THE
ACADEMY
LAW REVIEW

Vol. XVI Numbers 1 & 2 1992

THE CHANGING CONCEPT OF STATE IMMUNITY AND INDIAN PERSPECTIVE

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Reprint

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The genesis of the concept of sovereign immunity of State can be traced to an era of personal sovereignty, when kings theoretically do no wrong and when exercise of authority be one sovereign over the other was looked with hostility. In fact the doctrine of state immunity originated on the basis of respect given to foreign sovereigns by a State as a friendly gesture, courtesy, public policy and comity. These practices later have crystallized into customary international law under which the foreign sovereigns enjoyed the immunity from suit and other territorial jurisdiction. In other words the notion of sovereign immunity is harmonized upon the grounds that the exercise of jurisdiction would be incompatible with the dignity, independence and sovereign equality of every superior authority enjoyed by every State[1] *par in parem non habet*

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1. See *The Parlement Belge,* (1880) 5. P. D. 197; *Mighell* v. *Sultan of Johore,* [1894] 1 Q.B. 149; *The Cristina* [1938] A.C. 485; *Compania Mercantil Argentina U.S. Shipping Board* (1924) 40 T.L.R., 60; *The Porto Alexandre,* (1920) C.A. 30; Oppenheim, *International Law* (ELBS edn, 1966) p. 272, O' Connell; *International Law* (1965) Vol. II p. 913, Myres McDougal and W. Michel, Reisman, *International Law in Contemporary Perspective* (1987), p.1459; Oliver J. Lissitzyn, *International Law Today and Tomorrow* (1965), p. 22; Gamal Moursi Badr, *State Immunity An Analytical and Prognostic View* (1984); Ian Brownlie: *Principles of Public International Law*

imperum. The courts also supported the concept of sovereign immunity to avoid possible embarrassment to those responsible for the conduct of international relations. In the words of Fuller, C.J.

> Every foreign State is bound to respect the independence of every sovereign State, and the courts of one country will not sit in judgements on the acts of the government of another done within its territory.[2]

The concept of 'sovereign immunity' and 'state immunity' although resemble to be one and the same, there exists different juristic perceptions. Authors like Sinclair make a hairsplitting analysis to bring out the subtle difference between the two.[3] The courts in the United States also held[4] the idea that the State was a juristic personality distinct from its sovereign. No doubt, these faint differences do not affect in any manner the State practice, for sovereign as a State's representative or a State as sovereign's representative enjoys equal powers and privileges.

In modern times the concept of state immunity has undergone a sea change because of the dilution in the sovereign power and gross misuse of the privileges and immunities by the States. The States are forced to change their practice of adherence from the 'absolute theory'[5] to the 'restrictive theory'[6] in extending the immunities to foreign States.

(ELBS edn., 1979) p. 321; *Also refer fourth edn., (1990)*, p. 322; J.L. Brierly, *The Law of Nations* (Third edn. 1942) p. 194; George Schwarzenberger, *A Manual of International Law* (Sixth edn., 1976) p. 81; Sir Hersh Lauterpacht, *The Problems of Jurisdictional Immunities of Foreign States (1951) BYIL*, 220; J.G. Starke; *Introduction to International Law* (Ninth edn., 1984) p. 95; also refer tenth edn, 1989, p. 96; D.J. Harris, *Cases and Materials on International Law* (Third edn, 1983) p. 241; F.A. Mann, *Further Studies in International Law* (1990), p. 4; S.K. Agarwala, "The Plea of Sovereign Immunity and Indian State Practice" *Essays in Honour of K. Krishna Rao,* (Indian Society of International Law, 1975) p. 314.

2. *Underhill* v. *Hermadez,* (1897) 168 U.S. 250.

3. Sir Ian, Sinclair "The Law of Sovereign Immunity Recent Developments" *Recuil Des Cours* (1980) Vol. II, pp. 197–98.

4. *United States* v. *Wagner,* (1867), 2 Ch. App. 582.

5. Absolute Theory maintains that a foreign State is immune from suit without its consent regardless of the nature of the activity which has given rise to the suit against it, similarly its property is also immune from judicial attachment or execution.

6. Restrictive Theory maintains that a foreign State may be sued on cause of action growing out of its commercial activities.

The Report of the International Law Commission clearly depicts that in recent times the courts of the great majority of States lean in favour of the restrictive theory of immunity than the absolute theory of immunity.[7]

The aim of the paper is to study the rationale behind the state immunity and theories of state immunity and the Indian practice under the changing circumstances.

