

BOOK REVIEW

AS KANTER: *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS* (2014)

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1 Introduction

This 'must read' book presents an accessible, personal style and diverse content, which is clearly a reflective product of conversations, ideas and experiences Arlene Kanter has shared with several people in the fields of disability and law. She provides unique insights into the Convention on the Rights of Persons with Disabilities (CRPD) and how it evolved from its foundation as an international legal framework. A unique feature of this book is the author's involvement in the CRPD generation process. Hence, the narrative reflects upon all aspects of the CRPD from personal and interactive perspectives. The author's personal experiences clearly exhibited in this book, sets it apart from most disability rights texts, while at the same matching well-thought out academic writings.

In this book, Arlene Kanter examines the status of the rights of people with disabilities under the international law prior to the adoption of the CRPD. She further critically analyses the CRPD drafting process, its potential for achieving disability rights and its complexities from an insider's perspective.¹ This is so because Kanter made known her participation in the CRPD drafting process, an aspect that significantly enriches this text.

Kanter further argues that by articulating what she refers to as the 'new human rights' (for example, the right to live in the community, accommodations and support) as well as new interpretations of existing human rights (for example, liberty, security, integrity, access to justice and freedom from torture and ill-treatment), the CRPD is not only significant

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1 See acknowledgments, p. vi.

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for people with disabilities, but for the general development of international human rights law. Kanter strongly believes that the success of the CRPD rests on the extent to which individual countries enforce their own domestic laws and policies, guided by this international instrument. Apart from domesticating the CRPD, Kanter also takes the changing of societal attitudes towards people with disabilities as a critical element in ensuring access to disability rights.

The strength of this book lies in its global perspective dimension; thus focusing on disability rights in the United States of America, Africa, Europe, and the Middle East, although not much reference is made to African countries,² which is a weakness of this text. Nonetheless, it is because of this 'global context' that it can either be used as a reference book or as a focus for cross-cultural studies on disability rights. By adopting a comparative perspective, the book explores the CRPD and its potential for achieving disability rights. Thus, this book becomes significant to researchers, policy makers, disability activists, students of international and comparative human rights law, discrimination law and disability studies.

The book is split into eight chapters to support her arguments. In each chapter, Kanter analyses one or two CRPD articles, without necessarily covering all 50 articles and optional protocols. However, she intentionally discussed those articles she felt, present examples of the greatest potential impact of the CRPD on the lives of both people with and without disabilities. She however deliberately excluded article 24, despite its potential for transforming the education systems into more inclusive environments. This is because she is intending to separately publish article 24 in her forthcoming publication, perhaps due to its pivotal role in influencing other disability rights.

Kanter begins with an introduction where she presents the background of the CRPD; thus, its birth, what it provides and why this convention drew international attention as a new approach to human rights treaties and their enforcement. Key to her introduction is the aspect that the CRPD removes the distinction between political, civil, social, economic and cultural rights by embedding them in the overall structure of the CRPD.

Chapter 1³ is divided into two parts, of which the first part discusses the development of the international human rights laws from the emergency of the United Nations (UN) until the adoption of the CRPD in 2006. The second part discusses the CRPD and its tenets, taking into account the drafting process that led to the final document. Since Kanter was part of the drafting process, she relied heavily on her personal notes as well as official UN archives to capture the tone of the Ad Hoc Committee

² See pp 25; 36-37; 51; 83; 94; 82-83; 288-89; 292.

³ pp 21-63.

discussions; an aspect that places her at a very informed position to tackle issues in this text.

Chapter 2⁴ discusses article 19, which is on the right to live in the community for people with disabilities. In this chapter, she presents a strong argument that article 19 should not be used as a reason to deny the person his/her right to live in a home in the community. She goes further to discuss how various countries have denied people with disabilities their right to live in their own homes and community; as well as the meaning of 'home' and 'community' from nine-discipline specific perspectives (70-75). That is

- Architecture;
- Anthropology;
- Etymology;
- Geography;
- Gerontology;
- Environmental psychology;
- Sociology; and
- Law.

