The High Court was fortified in making its decision by an implication drawn from the Australian Constitution, but the significance of the case is not limited to this context. In neither Australia nor Britain has the historical development of the law of defamation taken account of a positive right to freedom of expression on political matters. Both the House of Lords and the High Court have now recognised that the balance struck by the common law between the competing public interests of freedom of political expression and the safeguarding of reputation is not the most appropriate one.[68] Once this has been conceded, and it is accepted that the law does recognise a positive right to express oneself on matters of political concern, it is but a short step to reach the conclusion that the law of defamation should have a more restricted operation in the political sphere than in other areas of society. The decision of the High Court in *Theophanous* indicates that that of the House of Lords in the *Derbyshire County Council* case marks only the start of the necessary development of the common law.[69]

TIMOTHY H. JONES*

WHEN THE STATE TAKETH AND THE STATE GIVETH

THE recent decision of the House of Lords in *Kuwait Airways Corporation* v. *Iraqi Airways Company*[1] has done little to help resolve one of the most difficult questions relating to the practical application of the 1978 State Immunity Act. Indeed, it highlights the near intractable nature of the question at the heart of the case: was the seizure and subsequent operation by the respondent (IAC) of ten aircraft belonging to the applicant (KAC) an act—or action (and the distinction is important)—which attracted immunity under the Act? The answer to such a question is difficult enough when the acts involved are done by a State. When, as in this case, they are done not by the State but at the behest of the State, it becomes even more difficult to resolve and the principal problem with the decision of the majority in the House of Lords is that it fails fully to appreciate the full effect of this point of difference. Moreover, in order to return to the position abandoned by their interpretation of the Act, the majority raise the spectre of justiciability, which not only introduces additional complications but also distorts the frame of reference.

The facts of the case are clear and not in dispute. On 2 August 1990 Iraq invaded Kuwait and, by virtue of Revolutionary Command Council (RCC) Resolutions 312 and 313 of 8 and 9 August, Kuwait was declared to be an integral part of the Iraqi State. On 6 August the Iraqi Minister of Transport and Communication directed IAC to arrange for the ten aircraft in question to be taken to Iraq. This was duly done, as was routine maintenance both before and after their removal.

68. This observation is made notwithstanding Lord Keith's attempt to maintain the fiction that the protection provided to freedom of expression by the common law is coextensive with Art.10 of the European Convention: [1993] A.C. 534, 551.

69. Cf. I. Loveland, "Defamation of 'Government': Taking Lessons from America?" (1994) 14 Legal Studies 206.

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1. [1995] 1 W.L.R. 1147.

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On 17 September RCC Resolution 369 transferred the assets of KAC to IAC, following which IAC made what limited use of them it could, given that almost all international flights to and from Iraq had been suspended. Shortly before the launch of Operation Desert Storm six of the planes were flown to Iran, where they were interned. The four aircraft remaining in Iraq were subsequently destroyed by allied bombing. On 11 January 1991 KAC began an action against both Iraq and IAC claiming either delivery of the aircraft or payment of their value plus interest ($630 million) either under section 3 of the Torts (Interference with Goods) Act 1977 or under common law. A default judgment was entered against both defendants.

At this point, Iraq issued a summons to set aside the purported service of the writ, whilst IAC issued a summons under RSC Order 12, rule 8, by which it challenged the jurisdiction of the court on the grounds of State immunity and also raised the question of justiciability. On 16 April 1992 Evans J set aside the service of the writ against Iraq but dismissed the application by IAC as regards both State immunity and justiciability.[2] The Court of Appeal, whilst agreeing that the purported service of the writ upon Iraq was ineffective, decided to allow the application by IAC on the basis of State immunity and did not, therefore, consider the question of justiciability.[3]

