https://doi.org/10.22364/jvzl.09.06

FROM HARMONY TO UNISON: THE EVOLUTION OF DIPLOMATIC IMMUNITIES (1814–1964)

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ABSTRACT

Diplomatic immunities are still in debate today after more than 1000 years of existence even after they have been codified by the international community in 1964. This article aims to provide an overview on the evolutions of one of the key juridical tools in international relations to better understand the rise of contemporary international law. Our sources and studies show that those unique tools, even if they always had significance, also suffered from a lack of theoretical basis that created a dichotomy between doctrine and practice. Therefore, although has a strong political importance, the evolution of the concept shows a logical pattern in the history of law that can only be explained through a cross-analysis of law and history.

Keywords: ambassadors, diplomacy, immunities, history of law, international law.

INTRODUCTION

Even if traces of message protection can be traced back to ancient Mesopotamia with the sanctity of the messenger under the protection of the gods (Sasson 1995, 1465), diplomatic immunities and privileges as a juridical tool have only emerged after the birth of residential diplomacy. Indeed, to put aside all divine protection that existed prior and during the Middle Ages, diplomats were often close relatives, and even familiars of the ruler. Their ranks would offer them privileges that could justify a good treatment and honours from their host while delivering the messages. When they were not of high birth, they were often scholars or priests that could be respected as a consequence of their knowledge and moral influence.

Their protection was sometimes political, but mostly moral. It can be linked to the fact that they were only messengers, their safety was considered as an accessory to the message they were carrying (Mattingly 1955, 21). "Going to embassy" only meant travelling on an official matter and their statute was therefore exceptional.

With the birth of "residential diplomacy" in Italy during the 15th century, the definition of an envoy changed (Moeglin 2010, 15). Ambassadors were now supposed to remain on the land of their receiving state permanently and became a constant source of information while representing their country of origin. Therefore, a stronger shield than their ranks was needed, and this would take the form of a true juridical statute established as a custom between nations. It became even more pronounced with the Reform, when diplomats were used as "trade money" in time of religious wars. Hence, the birth of the privileges and immunities of diplomats – a juridical tool that could prevent them from being harmed but also shielded local populations from their extensive powers.

Between the 15th and 16th century, an extensive amounts of literature about their whereabouts was written in Europe. Most of the major authors and jurists that participated in the rise of international law mentioned the particular situation of ambassadors. By compiling their views, it is obvious there are as many theories as writers. Under their quills, they are both "keepers of the peace amongst men" (Gilli 2015) and "voice of their masters" (Bouvet 1493, 23). We also learn that they cannot reasonably be treated as subjects of the local laws (Adair 1929, 17), it is the Gordian knot of the juridic claims against them. They are immune to law. This peculiar situation created a wave of indignation amongst scholars, as some considered this to be an impunity more than an immunity. Of course, this does not mean that ambassadors can violate local laws, but it has been and still remains difficult to obtain justice against such a representative to the common man's eye. Therefore, a dichotomy undeniably exists between theory and practice.

THE ESSENCE OF DIPLOMATIC IMMUNITIES AND PRIVILEGES

Inviolability is one of the oldest parts of diplomatic immunities and privileges. "No harm can be done to any messenger" (Vallecalle 1994, 633). is even written in "La chanson de Roland", the French epic poem of the 11th century. A certain type of inviolability can be traced even before, in the Roman Empire, but it was closely related to a divine protection (Auliard 1992, 15). In the modern view, inviolability is the most obvious

protection and the authors never argue about this principle. However, until the rise of permanent embassies, this inviolability was linked to the message. Therefore, after it was delivered, the messenger was no longer protected. A lot of chronicles report acts of gratuitous violence against papal envoys after delivering their messages (Moeglin 2010, 28). By itself, inviolability cannot be considered as efficient. It is common to consider that harming another man is a last resort, but while it was the only protection for diplomats until the end of the 16th century international relations were considered "insubstantial, chaotic and even absurd" (Mattingly 1955, 47).