Such a multi-disciplinary approach, makes this book relevant to a wider audience, and hence becomes a useful resource to various stakeholders. Also, issues of religion and culture are sensitively addressed.

Chapter 3⁵ addresses article 14, which focuses on the right to liberty and security. Kanter explicitly chronicles various ways in which people with disabilities, particularly those with intellectual impairment, have been perpetually subjected to restrictions on their liberty and freedom in ways that people without disabilities are not. She argues that mental health laws that discriminate against people with disabilities for involuntary treatment and detention violate the intent, if not the language of article 14.

In chapter 4,⁶ Kanter discusses article 15, which focuses on the right to be free from torture and cruel, inhuman or degrading treatment and punishment. She is concerned that the article does not provide any standards to guide the determination of what type of treatment or condition rise to the level of torture or ill-treatment in violation of the CRPD. She further suggests that involuntary institutionalisation be treated as ill-treatment or torture.

4 pp 64-124.
5 pp 125-158.
6 pp 159-201.

Chapter 5⁷ discusses two articles; that is 17 and 25, which focus on the right to protection of the physical and mental integrity of the person and on the right to health respectively. Kanter brings together these two articles because she is convinced that article 17 amplifies the issue of informed consent, which she feels, is part of the right to mental and physical integrity.

Chapter 6⁸ addresses article 13 that is on access to justice for people with disabilities. Here, Kanter argues that access to justice is one of the foundations of any legal system and this encompasses the right to participate in the judiciary system as witnesses, complainants and victims. Key to this chapter is the discussion of many barriers facing people with disabilities in seeking access to justice on an equal basis with people without disabilities as articulated in article 13.

Chapter 7⁹ discusses in depth, the right to legal capacity and supported decision-making of people with disabilities under article 12. From her insider's knowledge, Kanter highlights that this article was one of the most keenly debated articles of the entire CRPD. This was because several countries objected to the inclusion of broad protections upholding the right of all people with disabilities to legal capacity, seeking instead to retain their countries' limitations on legal capacity for people with certain mental incapacities. Kanter documents the arguments that culminated into the final version of article 12, which recognises the legal capacity of all people with disabilities, regardless of the type, scope or severity of their disability. My main worry here is that although she has a sound understanding of the terms disability and impairment, Kanter seems to use them interchangeably in this text. For instance, severity should be of 'impairment' and not 'disability'. Otherwise, there will be double standards on disability activism where disability, which is a social construct, becomes synonymous to 'impairment', which is a medical condition.

Kanter concluded the chapter with a discussion of the implications of article 12 on the right of people with and without disabilities to receive the support and services they may need in order to realise their own human potential. For me, this promotes inclusive development, where both people with disabilities and those without are viewed as equals in society.

Chapter 8¹⁰ concludes the book by focusing on moving beyond the CRPD and provides a discussion on whether or not this legal instrument will make any difference to the lives of people with disabilities. Kanter does so by making reference to international human rights theory and

7 pp 202-220.

8 pp 221-234.

9 pp 235-290.

10 pp 291-305.

scholarship. She also argues that the success of the CRPD is neither by the number of countries that have ratified it nor by its terms, but by the process that led up to the adoption of the treaty. In addition, she feels that the success of the CRPD is based on how it has been used to mobilise self-advocates and their allies throughout the world.

Kanter also presents reasons why some countries choose to sign and ratify international treaties, a discussion that provides interesting insights. She triangulates arguments by various legal scholars on why some countries ratify treaties, one of which is that treaties cause changes in domestic practices since they create binding obligations on state parties. In contrast, other scholars argue that treaties do not make any difference at all in state practices as this process is essentially done ceremonially to merely protect countries' international reputation and to avoid the threat of isolation or punishment. This is seen when a country signs and ratifies a treaty and does not make any effort to re-align its domestic laws and practices.

