

4. Discuss in detail the State Jurisdiction' with the theories concerning to Territorial jurisdiction with immunities and servitudes.

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1. Introduction

JURISDICTION generally describes any authority over a certain area or certain persons. In the law jurisdiction refers to particular area containing a definite legal authority.

Jurisdiction also refers to the origin of courts authority. Jurisdiction can also be used to definite the proper court in which to bring a particular case. Finally jurisdiction refers to the inherent authority of a court to hear a case and to declare a judgment.

As pointed by an author State jurisdiction is the power of a state under international law to govern persons and property by its municipal law. It includes both the power to prescribe rules (prescriptive jurisdiction) and the power to enforce them (enforce jurisdiction).

The later includes both executive and judicial powers of enforcement. Jurisdiction may be concurrent with the jurisdiction of other states or it may be exclusive. It may be civil or criminal. The rules of state jurisdiction identify the persons and the property within the permissible range of a state's law and it's procedures for enforcing that law. They are not concerned with the content of a state's law except in so far as it purports to subject a person to it or to prescribe procedure to enforce it.

State jurisdiction connotes essentially the extent of each state's right to regulate conduct on the consequences of events. A state may regulate its jurisdiction by legislation, through its court or by taking executive or administrative action. State jurisdiction concerns both international law and internal law of the state.

While the former determines the permissible limits of a states jurisdiction in the various forms it may take, the latter prescribe the extent to which, and manner in which, the state in fact asserts its jurisdiction. Each state has normally jurisdiction over all persons and things within its territory.

2. Types of immunity

i. Sovereign Immunity

- It refers to the legal rules and principles which determine the condition from which the State can claim the exemption of sovereign immunity from the jurisdiction of another State.
- This immunity is a creation of the customary international law which is derived from the principles of independence and equality of sovereign States.

ii. Diplomatic Immunity

- The rules here are most accepted and uncontroversial rules of International Law. This helps in the maintenance and conduct of the relations between the States.
- Diplomatic agents enjoy immunity from the criminal jurisdiction of the receiving State.

iii. Consular Immunity

- An agent of the state who represents the commercial interest of sending state i.e. the consular officer is like a diplomatic agent who represents the State who will be receiving State.
- Not granted the same degree of immunity from jurisdiction as a diplomatic agent.

3. Theories of territorial jurisdiction

i. Subjective theory

- This is regarded as the technical extension of the territorial principles. According to this principle, a state may claim jurisdiction over crimes commenced within its territory but completed outside its territory.
- The state where the crime commenced or was initiated may enact under its criminal law that it will have jurisdiction over such preparatory acts. ordinarily, states do not exercise this type of jurisdiction .
- There are, however certain situations wherein states where the crime commenced or was initiated are under duty to punish the accused.
- THIS is provided for example under the Geneva Convention for the suppression of counterfeiting of currency (1929) and the convention for the supervision of the illicit Drug traffic (1936).
- State parties to these conventions have accepted this obligation so as to prevent commission of crime in other states.

ii. Objective theory

- According to this principle, a state gets jurisdiction over the crime, if any of the constituent elements of the crime is consummated in its territory.
- For the state concerned to assume jurisdiction it is also necessary that the act must have produced some harmful effect within or on the territory of state.

- **Hyde**, a jurist explained the principle as

The setting in motion outside of a state of a force which produces as a direct consequence an injurious effect therein justifies the territorial sovereign in prosecuting the actor when enters its domain.

- In **S.S. Lotus case** Judge Moore observed

It appears to be now universally admitted that when a crime is committed in the territorial jurisdiction of one state as a direct result of the act of a person at the time physically present in another state, international law, by reason of constructive presence of the offender at place where his act took effect does not forbid the prosecution of the offender by the former state, should come within its territorial jurisdiction. The objective territorial principle is generally accepted and often applied.

iii. The active personality (nationality) theory

- The nationality principle implies that a State jurisdiction extends to its nationals and actions they take beyond its territory. It is based upon the notion that the link between the State and its nationals is a personal one independent of location. Criminal jurisdiction based on the nationality principle is universally accepted. While civil law countries make extensive use of it, the Common Law countries use it with respect to major crimes such as murder and treason. The Common Law countries, however, do not challenge the extensive use of this principle by other countries.
- A State may prosecute its nationals for crimes committed anywhere in the world; the ground of this jurisdiction is known as active nationality principle. Also, it may claim jurisdiction for crimes committed by aliens against their nationals abroad; the ground of this jurisdiction is known as passive national principle.

