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The Alien's Access to Local Remedies: The African Commonwealth Countries' Experience

Ivan L. Head*

I. INTRODUCTION

Of the 27 members of the Commonwealth of Nations 11 are located on the continent of Africa. They range in size from Nigeria, with an area of 356,000 square miles and a population of 60 million, to The Gambia, with an area of 4,000 square miles and a population of 350,000 persons. Prior to 1957 all of the 11 States were colonies of the British crown. In little more than a decade they have all gained political independence—one hundred and six million people residing in autonomous communities which are, in the words of the 1926 Balfour Declaration, "equal in status, and in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."¹

These Commonwealth States are dissimilar in many ways. Their external policies, their horizons of economic development, and their governmental structures all vary considerably. In two respects, however, there are common themes. The first is the use of English as a *lingua franca* in the courts and in the international market place; the second is found in the heritage of the common law. In each of these countries English law has become well entrenched. This is not to say that it has dispelled or replaced local laws. Rather, like the law merchant, it has flowed in to fill gaps and now serves in a complementary fashion the needs of these countries. With the English law came English legal institutions and English procedural devices. As a result, it is possible, even now, in some African Commonwealth countries to commence, try, and conclude litigation by employing pleadings, following procedures, and relying on substantive law which in all respects are almost identical to those in use in the law courts in London. Indeed, even the names of the courts, the titles of the judges, and the dress of the barristers are patterned closely on the English model.

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1. SUMMARY OF PROCEEDINGS, IMPERIAL CONFERENCE, 1926 at 12.

It is this fidelity to the common law and its institutions which may be regarded by historians in years to come as the great strength of the Commonwealth. Loyalty to the Crown, however, is capable of many degrees of interpretation. For example, the parliamentary system of government has in some countries given way to a republican model and the old practices of the Commonwealth preferential tariff and freedom of movement of Commonwealth citizens have in many instances been considerably modified. Yet the manifestations of what is perhaps the greatest legal system in the world—the one to which the United States and Canada owe so much—still remain.

If the common law is firmly rooted, and if democratic legislative institutions perform the role traditionally assigned to them, the substantive laws of these ex-colonies can be expected to develop and to exhibit autonomous characteristics which will reflect the social requirements, not of England, but of the state in question. Using Canada as a model, it is apparent that the degree of departure from English substantive law in these countries will be in direct proportion to the period of independence. If the spirit of justice is as equally well-rooted as the law, however, (again using Canada as a model) then the procedures introduced into those countries in their colonial era should not be expected to be subject to the same pressures for major revision. They will continue to do the job required of them in their old form.

This continued adherence to English civil procedure in African Commonwealth countries is of considerable significance and not only to the alien who may find himself a litigant in those courts, because the rules of civil procedure effect more than the particular lawsuit which they may be governing. Unquestionably, without some accepted formulae no lawsuit could begin or proceed. But rules of court are concerned with far more than the orderly disposition of any single lawsuit, or number of lawsuits. If designed properly, they promote fundamental social values. They involve more than the merits of the case at hand, since they consider and protect the interests of the entire community. For example, the desire of society to deal quickly with and dispose finally of litigation is reflected in limitations statutes, bars against laches, and rules of *res judicata*. Protection of members of the community from hit-and-run plaintiffs residing elsewhere has made necessary the requirements for deposit of security for costs, and appointment of agents for service within the jurisdiction. These provisions for execution and satisfaction of judgments advance the interest not just of the successful litigant, but of the community as a whole, for they create a respect for law and the orderly functioning of commercial intercourse and private con-

tractual relationships.

There is a second, larger, community which also benefits from orderly procedures in civil litigation. This is the community of nations subscribing to the principles of international law and the exhaustion of local remedies requirement. The exhaustion rule, at its most basic level, serves to reconcile the conflicting interests of the respondent state and the plaintiff alien, permitting each to seek justice in a way that is cheapest and most convenient. The interest of the international community is to see that litigation with an international element is disposed of in the most efficient fashion so that incidents of potential international irritation are contained within reasonable bounds.

