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The Law of State Immunity

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***State Immunity: Selected Materials and Commentary*, by Andrew Dickinson, Rae Lindsay, & James P. Loonam (Oxford University Press, 2004), pp. xc, 542, Index. £__.**

***The Law of State Immunity*, by Hazel Fox (Oxford University Press, 2002; paperback ed. 2004), pp. lxiv, 572, Index. £__.**

Not so long ago, a book on the immunity of foreign states came along once a generation, if that often. In 2004, two very different books on the topic were published in 2004 in the United Kingdom—*The Law of State Immunity* by Hazel Fox and *State Immunity: Selected Materials and Commentary* by Andrew Dickinson, Rae Lindsay, and James P. Loonam. Fox, a Queen's Counsel, has given us an analytical work on the structure and theory of immunity, as well as exploring the practical questions encountered in litigating a case against a foreign state or a foreign-government-owned corporation. Dickinson, Lindsay, and Loonam have collected primary source material that would be useful for lawyers who might not have ready access to those materials.

One needn't look far for the reasons for the change in the level of professional attention to foreign state immunity. One hundred years ago, most nations still adhered to more or less absolute theories of foreign state immunity.[1] Under the absolute theories, one could only bring a suit against a foreign state if the state waived its immunity and in certain, ill-defined cases involving disputes over title to property (Fox pp. 110-12, 115-17).[2] Some countries in the civil law tradition had already moved to a more restrictive theory of immunity, and by 1950 most non-

[1] *See* The Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116 (1812); The Parlement Belge, 5 P.D. 197 (C.A. 1880).

[2] *See, e.g.*, The Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822).

Communist states in the civil law tradition had done so (pp. 118-23).[3] Mostly, this shift in civil law countries occurred through caselaw.[4] Under the restrictive theory, foreign states were immune when they acted in a public capacity (*acta jure imperii*) and not immune when they acted in a private capacity (*acta jure gestionis*). Today nearly all states have adopted some form of this restrictive theory.

Common law countries continued to adhere to the absolute theory long after it was abandoned by other democracies because common law courts declined to reconsider the old precedents establishing the absolute theory (Fox details the British version of this story at pp. 101-17). Finally, during the period 1975 to 1985, many common law countries enacted the statutes to implement the restrictive theory of state immunity (pp. 124-37).[5] A quarter of a century later, there are numerous reported cases on the restrictive theory common law countries, particularly the United States.[6] There have been fewer decisions in other countries—whether within or without the common law tradition—if only because other countries have less litigation generally.

Hazel Fox's book was originally published in a hardbound edition in 2002. The new (2004) paperback edition includes an extended preface (pp. vii-xxxvi) recounting the legal developments in the interim. Fox begins her book proper in with an abstract discussion of various theories of statehood and of state immunity as they derive from those theories (pp. 11-64). She then turns in to the evolution of the restrictive theory and its embodiment in treaties, national legislation, and

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[3] *See generally* JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 3-14 (2nd ed. 2003).

[4] *See, e.g.*, Judgment of Dec. 8, 1964 (Enterprise Pérignon c. United States) (Cass. Civ. Ire), 45 I.L.R. 82 (1972), *reprinted in* 65 I.L.R. 39 (1984); Judgment of Jan. 17, 1973 (Spain c. S.A. de l'Hotel George V) (Cass. Civ. Ire), 113 JOURNAL DU DROIT INTERNATIONAL 170 (1986). *See generally* GAMEL MOURSI BADR, STATE IMMUNITY: AN ANALYTIC AND PROGNOSTIC VIEW (1984).

