

## **EXECUTIVE AND SOVEREIGN IMMUNITY FOR HEADS OF STATES**

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***Abstract:** Over the course of the past few decades, creative government lawyers asserted a variety of privileges and immunities to shield highest executive officials, especially head of the state, from both criminal and civil proceedings. Underlying principle is that King can do no wrong. Critics are of the view that the concept of immunity places executive above the law and is an open invitation to secrecy, corruption, and abuse of power. This article shall go through some aspects of the topic from legal perspectives taken in the USA, India, and UK. This jurisdictional study outlines conditions in which presidents or prime ministers cannot escape litigation and circumstances in which a president/prime minister should be excused absolutely from litigation. The paper concludes that immunity cannot be invoked if alleged act is not official act, but done in private capacity, or is breach of criminal laws of the state; or it is a past act done by present head of state in the past in a different capacity, or is a crime against humanity and comes under international law.*

**Key Words:** Executive immunity, sovereign immunity, head of the state immunity, *Fitzgerald v. Nixon*, *Clinton v. Jones*, *Kasturi Lal Case*, *Jure Gestionis*, *Jure Imperii*.

### **Introduction**

There is an old saying, “You can’t sue city hall.” The reference is that the executive is immune from lawsuits; so don’t bother with litigation. It will just be wastage of time and resources. Cynics have interpreted the concept of immunity as an open invitation to secrecy, corruption, and abuse of power. They argue that by making executive branch officials of a government immune

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from court proceedings, both locally and internationally, the executive is made above the law. Over the years, though, legislative bodies and United Nations organization have passed numerous laws and treaties designed to promote open government and to hold executive officials and heads of state accountable to the other branches of government and to their constituents, and ultimately to the world conscience.

Immunity may be of two types: One, asserted by the executive in the national courts. This is executive immunity and is a privilege. Second, asserted by state for its official in international tribunals. This can be either sovereign or diplomatic immunity. (Both types have same underlying principle that “King can do no wrong.”)

When this immunity is to be invoked? Immunity is a privilege and an extraordinary assertion of power; not to be lightly invoked. Once executive privilege is asserted, other branches of the government are set on a collision course, which places courts in an awkward position of evaluating the executive’s claims of confidentiality and autonomy, and give rise to difficult questions of separation of powers and checks and balances. These occasions for constitutional confrontation between the two branches should be avoided whenever possible.

In order to understand some parameters of executive and sovereign immunity, it may be helpful to look into the state practice of some major jurisdictions of the world. This article shall go through some aspects of the topic from legal perspectives taken in the USA, India, and UK. This jurisdictional study will outline conditions in which presidents or prime ministers cannot escape litigation and circumstances in which a president/prime minister should be excused absolutely from litigation i.e., immunity from the law suits.

Those who seek to remove immunity speak of the *rule of law*. But among the most fundamental rules of law are the principles that those who accuse have the burden of proof and those who are accused have the right to defend themselves by relying on the law, established procedures, and the constitution. These principles are not

*legalisms*, rather the very essence of the *rule of law*. But it is noted many times that immunity creates a ‘petri dish atmosphere’ for violations of civil rights against members, employees, and patrons of state businesses. “Lack of accountability leads to abuse.”<sup>1</sup>

This article begins with an overview of the parameters that some Courts have established regarding sovereign immunity. The article then proceeds to a discussion of how the Courts in various countries have addressed the current administration’s efforts to avoid civil action against the executive by asserting executive immunity based on the separation of powers doctrine.

