

BOOK REVIEW

PETER BLANCK & EILÍÓNOIR FLYNN (EDS)
THE ROUTLEDGE HANDBOOK OF DISABILITY LAW
AND HUMAN RIGHTS (2017)

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1 Introduction

One of the numerous benefits (possibly unanticipated) of the adoption of the Convention on the Rights of Persons with Disabilities (CRPD)¹ 12 years ago has been the burgeoning international scholarship on disability rights that has since emerged. Recent years have seen the publication of a number of innovative texts on the CRPD as well as on disability rights more broadly.² The *Routledge handbook of disability law and human rights (Handbook)*, edited by Peter Blanck and Eilíónoir Flynn, is a commendable addition to these ranks.

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1 GA Res A/RES/61/06, adopted on 13 December 2006, entered into force on 3 May 2008.

2 Examples include O Arnardóttir & G Quinn (eds) *United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009); MH Rioux et al (eds) *Critical perspectives on human rights and disability law* (2011); M Sabatello & M Schulze *Human rights and disability advocacy* (2014); AS Kanter *The development of disability rights under international law: From charity to human rights* (2015); V Della Fina et al (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A commentary* (2017); C O'Mahony & G Quinn *Disability law and policy: An analysis of the UN Convention* (2017); I Bantekas et al (eds) *The Convention on the Rights of Persons with Disabilities: A commentary* (2018).

The editors explain at the outset that the *Handbook* aims to acquaint the next generation of disability rights and other scholars with the critical ideas that have directed the growth of law and policy over the past several decades.³ Significantly, the volume brings together a number of well-established experts as well as newer authors working in the field of disability rights and related disciplines.

The *Handbook* consists of three components, examining the theoretical underpinnings of disability law, ongoing debates and emerging fields respectively. For ease of reference, each of these parts will in turn be discussed below. The review concludes with some observations regarding the significance of the volume.

2 Overview of contents

2.1 Part 1: Theoretical underpinnings of disability law

The initial part of the *Handbook* focuses on the ‘classical theories guiding the evolution of disability rights law in different regions of the world’.⁴ The first chapter, co-authored by Lawson and Priestley, presents the concept of the social model of disability and explores the key questions this model poses for disability law and policy.⁵ The authors briefly recount the history of the social model and also outline certain of the controversies accompanying this model, most notably the uneasy relationship between ‘impairment’ and ‘disability’.⁶ They argue that the social model provides a helpful lens through which to analyse, on the one hand, legal rules and principles that disadvantage and oppress persons with disabilities and, on the other, the potential of law as a mechanism for resisting disabling barriers.⁷ Given the potential for law to be enriched by disability studies, they ultimately call for greater engagement by legal scholarship with the social model of disability and its concomitant debates.⁸

The contribution by Lawson and Priestley logically leads to a subsequent⁹ chapter by Degener, which considers the human rights model of disability as one possible alternative to the social model.¹⁰ Importantly,

3 P Blanck & E Flynn ‘Introduction’ in P Blanck & E Flynn (eds) *Routledge handbook of disability law and human rights* xv.

4 As above.

5 A Lawson & M Priestley ‘The social model of disability: Questions for law and legal scholarship’ in Blanck & Flynn (n 3) 3-15.

6 Lawson & Priestley (n 5) 7-9.

7 Lawson & Priestley 14.

8 Lawson & Priestley 15.

9 This review does not follow the sequence of chapters as they appear in part 1 of the *Handbook*.

10 Degener points out that her argument is not ultimately aimed at discarding the social model, but rather at expanding it; T Degener ‘A human rights model of disability’ in Blanck & Flynn (n 3) 48.

Degener's examination of the human rights model is grounded in her experience as a long-standing member and current Chairperson of the Committee on the Rights of Persons with Disabilities (CRPD Committee), and in this sense it provides readers with a first-hand view of the challenges encountered in putting the Convention into practice.