The immunity of jurisdiction is the most discussed of the protections in modern times. An ambassador is always considered outside the range of the local jurisdictions. It concerns both criminal and civil jurisdictions, but also every measure of "simple police" that could be taken towards him. For instance, an ambassador is virtually immune to any debtor. In the 16th and 17th centuries, court life was dispendious, and debts were often necessary to maintain an embassy. Therefore, Antonio de Vera pragmatically dedicated a whole chapter of his treaty to "why an ambassador must be rich" (De Vera 1642, 13). Bynkershoek wrote *De Foro competenti Legatorum* when the Dutch civil court arrested the ambassador of the Duke of Holstein and ceased his belongings in the United provinces. To the problem, two solutions are proposed: De Vera thought that the only solution was to prevent ambassadors from signing any contracts. Bynkershoek, being more practical, considered that the only real way to punish an ambassador was to send him back to his birth country in the hope that he would be judged there (Bynkershoek 1723, 138).

Other privileges are also present due to the function of ambassadors. They are considered minor by a lot of authors but are still feared and respected even in countries known for their disrespect of international law. Ambassadors are free in their movements, cannot be called for testimony, have the sanctity of their personal homes and belongings, can hoist their flag, practice their religion. This also applies to buildings, as embassies benefit from a particular statute when rented or bought by different countries. Some authors consider these privileges as "simple courtesy amongst nations" (Yeh 1938, 18) but denying all juridicity to a protection makes it less consistent and leads to some "necessary evil" (Barker 1996, 1).

THE THEORIES AROUND IMMUNITIES AND PRIVILEGES

Various answers were proposed to ensure the application of diplomatic privileges and immunities. However, our sources show that even to this day there is a surprising lack of basis over the concept most of the time,

it is only considered as a "usage amongst nations" (Vienna Convention on Diplomatic Relations, 1961). In practice, this lack of basis led to a lot of variations in the application of diplomatic privileges. Two of the main theories will be noted here due to their significance in the further attempts for codification.

- The Theory of Exterritoriality is known to have been popularized by the Dutch jurist Hugo Grotius. Most modern authors consider that his attempt to create a juridical basis to immunities is the starting point of the inflation of literature about the topic. Interestingly, he only mentions it in a chapter that seems insufficient and his words "a sort of juridical fiction" (Grotius 1724, 540) are not convincing. However, he is the first to consider immunities as a juridical object and not a political one, and even if he is uneasy with the concept, his followers like Cornelius Van Bynkershoek, even in case of disagreement will keep the focus on this juridical aspect.
- The Theory of the Functional Independence or *ne impediatur legatio* is mainly developed by one of Grotius' contemporary authors Cornelius van Bynkershoek. This theory is peculiarly interesting. Indeed, in a juridical way, this theory makes the ambassador more of a function than a person. Therefore, all his privileges are linked to his function. With the development of international relations, the acceleration of movements and the loss of importance of the birth privileges of diplomats in the 19th century, this theory would prove useful in the first works of preparation of a potential international codification.

THE IMMUNITIES AND PRIVILEGES IN THE CONGRESS OF VIENNA (1814)

The congress of Vienna, which took place following the Napoleonic Wars in 1814, regrouped all of Europe around a common objective: redesign the equilibrium of powers on the continent. Of course, diplomatic privileges and immunities were not the first goal of this encounter but with more than 200 princes, 15 royals and 216 diplomats, all participants soon realized that diplomacy needed a change to be effective (Malet 1929, 404). There was a true dichotomy between a strict codified order of diplomacy and a practical impossibility. It led to a sort of "new diplomacy", where ambassadors played around the heavy protocol and ceremonial order. No plenary sessions were organized and political issues were more frequently settled during balls and dinners than under the spotlights of Vienna. Most of the juridical work done during the congress was divided amongst commissions, one of them working exclusively on a reform of the order of precedence in

diplomacy. They managed to create a simplified order of diplomats, thereby drastically reducing the number of recipients of diplomatic immunities and privileges.