### **Practice in the US**

Over the course of the past few decades, creative lawyers in the executive branch have asserted a variety of privileges and immunities to shield highest executive officials, the president and vice president of the United States, from both criminal and civil proceedings. The challengers naturally raise important constitutional questions, which the federal courts were often asked to address.<sup>2</sup>

So when exactly can you sue the president of the USA? In the past decades, the task of answering this question has ultimately fallen on the United States Supreme Court. Beginning with the rejection of President Richard Nixon’s claim of executive privilege to prevent discovery in a criminal proceeding, the Supreme Court has offered some broad limits for holding the president in check while at the same time preserving the balance between the three branches of the federal government.<sup>3</sup>

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<sup>1</sup> *Sovereign Immunity Hearing Before the Committee On Indian Affairs United States Senate*, 105<sup>th</sup> Cong. (1998) (testimony of *Craig D. Greenberg, Esq., Attorney - Minneapolis, Minnesota*), accessed February 12, 2012, [http://www.archive.org/stream/sovereignimmunit02unit/sovereignimmunit02unit\\_djvu.txt](http://www.archive.org/stream/sovereignimmunit02unit/sovereignimmunit02unit_djvu.txt).

<sup>2</sup> The Judiciary can resolve constitutional controversies given their power of judicial review. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>3</sup> The employment of the term *executive privilege*, however, only dates back to 1958. The Supreme Court did not address the concept until

Though the Supreme Court failed to provide a definitive answer, it did indicate through some instances that presidents and vice presidents, while not above the law, are certainly entitled to greater deference than anyone else in American society. It also opened the door for executive immunity on the grounds of the separation of powers doctrine.

**Defining Executive Immunity:** In 1974, a unanimous Supreme Court of the USA recognized that presidents are entitled to executive privilege in certain instances that would shield the executive branch from the demands of the legislative and judicial branches of government. In the same case, however, the Court held that presidents could not escape the due process requirements of a criminal proceeding by invoking executive privilege, unless perhaps state secrets were at risk.

In 1990s, President Bill Clinton attempted to use the high court's previous immunity ruling to avoid being sued in civil court for a private action. Again, swinging to the other side, a unanimous Supreme Court rejected the president's claim of executive immunity for all civil actions. If damages were sought for official actions, presidents were granted absolute immunity. This did not, however, excuse presidents from all civil litigation – certainly not if the litigation involved private acts.

***United States v. Nixon:***<sup>4</sup> In 1974, the District Court of the District of Columbia, at the request of the special prosecutor charged with investigating the Watergate break-in, issued a subpoena directing President Richard Nixon to turn over certain tape recordings and documents of conversations involving the president and his aides. The president moved to quash the subpoena, asserting, among other grounds, that the material was protected from disclosure by executive privilege.

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1974, when it was invoked by President Richard Nixon. Similarly, *presidential immunity* was first addressed by the Supreme Court in 1982.

<sup>4</sup> United States v. Nixon, 418 U.S. 683, 686–87 (1974).

In asserting that the subpoena must be quashed for reasons of executive privilege, the president put forth two arguments: First, President Nixon contended that a president's claim of privilege could not be subjected to judicial review because of the separation of powers – in essence, making the president's claim of executive privilege absolute. Second, should executive privilege not be deemed absolute, President Nixon insisted that executive privilege should at least be held to prevail over subpoenas as a matter of law.<sup>5</sup>

After declaring that judiciary, not the executive, ultimately has the authority to interpret the Constitution, the Supreme Court then dismissed the possibility of an absolute privilege: "...neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances..."<sup>6</sup>

Despite rejecting the president's claim of absolute privilege, the Supreme Court was receptive to the president's second argument that protecting confidential presidential communications is a qualified privilege granted to the president by the Constitution: "Nowhere in the Constitution... is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based."<sup>7</sup>

Still, this did not translate into a sufficient enough privilege to trump a subpoena in a criminal matter. (The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.)<sup>8</sup>

The result from the Nixon case was that a general assertion of executive privilege could not be used to shield presidential communications and documents from discovery in a criminal

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<sup>5</sup> *Nixon*, 418 U.S. at 686–87.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, 712–13.

proceeding. As to civil matters, though, the specific guidelines as to when a president could be sued and/or subjected to discovery were not delineated. Still, the Nixon case provided a separation of powers rationale for asserting executive immunity (at least in civil cases).

