right to education would call for the adoption of other and more focused educational projects, in order to achieve inclusion, instead of integration. Starting from the needs of subjects − children in this case – who are being dominated/oppressed, we could develop inclusive approaches for everyone.

If education plans, school buildings, and educational activities were designed by bearing the vulnerable subject in mind, they would be more effective and probably lead us closer to achieving the aim of mass literacy. There would not be subjects to include through specific integration politics, since educational programs would be centered on the specific needs of those who generally excluded, and who would be then included from the start.

Some might object that planning an educational system based on vulnerable subjects could slow down the learning process of other children. This sort of remark reveals the cultural prejudice on which the current educational model – that aims to train students who correspond to the model-parameter at the expense of all others – is based.[32] A system created on the needs of everyone would probably be more flexible and suitable to the necessities and abilities of each individual, promoting everyone's development without causing damage to anyone[33].

IV. CONCLUSION: TAKING DIFFERENCE SERIOUSLY

A notion of relational equality where the parameter of comparison – depending on the configuration of the societal power-relationships – is 'shifting' seems to be the

classes: for some data, cfr. Griffo, Giampiero. Persone con disabilità e diritti umani. In *Diritti umani e soggetti vulnerabili*, ed. Thomas Casadei (Ed.) 2012. Torino: Giappichelli, 148.

[32] Gardou, Charles. *Diversità, vulnerabilità e handicap*. 2006 (or. ed. 2005), Trento: Erikson.

[33] This is the aim of two of the latest documents elaborated by the Italian Public Education Ministry, namely *Recommendations over preschool and first education curriculum*, Rome, September 2007 and *Person, technologies and competences. Polytechnic schools as innovation schools*, Rome, March 2008.

necessary point of arrival for the debate on equality and difference, which are still often presented as antagonistic concepts.

However, considering them as opponents does not seem to help overcome a long-standing deadlock: both sides produce great arguments, but there does not seem to be a chance of dialogue between them. Furthermore, this distinction perpetrates the traditional and hierarchical juxtaposition between included and excluded identities, between 'us' and 'them' (the 'Others'). However, as it has been claimed,

> It is easy to say that whoever is exactly like 'us' has the right to equality. It is more difficult to say that everyone who is in some way 'different' from us should have the same rights to equality we enjoy. Yet, as soon as we state that every listed group [...] or a similar group is less worthy of this protection, every minority and the society as a whole [...] are diminished. It truly is wrong and absolutely offensive to claim that all people with disabilities or belonging to a certain cultural group, or religion, or color, or sexual orientation are less worthy, yet if any of the mentioned groups or a similar one were denied equality [...] then the equality of any other minority group would be in danger. [...] It is the acknowledgment of equality that feeds the dignity of every individual[34]

The issue, then, is that of correctly understanding the meaning of equality and difference. Think about statements like 'M is different from F', 'F is different from M' and 'M and F are different': these expressions, which are not all the same, imply that 'being different' is an absolute property which contains in itself the parameter for reference. In fact, M is both the compared entity and the parameter of the comparison. The difference is absolute, and it is labeled with a connotation of value; consequently, diversity is perceived as a non-value.[35]

If we replace M and F with RP (reference parameter) and DS (dominated subject), it is clear how, until now, the subject in the dominant position has been the parameter and the reference-point of the relation. Taking difference seriously and contemplating it not as the exception, but as the necessary complement within a principle of equality – in which it is, essentially, the other side of the coin – compels us to give up the single permanent parameter, and to embrace a relational perspective. This is the only way to achieve an 'equal valorization of differences' in the fulfillment of rights.

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[34] Canada Supreme Court, (Cory J.), Vriend v. Alberta, in 'Dominion Law Reports', 156, 1998 (4th), 385, par. 417.
[35] Gianformaggio, Letizia. L'identità, l'eguaglianza, la somiglianza e il diritto, *supra*, note 5, 98.

Furthermore, the perspective of the *shifting parameter* allows to pinpoint each time a dominated subject without defining its identity or characteristics *a priori*. It means that the logic behind the *shifting parameter* would acknowledge by definition that today's disadvantaged subject could be, tomorrow, in a dominating and prominent position. When and if this happens, this subject would stop being referred to as the reference parameter, since the latter would be recognized in the dominated subject inside this new relationship[36].

Therefore it is Hobson's choice: taking (everyone's, since they are universal) fundamental rights seriously implies the adoption of the *shifting parameter* on a legal and practical level, while keeping the permanent one erases their universal value and reduces them to mere privileges of the *dominant subjects*.

[36] In our opinion, the systematization of the shifting parameter would allow to overcome the debate opposing the principle of equality to the one regulating freedom in fundamental rights matters. Only by adopting the shifting parameter all subjects would be free, becoming the parameter from time to time, and could then enjoy their rights, satisfy their needs and pursue their own life choices. On the contrary, with a permanent parameter, only certain subjects - the *dominating* ones - will continue to be *free and equal*, while all others – the *dominated* ones - will remain in their condition of exclusion and marginalization.