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THE CONCEPT OF SOVEREIGN IMMUNITY IN INTERNATIONAL LAW AND A REVIEW OF THE THEORIES ON IMMUNITY OF STATE

There are three theories involving states' immunity, The absolute immunity in which state is exempt from all responsibilities, Theory of refutation of immunity by virtue of which a state may be, like any other legal entity, prosecuted in courts and/or the arbitration awards issued against a state may be enforced ordinarily, The limited immunity of the difference between acts of sovereignty and actions of office. However, delimitation of acts of sovereignty and actions of office is in itself a problem for which publicists have not yet been able to fine a clear formula. At this stage, the state not in the position of a sovereignty holder but in a position similar to private entities proceeds to take actions. In other words, without using its rights of sovereignty, participates in habitually commercial and irregular activities. Obviously, in such circumstances, granting any immunity is pure injustice and shall be an impediment to development of commercial relations.

Keywords: sovereign immunity, absolute immunity, refutation of immunity, limited Immunity.

Interdiction;

Since early twentieth century, states and international publicists have put most of their efforts into prohibition of war and recourse to force in international relations. Obviously in such circumstances, the international law approach to sovereign jurisdictional immunity of state is a sovereignty-oriented approach; a manifestation of which is the protection of the states from the jurisdiction of the courts of the others. Therefore, in this period too, the theory of doctrine of absolute immunity of state is still the issue of consideration; something almost unexceptional[1].

However, due to social changes, especially the subsequent economical changes in the international community and states' interference in economic affairs on one hand, and the central tendencies of the international law on the other hand, its limits and boundaries extend and emerge more, so much so that it makes some publicists suspect that the issue of jurisdictional immunity of state is on the downfall[2].

The importance of the case in point is that it reveals the historical roots of the immunity of state in international law which is very useful for studying the theories and scope of jurisdictional immunity of state; a principle which is the subject of consensus. In this section, with due consideration to the significance of the issue, we study different views and compare them with one another.There are three theories involving states' immunity, as follows:

1. The absolute immunity in which state is exempt from all responsibilities

According to an ancient custom in common law, this immunity should be applied to all foreign states without distinction. It is assumed that state is exempt from all responsibilities. Marchal argues that no lawsuit can be brought against a rightful authority whose right arises from its will[3] and a ruling power cannot be brought, despite its will, under the jurisdiction of courts of justice[4].

The clarion meaning of this theory can be found in Qureshi v. USSR:

"According to this doctrine, state, in all cases, shall be sued in its own courts and shall be tried by virtue of its own laws. This rule is especially applicable to all situations even those in which the State is a party to private transactions and is involved through its representatives abroad in buying and selling, granting loans, acquiring credits and as a whole dealing with activities that are a part of international trade[5]."

In this theory, state sovereignty is interpreted in such a way that applying foreign jurisdiction and laws to a state is considered as a great degradation[6]. Therefore, the entire activities of a state including its commercial, sovereign and/or detrimental activities are assumed to be immune from any proceedings outside its territory. Given the changes and developments of the twentieth century, the Rule of States' Absolute Immunity gradually lost its conformity with the requirements of the time. In this era, with regard to the dramatic expansion of international trade and the necessity to repair the destructions caused by the world war, states entered the trade market and virtually started to do activities which were, previously, either impossible or the exclusive domain of the private sector. Therefore, the theory of absolute immunity gradually declined and the municipal courts of the European

states abandoned the absolute immunity over time. In this respect, the practice of the Swiss, German, English and French courts are noteworthy. In addition to the judicial precedent, the existing trend in international commissions is also a positive proof for the gradual abolition of the absolute immunity theory[7].

In this regard, the practice of non- official organizations, too, is in conformity with the trend of the abolition of states' absolute immunity; the draft of the Study Group of Harvard University in 1932, upon supporting the limited immunity theory, proclaimed the end of the rule of absolute immunity[8].