*Fitzgerald v. Nixon*:<sup>9</sup> The Supreme Court of the USA in this case was called upon to address the question of presidential immunity during the 1981–1982 term, after the Civil Service Commission determined that Air Force whistle-blower, A. Ernest Fitzgerald, lost his job for “reasons purely personal,” a suit was again brought against former President Nixon seeking damages for his official actions in the dismissal. President Nixon again asserted a claim of absolute presidential immunity from civil suit. The District Court for the District of Columbia allowed the suit to proceed, rejecting the former president’s claim. President Nixon appealed. The Court of Appeals for the DC Circuit summarily dismissed the collateral appeal. The issue of immunity sharply divided the Court, with five justices favoring a grant of absolute immunity and four opposing it. Justice Powell wrote:

It is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States. But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the executive branch. When judicial action is needed to serve broad public interests – as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, or to vindicate the public interest in an ongoing criminal prosecution – the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages

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<sup>9</sup> *Fitzgerald v. Nixon*, 457 U.S. 731, 738 (1982).

based on a President's official acts, we hold it is not.<sup>10</sup>

As such, the Court held "the President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress."<sup>11</sup> (Action by congress meant that immunity has to be waived by the executive declaration.)

The Court in this case recognized two pitfalls of executive immunity: 1) it may impose a regrettable cost on individuals whose rights have been violated. 2) It leaves the perception of a "nation without sufficient protection against misconduct on the part of the Chief Executive."<sup>12</sup>

The combination of legal doctrine, executive function, and political safeguards, therefore, convinced a majority of the justices to hold that President Nixon was "entitled to absolute immunity from damages liability predicated on his official acts."<sup>13</sup>

***Clinton v. Jones (1997):***<sup>14</sup> When President Bill Clinton was sued by Paula Jones in the District Court for the Eastern District of Arkansas for sexual harassment that allegedly occurred in 1991, prior to Clinton's election to the presidency, his lawyers drew on Fitzgerald case to argue "that in all but the most exceptional cases the Constitution requires federal courts to defer such litigation until his term ends and that, in any event, respect for the office warrants such a stay."<sup>15</sup>

Court of Appeals for the Eighth Circuit reversed the decision to stay the trial on grounds that it was de facto grant of temporary presidential immunity which was inappropriate in suits involving "unofficial acts." Justice John Paul Stevens wrote:

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Clinton v. Jones, 520 U.S. 681, 684 (1997).

<sup>15</sup> Ibid.

The principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct. The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion...<sup>16</sup>

This reasoning provides no support for immunity for unofficial conduct. As explained in *Fitzgerald*, “the sphere of protected action must be related closely to the immunity’s justifying purposes.”<sup>17</sup> The Court also rejected President Clinton’s separation of powers immunity claim. In sum, it is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States.

If judiciary may severely burden the executive branch by reviewing the legality of the President’s official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct. The court viewed that the burden on the President’s time and energy for coming to court cannot be considered as onerous as the direct burden imposed by constitution and law for his official actions. “We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.”<sup>18</sup>

The Supreme Court also addressed a concern raised by President Clinton that, as a practical matter (as opposed to a constitutional matter), allowing Paula Jones’s lawsuit to proceed

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, 692–93 (citations omitted). The Court made it clear that it categorized the alleged acts of president that provided a cause of action for Jones’s lawsuit to be unofficial acts: “It is perfectly clear that the alleged misconduct of petitioner was unrelated to any of his official duties as President of the United States and, indeed, occurred before he was elected to that office.”

would set a bad precedent that would lead to increased burdensome and/or vexatious lawsuits against the chief executive. The Supreme Court, however, discounted this concern, noting that historically this has not been a problem: “Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant.” And about the time consumed to come to court, it was noted that: “There is no reason to assume that the District Courts will be either unable to accommodate President’s needs or unfaithful to the tradition, especially in matters involving national security, of giving ‘the utmost deference to Presidential responsibilities.’”<sup>19</sup>

With dismissal of President Clinton’s immunity claims and litigation concerns, the Court established that presidents can be sued – especially when the causes of action relate to unofficial acts.

