

DISABILITY AND HUMANS RIGHTS: A THEORETICAL ANALYSIS

PATRICIA CUENCA GÓMEZ¹

Abstract: Since Enlightenment, theories of justice and, in particular, theories of human rights have been based on principles which are excludable for people with disabilities. The exclusion has not been resolved by contemporary theories of justice. A profound review of some basic assumptions is required to get a full and sound theory of human rights including people with disabilities in equal terms. The inclusion of people with disabilities is an urgent theoretical challenge which must be face in order to perform a sound reform of rules in legal practice.

Keywords: Disability, Theory of Human Rights, Theory of Justice.

Summary: I. INTRODUCTION; II. DISABILITY APPROACH IN THE CONTEMPORARY THEORY OF HUMAN RIGHTS; II.1.The approach on disability in Rawls´s theory; II.2.The approach on disability in Nussbaum´s theory; III. REVIEWING THE HUMAN RIGHTS THEORY IN INCLUSIVE TERMS FOR PEOPLE WITH DISABILITIES; III.1.Reviewing the importance of disability; III.2.Reviewing the approach; III.3.The review conceived as a consistent extension and reformulation; III.4.Reviewing the notion of dignity; III.5.Reviewing the role and the notion of autonomy; IV. A FINAL THOUGHT: THE CONNECTION BETWEEN THE THEORY AND THE PRACTICE OF HUMAN RIGHTS.

I. INTRODUCTION

Disability is usually now understood to be a human rights issue. In the international landscape this consideration has been clearly reflected in the Convention on the Rights of Persons with Disabilities². This Convention is a challenge for the national legislation that has not yet incorporated or developed all the implications resulting from understanding disability from the human rights perspective³.

The reflection developed in the following pages is derived from the premise that the consideration of disability as a human rights issue not only calls for substantial modifications to the legislation but is also challenging and requires a thorough revision from the moral theory perspective. The theoretical discourse on human rights has been

¹ Department of Public International Law, Ecclesiastical Law and Philosophy of Law. Human Rights Institute “Bartolomé de las Casas”, Universidad Carlos III de Madrid (pcuenca@der-pu.uc3m.es).

² Adopted by the General Assembly of the United Nations on 13th December 2006 and entered into force on 3rd May 2008. See on this Treaty PALACIOS and BARIFFI, 2007.

³ An analysis of the overall impact of the Convention in the Spanish legislation may be found in CUENCA GÓMEZ, 2010.

built upon some references whose "standard" interpretation ultimately excludes - sometimes in a more direct manner and alluding to other approaches more subtly - people with disabilities, particularly (but not only) people with psychosocial and intellectual disabilities. In my view, the reformulation of this discourse in inclusive terms requires its adaptation to the situation of persons with disabilities and compels us to re-examine the interpretation of its basic assumptions.

II. DISABILITY APPROACH IN THE CONTEMPORARY THEORY OF HUMAN RIGHTS

The theories of justice, in general, and the theories of human rights, in particular, have not addressed disability sufficiently (DE ASÍS, 2007) and when they have tackled this issue it has been in an inappropriate manner. People with disabilities and particularly people with cognitive disabilities have been treated in the theory of human rights as exceptions, as marginal cases or as examples and even, at times, they have been used in the other subject matters –for example in the case of the rights of non-human animals (SINGER, 2010 and McMAHN, 2010)– regardless of the damage, which basically consists of lowering their moral status in relation to people with standard cognitive skills, which may result from this use (CARLSON 2010: 317-318).

In any case, the application of what is considered to be the standard theory of human rights to the field of disability results in highly problematic implications. The rights discourse and its central reference point, the concept of human dignity, have been based on a model of an individual that is characterised by his capabilities and the role he plays in society (DE ASÍS, 2007). Both assumptions, as previously stated, exclude people with disabilities, specifically but not exclusively, people with intellectual and psychosocial disabilities.

The first of these assumptions states that human dignity depends on the ability of individuals to establish and pursue their own plans and life projects. This idea may be better understood referring to what Peces-Barba called the “dynamism of freedom” that involves considering that human beings have freedom of choice, i.e., “the freedom to choose between different possibilities” and guide their existence towards the achievement of certain life plans, towards attaining their moral freedom, which is thus presented as “a goal, an objective, an ideal to be achieved, perhaps a *utopia* of the human condition” (PECES-BARBA MARTÍNEZ, 1989)⁴. The ability to follow this path, that is, the moral autonomy or moral agency is dependent upon, in turn, the possession of another set of capabilities such as the ability to feel, to communicate and particularly the ability to reason⁵. Furthermore, the exercise of capacities is usually related to the social role of the persons and valued according to its usefulness or contribution to the community, that is, it depends on the capacity to obtain certain social results of their actions (DE ASÍS ROIG, 2007 and QUINN, 2005). Within this approach

⁴ A historical analysis of the idea of dignity may be seen in PECES-BARBA MARTÍNEZ, 2004. On the idea of dignity See FERNÁNDEZ GARCÍA, 2001, PELE, 2010 and ANSUÁTEGUI ROIG, 2012.

⁵ As stated by CARLSON and KITTAY (2010): 1, philosophers understand the mark of humanity as the ability to reason, the reason is considered the foundation of human dignity” and therefore “the special moral status that we attach to humans”.

only dignified individuals are involved in moral discussion, i.e., persons who are able to reason, feel and communicate and guide such capabilities towards achieving a life plan and play a certain role in society (DE ASÍS ROIG, 2007: 33).

II.1. The approach on disability in Rawls's theory

This vision enshrined in the theory of justice and human rights since the age of Enlightenment⁶ is still present in contemporary theories. At this point, the theory of Rawls –rightly regarded as one of the most influential theories of justice in the Western tradition– is paradigmatic⁷.

According to Rawl's approach, those individuals –in their original situation and behind the veil of ignorance– who are involved in establishing the basic principles of justice are those people who possess what this author refers to as the two moral powers: the ability to establish a sense of justice and the capability to provide a concept of good (RAWLS, 1996: 49). Such powers require a sophisticated rationality and the adequate development thereof also demands its independent exercise. For Rawls the capacity for a sense of justice means reasonableness, an understanding conceived as the ability to relate to others equal citizens and be able to participate with others according to rules one would expect others to abide by. The capacity to have a conception of good implies that people are rational to determine their own goals, that is, their own life plans and projects and to take the appropriate steps to achieve them (RAWLS, 1996: 59 and ff.)

According to Rawls, these two capabilities allow us to conceive people as “free” and equally, the possession of such powers to the minimum extent required to be fully cooperating members of society makes people equal (RAWLS, 1996: 48). These moral powers are connected in the Rawlsian approach to the objective that is considered to be directed towards the equitable social cooperation, that is, the achievement of mutual benefit (RAWLS 1996: 49). Thus, “moral” people are, according to Rawls, the strategic negotiators “capable” of obtaining and generating mutual benefits⁸ in their association. Therefore, they are in a similar position (SILVERS and FRANCIS, 2005: 45 and ff. and BECKER, 2005: 16 y ff.).

