eudaimonia

Journal for Legal, Political and Social Theory and Philosophy

No. 5 • 2021.

Published by

IVR SERBIA

Journal for Legal, Political and Social Theory and Philosophy

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Pages: 165–179

UDK 341:340.132.6

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DEFINING SOVEREIGN ASSETS FOR IMMUNITY FROM EXECUTION: INTERNATIONAL RULE OF LAW VERSUS INTERNATIONAL LAW-BASED RULE OF LAW

Sovereign assets receive restrictive sovereign immunity based on their purpose and/or use for execution of States' commercial liabilities. The forum States' courts decide the question of immunity of these assets. Due to lack of effective international conventions, these judgements result at inconsistent outcomes. Rule of law can be applied to mitigate this inconsistency. However, the objectives of rule of law vary for the national and the international legal order. Moreover, the divergence in group-interests of States and mandate of international organizations have failed to agree on a uniform definition of international rule of law. Thereby, this paper suggests international law-based rule of law as an alternative approach. International law-based rule of law aims at achieving the same objectives as domestic legal order, but, by the tools of international laws. Finally, it proposes to develop an inter-States consensus-based model law to have uniform principles of sovereign assets' immunity in international law.

Key words: *Foreign Sovereign Assets, International Law-based Rule of Law, International Rule of Law, Sovereign Immunity, Immunity from Execution.*

1. INTRODUCTION

In the case of *AF-CAP INC. v. the Republic of Congo*,[1] the Republic of Congo defaulted on its debt payment. The debt was secured with a hypothecation of its assets irrespective of the location along with its contractual waiver of sovereign immunity from jurisdiction and execu-

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[1] Af-Cap Inc. versus The Republic of Congo, CMS Oil and Gas Co.; et al., Garnishee and CMS Nomeco Congo Inc., The Nuevo Congo Co., Nuevo Congo Ltd., Garnishees, 383 F.3d 361 (5th Cir. 2004)

tion. Pursuant to a judgment from an English court in London, the enforcement litigation was filed in the New York State Court (NYSC). The NYSC gave *ex-parte* attachment order of USD 13,628,340.11 against any assets of Congo „of any nature, irrespective of the use or intended use of such property ... including any ... payments or obligations due to the Congo from any oil and gas exploration and development companies....” In 2001, the NYSC judgement was registered in Texas court for garnishment action[2] against certain private US companies. These US companies had contract with the Republic of Congo for extraction of oil in Congo upon paying taxes in cash or in kind. The State court in Texas dismissed the suit, as the taxes and royalties asked for garnishment were public assets of Congo. Congo, in exercise of its fiscal sovereignty, assigned the US companies for extraction of oil and receive payment in return. Nevertheless, the US Federal Court remanded the case for determination of factual question of „*use of property*” instead of '*nature of property*' as Congo used these assets once to pay its debt after default with a commercial entity.

The legal basis of this case is rooted in the international law for the question of foreign sovereign immunity. The inherent nature of sovereignty granted the immunity to the foreign State party from proceeding before any national court. Nevertheless, such absolute sovereign immunity is no longer available for private acts of States. This practice of restrictive sovereign immunity opens the door of the third States' courts against any sovereign entity for their commercial contracts. The private claimants start the proceeding either with the litigation or arbitration as agreed in the contract in question, and once get the award or judgment in favour, file execution proceeding. International law permits private parties to initiate legal proceedings against a sovereign entity for certain violations such as international investment agreements, infringement of international human rights, breach of commercial contract, default in sovereign debt and so on. Regardless of the type of litigations, and/or the deciding authority, once the private parties receive a monetary judgment or award against the State, the judgment creditors target one or more sovereign assets to seek attachment order from a third State's domestic court where the assets are situated, known as the forum States. According to the principles of

[2] Garnishment is a legal action by which the judgment creditor attempts to recover his judgment value from the third party who holds the property of the judgment debtor on its behalf pursuant to a court order. The third party is called Garnishee.

sovereign immunity from execution, the debtor State enjoys immunity before any foreign courts and its assets are protected from attachment with the exceptions of commercial assets. Because of this exception, the creditors of a State have access to the courts of the forum States. Pursuant to the application of private judgment creditors, the courts determine the character of the sovereign assets to grant and/or reject immunity to the asset.

