

REGIONAL DEVELOPMENTS

THE RIGHTS OF OLDER PERSONS WITH DISABILITIES IN THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A CRITICAL ANALYSIS

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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 (the Protocol) represents a unique opportunity as the first legally binding regional expression of disability rights, adopted after the entry into force of the UN Convention on the Rights of Persons with Disabilities (CRPD). This paper will highlight how the Protocol addresses the intersection of older age and disability which is missing from the CRPD and other regional instruments and the extent to which it adds value and improves on standards in the CRPD as well as some areas of concern. Finally, the paper will consider what lessons can be drawn from this experience for other regions intending to adopt similar instruments, as well as look into global efforts to develop a new UN Convention on the Rights of Older Persons.

Before delving into an analysis of article 30 of the Protocol, which explicitly sets out the rights of older persons with disabilities, it is important to set the context for this discussion. The Protocol was finalised in 2018 but has not yet entered into force. Ratifications from 15 countries are required for the Protocol to enter into force, and at the time of writing no country has ratified the Protocol.¹ Separately, the African Union adopted a Protocol to the African Charter on Human and Peoples' Rights

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1 AU, Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa (2018) art 38(1); Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa 'Status list' (18 June 2020).

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on the Rights of Older Persons in 2016, which has also not entered into effect, only receiving two ratifications out of the required 15.² That Protocol also includes an article on older persons with disabilities.³ However, that article is less detailed than article 30, and so will not be the main focus of the present discussion; although possible conflicts of interpretation between the two protocols will be addressed as an area of concern.

A full exploration of the drafting history of the 2018 Protocol is beyond the scope of this paper, however, there are some points worth noting as relevant to this discussion. The first is the participation of organisations of persons with disabilities in the drafting process;⁴ mirroring to some extent the participatory drafting approach of the CRPD.⁵ Second, is the explicit acknowledgement by the drafters of the gaps in rights protection which remained unaddressed in the CRPD, and the need to expand, rather than dilute, the application of universal human rights set out in the CRPD based on experiences in the African context.⁶ Finally, the experience of many of the state parties to this Protocol in reporting to the UN Committee on the Rights of Persons with Disabilities on their progress in implementing the CRPD in an African context. These interrelated standpoints and experiences set the context for the rights expressed in the Protocol as a whole and article 30 in particular.

The following section will address the key contributions made by article 30 of the Protocol, with specific reference to the topics of social protection, the intersection of gender, disability and older age, legal capacity, support in the community, violence, abuse and neglect, and sexual and reproductive health. Following this analysis, I reflect on the added value of article 30 and some areas of concern based on the regional context and potentially conflicting statements on rights in the two existing protocols. Finally, I consider the lessons which can be drawn from this experience for other world regions and for the international community as a whole moving towards a new UN Convention on the Rights of Older Persons.

2 AU, Protocol to the African Charter on Human and People's Rights on the Rights of Older Persons in Africa (2016) art 26(1); Status List (n 1).

3 Art 13 of the Protocol to the African Charter on Human and People's Rights on the Rights of Older Persons in Africa.

4 F Mahomed, JE Lord & MA Stein 'Transposing the Convention on the Rights of Persons with Disabilities in Africa: The role of disabled peoples' organisations' (2019) 27 *African Journal of International and Comparative Law* 335.

5 R Kayess & P French 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1.

6 O Onazi 'Disability Justice in an African context: The human rights approach' in O Onazi *An African path to disability justice* (2020) 39.

2 Key contributions of article 30

2.1 Social protection

Article 30(2)(a) contains a specific obligation on states to ensure that older persons with disabilities can access social protection programmes on an equal basis with others. This statement is important as it does not mandate states to create new social protection schemes for older persons with disabilities but rather requires states to ensure that old age is not a cut off point for receiving social assistance. This approach is particularly relevant in contexts where persons with disabilities lose their entitlement to specific kinds of social assistance when they age, such as personal assistance;⁷ and are automatically transitioned to different funding schemes designed for older (non-disabled) people, which may not include the required type or level of assistance. As more African countries introduce cash transfers and other forms of social protection,⁸ this provision is likely to become more significant with time.