Based on these premises, the individuals involved in the moral discussion are characterised by their “homogeneity” (SILVERS and FRANCIS, 2005: 45 and NUSSBAUM, 2007: 119). They are “rational adults”, independent and with similar needs and are capable of offering a “normal level” of productivity and social cooperation (NUSSBAUM, 2007: 120 and KITTAY, 1999: 88-99). The individuals who according to Rawls can be considered as moral subjects are found “within the limits of what is perceived as normal” so that whilst “they do not possess equal abilities... they do have, at least to a minimum degree, the moral and physical,

⁶ Kant's conception of moral autonomy and independence, which has a significant influence on the contemporary theory of human rights, gives a central role to rationality, See, For example, KANT (1989).

⁷ See a critical analysis of Rawls's theory focused on treatment of economic inequalities in RIBOTTA, 2011.

⁸ See on the idea of reciprocity, RAWLS, 1996: 46 ff.

intellectual capabilities that allow them to be fully cooperating members of society over a complete life cycle” (RAWLS, 1996: 216 and 217). Thus, people with disabilities – conceived as individuals who do not comply, or do not seem to comply with these traits in ways considered standard– lose their ability to participate as individuals of justice and “experience justice” as “dependent people” (SILVERS and FRANCIS 2010: 241).

Indeed, in accordance with Rawls's theory both people with physical disabilities and people with psychosocial and intellectual disabilities are expressly excluded from the initial discussion regarding the principles of justice⁹. The exclusion of the first group is justified because, although in this case the persons might be “fully cooperating” in the sense of being “productive to a normal standard” if certain adjustments and social conditions are introduced, the excessive cost that the adoption of these measures entails does not compensate as it is regarded as inefficient from an economic perspective¹⁰, leading to question the requirement of “reciprocity”¹¹. In regards to people with psychosocial and intellectual disabilities there are other more profound reasons apart from productivity and social cost. People with psychosocial and intellectual disabilities are directly disqualified as citizens because they do not conform to the ideal image of moral rationality¹² and to the ideal image of the independent agency that has been employed to define the citizen from the Kantian roots of the theory of human rights (NUSSBAUM, 2007: 145).

From these references, people with disabilities are not considered in the Rawlsian approach as primary individuals of justice. Persons in original position who undertake to reach an agreement on the basic political principles ignore what their gender, race, or social class will be but they know for certain that they will not be people with severe disabilities. For Rawls, the support to these people is an “urgent practical matter” that should be addressed at a later stage in the legislative field but it not a basic topic of justice that must be contemplated in the first instance¹³ (RAWLS

⁹ RAWLS, 1996: p. 50 excludes not only people with permanent disabilities and “severe mental disorders” but also neglects the consideration of temporary disabilities.

¹⁰ In the words of NUSSBAUM, (2007: 116 and 117) if cooperation agreement is “for mutual benefit” the participants should relate with those people whose cooperation is expected to be fruitful, not people with unusual and costly needs who cannot contribute much to the social product and therefore reduce the level of welfare of the whole society. It is an argument that has been used throughout history recursively to rationalise the social exclusion of people with disabilities, (STEIN, 2007: 103).

¹¹ GAUTHIER, 1986: 18 notes that it is only possible to talk “euphemistically” about building the capacities of the disabled live productive lives given that the services they require far exceed any possible product.

¹² RAWLS, 1996: 50 admits that his conception of justice is derived from an a concept of a person implicit in the public political culture, which is idealised and simplified in various ways.

¹³ To RAWLS, 1987: 546 that all citizens are fully cooperating members of society over a complete life means that “everyone has enough intellectual faculties to participate normally in society and that no one suffers atypical needs that are especially difficult to satisfy, as, for example, atypical and expensive medical needs. Obviously the assistance for people with these needs is an urgent practical issue. But at this early stage, the fundamental problem of social justice is between those who participate in full, actively and morally in society”. KITTAY in opposition to Rawls (1999: 77) argues that “any project that seeks to include everyone should consider from the outset the notion of dependence”. Also NUSSBAUM, 2007: 137 and 138.

1996: 50). People with disabilities are treated as “second-class citizens”, both in terms of their consent and in regards to their demands and interests (SILVERS and FRANCIS, 2005: 49 y 50). In conclusion, the Rawlsian theory cannot do justice to persons with disabilities¹⁴ and directly excludes them from the moral debate (SILVERS and FRANCIS 2005: 41). Rawls explicitly recognises that justice understood as fairness does not offer a reasonable response to the situation of persons with disabilities¹⁵, although this defect does not diminish, in his opinion, the overall value of his theory.

II.2. The approach on disability in Nussbaum’s theory

In her book *Frontiers of Justice* Nussbaum addresses disability¹⁶ from the capabilities approach as the most appropriate framework to include people with disabilities in the discourse on justice and rights. As is known, Nussbaum adopts the approach proposed by Sen within the field of development economics as a philosophical basis to construct a theory of the basic rights of human beings. According to this theory, which is substantive and not procedural as Rawl’s approach’, the capabilities are considered as political purposes which are the source of the basic principles of justice in a free society. So, capabilities are defined as opportunities to choose valuable functionings and lead a life or another, whilst the functionings are the person’s achievements, what he or she manages to do or become in life. In the words of Sen: “The functionings are... more directly related to living conditions... they are different aspects of the living conditions. Capabilities, in contrast, are notions of freedom in a positive sense: the existing real opportunities in relation to the life one can lead” (SEN, 1987: 36).

Based on Sen’s approach, Nussbaum introduces a list of ten basic capabilities that give form and content to the abstract idea of dignity and the idea of a threshold for each capacity below which it is considered that the citizen can not “function in a truly human way” (NUSSBAUM, 2007: 87). These capabilities are built upon an ethically evaluative consideration of human nature, of a conception of the species, selecting among the activities that define a “distinctively human being” some aspects that are considered to be so fundamental from a normative perspective that a life that lacks the possibility of exercising any of them is not a “truly human life”, a life aligned with human dignity (NUSSBAUM, 2007: 185 and 186).

According to this idea, a fair society is obliged to provide the necessary resources to enable people to develop their basic skills in the minimum required, allowing them to choose their own life plans. It is true that in some respects Nussbaum’s

¹⁴ This is because justice is regarded from the perspective of distributing the benefits from mutual cooperation between those who are able to contribute.

¹⁵ Indeed, RAWLS 1996: 50 and 51 notes that on this issue of justice as fairness may not have an answer either because it is not really a political justice problem or because although it is indeed a problem of political justice, justice as fairness fails in its treatment though it may work in other cases. See NUSSBAUM 2007: 42

¹⁶ See a comparative and critical analysis on the application of the theories of Rawls and Nussbaum to the field of disability in STARK 2010.

approach seems to be promising for people with disabilities. For example, her theory considers that people with disabilities are “fully” equal citizens and members of the human community (NUSSBAUM, 2007): 89), it rejects the idealisation of rationality¹⁷, it criticises the idea of mutual benefit as the basis for social cooperation and recognises the importance of support in relation to each of the capabilities of the list¹⁸ (NUSSBAUM, 2007: 167 and 168, 174-177). However, finally, Nussbaum’s approach is less inclusive than what was stated *a priori*, at least regarding some people with disabilities. Her theory fails to recognise the full dignity of persons with disabilities whose level of carrying performing basic capabilities is below the minimum universal threshold and excludes these individuals from full participation in society (STEIN, 2007: 101 and ff.)