The term " 'sovereign State' includes not only the foreign State itself, but also the head of State personally, and the government or any department of government including, in the case of a composite State, the government of province of a State."[8] According to Article 3, para (1) of the Draft Articles of the International Law Commission on the 'Jurisdictional Immunities of States and Their Property,' a State means,[9]

(a) the State and its various organs of government;

(b) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(c) agencies or instrumentalities of the state to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State; and

(d) representatives acting in that capacity.

The concept of state immunity is not developed solely on the basis of perfect equality, rank, precendence and absolute independence of sovereignty. There are various other causative factors which helped to develop the concept,[10] such as, first, the considerations of the dignity of the sovereign State and the traditional claim transposed into the international arena of the courts, a privileged position compared with

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7. 4th *Report on Jurisdictional Immunities of States and Their Property* (1982) prepared for the I.L.C. by its Special Rapporteur (Sucharitkul), UN Doc. A/CN. 4/357, pp. 35, see also the survey in Sinclair, *supra* 3. Chapter II.

8. *Halsbury's Laws of England* (1981) p. 795: para 1549.

9. *Year Book of the International Law Commission,* (1983) Vol. II, Part II, p. 140.

10. Lauterpacht; *supra* 1. pp. 230–32.

that enjoyed by the subject, *par in parem non habet jurisdictionem.*[11] Secondly, the principle of reciprocity and comity is a general practice accepted as a whole. Thirdly, the concept of noninterference in the internal affairs of a State.[12] Fourthly, the principle that the transactions of the policies of a foreign State should not be analysed by the municipal courts of another country.[13] Finally, according to International law, every State has the duty to respect the validity of the public acts of other States, in the sense that its courts will not pass judgments on the legality by the constitutionality of acts of foreign sovereigns under its own laws.[14]

Although the municipal courts had been cautious while dealing with the cases relating to the jurisdiction of foreign States, their hands off policy did not lend any support to the existence of international law of sovereign immunity, because neither the writings of the Western jurists like Gentili, Grotius, Bynkershoek, and Vattel nor classical international law refer to the practice. In fact Bynkershoek discussed at length the privileges and immunities of ambassadors rather than the immunities of the State concerned to which he had given only a passing reference. Coinciding with the views of Bynkershoek, Vattel admitted that a foreign sovereign could claim immunity in person, while he was silent about the position of immunity of foreign States. Agreeing with the views of the afore mentioned jurists, the I L C also listed in its draft articles, clearly the persons who are eligible to claim immunity under international law.[15]

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11. *Ibid.* at 245–46, also Brownlie, *supra.* 1, pp. 323.

12. *Buck* v. *A.B.*, [1965] Ch. 745, 770–1, Brownlie, *ibid.* at 324–25.

13. *Rahimtoola* v. *Nizam of Hyderabad.* [1958] A.C. 379,422.

14. *Supra n.* 2.

15. The Draft Article 4 (1) (a) of the ILC reads (a) its diplomatic missions, Consular posts, special missions to international organizations, or delegations to organs of international organizations or to international conferences, and (b) persons connected with them.

    Art. 4(2) specifies that the present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State *ratione personae.* For details, see *Report of the International Law Commission on the work of its Thirty-eighth Session* 41 UN GAOR supp. (No, 10), UN Doc. A/41/10 (1986).

Before discussing the two prevalent theories of the sovereign immunity it is noteworthy to study in brief the question of jurisdictional immunities of States in claiming immunity from a suit in a foreign State.

The word 'jurisdictional immunities' always need not point only to the judicial jurisdiction. There are various other jurisdictions such as administrative and legislative etc. that are exercised by States in their foreign relations. According to Art. 2 para (1) of the Draft Articles of the ILC, jurisdiction means, "the competence of a territorial State (State from whose territorial jurisdiction immunities are claimed by a foreign State in respect of itself or its property) to entertain legal proceedings, to settle disputes, or to adjudicate litigation, as well as the power to administer justice in all its aspects."[16] Accordingly, the term 'jurisdictional immunities' refers to the rights of sovereign States to exemption from the exercise of the power to adjudicate as well as to the non-exercise of all other administrative and executive powers by whatever measures or procedures by another sovereign State[17]. The ILC though specified the meaning of immunities in its Draft Articles (judicial and executive), a State always cannot claim that it is exclusively immune from the jurisdiction of the other State in relation to the questions of international law. There are two theories that prevail with regard to the concept of state immunity, viz., 'Absolute Theory' and 'Restrictive theory'.

