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A COMPARATIVE ANALYSIS OF DEVELOPMENT IN DISCOURSE OF HUMAN RIGHTS AND DIPLOMATIC IMMUNITY PRE AND POST 2010

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Abstract

Vienna Convention on Consular Relations, 1963 (hereinafter "VCCR") and Vienna Convention on Diplomatic Relations, 1961 (hereinafter "VCDR") are considered to be self-contained and to be very forthcoming in terms of there implementation by the countries who are party to it.1 The functioning of these treaties works on complete reciprocity. These instruments confer immunities to various diplomats and consular officers from both civil and criminal liabilities. It is well settled that the conferment of these immunities is absolutely necessary for these officers to perform their duties in the receiving states.4 However, despite its importance in the international law dynamics, immunity to diplomats has been one of the most debated subjects throughout the life of these instruments. The debate has centred around the misuse of immunity to commit serious crimes and various human rights violations. Many human rights having been largely codified in ICCPR and UDHR have attained the status of "jus cogens" and have thus become sacrosanct. Diplomatic immunity is, on the other hand, "jus cogens" as well. Thus, there has been a clash between these sacrosanct principles in the form that there have been instances both pre and post 2010 of serious crimes and human rights violations committed by diplomats and consular officers in the receiving state. These officers having immunity have gone back to their home states scot free from any

prosecution.[10] Till date the only remedy available in the VCDR is to declare the individual as "persona non grata" and nothing more.[11] There have been arguments of limiting and reconsidering the immunity altogether.[12] The paper aims to analyze this clash of arguments between immunity and human rights, both pre and post 2010 and also provide more insights to progress and provide a possible reconciliation between two "jus cogens" norms.

The scope of this paper is to provide a comparative view of developments in the approach of treating diplomatic immunity and human rights together between post-2010 and pre-2010. The focus is to highlight practical insights of various scholars and both domestic and international courts towards treating these two sacrosanct principles. Further, the author plans to make comments and suggestions on the possible future of these norms and possible ways to reconcile them.

Before 2010, as a matter of practice in international law, diplomatic immunity was chosen over human rights. This is pretty much apparent from the prejudicial treatment given to the victim and the clean chit given to the accused where there is a question of immunity from prosecution and human rights of the victim at hand.14 For instance, in the year 1982, a family member of the Brazilian Ambassador to the US assaulted some people at a Night Bar, thereby committing various felonies as per the US Law. This relative was not prosecuted by the United States but was made to return back to Brazil. Similarly, in 1981, a person was

accused of rape, and other offences were later discharged as he was relative to the Ambassador of Ghana to the United States. These are just two instances of the very incidents and crimes that have been committed by diplomats and

their relatives, and the worst thing that happens is invocation of Article 9 of VCDR and severance of diplomatic ties in very extreme cases. The victim usually does not get justice, and diplomats often use immunity as a card to commit very serious offences like rape and human trafficking.

However, this practice does not have a legal backing as there was no hard and fast rule which says so. Many authors like Ben-Asher, observe that this practice is surviving only because it is convenient and the sacrosanct principle of reciprocity. The receiving states fear that if they prosecute or conduct any criminal or civil inquiry on the diplomat of the sending state, the life and security of the diplomat in the sending state might very well be compromised. It is thus in the interest of reciprocal diplomatic relations and public good that such preference to diplomatic immunity is given over human rights pre 2010.

From an ethical point of view, human rights over diplomatic immunities are preferred. There are no legal reasons for it, though, and it is not possible to implement such a normative view. Diplomatic immunity is known as an important element without which diplomacy cannot survive. There are many people who would argue for diplomatic immunity to prevail over human rights no matter what the cost is to the victims. The ambassadors and their relatives in foreign countries face serious risks. There is a danger of false accusations which make the diplomats difficult to fulfil their duties if they do not have immunity.As has been pointed out by the American Foreign Services Association that it may be very difficult for the family of such a diplomat to face the travesties of the legal system of another country at which he is posted in and at the same time perform his diplomatic duties freely. There is no doubt that the very essence of the immunity is to make the lives of the diplomat easier, but it is the author's view that the cost at

which it is coming should not be ignored altogether. There is for the sure overwhelming support that diplomatic immunity cannot be compromised as it is quintessential. However, the author is of the opinion that the international community has not seriously attempted to delve on the question: -

"Whether diplomatic immunity has to be compromised a little if they result in a possible violation of human rights?"

