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CONTENTS

Articles

Mapping Koen De Feyter's Academic Legacy: Geographies of Shared Responsibility for Sustainable Development for Subaltern People(s) 1
Wouter Vandenhole

Article 70 of the Bangladesh Constitution: A Critical Analysis of its Impact on the Rule of Law and Legislative Independence 21
Md. Arif Rayhan

Gender Justice in India: An Analysis of India's Transformative Jurisprudence 54
Richa and D. Ananda

Mapping the Progression of the Doctrine of Sovereign Immunity: A Historical and Legal Analysis 79
Rajesh Kapoor

Understanding Constitutional Convergence in Comparative Constitutional Law 97
Nisha Bhaskar

MAPPING THE PROGRESSION OF THE DOCTRINE OF SOVEREIGN IMMUNITY: A HISTORICAL AND LEGAL ANALYSIS

Rajesh Kapoor*

Abstract

The doctrine of sovereign immunity holds significant importance in international law. Over time, it has evolved from an absolutist to a restrictive approach, reflecting the changing functions of the State in modern society. This doctrine plays a crucial role in upholding international comity and peace. However, despite its importance, there remains ambiguity regarding its legal foundations and differing interpretations of key judicial rulings in this area. Additionally, the absence of a comprehensive international treaty continues to hinder the uniform application of the doctrine. While the debate over the appropriate theory to apply has largely been resolved, disagreements persist—particularly in relation to issues such as the involvement of sovereign entities in acts of terrorism, responses to pandemics, and the impact of consenting to arbitration on the ability to invoke State immunity.

Keywords: *Sovereign, Immunity, Absolute, Restrictive, Enforcement*

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I. INTRODUCTION

The doctrine of sovereign or state immunity is a well-recognised principle of international law. Thus, Lady Hazel Fox states that 'there can be little doubt that there is a general acceptance, both as a general principle of law and as a rule of customary international law, of immunity as a legal bar in international law to certain national court proceedings being taken against a foreign State'.[1] The bar of sovereign immunity operates in two ways—first, there is immunity from jurisdiction of foreign courts, and second, immunity from enforcement. The doctrine plays an important role in maintaining international comity and peace. Hence, there are reasons to provide this defence to those who discharge sovereign functions and 'it will continue to play an important role in international life'.[2] Notwithstanding that, 'we know very little about the origin and legal basis of State immunity'.[3] This paper attempts to trace the development of the doctrine from its origins to its present form.

The paper is divided into five parts. Part I is the introduction and Part II traces the genesis and the legal basis of the doctrine. Part III discusses the theories and types of sovereign immunity. In relation to the theories, the discussion maps the transition from absolute theory to the restrictive theory and then moves to discuss the two variants of sovereign immunity, i.e., immunity from jurisdiction and immunity from enforcement. Part IV analyses the contemporary challenges and controversies in the application of the doctrine. The paper concludes with Part V.

II. GENESIS AND BASIS OF THE DOCTRINE

A. Genesis of the Doctrine

The reason for the genesis of the doctrine of sovereign immunity lies in the pre-modern world. Unlike the modern world where the political authority is centralised in one entity called 'State,' the political authority in the pre-modern world was very fragmented and divided among 'emperors, kings, princes, nobility, bishops, abbots and the papacy, guilds and cities, agrarian landlords, and

1 Hazel Fox and Fillipa Web, *The Law of State Immunity* (3rd edn, OUP 2013) 12.

2 James Crawford, 'Foreword' in Xiaodong Yang, *State Immunity in International Law* (CUP 2012) xviii.

3 ibid 33.

"bourgeois" merchants and artisans, to name but the most important ones'.[4] Thus, there were many centres of power which used to clash frequently with respect to the sphere of their authority. Furthermore, after the weakening of the Holy Roman Empire, there began a 30-year-long devastating war in Europe in the year 1618.

All this necessitated the creation of a centralised authority having supreme power to control the activities within a demarcated geographical space. This was achieved through the doctrine of sovereignty, which created a mystical supreme source of power within a territory called the sovereign. The doctrine established internally a hierarchical order with the sovereign being the fountainhead and therefore independent from external interference with respect to matters of governance related to his territory.[5] Everyone within the territory under his control was subjected to his command and he, being the supreme source of creation of law, was subject to none. Although some degree of submission on the part of the sovereign before the divine law, natural law or international law was recognised, by and large the sovereign was above and beyond the reach of any temporal authority.[6]

The doctrine has undergone many changes with the passage of time and thus has transformed from the idea of a personal sovereign in a monarchy to that of a popular sovereignty in modern constitutional democracies. However, one thing which never changes about it is the supremacy of the sovereign. Being the supreme authority within his territory, he could not be sued before the courts of his own State.[7] Further, it was accepted in view of his status or dignity that he shall not be sued before the courts of any other State or international tribunals as well,[8] and that is how the doctrine of sovereign immunity came into existence.