The concept of basic skills as defining elements of a dignified human life may entail, in the end, less respect for the dignity of those individuals who do not possess them. As Silvers and Francis point out, to adopt an approach that establishes a “socially appropriate” minimum threshold for acquiring a list of basic skills cannot be positive nor even neutral for people who fail to achieve the level of “standard” performance established by the norms of the specie and opens the door to the danger of stigmatisation (SILVERS and FRANCIS 2005: 54). In this sense, Nussbaum goes on to state that those individuals who do not have a reasonable expectation of reaching a “normal” development of some of the capabilities on the list suffer “a terrible misfortune” and their life is “unfortunate”¹⁹ (NUSSBAUM, 2007: 196 and 197). According to the author, the capabilities of the list are good and humanly important and so when someone does not achieve them they find themselves “in a difficult situation.” (NUSSBAUM, 2007: 197). For Nussbaum this means that society has the obligation to promote the acquisition of capabilities not only allocating social resources but also “healing” and “improving” people²⁰ and helping individuals to develop such capabilities through guardianship²¹. In relation to this point, Nussbaum adopts an approach that is

¹⁷ In this sense NUSSBAUM, 2007: 166 and ff. states to have an Aristotelian rather than a Kantian notion of the idea of rationality that is not an idealised idea and is not opposed to animal nature.

¹⁸ Nussbaum believes that her theory, unlike Rawls’, has approached the idea of assistance in an adequate manner within a conception of justice conceiving it as a primary need whose satisfaction to an appropriate level is one of the defining features of a fair society. For Nussbaum, assistance is not integrated in the list of capabilities as an extra capacity, but refers to the broad range of capabilities from the list, both for the person providing assistance and the person receiving assistance and must be appropriate and personalised.

¹⁹ As SILVERS and FRANCIS 2005 stated: 55, to be designated as someone who suffers a tragedy involves considering him a burden both for himself and for others. And this means greater vulnerability to social disapproval and damage. See on theory of personal “tragedy”, OLIVER, 1996: 31.

²⁰ NUSSBAUM, 2007: 197 in relation to Sesha, the daughter of the philosopher Eva Kittay, states that if we could cure her from her condition and make her reach the threshold of capacity, we would do so because “it is something good”, moreover, “it is important that a human being can operate in this ways, society would be obliged to pay for it... Additionally, if we could redesign the genetic aspects of their condition during pregnancy so that they would not be born with such serious deficiencies, that is also what a decent society should do... This line of reasoning does not propose to eliminate Down syndrome, Asperger syndrome, blindness or deafness through genetic engineering but is neither clearly opposed to these possibilities.” See the criticisms to this approach SILVERS and FRANCIS, 2005: 54 and ff.; STEIN, 2007: 104 ff. and BACH and KERZNER, 2010: 69.

²¹ NUSSBAUM, 2010 considers full protection as the only way to provide people with cognitive disabilities civil and political rights on the basis of their genuine equality. In her view, guardians should

typical of the medical model of treatment of disability that considers disability a mainly individual problem²². From this perspective, Nussbaum's approach favours "what is considered to be normal" and proposes a strategy of assimilation that may impose excessive burdens and be extremely harmful for those individuals who ultimately cannot or do not wish to be assimilated or whose assimilation is particularly difficult (SILVERS and FRANCIS, 2005: 155).

As noted in *Frontiers of justice*, within society "we complain and suffer" for those who cannot reach the necessary level of capabilities instead of accepting them as they are and helping them to participate in this way in the moral world (SILVERS and FRANCIS, 2005: 156). Furthermore –although Nussbaum is opposed to the Kantian idealisation of rationality– the list of capabilities includes an individual and sophisticated view of both the ability to practical reasoning –"to form a conception of good and be able to critically reflect on their own life plans"– and the abilities in relation to the "senses, imagination and thought" – to be able to use the imagination, thought and reasoning" and do so in "a truly human way," an informed and educated manner "through adequate education "including, but not limited to, literacy and basic mathematical and scientific education (NUSSBAUM, 2007: 88 and 89). Thus, the concept of dignity that the author intended to reject, are re-introduced "in her theory by the back door." (BACH and KERZNER, 2010: 70).

Furthermore, Nussbaum's approach does not fully respect the moral autonomy of persons with disabilities. The author states that, in general, for "normal" people the social goal is almost always to develop the capacity but not so much so the functioning. This clarification enables individuals to perform through the development of basic skills their different conceptions of good (NUSSBAUM, 2007: 91). In her opinion, forcing citizens to perform the functionings would be illiberal and dictatorial (NUSSBAUM, 2007: 177). Nevertheless, what was stated previously is allowed in the case of people with "mental deficiencies". Although also in this case Nussbaum considers that the norms should always allow people to be able to choose their adequate functioning she admits that "in many cases" and "many areas", given that people with severe mental disabilities cannot make decisions about their medical care nor provide their consent to sex or assess the risks of a particular job or profession, "the goal" will be the functioning rather than the capability (NUSSBAUM, 2007: 179, 202). The dangerous and risky shift from capabilities to functionings implies not taking into consideration the wishes and preferences of people with disabilities and prevents them from pursuing their own conceptions of good (SILVERS and FRANCIS, 2010: 244-247).

exercise rights for these people such as the right to vote or be part of a jury. BÉRUBÉ, 2010 also advocates for a robust concept of surrogacy, which involves considering the guardians as people with the right and responsibility to speak for others, as the safest way of recognising the dignity of people with severe intellectual disabilities.

²² A criticism to the medical model is put forward in OLIVER, 1996. The social model believes that disability originates predominantly from social causes, i.e. the design of society resulting from some references that do not take into account the situation of people with disabilities PALACIOS, 2008.

In Nussbaum's theory, people with disabilities should be brought to the threshold of capabilities dictated by the standard of the specie so, consequently, it does not allow people with disabilities to be able to express a conception of good; the goodness throughout life for people with intellectual disabilities is something "objective" and has been defined without taking them into consideration, i.e. to acquire a basic level in the performance of all fundamental capabilities (FRANCIS and SILVERS, 2007: 318 y 319). Despite these objections, as will be seen, some of Nussbaum's ideas may be re-adopted with the aim of reconstructing a human rights theory that includes people with disabilities.

It may can be argued from the previous reflections that the standard theory of human rights and Rawls' approximations, as a contemporary version of this theory and those of Nussbaum, which is in some ways aim to move away from it, in the end in one way or another establish a "line"²³ that classifies individuals into two groups: those who are "normal", that is, those that can be "fully cooperating" or may attain a minimum level of basic skills, and those who are outliers (SILVERS and FRANCIS, 2005: 40 and ff.), those who do not meet the required characteristics. This vision proposes a model of one size fits all and those who do not fit in, in this case people with disabilities, raises some obvious problems (SILVERS and FRANCIS 2010): 246. To conclude this section and to summarise the ideas above, we shall highlight three of these issues.

