Jacobus tenBroek

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'International Impact of the United Nations Convention the Rights of Persons with Disabilities – A New Engine of Reform'.

Thank you. It is a high honour and privilege to be here today.

1. Introduction.

It is said that law is too important to be left to lawyers. Fred Rodell – a famous Legal Realist at Yale – once wrote that the practice of law should be made a criminal offence! Naturally I disagree. I disagree not simply because the sentiment emanates from overstretched and overworked stereotypes. I disagree mainly because - on occasion – law intersects with ethics – with our better side. As Holmes once said 'it is the outward repository of our values.' To live in that intersection – where law intersects with ethics to produce justice – is inspiring. But it also leads to practical change which affects the lives of many. That is why you are here today.

To see a theory of justice embodied in a single instrument – in a single piece of law – gives one confidence in the possibility of seeking justice through law. That is precisely why the Americans with Disabilities Act lit a fire that spread rapidly throughout the world. And so it is with the new United National Convention on the Rights of Persons with Disabilities. I once wrote that while disability rights is an American invention, it is now truly a global challenge.

I want to talk about why such a convention was deemed necessary. As usual there is a formalistic answer that doesn't really reveal the true essence of the convention. I will give a different answer. I will suggest that the real added-value of the convention lies in its ability to trigger a ***new kind of disability politics worldwide***. This is admittedly a very non-legalistic answer to a legal question. But I believe it holds the key to the future of disability law reform throughout the world. For without a new ***dynamic of change*** – one that can sustain itself – we will not see real change happening.

And I also want to talk about the future – about how to optimize this potential and our collective responsibilities in that regard. This new dynamic of change won't happen just because the convention exists. Beware of this 'temptation of elegance'. Treaties are not self-executing. A convention initiates a process. It's down to us to make the process work. Change will only happen because the convention energizes us to become more engaged in assisting others to find their own solutions.

2. The Convention – Exposing Contradiction.

But first why was such a convention necessary?

Let me start from an unusual departure point! With due deference to John Adams, you all know that Thomas Jefferson espoused a particular theory of Republican Government – a theory that both justified the Revolution and that continued to inform his view as to the future development of the US. He may have been wrong – certainly Adams viewed him as wrong - but he was steadfast in his vision. Yet even he did not – or could not – face the contradiction between declaring that 'all men were equal' on the one hand, and continuing the institution of slavery on the other. While his values were admirable – his application of them was flawed. Famously, he did not face the contradiction. That came much later with the Civil War Amendments.

Likewise, let me suggest that the issue in disability – across the world – has nothing to do with the integrity of our legacy values. Instead, it has to do with the way in which these values are deflected, misapplied or not applied in the context of disability.

After all, we had an entire edifice of human values enshrined in the two headline UN human rights treaties: the UN Covenant on Civil & Political Rights, in the UN Covenant on Economic, Social & Cultural Rights. They were further particularized in

the various UN thematic treaties focused on women (CDAW), on Children (CRC) and on Racial Minorities (CERD). It is a very fair question to ask why these treaties – which ***purported to be universal*** – did not in fact yield benefit for persons with disabilities?

Some will explain it by saying that there were 'demand-side' problems – persons with disabilities themselves did not look to these treaties for validation of their claims and for just satisfaction. Some will explain it by saying that there were 'supply-side' problems: that the people appointed to the various convention bodies were just not attuned to disability as an equality and rights issue. Both explanations are correct.

Yet I think there is a deeper reason. The discounting of persons with disabilities in culture was in fact reflected in the intellectual structure of these treaties and especially in the way they were interpreted. At one level there was no need for a new convention since the existing normative instruments were certainly capable of being applied in the context of disability. On the other hand, there was little prospect of this unless the prodding of a new instrument was added to the equation.

So, to me, the main value of the convention – like the 14th Amendment - is that it forces us to face the contradiction between the 'myth system' of our laws and its 'operation system'. And the 14th Amendment was the lifework of Jacobus tenBroek.

It is said that John Browne made it impossible for people to sit on the fence on slavery. After Harper's Ferry you had to take a side. Well, the convention is our Harper's Ferry moment on the world stage with respect to disability.