The House of Lords also upheld the decisions concerning the service of the writ upon Iraq and, by its endorsement of the judgment of Evans J, has made it clear that section 12 of the 1978 Act requires that a writ must be received "at" the Ministry of Foreign Affairs of the State concerned if it is to be served effectively.[4] The British Embassy in Baghdad was closed on 12 January 1991 and no other power represented British interests. Therefore, on 14 January, the Foreign and Commonwealth Office sent the writ to the Iraqi Embassy in London with the request that it be forwarded to the Ministry in Baghdad. Since this did not take place, the writ remained unserved.[5]

However, the House of Lords decided to affirm the decision of the Court of Appeal in relation to IAC's claim in part only. It then remitted the remainder of the case to the Commercial Court, and left to it the task of determining the extent to which those questions were justiciable. The House of Lords may, then, yet get a chance to consider those aspects of this case which it has so far left alone. If this

2. See Fox, (1994) 43 I.C.L.Q. 193, 196–202; Marks, (1994) 53 C.L.J. 213.

3. [1995] 1 Lloyd's Rep. 25. See Fox, (1994) 110 L.Q.R. 199; Talmon, (1995) 15 O.J.L.S. 295.

4. *Supra* n.1, at pp.1155B–1156D. S.12 of the SIA 1978 provides: "Any writ or other document required to be served for instituting proceedings against a foreign State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and the service shall be deemed to have been effected when the writ or the document is received at the Ministry." KAC had argued that service on the Embassy was tantamount to service on the Ministry but Evans J considered that "In no sense is a diplomatic mission in a foreign State the same as the Ministry of Foreign Affairs of the sending State." This confirms the approach taken by Peter Gibson J in *Westminster City Council* v. *Government of the Islamic Republic of Iran* [1986] 3 All E.R. 284.

5. If it had been forwarded, then the service would have been effective: it must take place "through" the Foreign and Commonwealth Office and be received "at" the relevant ministry. It can, it seems, pass through any number of hands *en route*.

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does happen, it may regret passing up the opportunity to deal with the questions of immunity and justiciability, if not in tandem, at least in parallel.[6]

It is not intended to examine all aspects of this case, but to concentrate on what appeared, until the decision of the House of Lords, to be the chief point at issue: whether the actions of IAC attracted immunity under the 1978 Act. It is well known that the Act did by statute what had already been achieved at common law in the *Trendtex* case,[7] and replaced the "absolute immunity" doctrine, by which all actions of States were immune from process before the courts, with that of "restrictive immunity". The scheme of the Act is that there is a general presumption that the actions of States attract immunity. A State loses its immunity only if the act in question falls within one of the exceptions listed. No one would suggest that the Act is a model of elegant drafting but the purpose of Part I of the Act is clear enough. Even if it ever was true, it is certainly no longer true that States do not act in the commercial world as commercial players; there is no overwhelmingly convincing reason why States, when acting in a commercial fashion, should be treated any differently from any other person, natural or legal. If a recognised government can sue in a domestic court for an unpaid debt, why should it not be liable to be sued itself?[8] Thus section 3(1) of the Act provides: "A State is not immune as respects proceedings relating to—(a) A commercial transaction, entered into by the State".

The Act helpfully defines a "commercial transaction" by giving a number of cases in which it is clear that the State is acting in a commercial fashion but, inevitably, not all instances can be covered and so section 3(3)(c) provides a residual "catch-all" that includes within the definition:

> any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

It is at this point that one usually recalls the distinction drawn between actions of States undertaken *de jure imperii* and *de jure gestionis*, the former being equated with "sovereign acts", the latter with "commercial activities". This, however, tends to state the problem rather than solve it. Some controversy has surrounded the question whether the classification of the act as "sovereign" or "commercial" depends upon the "nature" or the "purpose" of the act. This debate was conclusively settled by Lord Wilberforce in *I Congreso del Partido* and the orthodoxy is that the purpose of the act is irrelevant and the crucial question concerns its nature: is it "governmental" or is it "private" in character?[9]

6. It is, however, true that, because the focus of the current action related to immunity, the issue of justiciability had not been fully pleaded and Lord Goff justified the decision to remit the case on this ground (*supra* n.1, at p.1165F–G).

