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## **A SOCIAL SCIENCES**

AA	PHILOSOPHY AND RELIGION
AB	HISTORY
AC	ARCHAEOLOGY, ANTHROPOLOGY, ETHNOLOGY
AD	POLITICAL SCIENCES
AE	MANAGEMENT, ADMINISTRATION AND CLERICAL WORK
AF	DOCUMENTATION, LIBRARIANSHIP, WORK WITH INFORMATION
AG	LEGAL SCIENCES
AH	ECONOMICS
AI	LINGUISTICS
AJ	LITERATURE, MASS MEDIA, AUDIO-VISUAL ACTIVITIES
AK	SPORT AND LEISURE TIME ACTIVITIES
AL	ART, ARCHITECTURE, CULTURAL HERITAGE
AM	PEDAGOGY AND EDUCATION
AN	PSYCHOLOGY
AO	SOCIOLOGY, DEMOGRAPHY
AP	MUNICIPAL, REGIONAL AND TRANSPORTATION PLANNING
AQ	SAFETY AND HEALTH PROTECTION, SAFETY IN OPERATING MACHINERY

## CURRENT TRENDS OF THE JURISDICTIONAL IMMUNITY DEVELOPMENT OF A FOREIGN STATE UNDER THE LAWS OF THE UNITED STATES OF AMERICA

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**Abstract:** The article examines the current trends in legal regulation of relations on granting jurisdictional immunity to a foreign state in the legal systems on the example of the United States of America. The author identifies the main principles of development of this institution, their reflection in the rules of law, and emphasizes the existence of problems associated with the application of state immunity in private law relations. The author substantiates the expediency of analyzing the most optimal legal positions reflected in US law and tested in international practice. The role of judicial practice in this process is shown. The article analyzes the origins of limited immunity in the United States and emphasizes the need to improve legislation and unify the rules of private international law in this area.

**Keywords:** immunity of a foreign state; concept of limited immunity; legal regulation of state immunity; commercial activity; property immunity.

### 1 Introduction

The study of the legal nature of jurisdictional immunity of States in private international law relations is relevant given the current state of political development of international relations and private international law, as evidenced by numerous situations, including court cases relating to private international law relations. Issues related to the assessment of trends in the development of State immunity in private international law are also relevant due to legal situations that constantly arise, in particular, for both Ukraine and other States of the international community. A new trend in the development of the concept of limited state immunity is, for example, the denial of immunity to a foreign state in claims arising from the exercise of sovereign power by that state if human rights have been violated in the course of such exercise (e.g., the judgments in *Flatow v. Republic of Iran 1998*, *Republic of Austria v. Altmann in 2004*).

The development of state immunity in the legal positions of foreign countries, its legal nature and legal justification are of great methodological importance for its understanding. The study of the US experience in this regard is relevant given the impact of its legal position not only on the states of the Anglo-American legal system, but also on the legal systems of the world in general, and requires not only study, but also, perhaps, imitation.

### 2 Materials and Methods

The methodological basis of the study is made up of general scientific methods, including the dialectical, system-structural approach, methods of induction and deduction, as well as special ones – primarily, formal-legal, comparative-legal, and historical-legal methods. The main research method is the formal-legal and historical method analysis, which are used to research current trends of the jurisdictional immunity development of a foreign state under the US laws, conceptual approaches to the main principles of development of this institution, their reflection in the rules of law.

### 3 Results and Discussion

There are two main concepts of state immunity in the international law: absolute immunity and functional (limited) immunity [10, p. 63-64]. According to the concept of absolute immunity, a state has judicial immunity, immunity from interim relief, and immunity from execution of a court decision, unless the state has given its consent to waive its immunity. As a rule, such consent may be contained in national legislation or international agreements on economic or trade cooperation. For example, Art. 32 of the Law of Ukraine “On Production Sharing Agreements” [16] provides for a mandatory waiver of judicial immunity, immunity from preliminary injunctive relief and

enforcement of a court decision. Nowadays, the national legislation of few countries upholds the concept of absolute immunity [1, p. 331]. American scholar, researcher of the concept of jurisdictional immunity of the state Kevin Simmons notes: “even Supreme Court Chief Justice Marshall, who was otherwise a supporter of the absolute theory of sovereign immunity, recognized that when the government becomes a partner in any commercial enterprise, it loses ... its sovereign character and acquires the character of a private person” [14].