Degener notes as a starting point that the renowned 'paradigm shift' from the medical to the social model has often been hailed as the CRPD's primary accomplishment.¹¹ While conceding that the social model was the predominant framework shaping the drafting process, Degener offers the interesting insight that the Convention as adopted 'codifies the human rights model of disability', thereby surpassing the social model.¹²

The chapter then distinguishes between the social model and the human rights model with reference to six supporting arguments. For example, it is explained that unlike the social model which has been criticised for overlooking impairment, the human rights model acknowledges the life circumstances associated with impairment.¹³ In this regard, Degener points out that the 'diversity principle'¹⁴ encapsulated in article 3 of the CRPD constitutes a significant addition to human rights theory.¹⁵ This is due to its implicit acknowledgment that impairment should not be regarded as a deficit or a factor that detracts from human dignity.¹⁶ The CRPD instead 'values impairment as part of human diversity and human dignity'.¹⁷ According to the author, it is at this point that the human rights model goes beyond the social model.¹⁸

The third chapter in part 1 considers the current status, and uncertain future, of the European welfare state.¹⁹ Hvinden describes the origins of the welfare state and also explains the factors giving rise to more recent austerity measures. Interestingly, the author does not find evidence of a general shift towards austerity measures for persons with disabilities in Europe since the onset of the international financial crisis in 2008, with the United Kingdom (UK) the only country among those examined exhibiting a clear trend towards a lower level of spending on disability benefits.²⁰ This

11 Degener (n 10) 33. She observes that most state parties to CRPD are still caught up in the medical model and lack an understanding of the new model; Degener (n 10) 32.

12 Degener (n 10) 33.

13 Degener 38.

14 Art 3(d) lists 'respect for difference and acceptance of persons with disabilities as part of human diversity and humanity' as one of the central principles of the CRPD.

15 Degener (n 10) 40.

16 As above.

17 As above.

18 As above.

19 B Hvinden 'Beyond the welfare state: What next for the European social model?' in Blanck & Flynn (n 3) 16-30.

20 Hvinden (n 19) 22.

result is in line with the report²¹ issued by the CRPD Committee in October 2016 pursuant to its inquiry into the UK in terms of the Optional Protocol to the CRPD.²²

While Hvinden's chapter is generally helpful in understanding recent trends in disability policies in the European context, it also results in the detection of a *lacuna* in this part (and indeed, much of the volume as a whole, as is argued below), namely, the omission of a 'Global South' perspective.²³ It is suggested here that, for example, an examination²⁴ of the current global hegemony of neoliberalism and the implications this holds for disability law and policy would have been a beneficial contribution to the first part of the *Handbook*.²⁵

2.2 Part 2: Ongoing debates around disability law

The objective of the second part of the *Handbook* is to examine key conflicts and tensions in disability rights law 'which continue to be debated throughout the globe'.²⁶ The contributions here look at, amongst others, inclusion in education;²⁷ equality of opportunity in employment;²⁸ access to justice;²⁹ and social and political participation.³⁰ In line with the general aims of the *Handbook*, the chapters in this part not only set out the applicable normative provisions (for example, of the CRPD), but also contextualise these norms by setting out aspects such as the historical

21 CRPD Committee 'Inquiry concerning the United Kingdom of Great Britain and Northern Ireland: Report of the Committee' (2016) UN Doc CRPD/C/15/R.2/Rev.1, 6 October 2016.

22 Optional Protocol to CRPD GA Res A/RES/61/06 Annex II, adopted on 13 December 2006, entered into force on 3 May 2008. Art 6 of the Optional Protocol provides for the CRPD Committee to institute an inquiry upon receiving reliable information indicating grave or systemic rights violations by a state party. In this instance the Committee examined the cumulative impact of legislation and policies adopted by the UK entailing a significant reduction of social benefits (paras 1-2). The Committee found that there was reliable evidence that the threshold of grave or systematic violations of rights had been met (para 113).

23 This review adopts the description of 'North/South' terminology proposed by Meekosha: Countries in the Global South 'are, broadly, those historically conquered or controlled by modern imperial powers, leaving a continuing legacy of poverty, economic exploitation and dependence'. The Global North, on the other hand, refers to the centres of the global economy in Western Europe and North America; H Meekosha 'Decolonising disability: Thinking and acting globally' (2011) 26 *Disability and Society* 669.

