

REGIONAL DEVELOPMENTS

DEVELOPMENTS REGARDING DISABILITY RIGHTS DURING 2013: THE AFRICAN CHARTER AND AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

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1 Introduction

The historical picture of disability rights in the African regional human rights system can be described as one of 'underutilised potential'.¹ The foundational instrument, namely the African Charter on Human and Peoples' Rights (the African Charter),² contains a dedicated provision on the rights of persons with disabilities,³ although this article has been subjected to some criticism, it is noteworthy for its recognition of the principle that persons with disabilities are entitled to specific measures in accordance with their requirements.⁴

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1 J Biegon 'The promotion and protection of disability rights in the African human rights system' in I Grobbelaar-du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) 54.

2 OAU Doc CAB/LEG/67/3 Rev 3 adopted on 26 June 1981 and entered into force on 21 October 1986.

3 Art 18(4).

4 Secretariat of the African Decade of Persons with Disabilities *The architecture for an African disability rights mechanism* (2011) 24.

In recent years, a number of significant shifts towards inclusion of disability rights have become apparent,⁵ with disability rights gradually making their way into the major instruments of the system such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).⁶

This subsection examines the work relating to disability rights of one institution in the African system during 2013, namely the African Commission on Human and Peoples' Rights (African Commission). A specific aspect, the draft Protocol on the Rights of Persons with Disabilities, as recently completed by the Working Group on the Rights of Older Persons and People with Disabilities in Africa,⁷ is discussed below.

2 African Commission on Human and Peoples' Rights

The African Commission held two ordinary sessions (the 53rd and 54th) and two extraordinary sessions (the 13th and 14th) during 2013. These sessions took place in Gambia, with the exception of the 14th extraordinary session, which was held in Kenya.

2.1 State reporting

In terms of both the African Charter and the African Women's Protocol, states are required to submit reports to the Commission every two years on the steps taken to implement these two instruments. It is significant to note that the majority of the reports submitted to or considered by the Commission during 2013 included reference to the rights of persons with disabilities.⁸ This related either to the implementation of article 18(4) – for

5 See Biegon (n 1 above) 82; H Combrinck 'Disability rights in the African regional human rights system during 2011 and 2012' (2013) 1 *African Disability Rights Yearbook* 362.

6 CAB/LEG/66 6/Rev 1, adopted on 11 July 2003 in Maputo, Mozambique, and entered into force on 25 November 2005.

7 The first African Union (AU) Ministerial Conference on Human Rights in Africa, held in Kigali in 2003, adopted a Declaration that included specific reference to persons with disabilities and called on member states to develop a Protocol on the protection of the rights of people with disabilities and the elderly – MIN/CONF/HRA/Decl 1(1), adopted by the First AU Ministerial Conference on Human Rights in Africa on 8 May 2003. The African Commission subsequently appointed a 'Focal Point on the Rights of Older Persons in Africa' in November 2007, which was expanded in 2009 to become a 'Working Group on the Rights of Older Persons and People with Disabilities in Africa'. For an overview of an initial draft Protocol prepared by the Working Group, see Combrinck (n 5 above) 367; SAD Kamga 'A call for a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2013) 21 *African Journal of International and Comparative Law* 219 224.

8 This section looks at reports examined by the Committee during 2013 as well as reports submitted during 2013 but awaiting consideration at the time of writing.

example, in the reports of Burundi,⁹ Cameroon¹⁰ and Mozambique¹¹ – or another right, such as the right to health – in the case of Senegal.¹² The report of Malawi, which includes a section on the implementation of the African Women’s Protocol (the only one submitted during this period to do so), also covers the position of women with disabilities.¹³

2.2 Recognition of human rights situation of persons with disabilities

It is significant to note that the rights of persons with disabilities are increasingly acknowledged in the Commission’s activity reports in the section describing the human rights situation in Africa. For example, in its 34th activity report, the Commission observes that the provision of free sunscreen for people with albinism and the accompanying sensitisation campaign in Kenya is a positive development, as is the adoption by the United Republic of Tanzania of measures to stop the killing of persons with albinism, including through the education of local communities and prosecutions to bring the perpetrators to justice.¹⁴

In its 35th Activity Report, the Commission notes as a positive development the adoption of Lesotho’s National Disability Policy, which recognises that persons with disabilities should have equal access to education, training, employment, health and other aspects of life.¹⁵ On the other hand, it expressed concern about the fact that persons with disabilities, and people with albinism, continue to experience prejudice in some countries, with a disproportionate toll on women with disabilities and/or albinism.¹⁶