The theory of absolute immunity has developed on the premise of avoiding litigation which might cause inconvenience and embarrassment to the sovereign authority of a foreign State, its various organs and its officials entrusted to look after the various matters of the State in their foreign relations. According to this theory the State has every right to invoke the jurisdictional immunities concerning any aspect of its activities. In other words, a State in every respect is immune from the jurisdiction of other countries, its government could not be sued abroad without its consent, its public property could not be attached, its public vessels could not be arrested, boarded or sued nor could any property or real estate owned by the State be taxed or attached in whichever country it might be located.[18] The theory gained much popularity

16. *Y.B.I.L.C.* (1980) Vol. II, Part II, p. 140.

17. *Ibid.* para 1 (b) of Art. 2.

18. *Schooner Exchange* v. *Mc Faddon,* (1812) 7 Cranch 116.

from the point of view of the customary international law and state practice until the beginning of the twentieth century. In support of the theory, Marshall, C.J. in his much quoted judgment observed:

> This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.
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> This perfect equality and absolute independence of sovereigns, and this common interest compelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.[19]

The advocates of the theory argue that the State at all times is supreme and its activities could not be questioned, which will derogate the powers of sovereign. The theory was prevalent in many States including the U.K., which was strictly adhered to the theory. Later writers and jurists started questioning its validity.[20] Lord Denning in *Rahimtoola* v. *Nizam of Hyderabad*[21] brought out the subtle difference that existed in a dispute involving a foreign government in a domestic court of another country. He observed that if the dispute involved the policy of the foreign government the courts should grant immunity so as not to offend the dignity of a foreign sovereign, much less to question the policy formulations of a foreign country. On the other hand if the dispute arose out of commercial transactions of a foreign government

19. *Ibid.* at 137

20. "If there is any international law at all on the subject which some writers are now beginning to doubt, it covers only a narrow field of governmental activity, and the problem is to delimit the field." O' 'Connell, *supra n.* 1 at 918.

21. *Supra n.* 13 at 379.

or its agencies then there was no need to invoke the sacred principles of sovereign immunity. In *Thai-Europe Tapioca service* v. *Government of Pakistan*[22] Lord Denning specified certain guidelines to the general rule of immunity with regard to commercial transactions. They are:

(a) a foreign sovereign has no immunity in respect of land situated in England;

(b) a foreign sovereign has no immunity in respect of trust funds in England or money lodged for the payment of creditors;

(c) a foreign sovereign has no immunity in respect of debts incurred in England for services rendered to its property in England; and

(d) a foreign sovereign has no immunity when it enters into a commercial transaction with a trader in England and a dispute arises which is properly within the territorial jurisdiction of English courts.

This indicates that the theory of absolute immunity is losing its fervour.[23]

In times when the absolute theory was at its peak there were attempts towards adopting the restrictive theory.[24] The Belgian courts are said to be the pioneers of the theory. There are cases decided by Belgian courts distinguishing the public and private acts of the States and extending their support to the restrictive theory since, 1857.[25] Even in England the High Court of Admiralty in *Parlement Belge*[26] preferred the restrictive approach but the decision was reversed by the Court of Appeal. Since the First World War the nations are hesitant to continue their adherence to the absolute theory, particularly for three reasons. First

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22. [1975] 1 W.L.R., 1485, 1490–1.

23. For the views of Robert Phillimore, see *The Charkeith* (1873) L.R. 4 A.E. 20, 159.

24. *Ibid.*

25. Gamal Mouris Badr, *State Immunity An Analytical and Prognostic* View (1984), pp. 21–24 discusses at length the Belgian practice.

26. *Supra* n. 1.

after large scale industrialization there was a sea change in the economies and the increasing commercial transactions of States through their public vessels including warships and might start claiming immunity in defence of their wrongful activities. Secondly, the ending of the *laissez faire* economic system and the emergence of the State trading corporations have given rise to the question of sovereign immunity being extended to such state trading corporations.[27] Finally, the growing concern for individual rights and public morality, coupled with the increasing entry of governments into what had previously been an enclave of private pursuits, have compelled a substantial number of States to amend their legislation in favour of the restrictive theory.[28]

It may be mentioned here that the municipal courts in a majority of States tend to abstain from exercising jurisdiction over foreign States without citing any basis for their practice. This led the States in recent times to argue that there is no rule in international law which specifies the extent of grant of jurisdictional immunity to the private acts. It was further observed by courts that the main purpose of the theory was to protect the interests of the individuals involved in business with foreign governments and to safeguard their legal rights through judiciary.[29] Basing on these premises, the theory of restrictive immunity has been developed in relation to the commercial aspect (*jure gestionis*). Supporting the restrictive theory Prof. Mc-Dougal observed that

> the purpose of sovereign immunity in modern international law is ...to promote the functioning of all governments by protecting a State from the burden of defending law suits abroad which are based on its public acts. However, when the foreign State enters the market place or when it acts as a private party, there is no objection in the modern international law of State immunity for allowing the foreign

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27. M. Sornarajah, "Problems in Applying the Restrictive Theory of Sovereign Immunity," (1982) *I.C.L.Q.* 662–63.