2.2 Intersection of gender, disability and age

Article 30(2)(b) requires states to take account of gender and age-related aspects of disability programming and resourcing in implementing the Protocol. This echoes to some extent the provisions of the CRPD, which contains specific articles on disabled women and children respectively,⁹ but is even more important in the context of older persons with disabilities, which of course was not the focus of a specific CRPD article. The specific needs of older men, women and non-binary people with disabilities will require particular attention from states, and this provision is a good example of how intersectional identities can be accounted for in an instrument focused on the rights of disabled people.

2.3 Legal capacity

Article 30(2)(c) echoes the earlier commitment to respecting the legal capacity of all persons with disabilities in article 7 of the Protocol and restates the application of this principle to older persons with disabilities. This restatement is particularly relevant in cases where a combination of

7 R Jessen 'Transfer-related experiences of people with spinal cord injury living in low socioeconomic, independent living communities in Johannesburg as seen in the context of relationships of personal assistance – A phenomenological study' Masters thesis, Disability Studies Division, University of Cape Town, 2019.

8 MP Opoku et al 'Extending social protection to persons with disabilities: Exploring the accessibility and the impact of the disability fund on the lives of persons with disabilities in Ghana' (2019) 19 *Global Social Policy* 225.

9 UN General Assembly, Convention on the Rights of Persons with Disabilities (2007) UN Doc A/RES/61/106 (24 January 2007) arts 6 & 7.

older age and disability may be used to justify restrictions or denials of legal capacity, for example with respect to inheritance; which may also have a gendered dimension for widows.¹⁰ It reiterates the obligation on states to provide older persons with disabilities with all the support they may require to exercise their legal capacity on an equal basis with others – which again is important as some supported decision-making systems may exclude older persons (for example, people with dementia) from their remit.¹¹

2.4 Services in communities

Article 30(2)(d) requires states to provide access to appropriate services to older persons with disabilities that meet their needs within their communities. This also echoes article 14 of the Protocol on the right to live in the community for all disabled people. Again, the restatement is important to ensure that older persons with disabilities are not obliged to leave their communities where they may be both providing and receiving support to their families and wider social networks in order to access services that meet their needs. While the term ‘services’ is not defined in the Protocol, it can be interpreted broadly, reading the Protocol as a whole, to include a wide range of services such as general health services (including physical and mental health), impairment or disability-specific services (including care and support), education, employment, and social services.¹² Again, this obligation recognises that older persons with disabilities may require specific and distinct services that meet their unique needs, while also requiring that any services available to persons with disabilities continue to be provided as that population ages.

2.5 Violence, abuse and neglect

Article 30(2)(e) places an obligation on states to protect older persons with disabilities from violence, abuse and neglect. This also echoes existing obligations in the Protocol with regard to prevention and responses to violence, abuse and neglect; including in article 9 (liberty and security of person), article 10 (freedom from torture, or cruel, inhuman or degrading treatment or punishment), article 27 (women and girls with disabilities), and article 28 (children with disabilities). This provision further includes specific recognition of particular forms of violence, abuse and neglect experienced by older persons with disabilities, such as those based on accusations or perceptions of witchcraft, which also incorporates a gender-

10 NE Groce, J London & MA Stein ‘Inheritance, poverty, and disability’ (2014) 29 *Disability & Society* 1554.

11 J Killeen ‘Supported decision-making: Learning from Australia’ (2016) Winston Churchill Memorial Trust https://www.wcmt.org.uk/sites/default/files/report-documents/Killeen%20J%20Report%202016%20Final_1.pdf (accessed 9 August 2021).

12 Onazi (n 6) 45.

based dimension, as referenced in article 30(2)(b). While violence, abuse and neglect of older persons with disabilities is clearly a global problem, this article recognises regional particularities in how this may be experienced in the African context,¹³ and by calling out these harmful practices (which are also prohibited by article 11 of the Protocol), stands as an example of the added value which regional instruments can bring to the application of universal human rights norms to specific contexts.