The international community it seems was not serious or too casual about this very question. The casual attitude might be due to the later development of the importance of human rights. The reason for preferring diplomatic immunity over human rights is basically to prevent larger bad for the common good of the people. This is because the diplomats if prosecuted, do not only carry implications which are personal, but it is considered as a personal attack by the sending state. This has been the crux of the approach towards this debate. Following are the failed attempted solutions by the states, courts and the international community at large to settle the clash between these two sacrosanct principles.

1. Several recommendations were made to comprehensively amend the VCDR to solve the problem. Neither of the proposals has yet passed the design. It is unlikely that

amendments can be made to VCDR both in terms of treaties or via customs is an accepted fact. The diplomatic bag was monitored and checked by officials in the UK when the Dikko incident occurred, despite immunity or privacy of the diplomat.[28] This violation was then defended as an obligation of the state to protect and maintain human life and peace.[29] Meanwhile, the aim was to make self-defence an exclusion from the immunity clause.[30] The idea of self-defence did not work out as only the receiving state would be in the prejudicial position to derive any advantage out of this. It would lead to very drastic actions in some states against the life and body of the diplomats owing to the different legal systems in various countries across the globe. Self-defence as an exception to diplomatic immunity was later dropped as it was impractical and unworkable in the international relations scheme of things.

An attempt was also made to settle the unsettling clash between human rights and diplomatic immunity by referring these disputes to International Court of Justice (hereinafter "ICJ") has been attempted once as a tool for amicable clearance of problems between states on questions of VCDR sections. This option was also a failure as it plagued with a lot of issues. Firstly, as VCDR does not encompass any reference of potential disputes to ICJ, express consent of all the parties are required if the parties have not signed the optional protocol. This is because one VCDR is a self-contained regime and diplomatic disputes as a general rule to not attract any compulsory jurisdiction by default.3 Moreover, there is an ICJ judgement, i.e. Tehran Hostage Case(US v Iran) when a matter pertaining to grave violations of both the VCCR and VCDR was brought up the US to the Court. However, the jurisdiction of ICJ was not accepted by Iran, and it was thus an ex-parte judgement. This shows that the states where diplomatic matters come up are not comfortable to provide jurisdiction to the ICJ as it often concerns national interests and is more than often very political in nature. However, even if ICJ considers a case the following consent by both the parties, there is no certainty that both the countries will stick to the verdict of the Court. Moreover, there is a possibility that such a mechanism might very well be exploited by the permanent countries like the US did not follow the verdict in the US v Nicaragua Case.

3. The Tehran Hostage situation also stressed that the appeal to the United Nations Security Council (hereinafter "UNSC") is not feasible provided that the Soviet Union vetoed the initiative once more while US sanctions against Iran were tied up and the permanent countries on the UNSC violated its remedy.
4. There have also been suggestions to set up a permanent diplomatic court in the similar lines of ICJ but solely devoted to diplomatic affairs. This suggestion has not fructified yet.

There is still no clear answer in the international law, about what recourse must be adopted in matters where there is a clash between two sacrosanct rules which have both reached the standing of *jus cogens*. Post-2010, the chronology of what is a more ancient practice is no longer relevant.[40] There have been certain developments tilting in favour of human rights. However, diplomatic immunity still remains absolute unless waived by the sending state. The author in this section aims

to point towards major cases of clashes of human rights and diplomatic immunity post-2010 to compare it with the last section of analysis.

