

REGIONAL DEVELOPMENTS

THE RIGHT TO AN ADEQUATE STANDARD OF LIVING IN THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF PERSONS WITH DISABILITIES IN AFRICA

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1 Introduction

The Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) was adopted by the African Union (AU) on 29 January 2018.¹ The primary purpose of this instrument is to 'promote, protect and ensure the full and equal enjoyment of all human and people's rights by all persons with disabilities' on the African continent.² The Protocol is thus potentially an important step forward in the achievement of equal rights by persons with disabilities in Africa.

Although not yet in operation, the African Disability Protocol stands alongside the United Nations Convention on the Rights of Persons with Disabilities (CRPD)³ in setting out human-rights standards in respect of persons with disabilities in the African region. While there are clear differences in emphasis between the two instruments, several commonalities may also be noted. One of these areas of overlap is the inclusion of the right to an adequate standard of living, set out in article 28 of the CRPD and article 20 of the African Disability Protocol respectively. Both of these documents guarantee the recognition of this right and require of states parties to take positive steps towards its realisation. The fulfilment

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1 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, adopted on 29 January 2018 <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa> (accessed 3 September 2019). The Protocol was adopted in terms of art 66 of the African Charter on Human and Peoples' Rights (African Charter), which allows for the acceptance of additional protocols to supplement its provisions.

2 Art 2 African Disability Protocol.

3 GA Res A/RES/61/06, adopted on 13 December 2006, entered into force on 3 May 2008.

of this right takes on particular urgency in the African context, where the living standard of persons with disabilities is often reported to be dismal⁴ – a function of the disproportionately limited access to education, employment and other means of support they experience. In order to assess and compare the potential of the two human-rights instruments to address the current situation, this commentary accordingly compares the scope and content of the provisions relating to the right to an adequate standard of living and examines the obligations imposed by each instrument on states. It then provides an overview of the implementation mechanisms of the African Disability Protocol, followed by a number of conclusions.

2 General obligations of states parties

Both the CRPD and the African Disability Protocol impose general obligations on states parties related to the rights of persons with disabilities. The CRPD provides that:

States Parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.⁵

Thereafter, article 4 lists a number of ways in which this full realisation of human rights and fundamental rights should be achieved, inter alia through the adoption of legislative measures to recognise the rights of persons with disabilities,⁶ the abolition of discriminatory laws and policies,⁷ and the development of universally designed goods, services, equipment and facilities for use by persons with disabilities.⁸

The African Disability Protocol in turn enjoins states parties to:

[T]ake appropriate and effective measures, including policy, legislative, administrative, institutional and budgetary steps, to ensure, respect, promote, protect and fulfil the rights and dignity of persons with disabilities, without discrimination on the basis of disability.⁹

Further, article 4 of the Protocol also confirms that states parties must take steps to mainstream disability in legislation and policy,¹⁰ abolish

4 See in this regard eg LO Oyaro 'Africa at crossroads: The United Nations Convention on the Rights of Persons with Disabilities' (2015) 30 *American University International Law Review* 347 352-353.

5 Art 4 CRPD.

6 Art 4(1)(a) CRPD.

7 Art 4(1)(b) CRPD.

8 Art 4(1)(f) CRPD.

9 Art 4 African Disability Protocol.

10 Art 4(b) African Disability Protocol.

discriminatory policies and laws¹¹ and criminalise and campaign against harmful practices against persons with disabilities.¹²

On a first reading, these general ‘operational’ obligations appear very similar. Upon closer inspection, the inclusion of certain steps to be taken by states parties in the African Disability Protocol shows a clear intent to contextualise the realisation of the rights of persons with disabilities on the African continent.¹³ For example, it explicitly mentions that states parties must take budgetary steps to ensure the full implementation of the Protocol,¹⁴ whereas the CRPD does not make express mention of such a requirement. Many countries in Africa do not prioritise spending on socio-economic issues, which makes the duty to allocate resources to the implementation of the Protocol particularly significant.¹⁵

This difference in emphasis is the first of many examples where the language between the two instruments differ in subtle, yet important ways. The African Disability Protocol has been drafted bearing in mind the unique experience of persons with disabilities on the African continent¹⁶ and therefore locates certain rights in this context to a greater extent than the CRPD does.¹⁷

11 Art 4(c) African Disability Protocol.

12 Art 4(d) African Disability Protocol.

13 For a helpful overview of the drafting history of the Protocol, see LM Mute & E Kalekye ‘An appraisal of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa’ (2016) *East African Law Journal* 68 70-76.