2.6 Sexual and reproductive health

Finally, article 30(2)(f) requires states to ensure that older persons with disabilities have access to appropriate sexual and reproductive health information and services. This echoes the obligation placed on states to respect the sexual and reproductive rights of all disabled people as expressed throughout the Protocol in article 17 (right to health), article 26 (right to family), article 27 (women and girls with disabilities), and article 29 (youth with disabilities). The restatement of this right as one which applies to older disabled people is particularly important, as this issue is often overlooked issue for this specific population. Read together with the provisions on gender and age, as well as the provisions on violence, exploitation and abuse, this provides a holistic approach to ensuring the protection of the sexual and reproductive rights of older persons with disabilities.

Having considered the content of article 30 in-depth, the following section will further explore the unique contributions of this article of the Protocol and some areas of concern which may need to be addressed during its implementation.

3 Expanding the rights of older disabled people: Added value and areas of concern

As the first example of a legally binding regional instrument that was developed post-CRPD and builds on it, the Protocol demonstrates added value in this field by addressing issues which were omitted from the final text of the CRPD. It provides a useful example of how a more intersectional approach can be taken – at least on the intersections of gender, age and disability¹⁴ – when it comes to understanding and addressing rights violations specifically experienced by older persons with disabilities. However, it is also worth noting that there are other

13 FA Eboiyehi 'Convicted without evidence: Elderly women and witchcraft accusations in contemporary Nigeria' (2017) 18 *Journal of International Women's Studies* 247.

14 E Flynn 'Disability and ageing: Bridging the divide? Social constructions and human rights' in P Blanck & E Flynn (eds) *Routledge handbook of disability law and human rights* (2016) 211.

intersecting identities which are omitted from article 30 of the Protocol, especially membership of the LGBTQI+ community and membership of different ethnic or cultural groups or minorities. Overall, perhaps the most important added value of article 30 and indeed the Protocol as a whole, is its emphasis on regional specificity in naming rights violations experienced by this group and its recognition and prohibition of particular harmful practices which are often targeted at older persons with disabilities.¹⁵ This level of detail is usually not achieved in an international human rights instrument such as those negotiated at the UN, and shows the value of adopting regional instruments, where these are legally binding, and build on the universal rights already established, without diminishing them.

One area of concern, however, is the fact that there appears to be potential conflicts in terms of the expression of rights contained in this 2018 Protocol and the 2016 Protocol on the Rights of Older Persons mentioned in the Introduction. For example, the 2016 Protocol does not recognise as strongly the right of older people to remain living in their communities,¹⁶ compared to the recognition of this right for persons with disabilities, including older persons with disabilities in the 2018 Protocol. It remains to be seen how these potential conflicts can or will be resolved, including by the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights. Given the potential for conflicting interpretations by states when implementing both Protocols, it will be important to clarify that the higher level of rights protection offered by the 2018 Protocol should be adopted as the appropriate threshold for identifying rights violations.

Another issue of concern is the low take up of this Protocol in terms of state ratifications, as this will impact on the Protocol's effectiveness as a tool for change at the domestic level. As mentioned in the Introduction, no state has ratified the 2018 Protocol at the time of writing and only two states have ratified the 2016 Protocol. This low level of ratification by states remains a concern – especially given the high levels of involvement of organisations of persons with disabilities in the negotiation and drafting of the Protocol text.

Moreover, there is a trend globally of scepticism towards a proliferation of new binding human rights instruments at the supra-national level.¹⁷ Grassroots advocates are often disappointed that these

15 J Biegon & F Viljoen 'The feasibility and desirability of an African disability rights treaty: Further norm-elaboration or firmer norm-implementation?' (2014) 30 *South African Journal on Human Rights* 345.