2. Theory of refutation of immunity by virtue of which a state may be, like any other legal entity, prosecuted in courts and/or the arbitration awards issued against a state may be enforced ordinarily. According to some publicists such as Lauter Pacht, State immunity is essentially devoid of legal basis and a state, just like any other legal entity, can be prosecuted in courts and/ or the arbitration awards issued against a state can be enforced ordinarily[9]. All the same, the said publicist, in some specific cases, has not been able to deny the state immunity and hence he has incorporated in his principle exceptions literally regarding the enforcement of sovereignty. He believes that due to the inherently political nature of some claims, the courts cannot hear the cases related thereto. In his opinion, these cases are as follows:

a- Actions taken for the enforcement of the provisions of law of a foreign state;

b- executive and administrative operations of a foreign state on the territory of the same;

c- issues concerning the political immunity[10]. Although, Luther Pachter made a lot of efforts to prove that the sovereignty- related actions are not only limited to the above cases, but also other disputes between a state and private entities such as acting, nevertheless, it does not seem that this publicist's opinion have been absolutely implemented in any legal system and, at present, is devoid of any solid basis in terms of positive law[11].

3. The limited immunity of the difference between acts of sovereignty and actions of office, a theory principally accepted by most of the legal systems, is that the sole intervention of a state in industrial and commercial operations is considered as that state's implicit waiver of invoking the principle of immunity in terms of cognizance of an issue by judicial authorities[12]. Therefore, before enforcement of an arbitration award, the court should take into account whether the award has been issued in respect of commercial disputes and acting, or on the basis of the dispute arising from issues that are somehow connected with state's sovereignty. It is to be noted that in this theory it is assumed that the state has two characters on the basis of which it will be held immune or accountable:

1- The governing character of the state; in this character, the state in its rule of sovereignty granted by people "rules as a sovereign". For instance, for the purpose of preserving the value of the national currency, prevents the import and export of some commercial items and/or for the purpose of preserving the public health, prevents some of the harmful activities. As may be seen, the nature of these activities is such that they are solely at the discretion and authority of the states; so much so that private entities are firstly unable of their incumbency and secondly, in case of encountering such activities, are devoid of bargaining power even if they are damaged, as those activities are considered as sovereignty acts.

2- The private character of state: the ruling character of the state doesn't prevent the same from exercising incumbency in activities that are often carried out by private entities. However, in the past, the states were less likely to engage in such activities. Nevertheless, delimitation of acts of sovereignty and actions of office (ACTA JURE GESTIONIS) is a problem for which the publicists have not yet been able to find a clear formula.

Some publicists like S. Weiss believe that for determining the actions of office, attention should be given to the nature of the claim[13]. If the claim is about a contract or it is a tort, the state shall not be entitled to immunity. However, this cannot be inferred from the sets of judicial precedent in different countries. Another theory more invoked by the courts believes that attention should be given to the aim of the legal issue. If the aim of transaction is the execution of a normal business, just the fact that the state is the transacting party does not cause immunity; and the state can enjoy immunity in other cases[14].

Conclusion;

Upon the formation of industrial revolution in Europe and presentation of theories by great economists such as Adam Smith, gradually an idea emerged to the effect that the intervention of government in business causes international community's tendency towards the doctrine of limited immunity instead of absolute immunity and the judicial immunity gradually took steps towards limited immunity too. We emphasize the effects of the First and Second World Wars because as a result of these two wars, especially the Second World War and due to severe damages, the mainly- private economies of the European States were forced to become state-sponsored ; and in most of these states, like socialist parties the state economy became

predominant. In such circumstances, the formation and public welcome of the theory of limited immunity could guarantee the interests of the private traders transacting with the state. Therefore, after the Second World War, the theory of limited immunity became internationally popular.Upon the formation of the necessity of states' incumbency in trade, states, like private entities, "have to possess property, conclude contracts, and be debtor or creditor;"i.e. actions that separate them from their sovereign character. At this stage, the state not in the position of a sovereignty holder but in a position similar to private entities proceeds to take actions. In other words, without using its rights of sovereignty, participates in habitually commercial and irregular activities. Obviously, in such circumstances, granting any immunity is pure injustice and shall be an impediment to development of commercial relations. However, delimitation of acts of sovereignty and actions of office is in itself a problem for which publicists have not yet been able to fine a clear formula.