Our interest in looking at the incidence and quality of local remedies abroad is motivated by two factors: (1) our concern for orderly international relations, and (2) our concern as citizens of capital-exporting states that the interests of Americans and Canadians abroad will be protected by just laws. This study of several states, which are members of the Commonwealth, presents two sets of problems not associated with the legal systems of other countries. The first arises out of the *inter se* doctrine, the second out of the previous colonial status of the countries. I shall consider each of these sets of problems briefly.

II. THE *Inter Se* DOCTRINE

The local remedies rule is applied only when an alien interest is affected, such as an American in the Congo or a Frenchman in Brazil. But what about a Canadian in Australia? Both Canada and Australia were former British colonies. Once they attained independence, and thus gained an international personality, the question arose concerning their legal relationships. What duties and responsibilities did international law require of them *inter se*? Daniel P. O'Connell has said that the answer:

was formulated in the doctrine that the Dominions and the United Kingdom *inter se* were bound by rules of constitutional and not of international law, or in some instances, not bound by either. . . . It was considered that disputes between Commonwealth members should be settled either by the Privy Council, when this possessed jurisdiction, or through domestic channels. The reasoning behind this was never very clear, but the predominant factor seems to have been the importance of treating imperial matters as domestic, the Crown representing the unifying link. . . . To meet the need for arbitration between Commonwealth members it was proposed to set up *ad hoc* tribunals of Commonwealth arbitrators who would have jurisdiction over justiciable disputes, but the proposal was never implemented.²

2. D. P. O'CONNELL, INTERNATIONAL LAW 391-92 (1965).

Following the Treaties of Versailles, and then the Imperial Conference of 1926, agreements between Commonwealth members could not take the form of treaties, because they were normally concluded in a head-of-state form, and the indivisibility of the Crown prevented this. Therefore, the practice developed for Commonwealth members not to register *inter se* bilateral agreements, and to include in multilateral agreements reservations concerning their application *inter se*.

A more realistic attitude now exists with regard to these agreements, but manifestations of the earlier theories still occasionally recur. For example, in 1947 India invoked before the United Nations a 1927 agreement between itself and South Africa,³ and South Africa, relying on Article 2(7) of the United Nations Charter,⁴ contended that the dispute was domestic, being *inter se*. The declaration of acceptance by Canada of the compulsory jurisdiction of the International Court of Justice contains a reservation with respect to disputes among Commonwealth members,⁵ and thus the legal position of the British subjects of Indian origin now suffering discrimination in Kenya may well in some instances be affected by the *inter se* doctrine.

III. PROBLEMS RESULTING FROM THE PREVIOUS COLONIAL STATUS OF THE COUNTRIES

The other problem which must be faced in examining the legal systems of ex-colonies is the identification of the laws now applicable and effective. The attainment of independence of Commonwealth members has in most instances the same legal effect as secession.⁶ But the laws of most of these countries are in varying degrees intertwined with English laws. Many of the statutes of these countries are almost identical in whole or in part to English legislation, or as in East Africa, to English and Indian legislation. In these instances, and in those where specific English statutes are incorporated into the local

3. The dispute was centered around the question of the treatment of people of Indian and Indo-Pakistan origin in the Union of South Africa.

4. U. N. CHARTER art. 2(7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

5. The Declaration of Canada, dated 20 September 1929, ratified 28 July 1930, contained a reservation with respect to "disputes with the government of any other Member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the Parties have agreed or shall agree. . . ."

6. There is an important distinction not always present in other newly-independent States. In every instance, Commonwealth members have been *granted* their independence. No questions of legality or illegality of independence exist.

law, special attention is paid to the way in which the original or "pattern" legislation has been interpreted in the country of origin.

Another area in which external law is incorporated is in the general reception statutes, which always cause some difficulty in interpretation. These statutes generally provide that the common law, doctrines of equity, and statutes of general application in England shall be in force in the country in question, but subject to such qualifications as local circumstances may make necessary.

