
The Legal Basis for Granting Immunities and Privileges to the Diplomatic Envoy.

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Abstract:

The possibility of expanding or restricting the scope of the concession system that may be accepted is also related to the basis of this system. If the principle of the necessities of the job is adopted, and when the concept of the diplomatic job is clearly defined. It is then possible to clarify the system of privileges necessary for the exercise of this function, and when the legal basis for these privileges is determined, it becomes easy to organize and solve the disputes that such a system may raise, as there is then a clear standard of interpretation that can be relied upon, for all these reasons it seems useful and necessary To discuss the issue of the legal sources of privileges and immunit

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Introduction

International Law scholars have sought to find a legal basis for the concept of diplomatic immunities and privileges of the diplomatic envoy as a special diplomatic system and as a series of privileges within the legal basis and within the international law²

In this regard, there have been a variety of theories. The most important of these are the following:

- 1) Representative Character Theory.
- 2) theory of extraterritoriality
- 3) Functional Necessity Theory.

1) Representative Character Theory.

This theory is the oldest as it has deeply-rooted basis in the history of diplomacy. The basis of this theory goes back to the middle ages, as the international relations were personal among Heads of States until the French Revolution. The envoy and the heads of missions were considered as personal representatives to their States and their Heads of States. Henceforth, any aggression against them was viewed as if it is against the State and its Head³. This theory considers the diplomatic mission and envoy as local extension to the sending State, hence the local provisions and laws of the receiving State do not apply, as it was assumed by way of fiction that the envoy has not left his

² الجسور، ناظم عبد الواحد، 1422 هـ، أسس وقواعد العلاقات الدبلوماسية والقنصلية، ط1، دار مجدلاوي للنشر والتوزيع، عمان، ص 149-150
Al-Jusoor, Nazem Abd al-Wahid, 1422 AH, Foundations and Rules of Diplomatic and Consular Relations, 1st Edition, Majdalawi House for Publishing and Distribution, Amman, pp. 149-150

³ سلامة، عبد القادر، (1997)، التمثيل الدبلوماسي والقنصلي المعاصر، ط1، دار النهضة العربية، القاهرة، ص170
Salama, Abdel Qader, (1997), Contemporary diplomatic and consular representation, 1st floor, Dar Al-Nahda Al-Arabiya, Cairo,, p. 170

country and as he is carrying his job in his own country, though he is essentially on the land of the receiving State⁴. Moreover, the principle at the time was that of equality between Kings and Princes who were seen as embodiment to their countries. And it was not imaginable to subject them to law, depending on the principle of equality and that equal people have no power or dominance on each other⁵.

Some judges and scholars indicated that diplomatic immunities and privileges should be equal with the rights granted by the State and that any violation against the diplomat is not only considered against the State, but also against the whole world⁶. This theory is based on the formulation of Montesquieu that says that the diplomatic envoy is the sound of the prince and this sound must be free and no obstacles to his work are permissible⁷.

Criticism of the Theory:

theory belonged to absolute monarchy system, as the character of the State was mixed with the character of the Head of State, whether he was a king or a prince, where sovereignty was attributed to the Head of State as a person and

⁴أبو الوفاء، أحمد، (2012) قانون العلاقات الدبلوماسية والقنصلية، ط1، دار النهضة العربية، القاهرة، ص 128-130
Abu Al-Wafa, Ahmad, (2012) Law on Diplomatic and Consular Relations, 1st Edition, Dar Al-Nahda Al-Arabiya, Cairo, pp. 128-130

⁵الغنيمي، محمد طلعت، (1973)، الوسيط في قانون السلام، ط1، دار معارف الاسكندرية، الاسكندرية، ص964، وأنظر ايضا: خير الدين عبد اللطيف محمد (1993)، الحصانات الدبلوماسية القضائية، المكتبة العربية للنشر والتوزيع، الدوحة، ص 24
Al-Ghunaimi, Muhammad Talaat, (1973), Mediator in Peace Law, First Edition, Dar Maarif Alexandria, Alexandria, p. 964 See also: Khair al-Din Abd al-Latif Muhammad (1993), Judicial Diplomatic

⁶الملاح، فاوي، (1981) سلطات الأمن والحصانات الدبلوماسية، ط1، دار المطبوعات الجامعة، الاسكندرية، ص254
Al-Mallah, Fawy, (1981) Security Powers and Diplomatic Immunities, 1st Edition, University Press, Alexandria, P. 254

