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## Book Review [International Law, National Tribunals and the Rights of Aliens]

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## BOOKS

### *BOOK REVIEW*

INTERNATIONAL LAW, NATIONAL TRIBUNALS AND THE RIGHTS OF ALIENS. By Frank Griffith Dawson and Ivan L. Head. Syracuse, New York: Syracuse University Press. 1971. Pp. 334, \$11.75. Hardcover.

Mr. A. V. Dicey once said that it is not the formal declaration of rights but, rather, legal remedies that really matter.<sup>1</sup> This is the theme of this timely volume, the 10th of a series relating to the procedural aspects of international law. Edited by Professor Richard B. Lillich, the first study dates back to 1962. The authors, and their collaborator, Professor Peter Herzog of the Syracuse University law faculty, seek to tell it like it is concerning the procedural rights of aliens abroad. To perfect their undertaking they visited 25 countries in 1967 and 1968 in search of data. Innumerable consultations were held with foreign law experts concerning issues of procedure and practice likely to arise in cases involving foreign claimants.

The authors concentrate on very practical matters at a time when there are rapidly accelerating cross-frontier activities and also fairly obvious trends in some areas toward legal nationalism. Their purposes are several. They wish to explore the protections accorded to individuals. They also wish to contribute to the reduction of tensions among States which arise when nationals of one State are not fairly treated in and by other States. They suggest practical reforms by treaty or by legislation. The following paragraph from this book is indicative of the authors' excellent efforts.

This study began with the premise that it is in the mutual interest of all nations, be they host States or potential protecting States, to promote the settlement of controversies at local court levels rather than allow them to grow into international disputes between sovereign States. As revealed throughout these Chapters, there are certain areas where, unless greater clarification and uniformity are obtained, formal procedural inadequacies, reinforced by extralegal factors discussed herein, could produce denials of justice and thereby precipitate international claims. Nevertheless, the evidence indicates that, in the main, aliens' fears of foreign legal systems are groundless and founded more upon ignorance than on fact. This does not however, mitigate the need for improvement of national court procedures, since world order must for the foreseeable future depend upon a fragile, horizontal interaction between local tribunals, foreign offices, and national institutions of varying complexity.<sup>2</sup>

Additionally, it was the authors' announced purpose to provide

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<sup>1</sup> A. DICEY, *LAW OF THE CONSTITUTION* 198-99 (9th ed. 1939).

<sup>2</sup> F. DAWSON & I. MEAD, *INTERNATIONAL LAW, NATIONAL TRIBUNALS AND THE RIGHTS OF ALIENS* 311 (1971).

a reference book for counsel who engage in protecting clients located in foreign States.

The authors identify the political and legal forums in which counsel may be obliged to work.<sup>3</sup> They also identify the functional legal bodies in which decisions take place, and refer not only to legislative, executive, judicial, and administrative agencies, but also to the function of private and public arbitration as dispute-resolving processes. Their emphasis, as respects the rights of aliens, is upon obtaining just, valid, and enforceable governmental decisions.

The authors' examination of these problems is limited to selected countries and to selected issues. Being a limited sample of States—some mature and others developing—no claim is made as to definitiveness. Indeed, to have attempted an analysis of the 131 members of the United Nations, plus all the outsiders, would have presented insuperable difficulties. Thus, the generalizations only relate to each of the nations investigated, and only 25 States were examined in depth. Even in culturally homogenous States with common legal traditions, such as the Latin American countries, there have been a multiplicity of views put forward on a variety of subjects. For example, the integrating influence of the Bustamante Code, which has been honored as premium literature in the area, appears to have been honored both in its observance as well as its breach.

To obtain some substantial measure of generalized coherence it is clear that recourse to the treaty process must be available in regions and among varied national legal systems. While the book purports to offer practical help to a non-national litigant while abroad, its basic impact may well be to highlight the inadequacies in many areas of the existing legal process. While codification, as the authors note, would alleviate or correct a bewildering variety of

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<sup>3</sup> They state: "Until the end of World War II, if local remedies were unavailable, or if access to them were unjustly withheld from aliens, States could intervene legitimately on behalf of their nationals abroad, utilizing a spectrum of self-help techniques ranging from diplomatic protests to armed coercion. This approach is no longer an accepted problem-solving modality except perhaps in extreme, isolated instances involving humanitarian intervention to protect human rights, since employment of self-help devices has been curtailed by the advent of the nuclear age and by ideological divisions. In addition, foreign offices and legal advisers, by the force of events, now may be constrained to limit their traditional functions as advocates and champions of citizens abroad, and to place more emphasis upon conciliating differences rather than upon imposing solutions. This diminished function of one of the traditional participants in the horizontal legal system, plus the failure of progress any further toward vertical international order, has placed greater responsibility upon national courts to preserve international stability in an era of social upheaval." *Id.* at 291. Further, "The problems aliens encounter in obtaining relief in local judicial and administrative tribunals in the countries examined are due either to the lack of adequate, formal legal machinery, to the deficient political, economic, and social environments in which that machinery must function, or to a combination of both." *Id.* at 294-295.