Few international conventions and non-binding drafts have listed the sovereign assets following the question of immunity from execution. Notwithstanding the absence of any effective uniform international legal instruments, there is the European Convention on State Immunity (1972) as a regional instrument. It took restrictive approach to protect the self determination of the States whereas, the United Nations Convention on Jurisdictional Immunities of States, and their Properties (2004) (the UN Convention) listed the immune assets but left the question of non-immune assets with the courts to determine based on the commercial or non-governmental use. The draft of International Law Association (ILA) (1982) added a list of non-immune asset including the assets in commercial nature, having commercial purpose and also the assets acquired in violation of international law. The academic scholars followed similar trend but with a different approach of classifying the assets for the purpose of immunity from execution (See Fox 2002; Bankas 2005). The lack of a comprehensive and effective international convention brings the question of application of international rule of law while deciding the question of immunity for sovereign assets.

This paper focuses on the international rule of law in determining the questions of immunity of sovereign assets and possible alternative approach to international law-based rule of law. This paper looks for the coherent understanding of international rule of law. It further classifies the sovereign assets as illustrated in the relevant international drafts as well as in the literatures. The study identifies the grey areas in the law on foreign sovereign immunity yet to be scrutinized. For instances, the prejudgment attachment order or conservatory measures against the sovereign and the execution against the assets of the State instrumentalities. The fourth part of the paper concentrates on the role of international rule of law in determining the question of immunity of foreign sovereign assets. Finally, in the concluding remaking, it poses certain open questions of the international rule of law and interna-

tional law-based rule of law while defining the targeted assets based on their legal definitions in international law.

2. INTERNATIONAL RULE OF LAW AND INTERNATIONAL LAW-BASED RULE OF LAW

Rule of law connotes three popular meanings: formal, substantive and a-culture. In formal rule of law, application of due process with the expectation of social justice is the prime objective (Neumann 1985), whereas substantive rule of law has broader periphery as to the formulation of a legal order regulating the aspects of social, economic, and political life of a State (Chimni 2012, 290). A-culture concept of rule of law concentrates on the conceptualization of the same of a single culture and measures the others on its standard.

The scope of international rule of law is broader than the definition of rule of law, given by Dicey (1982). From the theoretical perspective, the actors of international legal order i.e., the States stand on horizontal relation unlike the vertical footing of the subjects in domestic legal order. Hence, the international legal order demands the rule of law to be defined appropriate to its nature as distinct from the national legal order. From this structural position, Chesterman (2007) analysed three meanings of international rule of law: application of rule of law principles in relation to the States and other subjects of international law, supremacy of international law over national law and emergence of global rule of with normative regimes. On the other hand, according to Chimni (2012), several approaches are available from more pragmatic view, including the realist, the liberal, the critical and the third world approach. The liberal view assumes international law strong enough to censor the State conducts whenever necessary to make them comply therewith. In contrast, the realist approach brings the question of international policies and the accumulation of power. Hence, except in the rare cases where no national interests are involved, cooperation is found to establish rule of law. Otherwise, the role of international laws is subject to conflicting interpretations to embrace the national interests from time to time.

