Restriction of Aliens in Business in Ghana and Kenya

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Introduction

The position of non-citizens in certain African countries has been in focus in the world news in the recent past. Indeed in the past ten years many African countries have tightened their immigration laws to invalidate the right of non-nationals to live and work in the country. New legislation has also been passed by the national legislatures, restricting indigenous aliens from various aspects of the economy, especially in commercial activity, an effort designed to attain increased participation in their respective economies.

In some African countries, notably Uganda, these decisions have come abruptly and, indeed, the measures in that country were directed at the expulsion of non-nationals. In the space of a few weeks, the President of Uganda, General Amin, made various pronouncements on the position of Asians in Uganda. The General first abruptly announced the expulsion of all Asians with British passports, within a period of ninety days, but exempted lawyers, doctors, teachers and other professionals from the Order. Shortly thereafter, the exemption was dropped and, more significant, Asians who had acquired Ugandan citizenship were included in the expulsion Order. A few days later, General Amin changed his mind, reverting back to the initial position of expelling only those Asians with British passports. The reason for the issue of the expulsion Order was that Asians as a group had too much control over the Ugandan economy and were sabotaging the economy through their business practices, thus making it clear that as long as they retained control, Africans were unlikely to acquire control of their own economy.2

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This paper, however, will focus on the legislation restricting non-citizens in the conduct of business in Ghana and Kenya, where the same objective has been sought, but in a continuum.

First, Ghana, which issued an order in 1968 requiring aliens (who are required to have resident permits) to have work permits before they could act as employers, self-employed or employees. This was followed by the Ghanaian Enterprises Decree 1968, consolidated and revised into the Ghanaian Business (Promotion) Act 1970, designed to achieve a long-term development of a Ghanaian-controlled economy. These measures affected primarily nationals of other West African countries, and about 600 nationals of Lebanon, India and Syria.³

The other country is Kenya where the Immigration Act of 1967 required non-citizens to obtain entry permits in different classes, which served as both a residence permit and a work permit and, more important, the Trade Licensing Act commencing in 1968. This Act sought to restrict non-citizens from trading in certain geographical areas and also prohibited them from handling certain products. This was designed to enable Kenyan citizens to play a significant role in the economy.⁴

The provisions of this legislation will be discussed herein below.⁵

Who Is a Non-Citizen

Ghana

The law relating to citizenship is not clear. Indeed, a non-citizen or an alien is not clearly defined in any of the legislation relating to citizenship. In the Aliens Act⁶ 1963, for instance, an alien is defined as "any person who is not a citizen of Ghana."

Even though the Ghana Constitution of 1969 is suspended,⁷ the Ghana Nationality Act,⁸ which consolidates the law relating to the acquisition and loss of citizenship, is still in force, with minor amendments to take care of the new structure of government. There are three categories of persons who can become citizens of Ghana by birth. Every person born before March 6, 1957, the date of Ghana's independence from Great Britain, who was born in Ghana and at least one of his parents or grandparents was born in Ghana or was born outside

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⁵See second, third and fourth sections, infra.
⁷After a military take-over on January 13, 1972, the new military Government by means of a Proclamation suspended the Constitution.
⁸Act 361 (1971).
Ghana of parents of which one was born in Ghana, is a citizen of Ghana. After March 6, 1957, but before August 22, 1969, a person born in or outside Ghana any of whose parents, grandparents or great-grandparents were born in Ghana is also a citizen of Ghana. Third, all persons born in or outside Ghana either of whose parents was a citizen of Ghana is also a citizen of Ghana by birth. Provision is also made for the registration of persons who are nationals of other countries and who have been ordinarily residing in Ghana for at least a period of five years preceding such application. Every woman married to a Ghanaian citizen is also eligible to registration as a Ghana citizen. There is also provision for naturalization which requires such person wishing to become a citizen of Ghana to have resided in Ghana twelve months before applying and an aggregate of five years in the past seven years before that. Everybody who does not come within any of these formulations is then an alien.

The admission of aliens into Ghana is regulated by the Aliens Act and certain regulations made thereunder. Under these regulations, an alien is normally admitted into Ghana (1) if he is not a prohibited immigrant, (2) if he is in possession of a valid passport, and (3) unless he is an exempted person (diplomats, international civil servants, persons under sixteen years of age, etc.) if he has a visa or an entry permit issued by the competent authority. For instance, a person who is a citizen of Portugal cannot enter the Republic of Ghana.

More important, if an alien wants to remain in Ghana for any length of time, he must be granted one of the permits provided for by the regulations. Three types of permits are granted. First, a residence permit which an alien must obtain in order to take up, or continue in, employment in Ghana or to engage in any trade, business or profession or to remain for a substantial or indefinite period. Second, a transit permit for a person desiring to stay in Ghana for a period not exceeding fourteen days. And third, a visitor's permit which is granted where the residence or transit permit is inapplicable or inappropriate.

Kenya

Although there is extensive legislation on the law relating to citizenship there is no comprehensive definition of who is an alien. Chapter VI of the Constitution of Kenya 1969 provides for the law relating to citizenship. As in Ghana, a person can become a citizen of Kenya by four ways, viz., by birth, by descent, by registration, or by naturalization.

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9Ibid., Section 1.
12Aliens Regulations, supra note 10, sections 5-9.
First, every person born in Kenya after December 11, 1963, one of whose
parents was born in Kenya, automatically becomes a citizen of Kenya. Indeed,
yany person born outside Kenya after December 11, 1963 is a citizen of Kenya, if
on his date of birth his father is a citizen of Kenya or would, but for his death,
have become a citizen of Kenya. By registration any woman who was married to
a citizen of Kenya on December 11, 1963 is entitled to be registered as a citizen
of Kenya. Apart from women, any Commonwealth citizen or a citizen of an
African country who has been ordinarily resident in Kenya for such period as
may be prescribed by an Act of Parliament is also eligible to be registered as a
citizen of Kenya. There is also a provision prescribing conditions to be fulfilled
in order to be naturalized as a Kenya citizen.14

The conditions and terms of admitting aliens into Kenya are, however,
regulated by the Immigration Act of 1967.15 "No person who is not a citizen of
Kenya shall enter Kenya unless he is in possession of a valid entry permit or a
valid pass,16 unless such person has a diplomatic status." There are twelve
classes of entry permits.17 These entry permits range from permits for persons
who are qualified to undertake employment to persons who intend to engage in
the business of agriculture, to practice a profession, or to engage in trade.18

The Immigration Regulations,19 made in accordance with the power granted
to the Minister, facilitate the implementation of the Immigration Act. Under
section 11 of the Regulations, although the period of validity of the permit
granted to any person is at the discretion of the immigration officer, and may be
renewed periodically, no entry permit can be issued or renewed for a period
exceeding five years at a time.

Clearly then, in both Ghana and Kenya, to be able to reside in the country an
alien must obtain either a residence permit or an entry permit. In Kenya, the
entry permits serve at the same time, by their nature, as work permits,
especially in the case of those aliens who wish to engage in employment, some
form of business or to practice their profession.

