

A CRITICAL ANALYSIS OF THE DOCTRINE
OF SOVEREIGN IMMUNITY AND STATE
INVOLVEMENT IN COMMERCIAL
ACTIVITIES

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ABSTRACT

The study appraised the doctrine of sovereign immunity in the light of recent Conventions and Laws with a view to determining how these enactments have facilitated State involvement in commercial activities. It also examined the laws governing the immunity of the sovereign in a foreign court, identified the legal problems and constraints in the application of the doctrine, analysed the experience of some states in this regard and examined the measures taken to address these problems.

The study relied on primary and secondary sources of information. The Primary sources included international treaties and conventions, national legislation, decisions of municipal courts, the International Court of Justice and arbitral tribunals as well as the official records of the Ministry of Foreign Affairs. The secondary sources of information included textbooks, journals, seminar papers, conferences papers, magazines, newspapers and other materials sourced from the Internet. The data collected from these sources were subjected to content analysis.

The study revealed that the doctrine of sovereign immunity was established and developed at a time when most of the developing countries were not independent and the sovereign function was limited to purely state functions like maintaining law and order, conduct of foreign affairs and the defence of the state. After the Second World War, states had to carry out rehabilitation, reconstruction and redevelopment of the war affected areas. This accounted for their growing involvement in commercial activities and the shift in the jurisprudence on sovereign immunity from one of absolute to that of restrictive immunity. The study revealed that activities involving the states were

classified into Commercial (**jure gestionis**) and governmental (**jure imperii**); but the tests applied in determining the classification were beset by a number of problems. The study also indicated that the major problems were whether the nature of an activity or the purpose of a transaction should be the decisive criterion for classification. These problems constitute the main constraints in the application of the doctrine. The study therefore advocated the enactment of a legislation specifically aimed at addressing the problem of classification as a means of getting out of the legal quagmire experienced in some jurisdictions examined in this respect.

The study concluded that the restrictive immunity approach could be desirable if trade and commerce were to grow and be conducted on fair and equitable basis.