From a practical perspective, even if immunities *per se* were not mentioned in the final act of the convention, we believe that the congress of Vienna was a breach in the rigid statute of diplomats. During the congress, a new kind of diplomacy appeared, more secretive and discreet, but also more efficient, as it was now free of all the weight of protocol. Women could take part in negotiations and small nations could finally be heard in discussions. The public opinion shifted forever, and diplomats were far from being seen as keepers of peace (Blier 2010). The congress was for ambassadors, as much a progress as a failure, making the opinion shift into modern times before diplomats themselves could even change. It silently marked their entry into modernity (Nicolson 1947, 219).

THE 19TH CENTURY FOR DIPLOMATS

Never before time had accelerated as fast as in the 19th century. For diplomats, it is almost a change of nature that happened. Indeed, they entered the century with the Congress of Vienna and ended it with the negotiations over World War I.

No major conflicts impacted the role of diplomats as much as the Congress of Vienna, and a sort of *status quo* developed. Immunities and privileges were impacted, however, by the technological advancements of the century, as messages could be sent faster, they had to specialize more and more to keep their power as a source of information. As Europe ceased being the centre of the world, and republics went from exception to norm, they also fundamentally changed their way of representation. From an embodiment of a ruler, they became an embodiment of a whole nation and could therefore be judged, at least morally, by entire populations that began acquiring education and reading the press. By the end of the 19th century, law specialists realized that diplomats were no longer only a function assumed by nobility, but slowly transformed into a real profession that needed to be clarified and, moreover, regulated.

In 1884, a society of jurists was reunited in Geneva under the patronage of the Institute of International Law. This institute was created with the objective of promoting peace and preventing by law any source of conflict in the future. They thought that this goal could be achieved only by codifying some parts of international law. In one of their first sessions, they noted that codifying international immunities and privileges would be a way to prevent any future conflict (Annuaire de l'institut de droit international,

Vol. 7, 690). At their Geneva session in 1892, the members of the institute argued fiercely against one another on various topics. One of the most surprising is that they often were not sure about the very definition of some fundamental terms like "exterritoriality" (AIDI, Vol. 7, 693). Some of them, the "Italian school" even stood against diplomatic immunities, judging the world to be sufficiently developed to leave behind such old methods (AIDI, Vol. 7, 690). Interestingly, even after all those debates the term "exterritoriality" was retained in the final draft of this project while being emptied of all the substance that could make it a core concept. It was only kept as the best meaning for lack of a better word, and one of the members of this commission, Ernest Lehr, later published a pamphlet judging their approach too "conservative" and therefore, useless (Lehr 1905).

According to the theory of solidarity, we can understand that their goal was to achieve "peace by the law". It was a common trend among jurists at the time to think that society was prone to deliver itself from its ancient political shackles by strict rules that could be applied internationally. The main issue that stayed open was to know how far a group of jurists could push the law while keeping content the public opinion of so many different nations. It naturally led to a lack of boldness, but even if some projects of codification were successful later, like the Treaty of Havana, it never concerned as much states as the original draft of 1884, or the aborted project of the Society of Nations.

THE 20TH CENTURY AND THE CODIFICATION ERA

In 1903, ambassadors protested against a new tax created by the city of Paris in order to finance the cleaning of every domestic waste. This tax was created after the suppression of another one that used to be applied on alcoholic beverages in Paris from which ambassadors had been exempted since 1810. The Council of Paris, when publishing the new tax, omitted to mention the ambassadors. They already were exempted from taxes on all buildings, and legislators thought it was natural not to include them in the new one (Barthélémy 1906, 4). This lack of mention led to a juridical battle that took more than five years to settle.