24 See in this regard K Soldatic 'Surplusivity: Neoliberalism and disability and precarity' in B Watermeyer et al (eds) *The Palgrave handbook of disability and citizenship in the Global South* (2019) 13-26.

25 See also comments below regarding Keogh's equality analysis.

26 'Introduction' in Blanck & Flynn (n 3) xv.

27 R Kayess & J Green 'Today's lesson is on diversity' in Blanck & Flynn (n 3) 53-71.

28 L Waddington et al 'Equality of opportunity in employment: Disability rights and active labour market policies' in Blanck & Flynn (n 3) 72-87.

29 A Lawson 'Disabled people and access to justice: From disablement to enablement?' in Blanck & Flynn (n 3) 88-104.

30 L Schur 'Towards inclusion: Political and social participation of people with disabilities' in Blanck & Flynn (n 3) 118-133.

background or major points of contention. For example, the chapter by Waddington et al situates the challenge of achieving full participation in employment by persons with disabilities within fundamental questions such as the equal right to work³¹ and the significance of '(in)ability to work' in traditional notions of disability.³²

Lawson's chapter, which conceptually follows on the chapter by Lawson and Priestley in part 1, similarly provides a framework for her discussion of the enabling potential of article 13 of the CRPD. In order to orient the reader, she explores the different meanings of the term 'access to justice'³³ and systematically describes the barriers encountered in accessing justice with reference to three stages, namely, before, during and after legal proceedings.³⁴

This chapter on access to justice neatly segues into an instructive contribution by Cojocariu,³⁵ who provides a practitioner's perspective on procedural accommodations aimed at ensuring effective access of people with mental disabilities³⁶ to the European Court of Human Rights (European Court). The first part of the chapter examines the notion of '*de facto* representation' which was for the first time introduced in the case of *Câmpeanu v Romania*.³⁷ This matter arose from an application lodged with the Court by the Centre for Legal Resources (CLR)³⁸ following the death of Valentin Câmpeanu, an HIV positive man with intellectual disabilities of Roma descent, under extremely harsh institutional conditions. One of the aspects to be resolved in considering the admissibility of the application was the legal standing of the CLR before the Court.³⁹

The general rules regarding legal standing of individuals before the European Court stipulate that usually only living individuals ('direct victims') may validly lodge an application.⁴⁰ In cases where the direct victims have died or disappeared, close relatives (regarded as 'indirect

31 Waddington et al (n 28) 73.

32 Waddington et al 73-74.

33 Lawson (n 29) 88-90.

34 Lawson 91-97.

35 C Cojocariu 'Hit and miss: Procedural accommodations ensuring the effective access of people with mental disabilities to the European Court of Human Rights' in Blanck & Flynn (n 3) 105.

36 The author explains that this term refers to persons with psychosocial disabilities and persons with intellectual disabilities. It is also used in this review for clarity.

37 *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC], Case 47848/08 (2014) (*Câmpeanu v Romania*).

38 The Centrul de Recurs Juridice (CLR) is a non-governmental organisation (NGO) operating in Romania, which conducts human rights monitoring and advocacy, with a particular emphasis on violations of the rights of persons with mental disabilities in institutions. See <http://www.crj.ro/en/about-crj/what-we-do/> (accessed 1 December 2018).

39 *Câmpeanu v Romania* (n 37) para 80.