In this chapter, she also highlights that since it is the first treaty to include direct beneficiaries in the drafting process and in its national implementation, the CRPD presents a new model for the development of future human rights treaties. Also, the domestication of the CRPD has the potential of changing societal attitudes towards people with disabilities and beginning to see them as rights holders entitled to legal protection as equal members of society. Key to Kanter's discussion is the removal of the 'them' and 'us' binary so that communities start to embrace diversity. In her own words, Kanter argues (p 17) that:

The CRPD seeks to remove long-standing barriers between those who are considered "normal" and those who are not, implementation of the CRPD may result in the development of domestic laws that offer greater acceptance not only for people with disabilities but for other marginalized groups as well.

This book serves as a 'one-stop-shop' in that, apart from the presented 8 chapters, it also has very useful appendices. Appendix 1¹¹ provides a summary of the mechanisms that may be used to assist people needing support in decision-making. The way Kanter tabulates the information makes it easy for readers to engage with the information as an advocacy tool for disability rights. The CRPD is presented in Appendix 2¹² and this makes it readily accessible as a reference point when reading this text.

Important to this text is the provision of five convincing discussion points on how the CRPD is regarded as a significant international treaty that protects the rights of people with disabilities. Firstly, Kanter pointed out that the CRPD does not specifically define a 'person with a disability'

11 pp 306-307.

12 pp 309-338.

(p 8) because the Ad Hoc Committee responsible for this statute felt that this would have profiled the medical basis of disability. Rather, the committee agreed that the CRPD categorically states its purpose in safeguarding the rights of people

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 (p 8).

Kanter reaffirms the social model of disability's understanding by disability activists such as Mike Oliver,¹³ whose interests moved from the body to the environment. Thus, it is not the impairment, but rather the interaction of the impairment with various forms of barriers (attitudinal, environmental [physical and communication] and institutional [policies and practices]), which prevent an individual from participating in society.

Secondly, the CRPD's significance relates to the process that led to its adoption (p 8). Unlike other preceding human rights treaties, Kanter stresses that the CRPD was to a greater extent, written by its beneficiaries. This implied the fulfilment of the 'nothing about us without us' disability activists' motto, which since then, has become the guiding principle for the implementation of the CRPD; thus, promoting meaningful participation of people with disabilities in decision-making processes. This was revolutionary as never before in the history of the UN had the direct treaty beneficiaries being invited to play such a major role in the drafting process.

Thirdly, Kanter believes that the CRPD presents a new model for future human rights treaties in terms of its scope and breadth (p 9). In addition, it includes more substantive rights than in any previous treaty. Specifically, Kanter makes reference to what she calls 'new rights' presented by the CRPD. These include the right to 'reasonable accommodations', 'accessibility' (article 9), 'inclusive education' (article 24), 'live in the community, with choices equal to others' (articles 19 & 23), 'supports' (articles 26 & 28), 'communication access' (articles 9 & 21) and 'awareness raising' (article 8) (p 9). These 'new rights' have not been part of the existing human rights under the Human Rights Declaration of 1948, or other subsequent treaties.¹⁴

Kanter presents a fourth way that makes the CRPD significant. That is, it makes clear the interdependency of civil and political rights; and social, economic and cultural rights. She succinctly argues that traditionally, human rights instruments addressed either civil and political rights or social, economic and cultural rights, but not both rights categories of rights. For instance,

13 See M Oliver 'The social model in action: If I had a hammer' in C Barnes & G Mercer *Implementing the social model of disability: Theory and research* (eds) (2004) chap 2.

14 United Nations Declaration on Human Rights (1948).

- The right to equality and non-discrimination of people with disabilities (article 12) can only be realised if there are accommodations in the workplace, public sphere, transportation and communication (article 9).
- The right to liberty for people with disabilities (article 14) is dependent on their right to be free from involuntary institutionalisation on the basis of their impairment (article 19).
- The right to access to justice for people with disabilities (article 13) is made possible if voting places and courthouses are made accessible (articles 8 & 21).

It becomes explicit that the rights of people with disabilities enshrined in the CRPD's articles can only be realised because of their interdependency, thus offering a new model for subsequent international human rights treaties.