28. FSIA of US (1976); UK Sovereign Immunities Act, 1978; Singapore Sovereign Immunity Act, 1969; South African State Immunities Act, 1981; Candian State Immunity Act, 1982; Pakistan State Immunity Ordinance 1981 and Australian Foreign State Immunities Act, 1985 etc.

29. *Victoria Transport Inc.* v. *Comisaria General De Abastelimientos Transporters*, 336 I. 2d 314 (1964); also see D.J. Harris, *supra n.* 1 at 244.

> State to avoid the economic costs of the agreements it breaches or of the accidents it creates; the law should not permit the foreign State to shift these every day burdens of the market place onto the shoulders of private parties.[30]

The municipal courts of various countries also favoured the doctrine of restrictive theory of immunity, for example, the Privy Council, even before passing the Sovereign Immunities Act of 1978, extended its support to the restrictive theory of immunity regarding actions *in rem* brought against State owned vessels engaged in commercial activities[31]. Lord Denning reiterating his stand towards the restrictive immunity doctrine in *Trendtex Trading Corporation* v. *Central Bank of Nigeria*[32] held that the doctrine of sovereign immunity no longer applied to ordinary trading transactions and that the restrictive theory should be regarded as being applicable to actions *in personam* as well as acts *in rem*.

The courts while exercising jurisdiction over matters relating to a foreign State should be cautious in differentiating the private and public acts of a State and then should proceed according to the nature of the dispute in applying the theory of restrictive immunity as per the municipal laws. Although it is difficult at times to identify the activities of a State as public or private, jurists have offered some suggestions to avoid the possible embarrassment in administering the jurisdiction. The US Court of Appeal in *Victoria Transport Inc.*[32A] has broadly identified some of the public acts, e.g. (a) internal administrative acts, such as *expulsion* of aliens, (b) legislative acts such as nationalization, (c) acts concerning the armed forces, (d) acts concerning diplomatic activity, and (e) public loans. According to Article 12, para (1) of the Draft Articles of the ILC "in the absence of an agreement to the contrary, a State is not immune from the jurisdiction of another State in respect of proceedings relating to any trading or commercial activity conducted by it, partly or wholly in the territory of the other State, being an activity in which private persons or entities may engage".[33] It is

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30. 70 *A.J.I.L.* 817 (1976).
31. *The Phillipine Admiral Case,* [1976] 2 W.L.R. 214.
32. [1977] All E.R. 881.
32A. *Supra n.* 29.
33. (1982) *Y.B.I.L.C.* 209.

observed that the courts always must be vigilant in identifying the acts of a State first of all in determining the factors like the nature of the act, the purpose of the act, the general practice of the States and the basic principles of international law should be borne in mind.[34]

Commenting on the Draft Articles of the ILC, Prof. Greig[35] offered some more suggestions in identifying the public acts *(jure imperii)* and private acts *(jure gestionis)*. According to him, first the courts must take into consideration whether they have jurisdiction to entertain a dispute; secondly, is the foreign State entitled to immunity or not regarding the particular aspect and finally, the courts of the State should establish whether jurisdictional rules of its own State would permit to deal with a dispute wherein a foreign element is involved. Even in the *Claims Against the Empire of Iran Case,*[36] it was observed that in determining the distinction between the acts of *jure imperii* and *jure gestionis* one should rather refer to the nature of the State transactions or the resulting legal relationships, and not to the motive or purpose of the State activity. This depends on whether the foreign State has acted in exercise of its sovereign authority or like a private person. These restrictions are recommended with a view to giving guidelines to courts to protect the legitimate interests of the foreign States being subjected to the pressures of the home State.

The concept of state immunity though recognised and practised by States for their smooth conduct of relations, the efforts to codify the law also began long back by various governmental and non-governmental organizations. The Institute De Droit International in its early attempt in 1891 adopted a resolution on the jurisdiction of courts in proceedings against foreign States. In 1926 an International Conference was held at Brussels and adopted a Convention for the unification of certain rules relating to the immunity of government vessels. This was modified through an additional protocol in 1934.[37] The International Law Association at its

34. Brownlie, *Principles of Public International Law* (4th edn), pp. 331–333.

35. D.W. Greig, "From State Jurisdiction and Sovereign Immunity under the ILC's Draft Articles" 38 *I.C.L.Q.* (1989).

36. [1963] 45 L.R. 57, 80.

