

## WHO ARE PEOPLE COVERED BY THE DIPLOMATIC IMMUNITIES?

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### ABSTRACT

Nowadays, Issues of Diplomatic Immunity have become vital to discuss legally and in Islamic Law, where there are several cases around the globe happened to the diplomat those who are Muslim and non-Muslim, in the country where they sent by their ministry of forum affairs, in this regard, this paper aims to provide solutions from both Islamic Law and international law on Diplomatic cases that were happened, and to highlight the methods for protecting cases against diplomats, where the researcher provided the concept of Immunity and those who deserve to enjoy it, as well as to discuss the Diplomatic Immunity from legal and Shari'ah point of view, moreover; the researcher has divided the paper into four parts: where the first part is: The Immunities of the Family Members of Political Representative, the second part is: The Immunity of Administrative and Technical Staff, the third part is: Immunity of the Assistants of the Mission, and the fourth part is: where the first part is: The Immunities of the Family Members of Political Representative, the second part is: The Immunity of Administrative and Technical Staff, the third part is: Immunity of the Assistants of the Mission, and the fourth part is: the Immunity of the Private Servants Assistant of the Diplomatic Mission. Also researcher used the comparative method for comparing and analyzing evidence for both perspective legal and Shari'ah, and the paper concluded by recommending applying Legal and Shari'ah point of view in the cases of Diplomatic Immunity.

**Keywords:** Diplomatic Immunity, Immunity of the Family Members, Administrative, Private Servants.

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### Introduction

It is common knowledge that the senior members of the diplomatic corps, that is the ambassadors, the staff the carry out the daily diplomatic business and the advisers, indisputably, enjoy full diplomatic immunities. Thus, it can be said that the observance of the immunities with respect to these personalities is considered as part of the standing and binding the rules of international law to which every countries of the world is obliged.<sup>1</sup>

This is an agreed upon matter in respect of these personalities. That is among countries, both in the modern and the ancient periods. However, there might be disagreement about who is covered by the immunities apart from those people that are mentioned. They may impose some restrictions. That is to say, they may restrict the type of the immunity that is enjoyed certain personality by creating some rules in that respect. However, it obviously in reality that they are covered by the immunity regardless of any kind it might be. This is the known practice.

The Vienna Convention of 1961 organized personal immunity and endorsed it for other members of foreign mission apart from the owners of diplomatic immunity. This personal immunity covers the administrative, technical staff and the service rapporteurs, such: (driver, gardener...etc). This is inclusive of the members of their family, and the family members or household of diplomatic envoys. Thus, pursuant to the provision of Article (37), all these individuals enjoy personal immunity that is only constrained by two conditions and requirements:

1. Shall not be one of the above mentioned personalities which hold the nationality of the receiving state with exception of (service rapporteurs) during their assigned tasks.
2. Shall not be the permanent residents in the receiving state, except the (service rapporteurs) during their assigned tasks.

That are the requirements of nationality permanent residence.<sup>2</sup>

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<sup>1</sup> Fowey al-Malah, Sultat al-Amn wa al-Hasanat wa al-Imtiyazat al-Diplomasiyah, p 230.

<sup>2</sup> Al Shami, Ali Husain (1990). *Al Diplomasiyyah Wa Nash'atuha Wa Tatawwuruha, Wa Qawa'iduha Wa Nizhamul Hasanaat Wal Imtiyazat al Diplomasiyyah* p 530.

### Objectives of the research

The main objectives of the research are as follow:

1. To study who are enjoy full immunity and specific immunity.
2. To knowledge the owners diplomatic immunities in Islamic law and International law.
3. To highlight of difference diplomatic immunity under Islamic law and International law.

### Scope of the research

The scope of this research is to provide the clear information about the following:

- 1-Immunities of the Diplomats Family Members, administrative and Staff e.t.c.
- 2-Highlighting Islamic point of view on the Immunity of the Diplomats
- 3-Comparing similarities and differences, on the immunity of Diplomats, Legally and Islamically.

### People that are covered by the Diplomatic Immunities

The classes of the people that are covered by immunity will be discussed here. This is according to the definition of some authors who discussed the classes that are covered by the diplomatic immunities which are presented as follows:

#### The Immunities of the Family Members of Political Representative

The members of family of political representative that accompanied them are given immunity right by the Vienna Convention on Diplomatic Relations. This is in accordance to the provisions of Article (37), Paragraph (1) of the Convention. It provides that, "the family members of diplomats who are from his household and are not nationals of the host country will enjoy the privileges and immunities that are provided in Articles 29-36."<sup>3</sup> This means that the families of political representative enjoy the same immunities that are enjoyed by the political representative themselves. Thus, this Article reflects two things; first, that the immunity covers individuals who reside with the political representative in the same place. This requirement is in consistence with the practice of the Islamic state that took the lead in this aspect. This will be explained in our discussion about the practice of the Islamic state regarding the people that are covered by the immunity, and secondly, that such member of the family should not be with the nationals of the host country.

