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# REGIONAL DEVELOPMENTS

## DISABILITY RIGHTS IN THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM DURING 2011 AND 2012

*Helene Combrinck\**

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### **An overview**

*One of the remarkable consequences of the introduction of the Convention on the Rights of Persons with Disabilities (CRPD) is that it is already making its influence felt in most parts of the international human rights system.<sup>1</sup> This is certainly true of the African region, where the impact of the Convention is already discernible even within its relatively short existence. This appears inter alia from the emergence of an increasingly in-depth scholarly analysis (reflected in Section A)<sup>2</sup> and the progress towards domestic implementation level as documented in Section B.*

*In this Section, developments in the African human rights system<sup>3</sup> during the period 2011 to 2012 are outlined. H Combrinck first examines the African regional system generally, and then L Wakefield looks at the specialised treaty adopted in respect of children's rights, namely the African Charter on the Rights and Welfare of the Child. The Section finally reports on the position in three sub-regional economic communities, namely the East Africa Community, Southern African Development Community and the Economic Community of West African States, with contributions by N Murungi, A Mandlate and B Armah respectively.*

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1 One example is the work of the UN Committee on the Rights of the Child: Byrne demonstrates how the CRPD has pervaded the approach of this Committee to the interpretation of art 23 of the Convention on the Rights of the Child, with specific reference to the right to education. See B Byrne 'Hidden contradictions and conditionality: Conceptualisations of inclusive education in international human rights law' (2013) 28 *Disability & Society* 241.

2 It may be argued that the recent establishment of academic programmes specialising in disability rights, including those offered by the Centre for Disability Law and Policy at the University of the Western Cape and the disability rights modules developed under the auspices of the Centre for Human Rights at Pretoria University have been instrumental in this regard.

3 The term 'African human rights system' has been described as the 'architecture of norms and institutions comprised in the core pan-continental human rights treaties adopted under the Organisation of African Unity or African Union' – Secretariat of the African Decade of Persons with Disabilities *The Architecture for an African Disability Rights Mechanism* (2011) 20. This meaning is also adopted here.

*The main aim of this Section is to give an update on recent events in the African region.<sup>4</sup> However, in order to establish a 'baseline' for purposes of future editions, a brief contextualisation is provided in order to locate disability rights in the broader African rights regime. In each subsection outlined above, the authors therefore briefly track the development of 'norm acceptance' in respect of disability rights<sup>5</sup> and also look at the institutional arrangements for norm enforcement.*

## 1 Introduction

The history of disability rights at the African continental level has been described as (at best) one of 'benign neglect'.<sup>6</sup> However, as noted, there have also been a number of significant shifts in this dispensation. In order to understand the current position, this subsection commences with an overview of the foundational framework, with specific reference to the African Charter on Human and Peoples' Rights (the African Charter),<sup>7</sup> and looks at the implementation mechanism for this framework. It then examines recent events, with an emphasis on the debates regarding the need for a new, 'uniquely African' human rights instrument.

## 2 The normative framework

The gradual acknowledgment of disability rights in the African human rights system should be seen against the background of two parallel historical trajectories. On the one hand, there was the growing recognition internationally of disability as a compelling human rights concern; on the other, the slow shift of the Organisation of African Unity (OAU) towards a human rights orientation.<sup>8</sup> Considering that the African Charter was drafted and adopted at the beginning of the 1980s, this historical perspective assists towards understanding why this foundational

4 In certain instances, it is necessary to go further back than 2011 in order to provide a clear sense of context.

5 For a helpful discussion of the notions of 'norm acceptance' and 'norm implementation' see CH Heyns & F Viljoen 'The regional protection of human rights in Africa: An overview' in PT Zeleza & PJ McConaughay (eds) *Human rights, the rule of law, and development in Africa* (2004) 129-143. These concepts are utilised for purposes of this section.

6 TP van Reenen & H Combrinck 'The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 years' *SUR International Journal on Human Rights* (2011) 14-153.

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

8 See 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) 56-57, where these two historical paths are tracked.

document contains limited references to disability,<sup>9</sup> it also explains certain subsequent events, as appears below.

While the Charter must be read in its entirety, two of its provisions are of interest here. These are article 2 (the prohibition of discrimination) and article 18(4), which provides that the aged and the disabled have the right to 'special measures of protection' in keeping with their physical or moral needs.