### **National Energy Policy Development Group cases<sup>20</sup>**

During his first weeks in office, President George W. Bush set up the National Energy Policy Developer Group (NEPDG). This task force was established within the Office of the President under the chairmanship of Vice President Dick Cheney. Following the release of the NEPDG’s final report, Judicial Watch and the Sierra Club brought legal action against the NEPDG and the vice president under the Federal Advisory Committee Act (FACA), which requires advisory committees to make all their records available for public inspection. The vice president objected, asserting that the NEPDG was exempt from FACA disclosure requirements because all members appointed to the group were federal government employees.

The vice president filed a motion for a protective order shielding him from discovery on grounds that discovery in this matter would violate the separation of powers doctrine. The District Court denied the motion. Court of Appeals, in a 2–1 decision, deemed the separation of powers argument *premature*, the district

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<sup>19</sup> Ibid.

<sup>20</sup> Judicial Watch v. NEPDG, 219 F. Supp. 2d 20, D.D.C. (2002).

court ordered defendants to produce non-privileged documents and a privilege log.

The Supreme Court had to address a threshold question: is the vice president entitled to the same separation-of-powers immunities as the president? The Supreme Court felt that Nixon was of limited precedential value because it involved a criminal prosecution, whereas the present case involves a civil action. Different nature of each proceeding entails distinct separation of powers concerns.

With regard to criminal matters;

A primary constitutional duty of the judicial branch is to do justice in criminal prosecutions. Withholding materials from a tribunal in an ongoing criminal case, when the information is necessary to the court in carrying out its tasks, conflicts with the function of the courts under Article III. Such an impairment of the essential functions of another branch is impermissible.<sup>21</sup>

In civil litigation matters;

...at the very least, pit the protection of executive branch deliberations and communications against the need for production and disclosure of such information to private parties is to be afforded less protection for it does not hamper another branch's ability to perform its 'essential functions' in quite the same way.<sup>22</sup>

The USA Constitution provides that the President shall be removed from his office only upon "impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."<sup>23</sup> The framers believed that impeachment and

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<sup>21</sup> Ibid., 25.

<sup>22</sup> Ibid.

<sup>23</sup> U.S. Const. art. II, sec 4.

removal were appropriate only for offenses against the system of government. High crimes and misdemeanors refer to nothing short of Presidential actions that are great and dangerous offenses or attempt to subvert the Constitution. Impeachment was never intended to be a remedy for private wrongs. It was intended to be a method of removing a President whose continued presence in the office would cause grave danger to the nation and constitutional system of government. Thus, “in all but the most extreme instances, impeachment should be limited to abuse of public office, not private misconduct unrelated to public office.”<sup>24</sup> Impeachment was designed to be a means of redressing wrongful public conduct. Sen. Lautenberg is of the view: “Our President is amenable to the laws in his private character as a citizen, and in his public character by impeachment.”<sup>25</sup>

If USA Law can hold a president liable for certain activity, what is the standard of that misconduct? It was answered in the following words:

We believe that the misconduct alleged in the report of the Independent Counsel does not cross the threshold. It is clear that members of Congress could violate their constitutional responsibilities if they sought to impeach and remove the President for misconduct, even criminal misconduct, that fell short of the high constitutional standard required for impeachment.<sup>26</sup>

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<sup>24</sup> White House Defense, in, *White House Trial Memorandum*, In the Senate of the United States sitting as a Court of Impeachment, January 13, 1999, accessed February 13, 2012, <http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/whtext011399.htm>.

<sup>25</sup> Statement of Sen. Lautenberg (D-N.J.) in President Clinton’s Impeachment Trial, accessed February 13, 2012, <http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/lautenbergtxt021399.htm>.

<sup>26</sup> *White House Trial Memorandum*.