B. Basis of Sovereign Immunity

Although the doctrine of sovereign immunity is well-established in international law, its basis is a contentious issue. It is largely accepted that the defence of sovereign immunity is based on the principle of equality of sovereign

4 Ronald Axtmann, 'The State of the State: The Model of the Modern State and its Contemporary Transformation' (2004) 25 International Political Science Review 259.

5 ibid 260.

6 See Winston Nagan, Aitza Haddad, 'Sovereignty in Theory and Practice' (2012) 13 San Diego Int'l LJ 429, 441.

7 Malcom Nathan Shaw, *International Law* (6th edn, CUP 2008) 698.

8 ibid.

nations, 'developed out of the principle maxim *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State'.[9] However, dignity, independence, comity and reciprocity are equal contenders to be regarded as the basis of sovereign immunity.[10] Marasinghe, too, agrees that there are multiple factors like independence, comity, dignity, etc., as the basis of sovereign immunity. [11]

On the other hand, the US Supreme Court in *Republic of Austria v Altmann*[12] has recognised comity as the only basis of sovereign immunity, while in *Compania Naviera Vascongado v S. S. Cristina*,[13] the House of Lords has observed that independence and dignity are the basis of sovereign immunity. According to Hazel Fox, in civil law countries, lack of competence is considered to be the basis of sovereign immunity, while in common law countries, independence and equality play a major role.[14]

If dignity is a potential basis of sovereign immunity, then, according to Lord Denning, 'it is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction'.[15] However, there are problems with such arguments because it would be hugely controversial to recognise some courts as courts of 'acknowledged impartiality' and not the others. As far as the other grounds are concerned, Oppenheim observes that:

> There is no obvious impairment of the right of equality, or independence, or dignity of a State if it is subjected to ordinary judicial process within the territory of a foreign State – in particular if that State, as appears to be the

9 *Al-Adsani v The United Kingdom* (2002) 34 EHRR 11 para 54. The maxim means that 'equals do not have authority over one another,' <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100306400> accessed 15 June 2024.

10 Xiaodong Yang (n 2) 46; *Regina v Bartle and the Commissioner of Police for the Metropolis and the others* [2000] 1AC 147, 252. The Court quoted from the Halsubry's Laws of England, vol 18 (4th edn, Butterworths 1977) in para 1548 that sovereign immunity 'is accorded upon the grounds that the exercise of jurisdiction would be incompatible with the dignity and independence of any superior authority enjoyed by every sovereign State. The principle involved is not founded upon any technical rules of law, but broad considerations of public policy, international law and comity'.

11 Lakshman Marasinghe, 'The Modern Law of Sovereign Immunity' MLR 54 (1991) 644, 666.

12 (2004) 541 US 677.

13 [1938] AC 485.

14 Hazel Fox and Fillipa Web (n 1) 27.

15 *Rahimtoola v Nizam of Hyderabad and another Respondent* [1958] AC 379, 418.

> tendency in countries under the rule of law, submits to the jurisdiction of its own courts in respect of claim brought against it.[16]

Does this mean that the protection of sovereign immunity should be denied to those States which submit to their local courts, but accorded to those who do not? According to Yang, it seems that, at best, the sovereign immunity is a matter of grace or concession on the part of the forum State.[17] The reason is that the forum State, being the sovereign within its territory, anything within its boundaries can happen only if allowed by it. The problem with this line of reasoning is that it would leave the matter completely to the liking of the forum, and Yang admits that cannot be the case, especially in view of 'the painstaking effort of the courts in search of rules of international law regarding immunity.'[18]

The technique developed by the courts is to confine the discussion to the local statute without pinpointing the legal basis of the doctrine and put several bases together, 'just to make sure that one of them hits the mark'.[19] Thus, what constitutes the basis of sovereign immunity is quite a contested issue. Perhaps Yang is very right in conceding that 'any doctrinal inquiry into the legal basis of immunity will lead to a dead end'.[20]

III. THEORIES AND TYPES OF SOVEREIGN IMMUNITY

A. Theories

There are two theories of sovereign immunity. One, which has become obsolete, provides absolute immunity to a State from the jurisdiction of foreign States, while the one which is in vogue restricts the application of the doctrine to the acts of a sovereign nature only. This means a sovereign entity is not immune with respect to commercial acts. The former is defined as the theory of absolute immunity, and the latter as restrictive immunity.