Firstly, in accordance with the guidelines of this approach it seems that the inclusion of people with disabilities in the rights discourse is not possible, or at most, it would be regarded as the object of the discussion but not as subject (DE ASÍS ROIG, 2007: 36). Certainly, people with disabilities are often treated in the theory of rights as moral objects, as passive recipients who deserve to receive attention, support and care, but not as active moral agents who deserve to be able to choose and develop their own life plans and projects. From this perspective, people with disabilities "can be attributed rights yet it is not justified based on the idea of human dignity, but as a result of the decision taken by individuals who are able to do so because they are considered worthy of this attribution" (DE ASÍS ROIG, 2007: 36).

Secondly, this approach presents us with the "uncomfortable situation" (CAMPOY CERVERA, 2007: 166) of having to argue that even defining human dignity in accordance with certain capabilities that allow standard levels of social contribution, it is also applicable to those who do not possess such capabilities or cannot develop them fully, or having to accept that somehow these people are not fully worthy, have their dignity diminished or impaired or have lost it.

²³ NUSSBAUM (2007): 123 criticises RAWLS (1996): 217 for establishing a clear distinction between changes in the capabilities that put people "above or below" a line that separates those who have "more" and those who have "less" minimum capabilities that are required to be a normal cooperating member of society. However, also within this line of thought to have or not, "realistic expectations" to reach the minimum threshold can establish an important line (between a life that is a tragedy and one that is not, among the deficiencies that are required to be cured and prevented and those not, between those for which the only solution is guardianship and those for whom this is not the case).

Finally, the traditional approach in regards to persons with disabilities in the rights theory justifies an excessive paternalism that generates overprotection and arbitrarily restricts their autonomy (CAMPOY CERVERA, 2007: 166). Thus, it is justified that people who meet in a satisfactory manner the characteristics that define human dignity design the moral horizon of the people who do not satisfy them based on their best interest and replacing them in the decision making about their plans and life projects.

III. REVIEWING THE HUMAN RIGHTS THEORY IN INCLUSIVE TERMS FOR PEOPLE WITH DISABILITIES

To propose a comprehensive and exhaustive theory of rights that would include on equal terms persons with disabilities exceeds the scope of this paper. My objective, less ambitious, involves making some observations that may contribute to the construction of this theory and which are reflected in some changes of perspective, nuances and new approaches²⁴ that entail a significant review of the assumptions on which the standard version is based.

III.1. Reviewing the importance of disability

The theory of rights has to mainly address and deal with the question of disability and not tackle it as a marginal issue or consider it as a problem that may be left unresolved. The difficulties that the rights theory encounters in its application to persons with disabilities cannot be understood as a minor deficit. On the contrary, the exclusion of people with disabilities is a “profound defect” that affects the overall validity of the theory (NUSSBAUM, 2007: 110). Disability becomes, in this sense, a testing ground for the theory of rights. A satisfactory theory of rights must recognise the equality of persons with disabilities but must also accept the existing “continuity” between normal lives, also characterised by numerous deficiencies, needs and dependencies and of those who suffer permanent disabilities (NUSSBAUM, 2007: 110 and 112). Therefore, the review of the theory of rights to enable the inclusion of people with disabilities is a task that potentially affects and benefits all citizens (QUINN, 2011 and WOLF, 2010: 147).

III.2. Reviewing the approach

Traditionally, disability has been considered in the discourse of rights as a property related to the personal traits that identify certain individuals. Such a perspective is connected with what has been referred to as the medical model of the disability approach, which as stated above, understands disability as a problem of the person derived from the individual limitations caused by a deficiency. Also, this approach is related to the common analysis of disability within the so-called process of

²⁴ These approaches are not entirely new but have been highlighted in the critical review of the standard theory of human rights in relation to the treatment of groups traditionally excluded from this debate.

specification of the rights²⁵. This process is characterised by the diversification of the ownership of rights and seeks to justify the attribution of rights alluding to the recognition of the particularity, i.e. the specification leads to the emergence of specific rights of certain individuals or groups that they would be entitled to because of the features that make them different or identify them.

In my view, the disability approach in the theoretical and legal discourse from the individual or group perspective, from the medical model and from the specification process contributes towards stigma and underestimation of people with disabilities, perpetuating their image as special and unusual (DE ASÍS ROIG, 2007: 34 and 35; BARRANCO AVILÉS, 2011: 22 and 23).

The rights theory must fundamentally address disability from the perspective of the situation, the social model and the generalisation process. The focus on the situation means understanding that disability is not so much a personal trait but rather a situation in which certain people find themselves (DE ASÍS ROIG, BARRANCO AVILÉS, CUENCA GÓMEZ and PALACIOS, 2010). Such situation, in line with the assumptions that define the social model must be understood as the result of a combination of social and individual factors. From this point of view, the generalisation process, characterised by expanding or extending universal rights rendering it less “abstract” in order to include more “real” persons (BARRANCO AVILÉS, 2011: 22) is presented as the most appropriate perspective from which to address the approach of the rights of persons with disabilities (DE ASÍS ROIG, 2007: 34 and 35).

When adopting this approach, it is accepted that the rights of persons with disabilities are the same as those of other citizens and argues the need to extend them fully to this group, which certainly requires the adaptation of the “common” rights that have been abstractly formulated to the specific life circumstances of people with disabilities (BARRANCO AVILÉS, 2011: 24). Thus, the process of generalisation is based on the need to overcome a situation of discrimination and is connected to the objective of universality of rights.

In any event, the adoption of this approach as the primary one does not mean that the theory of rights should not be open to other considerations. In this regard, two emerging models become increasingly important: the diversity model and the identity model.

The diversity model is presented as an evolution of the social model which also includes the exaltation of the value of diversity represented by disability that is considered as an enriching factor in society²⁶ (DE ASÍS ROIG, 2006:15-25). It is a

²⁵ This is one of the four processes of historical evolution of human rights; See on these processes PECES-BARBA MARTÍNEZ and others, 1995: 160-196. Regarding the specification process BOBBIO 1991: 109. On the treatment of disability within the specification process see PECES-BARBA MARTÍNEZ, 2007.

²⁶ This model advocates a terminological change that eradicates any negative connotation on disability proposing the use of the term people with functional diversity and highlights the idea of equal dignity in

reflection that must be taken into consideration by a rights theory that treats people with disabilities fairly.

As for the “identity model”, supported by the deaf community²⁷, is based on a cultural and particular argument. This model means that the “deaf community” is a group with common values and identity, built around the use of sign language, which must be respected, preserved and promoted. From this point of view, the model would rely on the particularity of the group and would adopt its own approach to justify the specification process, alluding to identity reasons, the existence of rights exclusive to the deaf community that would be conceived as a cultural and linguistic minority (LANE, 2005). In the field of disability, as in other areas, a good theory of rights must, in my opinion, combine the universal perspective as the main point of view with the particular and cultural vision.