14 Art 4 African Disability Protocol.

15 A Odusola et al (eds) *Income inequality trends in Sub-Saharan Africa* (2017) 179.

16 This is evident from the Preamble to the Protocol, which makes reference to ‘the lack of a substantive binding African normative and institutional framework for ensuring, protecting, and promoting the rights of persons with disabilities’ and the need to establish such a framework through the African Union.

17 Examples include: the recognition in the Preamble of the maiming or killing of persons with albinism as a worrying phenomenon on the continent; the definitions of ‘harmful practices’ and ‘ritual killings’ are to be read with art 11, which addresses the duties of states parties in respect of eradication of harmful practices committed against persons with disabilities; and the undertaking to protect (amongst others) closely related family members, children and caregivers against discrimination based on their association with persons with disabilities (art 5(2)(c) Protocol).

3 The right to an adequate standard of living

3.1 Interpreting the provisions of the African Disability Protocol and the CRPD

As noted above, the right to an adequate standard of living of persons with disabilities is provided for in article 20 of the African Disability Protocol and article 28 of the CRPD respectively.

Article 20(1) provides that:

Persons with disabilities have the right to an adequate standard of living for themselves and their families, including adequate food, access to safe drinking water, housing, sanitation and clothing, to the continuous improvement of living conditions and to social protection.

It thus confirms the rights to an adequate standard of living and the related right to social protection. It also provides some insight as to the scope and content of the right to an adequate standard of living by listing certain components of this right, such as housing, adequate food and access to safe drinking water.

Article 28(1) of the CRPD sets out the following:

States Parties recognise the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realisation of this right without discrimination on the basis of disability.

The proper implementation of the right to an adequate standard of living may contribute towards persons with disabilities participating in society fully and equally with other people on a daily basis.¹⁸ In terms of the obligations created by article 28(1) of the CRPD, this means that states parties have a duty to ensure that persons with disabilities are provided with access to the means to ensure such full and equal participation. In doing so, states parties must make use of the measures listed in article 4 as discussed above. Similarly, article 20(1) of the African Disability Protocol attempts to ensure proper emphasis on the right to an adequate standard of living of persons with disabilities by incorporating specific obligations that are complemented by the general ones set out in article 4.

18 Icelandic Human Rights Centre 'The right to an adequate standard of living' <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-an-adequate-standard-of-living> (accessed 3 September 2019).

Article 20(1) provides that an adequate standard of living *inter alia* includes access to safe drinking water and sanitation. In this regard, the African Disability Protocol provides more information on what is required, since the CRPD provides only for the access to clean water services by persons with disabilities.¹⁹ The express inclusion of these two elements, which have historically proved to be socially and politically critical,²⁰ reminds us that many persons with disabilities in Africa do not yet have access to these basic necessities (which may not be as urgent a priority in so-called 'developed' countries that are states parties to the CRPD).²¹ Access to safe drinking water and sanitation should therefore be emphasised in the 'continuous improvement of living conditions' of persons with disabilities in Africa.²²