It should be noted that the concepts of “functional immunity” and “limited immunity” are not identical. Immunity based on the division of state functions into public and private law is called *functional immunity*. The main point of the functional immunity theory is that the state, acting as a sovereign, always has immunity. If the state acts as a private person (e.g., conducts foreign trade operations and/or engages in other commercial activities), it does not have immunity. This immunity has its drawbacks: neither the doctrine, nor the court practice, nor the laws have established criteria for dividing the activities of the state into commercial and non-commercial ones. The same set of facts is interpreted differently by the courts of even the same country.

*Limited immunity*, in contrast to *functional immunity*, formulates a list of specific cases when a state does not enjoy immunity. These cases can be formulated by the states themselves on a bilateral or multilateral basis, as well as on a universal basis. As a result of long-standing judicial practice, certain exceptions to the principle of immunity of a foreign state have been formed, in respect of which the court exercises jurisdiction. These exceptions have been enshrined both in national laws on the immunity of a foreign state adopted in a number of countries (the United States, the United Kingdom, Austria, Pakistan, South Africa, Canada, Australia) and at the international level. First of all, it is about the European Convention on the Immunity of States of May 16, 1972 [5] and the Convention on Jurisdictional Immunities of States and Their Property, adopted on December 2, 2004 by the UN General Assembly [19], which has not been ratified by the United States. The exceptions relate to commercial contracts concluded by the state with individuals and legal entities, labor contracts, torts, and disputes over the establishment of ownership, possession and use of property. The theory of limited immunity is applied in the judicial practice of Greece, Denmark, Finland, France, Italy, Norway, Switzerland, and the United Kingdom.

Despite the fact that the concept of limited immunity is used in the national legislation of many states and enshrined in international treaties, the doctrine and law enforcement practice have not developed a unified approach to determining which state actions should be interpreted as *de jure imperii*, which grant immunity to the state, and which as *de jure gestionis*, that do not grant immunity to the state [13]. As rightly noted by Yevhen Korniychuk, “namely in the absence of evidence of the existence of general rules of international law on state immunities, the national practice of states representing the main families of national legal systems of the world becomes particularly important. This practice includes acts of the legislative, judicial, and executive branches of government. The first two of them undoubtedly deserve special attention” [9, p. 16].

The emergence of the theory of limited immunity was a response to the activation of the state's participation in private legal relations on an equal footing with legal entities and individuals. However, the state, as a special kind of entity, was above the ordinary judicial procedure - it could not be sued, its property could not be used as collateral for its participation in civil circulation. For private individuals, this state of affairs meant a de facto denial of judicial protection of their rights. Initially, the national legislation of many states allowed for claims arising from contracts and torts to be brought against states in their own

courts. In particular, in the United States, since the mid-nineteenth century, there has been a case law where the state could be sued for breach of contract, and in 1946 *The Tort Claims Act* abolished immunity from liability for torts. Over time, many states began to waive immunity themselves if the state's contracting with private parties was in the public interest.

In the late nineteenth and early twentieth centuries, the practice of a foreign state as a subject of private law and a holder of private rights became widespread among continental European countries, and later among others, including the United States, according to which a foreign state, along with other private individuals, may be subject to the jurisdiction of a local court. The *U.S. Merchant Marine Act of 1925* recognized the subordination of U.S. state-owned merchant ships to foreign jurisdiction. The subsequently adopted *Brussels Convention on the Immunity of State Vessels of 1926* equalized state merchant ships with private vessels "in respect of claims relating to the dispatch of ships and the carriage of goods" [8]. Later, the concept of limited immunity, as already mentioned, was enshrined in the European Convention on the Immunity of States of 1972 and the UN Convention on Jurisdictional Immunities of States and Their Property of 2004. As noted by scholars, "despite the fact that the first of them was concluded by a limited number of states, and the second has not entered into force, the conventions are considered as a codification of the customs of international law. They are quite actively used by states and international judicial institutions" [18].