History of the Aliens and Their Participation
in the Business and Employment Sector of the Economy

Ghana

There have been five population censuses in Ghana, although the latest one in
1970 is yet to be published. The total population of Ghana in 1921 was

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14Ibid., sections 87-93.
15No. 25 of 1967.
16Section 41 of the Act.
17Schedule to the Act.
18Classes A, F, G, H, I, J are important. These classes include permits for Government
employees, employees under U.N. technical aid schemes, non-citizens who would engage in
employment which will be beneficial to Kenya, non-citizens who plan to engage in a specific trade,
business or profession, or prospecting for minerals and the manufacture of goods in Kenya.
The population is almost entirely African: 99.77 percent of the population in 1960. The total population of persons of foreign origin in 1960 was 827,000, of which 98.1 percent came from other African countries. Indeed, 80.6 percent of the alien population of African origin migrated into Ghana from Togo, Upper Volta and Nigeria, all West African countries. Ghana has borders in the north with Upper Volta and to the west with Togo. Thus only 1.9 percent of the population of foreign origin came from countries outside Africa, more particularly, Europe, Australia, America, Lebanon and India. The actual figure in 1960 was 16,000 persons.

Ghana has attracted many immigrants, mainly of West African origin, because of the relatively higher standard of living and the job opportunities that came with the expansion of industry and commercial farming. Indeed, the majority of the alien population lived in the rural areas where they served as farm workers. However, a smaller percentage of them lived in the urban areas where they exercised a significant influence in economic life, in the diamond, transportation and especially in the wholesale, retail and petty trade areas.

"At the time of independence in 1957, perhaps as much as 98 percent of the import and distributive trade was in the hands of non-nationals. In 1960, it was estimated that about 95 percent of the trade was in the hands of aliens. Now in 1970, Ghanaians hold no more than about 20 percent of the import trade." Indeed, although aliens constituted 18 percent of the adult male population in Ghana in 1960, they contributed 25 percent of the tailors, 46 percent of the male millers, bakers, and brewmasters, 32 percent of the longshoremen, 59 percent of the butchers, 39 percent of the laborers and 42 percent of the service workers (including the army and police).

These figures indicate clearly the significant position of aliens in the economy of Ghana.

21Ibid, p. 27.
22Ibid.
23Cocoa growing industry 70,354
   Metal 3,628
   Diamond 10,173
   Transport 7,284
   Wholesale Trade 46,739
   Petty Trading 36,065
   Government Services 7,646
   Army, Navy, Air Force 1,823
   Justice, Police and Prisons 1,563

Source: 1960 Census


Kenya

The alien population in Kenya is more varied and the population of persons of non-African origin is greater numerically. The population of Kenya in 1967, as estimated by the Kenyan Government, was approximately 9,671,000 Africans, 192,000 Asians and Arabs, and 42,000 Europeans.\(^{26}\) By 1969, the Kenyan population had increased to 10,506,000 including 267,000 non-Africans. In 1970, the population had increased to 10,942,000 including 209,000 non-Africans.\(^{27}\) The decrease in the non-African population may be due to the impact of the Immigration Act of 1967, which required aliens to obtain various forms of entry permits described above, and the Trade Licensing Act which restricted the participation of aliens in certain areas in Kenya and in the marketing of certain products.

As the figures indicate, most of the non-African population is of Asian origin. Kenya became a United Kingdom protectorate in 1895 and with the construction of the Uganda railway the British imported many Asians to work on the construction.\(^{28}\) Most of these Asians did not stay on after the completion of the railroad, but the descendants of many of the traders followed the railway to trade. Aside from being traders, the Asians at this time were Kenya’s main reserve of skilled labor and also filled the clerical positions opened up by the Colonial Governments.

As in Ghana, the Asians dominated the Kenyan economy both in the business sector and occupationally. Twenty-three percent of the economically active males in the Asian community were in professional and managerial positions, 42 percent were in clerical positions, 26 percent were craftsmen or skilled manual workers and a mere 5 percent were semi-skilled or unskilled workers.\(^{19}\) As compared with the African population, 80 percent of which was unskilled, the Asian population dominated the middle-class. Perhaps more important was the fact that they controlled the private business sector of the economy: trading, industry, transportation and manufacturing. A survey of distribution in 1960 covered 4,748 establishments, with a gross turnover of 248 million Kenya Pounds. Of these, 76 million Kenya Pounds were in the retail trade dominated by the Asians. Commerce has contributed significantly to gross national product. In 1968-1970, commerce contributed close to 10 percent of the gross national product.\(^{30}\)

This brief account of the position of aliens in the economy of Ghana and Kenya demonstrates their significant role. However, there is one important

\(^{19}\)Kenya Census 1962.
\(^{30}\)Supra note 27.

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distinction between Ghana and Kenya. The percentage of non-African aliens is comparatively much smaller in Ghana than in Kenya. Consequently, measures restricting aliens in Ghana have affected mainly nationals of other African countries.

The Legislation Restricting Aliens in Business and Programs Designed to Encourage Indigenous People to Participate in the Business Sector of the Economy

The governments in many African countries have showed great concern over the domination of their economies by aliens. Consequently, they have conceived of methods of encouraging their own nationals in the business sector of the economy. Three alternatives are open to these governments: a) to expel the aliens who have dominated the economy, b) to restrict aliens in areas of business where indigenous persons can operate without much capital, or c) to allow the aliens to continue in their businesses and to encourage indigenous people to compete with them. Most African countries have followed a combination of the second and third alternatives, but Uganda followed the first.

Ghana

The movement towards the restriction of aliens in business in Ghana started indirectly as far back as 1947, through a process of tightening the immigration laws to prohibit "any persons or classes of persons whose intended occupation may, in the opinion of the Governor in Council, prove detrimental to the economic development of the inhabitants of the Gold Coast." This policy was adopted in view of the general agitation in the Gold Coast after the Second World War by indigenous soldiers who had fought alongside the British and who consequently had been exposed to the economic process in other parts of the world. The principal declared objective of this piece of legislation was not only to avoid the possible complications that might arise out of the presence of a substantial non-African population, but, more particularly, "to ensure that the indigenous population is allowed to progress without the eventual complications of pressure from powerful and strongly entrenched non-African interests, not only in the political sphere, but also in the commercial and economic spheres."

In the course of the administration of this law, the criteria used to evaluate aliens barred the starting of new trading activities or the expansion of already existing semi-wholesale and retail trading enterprises, although aliens who wished to set up manufacturing industries were encouraged. This policy was aimed especially at the Lebanese and Indian traders whose "trading activities

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1. Immigration Ordinance, Chapter 48, Section 12. Laws of the Gold Coast (1947).
were regarded as particularly unproductive and were objects of a special degree of mistrust and apprehension in the eyes of the immigration authorities."\textsuperscript{33} As there was no incentive program for the indigenous people, however, the effect of the policy was to consolidate the position of the already existing European and Levantine trading firms.

