

REGIONAL DEVELOPMENTS

RATIFICATION OF THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF PERSONS WITH DISABILITIES IN AFRICA: AN OVERVIEW OF THE IMPLICATIONS

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1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) was adopted on 28 January 2018 and entered into force on 5 July 2024.¹ It is a substantive supplementary document drafted under article 66 of the African Charter on Human and Peoples' Rights (African Charter).² It is designed to promote and protect the rights of persons with disabilities in Africa.³ Its overall purpose is to ensure the full and effective participation and inclusion of persons with disabilities in society.⁴

To date, 17 African countries have ratified the African Disability Protocol.⁵ In most states, ratification is a process that involves the executive and the legislative organs of the government. In others, the judiciary may also have a role to play. Depending on the nature of the

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1 African Union, The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, adopted by the 30th ordinary session of the Assembly, held in Addis Ababa, Ethiopia, on 29 January 2018.

2 Organisation of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter), CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), 27 June 1981 (adopted 1 June 1981, entered into force 21 October 1986).

3 Preamble, African Disability Protocol.

4 As above.

5 Angola, Burundi, Cameroon, Republic of the Congo, Kenya, Mali, Malawi, Mozambique, Namibia, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, South Africa, Uganda, and Zimbabwe. See https://au.int/sites/default/files/treaties/36440-si-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_PERSONS_WITH_DISABILITIES_IN_AFRICA_0.pdf (accessed 14 December 2024).

treaty, the relevant ministerial department initiates a draft request for ratification, which is then discussed in cabinet to determine whether it conforms with the nation's respective constitutional laws and practices. After it has been endorsed by cabinet, it is sent to parliament for adoption. A formal instrument to that effect is then deposited with the African Union (AU) Commission on Human and Peoples' Rights (the African Commission) by the state's ministry in charge of foreign affairs.⁶

The aim of this commentary is to highlight the implications of the ratification of the Protocol. The article has six main sections. Following the introduction, section two provides a brief overview of the history of the African Disability Protocol. Section three examines selected provisions of the Protocol with a view of demonstrating how they compare with the Convention on the Rights of Persons with Disabilities (CRPD),⁷ in terms of enhancing the rights of persons with disabilities in Africa. Section four illustrates some of the main implications of domesticating the African Disability Protocol. Section five examines the challenges and constraints which may underlie the implementation of the Protocol. The last section is the conclusion.

2 Historical background

Efforts to make provision for the human rights of persons with disabilities' rights in Africa can be traced back to the United Nations (UN) Decade on Disabled People, which ended in 1992.⁸ Reflections on the success of this initiative suggested that Africans with disabilities had not benefited from the work done during the ten years.⁹ After much advocacy by disability rights activists, the Labour and Social Affairs Commission of the Organisation of African Unity (OAU) recommended that a decade on disability be declared by the OAU. The recommendation was adopted by the OAU Assembly of Heads of State and Governments in July 1999, and the period between 1999-2009 was declared to be the African Decade for Disabled Persons.¹⁰

The OAU urged all countries to formulate policies and programmes to ensure the full participation and empowerment of persons with disabilities,

6 T Maluwa 'Ratification of African Union treaties by member states: Law, policy and practice' (2012) 13 *Melbourne Journal of International Law* 8.

7 UN General Assembly, Convention on the Rights of Persons with Disabilities: Resolution adopted by the General Assembly, 24 January 2007, UN Doc A/RES/61/106 (2007) (CRPD) adopted on 13 December 2006 (entered into force on 3 May 2008).

8 United Nations Decade of Disabled Persons (1983-1992).

9 D Msipa & P Juma 'The African Disability Protocol: Toward a social and human rights approach to disability in the African human rights system' in MH Rioux et al (eds) *Handbook of disability* (2023) 12.

