

Developing Deaf Legal Theory

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Critical jurisprudence

Positivism

- Law should be examined scientifically
- No moral or ethical criteria
- The law that *is*

Natural law

- Law is based on a higher law reflecting principles of morality
- Religion or reason
- The law that *ought to be*

Legal Realism

- Law is not a body of rational, coherent rules
- *Law in the books v law in action*

Marxism

- Society governed by economic and material factors
- Law is a tool of the powerful

Critical Legal Studies

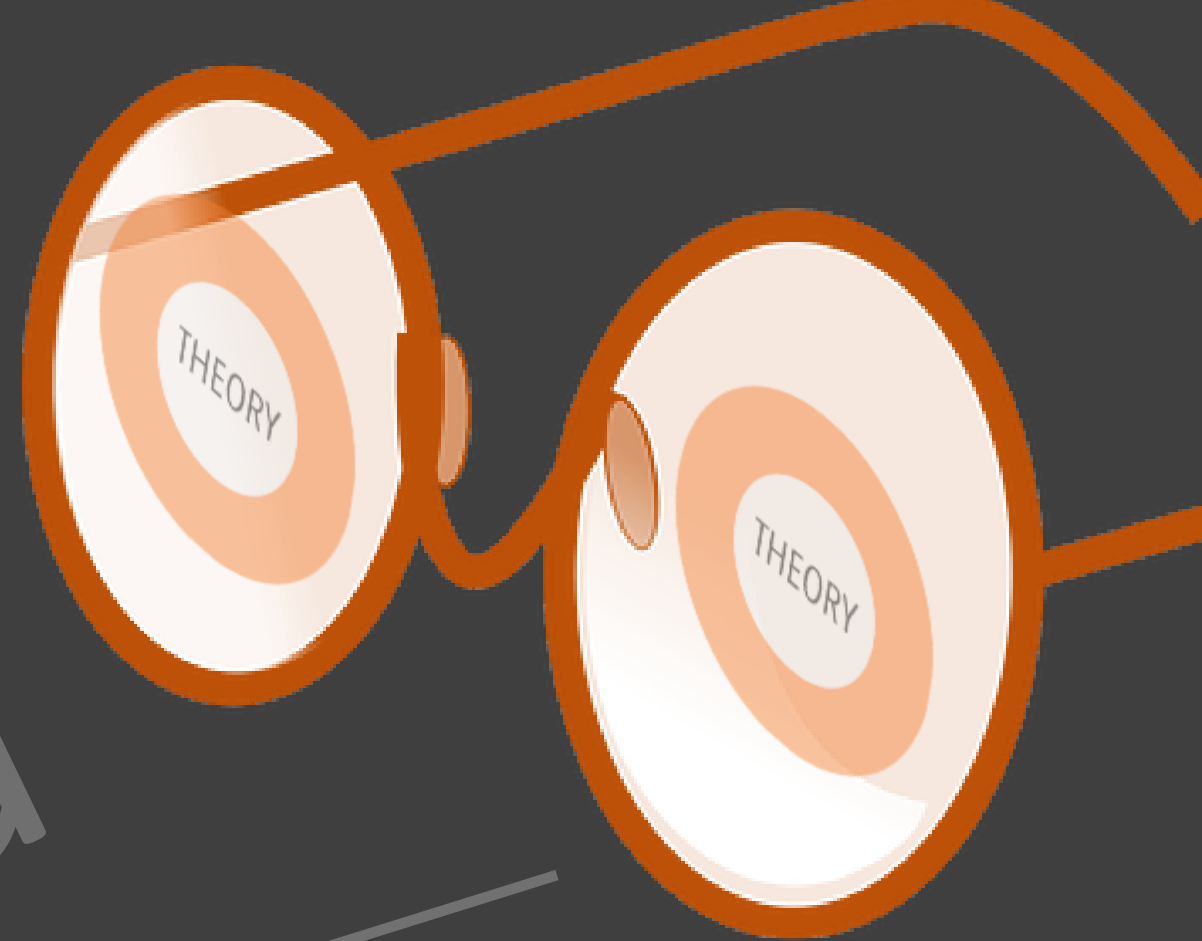
- Challenges accepted norms
 - Feminist Legal Theory
 - Critical Race Theory
 - Critical Disability Theory
 - **Deaf Legal Theory**

Justice theory

- Principles of justice should regulate society
- Law should be designed by person with a veil of ignorance



Data



The 'pair of glasses' analogy

What is Deaf Legal Theory (DLT)?