Majed H Ashoor, the First Secretary of Saudi Arabia in Delhi in September 2015 was charged for rape and physical assault of a few servants whom he had appointed. He had trafficked them from Nepal to India for allegedly committing sexual assault. It is undisputed that the actions of this diplomat was punishable within the Indian Penal Code, 1860 fair and square. Despite strong evidence at hand, the diplomat was allowed by the Indian Government to go back to Ryadh without pressing any charges. The blind eye turned by the Government to the actions of the diplomat and letting him go scot-free attracted rage from the whole human rights community and the internal media as well. It is to be understood that even in this case, the Indian government could not have tried him for any crime as it is a clear violation of provisions of VCDR. Moreover, such prosecution of Majed Ashoor would have resulted in retaliation and severance of diplomatic ties from Saudi Arabia, which would compromise the security of Indian diplomats at Saudi Arabia.[45] There are other considerations to maintain positive international relations with Saudi Arabia due to heavy domestic dependence on oil needs. Therefore, India cannot afford to cut off ties with Saudi Arabia to face both economic and diplomatic sanctions.[47] In this regard, i.e. prosecution of the diplomat and other remedies the remedies have not changed much since 2010 as the larger interest of nation are preferred over few human rights victims and the only remedy available is Article 9 which is persona non grata.

Another anecdote on a recent happening in 2011 is shared by Glendon Salter on Guardian where he talks about a migrant worker, Alia who was trafficked to the UK to for supposedly providing domestic help. However, she was made to work for 19 hours a day with no wages and was often at the receiving end of sexual assault and torture. After these incidents were reported to Kalyaan, NGO she did not receive any compensation as the diplomat went scot-free by claiming immunity under the VCDR regime and there was no remedy for the victim. This incident is another highlight that the practice of abuse of immunity towards trafficking, slavery, physical assault is still prevalent, and there is no rescue to the victims either in terms of finance or otherwise. *Devyani Khograde case*- This case marks special developments in the US screening systems for grant of diplomat status. In this case, a consular officer who allegedly trafficked a domestic servant committed visa fraud and committed human rights violations by paying less than the minimum wage was after the prosecution was started given full diplomatic immunity. The US, after this case, made certain changes in their domestic laws whereby diplomatic immunity cannot be given at a later stage once the prosecution has commenced. This kind of provisions can be provided by other countries as well to prevent misuse of diplomatic immunity to violate human rights.

A further development post-2010 points out that the majority of human rights violations committed by diplomatic officers are related to human trafficking only. This trend might prove to be useful to effectively tackle the human rights violations and commission of serious crimes as the focus can now be made towards the prevention of human trafficking.

There has been some progress post-2010 in terms of internationally accepted measures that are to

be undertaken by the receiving states in case of criminal offences and violations of human rights committed by diplomats to domestic workers. This is mentioned in a working paper of CEDAW[55] which advocates for a criterion to be prepared by the states for the use of all diplomatic measures in such cases.

Perhaps the most critical development post-2010 is the use of recognized exceptions to diplomatic immunity specified in VCDR in Article 31(1)(c), i.e. commercial or professional activities by the diplomats outside their official functions.[56] In Reyes Judgement[57] of the Court of Appeal of UK even though concerns the application of ECHR is significant in terms that it rejects the fact that employment contracts are entered into by diplomats for commercial gains. The court observed that entering into employment contracts was essential for the diplomat to live in the receiving states.[58] Therefore, human rights violations committed by diplomats in the guise of employment contracts cannot be argued as an exception to Article 31(1)(c). The judgement, however, is significant in the sense that it is admitted by the court that the diplomat may have been involved in trafficking. This is very pathbreaking in terms of "access to justice" in this sense.[60] However, the court is perhaps wrong in not looking at employment contracts from a dualist perspective here, in the sense that they serve both a public policy question and it has economic considerations on the one hand.[61] The economic bit is ignored by the courts to exclude it from being an exception under Article 31(1)(c) as once again the approach is to look at the larger good of people by not prosecuting the diplomat as it would have major political and diplomatic consequences.

Despite more cooperation and awareness of human rights, the approach of the courts or the international community at large is not very different from what was the approach pre-2010. There have surely been some developments at the regional level. However, there is no plausible and substantial change at an international level to result in a possible reconciliation between human rights and diplomatic immunity. Countries, however, have through actions like the US in Devyani Khograde case made it very clear that abuse of diplomatic immunity is frowned upon at large and human rights are more important at a very normative level. Moreover, as most of the human rights have now been incorporated in the domestic law of various countries, the countries see the violation of human rights as disrespect to the domestic laws of the receiving state. There has been very limited change in the attitude of the states to waive immunity according to the limited cases mentioned above.