At the end of the twentieth century, the theory of limited sovereignty was consolidated at the regulatory level and was characterized by the adoption of national laws on state immunity, the first of which was the *United States Foreign Sovereign Immunity Act of 1976* of October 21, 1976 [20] (hereinafter referred to as the 1976 Act). This Act came into force on January 21, 1977 and is still in force with amendments adopted in the 80s and 90s of the last century and at the beginning of the 21st century; it contains criteria that should be used by US courts in determining whether a foreign state has or does not have immunity. Certain provisions of the 1976 Act are included in Title 28 of the U.S. Code of Laws, entitled "Judicial System and Judicial Procedures", Part 4 "Jurisdiction and Judicial District", Chapter 85 "District Courts and Jurisdiction" and Chapter 97 "Jurisdictional Immunities of Foreign States". The titles of the 1976 Act follow the numbering of the U.S. Code. The 1976 Act defines the jurisdiction of the United States courts in actions against foreign states and the circumstances under which foreign states are immune from suit and under which their property cannot be recovered. According to the American researcher Elizabeth Defeis, this Act is the only basis for obtaining jurisdiction over a foreign state in federal courts [3]. In essence, it is "a codification of existing law governing lawsuits involving foreign states in the United States courts". The law establishes "uniform and exclusive standards to be applied in resolving sovereign immunity issues raised ... in federal and state courts" [14].

However, researchers of American law in this area note that the application of the concept of limited immunity "has not been fully effective... while this restrictive theory correctly reflected economic reality, it has been difficult to apply in practice" [13]. The main conceptual difficulties were related to the distinction between public and private actions of the sovereign, and the courts that tried to apply these distinctions reached completely contradictory results. Simmons gives the following examples. In the case of *Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce, Procurement Office* [14], the Second Circuit Court of Appeals held that a contract concluded by the Greek Ministry of Commerce for the purchase and shipment of grain was a non-immunized commercial act. On the other hand, in *Isbrandtsen Tankers, Inc. v. President of India* [14], the same court upheld India's defense of sovereign immunity in a claim arising out of a grain contract similar to the *Petrol Shipping* case. In the case of *Et Ve Balik Kurumu v. B.N.S. International Sales Corp.* [14], the plaintiff, a state-owned enterprise of the Republic of Turkey, whose responsibilities included the supply of meat

and fish to the Turkish army, entered into a contract for the purchase of lamb. A dispute arose, and the court ruled that the plaintiff's actions constituted commercial activity, which was not protected from the defendant's counterclaim. However, another court, in the case of *Kingdom of Romania v. Guaranty Trust Co.* [14] came to the opposite conclusion. In that case, a foreign state that entered into a contract in the United States to purchase shoes for its army was entitled to the protection of sovereign immunity because the transaction was a public act.

The 1976 Act contains declaratory purposes, which are defined as follows: "The Congress finds that the determination by the courts of the United States of claims by foreign states of immunity from the jurisdiction of such courts will serve the interests of justice and protect the rights of both foreign states and litigants in the United States courts. Under international law, states do not have immunity from the jurisdiction of foreign courts when it comes to their commercial activities, and their commercial property may be seized to enforce judgments rendered against them in connection with their commercial activities. Claims of immunity by foreign states shall henceforth be determined by the courts of the United States and the individual states in accordance with the principles set forth in this chapter" (art. 1602).

When characterizing the US Foreign Sovereign Immunities Act of 1976, one should keep in mind some peculiarities of the American legal system.

The federal structure of this country determines the existence of American law at two levels - the states and the federation. The states that are part of the United States have a fairly broad competence to create their own legislation and their own system of *common law*, which is formed by judges, not by doctrine. The jurisdiction of the courts also depends on their own legislation.

The trend in the evolution of state immunity in the US doctrine and legal practice is to distinguish between a greater number of types of immunity than in other countries, depending on its bearer (federal, state and foreign immunity) and to recognize the historically parallel development of these types of immunity, their perception in doctrine and regulation in practice as a single phenomenon with similar features - superior immunity. Specific injunctive relief varies from state to state. American courts issue orders to seize the defendant's property, as well as issue "disclosure orders", repatriation orders, and orders prohibiting the defendant from engaging in certain activities.