## **Indian Law Practice:**

The case, which seriously discussed the question of Sovereign Immunity, is the *P & O Steam Navigation Co. v. Secretary of State for India*.<sup>27</sup> In this case a piece of iron funnel carried by some workmen for conducting repairs of government steamer hit the plaintiff horse-driven carriage and got injured. The plaintiffs sued for damage. The plaintiff filed a suit against the Secretary of State for India for the negligence of the servants employed by the Government of India. The Small Causes Court judge decided that the dockyard servants were negligent, though he expressed some doubt as to whether the plaintiff's coachman had not advanced in the manner that was more than absolutely necessary. He stated the case to the Supreme Court. The Supreme Court at Calcutta, speaking through CJ Peacock held that: The Government will be liable for the actions done by its servants while doing non-sovereign functions but it won't be liable for injuries caused while pursuing sovereign functions.

In *Secretary of State V. Hari Bhanji*,<sup>28</sup> the court in India denied any distinction between sovereign and non-sovereign functions and held that where an act is done under the sanction of municipal law and in the exercise of powers conferred by that law, the fact that it is done in the exercise of sovereign function and is not an act which could possibly be done by a private individual does not oust its judiciability.

Supreme Court of India, in *State of Rajasthan v. Mst. Vidyawati*,<sup>29</sup> rejected the appeal by the State of Rajasthan on the ground of sovereign immunity. The Court ruled that the State is liable for the tort or wrongs committed by its officials. In this case, distinction between sovereign and non-sovereign functions was disregarded, but the court observed that the State would not be responsible for the 'Act of State' under Article 300 of the

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<sup>27</sup> The P & O Steam Navigation Co. v. Secretary of State for India, 5 Bom. H.C.R. App. (1861).

<sup>28</sup> ILR 5 Mad. 273 (1882).

<sup>29</sup> S.C. 933, AIR (1962).

Constitution. The Supreme Court, in this case, added that in modern times, the State has welfare and socialistic functions; and the defense of State immunity based on the old feudalistic notions of justice cannot be sustained.

In *Kasturi Lal v. State of U.P.*,<sup>30</sup> the court observed that no civilized system could permit an executive to play with the people of a country and claim to be sovereign. To place the State above the law is unjust and unfair to the citizens. In the modern sense, the distinction between sovereign and non-sovereign functions does not exist. The ratio of *Kasturi Lal* is available to those rare and limited cases where the statutory authority acts as a delegate of such functions for which it cannot be sued in a court of law.

In *N. Nagendra Rao Company v. State of AP*,<sup>31</sup> the court held that the doctrine of sovereign immunity has no relevance in the present day.<sup>32</sup>

### **Practice in the United Kingdom**

The most basic constitutional tenet of British system is that all citizens are equal before law.<sup>33</sup> According to Dicey, "Every official from prime minister to constable or a collector of taxes is under same responsibility for every act done without legal justification as any other citizen."<sup>34</sup>

In Dicey's days, Crown was immune from tortious liability. Today, immunities from general processes have been removed, e.g.,

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<sup>30</sup> S.C. 1039, AIR (1965).

<sup>31</sup> S.C. 2663, AIR (1994).

<sup>32</sup> Rakesh Kumar, *Doctrine of Constitutional Tort: Evolution and Evaluation*, Legal Services India (2004), accessed February 10, 2012, <http://www.legalservicesindia.com/articles/dct.htm>.

<sup>33</sup> Daniel P. Franklin and Michael J. Baun, *Political Culture and Constitutionalism: A Comparative Approach* (New York: M. E. Sharpe, 1995), 5.

<sup>34</sup> Albert Venn Dicey, *Introduction to the study of the law of the constitution*, (New York: Macmillan, 1885), 193.

Britain passed Crown Proceedings Act 1947.<sup>35</sup> However, section 40(2) of the Crown Proceedings Act still preserves Crown immunity concept in order to allow the government to function smoothly for its state business. The Crown in the past benefited from the immunity for any of its acts by invoking public interest defense. However, in 1968, the House of Lords held the power of the court to review, and in appropriate cases, even to set aside objection of the executive to disclosure.<sup>36</sup> Then in *Rogers v. Home Secretary*,<sup>37</sup> crown privilege was interpreted to be qualified protection to the documents of state importance. The court held that it is for courts to balance any such Crown interest against the state or public interest in the due administration of justice. In coming to this decision, the court also held that court must also ensure right to fair trial.<sup>38</sup>

The government's abuse of public interest immunity has on occasions caused deep controversy. For example, in 1990s, evidence was tried to be withheld in criminal trials of the directors of the companies that had been engaged in covert trading with Saddam Hussein. The defendants had contended that such business was conducted by them with full knowledge and encouragement of British intelligence MI6. This led to setting up of Scott Inquiry Commission. Various means have been adopted for securing conformity by Crown bodies about activities with general standards and requirements imposed by statutes.