The interpretation of the phrase 'adequate standard of living' leads to two questions: what is adequate and which elements are essential for a living standard to be regarded as adequate? In ensuring such an adequate standard of living, states parties may be expected to provide persons with disabilities with access to a range of goods and services.²³ However, it is clear that an adequate standard of living consists of more than simply having access to the necessities specifically mentioned in this article. The realisation of the right to an adequate standard of living therefore demands more from states parties than merely making these requirements available.²⁴ An exact list of the necessities contributing to the achievement of an adequate standard of living for persons with disabilities cannot readily be compiled, because the right is highly subjective and what is required must be determined on a case-by-case basis.²⁵ However, it is argued here that certain goods and services, namely those expressly enumerated in article 20(1), can clearly be considered part of the right to an adequate standard of living for persons with disabilities. This list should therefore not be seen as an exhaustive one, but rather as a guideline for the provision of certain minimum necessities. In terms of what can be considered 'adequate', this can only be determined on a case-by-case basis, since the needs of individual persons with disabilities may differ greatly.²⁶

19 Art 28(2) CRPD.

20 BS Levy & VW Sidel 'Water rights and water fights: Preventing and resolving conflicts before they boil over' (2011) 101 *American Journal of Public Health* 779.

21 Goal 6 of the United Nations Development Programme's Sustainable Development Goals highlights the challenges faced in providing access to safe drinking water and sanitation, see <http://www.africa.undp.org/content/rba/en/home/sustainable-development-goals/goal-6-clean-water-and-sanitation.html> (accessed 3 September 2019).

22 Art 20(1). See also discussion below.

23 Y Wiid 'The right to social security of persons with disabilities in South Africa' LLD thesis, University of the Western Cape, 2015 152.

24 D Moeckli & S Shah (eds) *International human rights law* (2010) 196.

25 As above.

26 The Committee on Economic, Social and Cultural Rights (Committee on ESCR) has provided guidance in determining 'adequacy' in the context of the right to housing, which may also be applicable more broadly: see Committee on CÉSCR General Comment 4: The right to adequate housing (1991) UN Doc E/1992/23 dated 13 December 1991 para 8.

3.2 Duties of states parties to ensure the right to an adequate standard of living

Both the African Disability Protocol and the CRPD impose clear obligations on states parties in the realisation of the right to an adequate standard of living. Article 20(1), read with article 20(2),²⁷ provides that states parties must provide certain goods and services in the realisation of the right. Similarly, article 28(1) of the CRPD provides that: ‘States Parties ... shall take *appropriate steps to safeguard and promote the realisation of this right*’.²⁸ It is generally accepted that the guarantee or recognition of a particular right by a state party gives rise to obligations to respect, protect and fulfil the right concerned.²⁹ Second, the general obligations incorporated in article 4 of the Protocol are also applicable to the right to an adequate standard of living of persons with disabilities.

Article 20(1) further calls for the ‘continuous improvement of living conditions’ of persons with disabilities. This commitment is also found in article 28(1) of the CRPD, although, as mentioned previously, the obligation to continuously improve living conditions on states parties is clearer in the latter. Essentially, this confirms that states parties have an obligation to ensure the progressive realisation of the right to an adequate standard of living for persons with disabilities. This is indicated by the constituent elements, such as adequate food and housing. As explained by the UN Committee on Economic, Social and Cultural Rights, ‘progressive realisation’ does not require that a right be fully implemented and realised immediately, but rather that states parties must ensure the realisation of the right over time.³⁰ States parties must therefore evaluate and monitor the standard of living of persons with disabilities within their territory and, importantly, must endeavour to constantly improve on that position.³¹

At the same time, it is noteworthy that the right to an adequate standard of living is interwoven with a prohibition of disability-based

27 Art 20(1)-(2) African Disability Protocol.

28 Emphasis added.

29 The Committee on ESCR first adopted the following analysis of state duties: ‘The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect, protect* and *fulfil* the right.’ (Emphasis added): Committee on ESCR General Comment 14: The right to the highest attainable standard of health (2000) UN Doc E/C.12/2000/4 dated 11 August 2000 para 33. This approach has subsequently been applied extensively in respect of a range of rights.

30 Committee on ESCR General Comment 3: The nature of states parties’ obligations (1990) UN Doc E/1991/23 dated 14 December 1990 para 9; see also Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities <https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-two-the-convention-in-detail-4.html> (accessed 3 September 2019).