iv. The passive personality theory

- Under this principle, a state may claim jurisdiction to try an individual for offences committed abroad which have affected or will affect nationals of the state.

v. The protective theory

- This Principle is used to exercise Jurisdiction over an alien outside the territory of the State. It is a very controversial principle because it can easily be abused to undermine the sovereignty of other state.
- In practice however, this principle is applied in those cases where the acts of the person which take place abroad constitute crimes against the sovereignty of the State, such as plots to overthrow a government, treason, espionage, forging a currency, economic crimes and breaking immigration laws and regulations.
- This principle is often used in treaties providing for multiple jurisdictional grounds with regard to specific crimes, such as the 1979 Hostage Convention and the 1970 Hague Aircraft Hijacking Convention.

vi. The Universality Theory

- State can take jurisdiction over certain crimes by anyone anywhere in the world without any link to its territory, nationality etc.
- Before the Second World War, such universal jurisdiction has been considered as contrary to International Law by the Common Law countries, except for acts regarded as crimes in all countries, and crimes against international community as a whole such as piracy and slave trade.
- After the Second World War, universal jurisdiction has been universally recognized over certain acts considered as international crimes.

International crimes are those committed against the international community as a whole or in violation of International Law and punishable under it, such as war crimes, crimes against peace and crimes against Humanity.

- In recent years, crimes such as Hijacking of aircraft, violation of human rights and terrorism, have been added to the list of international crimes currently, under the universality principle, each State and every State has jurisdiction over any of the international crimes committed by anyone anywhere.

4. Immunities from territorial jurisdiction

Under international law, the following entities are exempted, to a certain extent, from the territorial jurisdiction of a State, and in many cases, by recognition of the immunities under municipal law:

- i. Foreign States and Heads of Foreign States**
- ii. Diplomatic Representatives of Foreign States**
- iii. Public ships of foreign States**
- iv. Foreign armed forces International Institutions**
- v. International Institutions**

- i. Foreign States and Heads of Foreign States**

- Once a State is recognised, it is an accepted principle of international law that such State or its head cannot be sued in the municipal court of the recognising State, unless such State or its head voluntarily submits to the jurisdiction of the Court. Such submission may be either under a treaty generally, or ad hoc for the purposes of a particular litigation. But this immunity does not prevent a foreign State or its head from suing in the municipal court of another State.

- The theoretical basis of such exemption is not uniform. According to some, it is based on comity, according to others, it is based on the practical principle of effectiveness, whereas some other writers feel that it is based on a grant. Whatever the theoretical basis may be, the rules regarding immunity are well-settled.

ii. Diplomatic Representatives of Foreign States

The customary rules regarding jurisdiction and immunities of Diplomatic Agents are now modified and formulated by the Vienna Convention on Diplomatic Relations of April 18, 1961.

The relevant Articles and Conventions pertaining to immunities of Diplomatic Agents can be summed up as follows:

(1) The person of a Diplomatic Agent shall be inviolable. He shall not be liable to any form of arrest or detention. (Art. 29)

(2) A Diplomatic Agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the following cases:

- a. A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the Mission.
- b. An action relating to succession, in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person, and not on behalf of the sending State.
- c. An action relating to any professional or commercial activity exercised by a diplomatic agent in the receiving State outside his official functions. (Art. 31)

(3) The members of the family of a diplomatic agent, forming part of his household, if they are not the nationals of the receiving State, shall also enjoy the immunities.

(4) The following shall also enjoy such immunity, provided they are not nationals of or permanent residents in the receiving State:

- a. Members of the administrative and technical staff of the Mission, together with members of their families forming part of the respective household.
- b. Members of the service staff of the Mission, in respect of acts performed in the course of their duties.
- c. Private servants of members of the Mission may enjoy immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the function of the Mission.

iii. Public ships of foreign States

- A public vessel is one which is owned and commissioned by the Government of a sovereign State, or even by the Government of a semi-sovereign State, so long as the latter is recognized externally as a separate international person. Even a private vessel chartered by a State for a public purpose is a public vessel. The public character of a vessel is determined by her flag and the commission issued by the Government of the State to which she belongs.