Interestingly, the Council of Paris never contested the exemption of taxes granted to ambassadors. For them, it was natural that this mechanism should exist. Only the basis of this acceptance was discussed. Indeed, an exemption from the city of Paris could only have been perceived in two different ways and was either "an international courtesy", as the city was arguing (Barthélémy 1906, 5) or a "rightful privilege", as the diplomats wanted. The proportions of this incident were so serious that even

the Minister of Foreign Affairs and the Minister of Finance had to intervene. In the end, after a lot of conflictual exchanges, the rapporteur of the municipal council stated that "the issue stays fully open on a theoretical point of view" (Barthélémy 1906, 6).

After World War I, a lot of different cases on the same topic were debated in courts all around Europe and worldwide. Ambassadors had, once more, to change their position and become technicians. It happened partly because they were held responsible for the failure of negotiations leading to the Great War but also, in a way, because they lost their significance in a lot of fields (Martin 1996, 16). The League of Nations included diplomatic immunities and privileges in their matters to be codified but a committee of experts declared after negotiations that diplomatic privileges and immunities were not to be codified under their supervision but could eventually be codified, – in the future (R1292/19/47229/47229). This decision seems surprising, especially when 25 years earlier, some authors were ready to suppress them entirely. Nevertheless, it shows that the fading of heavy protocol and the democratization of international relations were already leading the way into a possible codification of the matter.

It is only after the devastating World War II that diplomatic privileges and immunities came to a closure with their "international custom" origin and became codified during the Convention of Vienna on diplomatic privileges and immunities in 1962. From a theoretical point of view, this conference had a considerable effect on the status of diplomats. The committee managed to actualize *ne impediatur legatio*, a theory from Bynkershoek and adapt it to modern times, putting an end to the conflict between the extraterritoriality and functional independence partisans, naming this third way "the interest of the function" (FRMAE10INVA413/TER-413/11). As Philippe Cahier wrote just after the convention: "The convention arrived just on time because of the Cold War and the multiple expulsion of diplomats between September and October 1961, it fixed the usages and permitted the new little states to participate" (Cahier 1964, 327).

Of course, this needs to be tempered, as diplomatic immunities and privileges suffered immensely during the Cold War, and a quick glimpse into the diplomatic archives of France shows an inequality of treatment towards the Eastern bloc that was kept secret (FRMAE123SUP/157/303BIS). Meanwhile, the issue is even more present when looking at the complicated geopolitical situations. For instance, the French government recognized M. Oļģerds Grosvalds as an envoy of Latvia in 1934. After the annexation of Latvia by USSR, the government considered the latter was no longer an envoy for the Republic of Latvia, as his state no longer had a physical territory (Škapars 2005, 377). It is, *per se*, a violation of *jus gentium*, as the Latvian state was recognized by France and therefore should have

an embassy. However, this situation can be explained via the concept of reciprocity in the international custom. In our opinion, this is a denial of international law. If protection and recognition can only rely upon the ambassador of the receiving country being treated equally in the opposing one, it is a setback in international relations. It marks a lack of trust that could be interpreted as an international *Ius Talionis*. Only strong states can be heard when new states are silent in the concert of nations. That is why law and the analysis of history in this field is fundamental. The objective of the international community is, undeniably, peace. As George Scelle, a French internationalist wrote in the 1930: "peace can only be achieved in the international community with law and solidarity" (Scelle 2008, 10).