Holding the mirror of the convention up to society is important. It seems that the default setting of nearly every culture in the world is to discount persons with disabilities – without experiencing any sense of contradiction. Henceforth, it is no

longer possible to explain away the exclusion on grounds of paternalism or a sense of misplaced welfare.

Facing the contradiction is a beginning. What it should lead to is a roadmap for change. Logically, this roadmap should be expressed as a National Disability Strategy – one that builds on disability discrimination law but which goes beyond it to include social and other support programmes.

My own experience on the other side of the Atlantic tells me that if the roadmap is bottomed on a realization of this contradiction between myth and reality and a real urge to close the gap then it can be sustained even during rough patches. But if it becomes simply a technical process of law reform divorced from this underlying understanding then it will predictably stall.

3. The Limits and Possibilities of International Law as an Engine of Change.

Before outlining how the convention creates space for a new dynamics of disability politic and reform, let me first address a threshold issue which has to do with the value of international law in the first place. I am sure it must be at the back of your minds.

Some will make exaggerated claims for international law – that it can force recalcitrant States to conform, that it contains hard and fast norms that if interpreted properly lead to one right answer on every question. I don't believe this – and very few public international lawyers claim this. True, international courts such as the European Court of Human Rights can have a dramatic impact. But that court has spent decades building its institutional legitimacy. As you know, there is no court attached to the disability convention. And, as befits a convention that in its essence pivots on the equality idea, there will many occasions when the language of the text restates rather than resolves hard cases.

There are others who will claim that international law does not exist in the sense that it can significantly drive state behaviour. Rather, States comply when they want to and when its suits their interests to do so – and *vice versa*. This may be descriptively true in many instances. But that does not mean to me that international law is robbed of all autonomy. In any event, even if one were to subscribe to this view then it would certainly be true to say that it is in the interests of the US to engage in the convention process because – as Jefferson would put it – espousing and spreading the concept of freedom is not just in your interests – it *is your primary interest*.

To me, there is a third way that international law can bring about a transformed domestic policy environment. It is said the socialisation and acculturation can also nudge meaningful change. In other words, States – or a least actors within States such as senior policy makers and especially those conscious of their country's international reputation – could become socialised to align policy with the cosmopolitan norms and thus bring about meaningful change.

If a critical mass of key policy makers can be persuaded – either through 'persuasion' or 'socialisation' to tackle a core impediment (especially one that might have huge symbolic value such as outdated conceptions of legal capacity) then change can happen. And of course the really interesting thing about such policy breakthroughs is that even when there is significant domestic pushback this resistance tends to fade through time and the momentous change of today becomes simply part of the (new) orthodoxy of tomorrow - thus making further change easier.

But how can we ensure 'persuasion' and 'socialisation'? One should not rely on the fact that many State delegates were in fact 'persuaded' or 'socialised' during the negotiations (which they clearly were). Such delegates must also become 'normative entrepreneurs' within their own administrations upon their return home or inspire others to initiate change. Since diplomats do not normally rotate home, a

new set of institutional champions who are strongly motivated to reshape domestic law and policy in line with the convention to will have to emerge. To me this can only happen when the convention is used to open a new space for a ***different kind of disability politics.***

4. The Convention – Substantive Rights & Procedural Innovation

Let me briefly highlight some features of the roadmap for reform in the Convention – both in terms of substance and process.

Benjamin Franklin once said that he developed a lifelong aversion to drafting a text only to see it edited by a committee. Yet it has to be said that the text of the convention produced by the Ad Hoc Committee in the UN seems to have survived reasonably intact with a clear focus.

The convention itself is not a traditional charter of substantive rights. And it is not just a bald non-discrimination instrument. It is a hybrid between substantive rights and non-discrimination. It is effectively an equal opportunities instrument at the international level building on successful models under comparative law.

Substantive Rights.

The convention meets a longstanding demand of the disabled community to adopt and adapt the general human rights to which we are all accustomed and tailor them to the disability context to ensure that they are real and not just rhetorical.