In the recent past, more direct legislation has been used to achieve the objective of indigenous Ghanaians controlling the business sector of the economy. The first legislation of that nature was the Ghanaian Enterprises Decree 1968,\textsuperscript{34} which was consolidated into the Ghanaian Business (Promotion) Act 1970.\textsuperscript{35}

The policy behind this legislation was laid out by the Minister of Economic Planning in the debates on the Ghanaian Business (Promotion) Bill, as follows:

A major objective of Government economic policy is to encourage private enterprise (both foreign and Ghanaian) to continue its vital role as the leading contributor to the country's volume of production, income and employment. Pursuant to this objective, foreign investors in Ghana are granted adequate incentives and guarantees under the Capital Investments Act, and other official regulations. However, it is not the intention of the Government that the encouragement of foreign investment should result in the perpetuation of foreign control and domination of the economy. To avoid this, the pace of Ghanaian participation in all sectors of the economy will have to be faster than it has been in the past. . . . It is the Government's policy to ensure that Ghanaian enterprises receive the maximum encouragement, and that there is no excessive concentration of control by foreign enterprises in any economic sector. The objective in short is to develop well balanced and progressive business fields in which indigenous business plays its full role.

The Minister further elucidated this policy by quoting from the manifesto of his party, as follows:

We undertook to provide maximum support for Ghanaian businessmen to ensure that Ghanaians themselves acquire greater status in the economy of their own country and thus provide the economic basis for viable democracy in Ghana . . . and we undertook to eliminate from the system the present "high monopolistic nature of the import trade which makes it possible for a few powerful commercial houses, largely foreign-owned to dominate the import and distributive trade;" and we undertook to do these things in order to help reduce the cost of living in this country.\textsuperscript{36}

The policy objectives for the legislation are thus fairly clear.

The Act in essence prohibits alien entrepreneurs from the small, medium scale and wholesale trade areas and further prohibits alien enterprises from expanding without government permission while prohibiting them from certain specific trades. Part II of the Act is of paramount importance. It prohibits any person other than a Ghanaian (defined in Section 32 as "any citizen of Ghana or

\textsuperscript{33}\textit{Ibid.}, p. 159-60.
\textsuperscript{34}\textit{N.L.C.D.} 323.
\textsuperscript{36}\textit{Ibid.}, Col. 1069.
any company, partnership or association or body the entire capital or other financial interest in which is owned by citizens of Ghana and which is controlled by citizens of Ghana") from being an owner or part owner of a retail or wholesale trade enterprise after August 1, 1970, unless such enterprise has as of the tax year 1967-68 shown annual sales exceeding five hundred thousand cedis (c=$.78). Alien enterprises are also after August 1970 prohibited from operation of any business concerned with "a) overseas business representation, b) taxi service and c) the sale under hire purchase contract of taxis or vehicles intended to be used in the operation of a taxi service." Aliens are also prohibited from engaging in any of the following enterprises: commercial transportation by land, bakery, printing other than printing of textiles, beauty culture, produce brokerage, advertising and publicity, and manufacture of cement blocks for sale. Aliens in these areas of business were given a year to phase out their businesses.

More important, aliens are prohibited from selling in any market in Ghana and from petty trading, hawking, or selling from a kiosk. This provision affected aliens from other African countries who had mainly participated in this type of trading.

In delineating the areas in which aliens are to be prohibited to do business, the Government was apparently guided by three considerations authored by the Minister: "a) the historical evolution of Ghanaian business enterprise b) the need for ensuring and improving efficiency in the protected fields c) the role of Ghanaian entrepreneurs in the long-term development of the economy."

Indeed, in those areas that aliens were permitted to operate, for instance in a retail or wholesale trade where the turnover exceeds 500,000 cedis, such enterprises must be licensed by the Minister of Economic Planning in accordance with the Alien Enterprises Licensing Regulations. Not only must such enterprises institute a scheme for the training of Ghanaians "designed to equip them with all the skills required for the operation of the business," but in accordance with the Government policy they must provide training opportunities for technical and managerial positions in their enterprises.

Other provisions of the legislation are merely supplementary. The Ghanaian Enterprises Advisory Committee is established to advise the Government on

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1The predecessor legislation, the Ghana Enterprises Decree of 1968, envisaged a five year transfer period but this was shortened to a month by the 1970 Act. The 1968 Decree had been in effect for two years.


3Ibid.

4Ibid., section 13.

5Ibid., section 14.


7L.I. 670, 1970—an instrument made under the powers conferred on the Minister by Section 26(1) of the Act.

8Supra, note 39, section 16.
appropriate policies for promoting Ghanaian enterprises. Penalties are also prescribed for Ghanaians who are used by aliens as fronts (a term of imprisonment not exceeding two years without option of a fine), and alien offenders who are convicted of an offense under the Act, in addition to any penalty (normally a fine not exceeding two thousand cedis or a term of imprisonment not exceeding two years or both), forfeit any immigration quota granted to such person for the employment of aliens.\textsuperscript{45}

The provisions of the Act thus affected mainly two classes of aliens: the medium-scale retail or wholesale trader (mainly Lebanese, Syrian and Indian) and nationals from other African countries especially Nigerians who dominated the petty trading business.\textsuperscript{46} More important, it must be pointed out that the Act did not affect the large European conglomerates operating in retail and wholesale trading, which invariably had annual sales of more than 500,000 cedis.

It is also important to note that the Act did not affect the manufacturing industries. Indeed, the legislative history of the Act suggests that capital investment was still welcome in Ghana with the incentives and guarantees granted under the Capital Investment Act 1963.\textsuperscript{47} This latter Act is the principal measure relating to foreign investments in Ghana. It grants certain incentives, among which are included tax holidays, capital allowances, exemptions from indirect taxes and charges, and provisions for the payment of compensation in case of expropriation.

\textbf{Kenya}

The legislative provisions in Kenya were directed at restricting aliens from doing business in certain territorial areas in Kenya and also restricting aliens from trading in certain commodities, mostly products consumed by the African populace. The legislation, the Trade Licensing Act of 1967,\textsuperscript{48} was the first of its kind in East Africa and has been used as the basis for similar legislation in Zambia, Uganda and Malawi.

In introducing the Kenya Trade Licensing Bill in the Kenya Parliament, the Minister of Commerce and Industry enumerated the principal objectives of the Bill, designed to speed up the Africanization of the distribution system in the economy: first, that all forms of businesses should be licensed "mainly to ensure that there can be proper coordination to ensure that we do not have numerous

\textsuperscript{45}Ibid., sections 19, 22, 27, 28, 29, 30.

\textsuperscript{46}West Africa, July 9, 1971 reports that the Act was expected to affect about 600 alien businesses (mainly Lebanese, Syrian and Indian).