The liberal view does not receive much legitimacy in international law, as the authority who would decide the censorship of State conduct must receive the jurisdiction from State itself. Moreover, Ches-

terman (2007) commented that where the national rule of law aims at achieving justice, the international rule of law values the order more than justice. Such objective of international rule of law corresponds with the thick definition of rule of law which means the substantive notion of justice, distinct from the justice understood relying on a set of ideals or some fixed process. Nevertheless, the objective of maintaining international legal order has kept the concept of international rule of law fluid. The rule of law embraced in international legal order has no concrete meaning, but a set of principles varied with the development and economic growth of the international legal order. States given their various regional and group interests, defined international rule of law from different perspectives. Such as, the capital exporting home States no longer defined the foundational principles of sovereignty from the perspective of its immunities, exemption, or exclusiveness but from State responsibility to protect the foreign investors (see Sornarajah 2017). On the other hand, the capital importing host States emphasize on the non-interference to exercise of sovereign authority and the corporate responsibility to domestic laws of the host State. The advocates of welfare State emphasis on State responsibility to protect its citizen, compliance with democratic governance and international human rights laws (Chirwa 2004, 4).

The international organizations also forwarded the principles in the name of international rule of law, promoting their own mandate. Such as, the United Nations (UN) defined rule of law as obedience to existing international laws and its fundamental principles embodied in the UN Charter. The fundamental principles in the UN Charter consists of sovereign equality, non-intervention in external and internal affairs, peaceful settlement of international dispute, principles of fulfilling good faith obligation derived from international law.[3] There are also some non-binding international instruments attempting to list different principles as the standard of international rule of law. For instance, International Bank for Reconstruction and Development (IBRD) proposed confidence on law, obedience thereto, quality of contract enforcement as the ideals of rule of law in international legal order (Kaufmann *et al.* 2007).

In order to convergent the various group-interests, Chesterman (2012, 468) emphasized that international rule of law is not the means

[3] The Charter of United Nations (1945), art. 2

but the process. Rodoljub, and Bojan (2016) commented that in the absence of any authoritative definition and/or scope of international rule of law, the alternative approach could be international law-based rule of law. The concept of international law-based rule of can be explained as implementing the similar objectives of rule of law but through international law. The objectives of rule of law, as identified by Dicey (1982) were the limitation of governmental power to ensure the people's right and freedom and the legal certainty. Undoubtedly, these objectives do not work in their literal meaning for international legal order, because the States, as one of the subjects of international legal order, stand on horizontal footing whereas in domestic legal order, the State and the private persons stand on vertical one.

From perspective of international law, the objectives could be *inter alia* (i) the legal certainty in interpreting international law and (ii) the limitation of the interpretative power of the legal and non-legal authorities, acting in international legal order. Likewise, Chesterman (2012, 468) stated the aim of rule of law in international legal order to maintain the 'order' not 'justice' as it is in domestic level. According to the progress of the current Working Group 3 of UNCITRAL (2020), the consensus among States in terms of these two objectives is visible from their statements made in UNCITRAL working group discussion regarding investor-State dispute settlement (ISDS). In order to ensure legal certainty, consistency, coherence, and predictability in interpretation of international law is desired. On the other hand, international law is no more interpreted solely by the international courts but also by international arbitration tribunals (such as in ISDS arbitrations), domestic courts (for instance, in the cases of enforcement of the ISDS arbitral awards before the third State's courts), and other non-legal international organizations. Waldron (2011, 324) observed the purpose of rule of law is not only protect the subjects from the States but the States from other nation States at the international level. Nevertheless, question remains, whether the broad and abstract nature of international law act as an obstacle in precision of international law-based rule of law. Rodoljub and Bojan (2016, 62) negated the possibility. Rather its abstract nature gives the flexibilities to international law which is required to maintain the order.

From a comparative analysis, the scope of international law-based rule of law is narrower than international rule of law. Here the precise question is whether any international treaty, any State acts

pursuant to international law, any given interpretation of these treaties and/or the States' act under these treaties conform with the principles of rule of law. Furthermore, the international rule of law can be termed as 'internationalization of rule of law' whereas the international law-based rule of law as 'rule of law internationalized' (Nollkaemper, Wouters, Hachez 2008). In the former, new set principles are formulated to fit the concept of rule of law into international legal order. On the other hand, in the latter case, the objectives of rule of law are to be promoted in international legal order.