⁷علي صادق أبو الهيف (1987) قانون دبلوماسي، الطبعة الأولى، الإسكندرية، مؤسسة المعرفة بالإسكندرية ص 136.
Ali Sadiq Abu Al-Haif (1987), Diplomatic Law, First Edition, Alexandria, Knowledge Foundation of Alexandria P.136

not to the State as a legal entity distinct from the personality(character) of the Head of State. However, this theory lost its importance after the establishment of the national State with a democratic system, particularly after the American and French revolutions. The concept of this theory has retracted in the modern times and it has been criticized by researchers and scholars, despite the sense of the diplomatic envoy as the representative of his/her State through his job and title of the State's sovereignty as a legal and political entity.⁸

Henceforth, it became impossible to accept this theory in modern diplomatic application for the following reason:

- 1) This theory did not provide a clear interpretation for some of the matters required by the diplomatic work. It did not explain the immunities enjoyed by the envoy in case of his presence in a third State in which he has no representational capacity⁹.
- 2) This theory is loose and is based on a serious fallacy in relation to the task of managing international affairs.
- 3) This theory contradicts with the immunities and privileges enjoyed by the family members of the diplomatic envoy who are deprived of the representational capacity, except the wife of the diplomat within certain limits.¹⁰

2) theory of extraterritoriality

⁸ أحمد ابوالوفاء مرجع سابق، ص 241241 Ahmad Abu Al-Wafa, previous reference, p. 241241
⁹ سهيل الفتلاوي ، مرجع سابق ، ص. 126 سهيل حسين الفتلاوي (2006) الدبلوماسية بين النظرية والتطبيق ، الطبعة الأولى ، عمان ، بيت الثقافة، ص126.

Suhail Hussain Al Faitlawi (2006), Diplomacy between theory and practice, 1st edition, Amman, House of Culture, P126

¹⁰ سموي فوق العادة (1973) ، الدبلوماسية الحديثة ، الطابق الأول ، بيروت ، بيت الصحوة العربية ص279.
Smouhi fouk Alada (1973), Modern Diplomacy, 1st floor, Beirut, The Arab Awakening House

Beside the above mentioned theory, a new theory emerged. This theory explains and justifies immunities and privileges. It was agreed to call this theory as extra-territoriality theory. It was based on the theory of possession or personal sovereignty.

This theory is based on assumption like the theory of representativeness through which the ambassador is considered as the representative of the Head of State and by this assumption, he/she is regarded as outside the territorial jurisdiction of the State he/she accredited to¹¹

It was Grotius who was the first to establish this theory and he considered that immunities and privileges must be based on this theory. He points out that according to law of nations, this fiction that an ambassador represents the actual person of his sovereign engenders the further fiction that he must be regarded as being outside the territory of the power to which he is accredited¹².

He viewed that the diplomatic headquarters of the mission where the diplomatic functions are practiced are an extension of the territory of the State represented by the diplomatic envoy. This means that the diplomatic envoy resides in the territory of the State he has actually been accredited to, but he must be considered as a resident of the State of origin. On the base of this understanding, the diplomatic representative is not subject to the law of the

¹¹ علي حسن الشامي (2009) ، الدبلوماسية والقانون الدبلوماسي ، الجزء الأول ، بيروت ، دار العلم للملايين .
Ali Hassan al-Shami (2009), Diplomacy and Diplomatic Law, Part One, Beirut, Dar Al-Alam for Millions,P.452

¹² “selon le droit des gens ,comme un ambassadeur represente par une espece de fiction -2
personne meme de son Matrice ,il est aussi regarde ,per une fiction semblable , comme etant hors
des terres de la puissance aupres de qui il exerce ses fonctions et de la vient qui l n'est point tenu
d'observer les lois civiles du pays etranger ou il demeure en ambassade".,Par M.Merlin ,Recueil
alphabetique de droit ,France,1827,p279

receiving State and as the headquarters of the diplomatic mission as an extension of the territory of the State he represents (the sending state)¹³

Martins pointed out that international rights have expanded in the concept of the independency principle from the territorial authority. The diplomatic representative was considered as if he/she has not left the sending State and as if he/she is still living on its soil¹⁴

Within the framework of this theory, a problem faced jurists in that time, which was represented in the difficulty of making reconciliation between two principles. The principle is the absolute sovereignty of State on its territory. The second has to do with non-submission of the diplomatic representatives to the local laws of the host state.