31 The Committee on ESCR has further noted that states parties should move ‘as expeditiously and effectively as possible’ towards the full realisation of the right concerned and that deliberately retrogressive measures must generally be avoided – see General Comment 3 (n 30 above) para 9.

discrimination: article 20(2) contemplates the full enjoyment by persons with disabilities of this right, 'on the basis of equality'. Similarly, article 28(1) of the CRPD makes reference to safeguarding and promotion of this right 'without discrimination on the basis of disability'. Addressing disability-based discrimination is an obligation of immediate implementation, and therefore not subject to progressive realisation.³²

3.3 Related rights

The right to an adequate standard of living cannot be implemented independently of other rights. This is evidenced by the numerous links to and overlaps with other rights in the CRPD as well as the African Disability Protocol. Significantly, both documents include a reference to the indivisibility and interrelatedness of all human rights in their respective Preambles.

The right to social protection is an example of the overlap of the right to an adequate standard of living with other rights. The inclusion of the right to social protection in article 20 of the African Disability Protocol and article 28 of the CRPD is a clear indication that the two rights are interconnected and that their content may be similar. For example, both articles incorporate the need for the provision of housing to persons with disabilities in the right to an adequate standard of living,³³ and the right to social protection has historically included this as well.³⁴

Another significant link can be found between the right to an adequate standard of living and the right to life in the community as provided for in article 14 of the African Disability Protocol and article 19 of the CRPD. According to article 14(1), '[e]very person with a disability has the right to live in the community with choices on an equal basis with others'. Article 14(2) requires states parties to provide certain goods and services in the realisation of this right. These include rehabilitation services,³⁵ which in turn overlap with article 18 which specifically guarantees the right to rehabilitation services. It is submitted here that these facilities and services should therefore be added to those listed in article 20 as essential for an adequate standard of living.

32 See Committee on the Rights of Persons with Disabilities (CRPD Committee) General Comment 6: Equality and non-discrimination (2018) UN Doc CRPD/C/GC/6 dated 26 April 2018 para 12.

33 Art 20(1) African Disability Protocol and art 28(1) CRPD both include the right to housing in the right to an adequate standard of living.

34 Art 28(2) CRPD. See also the International Labour Organisation 'Social protection systems for and to prevent homelessness and facilitate access to adequate housing' (2019) https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2019/06/ILO-Geneva-SP-and-homelessness_220519-DRAFT.pdf (accessed on 4/12/2019).

35 Art 14(20(e)).

The right to an adequate standard of living should further be interpreted with reference to the inherent dignity of persons with disabilities, which constitutes one of the general principles of the CRPD.³⁶ It is understood that an adequate standard of living can only be achieved if the person or persons in question are able to live a life of dignity through having their basic needs met.³⁷

Other rights guaranteed in the Protocol that overlap with the right to an adequate standard of living include the right to be protected from exploitation, violence and abuse in various contexts (articles 9(2)(c) and 10(2)(d)). Since persons with disabilities are substantially more likely to experience violence (including from those who are involved in their daily care),³⁸ this right is particularly important in ensuring equal participation in society. The right to barrier-free access to the physical environment (article 15(1)),³⁹ the right to education (article 16) and the right to decent work (article 19) all tie in with employment opportunities in the workplace on an equal basis with persons without disabilities. The right to participate in political and public life (article 21) also contributes towards full participation in society by ensuring that the voices of persons with disabilities are heard when making decisions relating to governance.⁴⁰

4 Implementation of the African Disability Protocol

The Protocol sets out a number of measures aimed at implementation and enforcement.⁴¹ First, states parties are required to show in their periodic reports⁴² to the African Commission on Human and Peoples' Rights (ACHPR) which measures they have taken towards the full realisation of the rights recognised in the Protocol.⁴³ Mute and Kalekye explain that the adoption of the Protocol may have a significant impact on the approach of the ACHPR to disability rights in its examination of periodic state reports: they note that the lack of a normative framework has until now necessitated a consideration of 'generalities' rather than a focus on specific

36 See art 3(a) CRPD, which closely corresponds with art 3(a) African Disability Protocol.

37 Committee on Economic Social and Cultural Rights General Comment 12: The right to adequate food (1999) dated 12 May 1999 (item 4). See also Y Wiid 'The right to social security of persons with disabilities in South Africa' LLD thesis, University of the Western Cape, 2015 150.