- A new concept in jurisprudence
- Falls within Critical Legal Studies discourse
 - Challenges view that law and lawmakers are neutral and value free
- Law and legal system is 'hearing'
 - Law reflects hearing views
 - Law made to suit a hearing reality
 - Law is patriarchal
- Mainstream law is therefore:
 - 'hearing-subjective'
 - audist
 - 'looks after' deaf people, charity
- Law affords privilege to deaf people who fit within expectations of dominant hearing society – the 'hearing construct'
 - Mainstream education
 - Disability-related benefits
 - Funding for adjustments in workplace
 - NHS-funded cochlear implants and hearing aids

DEAF GAIN

RAISING THE STAKES
FOR HUMAN DIVERSITY



H-DIRKSEN L. BAUMAN and
JOSEPH J. MURRAY
Editors

Foreword by ANDREW SOLOMON

Afterword by TOVE SKUTNABB-KANGAS

The DLT Method

7 Oppression

Reinforcement of the status quo or new rights?

5 Application

How the law is or should be applied to deaf people (doctrinal elements)

3 Participation

Deaf people's involvement in shaping the law and/or policy

1 The frame

Society's understanding of deaf people



8 Lessons

Lessons to be learnt

6 Impact

Of the law on deaf people and their allies (socio-legal)

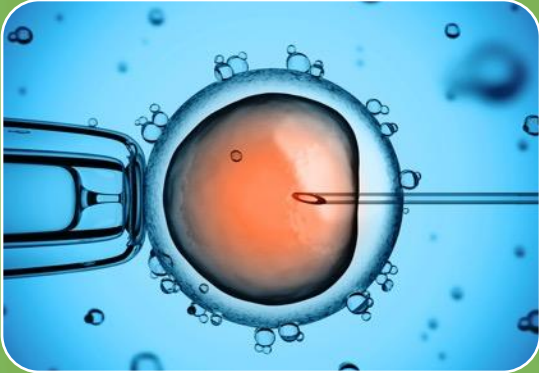
4 Cultural order

The imposition of other culture(s) on deaf people

2 Assumption

The manifestation of society's understanding of deaf people

Exposés



Human
fertilisation
law



Equality law



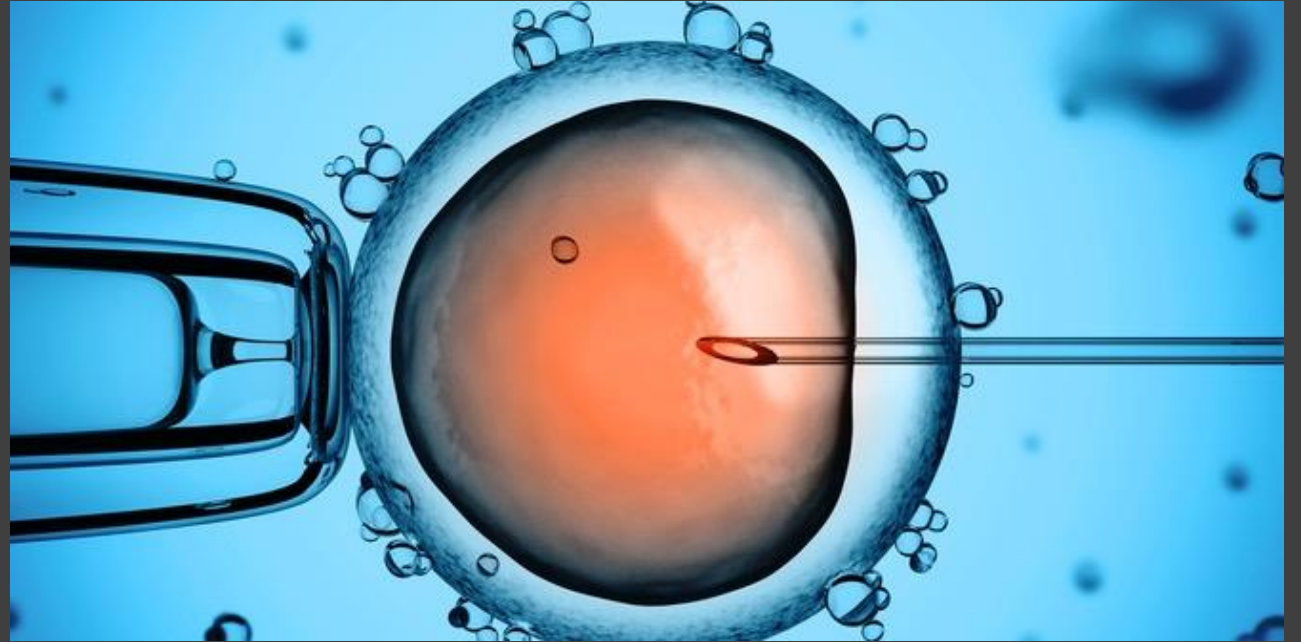
Sign
language
interpreters
and
translators



Deaf
education

Human fertilisation law

- Human Fertilisation and Embryology Act 2008 (HFEA)
- A new act to regulate reproductive issues:
 - human embryos outside body
 - use of embryos created by mixing human and animal embryos for research
 - ban on sex selection for non-medical reasons
 - allowed unmarried male partner to state he intends to be legal parent of child
- Advanced rights for both feminists and LGBT movements
- Bryan and Emery consider how it was:
 - Proposed
 - Consulted upon
 - Debated on



“I hope that your Lordships will be pleased that the deliberate choice of an embryo that is, for example, likely to be deaf will be prevented by Clause 14.”

Baroness Ruth Deech, House of Lords Hansard

Proposed

- Regulation of assisted reproduction
