Now That We Have Moved in Words, Can We Move in Action? the AU, Member States and African Union Protocol on the Free Movement of Persons in Africa

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When, in 1963, Kwame Nkrumah emphasised that Africans need to unite, he was vigorously reinforcing the pertinence of motioning the continent on the ideation of pan-Africanism, unity, and continental solidarity. There were evident implications of his rhetoric. The first is that the arbitrary borders of the continent could not continue to subsist. In his invocations, he insisted on the fact that it was pertinent to render 'existing boundaries obsolete and superfluous.' At the time this viewpoint was articulated, it met with wide agreement. Although certain leaders were persuaded that it was important to

do away with the borders, others who had just gained independence from colonial powers emerged as nationalists and were determined to consolidate their victories at a national level, given that their people had fought hard to win independence from imperialism and colonial structures.

While Nkrumah's views were based on a compromise negotiated earlier by Emperor Haile Selassie of Ethiopia between those wanting continental unification (Casablanca bloc) and those who felt it should be a more gradual process (Monrovia bloc), they have withstood the test of time as a crucial conclusion. The transition from the Organisation of African Unity (OAU) to the African Union (AU) echoes Nkrumah's rhetoric that the time had come for the borders to become fluid for the African continent to unite. One of the prevalent assertions of this rhetoric came through the formation of the AU Protocol on Free Movement of Persons, Rights of Residence and Right of Establishment in Africa (2018) (the Free Movement Protocol).

The Free Movement Protocol is a significant milestone on the road to a continental union in the context of migration and mobilities. Prior to the adoption of this instrument, several regional blocs with some form of arrangements on movement had emerged; notably, the Economic Community of West African States (ECOWAS) in 1979; Southern African Development Community (SADC) in 2005; East African Community (EAC) in 2009; Common Market on Eastern and Central Africa (COMESA) in 1993; Inter-Governmental Authority on Development (IGAD) in 2019; Economic Community of Central African States (ECCAS) in 1983 (The Community of Sahel Sub-Saharan Africa (CEN-SAD). While the Arab Maghreb Union (AMU) is yet to establish an arrangement on free movement, its constitutive Treaty emphasises one of its aims as '[w]orking gradually towards achieving free movement of persons.'

While various arrangements had emerged with graduated forms of movement, a significant gap has been upscaling these regional realities across the continent, thereby ensuring that Africans can move regardless of the regional bloc they are linked to by virtue of citizenship/residence. This is a reality that the Free Movement Protocol births in principle in that it codifies this in a continental framework adopted by the AU Assembly.

While the normative development milestones of the 1980s had significant rhetoric, for instance, the Lagos Plan of Action (LPA) emphasised the importance of the free movement of trade, goods and persons, the continental commitment towards developing the Free Movement Protocol was legally affirmed by the 1991 Treaty Establishing the African Economic Community (Abuja Treaty). Under the Abuja Treaty, states 'agree to adopt, individually, at bilateral or regional levels, the necessary measures in order to achieve progressively the free movement of persons and to ensure the enjoyment of the right to residence and the right to the establishment by their nationals within the Community.' However, it was only in 2018 that 'the long walk to freedom' was concluded through the adoption of the Free Movement Protocol by Heads of State and Government of the African Union. This was partly due to the need to appreciate the concept across the various national and regional perspectives. The objective of the Free Movement Protocol is to 'facilitate the implementation of the Treaty Establishing the African Economic Community by providing for the progressive implementation of free movement of persons, rights of residence and right of establishment in Africa. 'While laudable, serious questions need to be answered, particularly as its implementation will test the commitment of the AU in the furtherance of its own fundamental ideal of pan-Africanism and integration. This article raises five pertinent questions in this respect.

The first relates to who should be held responsible for implementing this Protocol. A definite answer to this question is embedded in the provision of Article 27(1), which emphasises that states 'shall be responsible for implementing this Protocol. A definite answer to this question is embedded in the provision of Article 27(1), which emphasises that states 'shall be responsible for implementing this Protocol.' This clearly places the burden of implementation on state parties. However, the question remains: at the national level, which organ should be saddled with implementation? This question is important because when one considers the rhetoric around the securitisation of movement and the fact that the Free Movement Protocol adopts a rights-based framework, the decision of what institution should lead state-based implementation is crucial. From a security-based approach, which is often expressed with regard to movement in many parts of the continent, implementation of this framework will be daunting. Across many states, the

issue of immigration is often securitised and in situations where human rights are not at the core of the mandate of activities of immigration departments, realising the fundamental objective of the framework becomes almost impossible to achieve.