\textsuperscript{47}Act 172. For a recent discussion of the Investment law, see G.F. MacDonald, \textit{Recent Legislation in Nigeria and Ghana affecting Foreign Private Direct Investment}, 6 \textit{INT'L LAW,} 548 (1972).

\textsuperscript{48}No. 33 of 1967—commencement date January 8, 1968, as amended by the Trade Licensing (Amendment) Act, No. 17 of 1969.
uneconomic little establishments all over the place and even more important to
direct trading in areas where it would be most profitable to the country and to
the particular trader;" 49 second, to require licensing in order to give preference
to citizens either in regard to particular areas of the country or in regard to
particular goods, leading to a much faster movement in the process of
Africanization of Commerce and Industry; and third,

...to specify certain goods in which only citizens will allowed to trade. As it is now,
if we want to give citizens a special preference, under the existing laws, we have to go
through the very tedious and elaborate mechanism of first scheduling the goods, putting
them under special licenses for imports, and then through administrative mea-
sures having to ensure that only citizens get them. ... This will make it possible to
assist new traders, new companies and new co-operatives, by giving them certain items
of trade in which they can make a reasonable profit and on which they can expect to
have their turnover fairly rapid. 50

The principal objective of the Trade Licensing Act then is to ensure the
control of the economy of Kenya by its citizens. Part II of the Trade Licensing
Act is the restrictive section. Section 5(1) is all important:

1) After the appointed day, no person shall conduct any business, except under and in
accordance with the terms of a current license.
2) After the appointed day, no person who is not a citizen of Kenya shall conduct a
business—
   a) in any place which is not a general business area; or
   b) in any specified goods, unless his license specifically authorizes him to do so.

The power to declare an area a general business area or to declare any
particular good or goods as specified goods is given to the Minister. This is the
crux of the Act. In order to appreciate the scope of the Act, one must refer to the
definition of business under the Act. The interpretation section defines
"business" as meaning "a concern carrying on the occupation of:

(a) a regulated trade
(b) importing and exporting goods
(c) commission agent or indent agent
(d) manufacturer's representative
(e) produce dealer or produce broker
(f) business broker or management consultant
(g) insurance broker or
(h) estate agent."

Although this section also defines "a regulated trade" to mean a wholesale or
retail trade, catering, laundering, hair dressing, beauty culture, shoe repairing,
motor vehicle repairing, cinematograph film exhibition, or advertising, no
provision of the Act prohibits aliens from participating in these enterprises. 51

49Kenya, National Assembly Debates, November 2, 1967, Col. 1609.
50Ibid., Col. 1611.
51Part I, section 2 of the Act.
However, where these definitions are read together with Section 5(2) it would seem that an alien can be prohibited from operating all the occupations listed from (b) to (h) in the definition of "business," together with the operation of those enterprises referred to in the definition of "regulated trade." Clearly then, aliens operating these enterprises are prohibited from the rural areas which are restricted to citizens only. In practice, the Minister declared certain areas as general business areas where citizens and non-citizens alike will be allowed to trade. These areas are the central part of Nairobi (the capital), Mokibasa (a major port), Eldoret, Kisumu, Nakura and Thika. The specified goods include maize and maize meal, sugar, rice, fresh vegetables, dried beans, cigarettes, cement, biscuits, soap, matches, salt, sweets, kerosene, charcoal, corrugated iron, barbed wire, nails and some textiles, including khaki drill.52

To implement its provisions, the Act provides for the appointment of licensing officers, who in performance of their functions, viz., grant licenses to both citizen and non-citizen, shall be guided by certain principles:

A licensing officer shall—(a) be guided by the principle that businesses carried on any place which is not within a general business area ought, where practicable, to be controlled by citizens of Kenya, and that specified goods ought, where practicable, to be dealt in by citizens in Kenya and in particular take into consideration—(i) whether the activities in respect of which the license is applied for ought to be and could be carried on by a business conducted by citizens of Kenya; (ii) whether the activity will be in the public interest; and (iii) any special programme of development in the area concerned. . . .

Other considerations involve capacity, bankruptcy and any convictions of the applicant in connection with offences provided for the trade regulatory laws.53

Other provisions of the Act are merely supplemental, providing for the inspection of business premises and for appeals by an aggrieved person to the Minister, whose decision shall be final.

This piece of legislation, then, principally affected the small non-citizen traders, mainly Asians, whose "trading premises are a small 'duka' often in a corrugated iron shed. Two rooms at the back serve as living quarters for his (usually large) family."54

It is important to note in the case of Kenya, as we did in the case of Ghana, that the Trade Licensing Act does not affect the private foreign investor. Such an investor is given numerous incentives by the Investment Legislation in Kenya.55

52 The Economy, March 1968, 28.
53 Supra note 48, section 6-11.
54 The Economy, December 1967, 19.
In addition to this legislation, both Ghana and Kenya have instituted programs designed to facilitate the entry of indigenous people into business. The major problems which have traditionally faced the African businessman are the lack of working capital, and the lack of managerial and organizational skill. In the Government Policy on the Promotion of Ghanaian Enterprises, 1968, these problems were specifically recognized. To remedy the situation, a training program was embarked upon by the Management Development and Productivity Institute, to provide indigenous businessmen with training in technical, business management and accounting problems. All the banking institutions, especially the quasi-Governmental banks, were urged to develop medium-term and long-term lending systems.66

A Kenya Government white paper on the "Kenyanisation of the Private Sector" identified the same problems and the Government decided that the already existing Industrial and Commercial Development Corporation establish a property company to undertake the following functions: (a) construct new premises which Africans can lease at economic rents; (b) develop market centers in the main towns; (c) give loans to citizens to construct business premises.57 More important the Government intended to undertake more training programmes for African commercial entrepreneurs in order to improve their business knowledge.

The process of Ghananization and Kenyanization of the private commerce and trade sector of the economy are comprehensive programs designed to promote indigenous citizens in that sector. Thus, these measures have been aimed not only at phasing out alien entrepreneurs in areas of commerce and trade where indigenous people were capable of operating, but also to provide new programs designed to give them working capital and adequate skills to undertake more sophisticated enterprises, culminating in the control of this sector of the economy by them.

An Appraisal of the Policies Underlying the Legislation and a Comparative Analysis with U.S. Law and the International Practice

The discussion in this section will focus on the legality or otherwise of this legislation according to the Constitutions of these countries, the contemporary rules of international law, and the practice in other countries, particularly the United States.

The legality of the legislation in Kenya can be tested by evaluating the provisions of the Constitution of Kenya, 1969. There are extensive provisions in

this Constitution for the protection of the rights of individuals, including the rights of aliens. There are, however, certain rights which belong only to the citizen. An important provision in this connection is Section 82(1) of the Constitution which provides:

Subject to subsections (4), (5) and (6) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

This section would apply to aliens except that subsection (4) clearly restricts the application of section 82(1) to "persons who are not citizens of Kenya." It would seem, then, that the Trade Licensing Act which specifically discriminates against aliens not only in relation to the goods that a trader can sell, but also the place where a trader can trade, in favor of the citizen, is constitutional, i.e., within the powers of the Legislature in Kenya. This is the present law of Kenya.