40 See art 34 of the European Convention on Human Rights. It is interesting to note how the matter of *locus standi* is dealt with by other regional human rights bodies. Eg, the Inter-American Commission on Human Rights (Inter-American Commission) permits

victims') are by way of exception permitted to initiate proceedings regarding the violation of the right to life as guaranteed in article 2 of the European Convention. In the *Câmpeanu* case, the European Court declined to recognise the CLR as an 'indirect victim' due to the organisation's lack of personal interest or sufficiently close link with the deceased.⁴¹ However, the Court was prepared to designate the CLR as a '*de facto* representative', basing this concession on the exceptional circumstances of the case as well as the serious nature of the allegations.⁴²

Cojocariu welcomes the introduction of the notion of '*de facto* representation', noting that by acknowledging the special circumstances of people with mental disabilities, this approach may open up options for cases that may previously have been regarded as inadmissible.⁴³ At the same time, this development is attenuated by the Court's assertion that the outcome here constituted an exception to established jurisprudence justified by the unique circumstances of the case.⁴⁴ This disclaimer thus limits the potential for broader applicability of this accommodation.

The author further identifies problematic aspects of the Court's practice in dealing with unrepresented applicants with mental disabilities⁴⁵ and, in addition, cautions that the amendment in recent years of certain procedural requirements poses a risk of disproportionate disadvantage to, for example, persons in institutions with mental disabilities.⁴⁶

2.3 Part 3: New and emerging fields in disability law

The final part of the *Handbook* investigates 'leading edge developments' in disability law and policy.⁴⁷ In addition to the chapters summarised below, the topics covered here include the right to independent living;⁴⁸ the accessibility and usability of web content (with specific reference to people with cognitive disabilities);⁴⁹ disability and ageing;⁵⁰ and government policies relating to families of children with disabilities.⁵¹ These issues reflect present-day realities such as demographic trends towards ageing

the submission of petitions by NGOs that are not 'direct victims' of rights violations; see art 44 of the American Convention on Human Rights, read with art 23 of the Rules of Procedure of the Inter-American Commission (2002).

41 *Câmpeanu v Romania* (n 37) para 107.

42 *Câmpeanu v Romania* para 112.

43 Cojocariu (n 35) 108.

44 As above.

45 Cojocariu (n 35) 108-115.

46 Cojocariu 115-117.

47 'Introduction' in Blanck & Flynn (n 3) 135.

48 C Brennan 'Article 19 and the Nordic experience of independent living and personal assistance' in Blanck & Flynn (n 3) 156-165.

49 P Blanck 'eQuality: The right to the web' in Blanck & Flynn (n 3) 166.

50 E Flynn 'Disability and ageing' in Blanck & Flynn (n 3) 195.

51 A Rimmerman & M Soffer 'Disability family policy and the United Nations Convention on the Rights of Persons with Disabilities (CRPD): The case of Israel' in Blanck & Flynn (n 3) 242.

populations and the uncertainties brought about by the so-called 'information age'.

Series et al consider recent developments relating to the right to equal recognition before the law as set out in article 12 of the CRPD.⁵² The authors give an overview of the interpretive guidance provided by the CRPD Committee in the form of General Comment 1. This is followed by a discussion of nascent law reform initiatives in Africa, with a specific emphasis on advances in Kenya and Zambia. The authors similarly track progress in the UK. Importantly, they call for further research and scholarship to examine national systems to discover whether these are impermissible substituted decision making according to the General Comment.⁵³

Against the backdrop of rapid progress in the availability and use of genetic-testing technologies, De Paor considers the potential implications of this advancement for persons with disabilities.⁵⁴ She observes that these new testing technologies, which may identify predispositions to disease prior to the onset of symptoms, thus drawing attention to the possibility of future disabilities, may also result in new layers of discrimination against persons with disabilities.⁵⁵

The author convincingly argues that the abuse of genetic information may result in the creation of an 'underclass' of persons deemed to be genetically unwanted in society.⁵⁶ The new genetic technologies have the potential to 'idealise the perfect person', thus devaluing the lives of persons with disabilities and persons with future or putative disabilities.⁵⁷ This in turn invokes the inexcusable past of eugenic policies.⁵⁸ She accordingly identifies a clear need to regulate the use of genetic information and genetic testing.⁵⁹

Keogh's chapter on inclusive development aid, which relates to article 32 of the CRPD,⁶⁰ puts forward the argument that in order to build on progress already made in disability-inclusive development, it is important

52 L Series et al 'Legal capacity: A global analysis of reform trends' in Blanck & Flynn (n 3) 137.

53 In the South African context, Holness's incisive analysis of current decision-making regimes is an example of such an investigation; see W Holness 'Equal recognition and legal capacity for persons with disabilities: Incorporating the principle of proportionality' (2014) 30 *South African Journal on Human Rights* 313.