The second is an understanding of the term 'free movement.'. Simply put, how do states interpret the ideation of free movement and does it cohere with the continental vision? The Free Movement Protocol defines the free movement of persons as 'the right of nationals of a Member State to enter, move freely and reside in another Member State in accordance with the laws of the host Member State and to exit the host Member State in accordance with the laws and procedures for exiting that Member State.'. However, in what may appear simple is an evident complexity: the fact that national laws do not always define the free movement in simple terms. In fact, a reflection on the constitutions across the AU Member States reflects differences in the conceptualisation of the right to freedom of movement and residence. A pertinent way of addressing this would be to refer to the General Comment No 5 of the African Commission on Human and Peoples' Rights on the Right to Freedom of Movement and Residence under article 12(1) of the African Charter on Human and Peoples' Rights. However, it will further be imperative for states to think through the progressive realisation clause in Article 5 of the Free Movement Protocol and aim at expediting processes that remove impediments to entry, residence, and establishment.

Third, what mechanisms for rights-based redress exist in the event that the rights to free movement, residence or establishment are violated? This question is important since the Protocol, in principle, adopts a rights-based framework. Moreover, the language of rights entails the existence of duties. Where duties are not carried out, it is vital to examine the ideal of compliance. However, the framework appears to treat this question loosely. For instance, it speaks of cooperation between states (Article 25), coordination and harmonisation (Article 26), the role of member states (Article 27), the role of regional economic communities (Article 28) and the role of the AU Commission (Article 29). However, it does not institute a specific mechanism that ensures specific compliance with the framework nor confers the African Court on Human and Peoples' Rights with a specific mandate in case of a violation of rights.

Nevertheless, it is significant that it emphasises the role of the African Commission on Human and Peoples' Rights (African Commission) and states that '[a] national of a Member State who is denied the enjoyment of the right to entry, residence, establishment or other related rights provided in this Protocol, having exhausted all legal remedies in the host Member State, may refer the matter to the African Commission on Human and Peoples' Rights.' This is evidently important. However, the extent to which the recommendations of the African Commission will be complied with in situations where matters arise in this context will determine the significance of this provision.

Fourth, with emerging issues such as climate change and the rhetoric of population displacement, can the Free Movement Protocol become a legal pathway for advancing mobilities? This question is imperative given the fact that there is increasing concern about climate change and mobilities. This is mainly due to the realisation that, in 2017, the average global temperature reached one degree Celsius above pre-industrial levels and clear warnings that the climate target under the Paris Agreement will likely be missed if current emission trends are not reversed. The effects of climate change on Africa's populations are a concern, especially in the context of mobilities. The inability of people to move due to climate change will significantly test commitments towards the Free Movement Protocol. The absence of impediments to movement will also be crucial. In the context of the COVID-19 pandemic, for instance, artificial 'borderisation' because of COVID-19-related requirements was a clear deterrent to movement. And while clear warnings emanated from the public health sector, the question is: should there be trump cards in view of the commitment towards a continental Africa where all states are united? Or should such issues be treated as a collective, where all states are affected by what occurs in one state and vice versa?

Fifth, to what extent can collective growth and a strong commitment to democratisation be achieved? The essence of this issue resonates with Fagbayibo's observation that 'Africa's search for unity, an idea that has taken different dimensions, has been ongoing for almost five decades and will continue to be influenced by the political and economic variables of the continent and the world.' The 'political and economic variables' across African states will need to be processed through adequate measures and mechanisms for effective reform and realisation. While there are no easy answers, the

existence of frameworks such as the 2007 African Charter on Democracy, Elections and Governance, the institutional commitment reflected through Agenda 2063, and the institutional arrangements that have emerged in the realisation of good governance, including the African Governance Architecture are key imperatives.

Overall, answering these questions will test the commitment of member states of the African Union to this continental vision. Ultimately, it will test the vision of the AU over the next decade as a continental organisation guided by a ' common vision of a united and strong Africa.' Furthermore, the quest for the free movement of persons will have a positive impact on the realisation of meaningful intra-African trade, as envisaged under the African Continental Free Trade Area (AfCFTA). As Adepoju asserts, Africa is 'a region rooted in migrations, voluntary and compelled.' As to whether the Free Movement Protocol will amplify movements will test the AU resolve over the next twenty years. Going forward, the implementation of the Free Movement Protocol should be guided by a significant knowledge of counter-balancing evident challenges across socio-political and economic rhetoric on the value of free movement of persons in Africa.

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