

Legal pluralism and the right to family life, and the transfer of offenders who are nationals of African countries, within Africa and to Africa

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Abstract

Globalisation has been accompanied by, inter alia, the movement of people from their countries of nationality or citizenship to other countries in search of better opportunities. Some of these people have been convicted of offences and sentenced to imprisonment in countries of which they are non-nationals. Because of the increase in the number of foreign nationals in prisons of different countries, initiatives have been taken at international, regional and national levels to transfer these offenders to their countries of nationality (administering countries) to serve sentences imposed by courts in a foreign country (sentencing countries). The effect is that the imposition of the sentence is governed by the laws of the sentencing country and the administration of the sentence is governed by the laws of the administering country. Therefore, the offender is governed by laws of different countries. Apart from the laws of the sentencing and the administering states, there are cases where these offenders are also governed by international law and in particular international human rights law. Although the rights of foreign offenders are increasingly receiving attention in the transfer discourse, one right that appears not to have been emphasised in Africa and other parts of the world is the right to family life and how seriously it should be taken by those responsible for transferring offenders before they make a decision. The purpose of this article is to argue that the right to family life should be taken seriously in deciding whether or not an offender should be transferred if the transferred offender is to be rehabilitated and ultimately reintegrated into society.

Introduction

Millions of people are estimated to be living and/or working outside countries of their nationality.¹ These include Africans who are working in countries outside Africa and within Africa.² This mobility has even triggered the international community to adopt an international treaty on the rights of migrant workers and members of their families.³ Many African countries are grappling with the issue of how to deal with the increase in the number of foreign nationals serving sentences in their prisons. Statistics show that countries, such as, South Africa,⁴ Uganda,⁵ Mauritius,⁶ Kenya,⁷ Ghana,⁸ Cameroon,⁹ Namibia¹⁰ and Zambia,¹¹ have many foreign nationals in their prisons. This is not a phenomenon unique to Africa. The increase in the number of

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