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16 Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1 (9th edn, OUP 2008) 342.

17 Xiaodong Yang (n 2) 50.

18 ibid 51.

19 ibid 48.

20 ibid 51.

(i) The Absolute Theory of Sovereign Immunity

The Schooner Exchange,[21] wherein Chief Justice Marshall accepted French emperor Napoleon's claim of sovereign immunity so as to bar the US courts from exercising jurisdiction in a dispute related to a warship, is considered 'the first definitive statement of the doctrine.'[22] However, it is not right to conclude that 'Chief Justice Marshall was holding foreign State immune from all claims, regardless of whether such claims involved the foreign States' public or private/commercial dealings'[23] because the dispute involved a warship, which undoubtedly comes under the category of a sovereign function of a State. It was much later that the US courts regarded sovereign immunity to be absolute and granted it even when a State was involved in commercial acts.[24] According to the theory of absolute immunity, a State cannot be subjected to the jurisdiction of a foreign court or tribunal for any act done by it. It deserves such treatment because of its status. The approach, when viewed in terms of principles, is apparently wrong, but in practice, it did not create much difficulty because:

> It is only in modern times that sovereign States have so far condescended to lay aside their dignity as to enter the competitive markets of commerce, and it is easy to see that different views may be taken as to whether an immunity conceded in one set of circumstances should to the same extent be enjoyed in totally different circumstances.[25]

In other words, the situation did not demand any classification between public and private functions as had to be done subsequently. Thus, practically it did not make any difference that a State was considered to have absolute immunity because *de facto* a situation to plead it in commercial matters used not to arise.

Also, England, which later emerged as one of the main bastions of the absolutist approach, was in favour of the restrictive theory in the beginning.[26] The

21 *The Schooner Exchange v McFaddon and ors* (1812) 7 US Cranch 116 <https://supreme.justia.com/cases/federal/us/11/116/> accessed 16 June 2024.

22 Lee M Caplan, 'State Immunity, Human Rights and Just Cogens: A Critique of the Normative Hierarchy Theory' AJIL 97 (2003) 741,745; See also Xiaodong Yang (n 2) 8.

23 Xiaodong Yang (n 2) 8.

24 *Berizzi Brothers Co v Steamship Pesaro* 271 US 562 (1926) <https://supreme.justia.com/cases/federal/us/271/562/> accessed 15 June 2024.

25 *Compania Naviera Vascongado v S S Cristina* [1938] AC 485, 498.

26 Lakshman Marasinghe (n 11) 669.

shift in its approach is believed to have happened with *The Parlement Belge* case.[27] However, on a closer examination, this case cannot be regarded as having adopted the absolutist approach because the 'ship' was held to be a vessel used for a public purpose by the Court of Appeal.[28] It is a much later decision of the House of Lords in the *S. S. Cristina*,[29] which is a clear authority in favour of the absolute theory of sovereign immunity, wherein the House of Lords observed that the following two propositions of international law are firmly established in English law:

> The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both.[30]

Thus, as per the theory of absolute immunity, a State enjoys immunity irrespective of the nature of the act. This is justified on the basis that every act a State does is to further the public interest, hence there cannot be any bifurcation of its functions. Countries following socialist ideologies have pursued this argument even after the absolute theory had become almost a relic of the past. Thus, in his report submitted to the International Law Commission on 'Jurisdictional Immunities of States and their Property,' Nikolai Ushakov raised an objection about the division of the power of a State into public and private.[31] He opined that any act done by a State

27 (1880) 5 PD 197. For further analysis of this point, See Lakshman Marasinghe (n 11) 644.

28 ibid 220.

29 *S S Cristina* (n 26) 485.

30 ibid 490. The Court had relied heavily upon Dicey's Conflict of Laws and quoted from the book that, 'no action or other proceeding can be taken in the Courts of this country against a foreign sovereign, nor can the property of a foreign sovereign be seized or arrested, even if it be merely a ship engaged in commerce.' See *S S Cristina* (n 26) 487.