III.3. The review conceived as a consistent extension and reformulation

A review of the theory of rights aimed at including people with disabilities requires a consistent application within the context of disability approach of the theory of the rights set forth in the first section. Disabled people - just as has been the case of other groups such as racial minorities or women - are excluded from the moral argument because it is believed that their “biological” differences imply less rational capacity and/or a smaller contribution to society. As is the case of the members of those previously mentioned groups, this statement is simply not true, at least in regard to some people with disabilities. In this sense, it is crucial to overcome the frequent and distorting confusion between functional and moral limitation (DE ASÍS ROIG and PALACIOS 2008: 51 and 52). As a result of the persistence of prejudice and stereotypes, people with functional limitations tend to be perceived as individuals limited in their moral capacity and social contribution when often they possess “standard” capabilities at a “normal” level –and particularly the rational capacity– required to be able to freely choose their own life plans and projects and can be “useful” for the community²⁸. (NUSSBAUM 2007: 117). Therefore, theories such as the one defended by Rawls, which excluded people with disabilities for these reasons, would simply be mistaken and if they correct these false premises nothing would prevent them from including people with disabilities²⁹ (NUSSBAUM, 2007: 117).

diversity, calling for a consistent application in all areas - and especially in the biomedical field – in the consideration that the life of all people, with or without functional diversity, has the same value and demanding respect for their autonomy PALACIOS and ROMANACH, 2006 and ROMANACH, 2009.

²⁷ See an analysis on this model DE ASÍS ROIG, 2012 a.

²⁸ In these cases the "outlier" problem is solved by assimilating these individuals to successful bargainers, proving that they possess the same abilities and their performance can generate social results and establishing measures to overcome the historical exclusion that they have suffered to guarantee, where appropriate, that the “bargaining” is conducted on a more equitable basis, SILVERS and FRANCIS, 2005: 42.

²⁹ Nussbaum believes that all contract theories possess a number of structural features that “prevent any defence in this sense”. SILVERS and FRANCIS do not share this opinion, 2005: 50 and ff.

However, this strategy of consistent extension is insufficient. Indeed, some people with disabilities show significant differences in their cognitive abilities and capabilities and cannot contribute to society in a way that could be considered “productive” in the usual sense³⁰. Therefore, it is not enough to *integrate* people with disabilities into the rights theory as it is conceived today, that is, for an abstract and ideal³¹ right holder – which is desirable for people without disabilities. It is necessary to *include* persons with disabilities on a rights discourse that is adapted to the needs of all, a task that entails the redesign of this discourse in relation to some important aspects³². The consistent extension of the assumptions that govern the human right discourse to people with disabilities and particularly the basic principle of the equal value associated to all human beings must, in consequence, be combined with the reconstruction of the references from which this idea is established and the reasons on which it is based. This requires, firstly, a reflection on the model of worthy human beings.

III.4. Reviewing the notion of dignity

Although the idea of dignity is presented as defining the “nature” or the “essence” of the human being, it is an articulated social construction based on features which have served to protect some individuals and, at the same time, have excluded others, for example people with disabilities (DE ASÍS ROIG, 2012 b). This circumstance is largely derived from the idea that the characteristics that define dignity are abstract and generic features that exclusively allude to the individual level without taking into consideration in its configuration the context in which these characteristics are developed, the social conditions and the collective dimensions projected on them, the existing inequalities between moral individuals and the real obstacles to achieving and exercising autonomy and independence (DE ASÍS ROIG, 2004: 68).

Certainly, the idea of dignity has been built on abstractions, idealisations and myths that do not correspond to the actual situation in which the individuals they refer to find themselves in.

III.4.1. Dignity and its relation with the capabilities

Among these myths, “rationality” –more or less idealised– is considered to be fundamental, the decisive criterion used to justify the attribution of special value and consideration to humans.

The standard rights theory overestimates the role of rationality in the decision-making process and the election of life plans. Studies in the field of cognitive psychology and neuroscience show that decision-making is a process in which various rational and irrational, natural or individual and social factors are mixed (DAMASIO,

³⁰ Their differences “seem to defy assimilation” so, therefore, become irreparable and “outliers” SILVERS and FRANCIS, 2005: 42 and 48 and ff.

³¹ See on this idea BARRANCO AVILÉS (2011).

³² See on the distinction between integration and inclusion, OLIVER, 1996: 92. This is a recurrent distinction in the immigration approach.

2010). Understanding and evaluating information, judgement and critical review of the options available and its implications are important aspects in this process, but so are the preferences, emotions, intuitions and experiences.

In connection with the above statement, it is also worth highlighting that the threshold of rationality or “mental” competence to consider a person capable of making their own decisions is a social construct designed to be useful to most ordinary citizens as it gives way to the optimal performance of socially practices considered to be relevant, albeit at the price of denying access to people with psychosocial and intellectual disabilities³³ (WINKLER, 2010: 195 and 196). The establishment of this threshold corresponds to an order of importance between the general welfare and the freedom of all citizens which is resolved in favour of the former (WINKLER, 2010: 196). The theory of rights should provide arguments to re-balance this situation allowing people with disabilities to make their own decisions and participate in relevant social practices and institutions without them losing their value or general utility.

Similarly, an inclusive theory of rights for people with disabilities must take into account the value of the capabilities, the respect for diversity and the origin of the limits of the capabilities. With regard to the first of these reflections, it is necessary to question the idea that is sometimes present in the standard theory of rights that a better ability to reason, feel and/or communicate translates into greater dignity and vice versa (DE ASÍS ROIG, 2007: 43 and 44). Regarding the second matter, it is important to insist that individuals can have different capabilities, some more developed than others, and may exercise them in different ways without being able to justify that certain capabilities are worth more than others, in a general context, or that there are correct and incorrect manners of developing them (DE ASÍS ROIG, 2007: 44). There is no single way of reasoning³⁴, feeling or communicating, but rather, there are various forms that deserve the same consideration and the same respect. Thirdly, the difference in the quality and performance of the capabilities and the barriers that some people with disabilities can encounter in their development of such skills do not always originate in their individual characteristics but in many cases they are caused, and almost always they are aggravated by the design of the social environment based on references that disregard the situation of these individuals. When they are taken into consideration, they are regarded as individuals who are not fully autonomous and are prevented from, or their access to certain goods and resources is hindered, whilst other people do not face such difficulties (DE ASÍS ROIG, 2004: 67).

In any case, the greatest challenge that the inclusion of disability poses to the theory of rights is to find a suitable alternative to the theoretical foundation for dignity based on the possession of certain abilities, especially the rational capacity.

³³ According to this author, it is necessary to change society so that "mental retardation" is not a handicap that could reduce the social and economic value of these relevant practices. The level of mental competence could also be raised, building a society "for the gifted".

³⁴ SILVERS and FRANCIS, 2010: 237 stated that people not only differ in their conceptions of good, but also in relation to the cognitive processes that lead them to construct these concepts, their implementation and maintenance.

One possibility would be to lower the rationality threshold required or redefine the threshold by appealing to a different rational capacity. As noted by Berúbé, this strategy is not entirely satisfactory since to establish a core capability and a threshold implies that someone will not be included or will be below the threshold³⁵, which again, will confer them less dignity.

