

ALL GUILTY PEOPLE MUST BE PUNISHED- A FAILED PROPOSITION IN CASES OF DIPLOMATIC IMMUNITY

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ABSTRACT

The paper derives its title from the Latin maxim “*In Quo Quis Delinquit In Eo De Jure Est Puniendus*” which signifies the basic embodiment of penal law that when one offends the law he has to be punished according to the law. This proposition however has not been accepted when it comes to establishing diplomatic relations with states. The paper deals with the background and concept of diplomatic immunity in consideration to the historical development of diplomatic relations that were established in post-world war-2 era where peace was the motto of all democratic nations. In light of achieving peace the Vienna pact was made that became the basis for establishing diplomacy amongst states. The paper also deals with the special status which was granted to the members of diplomatic envoys and ambassadors that were agents of diplomatic relations. The paper shall examine the reasons of granting the special status and the privileges that came affixed to this status. The privileges were given with a positive sense but after some passage of time they started becoming a liability for the host state. The blanket immunity was considered as a license to commit wrong and get away with the punishments prescribed by the law. The paper states that a relook is required for blanket immunities, privileges, rights. Thus, limits and procedure are required so as to impose a liability on the wrongdoer for their acts.

Keywords- Diplomatic Privilege, Abuse, Crime, International Law, Vienna Declaration

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INTRODUCTION-

Legal persons are all those people who have rights or duties and can sue or can be sued. This changes when it comes to certain special citizens of countries with which states have diplomatic relations. They have the ability to commit a civil or criminal wrong and have no liability to go along with it. In this sense it negates the concept of legal personality in the arena of international law. The only liability affixed upon them is that they need to respect and follow the laws of all host nations but what is seen is that this not done thereby creating an issue in peaceful relations amongst states. A foreign visitor from the same state as that of the diplomat is liable for any wrong and this creates two sets categories one liable in the eyes of law and the other is not fracturing the conceptual theory of legal personality as prescribed by legal jurisprudence. In light of this it is necessary to know the meaning of who are diplomats ,development of diplomacy and the legal status of such ambassadors in international law.

The relations of states are maintained by constant communication and strategies developed by nations for flourishing trade and peace. It is not possible for the head of each state to personally to overlook the same and thus he appoints agents under his authority to represent the nation in other states these are popularly known as diplomats or ambassadors. The historical diplomatic envoys were temporary in nature but in recent times the ambassadors have become permanent feature and reside in the embassies of the state. The state to which the diplomat belongs is the sending state which uses the document known as “letter of credence” which gives the diplomat the status and the state to which the diplomat is sent is called the receiving or host state who also has to be presented with the letter thus establishing the relation between states. As it can be seen the international though not completely codified is supported by rules of common customs and courtesy allowing the state to have good relations amongst themselves. The concept of ambassadors or nuncios are those head of state of ministers in the government who are given the privileges by virtue of the office they hold on the other hand diplomats or inter-nuncios are those who are to be accredited and accepted by the states .The third category of these agents are called “charges d’ affairs that are colloquially called substituted diplomats and are required to be accredited by the minister of foreign affairs ministry of the host state. Furthermore these categories of agents have been

given certain exceptions from the local legal systems of their receiving states these are called as the diplomatic privileges¹. The immunity from local laws of the receiving were given with the vision that they may cause a hindrance in proper functioning of the diplomatic mission, ease of functioning was the main reason why this exemption was granted. Though the makers of Vienna pact would not have envisioned that the privileges they granted would in future act as cloak to perpetuate illegalities by the diplomats.