Advocates of this theory view that diplomatic envoys must be treated as if they were not residing on the territory of the receiving State. According to this theory, crimes and actions committed and carried out inside the embassy are considered as if occurring in a foreign region ruled by the law of the country he represents. Moreover, this theory justifies the right of asylum and does not permit the receiving State authorities to break into envoy headquarters¹⁵

In fact this theory did not consolidate until the 15th century when foreign countries began to establish a system of permanent representation. It is

¹³ علي صادق أبو هيف ، قانون دبلوماسي ، مرجع سابق ، ص 122-123

Ali Sadiq Abu Haif, Diplomatic Law, Previous Reference, pp. 122-123

¹⁴ غايزي حسن صابريني (2002) الدبلوماسية المعاصرة ، دراسة قانونية ، الطبعة الأولى ، عمان ، بيت الثقافة ، ص 131.

Ghazi Hassan Sabrini (2002), Contemporary Diplomacy, Legal Study, 1st Edition, Amman, House of Culture,p131

¹⁵ فاوي الملاح, مرجع سابق ص262

Fawi Al-Mallah, previous reference, p. 262

natural that immunity on the basis of this theory did not take place without the establishment of diplomatic missions on the territory of the sending States¹⁶.

A Milan court (Italy) applied this theory in a ruling in 1951. The rule implied that the ambassador of Yugoslavia in Italy was considered as not residing in Italy but as he was residing in the boundaries of his national country and he was not subject to the Italian jurisdiction that only addresses the Italians¹⁷.

Criticism of the Theory:

- 1) Contradiction: This contradiction is based on the assumption that the diplomatic envoy is a resident of two places in the same time i.e. the receiving State in reality and hypothetically in the sending State. For this, researchers consider this theory as imaginative as it contradicts with the real and geographic reality¹⁸
- 2) Inappropriateness to actual reality and the ongoing situation. It is agreed that the diplomatic envoy must comply with laws and regulations of the receiving State and pay certain local fees for actual services and that commercial activities must be subject to the laws and rules in force in the where he/she actually resides. In fact, the theory of extra-territoriality is not commensurate with the current, ongoing situation and with the principle of State sovereignty over its territory¹⁹

¹⁶ خير الدين عبد اللطيف محمد, الحصانات الدبلوماسية القضائية, مرجع سابق, ص 30,
Khair al-Din Abd al-Latif Muhammad, Judicial Diplomatic Immunities, Previous Reference,
pg. 30,

¹⁷ وليد خالد الربيع, (لا يوجد سنة نشر), الحصانات والامتيازات الدبلوماسية في الفقه الاسلامي والقانون الدولي دراسة مقارنة, الكويت, جامعه الكويت, ص 9
Walid Khaled Al-Rabie, (There is no publication year), Immunities and Diplomatic Privileges
in Islamic Jurisprudence and International Law, Comparative Study, Kuwait, Kuwait
University, p.9

¹⁸ Same reference, p. 9

¹⁹ الدبلوماسية د. علي الشامي ص 455
Diplomacy dr. Ali Al-Shami, p. 455

3) Absurd and unacceptable results in taking with this theory. This is reflected in the fact that if a crime was committed in the mission headquarters, the offence must be subject to the laws and judiciary of the sending State, regardless of the nationality of the offender. If a criminal resorts to the mission headquarters after committing a crime, local authorities cannot detain him without certain procedures to be followed, as if he had escaped to another region. This is actually in contradiction to the principle of sovereignty of the receiving State and this is not acceptable to the receiving State. Some jurists, henceforth, pointed out that the imaginary perception on which this theory is based is not useful, vague, wrong and risky.²⁰

4) Differences of the legal systems in countries makes the diplomatic envoy to act in accordance with the law of his State, not with the law of the receiving State. Meanwhile, his actions may be contrary to the laws of the host State and may not prevent him from doing these actions which violate its laws. And this is considered as unacceptable.

Thus the United Nations has fully excluded this theory through conventions and agreements it has drafted since 1946 until now and adopted the functional concept instead. Despite differences of jurists' views, no one can deny the importance of this theory for a long time by adopting it as a basis for resolving disputes and contributing to development of diplomatic theoretical concepts and extending immunities.²¹

²⁰ وليد خالد الربيع, (لا يوجد سنة نشر), الحصانات والامتيازات الدبلوماسية في الفقه الاسلامي والقانون الدولي دراسة مقارنة, الكويت, جامعه الكويت, ص9

Walid Khaled Al-Rabie, (There is no publication year), Immunities and Diplomatic Privileges in Islamic Jurisprudence and International Law, Comparative Study, Kuwait, Kuwait University, p.9

²¹ الزين, هایل, (2011) الأساس القانوني لمنح الحصانات والامتيازات الدبلوماسية, رسالة ماجستير, ص45
Al-Zabin, Hayel, (2011) The Legal Basis for Granting Diplomatic Immunities and Privileges, Master Thesis, p45

3) Theory of Functional Necessity.