For example, it tailors traditional rights in the context of disability by:

- ensuring that the **dignity** of persons with disabilities is respected by protecting them against violence, exploitation and abuse,

- by giving power and **autonomy** back to persons with disabilities over their own lives – specifically by restoring the capacity to make decisions for themselves and to live independently,
- by focusing on the obstacles to **participation** and crafting broad liberty rights to ensure these obstacles can be dissolved,
- by ensuring that **economic and social supports and services and rights** – far from being part of the problem as in the past – are now genuinely part of the solution. Persons with disabilities – just like all citizens – do not want welfare or other supports as compensation for not being in the mainstream – they do not want this support simply to survive. They need social supports re-engineered so that they can lead active and productive lives.

So, from a **substantive point** of view the convention enunciates and elaborates a theory of equality and then clarifies the various substantive rights to ensure that they are equally available, in practice, to persons with disabilities.

A key point needs to be made with respect to those rights such as equal access to health care that are both cost-intensive as well as time dependent. Article 4.2 is to the effect that such rights are to be achieved 'progressively.' While this necessarily genuflects before economic reality it is not a *care blanche* for States. European jurisprudence interprets such an obligation to mean that there is at least a dynamic of change in place going in the right direction, that the pace of change is meaningful and measurable and that the negative impact of slow progress is fully taken into account not just for those directly affected but for others too. The convention does not require instant fixes on some of the more complicated law reform challenges. But it certainly requires good faith efforts to initiate a meaningful process of change. I submit this is a highly relevant consideration for the US to take into account when weighing up its ratification.

Procedural Reform.

To me, the **process-based** innovations are equally if not more striking. And that's what I really want to get at today.

How is this space for change to be created?

At the **international level** a new treaty body has been established –the **UN Committee on the Rights of Persons** – which will assess State performance by reviewing period State Reports. It will have the competence to entertain individual or group complaints provided the relevant Government opts in to an Optional Protocol to that effect. It will clarify the norms of the convention. We in fact advocated for something different during the negotiations but the States reverted to this very traditional model of monitoring. You should look to this body for authoritative interpretations of the convention in the years ahead. Such interpretations will be developed in line with the established jurisprudence of the other treaty monitoring bodies including those that are attached to conventions that the US has already ratified.

And also at the international level a **Conference of States Parties** has been established at the international with an extremely wide remit to exchange policy perspectives. This has the potential to channel the collective effort of States. It could become the main clearinghouse in the world on disability law & policy – ***provided it has the right leadership.*** This is another reason why we need your active engagement.

Yet it is the procedural innovations at the **domestic level** are the most remarkable of all. Oliver Wendell Holmes once wrote that to truly assess a new idea, a value or a legal instrument, you must first pour cynical acid over it and see if anything remains. I am often asked 'where is the pulse of this convention'. I used to reply that it resides in this shift from viewing persons with disabilities as objects to viewing them as subjects. But it is much more than that.

There are a lot of bad laws, policies and programmes around the world on disability. And the rights and obligations contained in the convention will enable one to challenge these laws. That, at any rate, is a lawyer's way of looking at the convention. I take a broader view of the convention and its potential to help frame change. I believe you miss the point if you confine the convention to the traditional role of challenging bad laws and policies. To me the most important potential of the convention resides in its ***potential to transform the process that leads to these laws in the first place*.**

One reason why bad laws were enacted in the past had something to do with the relative invisibility of disability and of persons with disabilities in the political process. For one thing, as you well know, the opportunity costs of political participation were formidably high for persons and their families simply struggling to survive. In addition, the policy process tended to work from a very narrow policy narrative – one that simply equated disability with cost and foreclosed serious analysis of reform. This absence of the most important voices from the table meant that these deficiencies could not be readily undone.

The framers of the convention were alive to the fact that **unless processes are changed there will be little effective outcomes.** The democratic system can right itself – but can only do so when the full panoply of voices are at the table. That is why the mantra 'nothing about us without us' is now enshrined in Article 4 of the Convention. This requires ongoing and active consultation between Government an persons with disabilities.

To govern is to choose. So this does not mean that persons with disabilities have a trump card. But it does redress a fundamental flaw and so measurably enhances the prospects of greater equity and better outcomes.