The 1976 law is fully consistent with the American legal doctrine of the "*long arm principle*", according to which any issue in any way (through persons and their property, territory, mere interest of the government, etc.) that affects the interests of the United States is subject to US jurisdiction.

Having common origins, the American legal system differs from English law, in particular in the status of courts in matters of foreign relations, which are dependent on the executive branch, primarily the State Department, as noted by researchers [3; 7; 9].

The U.S. Department of State in the well-known Letter of the Department's Legal Advisor J. Tate to the U.S. Attorney General of May 19, 1952 [2] supported the concept of limited immunity. This Letter, as noted by E.V. Korniychuk, played a "significant role in the development of American law approaches to the immunities of foreign states" [9, p. 21]. J. Tate noted that the United States was increasingly faced with the refusal to grant it immunity by the courts of foreign states, granting them, foreign states, full immunity. Tate offered the following conclusion at the end of the Letter: "Finally, the Department believes that the widespread and increasingly popular practice of engaging in commercial activities by governments makes it necessary to establish a practice that will allow persons doing business with them to enforce their rights in court. Accordingly, from now on, it will be the Department's policy to follow the limited theory of sovereign immunity in considering foreign government claims for sovereign immunity" [2].

Thereafter, the State Department continued to advise the courts on a case-by-case basis to determine whether to extend the immunity. If no guidance was provided in a particular case, the courts would determine whether immunity was appropriate.

In applying the concept of limited state immunity in the United States, certain difficulties arose, complicated by the unique practice that has developed in the consideration of claims for state immunity. Simmons writes: "in lawsuits against foreign states in U.S. courts, a foreign state had the option of either asserting sovereign immunity in court, making a formal diplomatic declaration of sovereign immunity in court, or making a formal diplomatic request to the State Department to "suggest" that the court dismiss the proceedings on the basis of sovereign immunity" [14]. The courts unquestioningly accepted these "suggestions" of the State Department without questioning them.

The US Foreign Sovereign Immunities Act of 1976 defines a foreign state as including "the foreign state itself, its political subdivisions, and their agencies or instrumentalities". The term "political subdivisions" includes "all governmental units subordinate to the central government, including local authorities. An agency or instrumentality of a foreign power is any organization: (1) that has a separate legal existence from the state so that it can sue or be sued in its own name; (2) that is an organ of a foreign power or is majority owned by a foreign power; and (3) that is not a citizen of the United States or organized under the laws of any third country. A foreign legal entity organized under the laws of a third country is presumed to be engaged in private commercial activity and is treated as any private enterprise (§ 1603(a)).

The law on foreign state immunity in the United States provides that states have immunity, but that there may be exceptions to this immunity in certain cases. The 1976 Act provides: a list of these exceptions and the conditions under which they are possible; the procedure for entering into a waiver of immunity and revoking a waiver already made; interpretation of a choice of law agreement concluded between parties, one of which is a foreign state; the form of a waiver of immunity agreement. It qualifies the fact of appearance of a foreign state in a domestic court, defines the procedure for "special treatment", regulates the immunity of a foreign state in connection with the filing of a counterclaim against it, as well as qualifies the activities of a foreign state.

The application of the concept of limited immunity in the United States under the 1976 Act is conditioned by *general exceptions to state immunity*, which foreign states enjoy unconditionally. These exceptions include commercial activities of a foreign state that have a connection with the United States. Under the laws of the United States, as well as the United Kingdom, Canada, Australia, etc., a foreign state is not granted immunity from enforcement actions in respect of property used for commercial (trade) purposes. The 1976 Act provides that "foreign sovereigns shall be immune from the jurisdiction of the courts of the United States except in limited specified circumstances" (§ 1604). In order to bring an action against a foreign sovereign, the case must be brought under one of the exceptions listed in the Act (§ 1605-1607). The Act provides for situations in which a foreign state engaged in commercial activities and establishing a jurisdictional nexus with the United States will not be entitled to immunity.

First, it is a waiver of immunity by a foreign state, directly or indirectly. In other words, a foreign state does not enjoy immunity from the jurisdiction of US and state courts if it has waived its immunity or has taken actions that indicate this, in particular, participates in court proceedings or files a counterclaim.