7. *Trendtex Trading Corpn.* v. *Central Bank of Nigeria* [1977] Q.B. 529.

8. The enforcement of judgments against States does, of course, raise very different issues and is subject to considerable limitations. See SIA, ss.12 and 13. It is ironic that the common law provided for a more liberal regime of enforcement than the Act: e.g. a *Mareva* injunction, available to the court in *I Congreso del Partido*, is not available under the SIA (s.13(2)(a)) and the position of a central bank, the object of the proceedings in the *Trendtex* case, is safeguarded by SIA (s.13(2)(b)).

9. [1983] 1 A.C. 244, 263–264 and 267. See also *Littrell* v. *USA (No.2)* [1994] 4 All E.R.

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This much was again confirmed by the House of Lords. However, it is well understood that, although the rules may be settled, their application in concrete situations may give rise to problems.[10] If the *Kuwait Airways* case was simply another example of the same phenomenon, there would be little of real concern. Unfortunately, it raises a new problem.

As has been said, the act(s) in question in this case was (were) not done by Iraq but by IAC, a separate entity. Section 14(2) of the Act provides that:

> A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—
> (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
> (b) the circumstances are such that a State ... would have been so immune.

Lord Goff, with whom Lords Jauncy and Nicholls agreed, identified the crux of the problem as being whether the act(s) in question had indeed been performed "in the exercise of sovereign authority" and expressed the view that that expression "here means *acta jure imperii* (in the sense in which that expression has been adopted by English law from public international law)".[11] In consequence, Lord Goff continued by exploring the question of whether the act(s) of IAC were of a commercial or of a governmental nature and concluded that "the taking of the aircraft and their removal from Kuwait Airport to Iraq constituted an exercise of governmental power by the State of Iraq".[12] The reason for this was that:[13]

> IAC was not just doing a job of work, but was closely involved with the State of Iraq in the last stage of an enterprise which entailed both the seizure of the aircraft and their removal to Iraq to be used for such purposes as the Government of Iraq should direct.

This seems to stray dangerously near the argument that the "governmental" character of the act was dictated by its purpose rather than its nature, but there is no reason to question the finding. The seizure and removal of the aircraft were not acts possessing a "private law" character and a clearer example of a separate entity acting "in the exercise of sovereign authority" can hardly be found. However, the problem is not with the finding but with the reasoning underlying it. Lord Goff saw in the expression "the exercise of sovereign authority" the requirement that the separate entity be acting *as if it were* a sovereign, and thought that this question should be answered by reference to the *acta jure imperii/gestionis* distinction. This is to be contrasted with the views of Lords Slynn and Mustill, who saw in that expression the much more elementary proposition that the separate entity must

203, 211–212 (Rose LJ) and 216 (Hoffman LJ). The language used by Lord Wilberforce does, however, suggest that acts which can be done by private persons are "commercial" in nature whilst those which cannot are "sovereign". This brings one closer to the "purpose" test than seems either necessary or desirable and encourages a mild degree of "slippage" when addressing this central issue.

10. In *I Congreso del Partido* e.g. the House of Lords was agreed that the acts of Cuba in relation to the vessel *Playa Larga* were of a "private" character, whilst their finding that the actions of the *Marble Islands* in diverting to Haiphong and disposing of its cargo were also "private" in nature was by a 3–2 majority.

11. *Supra* n.1, at p.1156F–G.

12. *Idem*, p.1163A.

13. *Idem*, p.1163B.

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have been acting *on the basis of* sovereign authority. On this view, once again, there is no doubting that IAC was acting upon such a basis in seizing the aircraft. In consequence, the House of Lords was unanimous in its view that IAC was entitled to immunity in respect of these actions. Their Lordships were, however, divided in their assessment of the subsequent actions of IAC.

RCC Resolution 369 vested title to the aircraft in IAC, which from that time onwards incorporated them into its fleet and attempted to use them in its ordinary commercial activities, to the extent that this was possible. Lord Goff thought that:[14]

> it cannot be said that IAC's retention and use of the aircraft as its own constituted acts done in the exercise of sovereign authority. They were acts done by it in consequence of the vesting or purported vesting of the aircraft in it by legislative decree.

