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Law of State Immunity under International Law

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ABSTRACT

State immunity deals with a State, its governmental officers and agencies. It relates with the most fundamental issue as whether a state is immune from judicial processes of its own courts and courts of other nations. The concept is derived from the maxim "par in parem non habet imperium" i.e. equals do not have authority over one another. Moreover, the concept of state immunity is also dealt with respect to Hohfeld's analysis that describes relations of immunity with disability.

Basically, there are two types of immunities - absolute and restrictive. The former refers to the privileges and exemptions, granted by one state through its judicial machinery to another, against whom it is sought to entertain proceeding, attachments of property or the execution of judgements. On the other hand, the later doctrine makes a distinction between acts performed in exercise of sovereign authority which remain immune and acts of a private or commercial nature in respect of which proceedings in national courts may be brought. The immunities granted can also be revoked as provided under the Vienna Convention. This waiver can be classified as Implied and expressed waiver.

The current trend is additionally inclined towards the restricted approach where countries have curtailed the likelihood of immunity for a remote State in their jurisdiction either by way of legislation or court decisions; there is justification that it is now well structured. This provides a new impetus for clearly determining state responsibility and international liability because the principle of state immunity has become well defined due to the restrictive approach.

I. INTRODUCTION

International law[2] is one of the essentialparts of the structure of our international society.[3] Public international law covers relations between states in all the myriad forms, from war to satellites, and regulates the operations of the many international institutions.[4] One of such concepts under this law is 'State Immunity'. It is a principle of customary international

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[2] J. Bentham, Introduction to the Principles of Morals and Legislation, London, 1780. (The term "International law" was first coined by J. Bentham.)
[3] Michael Byers, The Role of Law in International Politics: Essays in International Relations and International Law, Published to Oxford Scholarship Online: Jan. 2010.
[4] MALCOLM N. SHAW, International Law, Cambridge University Press, (6thed. 2008).

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law.[5]The law of State immunity relates to the grant in conformity with international law of immunities to States to enable them to carry out their public functions effectively and to the representatives of States to secure the orderly conduct of international relations.[6]

This law exempts a state from prosecution or suit[7] for the violation of domestic laws of another state.[8] Certainly, international law dealt with two forms of state immunities i.e. absolute and restrictive. The principle of absolute immunity has now been abandoned in many jurisdictions to embrace the principle of restrictive immunity approach which does not attach immunity to the commercial acts of a sovereign.[9]

The present article deals with the concept of state immunity, its historical background, types or forms under International law.

II. HISTORICAL BACKGROUND OF THE CONCEPT OF STATE IMMUNITY

The initial contributions to the concept of state immunity can be derived from the maxim *"par in parem non habet imperium"* i.e. equals do not have authority over one another. This maxim was originally the bedrock of a doctrine of absolute immunity.[10] The rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) a state has no jurisdiction over another state.[11] Moreover, just as a King would not be Subject to the Jurisdiction of another state while visiting the state, so too is monarchs representatives were granted Immunity.[12]

At present, there is no denying the fact that the boundaries between the Kings and States have blurred. With the passage of time, governments justified these broad Immunities by reference to the dignity, equality and independence of States.[13]In England, "dignity", coupled with Independence played an important part as an explanation of the doctrine of Immunity of Foreign States.[14] Lord Macmillan invoked "dignity", equality and Independence of Foreign States as the foundation of their Immunity. Remarkably, there is a close similarity between the manner in which the "dignity of the Sovereign" was used as a Justification of Sovereign

[5] Xiaodong Yang, State Immunity in International Law (Cambridge University Press Sept. 2012).
[6] HAZEL FOX & PHILIPPA WEBB, The Law of State Immunity, Oxford University Press, (3rd ed. 2013).
[7] State immunity deals with both civil and criminal liabilities.
[8] Paschal Oguno, The concept of state immunity under international law: An overview, IJL, Sept. 2016.
[9] *Id.*
[10] The Cristina (1938) 60 LR 147 (HL) 162
[11] Lord Bingham in the case of Jones v. Saudi Arabia (HL) while giving a reference to the case of Prosecutor v. Blaskic IT-95-14, (1997) 110 ILR 607 (ICTY) 707.
[12] Jeffrey L. Dunoff, International law – Norms, Actors, process: A problem Oriented Approach, Aspen publishers inc. New York, 383 (2002).
[13] Oguno, *supra* note 7.
[14] Parlement Belges case, LR5 P.D. 197.

Immunity within the State and the way in which it was relied upon for Jurisdictional Immunity of foreign States.[15]

The Sovereign could not be made subject to the judicial process of his country while also considering the Independence and equality of States which made it philosophically as well as practically difficult to permit Municipal courts of one country to manifest their power over foreign Sovereign States without their consent.[16]

III. IMMUNITY: HOHFELD'S PERSPECTIVE

According to Hohfeld, immunity as another fundamental legal relation, and defines it as the correlative of disability (no power). To illustrate, if the thief has no power to give good title to a purchaser of the horse he stole, then the owner is not liable to have his ownership divested, is immune from the thief's power, and hence is said to have an immunity. [17] This proposition of immunity can easily be understood from the wordings of Lord Bingham,[18]

"the rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) a state has no jurisdiction over another state. I do not understand how a state can be said to deny access to its court if it has no access to give."