Secondly, it is a case when a foreign state conducts commercial activities in the United States or activities outside the United States that have a direct impact on the United States.

Third, the situation arises when a foreign state commits an act outside the territory of the United States in connection with a commercial activity and that act has a direct effect in the United States. Thus, when a foreign state engages in commercial activity anywhere and that activity has a "direct effect" in this country, the foreign state may be held liable under the Act. For example, a foreign state's commercial activities abroad, such as price fixing, which have the effect of affecting prices in that country, may result in the foreign state being held liable under the Act. "The concept of 'direct effect' is broadly interpreted to recognize the fact that potential claimants who have suffered harm from such activities have, in practice, no other forum in which to seek judicial review of their claims" [14]. The application of the rule set out in the third situation is perhaps the most controversial aspect of the Law. However, this rule is in line with international practice. Extraterritorial application of the United States laws is most often found in antitrust law. In the case of *United States v. Aluminum Corp. of America* [14], one of the issues before the court was whether the Canadian corporation Aluminum, Ltd. violated the US antitrust laws. Answering this question in the affirmative, the court referred to the legal order: "as a matter of settled law, any state may impose liability, even on persons not subject to its nationality, for acts committed outside its borders" [14]. Thus, a foreign state that engages in commercial activity anywhere in violation of any law of the United States may be held liable in the same way as a private individual if that activity has a "direct effect" in the United States. Under the 1976 Act, a foreign state is liable in the same form and to the same extent as a private person in similar circumstances for any claim for injunctive relief in the United States.

A foreign state also does not enjoy immunity in the following situations: a) if the property was acquired in violation of international law and is located in the United States; b) if the rights to property received as a result of inheritance or gift or rights to real property located in the United States are violated; c) if a claim is filed to enforce an agreement entered into by a foreign state in favor of a private person, which submits to arbitration all or certain disputes that have arisen or may arise between the parties with respect to certain legal relations (§ 1605(a)(1)). There are also other exceptions.

Although the Act does not provide a precise definition of commercial activity, certain activities of a foreign state, such as selling or providing services, renting property, lending money, hiring employees, or investing in U.S. corporations, will clearly constitute commercial activity. In essence, the court "must determine whether the activity is of a private nature, i.e., is carried on by private persons, or whether it is specifically governmental". According to this analysis, the fact that the goods or services that are the subject of the contract will ultimately be used for state purposes by a foreign state is irrelevant. The 1976 Law provides that commercial activity includes either an ongoing course of business or a specific transaction or action: "commercial activity means either the ordinary course of commercial behavior or a specific commercial transaction or act. The commercial character of an activity is determined by reference to the nature of the conduct or specific activity and not by reference to its purpose" (1603, para. 2, subpara. d). At the same time, the decisive criterion for determining the characteristic of a foreign state's action is its nature, not its purpose [7]. When determining the commercial nature of an act of a foreign state, the US courts must establish whether it can be performed by a private person [3]. For example, the U.S. Supreme Court in the *Republic of Argentina v. Weltover* decision concluded that the purpose for which a foreign state carries out its activities is not important for determining the commercial nature, on the contrary, regardless of the purpose pursued by the foreign state, the decisive question for establishing the commercial nature is whether a private person can carry out such activities [12].

The regime of inviolability of state property is closely linked to the international legal doctrine of the "act of the state", according to which the courts of one state should not rule on acts



of the government of another country made on its territory. If a state has acquired property on the basis of an act adopted on its territory, no foreign court has the right to discuss the legitimacy of the property's ownership. Property immunity means that if the property is in the possession of the state that has declared that it belongs to it, no foreign authorities can verify the legitimacy of this fact.

At the same time, there are types of property of a foreign state that are granted full immunity from interim measures and enforcement actions: diplomatic and consular premises and other property of the state used for diplomatic and consular activities of their missions, consulates, special missions, etc. Their immunity is enshrined in the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, the Convention on Special Missions of 1969, the European Convention on Immunities of States of 1972, and the UN Convention on Jurisdictional Immunities of States and Their Property of 2004. The case law of European states (Austria, Spain, Italy, and Germany) confirms that the seizure of funds used for diplomatic purposes is not allowed.

