

AFRICAN PROTOCOL ON THE RIGHTS OF WOMEN TAKES ONE STEP FORWARD

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On 31 March 2003, the Ministerial meeting of the African Union approved a Draft Protocol on the Rights of Women, which is to be an optional addition to the African Charter on Human and People's Rights. The Draft Protocol is not a final document – it has merely been approved for consideration by the policy organs of the African Union. The Draft Protocol must now be considered by the Executive Council and the Assembly of the AU – both of which make decisions by consensus, or failing consensus by a two-thirds majority.

The Draft Protocol has been in the making since 1995. It grew out of a seminar on women's rights organised by the African Commission on Human and People's Rights and Women in Law and Development in Africa (WILDAF). The idea of formulating a protocol on women was approved by OAU Heads of State in July 1995. Experts were appointed to prepare a draft, working in consultation with African NGOs and other interested parties. The first draft was approved by the African Commission in 1998. A second draft was completed in 2000, incorporating the issue of harmful traditional practices affecting the health of women and children, which had until that stage been moving forward as a draft OAU Convention on its own. A third draft was finalised by the appointed experts in 2001. This 2001 draft, with only a few further revisions, evolved into the 2003 Draft Protocol which has now been approved for official consideration.

Space does not permit a full summary of the document here, but a few of the highlights will be discussed. The current draft takes a strong stand on violence against women, which it defines broadly as

*all acts directed against women which cause or could cause them **physical, sexual, or psychological harm**, including the **threat** of such acts; or the imposition of **arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of conflict/war.***

The specific inclusion of threats of violence is very welcome, as is the recognition that violence takes physical, sexual and psychological forms.

The Draft Protocol includes a long list of the actions that states must take to combat violence against women. They must prohibit all forms of violence against women by law, including both public and private manifestations of violence. They must attempt to identify the causes and consequences of violence, and put measures in place to prevent, punish and eradicate all forms of violence against women. Perpetrators must be punished, and women victims must be rehabilitated.. Under the Draft Protocol, states will further be required to promote "peace education" as a way of eradicating cultural beliefs, practices and stereotypes which tolerate and exacerbate violence against women. The practical cost of such measures is acknowledged, and states are required to provide adequate budgets and other resources for implementing and monitoring programmes aimed at addressing violence against women.

Another broad area is the condemnation of “harmful practices” against women and girls, defined as

all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.

The mention of attitudes here is important, as this is often the root of harmful behaviours. States Parties to the Protocol are generally required to “prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards”. More specifically, states pledge to take measures to raise public awareness of harmful practices, to prohibit female genital mutilation and scarification with laws backed by sanctions, to provide various forms of support to victims of harmful practices, and to protect women “who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance”.

On family law issues, the Protocol is somewhat more cautious. An earlier draft called for the complete prohibition of polygamy. This became a point of debate, particularly in light of the fact that some nations in the AU have large populations which subscribe to polygamy on religious or cultural grounds. The current draft takes the following position:

Monogamy is encouraged as the preferred form of marriage. States Parties shall protect and promote the rights of women in marriage and family, including in polygamous marital relationships.

The minimum age for all forms of marriage is set at 18. Men and women are to be regarded as “equal partners in marriage”. Married women are given the explicit right to retain their own names if they wish, and to use their maiden names alone or jointly with their husband’s surnames. Married women are also given the right to retain their own nationality upon marriage, or to acquire the nationality of their husbands. During marriage, “a woman shall have the right to acquire her own property and to administer and manage it freely”. But the Protocol draws back from giving mothers and fathers equal rights to pass their citizenship to their children – women are to have equal rights in this respect only where this is not contrary to a national law or “national security interests”.

Men and women are to have the same rights to seek divorce. In the case of a divorce, “the interests of the children shall be given paramount importance”, and the joint property of the marriage is to be shared “equitably”. (Note that “equitably” is not the same as “equally” – “equitably” refers rather to what is fair in the circumstances, which may turn into an interesting question of interpretation.)