Although article 2 does not explicitly include disability as one of the 'listed' grounds,<sup>10</sup> the phrase 'or other status' implies that this is not a closed list. Disability-based discrimination can therefore be read in by analogy.<sup>11</sup> Article 18(4), on the other hand, has been regarded as more problematic and has (correctly) been subjected to criticism, most notably for being 'vague and unclear'<sup>12</sup> and for conflating the rights of the aged with those of persons with disabilities.<sup>13</sup>

In the period following the adoption of the African Charter, disability rights began to slowly trickle into the regional system. For example, in 1985, the OAU adopted the Agreement for the Establishment of the African Rehabilitation Institute (ARI). The objectives of the ARI included 'manpower development'<sup>14</sup> and had a strong emphasis on rehabilitation. A further development was the adoption of the African Charter on the Rights and Welfare of the Child in 1990, with a specific article dedicated to the rights of children with disabilities.<sup>15</sup>

- 9 At the international level, the conceptual and philosophical shift from a medical or welfare approach to disability to the social model had begun to materialise in the adoption of two Declarations on the Rights of People with Disabilities during the 1970's (the Declaration on the Rights of Mentally Retarded Persons in 1971 and the Declaration on the Rights of Disabled Persons in 1975 respectively) and would also result in the adoption of the World Programme of Action concerning Disabled Persons in 1982. However, at the time this shift was by no means 'systemically' entrenched. See G Quinn & T Degener *Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 30.
- 10 'Every individual is entitled to enjoy the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.' (Emphasis added).
- 11 This view was expressed by the African Commission on Human and Peoples' Rights in the communication brought before it in *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003). For further discussion see Biegon (n 8 above) 70-71; SA 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* 219 237.
- 12 Kamga (n 11 above) 238.
- 13 Secretariat of the African Decade of Persons with Disabilities (note 3 above) 5. It could be argued that this commingling has in recent years held back the development of both sets of rights – see the discussion below.
- 14 The ARI was established with the technical assistance of the International Labour Organisation.
- 15 Art 13. See also the commentary in this section Lorenzo Wakefield on 'Making progress: The African Committee of Experts of the Rights and Welfare of the Child and the rights of children with Disabilities'.

Biegon notes that the end of the UN Decade of Persons with Disabilities (1983-1992) coincided with the rise of democratisation across the continent in the 1990s that brought with it a more 'favourable environment for the agitation of respect for and protection of human rights'.<sup>16</sup> This was reflected in the Grand Bay (Mauritius) Declaration and Plan of Action, adopted by the OAU Ministerial Conference on Human Rights in Africa in April 1999.<sup>17</sup> This Declaration notes that the rights of people with disabilities and people living with HIV/AIDS, in particular women and children, are not always observed and urges all African states to work towards ensuring the full respect of these rights.<sup>18</sup> Significantly, in July 1999, the OAU Heads of State and Government adopted a resolution declaring the period 1999-2009 as the African Decade of Persons with Disabilities.<sup>19</sup>

In 2000, with the adoption of the Constitutive Act<sup>20</sup> of the African Union (AU), and the transition from the OAU to the AU, the move towards a human rights mandate for the regional body was formalised. This Act leaves no doubt about the human rights focus of the AU.<sup>21</sup> This shift in emphasis also saw an acceleration in the endorsement of disability rights in the African system. For instance, the first AU Ministerial Conference on Human Rights in Africa, held in Kigali in May 2003, adopted a Declaration that included specific reference to persons with disabilities (among other concerns).<sup>22</sup> Noting 'the plight of the vulnerable groups including persons with disability in general', delegates called upon member states 'to develop a Protocol on the protection of the rights of people with disabilities and the elderly'.

It is notable that the main African instruments adopted since 2000, specifically the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),<sup>23</sup> the African Youth Charter,<sup>24</sup> the African Charter on Democracy, and

16 n 8 above, 58.

17 Grand Bay (Mauritius) Declaration and Plan of Action CONF/HRA/DECL (I), adopted by the OAU Ministerial Conference on Human Rights in Africa, meeting from 12-16 April 1999 in Grand Bay, Mauritius.

18 Art 7.

19 OAU Council of Ministers and the Assembly of State and Government in July 2000 in Lome, Togo. This was 'renewed' when the AU declared 2010-2019 as the second African Decade on the Rights of Disabled Persons.

20 AU Constitutive Act adopted in Lome, Togo, 11 July 2000 and entered into force 26 May 2001.

21 See eg article 3(h), which states that one of the objectives of the AU is to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.

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

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

24 Adopted on 2 July 2006 in Banjul, The Gambia and entered into force on 8 August 2009.

Elections and Governance<sup>25</sup> and AU Convention for the Protection and Assistance of Internally Displaced Persons<sup>26</sup> all contain disability-related provisions. While these provisions have attracted some criticism in respect of their limited scope and occasionally unwieldy formulation,<sup>27</sup> they do provide 'an evolving convergence as to the standards to be achieved'<sup>28</sup> by states in respect of the promotion and protection of disability rights in Africa.