31 Nikolai A Ushakov, 'Jurisdictional Immunities of States and their Property' Yearbook of International Law Commission, vol II (United Nations Publication 1983) 55.

is in the exercise of its public power.[32] Accordingly, all spheres of mutual relations of States are governed by the principle of sovereign equality.[33] Therefore, the restrictive theory of immunity is 'manifestly unsound'[34] and 'is directed towards the subordination of one State to the judicial power of another State, which radically contravenes the principles of the sovereignty and sovereign equality of States and non-interference in their domestic and foreign affairs'.[35]

According to this view, a State shall not be equated with a private party because, unlike a private party, which is motivated by private gain, a State gets involved even in commercial acts, for the public good. However, it can be argued that if public good is the basis to claim the immunity, then that would be better served by not extending it to commercial activities because in that situation private parties would not be ready to participate in a game where the rules are heavily in favour of a mighty power and such an exclusion would be against the public interest.

Furthermore, with the passage of time, the realisation that granting absolute immunity to a State is against the ideal of justice and the rule of law became stronger.[36] Thus, Lord Wilberforce says that 'It is necessary in the interest of justice to individuals having transactions with states to allow them to bring on such transactions before the courts'[37] and 'to require a state to answer a claim based on such transactions does not involve a challenge or inquiry into any act of sovereignty or governmental act of that state.'[38] Moreover, the rise of the modern constitutional democracies and submission of the sovereign within his own territory to the jurisdiction of the local courts gave severe blows to the archaic idea of absolute immunity and paved the way for the emergence of a restrictive theory of sovereign immunity.

(ii) The Restrictive Theory of Sovereign Immunity

It is said that 'the history of the law of State immunity is the history of the triumph of the doctrine of restrictive immunity over that of the absolute immunity'.[39]

32 ibid.

33 ibid.

34 ibid.

35 ibid.

36 K I Vibhute, *International Commercial Arbitration and State Immunity* (Butterworths 1999) 7.

37 *Playa Larga v I Congresso Del Partido* [1983] 1AC 244.

38 ibid.

39 Xiaodong Yang (n 2) 6.

The main plank of the restrictive theory is that a foreign State shall be accorded immunity only when discharging sovereign functions. Thus, Sir Robert Phillimore stated in *The Charkieh* that:

> No principle of international law . . . has gone so far as to authorise a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time all the attributes of his character.[40]

Accordingly, a few years later, in *The Parlement Belge* case, he did not allow the plea of sovereign immunity raised by the Belgian government, on the grounds that the ship was a trading vessel.[41] This is a clear example of the restrictive theory of sovereign immunity in action. Although the Court of Appeal reversed the decision and granted the plea of sovereign immunity, it did so on the basis that the vessel was used for public service.[42] Subsequently, this decision was relied upon to grant immunity to a vessel, exclusively used for commercial purposes,[43] which is regarded as a wrong application of the ratio laid down in *The Parlement Belge* case.[44] It is a much later decision of the House of Lords in the *S. S. Cristina*,[45] which clearly endorsed the absolute theory. However, in that case too, there was a very instructive dissent in favour of the restrictive theory, made by LJ Macmillan in the following words:

> Half a century ago foreign governments very seldom embarked in trade with ordinary ships, though they not infrequently owned vessels destined for public uses, and, in particular, hospital vessels, supply-ships, and surveying or exploring vessels. There were doubtless very strong reasons for extending the privilege long possessed by ships of war to public ships of the nature mentioned. But there has been a very large development of state-owned commercial ships since the Great War, and the question as to

40 *The Charkieh* (1873) 4 LR Adm and Esc 59, 99.
41 (1879) 4 PD 129.
42 [1874-1880] All ER 104.
43 *The Porto Alexandre* [1919] 1 WLUK 51.
44 Lakshman Marasinghe (n 11) 672.
45 *S S Cristina* (n 26).

> whether the immunity should continue to be given to ordinary trading ships has become acute. Is it consistent with sovereign dignity to acquire a tramp-steamer and to compete with ordinary shippers and ship-owners in the markets of the world? Doing so, is it consistent to set up the immunity of a sovereign, if, owing to the want of skill of captain and crew, serious damage is caused to the ship of another country? Is it also consistent to refuse to permit proceedings to enforce a right of salvage in respect of services rendered, perhaps at great risk, by the vessel of another country? Is there justice or equity, or for that matter, is international comity being followed, in permitting a foreign government, while insisting on its own right of indemnity, to bring actions in rem or in personam against our own nationals? My Lords, I am far from relying merely on my own opinion as to the absurdity of the position which our courts are in if they must continue to disclaim jurisdiction in relation to commercial ships owned by foreign governments. The matter has been considered over and over again of late years by foreign jurists, by English Lawyers, and by business men, and with practical unanimity they are of opinion that, if governments or corporations formed by them choose to navigate and trade as ship-owners, they ought to submit to the same legal remedies and actions as any other ship-owner. [46]