10 African Decade on the Rights of Disabled Persons, AU Executive Council Resolution EX.CL/477 (XIV), adopted during the 14th ordinary session of the African Heads of State and Government, 26-30 January 2009, Addis Ababa, Ethiopia.

including developing legislation to promote equality and to prohibit discrimination. In May 2003, the AU Ministerial Conference on Human Rights in Africa was held in Kigali, Rwanda, and it encouraged African states to develop a Protocol on the protection of the rights of persons with disabilities and the elderly.¹¹

3 Comparison between the provisions of the African Disability Protocol and the CRPD

When the African Disability Protocol was drafted and adopted in 2018, the CRPD had already entered into force and garnered a substantial number of ratifications in Africa.¹² The CRPD is the principal global legal instrument for the protection of persons with disabilities. However, in spite of its progressive and comprehensive approach, the CRPD does not fully capture unmet needs of African's with disabilities.

The African Disability Protocol speaks more fully to the circumstances of the African people.¹³ An important example is its attempt to resolve conflicts between traditional and customary laws and practices and how they affect persons with disabilities.¹⁴ The Protocol requires states to modify, outlaw, criminalise or campaign against any harmful practices applied to persons with disabilities.¹⁵ Such cultural practices include those attitudes and practices based on tradition, culture, religion, superstition or other reasons, which negatively affect the human rights and fundamental freedoms of persons with disabilities.¹⁶ Matters of HIV/AIDS as well as poverty that have a significant impact on the enjoyment of human rights and fundamental freedoms by persons with disabilities have also been addressed by the Protocol.¹⁷

The African Disability Protocol has addressed the contextual gap in the CRPD by extending and reformulating rights under the CRPD so as to suit the African context. It addresses issues such as: ritual killings (article 1); youth with disabilities (article 29); older persons with disabilities (article 30); persons with disabilities as duty bearers (article 31); definition of deaf culture (article 1); the role of the family, caregivers, and community (article 25); and also includes marginalised groups such as persons with

11 Para 20, Kigali declaration, MIN/CONF/HRA/Decl.1(I), adopted by the First AU Ministerial Conference on Human Rights in Africa on 8 May 2003.

12 Entered into force on 3 May 2008.

13 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.

14 Art 11(1), African Disability Protocol.

15 Art 4(d), African Disability Protocol.

16 Art 1, African Disability Protocol.

17 Preamble, African Disability Protocol.

albinism. Certain rights such as the right of access to justice have been extended to include customary law forms of justice (article 13(2)).

4 Implications of ratification of the African Disability Protocol for the African region

Domestic enforcement is one of the most effective means of implementing treaty obligations.¹⁸ The African Disability Protocol can play multiple roles, including ensuring legislative reform as well as policy formulation. The Protocol has an important role in overriding any inconsistent provisions in laws.

The principles and standards under the African Disability Protocol are supposed to supplement domestic law and enhance good governance.¹⁹ Where domestic law is poor or where a country is incapable of adequately protecting human rights of persons with disabilities, the Protocol's norms may be used to replace deficient domestic laws or complement them. Several pieces of legislation may have to be amended or adopted after ratification in order to take into account the rights of persons with disabilities. Some of the existing rights may have to be consolidated while others reinforced so as to eliminate disability inequality, institutionalise political equality, and enhance greater involvement of persons with disabilities in decision-making processes.²⁰

Another implication of the ratification of the African Disability Protocol is that it may lead to a rise in the number of cases that make use of the provisions of the Protocol. The entry into force of the African Disability Protocol has provided African judges with a greater panoply of texts that can serve as a basis for jurisdictional decisions. It will provide them with precise insights into the understanding of disability rights and ensure better protection of the rights of Africans with disabilities. Moreover, in the application of these provisions, the national judge will have the possibility of proceeding by comparative approach since the provisions of the African Disability Protocol will also be applied by the national courts of the other member states who are parties to the treaty.