It could conceivably be argued that the effect of the Act when it was passed was to deprive the alien of his right to protection from deprivation of his property, since he is excluded from the means of obtaining his livelihood without the payment of compensation. Indeed, when the disposition of the alien's property amounts to a forced sale, it is arguable that this is a deprivation of property. Such an argument could be countered in two ways. First, there is no compulsory taking as such, and the Constitution does not apply to de facto takings. More important, a State should not, and indeed cannot, be deprived of its right to change its economic, social or political policy as it sees fit in the interest of its citizens.

Second, when the aliens affected are given reasonable time to dispose of such property as they may have acquired, there is no de facto compulsory taking. In Kenya, the proposal for the Africanization of Commerce and Industry was sounded in April, 1967, and the Trade Licensing Bill was introduced at the beginning of November culminating on its passage by the National Assembly on November 22, 1967. Even then, the Act became effective on January 8, 1968, and the Ministry of Commerce and Industry issued a statement in January of that year, that "non-citizens will be given adequate notice so that they can wind up their affairs . . . to ensure that there is no disruption of trading activities in the country." It is submitted, then, that the non-citizens in Kenya were given reasonable opportunity to dispose of their properties in the areas where they were prohibited from doing business.

Perhaps a more interesting consideration is the fact that the Constitution operating at the time of the commencement of the Trade Licensing Act

58 Constitution of Kenya, No. 5 of 1969, Chapter V.
59 Section 75 of the Constitution Act provides for the compulsory acquisition of property only in the interest of defense, public safety, public order, public morality, etc. and the payment of prompt and full compensation in such cases.
60 Supra note 57.
extended almost all the rights given by the Constitution to citizens to commonwealth citizens residing in Kenya, where such rights and privileges are granted to a Kenyan citizen in the alien's country of origin. The countries to which these commonwealth citizens provisions applied were "the United Kingdom and Colonies, Canada, Australia, New Zealand, India, Pakistan, Ceylon, Ghana, Malaysia, Nigeria, Cyprus, Sierra Leone, Tanzania, Jamaica, Trinidad and Tobago, Uganda, Malawi, Malta, Zambia, The Gambia, Singapore, Guyana, Botswana, Lesotho, Barbados, Swaziland, Mauritius, Rhodesia and any other country that may be prescribed by Parliament."63

This section is of paramount importance since the bulk of the non-citizens affected were nationals of India, although some of them held British passports.64 There would seem to be a violation of the Constitution of Kenya if laws in these countries extended trading privileges to Kenyan citizens. The Constitution of India, like the Constitution of Kenya guarantees certain fundamental rights to its citizens and also in some cases non-citizens. For instance, an Indian citizen is granted the right to practice any profession or to carry on any occupation, trade or business subject to the power of the State to make any law "imposing," in the interests of the general public, reasonable restrictions on the rights conferred on the individual.65 Indeed, many decisions of the Supreme Court of India have held that although the constitutional guarantee from deprivation and compulsory acquisition of property without compensation operates in favor of all persons, citizens as well as non-citizens, the freedom to practice any trade or profession is restricted to citizens only,66 as Section 19 (i) clearly provides. If such a right did not exist in regard to non-citizens in India the Trade Licensing Act is consequently not unconstitutional when applied to them.67

6Essentially the same as the Constitution of 1969 except that Section 10 (among others) was repealed in 1969. And see also A.H. Smith, Employment, Self-Employment and the Non-Citizen, EAST AFRICAN LAW JOURNAL 166, 1968.

6Section 10(i).

6Asians in Kenya:
Total population 182,000
Indian citizens 24,000
Kenyan citizens 70,000
British Passport Holders 82,000
Status to be determined 6,000

Source: GHAI and GHAI, supra note 28, at 39

6Article 19, especially 19(i)(g) and 19(6).


6With regard to Asians holding British passports, they were only technically British citizens. The Nationality Act of 1964 (U.K.) although introduced with the intention of enabling British born Kenyan residents to renounce their Kenyan citizenship to return to Britain, it did not apply to Kenyan Asians. Indeed, after the Commonwealth Immigration Act of 1962, Asians holding British passports were no longer guaranteed free entry rights to Britain. Indeed, this situation was further accentuated by the Immigration Act (U.K.) 1968 which provided that British citizens overseas had
The position in Ghana is similar although perhaps much clearer. Chapter Four of the Constitution confers on citizens, as well as non-citizens, certain fundamental rights among them the right to "life, liberty, security of the person and the protection of the law." However, in connection with the rights of aliens, the Constitution provides as follows:

Subject to the provisions of clauses (4) and (6) of this article, no law shall make any provision that is discriminatory of itself or in its effect.

However, clause (5) of the article provides:

The provisions of clause (1) of this article (25) shall not apply to any law so far as that law makes provision, a) with respect to persons who are not citizens of Ghana; or b) for the imposition of restrictions on the acquisition of land by, or on the economic and political activities of any person who is not a citizen of Ghana.

These clear and unequivocal provisions of the Constitution of Ghana permit explicitly discrimination against non-citizens in their economic activities.

Now to be considered is the restriction imposed on aliens in the operation of their trade or the practice of their occupation in other countries, describing briefly the French system of restrictions and, in more detail, restrictions in the United States.

France has maintained a system of restrictions of aliens in business since 1938 by the "decree tending to assure the protection of French Commerce." As Fatouros has put it succinctly, "the primary impetus behind such absolute restrictions was a general desire to prevent vital services from falling under foreign control." These restrictions were introduced by the French Government after the great economic depression of the early 1930s, and were aimed at restricting aliens in carrying on business through a system of licensing. The effect of the Decrét-Loi of 1938 was "(1) to require that reciprocal treatment in similar activities be granted to French nationals in the alien's country before he could exercise them in France, (2) to establish fixed percentages by professions for the number of foreigners permitted to carry out their professions in a given area in France, as well as (3) to make more stringent requirements for aliens who sought to be inscribed in the register of commerce and who sought the protection of the bankruptcy law." There is no specific provision in the Constitution of the United States

no right to enter Britain if they had no close connection with Britain and also allowed only 1,500 entry vouchers for heads of families of all the overseas British. See GHAI AND GHAI, supra note 28, and R. Plender, supra note 4, at 312 ff.


*FRIEDMAN AND PUGH, LEGAL ASPECTS OF FOREIGN INVESTMENT, 746 (1959), chapter 42, p. 74 (__________).