The relation of immunity and disability can also be equated with the immunities guaranteed under the constitution.[19] For example, Article 105[20]endow with certain immunities to the members from any criminal and civil proceedings for any acts done. The immunity under this provision disables members to institute any suit or proceeding against any other member. These schemes of relations are similar to that of state immunity that exempts a state from prosecution or suit for the violation of domestic laws of another state. In basic terms, if a state has immunity then the other state has no power to act until and unless such immunity is waived either expressly or impliedly and vice-versa.

IV. TYPES OF IMMUNITY

State Immunity is a principle on which states claims that the particular court or tribunal does not have jurisdiction over them,[21] or any activity done by Head of State or government, or

[15] Cristina, *supra* note 10.
[16] Shaw, *supra* note 3.
[17] Isaac Husik, 72 University of Pennsylvania Law Review and American Law Register, Mar. (1924).
[18] Jones, *supra* note 11.
[19] INDIA CONST.
[20] INDIA CONST. art. 105.
[21] D Gaukrodger, Foreign State Immunity and Foreign Government Controlled Investors', OECD Working Papers on International Investment, 2010/2, OECD

diplomatic agents.[22]State immunity serves three main functions:

i. as a method to ensure a 'stand-off' between States where private parties seek to enlist the assistance of the courts of one State to determine their claims made against another State;

ii. as a method of distinguishing between matters relating to public administration of a State and private law claims;

iii. as a method of allocating jurisdiction between States in disputes brought in national courts relating to State activities in the absence of any international agreement by which to resolve conflicting claims to the exercise of such jurisdiction.

Absolute Immunity

Absolute Immunity thus refers to the privileges and exemptions, granted by one state through its judicial machinery to another, against whom it is sought to entertain proceeding, attachments of property or the execution of judgements.[23] There is no denying the fact that this approach was initially followed by several states. It was because the functions of the sovereigns were minimal. Be that as it may, the unmatched development in the exercises of the state, particularly concerning business matters, has prompted issues and in many nations, modification of the above standard.

The approach was dominantly followed in U.K which could be inferred through various judicial decisions. In the *Parlement case*[24] the Court of Appeal emphasised,

"the principle to be deduced from all the relevant preceding cases was that every state declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use...though such sovereign, ambassador or property be within its jurisdiction."

In *Tass Agency*[25] the Court of Appeal held that the Agency was a state organ of the USSR and was thus entitled to immunity from local jurisdiction. Later, a similar approach was followed in *Servicio Nacional del Trigo*[26] where the Court was of the opinion that the defendants, although a separate legal person under Spanish law, were in effect a department of state of the Spanish government. Therefore, once the Crown recognised a foreign ruler as sovereign, this

[22] Article 31, Vienna Convention of Diplomatic Relations, 1961.
[23] Oguno, *supra* note 7.
[24] Parlement Belge case (1880) 5 PD 197.
[25] Krajina v. Tass Agency [1949] 2 All ER 274.
[26] Baccus SRL v. Servicio Nacional del Trigo [1957] 1 QB 438.

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bound the courts and no other evidence was admissible or needed.[27]

Restrictive Immunity

The restrictive model makes distinction between the public and private law acts of the State, with immunity confined to public acts. The doctrine makes a distinction between acts performed in exercise of sovereign authority which remain immune and acts of a private or commercial nature in respect of which proceedings in national courts may be brought.[28]

The significant development was apparent in the 19th century. In 1950, the Austrian Supreme court held,

"Classic doctrine of Immunity arose at a time, when all commercial activities of State in foreign countries were connected with their political activities… Whereas today States engage in commercial activities and enter most competitions with their own nationals and with foreigners. Consequently, the classic doctrine … has lost its meaning and should be replaced by a doctrine restricting the Immunity of States.)"[29]

Later, the U.S proposed to implement this doctrine via a letter which stated that the department feels that the wide spread and increasing practice, on the part of government of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in courts. For these reasons it will hereafter be by the department's policy to follow the restrictive theory of Sovereign Immunity in the consideration of requests for a grant of Sovereign Immunity.[30]

In 1958, Lord Denning expressed the desirability of embracing the restrictive Immunity approach in the case of *Rahimtoola*[31] where he said in all civilised countries there has been a progressive tendency towards making the sovereign liable to be sued in his own court; notably in England by the Crown proceedings Act 1947. It was 'wrong' to apply the doctrine since states could in the western world be sued in their own courts on commercial contracts and there was no reason why foreign states should not be equally liable to be sued.[32] Finally, in *Trendtex Trading Corporation Ltd.*[33] all three judges of the Court of Appeal accepted the validity of the restrictive approach as being consonant with justice, comity and international practice.