Despite that this objection is true, in this line of argument the proposal of Bach and Kerzner is interesting. When formulating a minimum capacity threshold for decision-making and the allocation of human agency the authors allude to the ability to express will and/or intention and the autobiographical³⁶ capacity as broader, neutral, inclusive and respectful criteria in relation to the various ways in which people reason and communicate themselves (BACH and KERZNER, 2010: 58 and ff). These capabilities are also defined from a social, and not individual, point of view recognising their interdependence. In this sense, they represent the “my capacity to express my will and/or intentions, at least to others who know me well, and who can then ‘confer’ or ascribe agency to my actions in their descriptions of me to others” and “being able to tell ‘who’ I am, my life story of values, aims, needs and challenges, or having my community of knowing and valuing others do that for me, and using that narrative coherence of my life to help direct the decisions that give effect to my intentions.” (BACH and KERZNER, 2010: 65 ff). This proposal raises the problem of justifying the moral agency of subjects who cannot express their wishes/intentions or say who they are due to personal factors, either because of the severity of their functional diversity or social factors, i.e. the lack of meaningful personal relationships. Undoubtedly, these shall be regarded as extreme cases to the extent that many people with disabilities who do not meet the criteria of rationality itself do, however, comply with the requirements of the threshold established by Bach and Kerzner. Also, in many situations these cases will be reversible by building personal networks (BACH and KERZNER, 2010: 92 and QUINN, 2010). In regards to those people who still might not be included within these parameters, these authors seem to suggest the potential use of approximation to which I shall refer later.

Meanwhile, KITTAY (1999) alludes to capability to care as an alternative to substantiate the special moral status of human beings. Kittay’s approach, defined in opposition to liberalism, poses as a central focus of the political consideration that “we are all children of a mother” and are part of a network of dependency relationships. Whilst this proposal is extremely important especially to value the work of care and assistance, it seems to confer people with disabilities more of a passive role rather than an active one and thus fails to promote their moral agency (SILVERS and FRANCIS, 2005: 41 and NUSSBAUM, 2007: 219 ff.). In any case, to consider the caring capability as the fundamental criterion for assigning moral status also raises the question of what happens to those individuals who do not possess the emotional requirements and cognitive abilities –in any case, again, different and more flexible than those required by the criterion of rationality– that define them and therefore would fall below the

³⁵ Any performance criteria –independence, rationality, including the ability of mutual recognition, empathy– will exclude someone, BERÚBÉ, 2010: 100.

³⁶ See on the importance of this capability being specifically human, DAMASIO, 2010: 210 and ff.

“threshold of care” (JAWORSKA, 2010: 380 ff.). Once more, the solution would be to use the potential capacity of such people to “become caregivers” (JAWORSKA, 2010: 388).

The focus on the potential consequently delineates a way forward to build the notion of human dignity on the basis of inclusive criteria for people with disabilities.

In this line of thought, Wong defends the possibility to interpret Rawls's theory defining two moral powers discussed previously as “potential properties” (WONG, 2010:133). Rawls's position should then be interpreted to understand that “every citizen shall be considered as having the *potential* for the two moral powers, and as moral persons, regardless of whether they are people with cognitive disabilities.” (WONG, 2010: 129). From this perspective, the “enabling”³⁷ conditions that allow us to acquire, develop and exercise the two moral powers and, therefore, be able to participate fully in society should be considered as basic needs of citizens and its safeguard becomes a specific obligation of justice that society has with people with disabilities.

Nussbaum's theory seems, in fact, to adopt the potential approach. Thus, for example, the author establishes the obligation to respect the dignity of all persons with disabilities and their human potential, regardless of whether or it is a potential that is socially useful “in the narrower sense.” (NUSSBAUM, 2007: 140). Furthermore, the basis to claim rights does not consist in the actual possession of a rudimentary set of basic capabilities but in the capabilities that are characteristic of the human species (NUSSBAUM, 2007: 284). Thus, as already stated, society has a duty to secure the conditions for all people, including people with disabilities so that they can achieve a minimum level in their development. However, this obligation to bring all persons with disabilities to a universal threshold in the development of each and every one of the capabilities list does not take into consideration the importance of the previously mentioned diversity in capabilities, and therefore, the fact that for people with disabilities (as is the case for other individuals) certain capabilities may be more important than others (STEIN, 2007: 107 and ff.). Furthermore, as previously noted, according to Nussbaum the fact that an individual possesses, or not, reasonable expectations of reaching the capability threshold required establishes a significant dividing line.

In connection with the approach of Nussbaum, Silvers and Francis who point out that perhaps instead of working tirelessly to bring everyone to the minimum operating level established for citizens in a just society, ideally the solution would be to work tirelessly to position each person within a range of capacities that constitute their personal notion of the good (SILVERS and FRANCIS, 2010: 246). In any event, the vision of Nussbaum with some corrections and, especially the general approach of Sen,

³⁷ These conditions are linked to social factors such as membership in social groups, establishing personal relationships, education and training etc. and not to individual improvements, ISAKO WONG, 2010: 133.

may prove to be very useful in constructing a theory of rights that does not exclude people with disabilities³⁸.

De Asís (2007: 44) also refers to the “potentiality capabilities”. In his view, the moral individual is one who, somehow, “has the ability –real or potential, to a maximum degree or one way or another– to reason, feel and communicate and direct these capabilities to achieve a specific life plan”. The framework of the moral argument “is governed by the value placed on these capabilities and possibilities in the search for a life plan” (DE ASÍS ROIG, 2012 b). In a similar sense, Stein notes that the human rights model should not aim at establishing a standard level of basic skills or a cost estimate but should justify the obligation to provide resources to enable all people to develop their own potential and their individual talents regardless of whether this potential can be different and unequal and recognise their autonomy to manage their own moral development (STEIN, 2007: 106 ff).

As noted by Wong, this approach raises the difficulty of determining which human beings have the potential to develop moral agency. Indeed, it is difficult to ascertain which are the conditions each individual requires to develop their potential, what exactly is their concept of the potential and when this potential will be unlocked. However, in certain cases –once again these are considered extreme and marginal– there seems to be strong evidence suggesting that a person can never develop in any way their moral agency and, in addition, may have never developed it in the past. In connection with these situations it is necessary, first, to question whether this is evidence-based. Advances in research within the field of neuroscience and new technologies, particularly in the communications area, could eventually render possible, even in the most difficult cases, that people could somehow develop their moral capacity. Similarly, one might ask what would happen if society allocated all the necessary resources to fulfilling that possibility. In any event, to recognise these individuals as moral agents entails the risk of being over-inclusive in so far as it might imply extending the recognition of moral status to all living creatures (WONG, 2010: 139 and ff.) Nevertheless, undoubtedly it seems much worse the serious moral mistake of excluding from this status persons with disabilities. From this perspective, all human beings should be considered moral individuals without trying to determine exactly where they are positioned within the spectrum of cognitive functioning (WONG, 2010: 142).

The risk of over-inclusion may also be resolved by appealing to the argument of the potential of the species in an open and flexible manner (WONG, 2010:142 and 143). Humans, unlike other non-human beings - either because they are a mother’s son, either because they possess certain basic organisational structures, ultimately, due to their humanity - belong to a species that is able to direct their life towards the achievement of certain objectives and goals (more or less ambitious) through the exercise - conditioned and more or less dependant on the social context - of several, capabilities, abilities, and talents. Actually, the reformulation of the referent of dignity in inclusive terms for

³⁸ Regarding these points, there are some interesting ideas such as the understanding of human development, the conception of real freedom and the ability to acquire valuable performances, create and promote skills, the importance attached to social factors in achieving life plans etc.

people with disabilities is believed to take seriously the idea, so common in the theoretical and practical discourse of rights, of the equal inherent value of all human beings as an unquestionable statement. This implies an obligation to relate to all human beings as moral agents who should be involved in the moral debate and, therefore, aspire to develop their own life plans and life. Thus, interacting with people with disabilities in this way, whatever the type and seriousness of their functional diversity, means understanding that they deserve consideration and respect, that is, means recognising their dignity.