3. SOVEREIGN ASSETS IN QUESTION AND THE GRAY AREAS

Fox (2002, 401) divided the State property into three categories such as the property with immunity which are in public use, the second category is the other property with no immunity and the finally the property of State agency having separate legal entity. For the first category, she opined that reduction of immunity for the properties other than this category deviates from the previous rule that all State properties are protected from any forcible measures. She further questions should the presumption of public use of property be removed to determine which categories of the assets in question belong to. She advised for sperate listing of properties with immunity so that evidence would be redundant for them. For the second category, different jurisdictions accept different tests and various level of evidence, the common test for the non-immune category are the commercial use and link with debt and subject matter of claim. Varieties are found for mixed account and pre-judgment attachment.

The International Law Commission (ILC) Drafts (1991) listed the immune assets which purpose is always presumed to be public or non-commercial.[4] The similar properties are also recorded as immune in other international and national regulations such as the ILA Draft (1982).[5] In addition, it added another list of non-immune assets including the assets having commercial purpose or used in commercial activity. This was the assets received or exchanged pursuant to viola-

[4] The International Law Commission Draft (1991), article 17.

[5] The International Law Association Draft (1982), article VIII (C).

tion of international law.[6] Zdobnoh and Vark (2010, 166) duly continued that it is the characteristics of the assets targeted by the judgement creditor which determines the issue of immunity from execution.

Badr (1984, 108) divided the assets broadly into two categories, (a) public holdings of the State (*domaine public*) and (b) property held by State in private capacity (*domaine prive*). The former enjoys immunity from execution whereas the latter may be held as non-immune depending on the purpose or use of the assets in question. In closer view, the immune assets are divided into three major groups with two newly emerging ones based on the international and national legal instruments. Fox (2002, 389) listed the total five types of immune assets namely (a) diplomatic assets, (b) military assets (c) property central banks and the other two are (d) the cultural heritage of a State or of its archives and (e) property forming part of an exhibition of objects of scientific, cultural, or historical interests. On the other hand, the non-immune assets are categorised as having either commercial purpose or commercial nature or used for commercial activity. Here, the court applies its interpretation to assess the question of immunity for the sovereign assets. Another newly emerging class of non-immune sovereign assets is the assets received or exchanged in violation of international law.

The law on foreign State's immunity is still under development. There are certain areas where neither the international conventions nor the national legislations have achieved the common stand. For instances, the grant of pre-judgment attachment orders against the sovereign assets, the measures of constrains against the assets owned by the State-owned enterprises and the applicable law governing the purpose or nature of the assets targeted for execution. The coherence is yet to be reached for the requirement of nexus between the jurisdiction and the properties in question or between the targeted assets and the claim to be recovered out the properties. Thereby the courts hearing the execution cases against the foreign sovereign play a vast role in determining the loose ends of the legal framework of foreign sovereign immunities.

The legal practice as to the proof of the asset's purpose and nature, and/or its use is also inconsistent. The standard of proof varies as to the nature of the assets such as the tangible and intangible as-

[6] *Ibid*., article VIII (A) (3).

sets. The context becomes clearer with the mixed use of the assets or the bank account of the diplomatic missions. Moreover, the burden of proof varies as per the *lex fori* of the case. The Foreign Sovereign Immunity Act (FSIA) of the US, does not assign the burden of proof to prove the purpose of the assets or the intended use of the unallocated funds, strictly on the judgment creditor or the foreign sovereign (Delaume 1994, 266). Given the undetermined burden of proof, the judgment creditors face severe difficulties in proving the commercial use or purpose. On the other hand, the foreign sovereign may confuse the situation by changing its use or allocating it for some public purpose. Because of the open questions of law, the court applies the principles of international rule of in determining the public or commercial nature of sovereign assets for the purpose of its immunity in execution case.