- 9 Republic of Burundi ‘First Implementation Report’ (2010): http://www.achpr.org/files/sessions/50th/state-reports/2nd-achpr50_staterep_burundi_2010_eng.pdf (accessed 30 June 2014) 48. The Burundi report was considered in 2011; the Committee adopted its concluding observations at its 13th Extraordinary Session in February 2013.
- 10 Republic of Cameroon ‘Third Periodic Report’ (2013): http://www.achpr.org/files/sessions/54th/state-reports/3-2008-2011/staterep3_cameroon_2013_eng.pdf (accessed 30 June 2014) paras 546-562.
- 11 Republic of Mozambique ‘Combined report 1999-2010’ (2012): http://www.achpr.org/files/sessions/55th/state-reports/1-1999-2010/report_initial_and_combined_1999_2010_eng.pdf (accessed 30 June 2014) paras 304-331.
- 12 Republic of Senegal ‘Periodic Report’ (2013): http://www.achpr.org/files/sessions/53rd/state-reports/3rd-2004-2013/periodic_report_2004_2013_eng.pdf (accessed 30 June 2014) para 304.
- 13 Republic of Malawi ‘Report to the African Commission on Human and Peoples’ Rights 1995-2013’ (2013): http://www.achpr.org/files/sessions/14th-ao/state-reports/1-1995-2013/staterep1_malawi_2013_eng.pdf (accessed 30 June 2014) paras 241-243.
- 14 http://www.achpr.org/files/activity-reports/34/achpr53eos13_actrep34_2013_eng.pdf (accessed 30 June 2014) para 20(a)(x) and (xi).
- 15 http://www.achpr.org/files/activity-reports/35/achpr54eos14_actrep35_2014_eng.pdf (accessed 30 June 2014) para 28(a)(v).
- 16 Para 28(b)(vii).

2.3 Resolutions

The Commission firstly adopted a resolution¹⁷ renewing the mandate of the Working Group on Older Persons and People with Disabilities.

It also adopted a resolution aimed at the prevention of attacks and discrimination against persons with albinism.¹⁸ This resolution expressed concern about reports of systematic attacks against persons with albinism, including against women and children, and welcomed the steps taken and efforts made by the countries concerned, including initiating legal action against perpetrators of attacks against persons with albinism and public condemnation of attacks against persons with albinism. It reminds states parties of their obligations under articles 2 and 18(4) of the African Charter and calls upon state parties to, *inter alia*, take effective measures to eliminate all forms of discrimination against persons with albinism, and to increase education and public awareness-raising activities.¹⁹ It requests states parties to include in their reports submitted to the African Commission under article 62 of the Charter information on the situation of persons with albinism (including good practices in protecting and promoting the rights of persons with albinism).²⁰

The Commission has further adopted a resolution on Women's Right to Land and Productive Resources,²¹ which notes that women living with disabilities, amongst others,²² are more affected by marginalisation and calls on states parties to put in place special measures to protect the property rights of women with disabilities.²³

3 Perspective on considerations for an African Protocol on the Rights of Persons with Disabilities

3.1 Background

This subsection provides a personal perspective on the approach being taken to prepare an African human rights instrument on the rights of persons with disabilities.

17 Adopted at the 54th Ordinary Session, November 2013.

18 As above.

19 Para 3.

20 Para 4.

21 Adopted at the 54th Ordinary Session, November 2013.

22 Such as women living in rural areas.

23 Para 6(vi).

The Working Group on Older Persons and People with Disabilities in Africa (the Working Group) was established by the African Commission on Human and Peoples' Rights (the Commission) in accordance with Resolution 143/45 of 2009. The terms of reference of the Working Group include researching and vocalising the rights of persons with disabilities and advising the Commission on the adoption of a Protocol on the Rights of Persons with Disabilities (Disability Protocol).²⁴

The Working Group is chaired by Commissioner Yeung Kam John Yeung Sik Yuen; and presently its members are Commissioner Reine Alapini-Gansou, Commissioner Pansy Tlakula, Commissioner Lawrence Murugu Mute, Dr Tavengwa Machekano Nhongo, Dr Nadia Abdel-Wahab El-Afify, Dr Isabel Anita Gbenisola Aboderin, Mr Kudakwashe Dube and Dr Elly Macha.²⁵

An early initiative by the Working Group to prepare a continental disability rights instrument was unsuccessful on account of a number of reasons. First, there was inadequate consultation with stakeholders. Also, there was a certain amount of conceptual and normative conflation, for example on whether the disability rights instrument should be framed as a charter or a protocol.²⁶

In 2011, the Working Group was expanded to include more experts as well as members with disabilities. Subsequently, the Working Group finalised a concept paper for the Disability Protocol in 2012 and prepared Draft I of the Disability Protocol in 2013. The Working Group adopted Draft II of the Disability Protocol (Draft Protocol) in March 2014 and invited stakeholders' views and reviews.²⁷

24 <http://www.achpr.org/mechanisms/older-disabled/> (accessed 21 May 2014).