Nevertheless, the majority held that the doctrine applies to sovereign as well as non-sovereign acts. According to Hazel Fox, the common law countries like the UK and the US did not accept the public-private dichotomy of governmental power, under the influence of the ideas of A. V. Dicey.[47] Consequently, they accorded immunity to a sovereign State, 'in respect of all its transactions, including those of a commercial nature'.[48] On the other hand, the civil law countries had recognised the 'distinction between the exercise of regulatory and coercive powers of the State'[49] and did not find it difficult to restrict the application of the doctrine to acts of a sovereign nature only. Thus, Belgium has been applying the restrictive theory since 1857 and Italy from 1880 onwards.[50] Soon after, they were joined by other countries.[51]

46 ibid 521-522.

47 Hazel Fox and Fillipa (n 1) 33.

48 ibid.

49 ibid 34; Malcom Nathan Shaw (n 7) 710; Xiaodong Yang (n 2) 15.

50 See Jasper Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2010) 21 EJIL 853, 858.

51 See ibid 858.

On the other hand, France adhered to the absolute theory of sovereign immunity, despite recognising the public-private dichotomy of governmental functions under the Napoleonic Codes.[52] However, a shift in its approach towards the restrictive theory can be seen as early as 1924 in *Roumania v Pascalet*.[53] This is considered to be 'the first case clearly decided on the basis of restrictive immunity'[54] in France. The Commercial Tribunal of Marseilles held that, 'If the rule of international law which proclaims the independence of State flows from the principle of their sovereignty, that rule cannot be applied when sovereignty is not in question, in the case of acts which do not possess the character of acts of public nature'.[55] Furthermore, the Tribunal stated that the authority in this respect is well established in French law.[56] Subsequently, there was a gradual move towards the restrictive approach in France, and it was considered a country following the restrictive theory of sovereign immunity, although the Cour de cassation endorsed the said approach as late as 1969.[57]

Thus, the restrictive theory has always been followed in some parts of the world. However, its watershed moment came in the year 1952 with the famous *Tate Letter*[58] in the US. This document announced the US policy of adopting the restrictive theory, which was subsequently embraced by the US Supreme Court as well.[59] Till that time, the grant of sovereign immunity in the US has been 'a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.'[60] The decisions with regard to it 'were [being] made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied.'[61] This position has been addressed by the Foreign Sovereign Immunities Act 1976 (FSIA) as the decision with regard to the grant of sovereign

52 See Hazel Fox and Fillipa Web (n 1) 34.

53 *Roumania (State Of) v Pascalet France* 1924 2 AD 132.

54 Xiaodong Yang (n 2) 15.

55 *Roumania (State Of) v Pascalet* (n 53)132.

56 ibid.

57 *Administration v Societe Levant* (1969) 52 ILR 315.

58 Jack B Tate, 'Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments' 26 Dept of State Bull 984 (1952).

59 *Alfred Dunhill of London Inc v Republic of Cuba* 425 US 682 (1976).

60 *Verlinden B V v Central Bank of Nigeria* (1983) 461 U. S. 486.

61 ibid 488.

immunity was based upon the Act. By the time the English courts adopted the restrictive theory,[62] it had become the dominant approach internationally.[63]

The world moved towards the restrictive theory not only because of the increased participation of States in the market but also due to a change in political ideologies, which refused to keep the sovereign above the law.[64] The sovereign was no longer exempt from the jurisdiction of his own municipal courts, as can be seen from the passing of the Crown Proceedings Act, 1947 in the UK. And if there was no loss of independence or dignity in submitting to the jurisdiction of one's own courts, the same was not lost by submitting to the jurisdiction of the courts of a foreign State.[65]

In the present times, the dominance of the restrictive theory is so pervasive that in the year 2004, the editors of the International Law Reports stated that 'with the restrictive doctrine now long established, it seems inappropriate to continue to index material under the subheadings "absolute" and "restrictive" immunity.'[66] Although the uncertainty about which theory to apply is settled, differences persist with respect to certain crucial aspects of the doctrine, such as the effect of waiver or consent to arbitrate, the requirement of a nexus between the target property and the claim, and the status of certain properties like diplomatic assets. Different States answer these questions differently.