- There are two theories regarding jurisdiction in the case of a public ship of a foreign State:

(i) The "floating Island" theory, according to which a public ship is considered to be a part of the territory of the flag State. According to this theory, territorial courts would have no jurisdiction over the public ship.

(ii) According to the second theory, the floating island concept of a

public ship is not accepted. Immunities are granted to such ships according to this theory conditionally by the local law.

iv. Foreign armed forces International Institutions

- The extent of the immunity enjoyed by the Armed Forces of foreign States stationed in the territories of another State depends on the circumstances in which they are so stationed and also upon any express agreement between the States regarding the conditions of stationing of such forces.
- In the absence of such an express agreement, the mere admission of the foreign armed forces gives rise to certain consequences in international law.
- However, the nature of immunity granted to such armed forces, in the absence of an express agreement, may be summed up as follows:

(1) The members of the visiting force are immune from both, the civil and criminal jurisdiction of the local court, in regard to matters of internal administration of the force.

(2) The commander of the visiting force, and the courts of such force, have exclusive jurisdiction over the following kinds of offences:

- (i) offences committed by members within the stationing area in which the force is stationed;
- (ii) matters of discipline; and
- (iii) offences committed outside the stationing area, but while actually on duty.

(3) On the other hand, if the members of the force commit offences outside their area while engaged in non-military duties, the territorial State may exercise jurisdiction over them.

v. International Institutions

- International Institutions have been conceded immunities for the territorial jurisdiction. Such immunity is given both under international agreement like the Conventions on the Privileges and the Immunities of the United Nations, and under municipal laws like the British International Organisations (Immunities and Privileges) Act, 1950.

5. International Servitude

- i. Positive Servitude
- ii. Negative Servitude
- iii. Military servitude
- iv. Economic servitude

International servitude or state servitude is the term sometimes used to denote exceptional restrictions made by treaty or otherwise on the territorial supremacy of a state by which a part or the whole of its territory is in a limited way to serve a certain purpose or interest of another state.

i. positive Servitude

The question of positive servitude arises when a state permits another state to do some work over a certain part of the territory.

ii. Negative Servitude

The question of negative servitude arises when a state claims that other states should not work in its territory or a part of its territory in a particular way and if this claim is accepted by the state concerned.

iii. Military servitude

Military servitude to fulfill the military requirements. To keep military or armed forces in another state is a type of military servitude. for eg. The state of Malta has given an island to Britain on lease and has allowed Britain to have its Military base on it. It may be termed as military servitude .

Iv. Economic servitude

- Economic servitude are common and they arise when one state allows another state certain commercial or transport facilities.
- The term servitude means nothing more than accepted restrictions and grant of servitude does not amount to cession of territory.

Teen Bigha case or Union of India v. Sukumar sen Gupta, the SC observed Acceptance of servitude does not represent any negation of sovereignty, the term servitude means nothing more than accepted restrictions and grant of servitude does not amount to cession.

FACTS :

- This was with respect to an appeal from Calcutta High court decision In 1974 an agreement was entered into between India and Bangladesh regarding the land boundary and related matters including transfer of enclaves.
- The agreement provided that Indian enclaves in India should be exchanged expeditiously excepting the enclaves mentioned in para 14 without claims of compensation for the additional area, going to Bangladesh.
- Thereafter an understanding was reached in oct.1982 between the two governments in connection with the lease of perpetuity in terms of item 14 of Article 1974 agreement. Item 14 provided the following .

- India will retain the southern half of south Berubari Union NO. 12 and the adjacent enclaves, measuring an area of 2.54 sq miles approx. and in exchange Bangladesh will retain the Daha gram and Angerpota enclave.
- India will lease the perpetuity to Bangladesh an area of approx. 178 mts * 65 mts near TEEN BIGHA to connect to connect Dahagram and Panbari Moza of Bangladesh.
- Thus the agreement provided that the said land would be given on lease to Bangladesh to enable it to exercise Sovereignty over Dahagram and Angerpota
- but India would continue to retain sovereignty over the said area.
- Though the said agreement used the term lease in perpetuity, the supreme court held that it was servitude suffered by India in its territory, as known in international law.
- The said transaction did not amount to cession of the said area of Teen Bigha in favor of Bangladesh under the said agreements would amount to what is known as servitude in international law.

Further the term servitude means nothing more than accepted restrictions and grant of servitude does not amount to cession of territory.

6. Conclusion