III.4.2. Dignity and its relation with social cooperation

As noted, the idea of dignity has been linked in the standard version of the theory of rights to the contribution of individuals to society and such contribution has been traditionally defined in terms of mutual benefit and social productivity. Nevertheless, individuals who according to the reflections in the previous section should be considered worthy subjects may not be “fully cooperating” citizens in accordance with this vision. In this sense, the theory of human rights –whether or not it is inspired on the social contract theory– must reconsider the question of the purpose of social cooperation. Mutual and social benefit do not necessarily need to be considered as the basis for social cooperation nor as the strongest ties that bind individuals in a community³⁹.

In this area, the relationship of mutual trust has been proposed as the best option to replace the idea of bargaining cooperation focused on mutual benefit (SILVERS and FRANCIS 2010: 42 ff.)⁴⁰. Trust is portrayed in many ways as “the paradigmatic human relationship” as a foundational human interaction that is essential for social cooperation and the development of a system of justice. In a trust culture, unlike what happens in a bargaining culture, people with disabilities can be equally important participants and beneficiaries in the search for justice (SILVERS and FRANCIS, 2005: 43 and 44). Indeed, unlike bargaining, trust does not require a sophisticated reasoning and is not based on the material contributions of others or on the direct reciprocity of benefits, so it does not claim the homogeneity and symmetry of the parties. And it is shown as an accessible relation to all people, so that those who cannot be regarded as rational and independent bargainers they can, however, participate in the processes of creation and strengthening of trust (SILVERS and FRANCIS, 2005: 68 and 73). The purpose of the trust offers a more complex picture of cooperation that does not generate material benefits between the parties directly, but it does offer an important social benefit: the interactions between the participants enriches the community and their contribution to social trust benefits them. According to Silvers and Francis, social dynamics based on

³⁹ NUSSBAUM, 2007: 167 states that society is united by a wide range of feelings and commitments and only some of those are connected to productivity. In her view, productivity is necessary, or even good, but it is not the main purpose of social life. See also NUSSBAUM, 2007: 140.

⁴⁰ In their view, the exclusion of people with disabilities in contract theories is due to the assumption of the image of the successful negotiator as a paradigm of recruitment. In their opinion, a theory of the social contract does not have to embrace this paradigm and they propose to conceive the social contract more like a project to create a culture and a climate of trust rather than as a negotiating session.

the idea of trusting and being trusted reinforces mutual respect, the obligation of the most “capable” of giving or to give over to the least “capable” and encourages indirect reciprocity based on expectation to be benefited “not by the actual recipients of one’s own good deeds but by stimulating an environment in which people are disposed to help each other” (SILVERS and FRANCIS, 2005: 70).

In my view, this reflection is linked to the importance of the value of solidarity within the discourse of rights that should be emphasised in the disability approach (CAMPOY CERVERA, 2005: 134 ff.) and replaces the image of society as a set of independent negotiators acting on their own interest to achieve mutual benefits by an image of a community of interdependent individuals who take into consideration the situation, interests and viewpoints of others and who trust, support and cooperate in the development of life plans and projects.

III.5. Reviewing the role and the notion of autonomy

The autonomy must play a central role in a theory of rights that wishes to be inclusive for persons with disabilities on an equal basis. This requires, as a first step, to reflect on the reasons offered to justify the different results in relation to the balance between the principle of autonomy and the principle of protection depending on whether the disability factor is taken into consideration.

For people without disabilities this balance is tilted almost always on the side of autonomy. The liberal principle requires that, when there is no harm to other people (MILL, 1997), neither the State nor individuals interfere in their free choice of life plans and projects, even when those choices are clearly irrational and are not based on their “best interest”. Some approaches argue that the paternalistic measures may be justified in certain circumstances where “normal” citizens may be considered “basic incompetent”⁴¹. In the most extreme situations, such paternalistic measures can even lead to the replacement of the person in the decision-making process. In any case, these situations are referred to as exceptional so that the justification of paternalistic measures needs to meet a set of criteria and is based on robust guarantees⁴².

However, in the case of people with disabilities the balance always results in the primacy of the principle of protection. People with certain disabilities (usually, though again not exclusively, people with psychosocial and intellectual disabilities) are treated as “natural” basic incompetents in relation to all their decisions and are generally replaced in regards to its adoption. Interference in the free election of life plans and projects of these people does not require the concurrence of elements nor the safeguards

⁴¹ See on paternalism RAMIRO AVILÉS, 2006. The metacriteria that would allow establish the basic incompetence of a person would be ignorance or the lack of information, compulsion and the absence of rationality, See GARZÓN VALDÉS, 1988: 165-167.

⁴² It is outlined, for example, that the paternalistic measures should aim to prevent serious and irreparable harm to the person, must be the least restrictive possible for their autonomy and aimed at protecting the formation-process of their will and must respect their conception of good. See the idea of hypothetical or future-oriented consent proposed by DWORKIN, 1990: 156 ff.

required in the case of “normal” people. In connection to this point, the theory of rights must re-balance the conflict between protection and autonomy considering the dignity of risk and the right of persons with disabilities to also make their own mistakes as part of human development (QUINN, 2010; BACH and KEZRNER, 2010: 11 ff., 86 and 88). Disabled people may also be “subject” of paternalistic measures but never on grounds of disability and thus, under the same conditions and with the same guarantees as other citizens.

Furthermore, the theory of rights must proceed to reformulate the understanding of autonomy in relation to its standard conception.

Firstly, the autonomy should not be regarded as a starting point but as a point of arrival (AÑÓN ROIG, 1994: 267). The lack or denial of autonomy has precisely been what has prevented persons with disabilities from the exercise and enjoyment of human rights. Thus, autonomy appears not so much as a *prius* or as a logical antecedent of rights but as a goal to be achieved (MEGRET, 2008: 510 ff.).

Secondly, once again, it is essential to extend to persons with disabilities the traditional view of autonomy, however, it is also necessary to complete and re-build this vision. In the treatment of the situation of people with disabilities but also in other instances, a complex and robust concept of autonomy composed of two types of content should be advocated for: a negative content requiring no intervention or invasion by the State or a third party in the field of the autonomous decision power of the person which corresponds to the classical view of autonomy; and a positive content, which welcomes the active intervention of the State and society in order to promote and encourage the autonomous decision power of the person (DE ASÍS ROIG and BARRANCO AVILÉS, 2011: 110 and 111).

The negative dimension of autonomy requires the respect for the free choice of life plans that may not be restricted by reason of disability. The elections of life of these people must always be respected in the same way as those of other citizens. The positive dimension of autonomy claims that, in those situations where the differences some individuals have in their abilities and talents can create difficulties in choosing life plans and projects, relevant instruments or measures must be implemented to eliminate or mitigate these obstacles (DE ASÍS ROIG, 2004: 67). Therefore, the aim is to promote and maximise autonomy rather than deny, obstruct or prevent it. Thus, the vision of people with disabilities as equally worthy requires not only that we eliminate the barriers that restrict their autonomous moral development but also that we enable, support and assist them to make their own decisions.