[5] *See, e.g., The Foreign Sovereign Immunities Act*, 28 U.S.C. §§ 1330, 1391(f), 1441, 1602-1611 (2000); *The (British) State Immunity Act*, ch. 33 (1978), *reprinted in* 10 HALSBURY STAT. 641 (4th ed. 1985), *and in* 17 INT'L LEGAL MAT'LS 1123 (1979) ["BSIA"]; *The (Canadian) State Immunities Act*, ch. 94, 1980-1982 Can. Stat., *reprinted in* 21 INT'L LEGAL MAT'LS 798 (1982).

the International Law Commission's Draft Articles on Jurisdictional Immunity (pp. 67-254). She particularly focuses on the British and American statutes on state immunity (pp. 124-254). She then turns to her appraisal of the current state of international law regarding state immunity, with separate chapters on internationally accepted and controversial aspects of state immunity (pp. 257-71), exceptions to state immunity (pp. 272-322), the definition of a foreign state (pp. 323-67), and immunity from execution (pp. 368-417). Fox then addresses head of state immunity, diplomatic immunity, the immunity of armed forces, and the immunity of international organizations (pp. 421-73). Fox closes her book with chapters on distinguishing state immunity from the act of state and non-justiciability doctrines (pp. 477-502), immunity from criminal proceedings (pp. 503-16), the effect of local remedies and of the unlawfulness of acts under international law (pp. 517-40), and possible future models of state immunity (pp. 541-55).

While Fox gives considerable attention to the American cases regarding foreign state immunity, the book is principally useful for understanding the British approach to the topic. Unlike the American practice, which both in judicial decisions and in scholarly publications mostly focuses on the elucidation of the meaning of a single statute—the Foreign Sovereign Immunities Act, the Fox book conceives of state immunity law as applied in the United Kingdom as the national application of international law. In other words, she undertakes to review international developments and to show how British courts have implemented (or impeded) these developments. In doing so, she is consistent with the approach of courts and legal scholars in other countries apart from the United States. In part, this simply reflects the reality that courts in these other

[6] *See generally* DELLAPENNA, *supra* note 3.

countries have far fewer cases to consider as developing a peculiarly local approach questions of the immunities of foreign states.[7]

In part, the practice of courts in other nations of seeing there role largely in terms of elucidating international standards governing immunity might simply reflect the reality that judges (and their critics) in many other countries are more comfortable with reliance on and the application of international law than at least some judges (and their critics) are in the United States.[8] Fox's emphasis on this dimension of the topic makes her book useful then even for someone who has no particular interest in the British law of foreign state immunity, but who has an interest in the international law generally on the topic. Her examination of the relevant international authorities is thorough and comprehensive. Her discussion of the international sources of the law of state immunity are particularly helpful (pp. 67-100).

Throughout the book, Fox invests considerable space in developing international theories—often more space than she accords to specifically British (or American) takes on the questions she considers. Thus she deals with theories of statehood and sovereignty almost entirely in terms of traditionally and contemporary international theories on the topics (pp. 23-64, 323-67, 548-59). She seems intrigued by "postmodern" theories of the state (pp. 25-27), but in the end does little with them. This might simply reflect that the British practice of judicial deference to the decisions of the Secretary of State for Foreign and Commonwealth Affairs on whether a particular entity qualifies as a "state" for purposes of the State Immunity Act (pp. 139-41, 172-75). Fox

[7] In a typical year, federal district courts in the United States will public decisions in 50 or more cases and federal courts of appeal will publish decisions in 20 or so cases. The Supreme Court of the United States has decided 7 cases on the Foreign Sovereign Immunities Act in the 29 years it has been on the books. State courts have also contributed a few published decisions over the years. Altogether there were more than 500 reported decisions from American courts by the year 2000. *See* DELLAPENNA, *supra* note 3, at xiv.

[8] *See, e.g.*, Roper v. Simmons, 125 S. Ct. 1183, 1217-19 (Scalia, J., dissenting, joined by Rehnquist, C.J., & Thomas, J.).

discusses the theories of postmodernist international legal scholars on other topics frequently throughout the course of the book (*e.g.*, pp. 42-45, 48-50).