CONCLUSIONS

Diplomatic immunities and privileges are by essence a matter that can only be explained through history. All the principles applied to this mechanism today date as far back as the 15th century. Nonetheless, this institutional mechanism proves to be a unique paradox in the history of international law. Firstly, because of its longevity as a functioning tool of law. Secondly, because it has changed over the time but never disappeared. Even the French revolutionaries on the night of 4 August 1789 did not dare to exterminate the diplomatic privileges (BB/18/1069-BB/18/1226). This study illustrates the dichotomy between doctrine and practice, revealing that theories which are considered outdated by jurists have been unearthed in multiple occurrences when in need of a codification. It is also important to defend the juridicity of such a concept, because seeing it only as a political tool can lead to dangerous setback in international relationships. The long history of diplomatic immunities is not over, therefore the codification does not put an end to the claims but the Diplomatic Archive of France, especially the Protocolar Section, shows a progressive harmonization in the international custom that can be interpreted as "unison" in the concert of nations.

ACKNOWLEDGEMENT

I would like to express my heartfelt gratitude to Ms. Zanda Grauze and Mr. Eduards Stiprais for their expertise and insightful discussions. Without them, this study would not have been possible.

Likewise, my gratitude to Gisèle Moreau for her insight on this specific topic.

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NO SASKAŅAS LĪDZ VIENBALSĪBAI: DIPLOMĀTISKĀS IMUNITĀTES EVOLŪCIJA, 1814–1964

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ANOTĀCIJA

Jautājums par diplomātisko imunitāti mūsdienās joprojām tiek apspriests arī pēc vairāk nekā 1000 gadu pastāvēšanas, pat pēc tam, kad starptautiskā sabiedrība to kodificēja 1964. gadā. Šī raksta mērķis ir sniegt pārskatu par šī svarīgā juridiskā rīka attīstību starptautiskajās attiecībās, lai labāk izprastu mūsdienu starptautisko tiesību uzplaukumu. Avoti un pētījumi liecina, ka diplomātiskajai imunitātei, pat ja tai bija nozīme, vienmēr trūka teorētiskā pamata, radot dihotomiju starp doktrīnu un praksi. Tādēļ, pat ja šim jautājumam ir liela politiskā nozīme, jēdziena attīstība parāda loģisku tiesību vēstures modeli, ko var atspoguļot tikai kopīga tiesību un vēstures analīze.

Atslēgvārdi: vēstnieki, diplomātija, imunitātes, tiesību vēsture, starptautiskais likums.

Kopsavilkums

Par diplomātiskajām privilēģijām un imunitātēm pētnieki diskutē arī mūsdienās pat pēc tam, kad starptautiskā sabiedrība tās kodificēja 1964. gadā. Šī raksta mērķis ir izskaidrot faktu, ka diplomātiskās imunitātes, pat ja trūkst pietiekama teorētiskā pamata, ir attīstījušās savdabīgā virzienā, ievērojot loģiku. Šo loģiku var izskaidrot tikai ar daudznozaru pieeju, izmantojot mūsdienu arhīvus un teorijas, kuras lielākā daļa juristu uzskata par novecojušām. Vēsture, socioloģija un tiesības rāda, ka jēdziens nav iecirsts akmenī pēc tā kodifikācijas un izstrādātā juridiskā teorija par paražām, pat ja tās ir senas, var tikt piemērota mūsdienu parādību izskaidrošanai. Pētījums, izmantojot diplomātiskos arhīvus, pirmkārt, liecināja par izpratnes trūkumu starp doktrīnu un praksi, bet arī par dziļu juristu nepieciešamību saprast principu, kas bija kā ieradums bez spēcīga teorētiskā pamata. Bieži vien viņi noliedza koncepta likumību, lai varētu to labāk izskaidrot vai iekļaut to savā domāšanas sistēmā. No otras puses, vēsturnieki savos pētījumos mēdz pievērsties vēstnieka figūrai un tās politiskajai nozīmei, taču bieži vien neapsver šo personu mijiedarbību ar vietējo likumu un īpaši to, kā dažas viņu politiskās darbības var izskaidrot ar viņu juridisko statūtu palīdzību. Tāpēc mūsu mērķis ir apvienot šos divus uzskatus, lai labāk izprastu tādas juridiskās koncepcijas attīstību, kas ir cieši saistīta ar ļoti politisku funkciju.