---

62 See eg *Philippine Admiral (Owners) v Wallem Shipping (Hong Kong) Ltd* [1977] AC 373; *Trendtex Trading v Bank of Nigeria* [1977] 1 QB 529; *Playa Larga v I Congreso del Partido* [1983] 1 AC 244.

63 See eg, *Philippine Admiral* (n 62) , wherein it was observed that, 'According to the Tate letter the countries of the world were then fairly evenly divided between those whose courts adhered to the absolute theory and those which adopted the restrictive; but there is no doubt that in the last 20 years the restrictive theory has steadily gained ground. According to a list compiled by reference to the various textbooks on international law and put before their Lordships by agreement between the parties there are now comparatively few countries outside the Commonwealth which can be counted adherents of the absolute theory.'

64 See Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' in Hersch Lauterpacht (ed), *Brit YB Int'l L 1951* (OUP 1952) 220, wherein the Lauterpacht states that, 'However, the growing opposition to the jurisdictional immunities of foreign states has drawn its strength from factors more significant than modern developments in the economic sphere. These factors arise to a large extent from the challenge to the prerogatives of the sovereign state which denies to the individual legal remedies for the vindication of his rights as against the state in the matter both of contract and of tort, and which asserts a privileged position for the state in the procedural sphere. That challenge has been largely successful in most states under the rule of law.'

65 ibid 229.

66 Elihu Lauterpatch and others (eds), *International Law Reports Consolidated Indexes* (CUP 2004) 1484, quoted in Xiaodong Yang (n 2) 12.

B. Types of Sovereign Immunity

An interesting feature of sovereign immunity is that a foreign State can claim it not once, but twice, in the first instance, from the jurisdiction of foreign courts and tribunals, and if unsuccessful, from enforcement as well. Thus, there are two separate types of immunities available to a foreign State, i.e., jurisdictional immunity and immunity from enforcement, and both are recognised universally. Yang observes that 'it now appears safe to state that current State practice, and therefore the law of State immunity, universally treats immunity from measures of constraint as distinct from immunity from adjudication; and this is also the common position held by scholars across the world'.[67] Hazel Fox too agrees that it has become a universal practice to treat both immunities separately.[68]

Accordingly, under the European Convention, Jurisdictional immunity is dealt with under Article 15 and immunity from enforcement under Article 23. To the same effect is the Foreign Sovereign Immunity Act 1976 in the United States, wherein immunity from jurisdiction is dealt with under Section 1604 and immunity from enforcement under Section 1609. The United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 (UNCSI) deals with them in different Parts of the Convention, while jurisdictional immunity is dealt with in Part III, and immunity from enforcement features in Part IV.

As a foreign State has immunity from enforcement, an action against its assets situated in the forum State is possible only if it waives the said immunity or the property is used for commercial purposes. Consent is needed with respect to the properties used to discharge sovereign functions because an action against the said type of properties amounts to an interference with the sovereign activities of another State, which may disturb international comity. Furthermore, the said consent cannot be inferred from the consent to submit to the jurisdiction of foreign courts. Thus, Article 20 of the UNCSI states that 'Where consent to the measure of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint.'

Furthermore, the post-judgment measures of constraints cannot be awarded against every property belonging to the respondent State, which is used for

67 Xiaodong Yang (n 2) 361.

68 Hazel Fox and Fillipa (n 1) 301.

commercial purposes. Some instruments require a connection between the claim and the property in question, while some require a connection between the entity and the targeted property. Thus, according to Article 26 of the European Convention, enforcement can be sought against such property alone, which is 'used exclusively in connection with such an activity' that is the activity which constitutes the claim. Similarly, under the FSIA, in the US, enforcement proceedings can be taken against that property alone which 'is or was used for the commercial activity upon which the claim is based'.[69] The UNCSI, on the other hand, requires a connection between the targeted property and 'the entity against which the proceedings was directed'.[70] The State Immunity Act 1978 (SIA) in the UK takes an even more liberal approach and does not require any connection between the claim and the property or even the property and the entity. Thus, there is no uniform practice in this respect.