- Preimplantation genetic diagnosis (PGD)
 - “a technique to determine genetic defects in embryos created by in vitro fertilisation . . . prior to implantation in a uterus for gestation” (Steinbock, 2002)
 - Screening of embryos, eggs and sperm for illnesses and diseases
 - Section 14(4) bans selection of embryo for **non-medical** reasons
- Embryos known to have a **disability** or **illness**
 - Section 14(4)(9) – see right
 - In effect, couple who want hearing baby can, but if want a deaf baby, not allowed the choice
 - Only applies if couple decides to have PGD and test for a deaf gene, but could in future create expectation that couples should test for ‘abnormal’ genes

Section 14(4)(9):

Persons or embryos that are known to have a gene, chromosome or mitochondrion abnormality involving a significant risk that a person with the abnormality will have or develop—

(a) a serious physical or mental disability,

(b) a serious illness,

(c) any other serious medical condition,

must not be preferred to those that are not known to have such an abnormality.









Consulted on

- In USA, deaf couple wanted deaf donor for deaf child
- House of Commons Science and Technology Committee (2006) concluded this was an area needed further debate:
 - No evidence of any debate involving Deaf people, leaders or academic researchers
 - “A social or cultural perspective of Deaf people, sign language and Deaf culture was ... missing from the debate” (Emery, Middleton & Turner, 2010)
 - Went ahead with proposals

Debated on

- Stop Eugenics campaign
 - Attracted international support
 - 3-minute video of Deaf people world-wide signing STOP in native sign language
 - Open protest letter by 200 people
 - BDA sent letter to House of Lords, WFD sent letter to Department of Health
 - National and international radio programmes, TV broadcasts, newspaper coverage, media blogs, blog posts and online forums
 - Debate in Cardiff, march in London
 - BDA and campaign leaders met Department of Health
 - Resulted in modification of explanatory note in bill
 - Makes it clear that an embryo known to have an ‘abnormality’ cannot be preferred over an embryo not known to have an ‘abnormality’
 - In the end, little or no change to the position for deaf people but voice was at least heard?