Frank, La Carte De Commerçant: An Example of Legal Restrictions on American Investment in France, 5 HARV. INT. LAW CLUB J. 1, 8 (1963).
guaranteeing the right of freedom of profession or the freedom to engage in trade or occupation. The Fourteenth Amendment of the Constitution which assures to the individual, both citizen and non-citizen, the right not to be deprived of life, liberty or property without due process of law, and provides further that "no State shall make or enforce any law which . . . deny to any person [citizen as well as non-citizen] within its jurisdiction the equal protection of the laws," guarantees to the individual freedom to practice any profession or trade he chooses. This right is by no means absolute, and Federal and State legislation have provided for the barring of aliens from certain trades and occupations.

Indeed, in the interpretation of the Fourteenth Amendment in cases which concern the restriction of aliens in the practice of their trade or occupation, the Supreme Court has consistently reaffirmed the power of the State in the exercise of its police power to conduct a business, trade or profession, provided such restriction has some relation to the protection of the public welfare. In the well-known case of *Truax v. Raich*, the Court held that an Arizona statute forbidding the employment of alien workers in any kind or class of business in a greater proportion than 20 percent of all employees violated the Fourteenth Amendment as denying them the equal protection of the laws. The Court said:

...it is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislation to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, the ordinary means of earning a livelihood.73

Of course, the right of Congress to restrict aliens on the Federal level cannot be questioned. Indeed, the Immigration and Nationality Act of 1952, as amended in 1965 imposes severe restrictions on aliens with respect to their right to engage in economic activities. This power necessarily follows from the treatment of the subject in many treaties entered into by the United States with other countries.

However, the Supreme Court has declared unconstitutional much legislation that has sought to restrict aliens in business. The best known case is *Yick Wo v. Hopkins*.74 in which the Supreme Court held unconstitutional a San Francisco Ordinance which made it unlawful for an alien to engage in the laundry business without the consent of the Board of Supervisors, except in a brick or stone building. In elucidating on the scope of the Fourteenth Amendment, the Court said:

72In *Truax v. Raich* 239 U.S. 33, 42 (1915), Justice Hughes said "... the right to work for a living in the common occupations of the community is of the very essence of the personal liberty and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."

73Ibid.

74118 U.S. 356 (1886).
These provisions [the Fourteenth Amendment] are universal in their application to all persons without the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws.  

In this case, Yick Wo, the plaintiff, had been denied a license solely because of the fact that he was Chinese. The effect of this decision, then, is that a statute arbitrarily forbidding aliens from engaging in ordinary kinds of business amounts to an infringement of their right to earn a living and is therefore unconstitutional.

In Takahashi v. Fish and Game Commission, 76 the Supreme Court declared unconstitutional a California law which barred any person ineligible for citizenship from commercial fishing off the coast of California. The Court reasoned in that case that no "special public interest" was met by that restriction, and its effect was to deny the alien, a Japanese, the right to earn a living.

Many courts have, however, upheld the validity of many state statutes restricting aliens in ordinary business enterprises, such as the trade of peddling, the operation of pool rooms and the operation of motor-buses. 77 In the Massachusetts case of Commonwealth v. Hana, 78 the state court upheld a statute which prohibited aliens from the trade of peddling on the reasoning that this was a valid exercise of police power since peddling by its nature was replete with opportunities for fraud and aliens were more likely than citizens to take advantage of these opportunities. 79 In Trageser v. Gray, 80 a Maryland statute which prescribed a new system of the sale of intoxicating liquor in the City of Baltimore by the establishment of a Board, invented with the power of granting licenses to sell by retail only to citizens was upheld by the Maryland Court on the ground that the statute constituted a valid exercise of police power in view of the fact that it was a privilege that could easily be abused and aliens more than citizens were likely to take advantage of this privilege without considering the welfare of the community.

These cases were approved, obiter, by the United States Supreme Court in Patsone v. Pennsylvania, 81 a case in which a Pennsylvania statute made it unlawful for any alien to kill any wild bird or animal except in defense of person

76Ibid., at 369.
77334 U.S. 410 (1948).
78For a comprehensive list of legislation in the states restricting aliens in their practice of profession or occupation, see H. Field, Where Shall the Alien Work? in Vol. XII, No. 2, Social Sciences, December 1933. It must be pointed out that most of this legislation has not been tested in a federal or state court.
79195 Mass. 262 (1907).
80The deprivation of this right had been declared unconstitutional in State v. Montgomery, 47 Atl. (Me) 1965 (1900), on the ground that it imposed unequal charges on aliens.
8173 Md. 250 (1890). See also Anton v. Van Winkle, 297 F.2d 340 (9th Cir., 1924); Gizzarelli v. Presbrey, 117 A.2d 359 (Sup. Ct. R.I. 1922) and State v. Carrel, 124 N.E.2d 129 (Sup. Ct. Ohio 1919).
82232 U.S. 138 (1913).
or property. Mr. Justice Holmes, who delivered the opinion of the Court, cautioned that "obviously the question so stated is one of local experience on which this Court ought to be very slow to declare that the State legislature was wrong on its facts." This caution was heeded in the case of *Wright v. May*, in which the state court declared valid a State of Minnesota law which prohibited alien residents from acting as auctioneers. The reasoning of this court was based on a recognition of the difficulty that might be encountered in compelling such a non-resident to make do in case he rendered himself liable to a seller or purchaser.

Perhaps a better known case is *State of Ohio ex rel. Clarke v. Deckeback*, in which the United States Supreme Court upheld the validity of an Ordinance of the city of Cincinnati which prohibited the issuance of licenses to operate pool and billiard rooms to non-citizens. It is significant to note that there was a treaty between the United States and Great Britain granting the right to engage in commerce to citizens of both countries in each other's country. Mr. Justice Stone, in the course of his opinion, said:

> Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens . . . it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification . . . Some latitude must be allowed for the legislative appraisement of local conditions . . . and for the legislative choice of methods for controlling an apprehended evil. It was competent for the city to make a choice, not shown to be irrational, by excluding from the conduct of a dubious business an entire class rather than its objectionable members selected by more empirical methods. . . .

Although the case of *Takahashi*, discussed above, cast doubt on the continuing validity of the special public-interest doctrine expounded in *Clarke v. Deckeback*, the validity of *Clarke* is now questionable and would seem to have been eroded by the Supreme Court decision in *Graham v. Richardson*. Although this last case involved state welfare rights which discriminated against welfare applicants on the basis of their alienage, the Court discussed the principles governing the question of the right of aliens under the Fourteenth Amendment and the standard applicable to the states in this regard. The Court said:

> Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis. [citations]. . . . But the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority [citations] for whom such heightened judicial solicitude is appropriate. Accordingly, it was

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*Ibid.,* 144.

*127 Minn. Rep. 150 (1914).

*274 U.S. 392 (1927).