It will be notice in this statement that the individuals who enjoy immunities in this respect are not identified in terms of their relationship and class to the head of the household.<sup>4</sup>

Moreover, countries are of several views in respect of the extent to which families of diplomats can enjoy immunities. However, the controversy does not include the spouse of the head of the diplomatic mission. This is in fact, it is a common known rule of international law and a binding legal stipulation among countries that the spouse of diplomat is entitled all the privileges and immunities that the head of the mission enjoys. This rule is inclusive of his or her children. Thus, the controversy is about the members of the families of other members of the diplomatic corps that are not the head of diplomatic mission such the other employees. However, the common practice is that they equally enjoy the immunity.<sup>5</sup>

#### The Immunity of Administrative and Technical Staff

Diplomatic mission, in its daily activities, is in need of a work-force that will perform function that does not require diplomatic status. Thus, there some group of the people that join the members of the diplomatic mission to perform the required administrative and technical function. However, in reality this group of people are not diplomats *per say*. Nevertheless, they also enjoy diplomatic immunity. This is provided for in the Article 37, paragraph (2) of the Convention that, " the administrative and technical staff of the mission, as well as the members of their family that are of their household, if they are not citizens of the host state, or the permanent residents of the host state, shall enjoy the privileges and the immunities that are provided for in the Articles (29-35), with the condition that the immunity that is provision for in Paragraph (1) of Article (31) of the Convention shall not be extended to cover judicial cases in civil and administrative matters in the host country, including other activities that perform outside the scope of their diplomatic duties. They also enjoy the privileges that are set forth in Paragraph (1) of Article (36) in respect of the materials that imported to the host countries at the beginning of their mission in the host country.

#### Immunity of the Assistants of the Mission

The Assistants of the Mission are the example, but not limited to the driver, gardener and private guard, cleaner and the others. They may either be part of the nationals of the host country or the nationals of the mission state. If they are not the nationality of the host and are also non- permanent residence of the territory, they are entitled to partial diplomatic immunity. However, if they

<sup>3</sup> Article (37) Paragraph 1 of the Vienna Convention on Diplomatic Relations of 1961.

<sup>4</sup> Ahmad Salim Ba Umar, *al-Fiqh al-Siyasi li-al-Hasanah al-Diplomasiyah*, p 270.

<sup>5</sup> See, Fowey al-Malah, *Sultat al-Amn wa al-Hasanah wa al-Imtiyazat al-Diplomasiyah*, p 243-245 & <sup>5</sup> Al Shami, Ali Husain (1990). *Al Dibliomasiyyah Wa Nash'atuha Wa Tatawwuruha, Wa Qawa'iduha Wa Nizhamul Hasanaat Wal Imtiyazat al Dibliomasiyyah*. p 531.

are from the host country, they are not entitled to enjoy diplomatic immunity. This means that the presences of these two conditions are essential for the assistants before they can enjoy diplomatic immunity. Thus, this group is only entitled the diplomatic immunity during their official duties for the smooth running of their activities.

the Vienna Convention provided for the servants and assistance of diplomatic mission in the Article (37) of Paragraph (3) where it stated that "the servants that assist diplomatic mission who are not nationals of the host State or permanent resident of the state, will enjoy immunity on the basis of the services which they render, while they are performing their duties, and they will enjoy exemption from duties and taxes in respect of salary which they receive for their service that was provided for in Article 33."

### **Immunity of the Private Servants / Assistant of the Diplomatic Mission**

What are meant by the phrase "private servant/assistant" are those who render in domestic service for the individual members of the diplomatic mission, and are not in the service on the mission state. The Article (37) of paragraph (4) provided for the status of a private servant that "private servants of the individual members of the diplomatic, if they are not the nationals of the mission country or the permanent residence of the host country, will be exempted from fees and taxes in respect of the salaries which they receive for their services. However, they will not enjoy any other privileges and immunities except to the extent that is permitted by the host State. More so, it is obligatory on the state to check the exercising of its jurisdiction as regard the situation of these people. That is, against excessive interference in the way of the performance of the functions of the mission by the people."<sup>6</sup>

From the foregoing, it will appear that the Article 37 of the Vienna Convention on Diplomatic Relations in its Paragraphs 1 to 4 has addressed the matter of the people who are entitled to diplomatic privileges and immunities within its content. It is also clear that the people who enjoy the less diplomatic privileges and immunities are the special and private servants. It is evident from the Convention that the extent to which they are entitled to the enjoyment of the diplomatic immunity is a subject of the state consent. That is as contained in the Convention that "the state should check the exercise of its jurisdiction with respect to those people in such a way that the state will respect itself from excessive interference in relation to the performance of their duty in the diplomatic mission."<sup>7</sup> The researcher observed in this respect that this will affect some issues that are necessary for the function of the diplomatic mission. This will have some crippling effect on the performance of the duties of the mission.