Finally, Kanter provides a fifth example of the significance of the CRPD. That is, its unparalleled approach to international human rights enforcement, an aspect she presented in her previous text.¹⁵ She noted that in the past, reporting and monitoring requirements have been heavily criticised as powerless, with limited funding, unclear procedures and politically manipulated. On the contrary, the CRPD imposes stringent monitoring and reporting requirements. Kanter makes reference to article 33, which she clearly unpacks for easy understanding. She highlighted that the article includes an extensive system for monitoring and national implementation. Thus, it requires each member country to establish one or more 'focal points' that are responsible for leading the process of implementation within the government, to ensure that various departments within the government become accountable for the work to be done in implementing the CRPD. Also, article 33 mandates state parties to designate 'a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention'. Key to the implementation and monitoring processes is the active involvement of people with disabilities. Furthermore, Kanter presents article 31, which requires state parties to collect data on disability in order to 'give effect to the present Convention'. She presents a very important point as she unpacks article 31. That is, the importance of not just collecting statistical data on the number of people with disabilities as this has its own challenges. The article emphasises the need to also collect data on people with disabilities and their lives, including various forms of barriers they face in accessing their rights. Here, Kanter argues that no other treaty requires collection of data covering such a diverse range of issues. Thus, it becomes clear that articles 31 (data collection) and 33 (reporting and monitoring), present the most detailed requirements for national level implementation and monitoring of any human rights treaty

15 See S Kanter 'The promise and challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2006-2007) 34 *Syracuse Journal of International Law and Commerce* 287.

in the UN's history; thus, making the CRPD a model for subsequent human rights treaties.

Kanter also raises a significant point in that the CRPD Committee members are elected by state parties, which include 18 independent experts who serve in their individual capacities and not as government representatives (p 19). Again, she reminds readers of the 'nothing about us without us' motto, whereby these Committee members are mostly people with disabilities who are also experts in the disability field. Here, Kanter raises an important aspect whereby in the past, people with disabilities were considered interested parties and not experts. Thus, the CRPD makes it clear that the Committee should deliberately include experts with disabilities, thus acknowledging their worth.

Kanter acknowledges that merely ratifying the CRPD and its Optional Protocols, does not guarantee its domestication by member states. This is important because implementation has always been a challenge to many member states, particularly those from low-income countries. Kanter is aware that the CRPD presents a significant step towards the promotion of disability rights. However, she is sceptical about the CRPD's translation into domestic law, yet its success rests upon national implementation. It is because of the realisation of this barrier that Kanter informs the readers how the CRPD addresses this challenge by ensuring that the direct beneficiaries (people with disabilities) continue to be key stakeholders in the CRPD's implementation. Kanter makes it clear that no other treaty has included such a central role for beneficiaries of the treaty themselves; thus making it a learning point for future human rights treaties. She also acknowledges that it is not possible for people with disabilities to solely monitor the CRPD and in particular, forcing governments to comply with the CRPD and its tenets. Kanter argues that positioning people with disabilities at the centre stage, together with their families, friends, supporters and allies, the CRPD is likely to increase awareness about the need for greater discretion for the protection of the equal rights of people with disabilities. Thus, the CRPD will achieve what is yet to be achieved within the international community – that is, 'the promise of equality for people with disabilities under the law' (p 11). Her strong argument in this book is that the lessons of the CRPD are indispensable to the development and realisation of the rights of people with disabilities and to other groups. Accordingly, the CRPD has the potential of not only transforming the lives of people with and without disabilities, but to also provide a new model for the implementation of all future human rights treaties. This in a way, makes various countries realise the notion that what is good for people with disabilities, is good for all.

In thinking critically about how and why the CRPD came into being, Kanter inspires various stakeholders (including disability rights advocates) and future human rights treaties. Let me hasten to say that this powerful book, is an essential reading; not just for disability advocates and

researchers, but for anyone whose intention is to embrace diversity, where all global citizens (including people with disabilities) are seen as rights holders, entitled to legal protection as equal members of society. I am optimistic that her next edition on article 24 (inclusive education), will be equally stimulating.