In connection with this assessment, it is worth highlighting the need to destroy the myth of the independent exercise of autonomy that again, has proven to be exclusive for people with disabilities who might heavily depend on others to express and

formulate their conceptions of good⁴³. To firmly argue that autonomy prohibits assistance and the interaction with others in the development and implementation of life plans and projects would deny moral agency to all individuals (SILVERS and FRANCIS 2010: 249). “Normal” people do not make their decisions in isolation and in an absolutely independent manner either. Their decisions are influenced by the social, economic, family etc. context and/or are advised or assisted by others. However, unlike what happens with people with disabilities, these “dependencies” do not entail the loss of their freedom to make their own decisions.

In regard to this point it is important to stress that autonomy is not solitary, it is interdependent or relational in practice. The concept of “relational autonomy”⁴⁴ – developed, for example in the field of philosophy of feminism– reveals that the decision making is not exclusively an “individual” process, furthermore, it also points out that the identity of the person is formed in the context of a complex network of relationships and is strongly influenced by social factors (SILVERS and FRANCIS, 2010: 249; BACH and KERZNER 2010: 39 ff.; QUINN 2011). Identity is not solely construed by the person, but also other people contribute to its formation (LINDEMANN, 2010). Again the studies in the field of neuroscience show that the mind is not an atomistic entity and its operation depends on both biological structures as well as social, cultural and interpersonal factors (DAMASIO, 2010 and QUINN, 2011).

In summary, with regard to the issue of dependency the difference between people with and without disabilities is only gradual, the situation of the former is only a more visible and extensive version of the commonplace⁴⁵ (BACH, M. and KERZNER 2010: 84). Disabled people, like non-disabled persons have their own concept of good, that must be respected, albeit in some cases, it has not been fully expressed or communicated by them.

Some people with disabilities may rely on others to exercise their autonomy in different manners and levels. They may need assistance in communicating their choices⁴⁶ and/or to formulate their own life plans⁴⁷ and even to rebuild their moral

⁴³ In the opinion of FRANCIS and SILVERS, 2007: 332 the assumption that adults have personalised conceptions of good that are not only theirs, but also independent of any other involves an idealisation that leads to consider that those people who need others to form or express their conception of good are deficient as moral agents and label their formulations of good as the product of dependency.

⁴⁴ See on this concept of relational autonomy MACKENZIE and STOLJAR, 2000.

⁴⁵ Indeed, “to some extent”, we all formulate our conceptions of good interactively. We talk to others... and trust their advice and incorporate social guidelines, work identities, religion, class, race, ethnicity, gender”. The difference between most people and the minority of those who are “dependent” is the extension of the dependency, not its existence FRANCIS y SILVERS, 2007: 331 and 332. Also QUINN, 2011.

⁴⁶ The concept of “semantic agency” proposed by JENNINGS, 2010: 176 ff. becomes important in relation to this point as a strategy to protect the integrity “in the labyrinth of dementia”. The semantics agency refers to the ability to communicate, to participate in meaningful relationships and understanding and evaluating this communication. Communication is not identified with the semiotic communication, as the person may have lost the ability to manipulate semiotic signs, but is extended to gestures, contact, facial expressions, posture, eye contact as a means of expression of the semantics agency. As BACH and KERZNER (2010): 60 ff. point out, the choices made by people with profound disabilities, although they

ideals⁴⁸. All these interdependencies (which should be governed by the respect for the identity of the person) may reveal the moral agency putting it into practice. The theory of human rights must recognise and value that dependency and provide parameters so that it is articulated in such a manner that it does not restrict autonomy but rather it strengthens and promote it.

The previous considerations may help to solve three major issues encountered by the rights theory when applied to persons with disabilities that were outlined at the end of the first paragraph of this study. Since these people with disabilities are seen as moral individuals and not objects who can be ignored in the ethical discussion and as fully worthy individuals who deserve to be able to decide autonomously - with the necessary support and assistance - about their fate and their life choices.

IV. A FINAL THOUGHT: THE CONNECTION BETWEEN THE THEORY AND THE PRACTICE OF HUMAN RIGHTS

The inclusion of people with disabilities in the discourse of rights is not just a theoretical question of crucial importance but it also possesses a relevant practical significance. The construction of a theory that is capable of affirming the equal rights of people with disabilities is essential to tackling, in a reasonable manner, the implementation of actions and reforms in the legal field and when interpreting correctly the regulations in this area (DE ASÍS ROIG, 2007: 19 and 20).

The review of the theory of rights that has been proposed in this paper is particularly important in the interpretation and implementation of the Convention on the Rights of Persons with Disabilities and, above all, in determining the meaning and scope of Article 12, which contains the main provisions of this International instrument in regards to legal capacity understood as an access to the legal discourse (DE ASÍS ROIG, 2012 b) and the exercise of all human rights (BARIFFI, 2009).

may seem meaningless to others, are significant for people who know them well and are the expression of their moral agency.

⁴⁷ SILVERS and FRANCIS, 2005: 247 ff. propose the "assisted thinking" as a prosthetic practice that differs in extent and implementation but not in nature of social interactions that allow "normal" people to formulate their own conceptions of good. Its role would be similar to that of the prosthesis used by people with physical disabilities: enable and extend the performance of the function of the individual, in this case, formulate and express their own conceptions of good. Assisted thought must be inspired by the respect for the person receiving assistance and their own ideas of what is considered to be right that should not be replaced by the caregiver or by society.

⁴⁸ JENNINGS 2010: 176 ff. proposes the concept of *memorial personhood*, which means to be a person in the imagination and memory of others and requires the exercise of remembering the life history of the individual to decide upon it. As noted above, also BACH y KERZNER 2010: 63 ff. advocate a narrative approach to human agency. In their view, what allows us to consider a person as a moral agent is the ability to answer the question "Who am I?" with a coherent narrative and a life story that provides meaning to the changes, losses and new directions. This question may not only be answered by the individual, but also by others who personally know the person. In their opinion, it is precisely this narrative coherence "of my own and only life" that make reasonable the decisions giving effect to my intentions and not the abstract standard of "reasonable person" or "best interests".

This approach reaffirms the perspective that persons with disabilities have legal personality, it acknowledges their legal capacity on an equal basis with others in all aspects of life, undertakes to ensure access to the support they may require in exercising such capacity and establishes a number of safeguards in relation to the provision of this support aimed primarily at ensuring that their will, preferences and rights are respected. Thus, Article 12 is a real revolution in comparison with the traditional treatment of legal capacity in domestic Law based on the institution of incapacitation and the substitution in decision-making (QUINN, 2011).

In my view, whilst the traditional treatment of legal capacity can be interpreted as a specific application in the field of law of the assumptions of the standard theory of human rights, the new approach advocated by the Convention seems to be inspired on the reflections proposed herein to undertake a review of this theory. It is essential to develop further and strengthen this theoretical framework for the success of the revolutionary change sought by Article 12 and that should regard people with disabilities as full and active individuals with rights who are capable of exercising themselves all the freedoms that they are entitled to.

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