LEGAL PROVISIONS AS TO DIPLOMATIC PRIVILEGES²

The Vienna Declaration is the legal document that is responsible for granting the privileges and immunities to diplomats. These range from exemptions from civil liabilities such as payment of charges and certain taxes to even immunity from criminal prosecution for offences they might commit. Articles 20-40 of the declaration deal specifically with rights duties and immunities that are available to the diplomat their family and officials of the diplomatic mission. The immunity granted by the convention was only limited or restricted to their official function. The theory is popularly called functional immunity³ but the same is time and again wrongly construed as the immunity for all and any act done by the diplomat. Even the convention in its preamble finds mention and states that the immunities are limited to the official functions and are not to be used for personal protection from any liability. Therefore, the wide interpretation of the convention as done by states in establishing diplomatic is the reason why this privilege is taken for granted and abuse of these rights granted to the diplomats happens. The declaration was made as early as 1961 and thus may not be suitable to the present scenario and has to be revised only to accommodate those privileges which fit in the box of the functional theory.

Abuse of Diplomatic Privilege and Remedy

An abuse can happen when certain powers or privileges are used in a malafide manner. It can also happen when the acts done are not in consonance with which such status bestowed upon an individual. This is what happens in the case of diplomats that when they enter into any host country, they are given certain exemptions from local law of the state which are often misused. The manner in which this is perpetrated is either through the diplomatic pouch

¹ Malcom Shaw, *International Law* (6th Ed. 2008)

² Vienna Declaration, 63 AJIL 875 (1969)

³ Dr.Sonika Bharadwaj; Sowmya N.V, "Abuse Of Diplomatic Immunity and Privileges Under the Vienna Convention on Diplomatic Relations, 1961", Vol 7 IJRAR, 663,665,2020

which is a special bag that contains illicit material and as the pouch is not subject to scrutiny or security check it is used for wrong purposes; another facet of this crime is when the diplomat themselves commit a crime in the receiving state. Thus what are the recourse for the receiving state in this case is either waive the immunity granted to the so the accused can undergo the sentence in the receiving state but the same is rarely seen and the other is to declare the diplomat as a "*persona non grata*"⁴ which will lead to sending the diplomat back to the sending nation and hamper the relations between states. This only goes to show that other than the wrong doer everyone else suffers and thus it violates the cardinal rule that every offender has to be punished. The remedies available to the receiving states are not substantial in nature and citizens are not interested in the international relations of states and importance of immunity what they look for is punishment to criminals which this right takes away causing embarrassment to the state.

Case study on Abuse of Diplomatic Privilege

A) Bahrain Diplomat Case⁵

This was a case of heinous nature relating to the sexual assault over 49 year old woman who was a society building manager where the consul general of Bahrain was present. The lift in the building was not working and hence the diplomat lost his cool and hurled abuse at woman and he also inappropriately touched the lady. He had even ransacked the woman and was non-cooperative to the police when they arrived. The charges leveled against 354, 504 and 509 IPC which are cognizable in nature and warrant immediate arrest but the same could not be done by the officers of Malabar Hill police station as the accused enjoyed diplomatic immunity. The case did not undergo further proceedings and ultimately the accused was sent back to his state. This case would have had a very different outcome had it been a citizen of a foreign country or an Indian citizen and this is why the legal personality of being above the law afforded to diplomats needs an amendment.

B) United States vs Devyani Khobragde⁶

This is one of the most controversial cases of recent times in matters of diplomatic immunity. It related to the consul of India who was living in the US she was indicted for severe state and federal laws of the country. The facts leading upto this case revolved around the

⁴ R.Subraminam . "Abuse of Diplomatic Privileges and the Balance between Immunities and the Duty to Respect the Local Laws and Regulations under the Vienna Conventions: The Recent Indian Experience" Vol 3 CJGG 182,231.2017

⁵ Staff writer, Bahrain diplomat booked for molestation, verbal abuse, Deccan herald, last visited 16/10/2021 at 8:30 pm <https://www.deccanherald.com/content/376658/bahrain-diplomat-booked-molestation-verbal.html>

⁶ 3 (2013) 14 Cr.008 (SAS).

allegation that Khobragade had kept a maid for her house who was not being paid adequate wages and also that her passage as maid to the country was obtained by visa fraud. This case was an important one on matters of international relations due to the strategic partnership of India and USA. The case had even reached the indictment stage and the grand jury constituted had determined the case had substance to undergo trial. In a turn of events India and Khobragade claimed immunity as per Vienna pact and stated that she could not be punished under the local laws of USA. This made her return to India possible only with a slap on the wrist that is she was banned from USA in future. What is of essence is that a person accused serious crimes such as slavery and visa fraud were let off with only reprimand clearly establishes the need of functional theory to be strictly applied in such cases of diplomatic immunity.