37. For details see, *supra* n. 25 at 42–45. also refer Brownlie., *op.cit.*, at 328–29.

1952 session adopted a resolution evolving the substantive law with regard to state immunity. The Association in its resolution recommended that, a foreign State should not be covered by immunity from legal process when acting in a private capacity. The Afro-Asian Legal Consulative Committee also in one of its resolutions in 1960 pointed out the circumstances under which a State might be made a respondent in proceedings before the courts of another State in various contexts and also the various activities of the State should be identified and the immunity should be limited to the public acts of foreign States[38].

Issuing the 'Tate Letter' on May 19, 1952, the Government of USA stated that it would be guided by the restrictive theory in its relations with foreign governments and this influenced the European States to reexamine their concept of State immunity. In 1964 the Conference of the Ministers of Justice of the European Community established a Committee of Experts to study the various aspects of state immunity in the light of the changes in the state practice and also asked to prepare a draft convention covering all aspects of state immunity. The Committee held several deliberations and finally prepared a draft proposal with additional protocol and submitted it for the Council's considerations. In 1972 the European Community adopted the Convention entitled *European Convention on State Immunity*[39] with 42 articles, and an additional protocol with 14 articles. The European Convention is the first of its kind which enable many European States to pass independent legislation conforming to the guidelines of the Conventions.

The Committee of Experts for the Progressive Development and Codification of International Law of the League of Nations had expressed the need for the codification of the law on state immunities in 1928, but the League Council failed to give necessary attention it deserved. The ILC basing on the memorandum prepared by the Secretary-General of the UN in 1948[40] included the topic for its

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38. For a clear discussion, see I.M. Sinclair, "The European Convention on State Immunity", *22 I.C.L.Q.*, 261–63. (1973).

39. The text of the Convention and Protocol, see XI *ILM* 1470–89. (1972).

40. It was observed: "... to be little doubt that the question in all aspects of jurisdictional immunities of foreign States is capable and in need for codification". *Survey of International Law,* (UN Sales No. 1948) VI (1) para 50, cited in Greig, *supra* n. 35 at 243.

study under the title Jurisdictional Immunities of State and their Property in 1956. Although the Commission included codification in its programme much progress has not been made. As a part of this exercise the Commission desired to include a relevant part of the Secretary-General's working paper on the theme submitted in 1971, under the title 'Survey of International Law'.[41] At last the Commission included the topic in its programme of work in response to the recommendations of the General Assembly's resolution.[42] But the actual work of the Commission began only in its thirtieth session in 1978. It finally adopted in its thirty-seventh session a set of draft articles.[43] They are divided into five parts specifying part I, Introduction (articles 1–5); part II, General Principles (arts. 6–10); part III, Exceptions to State Immunity (arts. 11–20); part IV State Immunities in respect of property from attachment and execution (arts. 21–31); and part V, Miscellaneous Provisions (arts. 25–28). The Commission submitted the draft articles to the Secretary-General for comments and observations of the various member States of the UN. Once this has been approved by the States, the Commission could finalise the draft articles according to the suggestions of the member States. Then the General Assembly can adopt a convention making them part of international law to meet the long-felt need of the States.

In India a foreign State is entitled to claim immunity from domestic jurisdiction by virtue of the rule of law. It does not mean that a foreign State can enjoy all the privileges which the State as an entity avails before its own tribunals.[44] Moreover, on the matter of jurisdictional immunities of States there is no separate legislation in India. However, provisions of the Civil Procedure Code govern matters relating to foreign rulers, ambassadors and envoys and former rulers of Indian States.[44A] According to section 86 a foreign

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41. (1971) *YBILC* Part II, pp. 152–55.

42. General Assembly's Resolution 32/1511/(r) 19 December, 1977.

43. The Text of the Commission's work is reprinted in ((1987) *ILM* Vol. XXVI, pp. 625–46.

44. Justice Ray in *Mirza Akbar Kashani* v. *United Arab Republic,* A.I.R. (1960) Cal. 768.

44A. See sections 86 and 87.

government or trading corporation operated by a foreign government may be sued in India with the permission of the Central Government. This shows that the Indian law leans towards a restrictive theory of immunity.[45]

In v. *United Arab Republic*[46] *Mirza Ali Akbar Kashani* the Calcutta High Court held that under the old section of the Civil Procedure Code a suit against a foreign State was not necessarily a suit against the ruler of that State, and therefore a foreign State did not enjoy immunity under the provisions of section 86, but that such a suit was barred under the general principles of international law except in a case where the State was found to trade within the local limits of the jurisdiction of the court.[47] Rejecting the view the Supreme Court held that the section applied to suits against all foreign States whatever be their form of government, whether monarchical or republican.[48] The interpretation of the Supreme Court led to a further amendment of the Code in 1976.