At the very beginning, the repeated misuse of diplomatic immunity undermines one's confidence in the foreign community. There is a certain kind of problem in certain countries that adopt dualistic systems, and they face the condition that diplomatic protection is only above the constitution of the nation that ratified the treaty. In case of a diplomat suing the person, but not a person to sue a diplomat, for instance, upholding the rule of law that calls for the freedom of everyone in law is restricted. This claim gathers greater weight as the extraterritorial hypothesis has been rejected for granting the ambassadors protection, implying that the rules of the receiving state do not extend entirely. Participating states don't so much challenge the present scheme, because exemption misuse is quite small compared to the overwhelming majority of covered individuals.66 Its usage is very restricted. The remainder of the overall amount of offences perpetrated includes trivial offences such as shoplifting, illegal car parks, and so on. It is true that the proportion of diplomats who indulge in violation of human rights and other serious crimes is extremely low if compared to

the remaining criminals in that country.68 This, however, is not a reason for giving a free license to diplomats to commit grave human rights violations. However, these considerations surely diminish the inclination of the whole international community to solve the issue for once and for all conclusively. That said, however, it continues to be proposed that States will take every step they can to control the misuse of diplomatic immunities, which amounts to a breach of human rights. That is because the issue involves the violation of human rights and not a systemic violation of human rights. Just as the number of serious crimes reported is small, ambassadors must not be made aware of the fact that human rights violations can be done and immunity is for granted. There could be some easy and scalable measures to manage the abuse of immunity.

These measures include contractual obligations entered into by states in the form of bilateral treaties. These treaties would provide for a waiver of diplomatic immunities on mutual terms and conditions as agreed upon by the states. This takes into account the principle of reciprocity as states are in agreement with such a compromise. The challenge to this treaty must have been to draft it in such a way that it does not act as a hindrance for the diplomat to perform his functions as specified in VCDR. Moreover, as is common for various unsolved international law mysteries, a certain consolidated fund must be established to take care of monetary needs of the victims of such human rights violations and particular embassies must be held accountable to regularly contribute till a permanent solution to this clash is reached.

Moreover, as Alternate Dispute Resolution is an emerging concept for the last decade, negotiation and later on the mandatory referral of issues to arbitration might be a panacea given that arbitration is largely quick, flexible and provides an unbiased platform relative to ICJ where decisions can be easily influenced by the Permanent five nations in the UNSC.

There can also be a compulsory liability insurance scheme as was introduced by the US for foreign embassies and consulates to provide some compensation to the victims.

Moreover, there can be possible amendments in the domestic laws of the receiving states where special treatment can be given to diplomats in terms of privileges while prosecution is going on which will provide an added advantage while negotiating a waiver of immunity of accused diplomats. Special provisions should be made to check human trafficking which is by far the most prevalent human rights offence committed by diplomats as the nature of the job makes it very easy to traffic domestic servants and then treat them in an inhuman manner like slaves. Provisions like the one present in ECHR might be adopted. This is probably a major shift in the trend of treatment rendered to human rights and diplomatic immunity clash post-2010 and is definitely a welcome change.

Conclusion

It can be inferred from the aforementioned study that the disagreement between two sets of legal standards cannot be harmonized, i.e. Human rights and diplomatic Immunity. This is not, though, because the hands of the state are entirely obligated to cope with the issues. Potential solutions may be proposed in order to significantly or fully address this problem. These solutions will probably go a long way in settling the unsettling human rights and diplomatic immunity pandora box. Moreover, to state it as simply as possible, a certain power is given to the diplomats,

and it is unto them to utilize this power constructively only to carry out their functions.

Moreover, as every power gives responsibility, there should be a sort of implied responsibility on diplomats that they have to abide by all International Human Rights. This leads us to another observation that persons with clean record and officers with integrity must be allowed to exercise such diplomatic power. Extending absolute diplomatic immunity to all the officers when they commit an offence is bad practice and must be frowned upon by the international community.

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