In other words, the actions of IAC as regards the aircraft following the decree were "commercial" in nature and therefore could not attract immunity. Again, this seems impeccable, provided that one accepts that the *jure imperii/gestionis* distinction is to be applied in the determination of whether an act is undertaken in the exercise of sovereign authority in the first place. Both Lords Slynn and Mustill questioned this, although the manner in which they interpreted the facts tended to divert attention from the force of this aspect of their argument. Whereas Lord Goff considered IAC to have undertaken a series of acts relating to the aircraft, with those prior to RCC Resolution 369 attracting immunity whilst those undertaken subsequent to it not doing so, Lords Mustill and Slynn took a more robust and holistic approach. They saw a single act—the unlawful taking and retention of the aircraft[15]—and saw in that act not the hand of IAC but the sovereign authority of Iraq and in consequence believed that it attracted immunity.[16] This, then, comes across as the principal point of disagreement,[17] but the more fundamental—and significant—disagreement concerns the relationship between sections 3(3)(c) and 14(2) of the State Immunity Act, to which they also adopted a more robust and policy-orientated approach.

The scheme of the Act, as understood by Lords Mustill and Slynn, was as follows: the fundamental rule is that a State is accorded immunity from suit before the courts of another State. The Act removes that immunity in a limited number of circumstances, one of which involves transactions or activities which are engaged

14. *Idem*, p.1163C.

15. Cf. Lord Mustill: "I cannot detect any change in the character of the successive events. Put at its bluntest and most colourful, the plaintiff's complaint is that the Republic of Iraq stole the aircraft and IAC is unlawfully in possession of them ... IAC was not acting autonomously but in harness with the Republic of Iraq, and under the shadow of the sovereign authority by which the latter was acting, so that its acts were a manifestation of that authority."

16. This should be contrasted with the approach taken by Evans J. He also adopted a "holistic" approach, but saw a series of acts which—as acts—were of an essentially commercial nature (or, at least, were acts of the type that IAC engaged in in a commercial context) and allowed this to determine his view of the nature of the entire event. The views of Lords Slynn and Mustill are substantially the same as that of the Court of Appeal: [1995] 1 Lloyd's Rep. 25, 26 (Nourse LJ), 33 (Leggatt LJ) and 37 (Simon Brown LJ).

17. Support for a "broad-brush" approach in which a series of acts are characterised as having a single, governing nature is found in *Littrell*, *supra* n.9, at p.213 (Rose LJ).

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in by a State but which are not sovereign but commercial in nature. The wrongful seizure and retention of an aircraft does not in the slightest equate with a commercial transaction or activity which can attract immunity. The position with entities which are not States is very different. They are fully susceptible to the jurisdiction of the courts unless there is some reason why they should be granted immunity. The only such reason is that they were acting on the instruction of their sovereign in circumstances in which the sovereign, had it chosen to act directly rather than through an intermediary, would have itself been entitled to immunity.

In practical terms, this means that the "section 3(3)(c) question"—is the act *jure imperii* or *jure gestionis*?—does not arise, as Lord Goff argues, under section 14(2)(a) as a means of determining whether a separate entity has done something "in the exercise of sovereign authority". Rather, it arises under section 14(2)(b), when considering whether "a State ... would have been so immune" if it had acted in the same way. The principal reason for questioning Lord Goff's interpretation is that it renders section 14(2)(b) all but redundant. If the distinction between commercial and non-commercial acts is used to determine whether or not the act is undertaken "in the exercise of sovereign authority", it becomes pointless to consider whether a State would have been entitled to immunity had it acted in a similar fashion. If the "act of the separate entity" is considered to be in exercise of sovereign authority *because* it is undertaken *de jure imperii*, then it is clear that a State would normally be immune in such circumstances and there is no point in addressing that question for a second time under section 14(2)(b). This problem was recognised by Lord Goff, who argued that there might still be occasions in which a "sovereign" act might not attract immunity because, for instance, of a submission to the jurisdiction.[18] Lord Goff did, however, accept that any "commercial" act would fail to attract immunity by virtue of section 14(2)(a) alone.