The recent tendency of legislation has been to remove or restrict Crown immunity from statutory duties.<sup>39</sup> The government policy has been affirmed to ensure that government departments are "not shielded from obligations placed upon others."<sup>40</sup> The Crown

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<sup>35</sup> Colin C. Turpin and Adam Tomkins, *British Government and the Constitution: Text, Cases and Materials* (Cambridge: Cambridge University Press, 2007), 89.

<sup>36</sup> *Conway v. Rimmer*, AC 910 (1968).

<sup>37</sup> *Rogers v. Home Secretary*, AC 388 (1973).

<sup>38</sup> *Ibid.*

<sup>39</sup> National Health Service and Community Care Act 1990, Sec. 60 removed immunity from National Health Service bodies.

<sup>40</sup> Turpin and Tomkins, *British Government*, 353.

Proceedings Act 1947 was in fact made to make it easier to proceed against the Crown.<sup>41</sup> The Act has reformed the law of immunity, removing most of the disabilities of the litigants. For example, section 21 (1) of Crown Proceedings Act 1947 provides for award of money whether debt or damages. The court can pass the order and the relevant government department will take necessary action for payment.<sup>42</sup>

Under section 2 (1) of the Crown Proceeding Act, Crown can be liable for tort to the same extent as if it were a private person of full age and capacity. One interesting case was *Woolwich Equitable Building Society v. Inland Revenue Commissioners 1993*.<sup>43</sup> House of Lords was concerned with application of Common Law principle of restitution to the circumstances of payment in response to an unlawful demand of taxation from the Crown. Lord Goff of Chievely said that taxpayer is convinced that demand is unlawful and has to decide what to do. It is faced with revenue armed with coercive power of state. The company fears damage to its reputation if it does not pay. So it decides to pay first and asserting that it will challenge the lawfulness of the demand in litigation. Now Woolwich has won the litigation and revenue asserts that it was never under any obligation to repay the money and that it in fact paid only in grace. The court held that money paid by the citizen to the public authority in form of taxes was paid pursuant to ultra vires demand by the authority and is prima facie recoverable by the citizen as of right.<sup>44</sup>

### **International Law of Immunity**

Historically heads of state, like states themselves, were absolutely immune for acts committed either in public or private capacity; and many countries felt no need to distinguish between

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<sup>41</sup> Ibid., 703.

<sup>42</sup> Crown Proceedings Act 1947, sec. 25.

<sup>43</sup> *Woolwich Equitable Building Society v. Inland Revenue Commissioners*, AC 70 HL (1993).

<sup>44</sup> Ibid.

heads of state immunity and state sovereign immunity. But now international community has moved towards a restrictive form of immunity, stripping away state's immunity of private or commercial acts.<sup>45</sup> The main criticism was that a strong head of state immunity doctrine would prevent states from bringing some violators of the most serious international crimes to justice, a consequence that seemed at odds with the international community's ever-increasing focus on protecting fundamental human rights.<sup>46</sup> States consented to accept some limitations on their sovereignty to ensure more accountability for violations of these basic norms. Motivated by the desire for accountability, many state policymakers weighing the benefits of immunity against the interests of justice, decided it would be best to whittle away at the shield of immunity historically enjoyed by heads of state.<sup>47</sup>

Recent state practice has drawn a sharp distinction between former heads of state and current heads of state, as courts across the world have been much more willing to subject former leaders to their jurisdiction.<sup>48</sup> After British authorities arrested former Chilean dictator, Augusto Pinochet, on an international arrest warrant issued by Spain, Pinochet, who had traveled to London for back surgery, attempted to resist extradition based on his status as a former head of state. The British Law Lords denied him immunity for acts of torture committed after 1988, when the Torture Convention came into effect in the United Kingdom.