In some instances, such as Ghana, procedural law is also incorporated into the local law. The Supreme Court (Civil Procedure) Rules⁷ are almost identical to the English Rules of the Supreme Court as the latter stood prior to their revision in late 1954. But even after borrowing in this wholesale fashion, there is anticipation that what has been borrowed may not provide for every contingency. The Ghanaian rules state: "Where no provision is made by these Rules, the procedure, practice and forms in force for the time being in the High Court of Justice in England shall, so far as they can be conveniently applied, be in force in the Supreme Court of the Gold Coast."⁸

On the west coast, in Ghana, Nigeria, The Gambia and Sierra Leone, the English procedural practice came directly. This was not the case in Tanzania in East Africa. There, until October, 1966, the courts had employed the Indian Code of Civil Procedure of 1908, which itself is derived from turn-of-the-century English rules. The new Tanzanian Code,⁹ then, is a revised and refurbished version of the English procedure received via India.

This reliance by 27 countries, having a total population of 800 million people (almost one-fourth of the population of the world), upon a single source of substantive and procedural law is a remarkable phenomenon, and one that is not often appreciated outside the Commonwealth. It does, however, produce some unexpected results as is the case with Tanzanian civil procedure. Some of the English rules which formed the basis for the 1908 Indian Code have changed considerably in the past sixty years, and the Indian Code itself has been altered. Yet in Tanzania, there has been no change since 1908.

7. Laws of the Gold Coast, 1954, Subsidiary Legislation, ch. 4. The chapter 4 referred to is "The Courts' Ordinance" of July 1, 1935, which was repealed and replaced by the Courts' Act, 1960, (C.A. 9) which was in turn repealed and replaced by The Courts' Decree, 1966 (N.L.C.D. 84). Throughout, however, the Supreme Court (Civil Procedure) Rules of 1954 have remained intact and have been subjected to amendment or modification on very few occasions, most of which have related to matters of form only.

8. Order 74.

9. TANZANIAN CIV. PRO. C., Act No. 49 (1966).

Another example is Canada, where, until 1968, the divorce law¹⁰ has been based in large part upon the English Matrimonial Causes Act of 1857,¹¹ a statute that has not been the law of England for more than a quarter of a century.

These anomalies are accepted by Commonwealth lawyers without second thought. Accordingly, I find out of place the irritated comment of an American scholar writing on East Africa: "The reception statutes bristle with problems, *even apart from the question of the general wisdom of wholesale incorporation of foreign law into independent countries.*"¹² We do not, in the Commonwealth, think of other Commonwealth countries or their law as foreign. Commonwealth countries do not exchange Ambassadors (they exchange High Commissioners) or appoint consuls among themselves, and few of them maintain Ministries of Foreign Affairs. The relevant offices are called Ministries, or Departments, of External Affairs because they deal in relations with both Commonwealth and foreign countries.

IV. PROCEDURES AND REMEDIES

Because the root of much of the civil procedure in the African Commonwealth countries is of English origin, an alien litigant may, as a rule of thumb, assume (1) that he will always have access to the courts unless he is an alien-enemy, and (2) that a sophisticated range of remedies is available to him. Neither of these opportunities are hedged by conditions of reciprocity. In ordinary circumstances he will be given the same opportunities to traverse pleadings, to discover documents, to engage in pre-trial interrogatories, to call and examine witnesses at trial, and to appeal as would be available to him in England. He need not fear that he will be confronted with peculiar procedural requirements or unreasonably short periods within which to file a notice of appeal. Nor will he be required to deposit security for costs in prohibitive amounts. The usual sum ordered in Ghana is £500, while in Kenya a calculation is made on the basis of the party and party tariff.

Rather than catalogue all this information on a comparative basis, however, I will examine briefly those procedures, or those remedies, which are most likely to concern an alien. The area of activity most likely to attract alien interest embraces the fields of capital investment

10. Marriage and Divorce Act, R.S.C., ch. 176 (1952).

11. The Divorce and Matrimonial Causes Act, of 1857, 20 & 21 Vict., ch. 85. By an English "short titles" statute passed in 1907, the name of this act was declared to be "The Matrimonial Causes Act."