The full terms of reference of the Working Group are to:

'(1) hold comprehensive brainstorming sessions to articulate the rights of older persons and people with disabilities;

(2) draft a Concept Paper for consideration by the African Commission that will serve as a basis for the adoption of the Draft Protocol on Ageing and People with Disabilities;

(3) facilitate and expedite comparative research on the various aspects of human rights of older persons and people with disabilities on the continent, including their socio-economic rights;

(4) collect data on older persons and people with disabilities to ensure proper mainstreaming of their rights in the policies and development programmes of Member States;

(5) identify good practices to be replicated in Member States; and

(6) submit a detailed Report to the African Commission at each Ordinary Session.'

25 <http://www.achpr.org/sessions/55th/resolutions/269/> (accessed 10 August 2014).

26 See: Secretariat of the African Decade for Persons with Disabilities 'The Architecture for an African Disability Rights Treaty', available at: african-decade.co.za/.../Architecture_for_an_African_Disability_Rights_... (accessed 22 May 2014).

27 <http://www.achpr.org/news/2014/04/d121> (accessed on 21 May 2014)

3.2 Key considerations

A number of considerations continue to inform the Working Group as it is preparing the Disability Protocol. First, Africa's human rights architecture has evolved steadily to a point where specifically-binding instruments have given recognition to and affirmed the human rights of all the most marginalised groups on the Continent. There are African human rights instruments providing affirmations to the rights and protections for children – the African Charter on the Rights and Welfare of the Child (ACRWC),²⁸ women – the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),²⁹ youth – the African Youth Charter (AYC),³⁰ and internally displaced persons – African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.³¹ Indeed, the Working Group itself in 2012 finalised a draft protocol covering the rights of older persons. The Working Group surmises that Africa's human rights architecture will remain lopsided and incomplete without a human rights instrument affirming or reaffirming the rights of persons with disabilities.

Second, while it is true that some of the above-listed African rights instruments make mention of persons with disabilities, their content is by and large informed by the deficit/medical rather than the social/rights model of disability.³² Furthermore, the rights of persons with disabilities in some of those instruments are made subject to progressive realisation and availability of resources while other rights in those instruments are not similarly treated.³³ It is therefore necessary that the rights of persons with disabilities are set out correctly to conform to the letter and spirit of the Convention on the Rights of Persons with Disabilities (CRPD).

28 African Charter on the Rights and Welfare of the Child, OAU Doc.CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999: <http://caselaw.ihra.org/doc/acrwc/view/> (accessed 8 September 2014).

29 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003: www.achpr.org/instruments/women-protocol/ (accessed 8 September 2014).

30 African Youth Charter, adopted 2 July 2006: http://www.au.int/en/sites/default/files/AFRICAN_YOUTH_CHARTER.pdf (accessed 8 September 2014).

31 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted 22 October 2009: <http://au.int/en/content/african-union-convention-protection-and-assistance-internally-displaced-persons-africa> (accessed 8 September 2014).

32 See Article 13 of the ACRWC which makes reference to 'handicapped children'; Article 23 of the African Women's Protocol which provides for 'special protection of women with disabilities'; and Article 24 of the AYC which makes reference to 'mentally challenged youth'. All these provisions overemphasise special measures at the expense of the overall rights of persons with disabilities.

33 For example, Article 13 of the ACRWC requires states parties to provide appropriate assistance to a disabled child who applies for it subject to availability of resources. States are also required to use their available resources to progressively realise accessibility for persons with disabilities. Significantly, this Charter does not apply the principle of progressive realisation to any of the economic and social rights which it establishes, raising the question why it was found necessary to apply the principle in relation to the rights of children with disabilities.

Third, a far more pragmatic consideration is the reality that African states as well as the bureaucracy of the African Union Commission (AUC) need a home-grown instrument with which to drive the disability rights agenda in Africa. While at least 45 African states have ratified the CRPD³⁴ and 33 African States have ratified its Optional Protocol,³⁵ Africa's recent difficult relationship with the International Criminal Court³⁶ illustrates the unfeasibility of simply assuming that the Continent will pliantly look outwards for the inspiration to protect and promote the rights of its people.