There is specific section on widow’s rights. States parties are expected to take legal measures to prohibit “inhuman, humiliating or degrading treatment” of widows. More specifically, a widow shall automatically become the guardian and custodian of her children after the death of her husband (unless this is for some reason contrary to the welfare and interests of the children), and a widow has the right to remarry the person of her choice. The accompanying section on rights to inheritance says that a widow shall

have the right to continue to live in the matrimonial house, although this right continues upon remarriage only if the house belongs to her or she has inherited it. Furthermore, a widow has a right to “an equitable share in the inheritance of the property of her husband”.

On inheritance generally, “women shall have the right, as men have, to inherit in equitable shares, their parents’ properties. (On this point, it should be noted that all the references to women in the document are defined to include girls.)

The document contains a strong section on health, which explicitly promises women the right to control their fertility, to decide on whether and when to have children, to choose any method of contraception and to receive family planning education. A particularly important provision guarantees “the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS”. It is also noted that women have a right to be informed of their own health status and the health status of their partners, particularly with respect to HIV/AIDS, within the context of internationally recognised standards and best practices on confidentiality and disclosure.

There are several provisions which address the situation of women in particularly vulnerable situations. For example, one section emphasises the right of elderly women to freedom from violence, and also promises them protection against discrimination based on age and the right to be treated with dignity. Similar protections are promised in respect of women in distress, including homeless women and pregnant women in detention or in prison. Another provision is devoted to women with disabilities, with a similar emphasis on dignity, protection against discrimination and freedom from violence, along with measure to ensure that they have access to employment and the opportunity to participate in decision-making processes.

The following are amongst the other topics covered by the Protocol:

- a prohibition against any exploitation and degradation of women
- effective access to justice for women, including access to legal aid
- the right to political participation and participation in decision-making processes, including the right to be “represented equally at all levels with men in all electoral processes” (although this has been weakened since the earlier drafts, which more specifically promised equal representation of women “in all electoral and candidate lists”)
- the right “to a peaceful existence and the right to participate in the promotion and maintenance of peace”
- the right to equal opportunities in education and training as well as in access to employment
- the right to protection against sexual harassment in the workplace and in educational institutions
- the right to adequate and *paid* maternity leave
- effective measures to prevent the exploitation of women in advertising and pornography

- the promise to provide women with access to basic necessities – clean drinking water, fuel, systems for disposal of domestic waste, adequate housing, land and food security
- the right to live in a healthy and sustainable environment, including the protection of women’s “indigenous knowledge systems”
- the right to sustainable development, including measures to guarantee women’s access to and control over productive resources and their right to property

One overarching issue is the promise that “women shall have the right to live in a positive cultural context and to participate in all levels in the determination of cultural policies”.

Not surprisingly, not all of the members of the AU could reach full agreement on such an ambitious declaration of women’s rights. Seven countries entered reservations which affect a total of ten provisions in the current draft – but with none of these reservations coming from countries in southern Africa.

Once the Draft Protocol is approved by the decision-making bodies of the African Union, it must still be ratified by 15 countries before it comes into force. If it becomes binding, States Parties will be required to submit regular feedback as part of their reports under the African Charter, with matters of interpretation relating to the Protocol to be decided by the African Commission and ultimately by the envisaged African Court on Human and People’s Rights.

The Draft Protocol is still a long way from becoming a binding agreement, but even in its draft form it can be used as a rallying cry for women’s rights in Africa. However, as one commentator has already written on the subject: “One hopes that the Draft Women’s Protocol will not become just another document that states ratify to show that they are progressive while in reality they fail to implement its provisions”.

The final quote is taken from Martin Semalulu, a brief analysis of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women, 2000 (1) African Human Rights Law Journal. See this article for more information on the history of the Draft Protocol and the contents of its earlier drafts.