Under section 87–B of the Code, for various reasons the rulers of the former princely States are exempted from suit in courts like a foreign State. In *Her Highness Maharani Mandalsa Devi* v. *Ram Narain Private Ltd.*[49] the Supreme Court held that the former rulers of princely States were eligible to claim immunity from suits. The question was whether section 86 would be applicable to a suit instituted against a partnership, when one of the partners happened to be a former ruler. The Court held that when one of the

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45. The Supreme Court held that under section 86 there was no absolute prohibition against a ruler of foreign State being sued in India. *Raja Sir Harinder Singh* v. *C.I.T.*, A.I.R. (1972) S.C. 202.

46. A.I.R. (1962) Cal. 387.

47. For detailed discussion, see Agarwala, ***supra*** n. 1 at 328–29.

48. The reasons given are as follows: The effect of section 86 (1) appear to be that it makes a statutory provision covering a field which would otherwise be covered by the doctrine of immunity under international law. It is not disputed that every sovereign State is competent to make its own laws in relation to the rights and liabilities of foreign States to be sued within its own municipal courts. That being so, it would be legitimate to hold that the effect of section 86 is to modify to a certain extent the doctrine of immunity recognized by international law. A.I.R. (1966) S.C. 230.

49. A.I.R. (1965) S.C. 1718.

partners of a firm was ruler of a former State, the consent of the Central Government was necessary under section 86 read with section 87–B. It was further observed that though the suit was against the firm, no decree could be passed against the former ruler because of the immunity enjoyed by him[50].

In *Nawab Usman Ali Khan* v. *Sagar Mal*[51] the Court held that the former rulers were eligible to claim immunity from suits only. The question considered was whether a former ruler can claim immunity from a petition filed under the Arbitration Act, 1940. The Court observed that a proceeding for the passing of a judgment and decree on an award was not a suit and the consent of the Central Government was not necessary. In *Raj Harinder Singh* v. *C.I.T* the Court, rejecting the claim of immunity from income tax, held that the former rulers could not claim immunity from the provisions of C.P.C. because there was no absolute prohibition against a ruler of a foreign State being sued in India.

The judicial practice shows that the trend in extending immunity to the commercial activities of foreign trading corporations has also changed. This may be observed in the light of the decisions of the Calcutta and Delhi High Courts.

In *Royal Nepal Airline Corporation* v. *Manorama Meher Singh Legha*[53] the suit was instituted by Manorama against the Royal Nepal Airlines Corporation and its office in Calcutta for a sum of Rs. 8,42,500 as damages on account of the death of her husband in an accident in Nepal Territory, while he was flying in an aircraft of the Corporation. The Government of Nepal claimed immunity on two grounds. First, that the Corporation was part of the Government of Nepal under the control of the Ministry of Transport and Communications and the Corporation had not acquired the status of a corporate body. Secondly, being a public undertaking of the Government of Nepal, the suit was not maintainable against a foreign

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50. For a similar view, see *Mohan Lal* v. *Swai Man Singhji*, A.I.R. (1962) S.C. 73.

51. A.I.R. (1965) S.C. 1798.

52. A.I.R. (1972) S.C. 202.

53. A.I.R. (1966) Cal. 319.

State. It was further contended that the suit was not instituted with the consent of the Government of India, which was necessary under section 86.

The Court accepted the contentions and held that the Corporation was a department of the Government of Nepal and entitled to claim immunity as a foreign sovereign. Hence the consent of the Government of India was necessary and in the absence of the consent the suit was not maintainable.

In *New Central Mills Co. Ltd.* v. *VEB Deutfracht Seereederei Rostock*[54] the appellant had purchased diverse spare parts and accessories for its plant from one Neuman and Esser of Federal Republic of Germany. The appellant had duly paid the purchase price and consequently the ownership of the goods passed to him. The goods were shipped to India through the defendant DSR Lines, the carrier, under the bill of lading. The defendant contended that it was the department or agent or instrumentality of the Government of the German Democratic Republic. It was contended that all water and air transport were state property in the foreign State. It was therefore contended that the suit was not maintainable inasmuch as no consent of the Central Government had been obtained for the institution of the suit as required by the provisions of C.P.C.

The Calcutta High Court held that section 86 was confined to a suit against a foreign State by name.[55] As the present suit was not against the State, section 86 was held no application.

In *M/s. Uttam Singh Duggal and Co, Pvt. Ltd.* v. *United States of America Agency for International Development*[56] the Delhi High Court rejected the plea of immunity claimed by the respondents. The facts of the case disclose that the company had entered into a contract with the USAID for the construction of staff houses and apartment projects. The contract of agreement contained an arbitration clause that any dispute which arose between the parties should be solved through arbitration referred by the USAID Mission of India.