*403 U.S. 365 (1971).
said in Takahashi, 334 U.S. at 420, 68 S. Ct. at 1143, that the power of a State to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits. 87

Thus, any form of discrimination on the basis of alienage invokes a strict standard of review, and indeed many courts have followed the principles in many cases. For instance, it has been held that the refusal to grant an alien a tenure position in a college is unconstitutional as against the Fourteenth Amendment, for the restriction on granting tenure could not be justified as bearing some rational relationship to a legitimate state end or the so-called national interest of the state in providing its own citizens with work. 88

A more significant case is Raffaelli v. Committee of Bar Examiners, 89 in which the court held that a statute setting forth as a requirement for admission to the bar in California that an applicant must be a citizen of the United States offends the equal protection clauses of the Constitution of the United States and California. 90 There is, then, a definite trend against laws discriminating against persons solely on their alienage, and aliens would seem to have substantially the same rights as the citizens in the operation of ordinary commerce or practice of their professions.

No doubt then, the legislation in Ghana and Kenya, if it were to be tested against the Fourteenth Amendment, is clearly unconstitutional. Kenya and Ghana provide some limitations on the equal protection of the laws. It was important to discuss the earlier American decisions upholding discrimination against aliens in favor of citizens, to demonstrate the court's reaction to the growing nationalism in the United States in the early 1900s, and the growth of technical developments. Ghana and Kenya are in the process of building up their economies into viable ones and economic self-determination is therefore an important consideration.

Many reasons have been attributed to the Federal Government and the states with respect to the imposition of restrictions on aliens in the conduct of business or occupation. Foremost among these reasons, perhaps, is the quest to ensure the security of the United States and to promote the welfare of the citizens of the

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87Ibid., 372.
89496 P.2d, 1264, 101 Cal. Rptr. 89 (1972). The Supreme Court in the recent case of In re Griffiths decided June 25, 1973, held that the State of Connecticut's exclusion of resident aliens from the practice of law violates the Equal Protection Clause of the Fourteenth Amendment since the Bar Committee did not meet its burden of showing that the clarification is necessary to vindicate the state's interest in maintaining high professional standards.
90See also Espinoza v. Farah Manufacturing Co., 462 F.2d 1331, 1334 (1972) (refusal of employment on the basis of citizenship); Jalil v. Hampton, 460 F.2d 923 (1972) (denial of resident alien opportunity to take competitive examination), and Hsieh v. Civil Service Commission of the City of Seattle, 488 P.2d 515 (1971 Wash) ("state and local laws cannot substantially encroach upon exclusive power of Congress to regulate immigration and naturalization, and no laws may stand if they impede, burden or obstruct full execution of comprehensive congressional scheme of regulation of a particular aspect of immigration.")
United States. Other reasons have been purely economic, and are indeed similar to the reasons for the legislation restricting aliens in business in Ghana and Kenya. Such reasons included the protection of citizens engaged in a particular trade from competition by aliens.

Indeed, one author refers to the "all American policy" and the growing nationalism in the United States in the 1930s. A good example of this phenomenon is demonstrable by the "anti-Japanese legislation" in California in the 1940s. In discovering the motive of the legislature in making the regulations referred to in the Takahashi case cited above, Mr. Justice Murphy said:

The statute in question is but one more manifestation of the anti-Japanese fever which has been evident in California in varying degrees since the turn of the century.

Such nationalistic feeling has lurked behind the restrictions in Ghana and especially in Kenya where anti-Asiatic feeling was clearly demonstrated. For instance, the Minister of Economic Planning in a letter to a newspaper on the Asian problem writes:

One way or the other, Asians in Kenya must be made to modify their unscrupulous trade attitude at any cost. We cannot brag about building a harmonious multi-racial state amidst trade turbulency. . . . Whatever the future will be, the Asian Community has nothing to grumble about; the present trend, whether good or bad, is the harvest of seeds sown by themselves.

This reaction is explicable in view of the enormous and conspicuous differences in income and wealth between the African and Asian communities, nearly ten million as against 180,000, respectively, and the fact that the Asians virtually controlled the economy of Kenya. Similar reactions were evident in the parliamentary debate before the passage of the Ghana Business Promotion Act. As one member of the National Assembly put it:

. . . if the Ghana economy has not been buoyant, the blame should be laid at the doors of these wicked and horribly corrupt Syrians, Lebanese and Indians. They are the cunning capitalists of the world, they are the enemies of Ghanaian society. . . . The Solution is a very simple one, and that is, we should be drastic in doing it. The Government could give the Syrians, Indians and Lebanese marching orders to get out of this country irrespective of whatever they do. This has been done in East Africa.

It is submitted, in any case, that the objectives proposed by these legislators are sound. The history of the alien businessmen demonstrates the control maintained by them on the economies of these countries. This situation existed because of the British policy of having as little contact with the indigenous people as possible and on the reasoning that the Africans were poor and, in the

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92H. Fields, supra note 77.
94For an article which considers the Asian position favorably, see Gupta, The Asians in East Africa: Problems and Prospects. 10 INTERNATIONAL STUDIES 270 (1969).
95B. Ackuaku (N.A.L. Ozodze), PARL. DEB. Vol. 3 No. 2, Col. 1102, June 23, 1070.
absence of an ability to generate capital and with no business experience, the business sector of the economy should be in foreign hands.

This policy had an important consequence. Society in Ghana, and even more pronounced in Kenya, was characterised by certain economic divisions based on race and economic power: the Europeans on top of the ladder, the Africans at the bottom, and the Asians and Lebanese filling the middle-rung. The situation was more pronounced in Kenya, in view of the fact that the Asians controlled not only the business sector of the economy, but also performed the vital administrative functions for the colonial Government, thus eliminating the need for the training and encouragement of Africans. This situation has changed since Independence, when Government was turned over to the Africans, who encouraged the education of the indigenous people. Consequently, the indigenous people have acquired the education and sophistication to undertake business operations. More important, the Governments of these countries have come under tremendous pressure from their citizens to institute programs that would achieve social and economic justice. The restriction of aliens in business and the encouragement of indigenous people present a viable alternative.

Certain malpractices are attributed to all trading communities in any part of the world. Malpractices such as over-charging and discrimination in prices, among others, also apply to trading communities in Ghana and Kenya. Indeed, many of the alien entrepreneurs have a doubtful morality as far as business practices go. In view of the fact that they carved out exclusive areas of monopoly for themselves, it has been difficult for indigenous Africans to enter those business areas. Their clannishness, their economic strength, their power to influence prices and their market strategy have created obstacles for newcomers to the business sector.

A more important consideration is the refusal of the alien entrepreneurs to identify with the economic interests of the State. This is evidenced by their tendency to transfer their profits to foreign banks, thus depleting further the already low level of foreign exchange reserves for these countries. More significant is the fact that the foreign exchange reserves are obtained from the sale of cash crops, produced through indigenous efforts in the rural areas. Foreign exchange restrictions have not been effective, and some alien entrepreneurs have naturally sought other ways to expatriate their profits, such as smuggling of minerals, like diamonds, equally detrimental to the economy. On the whole, it is fair to say that the problem of the depletion of foreign exchange reserves will more or less be alleviated if indigenous people control the business aspects of the economy.