State practices, it may be necessary to take a more creative attitude toward the treaty process so that new approaches will emerge consisting of internationally defined minimal procedural standards. With general treaties it would then be much more feasible to offer persuasive generalizations as to State practice. Thus, while the authors' statements on common procedural patterns may be viewed with caution, their assessments of basic trends are readily supportable. For example, the identification of the basic differences in outlook toward the functions of executive departments and the judiciary in civil and common law States is particularly instructive.

While codification or the drafting of treaties containing new assurances would contribute to the amelioration of existing inconsistencies, there is still the need to determine what priority States will assign to the negotiation of uniform simplified procedures for cross-frontier transactions. This is clearly an area where the more mature States, motivated by substantial self-interest, can lead. The authors are certainly correct in asserting that only where the public perceives the advantage of having respected dispute-resolving processes will the governments give such institutions the resources and supporting services necessary to true effectiveness.

Much attention was given to the identification of the procedures used in the examined States. The research understandably took the authors to national constitutions, legislation, executive orders and decrees, judicial decisions, administrative holdings, and treaties of the bilateral and multilateral type, as well as the commentaries of informed scholars and practitioners. To be relevant, such data must undergo constant revision. For a work of this sort to be useful some means is needed to insure its periodic revision, and, as suggested, to extend its coverage world-wide, or at least to a vastly larger number of States than were examined.

Such a task can hardly be accomplished by a group of scholars, even when supported, as these authors were, by a Ford Foundation grant. Despite the proliferation of new States and the ever-greater need for detailed information on the issues involved in this study, it is doubtful that the gathering and distribution of such data can be performed at a profit by lawyers' services companies. The magnitude of the problem automatically refers the matter to States or possibly to international organizations. To be useful, such bodies would need staffs, computers, and all the paraphernalia of a sophisticated private business organization. In order to provide the needed service the processors would have to deal with the various practices of each State which could conceivably deal with the interests and activities of aliens. Hardly a State could escape the area of investigation.

Thus, if the needed service—and it is needed—is to be established and kept up to date,<sup>4</sup> why should not one or more governments, either unilaterally or cooperatively, engage in or underwrite the collection and publication of this essential data? The costs to governments and international organizations might be justified with the assumption that satisfied litigants would no longer have the need for expensive diplomatic intervention. Presumably, the basic claim would be more readily resolved through private initiatives when such procedural data became more available. Furthermore, the economics of the practice of law dictate that valid claims, which might be justifiably asserted by aliens in foreign jurisdictions, are often never processed beyond the lawyer's office because of the disproportion between the cost of legal services and the true value of the claim. If an alien could protect his rights abroad at reduced cost there would be a minimization of his frustration, notwithstanding the reduction of possible international tensions. Moreover, with the increasing mobility of individuals, there is the greater probability of relatively small but legitimate claims: for example, the government owned railway losing the alien's baggage; the peculation of the petty postal clerk; or a minimal affront to an alien either by an excessive use of force by the police or by a failure to meet the international standard of protection. Also, counsel's clearer understanding of foreign procedural law may allow him to advise potential investors abroad of possible legal pitfalls. In such a situation preventive law might be more feasibly practiced with its obvious impact upon the alleviation of international tensions. A condition of trust, which is promotive of foreign investment, results from a clear awareness of the powers and the limits of national dispute-resolving procedures. Finally, world scrutiny of national procedural law will lead not only to changes beneficial to foreigners. Applied in an evenhanded way, they will also benefit one's own nationals. These persons may be more in need of the standards which flow from the development of national legal institutions than the alien requires. In many instances, both would stand to profit.

A book dealing with procedures and practices may be organized in at least two ways. First, it is possible to select a given subject, such as the enforcement of a foreign judgment, and then proceed to examine it in view of the practices of all available States. Second, each State may be examined in all of its aspects, much the way, for

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<sup>4</sup> For example, since the publication of this book the Government of Mexico has promulgated a policy permitting aliens to have extended use of land lying along its seacoasts and along its borders, which policy is a departure from the limitations mentioned by the authors at page 237. The new Mexican policy is set forth in an Executive Decree of April 30, 1971, and makes provision for the issuance of certificates of participation in real property.

example, as the Foreign Law Digests appear in the Martindale-Hubbell Law Directory.

These authors have used the topical approach of this first instance and have grouped together the subjects of extra-legal matters, access to tribunals, litigation problems including the posting of security, protection against governmental action, recognition and enforcement of foreign judgments, and comments on techniques for achieving minimum standards of justice in national tribunals. Such an approach places a high premium on an adequate index. Accordingly, this volume contains a detailed one. The authors have also provided a very careful and useful list of references, both original and secondary, which abundantly appear in the footnotes.

Viewed from the perspective of the increasing demands for recognition and observance of human rights, a better way to achieve goals like the establishment of effective national procedures permitting alien's to adjudicate their claims can hardly be imagined. If humankind is to know an acceptable standard of justice in all forms and areas of litigation—without regard for the size of the respective claims—the kind of research exemplified in this book will have to be extended manyfold. The need has been identified. The authors have provided some basic practical guides to those engaged in transnational litigation on behalf of the rights of alien clients. They have pointed one way to the enlargement of human rights. Of equal importance has been their noticing that much more remains to be done in the collection, formulation, and dissemination of the procedural laws and the multitude of dispute-resolving processes and practices of States.

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