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54. A.I.R. (1983) Cal. 225.

55. *Ibid.* at 227.

56. Decided by Delhi High Court on 24th May, 1982, Suit No. 448–A of 1974. Quoted in Gurdeep Singh, *Supra* n 1. at 184–86.

Disputes arose between the parties. The company called upon the USAID to refer the disputes for arbitration according to the contract. The USAID refused to act and claimed sovereign immunity. The company filed a petition in the court under section 20 of the Arbitration Act requesting the settlement of the dispute in accordance with the arbitration agreement. The company also obtained permission of the Central Government under section 86. Section 86 was inapplicable because the proceedings was not a suit.

The Court rejected the claim of immunity by the respondents, but treated the consent given by the Central Government only as an inclination to accept the restrictive theory of immunity.

The above judgments show clearly that the judicial practice is also changing comparable to the practice of other States like the U.K., and USA, where the commercial activities of the foreign trading corporations are not brought under the principle of sovereign immunity.

Though the judicial practice in India is changing towards the restrictive theory of immunity, at times the judiciary is helpless in protecting the right of the citizens, because of the obstacle posed by section 86 of C.P.Code. According to section 86 the Central Government must give clearance certificate to sue a foreign State in the courts, eventhough the entire transaction might have taken place within the jurisdiction of the Indian courts. Such provisions certainly infringe upon the interests of the citizens because of the overriding authority given to the Executive over the judiciary.

In *Harbhajan Singh Dhalla* v. *Union of India*[57] the petitioner had rendered services of general maintenance work at the embassy of Algeria in New Delhi. The petitioner went from pillar to post to collect Rs. 27,000/-, which were due to him from the embassy. When the petitioner approached the financial attache to get the payment the financial attache pointed a revolver at him and threatened him with dire consequences. Under these circumstances the petitioner sought the permission of the Central Government to sue

57. A. I. R. (1987) S. C. 9

under section 86. The Central Government refused permission. The Government in its letter to the petitioner mentioned clearly that the permission was refused on political grounds. However, the Government in its affidavit filed before the Supreme Court stated that it was of the opinion that no *prima facie* case was made out and therefore the sanction was refused. Thus two contradictory grounds were taken by the Central Government for refusal. The Court observed that according to the principles of international law and the Constitution, the power given to the Government must not be exercised arbitrarily or on whimsical grounds but upon proper reasons and grounds. The Court wondered how such a claim in respect of a building would jeopardise the dignity of a foreign State or relationship between two countries. On the contrary, the Supreme Court opined that the political relationship between the two countries would be better served and the image of a foreign State be better established, if citizen's grievance was judicially investigated. Finally, the Court directed the Union of India to reconsider the matter and pass a reasoned order in accordance with the principles of natural justice and keeping in view the trend and the development of international law.

Waiver of Immunity

The plea of immunity could not be extended wherein a State itself waives the immunity either expressly or impliedly and accept the jurisdiction of a court. In *Sagar mull Agarwala* v. *Union of India*[58], the Sikkim High Court held that

> ...a foreign State is not bound to and may not raise such a plea of immunity and if no such plea is raised, the foreign State shall be deemed to have waived such immunity and to have voluntarily submitted to the jurisdiction of the Court concerned.

Conclusions

The absolute theory and the restrictive theory of immunity are used by States in their day to day relations with other States. Although there is no uniform universal practice among States in relation to the concept of sovereign immunity, majority of States

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58. A.I.R. (1980) Sik. 22.

tend to change their practice in extending the restrictive theory. The absolute theory is followed for the simple reason that in ancient and medieval periods the monarchical system was prevailing and the immunities were granted because the law flowed from the king or monarch. But when the democracy became the order of the day the States started conferring the sovereign power upon many agencies which were determinable under law. The States are hesitant to confer immunity on agencies on whom the sovereign power is not vested. This necessitated the States to follow the practice of the restrictive theory. However, both these theories developed in the context of commercial activities of the States.

In recent times there has been a widespread change in the State practice of extending the restrictive theory of immunity towards the acts of a foreign State. Unfortunately the States started applying the theory without considering the factors that are responsible to give rise strength to the concept of sovereign immunity and also to the acts of the State. The tendency of applying the restrictive theory of immunity is being extended to the tortious acts of a foreign State,[59] and the realm of state responsibility.[60] While this being so, there are certain States which have been adhering to the absolute theory of immunity too.[61] The result is the proper international law to be applied in matters relating to sovereign immunity is indefinite. The Draft Articles of the ILC also mostly followed the restrictive approach, particularly regarding the commercial aspects (*jure gestionis)* founded on the premise of the Western States practice. This led to professors like Greig[62] to question: "Whether the Commission's code is designed to provide rules of municipal law or to lay down the limits to international jurisdiction?" He further observes that the Commission instead of providing a Draft Convention to be followed by States, has landed itself in a tight spot in contrasting

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59. *Amsrd*) *Cers Shipping Co.*, v. *Argentina Republic*, reprinted in XXVI ILM, 13225 (1987).