There are, of course, social and political reasons underlying this policy. The alien entrepreneur has tended to isolate himself, both morally and culturally, from the indigenous African, and his clannishness has exposed him as a distinct class of society. This phenomenon has been interpreted as a feeling of
superiority on the part of the alien. In Kenya, aliens clung to their British passports, even though there was an opportunity to become citizens of Kenya. Many developing countries, Ghana and Kenya included, have taken cognizance of the need for economic independence without which political independence becomes a mere misnomer.

Some economists may argue that the promotion of a class of African businessmen, and the objective of making the commercial sector non-competitive, will neither help the economy nor the bulk of African consumers and will be inefficient. It is submitted, however, that this policy will provide the economic underpinning for an independent country, by ensuring that the people have deep economic stakes and, more important, that there is little justification for the continuing control of the economy by aliens when indigenous people are capable of performing these functions.

As Mr. Justice Stone said in *Clarke v. Deckeback*:

> It was competent for the city to make such a choice, not shown to be irrational by excluding from the conduct of a dubious business an entire class rather than its objectionable members selected by more empirical methods. . . .

This statement can be applied to the restrictions in Ghana and Kenya. Not only will it be cumbersome, in terms of administration, to exclude from the conduct of business objectionable members of the alien entrepreneurs, but it would be an infringement of the State’s power to change its laws and policies in the interests of its citizens if these policies were objected to.

Contemporary international law rules provide for the treatment that should be meted out by a State to aliens who have been admitted to its territory. Although the reception of aliens is a matter of discretion arising from the State’s territorial supremacy, aliens traditionally have been given rights, by virtue of international law, equal to those of a citizen. The Universal Declaration of Human Rights, adopted at Paris in 1948, by the United Nations provides in Article 2:

> Everyone is entitled to all the rights and freedom set forth in this Declaration [right to life, liberty and security of person, freedom of movement, access to courts, protection from inhumane treatment etc.], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Many of these rights have been recognized by the Ghana and Kenya Constitutions.

However, it is an established principle of international law that a State is free

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*Gupta, supra note 94.
*Supra note 84.
*Supra notes 58 and 68.
to impose restrictions as it may think fit on the acquisition and transmission of property by aliens within its jurisdiction. "The alien's privilege of participation in the economic life of his State of residence does not go so far as to allow him to acquire private property. The State of residence is free to bar him from ownership of all of certain property, whether movable or realty." This does not mean, of course, that a State can divest aliens of their property rights with regard to property already acquired.

More important is the Internal Law rule that permits States to limit the right of aliens to participate in certain occupations, trades or professions. Indeed, as we have demonstrated, this is a more or less universal practice, especially in areas where the security of the State is deemed to be at stake. Most of the privileges granted to aliens to engage in trade or to practice their occupation and professions, therefore, can be found in treaties between different countries, which grant the same rights and privileges to do business to nationals of the two countries. Even then, governmental actions which discriminate against aliens in favor of nationals, which have the effect of excluding aliens in the operation of their particular trade, have been upheld by the International Court.

The best known case is the Oscar Chinn case. In this case, Great Britain claimed that the Belgian Government's measure of lowering the river transport rates, to an extent that was uneconomic from the point of view of trading, and granting subsidies only to one firm, a Belgian firm which was State-controlled, thus driving out other companies, especially that of Chinn, a British subject, was contrary both to customary International Law of respect for acquired rights and to treaty obligations imposed by the Convention of St. Germain. The Court held that Chinn, having no concession from the Belgian Government, did not possess anything in the nature of a genuine vested right. The Court held further that, even though the treaty guaranteed freedom to trade, such "vested rights" do not imposed an obligation on the State to refrain from the granting of such special benefits to its subjects as may result incidentally in effect to a restriction of nationals of other countries. In the Court's words:

... the circumstance which... was the determining cause of the measure... was the general economic depression and the necessity of assisting trade, which was suffering grievously from the fall in prices of colonial products, and of warding off the danger which threatened to involve the whole colony in a common disaster.

The Belgian Government was the sole judge of this critical situation and of the

100 Roth, The Minimum Standard of International Law Applicable to Aliens 186 (1949).
102 P.C.I.J., see A/B No. 63 (1934).
103 Ibid., 88.
remedies that it called for—subject of course to its duty of respecting its international obligations.\textsuperscript{104}

In connection with the de facto monopoly argument of the British Government, the court held that Chinn was unrestricted in his freedom to trade and that, if his activity proved profitless by virtue of the privileged position accorded to his competitor, this was an economic and not a legal consequence. This case then would seem to be authority for two propositions: first, that in a state of economic depression, a State may take measures it deems necessary to remedy the situation; and, second, that a State may grant monopolies and prevent alien nationals from trading in certain aspects of the economy, and incur responsibility under international law only when treaty rights intervene.

Ghana and Kenya maintain no such treaties with the States whose nationals were affected by their legislation. Indeed, all the declarations of the heads of state and representatives of governments of non-aligned countries, which includes Ghana, Kenya, Lebanon, India, and Syria, have consistently reaffirmed the "right of all sovereign nations to determine in full freedom, the paths of their internal political, economic, social and cultural development" in accordance with their own conditions, needs and potentialities.\textsuperscript{105}

Although Ghana is a signatory State of the Articles of Association for the establishment of an Economic Community of West Africa,\textsuperscript{106} together with all the West African countries whose nationals were affected by the legislation, this particular privilege is not granted to nationals of the various States. The Treaty was designed principally to "promote through economic co-operation a co-ordinated and equitable development of their economies" and to promote trade between them. Kenya is also a signatory of the Treaty for East African Co-operation, designed to strengthen the industrial, commercial and other relations of these countries—Kenya, Uganda and Tanzania. The privilege to engage in trade or business is not specifically recognized.\textsuperscript{107} It is arguable, however, that the legislation discussed above would seem to violate the spirit of those treaties. The legislation restricting aliens in business in Ghana and Kenya, then, does not conflict with the rules of customary international law.

Indeed, even if they contravene these rules, it is submitted that international law should not be a static body of rules, but new substantive principles and new methods of analysis should be developed so that it comes to grips with emerging historical trends and forces. After all, international law, as a body of law, developed as a result of the historical and cultural circumstances of the

\textsuperscript{104}Ibid., 78-79.

\textsuperscript{105}E.g., Section 11 of the Declaration of the Participants of the Third Conference of Non-Aligned Countries (held in Lusaka, Zambia, Sept. 8-10, 1970) in United Nations Note Verbale NU/209, Nov. 12, 1970.


European State system. Although principles evolved at that time may serve as useful background, consideration of the peculiar problems of this century must be of paramount importance.

Such an attempt has been made in various international documents. For instance, the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations in 1966 recognized the peculiar position of developing countries with respect to economic rights of individuals. Although the Covenant recognized the right of the individual freely to pursue his economic, social and cultural development, and the "right to work" which includes the right of everyone to the opportunity to gain his living by work which he freely chooses and accepts, Article 2, paragraph (3) provides:

Developing countries, with due regard to human rights and their national economy may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

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