12. Ian R. Macneil, *Research in East African Law*, 3 E. Afr. L. J. 47, 49 (1967) (emphasis added).

and business activity. Unquestionably, the totalitarian aspects of Ghana's government for a period preceding the *coup d'état* of February 24, 1966, the consequences of such events as Kenya's chauvinistic laws respecting labour permits, and Tanzania's Arusha Declaration of January, 1967, have affected the investment climate in those countries. But beneath the overlay of nationalistic, sometimes emotional, pronouncements it is necessary to determine what the alien's legal remedies are.

I shall look first at the Tanzanian statute entitled "An Act to give Protection to certain approved Foreign Investments and for matters incidental thereto,"¹³ which is often overlooked by outsiders. The statute has been in force since September 20, 1963, and is designed to encourage foreign investment. The act gives to any alien the opportunity to apply to the Tanzanian government for certification that his enterprise will "further the economic development of, or benefit"¹⁴ Tanzania. If at any time an approved enterprise, or property belonging to an approved enterprise, is nationalized or expropriated, "the full and fair value of such enterprise or property shall be ascertained"¹⁵ and the holder shall be paid. Should the compulsory acquisition be of shares in a body corporate, "the full and fair value"¹⁶ of these shall be paid. Compensation is paid in the foreign currency and may be transferred out of the country at the prevailing official rate of exchange. The remedy is provided by section 6(3) of the Act which reads:

If any question arises between the Government and the holder of a certificate as to the value of any enterprise, property, stock, or share, the question shall be referred to and determined by arbitration, and at any arbitration each party shall appoint one arbitrator, who shall jointly appoint a third.

The remedy is extra-judicial, but it is available and there is precedent to show that it is effective. It is one, therefore, which must be exhausted.

Pursuant to President Nyerere's 1967 Arusha Declaration, the Tanzanian Parliament, in February of that year, passed five expropriation statutes, but care was taken to insert in the appropriate acts a clause stating: "Nothing in this Act shall be construed so as to affect in any way the rights of the holder of a certificate issued under the Foreign Investments (Protection) Act of 1963."¹⁷ The five

13. Act No. 40 of 1963.

14. *Id.* § 3(2).

15. *Id.* § 6(1).

16. *Id.* § 6(2).

17. See, e.g., The State Trading Corporation (Establishment and Vesting of Interests) Act (1967), Tanzania, Act No. 2 of 1967.

statutes dealt with banks,¹⁸ trading firms,¹⁹ agricultural firms,²⁰ insurance companies,²¹ and industrial concerns.²² In each case a state corporation assumed ownership and management of certain scheduled entities. A uniform section appears in each of the five acts which reads: "The United Republic shall pay full and fair compensation." It is followed, however, by the following proviso: "Provided that the said amount of compensation shall be payable in such manner and in such installments as the Minister for Finance, after consultation with the person entitled, shall determine."²³

Should the person entitled to receive compensation not be satisfied with the manner and the installments, he will most likely turn to the Government Proceedings Act of 1967,²⁴ which makes the Government subject to liability in contract, in tort and "in other respects, to which it would be subject if it were a private person of full age and capacity,"²⁵ and which provides that money decrees shall apply against the Government as they do against a private person.²⁶ This legislation has not, to my knowledge, been tested in an expropriation case. When it is, the courts of Tanzania will have an opportunity to decide the scope of its application. Until some jurisprudence develops, the statute, I submit, provides a remedy which must be pursued.

In Kenya foreign investment is protected by the Foreign Investments Protection Act of 1964,²⁷ which in most respects is identical to the Tanzanian statute after which it was modelled. There is, however, a major variation. The Kenya act makes illegal the compulsory acquisition of any property without full and prompt payment of compensation as required by the Constitution of Kenya.²⁸ Article 19 of the constitution, which applies to all persons, provides that no property shall be taken compulsorily except where (1) the taking is

18. The National Bank of Commerce (Establishment and Vesting of Assets and Liabilities) Act (1967), Tanzania, Act No. 1 of 1967.