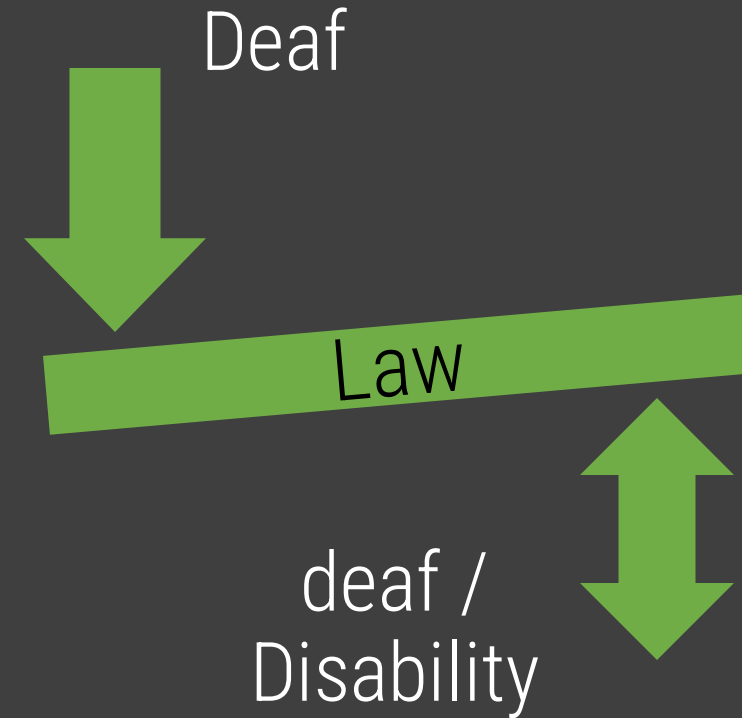
Applying the DLT method to: *Human fertilisation law*

	The frame Medical model of disability; deafness as a medical condition; a serious illness	01		Application Examination of the provisions of HFEA 1998, 2008; Hansard debates; consultation papers etc.	05
	Assumption Deaf donors and embryos are 'abnormal' and 'unsuitable'; deaf child is 'unhealthy'; 'better off not being born'	02		Impact Campaign; volatile 'interface' deaf people <-> genetics; implications for reproductive liberty; media penetration and the Internet; relationship deaf people and state	06
	Participation No consultation with Deaf community despite acknowledgment that needed to	03		Oppression Assumptions reinforce oppression; maintain status quo; deaf is undesirable; threat to existence of Deaf communities?	07
	Cultural order Hearing v Deaf culture; medical culture; fertilisation and embryology culture	04		Lessons Lack of awareness within legislature re deaf issues; need to consult more effectively; listening to medical profession too much?	08

Equality Law

The Deaf Legal Dilemma

- Deaf identity often at odds with laws that define them
- To qualify for benefits or protections afforded by law
- **Equality Act 2010, s 6(1)**
 - ‘a physical or mental impairment that has a substantial and long-term adverse effect on [the disabled person’s] ability to carry out normal day-to-day activities’.
 - **medical model of disability**
- **UN Convention on Rights of Persons with Disabilities 2007**
 - those ‘who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’
 - **social model of disability**



‘The Deaf dilemma: retain some important rights as members of their society at the expense of being mischaracterised by that society and government or surrender some of those rights in the hope of gradually undermining that misconstruction’

How equality law works for deaf people



European Convention on Human Rights

Extremely relevant as gives Deaf people various rights, e.g. right to life, right to fair trial, expression

4 cases involving Deaf people

Article 14: protection from discrimination

Limited right, means that only enforceable when other rights are breached

Enforcement difficulties (individual enforcement model)