4. RULE OF LAW IN MITIGATING INCONSISTENCIES

The execution cases are filed in the domestic court of a third State where the defendant State has assets available for execution of the arbitral award or the judgment. In commercial litigation before a domestic court, traditionally, procedural law is *lex fori* (law of the forum) (Dolinger, Tiburcio 1998, 428). However, as illustrated before, the legal framework for the foreign sovereign immunity and particularly in the case of sovereign assets, has not been exhaustive. Moreover, the involvement of a foreign sovereign's interest brings the question of international rule of law, higher than the *lex fori* of the forum State. Notwithstanding the procedural safeguard in the *lex fori*, the vulnerability increases when a sovereign is brought before a foreign court (national court of another State) and the sovereign litigant is not entitled to its sovereign immunities on the ground of its action being *jure gestionis* (Kurkela, Turunen 2010, 2).[7] Barr (2016) warned for cautious application of the FSIA of US avoiding adverse impact on international relations. Therefore, the international rule of laws a vital role in filling up the vacuums.

[7] Kurkela and Turunen (2010) argued that the parties to the arbitration proceeding need to be protected with the due process standards because arbitration is a not a proper (normal) court and the application of due process compensate them for their revocation of access to court right.

For the purpose of this paper, the international rule of law has been taken with its formal objective. The formal objective is to apply the due process in the transactions concerning the interests of the sovereign as well as the private litigants. According to the rule of law principles of Dicey (1982), due process law is to prevent arbitrary power of the State authorities, equality of all including the government officials before law and constitutional law as fundamental law. The procedural law requires the court to follow the rule of law in assessment of the damage caused by the breach and pronouncement of the consequence of the same.[8] One way of defining general principles of procedural law for international rule of law is content based approach where rule of law acts as standard (Strong 2018). Nevertheless, application of rule of law is manifestly subject to the public policy and order of the forum State. The Rome Convention duly emphasized „the application of rule of law of any country specified by the convention may be refuged only if such application is manifestly incompatible with the public policy (public order) of the forum."[9] As the second part of this paper argues that, there is no conclusive definition of international rule of law but a combination of several values, the international rule of law in order to assess the purpose of the sovereign assets may require a specific set of principles, other than the popular principles listed as international rule of law.

Barr (2016) identified the attempt to define the set of principles itself as a major challenge while deciding any execution case against the sovereign assets. This challenge resulted as inconsistent the precedents. For instance, the decision of the US court in the case of *Republic of Argentina v. NML Capital*,[10] was criticized on the grounds of breach of international comity by way of ignoring the amicus brief sent by the US government and granting the injunctive remedy going beyond the US law of equitable remedy (Araya 2016). By way of preventing the debtor State from paying other debts, the court forced the State to make payment to the creditors. It caused unreasonable burden of cost on third party e.g., intermediary parties who were involved in making the payment which is contrary to public interest. In another case of

[8] The Rome Convention on the Law applicable to Contractual Obligations1980, art. 10 (1) (c).

[9] *Ibid*., art 16.

[10] 134 S. Ct. 2250 (2014).

Pravin Banker Assocs Ltd. Vs. Banco Popular del Peru,[11] the US court observed that US has strong interest in enforcing the sovereign debt owed to the US lenders regardless of the burden on the debtor State. Thereby the creditors must have the voluntary options of restructure and the continued and guarantee right to enforcement. Hence the principle of comity did not act as a bar for acceptance of the case of *Pravin Banker Assocs Ltd. Vs. Banco Popular del Peru*.[12]

The questionable role of the dominant forum States is one of the significant pitfalls here. For instance, in sovereign debt litigation, US proposed a collective action clause after rejecting the proposal of sovereign debt restructuring mechanism advocated by IMF. Moreover, the sovereign debt litigation is controlled by the very few numbers of States' courts, hence their procedural practice and interpretation of international legal instruments in this regard dominates this area of law (see Strong 2018, 398; Frank *et al.* 2015, 467–468). Strong (2018, 398) stated, „international arbitration is controlled by a small cadre of industry 'insiders' because the various procedural norms are effectively ratified by States through adherence to the relevant treaties and through judicial interpretations of treaty norms that are highly consistent across national borders." Fundamental principles of any industry derive from the practice of the prominent players of that industry. This system lets the dominant States to set their own general principle such as adoption of restrictive sovereign immunity in commercial matters instead of absolute ones.