16 Art 11 of the Protocol to the African Charter on Human and People's Rights on the Rights of Older Persons in Africa requires states to ensure that 'residential care is optional and affordable for older persons'; whereas art 30(2)(e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa requires that 'older persons have access to appropriate services that respond to their needs within the community' and art 14 states that 'every person with a disability has the right to live in the community'.

instruments are not effective in generating change at the domestic level in terms of concrete law reforms, or practical changes (including investment in supports and services) which impact on the day to day lives of the marginalised groups affected (including older disabled people). The Protocol itself acknowledges that many of the rights violations experienced by older disabled people are carried out by non-state actors, including individuals, families or community members.¹⁸ Many of these practices are not enshrined in law or policy or regulated by the state directly, and so it is unclear how precisely ratification of the Protocol can assist states to dismantle these practices – apart from providing a reporting mechanism under which states can be held accountable for their actions on these issues, or failure to address them. As with all human rights instruments however, the consequences for states that do not comply with the obligations contained in the Protocol are fairly minimal. Therefore, more action is needed at the domestic level to maintain political pressure on duty-bearers to implement the Protocol in full, including article 30 as it applies to older disabled people.

These unique contributions and issues of concern with article 30 and the Protocol as a whole provide useful insights for other regions seeking to introduce new binding instruments following the entry into force of the CRPD, as well as for advocates working to develop a new UN convention on the rights of older people, which are considered further in the following and final section.

4 Conclusion and lessons for further reform

The negotiation process of the Protocol demonstrates the importance of a grassroots-led approach where the rights-holders are at the forefront in developing the text of any new binding human rights instrument. However, the low take-up in terms of state ratifications also provides an important lesson for future reform efforts; that is, the need to ensure substantial state buy-in during the negotiation process. To do otherwise risks the creation of a very progressive human rights instrument that never enters into force if it does not receive the required number of ratifications. Another valuable insight from this experience is the importance of developing a monitoring framework with each new instrument that is both effective and feasible in ensuring state accountability for progress in implementation.¹⁹ Finally, perhaps the most important lesson from the Protocol itself is that it stands as a very strong example of a binding

17 P Alston 'The populist challenge to human rights' (2017) 9 *Journal of Human Rights Practice* 1.

18 Preamble, arts 1 & 11 of the Protocol.

19 Secretariat of the African Decade 'Architecture for an African disability rights mechanism' (2011) Open Society Foundations; MA Stein & JE Lord 'Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, lost opportunities, and future potential' (2010) 32 *Human Rights Quarterly* 689.

regional instrument which enhances rather than diminishes the rights contained in the CRPD. This stands in stark contrast with other regional developments post-CRPD, for example the draft Oviedo Protocol in the Council of Europe that actively undermines the CRPD prohibitions on forced psychiatric treatment.²⁰

As the UN Open-Ended Working Group moves forward in its work and campaign efforts intensify to secure a new UN Convention on the Rights of Older People,²¹ the valuable lessons learned from the experience of creating the Protocol need to be taken on board. Since the process at the UN remains ongoing it may be productive to use this time to reach consensus on some of the issues where conflicting views on rights violations between the rights of older people and the rights of disabled people (including older disabled people) arise – as evidenced by the different positions on community living expressed in the 2016 and 2018 protocols to the African Charter. As with the development of the Protocol, the negotiation of a new UN Convention on the Rights of Older People opens up new opportunities to recognise how universal rights should apply to this group in ways that were not able to be included in previous UN instruments, while expanding on, rather than diluting the rights protections provided in the CRPD. There is much that advocates at the UN can learn from their counterparts in the African region, especially about how to build on the binding instruments within that region to support arguments for how rights could be recognised in a new UN convention.

20 European Disability Forum and Mental Health Europe 'Disability organisations urge Council of Europe to withdraw Additional Protocol of Oviedo Convention' <https://www.withdrawoviedo.info/join> (accessed 9 August 2021).

21 J Childs 'Elder rights are not nesting dolls: An Argument for an International Elder Rights Convention' (2020) 11 *Journal of International Aging Law & Policy* 141.