38 World Health Organisation 'Violence against adults and children with disabilities' <https://www.who.int/disabilities/violence/en/> (accessed 4 December 2019).

39 Significantly, art 15(2)(a) of the Protocol, which sets out the measures to be taken by states parties to 'facilitate full enjoyment' of this right, stipulates that such measures should apply to rural as well as urban settings.

40 JC Bricout & DB Gray 'Community receptivity: The ecology of disabled persons' participation in the physical, political and social environments' (2006) 8 *Scandinavian Journal of Disability Research* (2006)1.

41 Art 34 African Disability Protocol.

42 In terms of art 62 of the African Charter.

43 Art 34(1) African Disability Protocol.

aspects such as legal capacity.⁴⁴ This is accordingly one area where the advent of the Protocol may yield visibly positive results.

Further, the ACHPR will have the mandate to interpret the provisions of the Protocol⁴⁵ and may refer matters of interpretation and enforcement to the African Court on Human and Peoples' Rights.⁴⁶ This court will have the mandate to hear disputes arising from the implementation of the Protocol.⁴⁷

At the time of writing, five countries have signed the Protocol and none have ratified it.⁴⁸ The Protocol will only acquire legal effect once 15 AU member states have ratified it, which means that the Protocol is not yet binding on any of the 54 member states.⁴⁹ However, this instrument is complementary to the CRPD, which has been signed and ratified by the majority of AU member states.⁵⁰ The CRPD is also expressly referred to in the Preamble of the African Disability Protocol as an instrument that confirms the rights of persons with disabilities. The lack of ratification to date of the Protocol should thus not necessarily be seen as an absence of commitment to the rights confirmed therein; although the reasons for the lack of ratification of the Protocol are unclear, the relatively short period since its adoption must be borne in mind.

5 Conclusion

From the foregoing discussion, it becomes apparent that the importance of the right to an adequate standard of living cannot be overemphasised. Not only does the right to an adequate standard of living have a direct impact on the dignity of persons with disabilities, but the ideal of full and equal participation in society is wholly dependent on the goods and services included in the scope and content of this right. Unfortunately, the enforcement mechanisms provided for in the African Disability Protocol

44 Mute & Kalekye (n 13 above) 78.

45 Art 34(3) African Disability Protocol. The arguments against the adoption of an African regional instrument on disability rights in the form of a protocol to the African Charter included the concerns first that African human rights institutions, such as the ACHPR, have not historically paid a great deal of attention to the promotion of the rights of persons with disabilities and second, that these institutions are already under-resourced and overburdened and would therefore find it difficult to monitor the implementation. See generally Oyaro (n 4 above) 359-360, 367.

46 Art 34(4) African Disability Protocol.

47 Art 34(5) African Disability Protocol.

48 African Union 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa – Status list' <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa> (accessed 3 September 2019).

49 Article 38(1) African Disability Protocol.

50 United Nations 'Convention on the Rights of Persons with Disabilities' https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (accessed 3 September 2019).

remain only theoretical at this stage, since there has been no ratification of the instrument to date.

Until such time as the African Disability Protocol is ratified by AU member states, the reporting and monitoring mechanisms in the CRPD are the only way to measure the extent of implementation of the right to an adequate standard of living in member states that have ratified the CRPD. This is not an ideal situation – as mentioned previously, the African Disability Protocol has been drafted with the unique socio-economic and other challenges present in Africa in mind. This is evident in the unique details added to the African Disability Protocol that are lacking in the CRPD. The African Disability Protocol is therefore the ideal instrument to make strides in realising the right to an adequate standard of living for persons in Africa.