19. See note 17 *supra*.

20. The National Agricultural Products Board (Vesting of Interests) Act (1967), Tanzania, Act No. 3 of 1967.

21. The Insurance (Vesting of Interests and Regulation) Act (1967), Tanzania, Act No. 4 of 1967.

22. The Industrial Shares (Acquisition) Act (1967), Tanzania, Act No. 5 of 1967.

23. Act No. 1, § 10; Act No. 2, § 12; Act No. 3, § 7; Act No. 4, § 6; Act No. 5, § 4.

24. Tanzania, Act No. 16 of 1967.

25. *Id.* § 3, para. 1.

26. *Id.* § 14, para. 1.

27. Kenya, Act No. 35 of 1964.

28. Found as a schedule to the Kenya Independence Order-in-Council, 1963, S.I. 1963, No. 1968; Kenya L.N. 718, 1963. For a discussion of amendments to the constitution, see C. M. Njonjo, *Recent Constitutional Changes in Kenya*, 1 E. Afr. L.J. 98 (1965). Mr. Njonjo is the Attorney General of Kenya.

in the public interest, (2) the necessity affords reasonable justification for the causing of any hardship that may result to the property owner, and (3) there is prompt payment of full acquisition.²⁹ In addition, any person who has a right or interest in any property which has been acquired or possessed compulsorily shall have "a right of direct access to the Supreme Court" for the determination of (1) his interest, (2) the legality of the taking, (3) the amount of compensation to which he is entitled, and (4) for the purpose of obtaining prompt payment of that compensation.³⁰ No person entitled to compensation may be prevented from remitting that compensation out of Kenya free from any charge or tax in respect of remission.³¹

On the west coast, Ghana, in 1963, proclaimed the Capital Investments Act.³² No investment under the terms of the act "shall be subject to expropriation. . . . Where, however, in exceptional circumstances, an approved project is taken over in the public interest, the Government shall pay fair compensation" in the currency in which the investment was originally made.³³ Disputes over compensation shall be referred to an arbitrator appointed by the parties or, failing such appointment, to arbitration through the agency of the International Bank for Reconstruction and Development.³⁴

V. THE MECHANICAL STRUCTURE OF TRIBUNALS IN EAST AFRICA

In this brief discussion of remedies in a very narrow area of activity in these countries, I have given emphasis to the existence of the remedy and have not paused to discuss either its qualitative or discretionary aspects. Nor have I chosen here to engage in any discussion of the structure of the local remedies rule, or to make an analysis or comparison of the two dominant schools of thought concerning its legal character. Nor, finally, have I said anything about the relationship of the concept of denial of justice to the local remedies rule. Discussions of these considerations may be found elsewhere.³⁵ Before concluding, however, I should like to say a word about the structure of the tribunals dispensing these remedies. Since the courts of Ghana

29. KENYA CONST. art. XIX, § 2.

30. *Id.*

31. *Id.* § 4.

32. Ghana, Act No. 172 of 1963.

33. *Id.* § 8(1) & (2).

34. *Id.* § 8(3).

35. See, e.g., I. L. Head, *A Fresh Look at the Local Remedies Rule*, 5 C.Y.I.L. 142 (1967), and titles cited therein; F. G. Dawson, *International Law and the Procedural Rights of Aliens Before Municipal Tribunals*, INT'L & COMP. L.J. (1968); C. F. Amerasinghe, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* ch. 5-7 (1967).

have recently been studied in some detail,³⁶ I shall go to the other side of the African continent and say something about the institutions of Tanzania.