60. H. Fox : "State Responsibility and Tort Proceedings against a Foreign State in Municipal Courts," *Netherlands Year Book of International Law*, (1989).

61. Brazil, Bulgaria, China, Czechoslovakia, Ecuador, Hungary, Japan, Poland, Portugal, Sudan, Syria, Thailand, Trinidad and Tobago, USSR and Venezuela. The Polish courts emphasize the principle of reciprocity. See Brownlie, *op. cit.*, p. 328.

62. D.W. Greig: "Specific Exceptions to Immunity under the International Law Commission's Draft Articles", 38 *ICLQ* 584–87 (1989).

the State practices regarding the restrictive and absolute theories and proposed a set of Model Rules on Arbitral Procedures.[63] He suggests further that it will be better if the Commission changes its approach altogether in the light of the contrasting State practices. Besides this, one may find contradictions among the draft articles of the Commission. For example, Article 11 of the draft which specifies that it would not allow a State to invoke immunity in disputes arising out of its commercial contracts, is contrary to Article 3(2) which specifies that a court should take the purposes as well as the nature of a contract in determining whether the act of a State is commercial or not. With such built in contradictions the Draft Articles may not acceptable to the States.

In India although the provisions of sections 86 and 87 of C.P.C. are guiding the courts to lay down rules regarding the matters connected with immunities of foreign States, they are found inadequate and pose problems. First, the power of the executive to deal with the cases of foreign States in suits may create conflicts between the executive and judiciary. As per section 86, it is the Government of India which examines the concept of the sovereign immunity claimed by a State on the basis of the merits of the case. Sometimes the judiciary may entertain a case on the basis of a plea of waiver of immunity by a foreign State, but if the executive issues a certificate of immunity then the courts will be landed in trouble in protecting the rights of citizens. Fortunately, so far the judicial practice has not gone up to such an extent in recognising the waiver of immunity of a foreign State even after securing the certificate of the Government of India.[64] But if it happens in a case like *Harbhajan Singh* then the courts would be unable to safeguard the interest of the citizen. Secondly, the provisions of C. P. Code deal with suits only and may create problems in matters other than suits also if the executive interferes in the judicial domain. Thirdly, it is surprising that under section 87–B the erstwhile rulers of former princely States are eligible to claim immunity in suits like a foreign state even after

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63. He further comments although the Commission considered a restrictive approach in its Draft Articles, on the basis of the practice followed by a large number of States, it may not be acceptable to States because of the existing divisions among the States and there is no great incentive for a large number of them to accept a draft based upon the restrictive theory.

64. *Indian National Steamship Co., Ltd.* v. *Maux Faulbaum,* A.I.R. (1955) Cal. 491.

abolition of the privy purse long ago. It is already high time that the Government should delete the special privilege given to the erstwhile rulers.

Commenting on the peculiarities of section 86, Rama Rao observes that "the Section, however, is peculiar in its requirement of the sanction of the Central Government for the institution of suits, for in all other common law countries the question of exceptions to the rule of immunity of foreign States is left entirely to the decision of the judiciary". He further observes that "it is strange that an essential legal question has been left to the determination of the political department.... There would seem to be no remedy if the Government refuses to give its consent even if the conditions specified in clause (2) are fulfilled".[65]

The Government of India had already submitted a draft memorandum to the Asian African Legal Consultative Committee on "State Immunity in respect of Commercial Transaction" in 1955. At least to give effect to its stand in the memorandum, the Government of India should pass a legislation on "Foreign State Immunities", with specific guidelines to be followed by courts and also to avoid the anomalies presented in the present provisions of the C.P. Code.

In framing a new legislation, it would be more appropriate if the judiciary is given the exclusive power to determine the provisions to be applied with regard to granting of sovereign immunity to a foreign State (as is the practice in other States like the U.K. and USA) rather than the Government getting itself involved in such a strenuous exercise. It will further strengthen the hands of the judiciary to decide freely the legal intricacies involved in the concept of state immunity, rather than waiting for the mercy to be showed by the executive in protecting the interests of the citizen and also to observe the principles of natural justice without any hindrance.

65. T.S. Rama Rao : "Some problems of International Law in India," (1957) *I.Y.B.I.L.* 16, 18.