Presently, the African human rights system is being underused by both domestic and regional judicial and quasi-judicial institutions when it comes to the advancement of disability rights in Africa. This is evident when one considers the fact that there is only one communication

18 OA Hathaway 'Between power and principle: An integrated theory of international law' (2005) 72 *University of Chicago Law Review* 497.

19 Preamble, African Disability Protocol.

20 Arts 7 & 22, African Disability Protocol.

involving disability that has been brought before the African Commission – *Purohit and Moore v The Gambia*.²¹ Since the African Disability Protocol covers both civil and political as well as economic, social and cultural rights, there is potential of it giving rise to a diversity of thematic issues for which its provisions are invoked in courts in Africa. The African Disability Protocol has the potential of enhancing the ability of magistrates and judges to recognise and protect the human rights and improve the living standard of citizens with disabilities who have historically faced marginalisation on the continent.

The African Disability Protocol also has the potential of influencing the two critical African Union institutions in Africa. These are the African Commission and the African Court on Human and Peoples' Rights (the African Court). These organs are of critical importance to the promotion and the protection of the rights of persons with disabilities. The instrument has the potential of spurring collaborations within the organs, including the African Committee of Experts on the Rights and Welfare of the Child (African Committee). The treaty serves as a point of reference for the African Commission, both within its promotion and protection mandates, which may be done through concluding observations, general comments and resolutions.

The adoption of general comments will provide interpretive guidance on the obligations of state parties towards promoting the domestication and implementation of some of the provisions of the African Disability Protocol. General comments may address both general and specific obligations. For example, they may require states parties to adopt laws, policies and programmes guaranteeing the fulfilment of the sexual and reproductive rights of women with disabilities, including the allocation of sufficient and available financial resources for the full realisation of those rights.

The role of the African Disability Protocol may also extend to the United Nations (UN) human rights system, especially within the CRPD Committee, whose role is to monitor the implementation of the CRPD. The provisions of the African Disability Protocol are predicated on the functional and normative complementarity of institutional mechanisms.²² Thus, for example, article 33(a) of the Protocol enjoins the state parties to cooperate at the international, continental, sub-regional, and bilateral levels on capacity-building on issues of persons with disabilities. African states who have ratified the instrument are obliged to take measures to the maximum of their available resources and, where needed, within the framework of international cooperation, with a view to achieving

21 *Purohit and Moore v The Gambia* (2003) AHRLR 96.

22 Pan African Lawyers Union (PALU) *Guide to complementarity within the African human rights system* (2014).

progressively the full realisation of all rights including the socio-economic rights of persons with disabilities in the region.

Overall, the African Disability Protocol's norms guarantee changes in the public opinion towards the rights of persons with disabilities.²³ It has the potential of making a significant contribution to redressing the profound socio-economic disadvantages of persons with disabilities in Africa and promoting their participation, not only in the socio-economic sphere, but also in civil and political life, with equal opportunities for everyone. Citizens of ratifying states expect government officials to respect what they have signed.²⁴ This shift in attitude of the population regarding human rights norms of persons with disabilities is bound to encourage Organisations of Persons with Disabilities (OPDs) to advocate for compliance and courts to ensure compliance with the codified norm.²⁵

5 Challenges in implementation of the African Disability Protocol at the domestic level

Despite the comprehensive scope of the African Disability Protocol, there are some challenges that may impede effective implementation and enforcement of its norms. I highlight only four: non-compliance with state party reporting obligations; non-compliance by states parties with the recommendations of the African Commission; reservations; and lack of political will.

According to article 34(1) of the African Disability Protocol, states parties are required to allow inspection of their observance of the Protocol through the regular submission of state reports to be examined by the African Commission. However, and in spite of this provision, both non-reporting and the late submission of reports remain a significant problem in Africa.²⁶ This makes failure to report and minimal compliance with the recommendations of the African Commission a foreseeable challenge when it comes to the implementation of the African Disability Protocol. Under international law, a treaty generally binds only those states that have consented to be bound by its terms. Such consent is commonly expressed through ratification or accession.²⁷ Once the ratification process is complete states parties will have an obligation to submit periodic reports

23 BA Simmons *Mobilizing for human rights: International law in domestic politics* (2009) 80-81.

24 Simmons (n 23) 135.

25 Simmons (n 23) 129-130.

26 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington & Lee Journal of Civil Rights & Social Justice* 35.