Even though the ruling was decided on narrow grounds, for most scholars it sounded the death knell for head of state immunity for international crimes with respect to *former* heads of state, even

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<sup>45</sup> Michael A. Tunks, "Diplomats or Defendants? Defining the Future of Head-of-State Immunity," *Duke law journal* (2002).

<sup>46</sup> Hari M. Osofsky, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice* (YALE: L.J., 1997), 107. "...for human rights protections to have any real meaning, they must be enforced; if violators escape punishment, the prohibitions are merely declaratory."

<sup>47</sup> *Lafontant v. Aristide*, 844 F.Supp. 128 (1994).

<sup>48</sup> *Regina v. Bow St. Metro, Stipendary Magistrate* (2000).

when the crimes were perpetrated while the leader was in office. While former heads of state still retain immunity for the *official* acts they committed while in power, they enjoy no protection for their international crimes; because such serious abuses cannot fall within the scope of a head of state's legitimate functions.<sup>49</sup> Even though Pinochet served as a head of state at the time, international law deems acts of torture so far outside the bounds of legitimate state action that he must be considered a 'private actor' with respect to such conduct. Crimes against humanity, torture, and other international crimes are outside the scope of what can be considered a state's official public functions, seeking accountability for these acts does not infringe on a state's sovereignty, or at least not to outweigh the benefits of stronger human rights enforcement. This is exactly the rationale that led to the adoption of restrictive sovereign immunity for states.

***Jure Gestionis and Jure Imperii Acts:*** Since 1952, the development of immunity in many nations adopted the "Restrictive Theory of Sovereign Immunity" according to which the *public acts* (*Jure Imperii*) of a foreign state are entitled to immunity, while the *private acts* (*Jure Gestionis*) are not. Public and official duties are *jure imperii* while commercial activity of the state is now considered *gestionis* act in order to hold governments liable for financial liabilities internationally in trade transactions. Now UN Convention on Jurisdictional Immunities of states 2004 serves as a parameter for claiming sovereign immunity in foreign courts. The convention is not yet effective but has been signed by many countries. The convention accepts the principle that a state cannot invoke immunity is commercial transaction acts done by its organs or officials.

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<sup>49</sup> Majority of the Law Lords in the *Pinochet* case found that acts performed by state officials under the color of state law are not necessarily state acts when the conduct violates international law.

## **Immunity for Sitting Heads of State**

Some state practices suggest abrogating immunity even for sitting world leaders, at least for the most serious international offenses.<sup>50</sup> The Rome Statute of the International Criminal Court (Rome Statute) lent even more force to the argument that sitting head of state immunity was eroding under customary international law. The Rome Statute explicitly denies immunity to heads of state, declaring that “official capacity as a Head of State or Government... shall in no case exempt a person from criminal responsibility under this Statute.”<sup>51</sup> But Statutes do not change the principle that no head of state may be put on trial without the consent of his home country. And no country as yet has passed any judgment against any sitting head of state.

In *Yerodia Case*<sup>52</sup> the ICJ observed that the only exceptions to a head of state’s immunity under international law are: 1) that a head of state is not immune under international law from process in his own country; 2) likewise, a head of state’s home country may waive his immunity in foreign courts; 3) a former head of state is not immune for acts committed before or after his period in office or for private acts (including international crimes) committed while in office; and 4) a head of state enjoys no immunity when that immunity has been validly abrogated by an international tribunal.

A head of state is not immune under international law in the courts of his own nation, and a nation may waive the immunity of its own head of state, therefore, that state may be able to delegate its jurisdiction over its own head of state to the ICC, or alternatively, waive the head of state’s immunity in advance. However, no other country has jurisdiction over a third party’s head of state, and consequently, no two states (or group of states) may agree by treaty

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<sup>50</sup> “Cuban Exiles Act Against Castro,” CNN.com., October 4, 2001, accessed February, 09, 2012, <http://edition.cnn.com/2001/WORLD/europe/10/04/belgium.castro/>.