A discussion of the law of East Africa, not surprisingly, is a capsule of the political, social and economic history of the trading basin washed by the western edge of the Indian Ocean. The earliest law court in what is now the United Republic of Tanzania was a consular court in Zanzibar, established in 1839. Appeals from it lay to the High Court of Judicature in Bombay. A re-organization of the administration of justice at the turn of the century established a regular court of justice in Zanzibar in 1897, with an appeal to the Bombay court and then to the Judicial Committee of the Privy Council. In 1914, the route of appeal was changed and Bombay was replaced by the Court of Appeal for Eastern Africa. In 1920, the British established the High Court of Tanganyika, the forerunner of the present High Court of Tanzania, possessing both original and appellate jurisdiction.³⁷

The present High Court is provided for in the 1965 interim constitution.³⁸ Judges are appointed for life, but with a mandatory retirement age of 62. They may be removed from office only for cause, and safeguards are laid down to ensure that this is not abused. An investigation must precede any removal. The investigation is carried out by a tribunal composed of at least three persons, the chairman and one half of the others being persons "who hold or have held office as judges of courts of unlimited jurisdiction in some part of the Commonwealth." The President acts on the advice of this tribunal.³⁹

The Court of Appeal for Eastern Africa, first established by the British Crown in 1914,⁴⁰ was re-established by the governments of Tanzania, Kenya and Uganda through the medium of the East African Common Services Organization Agreements of 1961 to 1966.⁴¹ These agreements established such other remarkable cooperative common services as income tax, customs and excise, posts and telecommunications, and East African Airways. When these agreements were re-

36. I. L. Head, *International Standards of Civil Procedure: The Alien in the Courts of Ghana*, 12 ST. L. UNIV. L.J. 392 (1968).

37. For more detailed discussions of this development, see Cole and Denison, *Tanganyika*, in 12 THE BRITISH COMMONWEALTH: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTIONS (1964).

38. An Act to Declare the Interim Constitution of Tanzania, 1965, Tanzania, Act No. 43 of 1965, § 56.

39. *Id.* § 58.

40. The East Africa Protectorate (Court of Appeal) Order-in-Council, 1902, art. 2.

41. Court of Appeal for Eastern Africa Act, East Africa Common Services Organization Agreement No. 13 of 1962, *as amended*.

placed on December 1, 1967 by the Treaty for East African Co-operation, a new court was constituted and entitled the Court of Appeal for East Africa.⁴² The previous court "shall continue in being" under the new name and "shall be deemed to have been established by this Treaty."⁴³ The Court of Appeal is a circuit court sitting in Kampala, Dar es Salaam and Nairobi, but when not sitting it is headquartered in Nairobi.

This mechanical structure must, I think, be examined against the background of the Tanzanian constitution. I should like to conclude by quoting from the opening passage of that document because it places in perspective the entire question of non-discrimination, of fairness of treatment, of just laws, and of adequacy of remedies of which I have been talking. The interim constitution of July 1965 reads, in part, as follows:

Whereas freedom, justice, fraternity and concord are founded upon the recognition of the equality of all men and of their inherent dignity, and upon the recognition of the rights of all men to protection of life, liberty and property, to freedom of conscience, freedom of expression and freedom of association, to participate in their own government, and to receive a just return for their labours:

And when men are united together in a community it is their duty to respect the rights and dignity of their fellow men, to uphold the laws of the State, and to conduct the affairs of the State so that its resources are preserved, developed and enjoyed for the benefit of its citizens as a whole and so as to prevent the exploitation of one man by another:

And whereas such rights are best maintained and protected and such duties are most equitably disposed in a democratic society where the government is responsible to a freely elected Parliament representative of the People and where the courts of law are free and impartial.⁴⁴

In the final analysis, a functioning judicial system, complete with adequate remedies and reasonable procedures, which are so important to an orderly international community, is also beneficial to the persons who reside within the jurisdiction of the system. In this way international law and municipal law each gain from the other.

42. Signed at Kampala, Uganda on June 6th, 1967, reproduced at VI I.L.M. 932 (1967).

43. *Id.* art. 80.

44. See note 38 *supra*.