Lords Slynn and Mustill interpreted the Act in a way which would permit a separate entity to enjoy immunity when acting in pursuance of expressions of the sovereign will of the State whereas Lord Goff and the majority would not allow this if what was demanded of it pertained to its sphere of commercial operation. Lord Goff objected that "a separate entity of a state which receives nationalized property from the state cannot ipso facto claim sovereign immunity in respect of a former owner" but, however, overlooked the point that the question of immunity arises only in the context of commercial transactions or activities. The receipt of property by such a body does not involve questions of immunity at all. In such circumstances what is being challenged is not the activity of the separate entity but of the State and this raises the question of justiciability.[19] Given that Lord Goff

18. *Supra* n.1, at p.1159B–D. He thought that this difficulty had resulted from the manner in which the SIA had reflected the provisions of the 1972 European Convention on State Immunity. S.14(2)(a) of the SIA reflected Art.27(2) of the Convention, which required that immunity be granted to separate entities acting "in the exercise of sovereign authority (acta jure gestionis)" whereas s.14(2)(b) of the SIA reflected Art.27(3), which provided for proceedings against such entities whenever the courts would have had jurisdiction against a State. The 1972 Convention did not include the "commercial transaction" exception embodied in s.3(3)(c) of the SIA and therefore the SIA used the *jure imperii/gestionis* distinction in two places, and, by implication, "twice" in s.14(2). Even if this is so, it does not explain his preference for an interpretation of the SIA which reinforced rather than ameliorated the results of this.

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himself falls back on justiciability as a means by which the respondent might seek protection there cannot be much weight in his objection.

The essence of the doctrine of justiciability is that "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of government of another done within its own territory."[20] Nevertheless, the doctrine is acknowledged to be one of judicial restraint[21] and, in consequence, it is argued that courts may exercise jurisdiction where public policy requires it.[22] Given the uncertainties surrounding both the scope and substance of public policy in this area,[23] it is by no means clear that the court will be able to exercise jurisdiction and the final result may well be the same as if IAC's claim to State immunity had been permitted.

On one level, then, the differing approaches taken within the House of Lords might appear to be of little consequence. There is, however, a significant difference between deciding that IAC is entitled to immunity and deciding that the claim is non-justiciable. The approach of Lords Mustill and Slynn has the effect of placing the policy debate within the framework of the State Immunity Act and this should enhance the likelihood of a successful challenge to the exercise of jurisdiction.[24] Policy factors raised in a debate concerning general issues of justiciability are likely to range far more widely, enhancing the prospect of a decision which reflects the general opprobrium heaped upon an international aggressor.[25] As Lord Slynn pointed out, the more heinous the underlying act, the less likely it is to

19. At first instance Evans J had rejected the IAC's submission concerning justiciability because he did not see it as having any application to situations in which the SIA failed to provide immunity to a commercial transaction. Lord Goff rejected this opinion: *supra* n.1, at p.1165D–F.

20. Fuller CJ in *Underhill* v. *Hernandez* (1897) 168 U.S. 250, 252 and see *Buttes Gas and Oil Co.* v. *Hammer* [1981] 3 All E.R. 616, 629–630.

21. *Buttes*, *idem*, p.628g.

22. *Supra* n.1, at p.1166C–E, in which reference was made to *Re Helbert Wagg* [1956] Ch. 323, 346–349 (Lord Upjohn); *Oppenheimer* v. *Cattermole* [1976] A.C. 249, 277–278 (Lord Cross) and *Banco Nacionale de Cuba* v. *Sabbatino* (1964) 376 U.S. 398.