27 According to art 2(1)(b) of the United Nations, Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol 1155, p 331, 23 May 1969, '[r]atification' is when 'a State establishes on the international plane its consent to be bound by a treaty'.

on measures taken, progress made and challenges encountered in the implementation of the rights and obligations enshrined in the African Disability Protocol.²⁸ At the time of writing this article, none of the state parties reports under the Protocol were overdue. However, in the past many states parties have been tardy in their compliance with reporting obligations. Apart from that, many countries have failed to implement concluding observations and recommendations of, for example, the African Children's Committee and the African Commission.²⁹

Some states may argue that the provisions of the African Disability Protocol are at odds with their domestic laws. For this reason, they may be against not only the ratification but also implementation of the Protocol. The situation may lead to entry of reservations by some of the member states. This has happened in the past especially with regards to provisions concerning women, family and social relations which were contrary to the then existing customs and practices of certain African nations.³⁰ Article 39 of the African Disability Protocol expressly provides for reservations. The latter limit the application of the treaty in relation to the state concerned.³¹ They are recognised in treaty-making processes and are often used so as to enable as many state parties as possible to ratify the treaties in question.³² According to article 19 of the Vienna Convention, any reservations made to any treaty must be compatible with the object and purpose of that treaty.³³ However, the experience in Africa is that when reservations are made to a treaty, they tend to weaken the objective(s) of the particular treaty.³⁴ In this case, reservations that for example, preclude the application of provisions concerning women with disabilities and social relations on account that they are contrary to existing customs and practices may undermine efforts of advancing the promotion and protection of disability rights in Africa.

Other factors that may inhibit the implementation process of the African Disability Protocol include financial incapacity and corruption. Poverty, ignorance and lack of awareness of the Protocol and its mechanisms, as well as insufficient political commitment may also impede negatively on the positive impact of the African Disability Protocol and activities of the African Commission in states parties. The persistence of these obstacles may as a result, lead to the non-harmonisation of the provisions of the treaty with domestic law in the countries which have

28 Art 34, African Disability Protocol.

29 A Olaborede & C Lumina 'The normative complementarity of the African Children's Charter and the African Women's Protocol in the context of efforts to combat child marriage' (2017) 31 *Speculum Juris* 58.

30 Viljoen (n 26) 48-49.

31 JD Mujuzi 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's reservation and interpretative declarations' (2008) *Law, Democracy and Development* 46.

32 Mujuzi (n 31) 46-47.

33 Vienna Convention on the Laws of Treaties.

34 Mujuzi (n 31) 47-49.

ratified the Protocol. Many political and civil society actors will be required to solve these challenges by conducting sensitisation campaigns that are geared towards ensuring the respect for disability rights in particular. Such actions are bound to enhance the impact of the African Disability Protocol among the states parties.

6 Conclusion

The African Disability Protocol should certainly be commended for its role in furthering the protection of the human rights of persons with disabilities in Africa. Through its adoption and enforcement, Africa is on the verge of witnessing the enactment and implementation of innovative laws, policies and other institutional mechanisms at a national level geared towards advancing the human rights of persons with disabilities. While these prospects are commendable, a number of countries will confront several challenges in ensuring its application. The slow pace of implementation of African human rights instruments in the past underscores the need for more effective domestication mechanisms that go beyond mere general exhortations. The AU should be more involved in encouraging the implementation of the African Disabilities Protocol. State parties are also encouraged to collaborate with civil society organisations, such as OPDs, in the implementation process.