Equality Act 2010

Reasonable adjustments

Single, one-off adjustments more likely to be reasonable than recurrent ones

Deaf people tend to need recurrent adjustments

Public sector equality duty

Can effect positive change











UN Convention on the Rights of Persons with Disabilities

Refers to national sign languages

Have to exhaust domestic means of redress (individual enforcement model)

Only 34 complaints received to date, 4 related to Deaf people

Applying the DLT method to: *Equality law*

	The frame Health and medical profession; deafness as an impairment; adjustments as solution	01		Application Examination of EHCR, EqA 2010, UNCRPD	05
	Assumption Medical model of disability; social model of disability; adjustments not language equality	02		Impact Minimal impact; PSED shows promise	06
	Participation ECHR enacted in 1950 so none; some evidence of consultation for EqA 2010; WFD heavily involved in UNCRPD; (former) equality plans under PSED	03		Oppression Equality law fails to challenge oppression that deaf people experience	07
	Cultural order Hearing v Deaf culture Medical culture	04		Lessons UNCRPD model needs to be directly enforceable; recurrent adjustments issue to be recognised and dealt with	08



Sign language interpreters and translators

Distinction between *Deaf-disabled* and *language minority* rights

Equality Act 2010; Americans with Disabilities Act 1990; UNCRPD; ECRML; ILO; European Parliament

Bilingual v *interpreter-mediated* services

Interpreters and translators as *allies* and *advocates*

Role of *regulators*

Applying the DLT method to: *Sign language interpreters and translators*

	The frame Deaf need help; patriarchal; adjustments as solution	01		Application Interpreting and translation discourse; regulatory systems; <i>deaf-disabled</i> and <i>language minority</i> laws	05
	Assumption A quick fix; 'illusion of inclusion'; social model of disability; adjustments not language equality	02		Impact Access?	06
	Participation Do interpreters and translators consult with Deaf community about services they provide? Do service providers ask deaf what they want?	03		Oppression Maintain status quo in terms of access; no language equality?	07
	Cultural order Hearing v Deaf culture Medical culture	04		Lessons Lorem	08

Deaf education

- **Phase 1**
 - Impact of BSL (Scotland) Act 2015 on deaf education
 - Documentary analysis
 - Report published 6 November 2021
 - 14 recommendations
- **Phase 2**
 - Impact of BSL (Scotland) Act 2015 and Curriculum for Excellence and Curriculum for Wales on deaf education
 - Comparisons with Gaelic- and Welsh-medium education
 - 18 qualitative interviews with 21 stakeholders in Wales and Scotland in government, national public bodies, local authorities, schools, colleges and universities and third sector
 - Three new themes:
 - Conceptualisation of BSL as a language
 - Gaps in early years provision
 - Resources
 - 14 recommendations
 - Report published October 2022



Interview Findings



Influence of
medical
intervention



Resources
(curriculum
development
and staffing)



Need for more
training in
language
pedagogy and
how it relates to
deaf children



Example of
Welsh and Gaelic
language
education



Gaps in early
years education
for deaf children



Applying the DLT method to: *Deaf education*

	The frame Health and medical profession Rehabilitation (cochlear implants; speech therapy; hearing functions)	01		Application Examination of education systems, language policies, BSL (Scotland) Act 2015	05
	Assumption 'Deaf can't'; BSL is communication tool not a language	02		Impact Some impact, but no top-down approach	06
	Participation Scottish Deaf community consulted for BSL Act but did not include education; Curriculum for Wales consultations	03		Oppression Maintaining the status quo; denying deaf children the <i>right</i> to learn BSL	07
	Cultural order Hearing v Deaf culture Medical culture Gaelic and Welsh culture	04		Lessons Engagement with Deaf community; gaps in personnel, provision and other resources	08

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Welcome to the Developing Deaf Legal Theory (DLT) Blog. This is maintained by Dr Rob Wilks at Cardiff University. Originally from Newport, South Wales, Rob is a Deaf British Sign Language (BSL) user and teaches through the medium of BSL. He was awarded a doctorate in 2020 by the University of Leicester exploring whether equality law is working for Deaf

Developing Deaf Legal Theory Blog

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What's next?



Sign Language Law