The challenges in defining international rule of law to resolve the open questions in sovereign assets' immunity, can be mitigated with the application of international law-based rule of law, *albeit* cannot be eliminated. The power of the dominant form States in interpreting *jure imperii* and *jure gestionis* needs to be limited to bring equal representation of States' interest in interpretation of international law on immunity of sovereign assets from execution. Coherence, predictability, and consistency in interpretation of purpose and use of sovereign assets is needed to establish the international law-based rule of law. A consensus-based interpretation of *jure imperii* and *jure gestionis* can be a solution to achieve both the objectives.

[11] 1995 109 F.3d 850

[12] 1995 109 F.3d 850.

5. CONCLUSION

The absence of lack of effective international convention in this regard and the inconsistent judgments open the question of applicable principles of international rule of law. However, the major challenge is to define the content of international rule of law based on the context of foreign sovereign's assets. Following the 'a-culture' meaning of rule of law discussed above, the dominant States' domestic law form the basis of international law on foreign sovereign immunity and here the principles of international rule of law. These States put national stake at the priority. They could not overcome the contradictions of need on international forum and the self-interest. In following these meanings, it again returns to the question of 'an unqualified human good' and 'cultural achievement of universal significance' (Thompson 1975). For instance, Weidemaier and Gelpern (2014) observed the rule of law defence under the light of different cannons of law in sovereign debt litigation: the holdout creditors pose the contract law-based rule of law requiring the State to honour its debt. In contrast, the sovereign relies on the international law-based rule of law concerning its sovereignty and unequivocal power of determining its monetary policy and pay the debt accordingly. The State takes the forceful payment pursuant to an execution order of a foreign court as an encroachment to its internal sovereignty under the international law-based rule of law (Weidemaier, Gelpern 2014).

The concept of rule of law has been criticized because of being mere structural norm instead of some fundamental principle when fitting the same into the concept of due process of law. Strong (2018, 373 n. 144) stated, „the rule of law is intimately connected with some conception of justice which can reflect „corrective", substantive, distributive, social, procedural, organizational, interactional, interpersonal, communicative, communitarian, restorative and transitional" values, depending on the circumstances." 'Principles' and 'rules' need to be distinguished. Rules are made based on principles. Principles are more generic and fundamental in nature. In other words, rule of law is not limited to some rules rather it presents the concepts of procedural due process by ideals of fairness, natural justice (Waldron 2008). Drawing the conclusion relying on the previous argument that the international rule of law as a set of principles, the question still remains

open whether the court should be guided with international rule of law or international law-based rule of law.

There are international instruments e.g., the UN Convention (2004) and regional convention like the European Convention on State Immunity (1972) regarding immunity of foreign sovereigns and their assets, although the UN Convention has not been effective yet. Given the diverse interests of States, reluctance among states is visible in ratifying the UN convention. The dominant forum States e.g., US, UK, Germany have not ratified the Convention. The case-laws from the dominant forum states are filling up the vacuum in international law. Therefore, in given situation, States can begin negotiation to prepare model law in order to interpret *jure imperii* and *jure gestionis* following international law-based rule of law. Such model law can be adopted on a consensus basis and subsequently can act as model text for the domestic legislation on sovereign immunity. Such model text can limit the arbitrary and inconsistent interpretation of the domestic jurisdictions and also ensure coherent interpretation of sovereign assets and their immunity.

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