<sup>51</sup> Rome Statute of the International Criminal Court, art. 27.

<sup>52</sup> *Congo v. Belgium*, 41 I.L.M. 536, 541 (2002).

to waive the immunity of a third party's head of state without that other nation's consent.

## **Conclusion**

So returning to this article's initial question, can you sue the head of a state? Well, unless one is seeking civil damages in local court from the president for official actions, the answer is most likely *yes*. But just because one can bring a suit against the president does not mean that the case will result in a judgment. Presidents have privileges and immunities that might shield them from different types of litigation. Practices in different states are as follows:

- ✓ In USA, bribery or criminal behavior has no constitutional immunity.
- ✓ In UK Ultra Vires acts of government are not immune. State Immunity Act of 1978 was passed in UK that also included commercial transactions as an exception to the rule of sovereign immunity. Section 3(3) of the Act defines commercial transactions to include loan or other transaction for the provision of finance or guarantee.
- ✓ In India Immunity is a feudal notion according to *Kasturi Lal Case*, and there should be no distinction of sovereign and non sovereign acts when it comes to state duties. In 1994, the Supreme Court blurred the distinction between sovereign and non sovereign functions; and stated that in the modern age, the state should not be allowed to claim immunity for its actions barring defense, foreign affairs, etc.<sup>53</sup> But it fell short of overruling the theory of primary and inalienable functions. Since the Indian government has not reacted in kind and codified the ruling of the Supreme Court, determination of sovereign immunity is still done on a case to case basis.
- ✓ Under international Law, unofficial acts of government officials and very serious crimes like crimes against humanity have

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<sup>53</sup> Nagendra Rao v. State of AP, AIR SC 2663 (1994).

no immunity. Corruption has been now held to be a very serious crime under international Law.

- ✓ United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 has Article 4 on “non-retroactivity of immunity that says:

Without prejudice to the application of any rules set forth in the present Convention to which jurisdictional immunities of States and their property are subject under international law independently of the present Convention, the present Convention shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the present Convention for the States concerned.<sup>54</sup>

So as an analogy, can a case instituted prior to a person becoming head of state be stopped on basis of his new immune status? May be not. But at the same time, Article 13 of the same UN convention is about non availability of immunity in case of ownership, possession, and use of property of a state:

“Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the determination of: a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; b) any right or interest of the

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<sup>54</sup> Roger O’Keefe and Christian Tams, *The United Nations Convention on Jurisdictional Immunities of States and their property*, (Oxford: Oxford University Press, 2012), 425.

State in movable or immovable property arising by way of succession, gift, or bona vacantia...”<sup>55</sup>

Immunity is a privilege, not a power held by any leader. It is important to remember that the head of state immunity doctrine does not give sitting heads of state the power to act outside the law. Instead, it places procedural restrictions on *when* other states are permitted to bring them to justice. As the ICJ emphasized that jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

Once a foreign leader who has committed international crimes leaves office or is forced from power, he no longer enjoys the protections of head of state immunity for those crimes under international or national law. Immunity is not retrospective. It is only about a procedural matter, i.e., does court have jurisdiction? Not about whether an act was committed or not or is a crime or not. What needs to be settled is to hold sitting head of state liable for his past, private, and unofficial conduct without hampering his present official duties and status. Can he attend a court and fight out a case while remaining head of state? From all the above case law discussion it seems it is not impossible.

King can still do no wrong, but if act complained of: is not official act, but done in private capacity, or is breach of criminal laws of the state; or it is a past act done by present head of state in the past in a different capacity (*Clinton v. Jones*). Then a present head's schedules can be adjusted by the court to allow smooth functioning of government, especially when a country has British form of Government where president is only ceremonial head of state, not a busy prime minister.

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<sup>55</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, 4, accessed February 09, 2012, [http://untreaty.un.org/ilc/texts/instruments/english/conventions/4\\_1\\_2\\_004.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2_004.pdf).

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