IV. CONTEMPORARY CHALLENGES AND CONTROVERSIES

In contemporary times, the doctrine of sovereign immunity is facing newer challenges as lawsuits have been filed against foreign States for being involved in cyberattacks, terror activities, the pandemic, etc. Thus, lawsuits were filed in the US against Saudi Arabia by the families of the victims of the 9/11 attack. It was alleged that the Saudi government's officials had knowingly contributed to charities that financed al-Qaeda and, ultimately, the attacks. However, in 2008, the Second Circuit Court dismissed the case based on the principle of sovereign immunity. In response, Congress enacted the Justice Against Sponsors of Terrorism Act (JASTA), which revised the FSIA to permit lawsuits against foreign nations accused of intentionally supporting acts of terrorism on US soil. Whether the said amendment is in consonance with the principles of international law is a contentious issue.[71]

Another controversial area in recent times is the liability of a State during a pandemic. Thus, in March 2025, a federal judge in Missouri ruled that the Chinese government was liable for concealing the onset of the Covid-19 pandemic, stating that 'China was misleading the world about the dangers and scope of the Covid-19

69 Foreign Sovereign Immunity Act 1976, s 1610 (a).

70 United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 (UNCSI), art 19 (c).

71 Eric T. Kohan, 'A Natural Progression of Restrictive Immunity: Why the JASTA Amendment Does Not Violate International Law' (2017) 92 Wash L Rev 1515.

pandemic'.[72] Consequently, he passed a judgment imposing a penalty of $24 billion on China. The amount can be recovered by targeting Chinese-owned assets. However, the Chinese embassy in Washington replied, stating that 'The so-called lawsuit has no basis in fact, law or international precedence.'[73] The reply mentioned unequivocally that 'China does not and will not accept it. If China's interests are harmed, we will firmly take reciprocal countermeasures according to international law.'[74] Thus, the doctrine of sovereign immunity in contemporary times is being tested like never before because of the newer challenges the present globalised world is posing.

The effect of consent to arbitrate has emerged as another challenging area *vis-à-vis* the application of the doctrine of sovereign immunity. While there is a consensus that an agreement to arbitrate amounts to a waiver of jurisdictional immunity, including the supervisory jurisdiction of the national courts,[75] its effect on enforcement immunity has become quite a contentious matter. The more prevalent position is that a foreign State's agreement to arbitration does not divest it of immunity from execution.[76] Depriving a State of enforcement immunity requires a separate waiver if the targeted property is not used for a commercial purpose. This is the approach followed under the UNCSI, which requires either an express consent to take an action against the property of a foreign State or the property to be specifically

72 Mitch Smith, 'US Judge Finds China Liable for Covid Missteps, Imposes $24 Billion Penalty' *The New York Times* (7 March 2025) <https://www.nytimes.com/2025/03/07/us/missouri-china-covid-judgment.html> accessed 15 July 2025.

73 ibid.

74 ibid.

75 UNCSI, art 17: 'If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity, interpretation or application of the arbitration agreement;

(b) the arbitration procedure; or

(c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides'; UNCSI, art 12(1); State Immunity Act 1978, art 9.

76 Mess Brenninkmeijer and Fabian Gelinas, 'Execution Immunities and the Effect of the Arbitration Agreement' (2020) 37 JOIA 549 (3.2). 'Normally, the agreement between a state and a foreign private party to submit their disputes to arbitration is construed as the state consenting to waive its own immunity. This however, is accepted in relation to immunity from execution - for which, generally speaking, a separate waiver is seen as needed'.

in use or intended for use by the State[77] for other than government non-commercial purposes.[78]

However, there are important decisions where consent to arbitration has been held as sufficient to deprive a State of execution immunity also. Reliance for this view is placed on Article III of the Convention, which mandates the Contracting States to enforce arbitral awards. Thus, in the US, the consent for a *situs* in a country signatory to the New York Convention has been regarded as a waiver of immunity from enforcement, even though the respondent State was not a signatory to the Convention.[79] Furthermore, Section 1605(a)(6) of the FSIA, 1976 empowers the courts in the US to exercise jurisdiction to recognise and enforce an arbitration award 'if the arbitration takes place, or is intended to take place, in the United States,.. the agreement or award is or may be governed by a treaty or international agreement in force for the United States which calls for the recognition and enforcement of arbitral awards'. As the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) is in force in the US, an arbitral award passed in a country signatory to the Convention cannot be refused enforcement in the US on the ground of sovereign immunity and the US courts have used the same provision to enforce the Convention awards.[80] Similarly, in France, consent to arbitration has been held to deprive a State of execution immunity as well.[81] However, the French legislature has resiled from this position by introducing amendments to the law.[82]

In a recent decision, a High Court in India has held that consent to arbitration is an 'indicator of the waiver of the sovereign immunity against post-judgment measures of constraints'[83] as well. According to the Court, this practice is

77 UNCSI, art 18.

78 ibid, art 19.