### 3 Institutions

The African Charter makes provision for the following mechanisms to monitor its implementation: state reporting; a communications procedure; and a judicial procedure. In the case of the former two, state reports and communications are received by the African Commission on Human and Peoples' Rights (the African Commission). For the judicial procedure, the relevant institution is the African Court on Human and Peoples' Rights. To date, the African Commission has examined only one disability-related communication. Biegon further observes correctly that disability has been conspicuously absent from both the Commission's thematic resolutions and state reports submitted to the Commission.<sup>29</sup> For the judicial procedure, the relevant institution is the African Court on Human and Peoples' Rights, although at the time of writing no cases relating to disability have served before the court.<sup>30</sup>

It is not entirely implausible that the African Commission's first dedicated efforts on disability rights in 2009 may have been inspired by the CRPD coming into force in 2008, given that it had not previously made attempts to act on the 2003 Kigali Declaration. In May 2009, the Commission expanded its pre-existing 'Focal Point on the Rights of Older Persons in Africa' to also include people with disabilities. This initiative is discussed below.

It is encouraging to note that certain of the AU's organs have now also assumed responsibility for the promotion of disability rights. For example, the Pan-African Parliament (potentially) deals with disability issues

25 Adopted on 30 January 2007 and entered into force on 16 September 2013.

26 Adopted on 23 October 2009 and entered into force on 27 January 2013.

27 See eg Van Reenen & Combrinck (n 6 above) 142; Kamga (n 11 above) 240-244.

28 This term was employed by the European Court of Human Rights in a different context but is also apposite here – *MC v Bulgaria Application* 40 EHRR 20.

29 Biegon (n 8 above) 69-70.

30 The current status of the African Court can best be summarised as 'all dressed up and nowhere to go'. Having largely overcome its initial logistic problems, the African Court is now being held back by the reluctance on the part of states to ratify the Protocol establishing the Court and to make the Declaration allowing individuals and NGOs to submit cases directly to the Court. For a more detailed discussion of the *status quo*, see M Killander & AK Abebe 'Human rights developments in the African Union during 2010 and 2011' (2012) 12 *African Human Rights Law Journal* 199 213-216.

through its Committee on Gender, Family, Youth and People with Disabilities.<sup>31</sup>

In November 2012, the third Session of the AU Conference of Ministers of Social Development adopted the theme of 'promoting the rights and welfare of persons with disabilities'.<sup>32</sup> Under this banner, delegates examined a number of disability-related reports, including the Reviewed Continental Plan of Action on the African Decade of Persons with Disabilities (2010-2019); the Draft African Union Disability Architecture (AUDA); a report on the restructuring of the African Rehabilitation Institute (ARI); and the proposed Protocol on the Rights of Persons with Disabilities.<sup>33</sup>

#### 4 Recent developments

As noted above, the Kigali Declaration of 2003 called on Member States to develop a Protocol (to the African Charter) with the purpose of protecting the rights of persons with disabilities and the elderly. The African Commission subsequently appointed a 'Focal Point on the Rights of Older Persons in Africa' in November 2007.<sup>34</sup> In order to remedy the omission of people with disabilities, the Focal Point was expanded in 2009 to become a 'Working Group on the Rights of Older Persons and People with Disabilities in Africa'.<sup>35</sup> The five-member Working Group was mandated *inter alia* to draft a concept paper for consideration by the African Commission that would serve as the basis for the adoption of a Draft Protocol on Ageing and People with Disabilities.

Members of the Working Group attended an Expert Seminar on the Rights of Older Persons and People with Disabilities in Accra, Ghana from 26-28 August 2009. While the objective of the seminar was to initiate the drafting of a (single) Protocol on the Rights of Older Persons and People with Disabilities in Africa, two distinct documents emerged from the event. The first draft Protocol, which related to 'Older Persons', enjoyed further consultation and was later submitted to the African Commission

31 Biegon cautions that anything concrete is yet to emanate from this Committee (n 8 above) 61.

32 Some critics may question the concurrent use of the notions 'rights and welfare' of people with disabilities.

33 Third Session of the African Union Conference of Ministers of Social Development, held in Addis Ababa, Ethiopia, 26-30 November 2012, CAMSD/MIN/Rpt(III) para 24 (Report of session).