[1] - Ref. Kowanakoa V. Polybank Case, 205 VS. 354, 1907
[2] - Nassiri, Morteza, Enforcement of Foreign Arbitral Awards, Tehran, 1366, P. 69
[3] - Qureshi V. USSR, OP, Cit, p. 1067.
[4] - Chisholm V. Georgia {1793} op.cit.p.230
[5] - Abdollahi, Mohsen & Shafeh Mirshahbaz, State's Jurisdictional Immunity in International Law, Tehran 1386, P. 43-45.
[6] - Abdollahi, Mohsen & Shafeh Mirshahbaz, State's Jurisdictional Immunity in International Law, Tehran 1386, P. 43-45
[7] - Convention on International Civil Aviation Chicago, 1944.
[8] - Nassiri, Morteza, Enforcement of Foreign Arbitral Awards, Tehran 1346, P. 98
[9] - Ref. Art. Lauter Pacht, Titled: " The Issue of Foreign States' Jurisdictional Immunity" stipulated in Volume 28, English Yearly Publication of International Law (1961)
[10] - Nassiri, Morteza, Enforcement of Foreign Arbitral Awards, Tehran 1346, P. 98
[11] - Ibid, 1346, P. 99
[12] - Ref. Weiss Art. " Immunity or Non-immunity against Foreign States", Lessons of the Hague International Law Academy (1926)
[13] - Nassiri, Morteza, Enforcement of Foreign Arbitral Awards, Tehran 1346, p. 100
[14] - Abdollahi, Mohsen & Shafeh Mirshahbaz, State's Jurisdictional Immunity in International Law, Tehran 1386, P. 43-45

Մոստաֆա Յուսֆվանդ
ԵՊՀ իրավագիտության ֆակուլտետի
եվրոպական և միջազգային իրավունքի ամբիոն

ԱՄՓՈՓՈՒՄ

Սուվերեն անձեռնմխելիության հայեցակարգը միջազգային օրենքում և ակնարկ պետության անձեռնմխելիության տեսությունների մասին

Պետությունների անձեռնմխելիության վերաբերյալ գոյություն ունեն երեք տեսություններ: Բացարձակ անձեռնմխելիությունը, որտեղ պետությունն ազատված է բոլոր տեսակի պատասխանատվություններից: Անձեռնմխելիության հերքման տեսությունը, ըստ որի, պետությունը կարող է, ինչպես ցանկացած այլ իրավաբանական միավոր, մեղադրվել դատարաններում, և/կամ պետության դեմ կայացած արբիտրաժային որոշումները կարող են, որպես կանոն, չիրագործվել: Սուվերենության դրսևորումների և պետության գործողությունների միջև առկա տարբերությունների սահմանափակ անձեռնմխելիություն: Սակայն, սուվերենության

դրսևորումների և պետության գործողությունների սահմանազատումն ինքնին խնդիր է, որի համար հրապարակախոսներին դեռևս չի հաջողվել գտնել հստակ բանաձև: Այս փուլում, ոչ թե սուվերենության իրավատիրոջ կարգավիճակում, այլ մասնավոր միավորների նմանությամբ կարգավիճակ ունեցող պետությունն սկսում է քայլեր ձեռնարկել: Այլ կերպ ասած, առանց օգտագործելու իր սուվերենության իրավունքները, մասնակցում է սովորաբար կոմերցիոն և չկանոնակարգված գործողությունների: Ակնհայտորեն, այսպիսի իրավիճակներում, շնորհել ցանկացած ձևի անձեռնմխելիություն միանշանակ անարդարություն է և խոչընդոտ կհանդիսանա առևտրային հարաբերությունների զարգացման համար:

Հիմնաբառեր- *Սուվերեն անձեռնմխելիություն, բացարձակ անձեռնմխելիություն, անձեռնմխելիության հերքում, սահմանափակ անձեռնմխելիություն:*

Мостафа Юсуфванд
Кафедра европейского и международного права юридического
факультета Ереванского государственного университета

РЕЗЮМЕ

Конвенция суверенного иммунитета в международном законе и обзор теории иммунитета государства

Относительно иммунитета государств существуют три теории. Исключительный иммунитет, где государство освобождено от всякого рода ответственности. Теория опровержения иммунитета, по которой государство может как любая иная юридическая единица, обвиняться в судах, и/или арбитражные решения, вынесенные против государства, могут, как правило, не осуществляться. Между проявлениями суверенитета и действиями государства наличествуют различия ограниченного иммунитета. Однако, ограничение проявлений суверенитета и действий государства само собой является проблемой, из-за которой публицистам до сих пор не удалось найти четкой формулы. На данном этапе, не в качестве обладателя суверенитета, а как имеющее статус в отношении к частным единицам государство начинает принимать меры. Иными словами, без использования своего права на суверенитет обычно участвует в коммерческой и нерегулируемой деятельности. Очевидно, что в таких ситуациях, награждать иммунитетом к любой форме однозначно несправедливость и станет препятствием на пути развития торговых отношений.

Ключевые слова*: Суверенный иммунитет, абсолютный иммунитет, опровержение иммунитета, ограничен-*