Despite Fox's apparent fascination with postmodernism, her book takes a strongly traditionalist approach to the topic. Thus she insists on seeing the decision to allow pleas of state immunity not only as procedural issues, but as strictly pleas to the jurisdiction of the court. (pp. 16-22, 45-64). Fox seems oblivious to the possibility that the rules pertaining to foreign state immunity serve substantive as well as procedural ends—a possibility that has been recognize, at least in a limited sense, in our cases[9] even though all too often the very same U.S. courts seem to ignore that possibility.[10] Nor does she seem attuned to the different notions that pass under the word "jurisdiction." Much of her discussion really is about the authority of states to prescribe and enforce substantive law (pp. 45-64), yet at other times her discussion of jurisdiction clearly pertains to the authority of national courts to hear and decide specific cases (pp. 16-22). At no time does she allude to these different meanings or consider the possibility that these different meanings might require different results under the law of state immunity.

In other words, while Fox considers at various points the questions of whether a court should exercise personal jurisdiction over a defendant (pp. 58-63) and whether a court should hold a particular defendant immune from suit (pp. 45-48), she does nothing to prevent the sort of pervasive confusion of these questions characteristic of American decisions on these points.[11] Nor does she draw a line between the decision to hear a case and a decision that if the case is heard the law of

[9] Verlinden BV v. Central Bank of Nigeria, 461 U.S. 480, 493-98 (1983). *See generally* DELLAPENNA, *supra* note 3, at 137-44.

[10] Republic of Austria v. Altman, 541 U.S. 677 (2004) (applying the Foreign Sovereign Immunities Act retroactively on the grounds that it was merely procedural); Dole Food Co. v. Patrickson, 538 U.S. 468, 478-80 (2003) (holding that the status of an entity as a "foreign state" must be decided as of the time the suit is filed).

[11] *See, e.g.*, Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1106 (S.D.N.Y. 1982) ("a statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and its many deliberately

the foreign state must, to at least some extent, be applied as the rule of decision (pp. 45-48, 51-58).[12]

When Fox finally turns to actually examining the caselaw under the British State Immunity Act (pp. 137-83) and the U.S. Foreign Sovereign Immunities Act (pp. 183-208), she does so with great brevity but also with considerable sophistication. In particular, she identifies the major points of confusion in the application of the American act, particularly the thus far irresolvable confusion over how to decide whether an activity is commercial or governmental (private or public) (pp. 196-204). In a few brief sentences she sets forth the manifest contradiction between the Supreme Court's holding in *Argentina v. Weltover, Inc.*[13] (in which the Court held that an act was commercial, indicating along the way that the question should be determined by taking the act in its most specific characterization and without regard to its underlying purpose) and *Saudi Arabia v. Nelson*[14] (decided only a year later in which the Court used a highly general characterization and relied on the underlying purpose to decide that the act in question was not commercial).[15] She also aptly characterizes the attempt to craft an implied waiver of immunity from a state's violation of human rights as "part of a general campaign to side-step immunity" (p. 196; *see also* pp. 517-40). Fox does not, however, offer her own assessment of these and other problems (pp. 215-16). She concludes her discussion of the practice under the two Acts with a brief survey of the Alien Tort Act and the Torture Victim Protection Act (pp. 208-16).

Fox completes her study of "current state practice" (as the chapter is called) by giving as extensive an analysis of the work of the International Law Commission and the UN General As-

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vague provisions, has during its brief history been a financial boon to the private bar but a constant bane of the federal judiciary"). *See* DELLAPENNA, *supra* note 3, at 117-20, 323-25.

[12] *See* DELLAPENNA, *supra* note 3, at 137-44, 469-557.

[13] 504 U.S. 607 (1992).

[14] 507 U.S. 349, 356-63 (1993).

sembly on state immunity as she did to either the British or the American experience (pp. 216-54). Her emphasis on the international dimension appears again in the preface to the paperback edition (pp. viii-xiii, xx-xxiii). She follows this with an extended survey of the practice of courts around the world regarding the key questions of state immunity in chapters 6 to 9 (pp. 257-417). All of this is in keeping with her emphasis on state immunity as grounded in international law and not simply as expressed in national legislation.