34 Res 118: (XXXXII 07), adopted at 42nd Ordinary Session of ACHPR held in Brazzaville, Congo, 15-28 November 2007.

35 Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa, ACHPR/Res143 (XXXXV) 09, adopted at 45th Ordinary session of ACHPR held in Banjul, Gambia 13-27 May 2009.

for consideration.<sup>36</sup> The second product of the Expert Seminar, relating to persons with disabilities, had a far stormier course ahead.

This document, known as the 'Accra Draft', has been criticised for having been developed without the participation of persons with disabilities; at a time when the principle of 'nothing about us without us' is finally gaining recognition in human rights discourse, through the CRPD and its emphasis on participation, this omission in itself should have been sufficient to sink the Accra Draft before it even set sail. Second, as Kamga points out, the Accra Draft presented a diluted version of international standards, most notably the CRPD, without adequately – if at all – introducing an 'Africa-specific' perspective;<sup>37</sup> that was the *raison d'être* for a supplementary regional instrument. It is therefore hardly surprising that the Accra Draft was in 2011 'put on hold' for further reflection.<sup>38</sup>

At its 49th Ordinary session,<sup>39</sup> the African Commission reconstituted the Working Group to include three new members to bring expertise on disability.<sup>40</sup> The Working Group subsequently resolved to develop a concept note on the desirability of a Protocol; the completed concept note on the Rights of Persons with Disabilities in Africa and its deliberations on this note persuaded the Working Group in 2012 that such a Protocol is indeed needed.<sup>41</sup>

Significantly, the Third Session of Ministers of Social Development resolved at its November 2012 meeting that the Working Group should finalise the drafting of the Protocol on the Rights of Persons for adoption in 2014. The draft Protocol should be circulated to Member States and persons with disabilities should be consulted in the drafting of the Protocol. The Protocol should be presented for discussion by the next session of the AU Conference of Ministers of Social Development (scheduled for 2014).

The debates about the adoption of an 'African Disability Protocol' have thus now to some degree been settled, at least in respect of whether it is regarded as needed by the Working Group.<sup>42</sup> Questions remain on the

36 At the time of writing, it awaits consideration by the African Union Commission.

37 Kamga (n 11 above) 224.

38 49th Ordinary Session ACHPR held in Banjul, Gambia 26 April-12 May 2011.

39 49th Ordinary session of ACHPR held in Banjul, Gambia 26 April-12 May 2011.

40 Dr AIG Aboderin, Mr AK Dube and Mr Lawrence Mute.

41 See Commissioner YKJ Yeung Sik Yuen 'Intersession Activity Report' (13 April 2012) <http://www.achpr.org/sessions/51st/intersession-activity-reports/older-disabled> (accessed 20 September 2013); Commissioner YKJ Yeung Sik Yuen 'Report of the Chairperson of the Working Group on the Rights of Older Persons and People with Disabilities in Africa' presented during the 52nd Ordinary Session of the ACHRPR in held in Yamoussoukro, Cote d'Ivoire, 9 - 22 October 2012, para 8.

42 As endorsed by the Ministers of Social Development (above). While this is not the view of the author, an analytical discussion is beyond the scope and purpose of this section.

form such an instrument should take.<sup>43</sup> Among the alternatives proposed have been a new, separate African-specific treaty on the rights of persons with disabilities, with a new treaty body; alternatively, that a new set of treaty standards should be adopted, but without establishing a treaty body, which would be akin to the African Women's Protocol.<sup>44</sup> Whether the maxim 'from Africa always something new'<sup>45</sup> will be applicable to the African Disability Protocol remains to be seen.

It has also been proposed that the existing potential of the African human rights system to realise the rights of people with disabilities should be explored more fully. This may, for example, entail the adoption by the African Commission of thematic resolutions that could act as guidelines to the interpretation of the African Charter.<sup>46</sup> This could supplement an African Disability Protocol, especially while the drafting of the latter remains underway. The proposal has considerable merit and should be further explored by disability rights advocates.

43 A comprehensive discussion of the background and a consideration of the different options is provided in Secretariat of the African Decade on Persons with Disabilities (n 3 above) 5-47. Kamga takes this one step further by providing a thought-provoking argument for the adoption of a Protocol to the African Charter – see Kamga (n 11 above) 235-249.

44 See Secretariat of the African Decade on Persons with Disabilities (n 3 above) 36-45. One may assume that such a Protocol would be subject to the same limitations in norm enforcement as the Women's Protocol.

45 The original Latin phrase '*semper aliquid novi Africa affert*' is ascribed to Pliny the Elder.

46 See Secretariat of the African Decade on Persons with Disabilities (n 3 above) 32-35.