Diplomatic relations and the role of the State and its functions have developed in all aspects. This has led the international community to look for practical bases that go in line with these developments.²² So came the theory of functional necessity and restricted the diplomatic immunities and privileges and considered that the diplomatic envoy need to be committed to respect of public order and to take into account the rules of the receiving State²³.

Article 13 of the 1976 of the Convention of Immunities and Privileges of the Islamic Conference Organization states that immunities and privileges shall not be granted to representativeness of member states for their own benefit but to ensure their full independence in the management of their functions with the organization.²⁴

Evaluation of the theory

This theory has received considerable support both theoretically and practically²⁵. The international community has preferred this theory because it is the most comprehensive and most logical and is consistent with the modern trends in contemporary international law. The previous two theories, however, did not provide the accepted objective justification for the basis of granting diplomatic immunities and privileges. The theory of functional necessity has been pointed to by the work report of the International Law Institute in Vienna

²² الشامي, علي حسين, مرجع سابق ص 457

Al-Shami, Ali Hussein, previous reference, p. 457

²³ راتب, عائشة, (1963) التنظيم الدبلوماسي والقنصلي, دار النهضة العربية, القاهرة, ص 129

Ratib, Aisha, (1963) Diplomatic and Consular Organization, Dar Al-Nahda Al-Arabiya, Cairo, p. 129

²⁴ The 1976 Islamic Conference Agreement

²⁵ الدكتور علي صادق أبو هيف: مرجع سابق, ص 5

Dr. Ali Sadiq Abu Haif: Previous Reference, pg. 5

in 1934. The report stated that the basis of diplomatic immunities is the functional interest. Moreover, this theory has been dealt with in the report of the International Law Committee presented to the General Assembly of the United Nations in 1956.²⁶ Finally, this theory has been adopted by the 1961 Vienna Convention on Diplomatic Relations. In the introduction of the convention it was stated that the member states of this convention believe that immunities and privileges mentioned are not for the purpose of making individual distinct, but to enable diplomatic missions, as representative to States, to perform their function in an efficient manner²⁷.

There is, however, a note on this theory; it is considered somewhat vague. Diplomatic immunities and privileges have been granted to facilitate support relations among States, what extent should these immunities be granted?

In the light of this theory, the diplomat must be given some freedom in line with what is necessary to carry out his/her mission. But, on the other hand, there is another fact relevant to the national security of the host State, that is, defining the limits of the immunities and privileges enjoyed by the diplomatic envoy. States are inclined to adopt this theory to their internal security. In the case of conflict, priority is given to the security of the receiving State. From this principle, diplomat's enjoyment of diplomatic immunities and privileges based on the requirements of his/her job is connected with respecting the national

²⁶ The report of the United Nation 1956.

²⁷ التمثيل الدبلوماسي والقنصلي المعاصر السفير عبد القادر سلامة ص 170.

Contemporary diplomatic and consular representation, Ambassador Abdel-Qader Salameya, p. 170, previous reference. See also diplomatic and consular relations, Dr. Al-Bakri, p. 104, see also the discussion of diplomatic immunities and privileges, Dr. Walid Khaled Al-Rabie

security of the host State. This is in fact consistent with the current trends of international action²⁸

Conclusion :

Diplomat enjoys diplomatic immunities and privileges based on the requirements of his position, in return for him to respect the requirements of the national security of the country to which he is

dispatched, and this is consistent with the contemporary international work trend.

It is possible to combine the theory of the requirements of employment with the principle of reciprocity to lay a philosophical basis to justify the granting of immunities and privileges to the salesmen and diplomatic representatives, if the countries of the principle of treatment came to fill the void left by the theory of the requirements of employment when it did not explain the reason for granting immunities in cases that have nothing to do with the diplomatic function.

Working on an international contract under the auspices of the United Nations to establish a new agreement for diplomatic relations to keep abreast of developments and developments in diplomatic, technological and security, as well as the changes that accompanied international relations and diplomatic work.

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²⁸ انظر في هذا المعنى الدكتور محمد طلعت الغنيمي : قانون السلام الناشر منشأة المعارف، 1973، ص 573
See in this sense Dr. Muhammad Talaat Al-Ghunaimi: Law of Peace, published The
Knowledge Foundation Alexandria, 1973, p. 573

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