[27] Shaw, *supra* note 3.
[28] Fox, *supra* note 5.
[29] Dralle v. Republic of Czechslovakia (1950) 17 (ILR).
[30] 26, Department of State Bulletin, 984 (1952).
[31] Rahimtoola v. Nizam of Hyderabad [1958] AC 379.
[32] *Id.*
[33] Trendtex Trading Corporation Ltd v. Central Bank of Nigeria [1977] 2 WLR 356.

V. WAIVER OF IMMUNITY

Article 32[34] of the Vienna Convention permits the state to waive the immunity from jurisdiction of diplomatic agents and others possessing immunity under the Convention. Such waiver must be express.[35]It is to be noted that this waiver is limited to the states i.e. individuals cannot waive their liability personally. This intention was comprehensible due to the memorandum entitled *Department of State Guidance for Law Enforcement Officers With Regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel*[36] the point is made that waiver of immunity does not 'belong' to the individual concerned, but is for the benefit of the sending state.

In *Al-Tajir*[37] the Court of Appeal referred to an apparent waiver of immunity by an ambassador made in pleadings by way of defence. Kerr LJ noted that both under international and English law, immunity was the right of the sending state and that therefore only the sovereign can waive the immunity of its diplomatic representatives. They cannot do so themselves.

Immunity can be waived in two ways, expressly and impliedly.[38]

1) Express waivers

Express waivers are typically found in contractual provisions, although they could arise from independent statements (for example, by a duly authorized governmental official). They are normally construed narrowly by U.S. courts in favour of the sovereign.[39] In some situations, treaty provisions may also qualify, although the U.S. Supreme Court cautioned in *Argentine Republic v. Amerada Hess Shipping Corp.* that federal courts should not lightly imply a waiver based upon ambiguous treaty language.[40]

2) Implied waivers

As a rule, courts are even more reluctant to find implied waivers, requiring strong evidence of the foreign state's intent.[41] As noted *In re Republic of the Philippines,*[42] implied waivers have traditionally been found only when:

[34] Article 32, Vienna Convention of Diplomatic Relations, 1961.
[35] Public Prosecutor v. Orhan Olmez 87 ILR.
[36] 27 ILM, 1988
[37] Fayed v. Al-Tajir [1987] 2 All ER 396.
[38] It is very rare and generally courts are reluctant to search for implied clauses until and unless there are substantial evidences.
[39] World Wide Minerals, Ltd. v. Republic of Kazakhstan, 296 F.3d 1154.
[40] Carpenter v. Republic of Chile, 610 F.3d 776.
[41] Cf. Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012).
[42] In re Republic of the Philippines 309 F.3d 1143, 1151 (9th Cir. 2002).

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1) A foreign state has agreed to arbitration in another country.[43]

2) A foreign state has agreed that a contract is governed by the law of another foreign country[44] or

3) A foreign state has filed a responsive pleading in a case without raising the defence of sovereign immunity.[45] By comparison, a clause providing that "the Courts in India and USA only shall have jurisdiction in respect of all matters of dispute about the [bonds]" has been held insufficient to waive immunity.[46] Allegations of implicit waiver by foreign government conduct in violation of the norms of international law (including acts alleged to be contrary to *jus cogens*, such as torture or genocide) have not been successful.[47]

VI. CONCLUSION

State immunity deals with a State, its governmental officers and agencies. It relates with the most fundamental issue as whether a state is immune from judicial processes of its own courts and courts of other nations. Initially, sovereignty, dignity and independence were the justifications given by the states to avail this principle. With the passage of time, the boundaries between the state and its heads, governments and agencies blurred. This evolution brought and perfectly established the doctrine of state immunity. The difficulty began when states availed absolute immunity. There were no rules or regulations that could limit the immunity of the states. These problems further developed when functions of the sovereign became more complicated due to increase in trades and other commercial transactions. All these circumstances evolved the doctrine of restrictive immunity. It confined the immunity of the states to the public functions only.

The current trend is additionally inclined towards the restricted approach where countries have curtailed the likelihood of immunity for a remote State in their jurisdiction either by way of legislation or court decisions; there is justification that it is now well structured. This provides a new impetus for clearly determining state responsibility and international liability because the principle of state immunity has become well defined due to the restrictive approach.

[43] Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc., 236 F. Supp. 2d 1140.
[44] World Wide Demil, L.L.C. v. Nammo, A.S., 51 F. App'x 403, 405 (4th Cir. 2002).
[45] Haven v. Polska, 215 F.3d 727, (7th Cir. 2000).
[46] Poddar v. State Bank of India, 235 F.R.D. 592, 597 (S.D.N.Y. 2006).
[47] Matar v. Dichter, 563 F.3d 9, 14 (2d Cir. 2009).

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