Fourth, though, the Working Group is careful to make the explicit acknowledgement that the CRPD is the novel global standard-bearer on the rights of persons with disabilities. Any new disability rights instrument must not undermine the minimum standard established in the CRPD. Consequently, the Working Group's treatment of key disability concepts such as legal capacity is consistent with the standard established in the CRPD.³⁷

Finally, the Working Group is proceeding on the basis that this Protocol offers a veritable opportunity for raising the bar for the rights of persons with disabilities in Africa by establishing further affirmations and clarifications to tackle Africa's specificities and realities. The Draft Protocol, therefore, covers issues which received no traction in the CRPD despite being of concern in Africa. For example, it provides for:

- (1) Protection of parents, guardians and caregivers from discrimination on the basis of their actual or apparent association with persons with disabilities;³⁸
- (2) Protection of persons with disabilities from harmful practices;³⁹
- (3) Provision for their equal right to hold documents of identity;⁴⁰
- (4) Protection against use of traditional forms of justice to deny persons with disabilities access to appropriate and effective justice;⁴¹
- (5) Calibration of provisions on living in the community to have specific regard for community based rehabilitation services which are a key feature of Africa's approach to disability;⁴²

34 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en (accessed 20 May 2014).

35 As above.

36 Following the 2013 election of an ICC indictee as President of Kenya, the African Union urged its members not to comply or cooperate with the ICC: 'Can the International Criminal Court and the African Union repair relations?' *Africa in focus* 26 December 2013 <http://www.brookings.edu/blogs/africa-in-focus/posts/2013/12/26-international-criminal-court-mbaku> (accessed 21 May 2014).

37 See art 12 of the CRPD and art 7 of the Draft Protocol.

38 Draft Protocol art 3(3).

39 Draft Protocol art 5.

40 Draft Protocol art 7.

41 Draft Protocol art 8(2).

42 Draft art 9(e).

(6) Provision against any presumption that persons with disabilities may be uneducable⁴³ or untrainable;⁴⁴

(7) Clarification that the support required by persons with disabilities to enjoy their legal capacity must respect their rights, will and preferences, and must not amount to substituted decision-making;⁴⁵ and

(8) Unlike the CRPD but in consonance with Africa's human rights standards, the Draft Protocol makes explicit mention that all persons with disabilities too have responsibilities to other individuals, their families and to the community.⁴⁶

An important choice which the Working Group has made is that this disability rights instrument should be framed as a Protocol rather than a Charter. It is essential that the rights of persons with disabilities remain anchored on Africa's flagship human rights instrument, the African Charter, which in article 18(4) provides that: 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs'. It is particularly vital that an artificial wall should not be created between the content of the African Charter and the content of a disability rights instrument. It is even possible that the content of the African Charter will gradually be interpreted to fit the modern conceptual framing on the rights of persons with disabilities to be established in the Protocol. The Draft Protocol hence is intended to be an organic progression from the norms established in the African Charter in the same way that the Maputo Protocol developed from provisions in the African Charter.⁴⁷

Framing this instrument as a Protocol also makes practical sense. A Disability Rights Charter would have required the initiation and execution of a totally new institutional infrastructure to monitor the instrument's implementation; whereas a Protocol would be managed institutionally by the African Commission on Human and Peoples' Rights. A Protocol would offer far more convenience for states parties to fulfil their reporting obligations relating to disability as set out in the Protocol alongside their overall reporting obligations under the Charter. Finally, framing the rights of persons with disabilities in a Protocol linked to the African Commission will not only mean that the Commission's established Communications infrastructure can be deployed immediately to offer redress to victims, but

43 For example in the case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC), it was submitted that the state made no direct provisions to educate children with severe or profound disabilities because they were uneducable and no amount of education would benefit them. Rather, parents would be left to impart life skills to such children.

44 Draft art 11(4).

45 Draft Protocol art 7(b).

46 Draft Protocol art 23.

47 Article 18(3) of the African Charter provides that: 'The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.'

that complainants may also take advantage of the special standing which the African Commission has before the African Court on Human and Peoples' Rights to prosecute human rights cases.

The Working Group continues to be extremely keen on getting feedback on the Draft Protocol. The Draft will in due course be reviewed to take account of feedback, before being presented to the Commission for consideration and adoption. Following that, it will be submitted to the AUC for onward processing including deliberation by African states before its possible adoption by the African Union.

4 Conclusion

The year under review offers optimistic evidence that disability rights are making further inroads into the African regional human rights system, with specific reference to the work of the African Commission. At the same time, it may be said that there are further opportunities that may be explored, for example, a greater integration of disability rights in the work of the Commission's special thematic mechanisms.⁴⁸ The introduction of the draft African Protocol on the Rights of Persons with Disabilities, while not uncontroversial, offers further potential for deepening an understanding of disability rights on the continent.

48 Secretariat of the African Decade of Persons with Disabilities (n 4 above) 33.