54 A de Paor 'Disability and genetics: New forms of discrimination?' in Blanck & Flynn (n 3) 211.

55 De Paor (n 54) 212.

56 De Paor 220.

57 De Paor 221.

58 De Paor 220-222.

59 De Paor 227.

60 M Keogh 'Inclusive development aid' in Blanck & Flynn (eds) 228. Although this topic has not been emphasised to a great extent in disability rights scholarship, it has enjoyed attention in development studies: See eg C McClain-Nhlapo 'Epilogue: A decade of implementing the UN Convention on the Rights of Persons with Disabilities' (2016) 1

to look at how equality for persons with disabilities is understood.⁶¹ While recognising that such an inquiry 'is not an easy task', the author does provide guidance on the different meanings of equality, with specific reference to the CRPD.⁶²

Keogh emphasises that discrimination experienced by persons with disabilities is multidimensional in that it may differ based on socio-economic, cultural and political environments, and also due to divergent individual characteristics.⁶³ The challenge for development actors, according to Keogh, is to take account of the diversity of persons with disabilities and to evaluate these compound levels of discrimination.⁶⁴ She consequently offers the notion of intersectionality as an analytical tool which addresses multiple discrimination⁶⁵ and also demonstrates the potential utility of an intersectional approach for persons with disabilities in the development context.⁶⁶

It is noteworthy that the CRPD Committee in its General Comment on women and girls with disabilities similarly employs the notion of 'multiple and intersecting forms of discrimination'.⁶⁷ Keogh's equality analysis, while not extensive, also contributes an essential component of the broader theoretical framework underpinning the *Handbook*.⁶⁸

3 Significance of the *Handbook*

It is evident from the overview above that the *Handbook* offers a rich and multidimensional collection of viewpoints on contemporary disability law. It captures a particular moment in time, reflecting both the events leading up to this point and looking ahead to future developments. The *Handbook* notably includes discussions of certain of the rights that proved most contentious in the drafting of the CRPD, and while it may not yet be possible to formulate definitive answers, the authors do not shy away from asking 'difficult' questions. In this way, one anticipates that the *Handbook* will also provide guidance in identifying areas for future research.

Third World Thematics 425-429; L Swartz & M MacLachlan 'From the local to the global: The many contexts of disability and international development' in M MacLachlan & L Swartz (eds) *Disability and international development: Towards inclusive global health* (2009) 1.

61 Keogh (n 60) 229.

62 Keogh 234-235.

63 Keogh 233.

64 Keogh 234.

65 Keogh 236.

66 Keogh 238-240.

67 CRPD Committee General Comment 3 (2016) on women and girls with disabilities UN Doc CRPD/C/GC/3 25 November 2016 paras 2, 3 & 16. See also SM Manning et al 'Uneasy intersections: Critical understandings of gender and disability in global development' (2016) 1 *Third World Thematics* 292.

68 It could be argued that a more in-depth discussion of equality and non-discrimination would have been a valuable addition to the theoretical overview in part 1 of the *Handbook*.

As indicated above, one point of concern does emerge, namely, the omission of Global South perspectives. The chapter by Series et al, which includes a specific section on legal capacity law reform in Africa, is a welcome exception. Keogh's chapter, dealing with inclusive development cooperation, also (inevitably) makes reference to the Global South and developing countries. However, one would have preferred the discussion to have moved beyond a conceptualisation of countries in the Global South as recipients primarily of development aid.

Despite this aspect, it can be said that the *Handbook* impresses: It is well-structured and the recurrence of themes such as the construction of disability as a (valued) aspect of human diversity serves to draw wide-ranging contributions together into a coherent unit. It is predicted that the *Handbook* will become an indispensable item in the resource collection of disability rights scholars.