There is another design flaw the framers were alive to. International law exists 'out there' – in the ether. In general, there is no transmission belt to ensure that the

fresh air of international law can reach into and revive the domestic reform process. You may score the odd victory in Geneva – but there the victory remains. So the trick is to find some way of ensuring that the norms of the convention gain traction where they count most – in Peoria, in Dublin, in Lusaka. They have to become somehow 'owned' by your administration and mine. Policy makers need to become motivated to 'see' the symmetry between the convention and their domestic reform agenda. Most importantly, policy makers should see them selves as giving back to the international arena. This is a two way street.

The framers of the convention actually took the next logical step by going beyond a simple listing of rights with a monitoring system hovering in the pure ether of international law. They put in place a ***domestic institutional architecture for change*** in Article 33. To me, this articles lies at the very heart of the convention – for it makes a stab at putting in place an architecture of change at home – in Washington DC or Dublin – that can transform processes that – if left untransformed – simply lead to even more bad laws and policies.

Article 33.1 demands the existence of a **Focal Point** as well as a **Coordination mechanism** within Government. This gets at and seeks to unravel the silo phenomenon whereby most Governments in the world disperse responsibility for disability across many Departments and even within Departments. The predictable result is the 'tragedy of the commons' whereby no entity takes lead responsibility and the chaos that ensues creates massive cracks into which ordinary people fall. Article 33 is truly innovative. All the more so when you realize that the Convention requires this Government mechanism to consult actively with persons with disabilities.

So far, so good. Yet something else is needed to ratchet a dynamic of reform into place. Good governance is about accountability – and accountability is not just an end in itself – it helps keep the reform process moving in the right direction. It underpins and not undermines effectiveness. That is why the framers took another

logical step by requiring States to **designate an independent body or set of bodies** to '***promote, protect and monitor***' progress in implementing the convention. The language is somewhat open-ended – an example of constructive ambiguity to bring along those Governments along (not your Government) that do not see accountability in quite the same positive light. But the intent is clear. The intent is to harness an independent body in the process of ensuring the norms are real and not rhetorical.

Human rights commissions, civil rights commission, national disability bodies such as the NCD, will have to be to the fore of such bodies. A first step in a rational process of 'designating' this independent entity or entities under Article 33.2 could well be to map out which entities already do some 'promotion, protection and monitoring' and to meld them together appropriately.

The triangulation at the domestic level is complete when one realizes that Article 33.3. also requires that the monitoring that is to be done by the relevant independent body is to be done in active consultation with persons with disabilities. This is unique and remarkable. It has no precedent. It will perhaps prompt some thinking by commissions on the larger issue of the relationship between independent commissions and civil society. At the end of the day such bodies still have their functions to perform. But the performance of these functions will be very considerably enriched by interaction with civil society. There are embryonic models out there but it is early days yet.

Article 32 on **International Cooperation** is going to be key in helping to embed this dynamic of change especially in those countries where disability has been neglected. It does not specifically require development aid to be increased or even earmarked. It does require that development should be inclusive of and accessible to persons with disabilities (32.(a)). To me this entails the proofing of development aid programs from a disability perspective. Just as important, it requires facilitating and supporting **capacity-building** which includes the sharing of information,

experience, training programs and best practice (32.(b)). This will be where your experience will be most telling. Logically, this should lead the US Government to find and support ways of transferring both knowledge and skills from US civil society to the nascent disability community abroad. And the Article requires cooperation with respect to research as well as technical assistance. You certainly have this research prowess and it would be good to see it harnessed to help others ratchet up their own research capacity on disability.

To me, these ***process-based innovations*** hold the key to the success of the convention. Unless the 'normal' process of change can be enriched with disability perspectives then it is likely to continue to ignore the just claims of persons with disabilities.

5. The Future of International Disability Law & Policy.

To my way of thinking, you underplay the significance of the convention if you simply view it as supplying a set of norms against which to measure bad laws and policies. Instead I would encourage you to see it as an instrument that can **transform the process that makes these laws in the first place**. The convention does not simply impose obligations – it seeks to improve the democratic process by opening it up to voices that were hitherto excluded or discounted.