A sharp contrast to the decisions of European courts is the decision of the American court in *Birch Shipping corp v Embassy of Tanzania* (1980) [12], which refused to grant immunity from interim measures to the bank account of the Tanzanian embassy. This account was used to pay expenses necessary to support the embassy's diplomatic activities. In Europe, it would be considered that such expenses were incurred for diplomatic, i.e., sovereign purposes. However, the US court applied the transaction character test set forth in the 1976 US law and recognized that since the contracts paid for from the embassy's account are commercial, the funds are used for commercial purposes. However, this decision is unique in its kind, since in other cases the US courts have recognized the payment of expenses related to diplomatic activities as governmental in nature.

The Foreign Sovereign Immunities Act of 1976 provides for the ownership of central banks, which establishes immunity from liens for central bank funds if they are used to support the functions of that institution, as well as the broad concept of central bank activities accepted by the US courts. Under these conditions, immunity may be granted even if the funds were used for commercial purposes, if it is proved that at the same time such use ensured the functions of the central bank of a foreign country. A similar view is taken by the United Kingdom.

Property used or intended for use in connection with military activities, or which is military in nature, or is under the control of military authorities, is also immune from interim measures and enforcement actions under the 1976 Law.

In 1988 and in 1996, significant amendments were made to the 1976 U.S. law. The amendments concerned traditional cases of exclusion from state immunity (e.g., commercial activities of a foreign state, torts, etc.). They added such cases as a state entering into an arbitration agreement with a private person and the financing of terrorist activities by that state. The 1988 amendment is aimed at expanding the scope of the doctrine of permissible waiver of immunity by entering into an arbitration agreement to the following cases: a) the place of arbitration is the United States; b) the arbitration agreement or award is governed or may be governed by a treaty or other international agreement to which the United States is a party.

In addressing the problem of terrorism, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996. This law amended § 1605 of the Foreign Sovereign Immunities Act by adding new provisions that established a new exception to foreign sovereign immunity. According to these amendments, United States citizens may sue foreign sovereigns for bodily injury resulting from "torture, extrajudicial execution, aerial sabotage, taking of hostages, or provision of material support or services for the commission of such an act, provided that the foreign state is recognized as a state sponsor of terrorism" [17]. Although this wording is very broad, it has several limitations on

its application. The amendment will apply only if a foreign state is designated by the U.S. Department of State as a state sponsor of terrorism. Even if a state is designated as such, courts will deny jurisdiction if the victim was not a U.S. citizen. The importance of this amendment to the 1976 Act is emphasized by Elizabeth Defeis: "The amendment extending jurisdiction to terrorism-related acts is a positive step... The 1996 Anti-Terrorism Amendment opened the door to limiting immunity for unlawful acts" [3].

Recently, the U.S. Supreme Court has issued a number of decisions on various issues of state immunity that have remained unresolved in the U.S. law. For example, in decision in the case of *Republic of Austria v. Altmann* in 2004, the U.S. Supreme Court recognized the retroactive effect of the Foreign Sovereign Immunities Act of 1976, although such effect of the Act had not been recognized before. The position of a defendant seeking to recover funds under a counterclaim against a foreign state was initially unenviable. The defendant in a foreign state's claim could not use any counterclaim. Pursuant to § 1607 of Title IV of the 1976 Act, in any action brought by a foreign state in a United States or state court, the foreign state shall not be immune from any counterclaim.

#### 4 Conclusions

The US law establishes rather strict conditions for preliminary injunctive relief against a foreign state, defines the types of waivers of this type of immunity, and controversially sets forth the requirements of the 1976 Act in relation to the provisions of international treaties concluded by the United States before its adoption. The Act also establishes provisions on the need to enforce judgments against foreign states in the United States.

The US legislation, regarding the evolution of jurisdictional immunity of states, needs to be updated in line with the requirements of the times, in particular, with regard to improving the rules governing exceptions to absolute immunity of states, since the US legislation lacks a general concept for determining which categories of actions of a foreign state are commercial in nature. In order to determine the commercial nature of contracts entered into by the state, it is necessary to take into account their nature, including in some cases the purpose. Legislation also needs to be improved in terms of the uniformity of application of the doctrine of foreign state immunity in the courts of the Federation and the states.

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