Fox does not begin to contrast the differences between the British State Immunity Act and the Foreign Sovereign Immunities Act, and their differences from general international practice, until she undertakes her comparative survey in chapters 6 to 9. Here, for example, she finally describes in some detail the problematic nature of the catchall reliance on "commercial activity" in the Foreign Sovereign Immunities Act[16] with the British Act's listing of specific categories of transaction for which immunity is denied (pp. 280-92). She notes once again the difficulties in demarcating the line between commercial acts and non-commercial acts, while also noting that one result of the more specific British list is that the British Act turned out to less comprehensive in its reach than had been expected. Not very surprisingly, she seems to come down in favor of a fairly specific listing, but rather than listing those for which immunity is denied, Fox seems to favor listing those for which immunity is recognized (pp. 292-303). It is only in her survey of state practice that she says much about immunity from execution (pp. 368-417).

After an excursion into the realm of head-of-state immunity (which is expressly included within the scope of the British State Immunity Act, but apparently not included within the For-

[15] For an extended analysis of these cases, see DELLAPENNA, *supra* note 3, at 360-69.
[16] 28 U.S.C. §§ 1603(d), (e), 1605(a)(2) (2000).

eign Sovereign Immunities Act) (pp. 421-73),[17] Fox finally turns to an attempt to distinguish state immunity from the act of state doctrine and the doctrine of the non-justiciability of certain questions (pp. 477-502). While I am not certain that her discussion of these questions adequately captures the nuances of the American version of the act of state doctrine,[18] her discussion of the British and American versions of the doctrine does allow one to compare the broad outlines of the two related but distinct approaches to the questions addressed under that rubric.

Only at the very end of the book does Fox reveal some of her own judgments regarding the many issues that she reports in her stimulating and interesting book. She expresses little sympathy for allowing national courts to litigate human rights violations, at least absent some independent grounds for finding state immunity inapplicable (pp. 517-40). She likewise seems to favor a cautious approach to further restrictions of state immunity in other contexts, with particular emphasis on awaiting a new international consensus before applying such restrictions in national legislation (pp. 541-54). All of this is consistent with her generally internationalist approach to such questions. Unstated, but important to an American lawyer or jurist, is that a need to await a clear international consensus could lead to the invalidation of a number of the innovations in the Foreign Sovereign Immunities Act. One need not agree with all of her conclusions to find Fox's book useful.

In contrast with the thoughtful and thorough book Hazel Fox has given us, the Dickinson, Lindsay, and Loonam book largely limits itself to collecting the salient texts. The authors do provide some section-by-section "commentary" to the British State Immunity Act and to the Foreign

[17] *See generally* DELLAPENNA, *supra* note 3, at 96-105; Joseph W. Dellapenna, *Head-of-State Immunity—Foreign Sovereign Immunities Act—Suggestion by the State Department:* Lafontant v. Aristide, 88 AM. J. INT'L L. 528 (1994).

[18] *See generally* DELLAPENNA, *supra* note 3, at 559-638; Joseph W. Dellapenna, *Deciphering the Act of State Doctrine*, 35 VILLANOVA L. REV. 1 (1990).

Sovereign Immunities Act, but this "commentary" consists of brief annotations of the precise holdings of cases interpreting the section with no real analysis. Thus, for example, in discussing the meaning of "commercial activity" as defined in 28 U.S.C. § 1603(d), the authors tell us only certain contracts have been held to be commercial and that the arrest and torture of the plaintiff by the police in Saudi Arabia was not commercial—without any real attempt to analyze or elucidate either conclusion (pp. 235-36). In other words, these annotations are neither complete nor terribly helpful. In today's world, where such documents are readily available on the internet and when one can easily find relevant cases construing particular sections of either the British State Immunity Act or Foreign Sovereign Immunities Acts through online legal research, these "commentaries" are of little help. The only argument in favor of buying this book is to have all of the selected documents available in a handy, single collection.

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