You can only bring these voices to the table – and trust the process to reach the right outcomes - by active listening to and with persons with disabilities themselves. The process of drafting the convention showed how useful and constructive this engagement can be. **In my view, the key to the success of the convention will be in how well States can embed the domestic institutional architecture for change envisaged by Article 33.**

The United States has been a global leader in disability law reform for at least the last 20 years. Your legacy values – your civil rights tradition – continually forces people to confront the contradiction between myth and reality. And your focus on using law to underpin freedom and choice – and not undermine it – is inspiring. Your model is one model and it is not perfect. But you have spent at least two decades building it and confronting many of the challenges and puzzles others now face. You need to share this - partly to help others and partly to gain new perspectives that may help you navigate some of your own internal issues.

Europe is in the middle of transforming its social model to accommodate a civil rights perspective. As you are aware the EU – as such – has signed the convention and is due to ratify (technically 'affirm') it by the end of this year. This could have a dramatic impact in the kinds of legislative proposals that the European Commission presents to the Council of Ministers and the European Parliament. And it should also dramatically impact the EU development aid budget which is now the single largest aid budget in the world. More interestingly, from your point of view, the EU ratification only affects EU law in as much as the EU has legal competence. In point of fact, most legal competences with respect to disability is retained by the EU Member States. The EU Presidency (of the Council of Ministers) has now agreed to share perspectives as between the Member States with respect to both ratification and implementation. I think it is fair to say that the Member States understand the need for common legislative and policy approaches even where the matter in question is not squarely a matter for EU law as such. It is also interesting to note that a number of EU Member States are either adopting National Disability Strategies for the first time because of the convention or amending them. Indeed, Australia has publically pledged to adopt a National Disability Strategy based explicitly on the convention.

To me the convention, if and when ratified by the United States, should help reinforce law reform trends in this country. It does not fatally undermine your sovereign responsibilities – it helps align them with challenges faced elsewhere. If

you ratify then it will be at least possible for the domestic courts to take the convention into account – among other factors – in the interpretation of domestic legislation. This does not supplant your legislation and the primacy of your Legislature. Yet it is certainly a desideratum within all common law countries to interpret domestic law – if at all possible – in a manner consistent with your international legal obligations. As Justice Stephen Breyer would put it, this would enables you to have a meaningful conversation with the world on common challenges.

Furthermore, there is sufficient 'margin of appreciation' to allow discretion at the domestic level. And the aforementioned concept of 'progressive achievement' affords sufficient latitude for the US and other States to begin laying the ground work for social supports to underpin freedom.

Additionally the new **Conference of States Parties** would appear to provide a unique platform to initiate a serious sharing of ideas, experience and expertise to trigger the law reform process worldwide. You gain – we all gain – through active participation on this. I know this can also be done bilaterally. But the impact would be magnified many times over through active participation on the Conference of States Parties.

You also have invaluable experience with respect to your institutional architecture for change. No ***sustainable process of change will happen unless this is gotten right***. Very few countries have this and are eager to learn. Article 32 on International Cooperation provides a 'window' through which to channel support for this process of change. To me this isn't just about knowledge of laws and policies – its probably more to do with transferring skills and know-how.

When Jefferson was based in Paris he reputedly had a small part to play in the drafting of the French Declaration of the Rights of Man. He was a true internationalist and understood that the pursuit of liberty knew no borders. He

couldn't face the contradictions between the myth of equality and the reality. But we can. Let me so bold as to suggest that as you face the process of ratification and then implementation that the spirit of freedom represented by Jefferson be your guide.

Let me conclude by saying that the convention is actually much more important than its application to disability. I think it is best to think of the convention as articulating a theory of justice that ***every citizen can subscribe to and in which every citizen has a stake in its success.*** It is not a case of special rights for a particular group. It is about equal rights for all. And it is about making the democratic process open to all voices so that blockages can be dissolved and solutions found to deal with the legacy of the past and build a more inclusive society or all. So the American disability rights revolution now belongs to all and we again look to you for leadership.