SUGGESTIONS- Thus from the aforementioned instances and legal provisions it becomes crystal clear that there is need for a better set up to affix criminal liability when it comes criminal offences and the following recommendations could aid to states⁷ -

- a) **Strict Application of Functional Theory-** The theory of agency is the basis on which the diplomacy works. As in agency the principal is only liable for the acts done within the scope of agency, immunity must only be granted for acts done in consonance of the relations necessary for diplomacy. External acts done or outside the scope of letter of credence must be subject to law of the receiving state. The strict application of this theory shall help in a better diplomatic relations amongst states.
- b) **Waiver or Post-Immunity Prosecution-** Another tool that can be used is to prima facie establish the involvement of the diplomat and negotiate a waiver with the sending state. In this situation the sending state should also as matter of respect to international law and custom should allow waiver of the immunity so that the law can take its course, The sending state is satisfied and the receiving state can also secure justice for its citizens. The waiver of blanket can entail a post immunity prosecution of the diplomat. This would be a great method where both states have their customary relations and general requirements of law are also fulfilled.

⁷William G. Morris "Constitutional Solutions to the Problem of Diplomatic Crime and Immunity", Vol 36, Hofstra Law Review, 601, 611, 2007

- c) Legislation-States can create a local legislation defining the scope and limitations to which the diplomatic immunity can be extended. The legislation can consider and include the concepts as enshrined under the functional theory and set the proper procedure with regards to waiver of immunity and its effect on the diplomat. It can also define the sentencing guidelines and arrest and detention procedures for diplomats which may be necessary if waiver is granted by the receiving state, the legislation can also consider legal representation as may be required by diplomats and fines that may be payable at the time of conviction. Thus a concrete piece of legislation by all states in consonance with the object of the Vienna Declaration can go a long way to meet the ends of justice and maintain safety and security of diplomatic relations.

CONCLUSION-

The above discussion entails that the status of diplomats and their immunities which were a sacrosanct custom for establishing relations has lost its charm. The reason for inclusion of such a privileged status to the envoys was ease of business between nations but has turned into a tool of abuse and acts a veil to perpetrate illegalities. Legal recognition as given by the Vienna also declared that the diplomats did not have personal immunity but interpretation for convenience has manifested the issues and problems with this status in an ugly manner with the world looking at the cases mentioned above with a microscope creating problems for both the host and sending state. Immunity to not only but their diplomats makes the purpose of this even more redundant as the veil allows each and everyone in the entourage feel that they are above the law. The manner in which liberal construction of the declaration has been adopted by the nations in history is what has encouraged the recent incidences of abuse. The solutions that is paper proposes are limited but can be applied by states in addition to one another thereby strengthening their ties with all modern democratic nations. The legal status of a person being capable of being sued is completely vanished when absolute and blanket immunity is granted to such people and the maxim of criminals have to be punished according to fails miserably when they just claim immunity and are left Scott free. Criminal law since time immemorial has survived on the theory of punishment and reform but the immunity neither does punish the wrongdoer nor does it try to reform the person and hence can be stated that it does not only fail the maxim but also fails the concept of equality, equity and justice. To conclude it is necessary to see that Vienna Declaration is more than half a

century old and has not withstood the test of time and case such as that of the Bahraini Diplomat, Italian Marines and Khobragade are proof that the need to amend the declaration by the General Assembly and states start to till them interpret the original declaration strictly so as avoid injustice upon the state and its citizens.