23. This is rendered even more difficult on the facts of *Kuwait Airways* by Iraq having rescinded RCC Res.369 and it being unclear whether this renders the original resolution void *ab initio*. Such a finding would, presumably, mean that, since ownership would not be deemed to have passed to IAC at all, the entire incident would be immune as an act *jure imperii*.

24. The recent decision of Mantell J in the case of *Al-Adsani* v. *Government of Kuwait* is illustrative of this. The case concerned alleged acts of torture inflicted upon the plaintiff in Kuwait which engaged the responsibility of the Kuwait government. In the course of proceedings to determine whether there should be leave to serve the government of Kuwait the view was expressed that there was an arguable case that the SIA did not grant immunity in respect of acts of torture in contravention of public international law (judgment of Evans LJ, 21 Jan. 1994). When fully examined in the context of the SIA this argument was rejected (Mantell J, 3 May 1995). There are, however, many factors—including the (arguably) *jus cogens* nature of the outlawry of torture in international law—which would suggest that a State ought not to be able to shelter behind the doctrine of Act of State or considerations of justiciability.

25. E.g. it was suggested before the House of Lords in *Kuwait Airways* (*supra* n.1, at p.1166D) that resolutions of the UN Security Council could be taken to provide an indication of public policy.

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be categorised as a commercial transaction and is, therefore, all the more likely to attract immunity under the Act.[26]

Of course, the irony is that when the act has been done by a separate entity on the instructions of the State, then, according to the House of Lords, immunity does not lie and it is the separate entity and not the State which runs the risk of liability. Surely it does appear somewhat unjust to allow plaintiffs to sue defendants who were acting in accordance with lawful—albeit reprehensible—instructions whilst at the same time granting the State itself immunity? Alongside this, however, lies a broader consideration. If, following their removal to Iraq, ownership of the aircraft in question had been vested in the Iraqi Air Force then KAC's claim would either have had to be pursued before the UN Compensation Commission[27] (where it would take its turn alongside all other claimants) or before a national court, assuming the effective service of a writ and the presence of attachable assets within the jurisdiction. It is not obvious why KAC should be advantaged by the purely fortuitous fact that the aircraft were handed over to IAC and it is the judgments of Lords Mustill and Slynn which seem best to adhere to the letter and the spirit of the Act both in the abstract and in the circumstances of this case.

MALCOLM D. EVANS*

PALM-FRINGED BENEFITS: ISLAND DEPENDENCIES IN THE NEW LAW OF THE SEA

> The genius of the century is also changing the conditions of our action overseas, leading us to bring an end to colonization. It is entirely natural that one should feel nostalgia for what was the Empire, just as one may regret the gentle light of oil lamps, the splendour of the navy under sail. But there is no valid politics outside realities.
>
> *President Charles de Gaulle, 1960*[1]

> France vigorously defends the application of the same regime that is applied in the metropolitan context to the islands and archipelagos of the Republic ... For France, the 200 mile zone covers in total ... 11 million square kilometres which makes France, from this standpoint, the third most powerful maritime nation in the world.
>
> *French Junior Minister for Transport, 1977*[2]

26. He said that the purpose of the Act was to: "prevent sovereigns or sovereign states from avoiding foreign courts investigating their activities in what were plainly the sort of commercial transactions which could equally be carried out by other sorts of persons. What happened here was totally different. Iraq is not being sued for carelessly flying an aircraft ... It is being sued because of the direct consequences of its act of aggression towards Kuwait, the seizure of KAC's aircraft and their subsequent detention and use. That is not in any sense the kind of commercial transaction contemplated by the restricted immunity doctrine." It should be noted in passing that this reinforces the view that a tortious act can attract immunity only if it arises out of a commercial transaction.

27. Established under Security Council Res.692 of 20 May 1991.

* Senior Lecturer in Law, University of Bristol. I am extremely grateful to my colleague Jonathan Hill for his general advice and particular comments concerning the drafts of this article.

1. J. Lacouture, *De Gaulle, The Ruler 1945–1970* (trans. A. Sheridan, 1992), p.267.
2. (1977) 23 Ann. français de droit int. 1055.

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