79 *S and Davis International Inc v The Republic of Yemen* (11th Cir. 2000) 218 F.3d 1292; *Creighton Ltd v Qatar* (D.C. Cir. 1999)181 F.3d 118.

80 ibid.

81 *Creighton Ltd v Minister of Finance and Minister of Internal Affairs and Agriculture of the Government of the State of Qatar* Year Book Commercial Arbitration XXV (2000) 458.

82 See French Code of Civil Enforcement Procedures, art L 111-1-2, that requires an express waiver with respect to execution immunity.

83 *KLA Const Technologies Pvt Ltd v Embassy of Islamic Republic of Afghanistan* 2021 SCC Online Del 3424 (31), [31].

followed internationally and is reflected in the UNCSI as well.[84] It is pertinent to mention here that there is no provision in the UNCSI which provides for depriving a State of enforcement immunity on account of entering into an arbitration agreement.

The uncertainty surrounding enforcement immunity in relation to arbitral awards has now disrupted the previously consistent approach taken by courts in England. Thus, the English High Court in its decision in *General Dynamics v Libya*[85] allowed enforcement of an arbitral award on the basis of an arbitration agreement, considering the same to be a waiver of enforcement immunity as well. It is remarkable to mention here that, as per Section 13 of the SIA, the waiver with regard to enforcement immunity must be express. On the other hand, the English High Court in *CC/Devas v The Republic of India*[86] refused to accept consent to arbitration as a waiver of enforcement immunity.

V. CONCLUSION

The doctrine of sovereign immunity has evolved from an absolutist to a restrictive approach, aligning more closely with the functions and responsibilities of the modern State. However, this transition has not resolved the ambiguities surrounding the doctrine. There remains no consensus on the precise scope of the restrictive theory or its underlying legal basis. This lack of clarity stems from the fact that sovereign immunity is rooted as much in political considerations as in legal principles.[87] It is accorded by a forum State ultimately in the interest of its diplomatic relations with its counterparts in the international community. Therefore, the application of the doctrine requires a balancing of the said interest and the interest that it has in remedying the grievances of private parties.

This balance is found in holding a sovereign accountable for the discharge of non-governmental commercial acts, and allowing only the properties used for commercial purposes to be liable to be attached in enforcement proceedings. However, the concept of 'commercial purposes' remains complex and often difficult to delineate.[88] Additionally, there is considerable variation in the standards applied

84 ibid.

85 *General Dynamics United Kingdom Ltd v The State of Libya* [2024] EWHC 472 (Comm).

86 *CC/Devas et al. v The Republic of India* [2025] EWHC 964 (Comm).

87 For more details, See Jasper Finke, 'Sovereign Immunity: Rule Comity or Something Else?' (2010) 21 European journal of international 853.

88 For example, See *LR Avionics Technologies Ltd v The Federal Republic of Nigeria, Attorney General of the Federation of Nigeria* WL 03693855.

to the quality and scope of waivers of immunity. In *NML v Argentina*,[89] the French Court de Cassation accepted Argentina's claim to immunity from enforcement, despite the fact that Argentina had expressly waived such immunity. Referring to the UNCSI, the Court held that a waiver of immunity from execution must be not only express but also specific. This marked a notably state-friendly approach, as the Court effectively extended principles traditionally reserved for assets protected by diplomatic immunity to all non-commercial assets of a State.

It is remarkable to mention here that the reliance upon the UNCSI to require a specific waiver is misplaced, because the UNCSI[90] requires only an express waiver to issue pre-judgment as well as post-judgment measures of constraints. There is no mention of the waiver to be specific, i.e., to enlist the types of assets against which action can be taken in execution proceedings. Thus, the application of the doctrine in contemporary times faces the challenge of inconsistent application and creates uncertainty about the outcome. These inconsistencies can be resolved or at least minimised by operationalising the UNCSI and enacting dedicated legislation at the national level that mirrors its provisions.

89 *Société NML Capital Ltd v République Argentine*, Cour de Cassation (1ère Chambre Civile), n° 09-72.057 (28 September 2011) <https://www.legifrance.gouv.fr/juri/id/ JURITEXT000024617044> accessed 7 May 2025.

90 See UNCSI, arts 18-19.

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