Developing Deaf Legal Theory

Dr Rob Wilks
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
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
The DLT Method

1 The frame
Society’s understanding of deaf people

2 Assumption
The manifestation of society’s understanding of deaf people

3 Participation
Deaf people’s involvement in shaping the law and/or policy

4 Cultural order
The imposition of other culture(s) on deaf people

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

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

7 Oppression
Reinforcement of the status quo or new rights?

8 Lessons
Lessons to be learnt

HEARING SUBJECTIVENESS
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

Emery, Middleton & Turner (2010); Bryan & Emery (2014)
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 mitochrondrial 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.
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

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

Harlan (2005, p. 297)
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

- **Assumption**
  Medical model of disability; social model of disability; adjustments not language equality

- **Participation**
  ECHR enacted in 1950 so none; some evidence of consultation for EqA 2010; WFD heavily involved in UNCRPD; (former) equality plans under PSED

- **Cultural order**
  Hearing v Deaf culture
  Medical culture

- **Application**
  Examination of ECHR, EqA 2010, UNCRPD

- **Impact**
  Minimal impact; PSED shows promise

- **Oppression**
  Equality law fails to challenge oppression that deaf people experience

- **Lessons**
  UNCRPD model needs to be directly enforceable; recurrent adjustments issue to be recognised and dealt with
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*

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

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<td>Health and medical profession</td>
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<td>Rehabilitation (cochlear implants; speech therapy; hearing functions)</td>
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<td>‘Deaf can’t’; BSL is communication tool not a language</td>
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<td>Scottish Deaf community consulted for BSL Act but did not include education; Curriculum for Wales consultations</td>
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<td>Gaelic and Welsh culture</td>
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<td>Examination of education systems, language policies, BSL (Scotland) Act 2015</td>
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<td>Some impact, but no top-down approach</td>
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<td>Maintaining the status quo; denying deaf children the right to learn BSL</td>
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<td>Engagement with Deaf community; gaps in personnel, provision and other resources</td>
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References


Contact

Dr Rob Wilks
Email: WilksR2@cardiff.ac.uk

Developing Deaf Legal Theory Blog
https://blogs.cardiff.ac.uk/developing-deaf-legal-theory/
What’s next?

Sign Language Law