However, from the sublime Sharia law view point, which never left any aspect of the life, except that it has organized it in such a way that is supreme to that of the contemporary world. This has been the practice since the time of the Prophet (SAW). Thus, it is not an exaggeration to assert that, although, the secular laws grant privileges and immunities to diplomats, nevertheless, such immunity is lopsided. That is to say, it grants it to some people and denied it from others. However, Islamic law is more considerate in this aspect as it widened the scope of the immunity to ensure the safety and it made it cover all the personality that have relationship with the diplomatic mission. However, it cannot be said that they enjoy equal rights in this respect. However, each personality is granted the right according to his status, in accordance with the saying of the holy Prophet (SAW) that says (reat people according to their status).<sup>8</sup>

It is a common knowledge that in that period, that is, at the beginning the Islamic state, it was difficult then to travel alone, and the people are capable to travel lonely are few because of the difficulty on the road, loneliness, and the long distances. That is to say, that a traveler was always in need of escorts. This matter will be clearer to us during the discussion over the issue of the people who covered by the immunity, that is safety in the diplomatic mission or envoys.

At this juncture, it will be discovered that all the members of the diplomatic mission, including ambassador, envoys, the people that accompany them such as the assistants and the families are all given the right of diplomatic immunities and privileges that enjoyed by the diplomats. Such right of immunity includes protection, respect, hospitable reception and etc. without any exception. This is part of the tolerance and justice of Islamic religion. There is proof for that any of the accompanying persons, servants and family are also entitle to the enjoyment of immunity and safety that are enjoyed by the diplomats or envoy themselves. The proof is the maxim; "the rule of the annexed is applicable to the annexure in Islam."<sup>9</sup> The proof is a fundamental rule. It implies that since the people that accompany the envoy such as servants and family are the annexure/follower and subordinate of the diplomat, it is therefore proper that the same rule will be applicable to them as regard their safety and immunity.

However, some people may disagree that the assertion that since the diplomat and the envoy was originally his escorts where heartened that at the forefront of our words say that this was have followers as it was discussed above, this will be answered that in the period everybody naturally live in that situation, and that such thing is acceptable to the shariah. This is because the foundation of such rule is the maxim "al-'Adah mu'hakkamah/custom is source of law."<sup>10</sup> As we have said the habit of people to travel in the company of other travelers.

<sup>6</sup> Ahmad Salim Ba Umar, *al-Fiqh al-Siyasi li-al-Hasanah al-Diplomasiyah*, p 268-277.

<sup>7</sup> Paragraph (4) of Article (37) of the Vienna Convention on Diplomatic Relations of 1961.

<sup>8</sup> Sunan Abi Daud (4844) Bab Tanzil al-Nas Manaziluhum.

<sup>9</sup> The Ministry of Awqaf and Islamic Affairs – Kuwait. (1427 AH-). *Qaidah al-Fiqhiyah, al-Maosu'ah al-fiqhiyah*. Second Edition, Dar Alslasl. vol. 4, p1.

<sup>10</sup> Sulayman Salim al-Rahili.(1423AH) *al-Qawaid al-Fiqhiyah,al-Madrasah li Marhalah al-Baklurius*. Islamic University of Madinah, p 1.

It is also clear from the statement of the scholars that the right of the immunity and safety of the envoy and the diplomat covers all the people that accompany him. According al-Baydhawi Qadi –al-Qudat who argued that the security and safety that is granted to a non-Muslim "is extended to anything or person that accompany him, because they are all like his annexures."<sup>11</sup> According to al-Qurtubi; "whoever come to us from the side of the warring-enemy we will not be responsible for the safety of his family, children and the property that he left behind in his enemy country."<sup>12</sup> Moreover, Imam al-Shaibani argued that the safety also covers the family of the ambassador and envoys and their properties, even if they lied in their words that the people that accompany them are their family. He continued that, "if the diplomats request for safety for themselves, their families on their property, that is that they should be covered by the immunity, they will be given the request, by covering them, their family and their property with the safety."<sup>13</sup>

Al-Sarkhasi commented that: "since their offsprings is covered in the safety, it includes the safety of their children and their ground children. That is regardless of whether they are (they are children of their male or girl children)."<sup>14</sup>

According to Ibn Qudamah al-Maqdasi; "a follower is entitled to the safety that is entitled to by the followed. However, if it is revoked from the followed it is also revoked from the follower."<sup>15</sup> This is what buttressed our opinion that those accompany them such as the family and the servants of the envoy or diplomats are entitled to immunity, based on the maxim 'al-tabi'u tabiu.'

The Quotient of the above discussion is that the family of a diplomats will also enjoy the right of the immunity that he is entitled to if they accompany him, and that the immunity will remain "for a certain period," even after the expiration of the status diplomat.

## CONCLUSION

From the above discussion, the researcher has found major important points which could be concern on the Issues of Diplomatic Immunity:

- 1- From Islamic point of view, Diplomats have Immunity in any Country around the world, where they sent by their ministry of Forum Affairs.
- 2- Diplomats and their families should have Immunity, socially and diplomatically and theses Immunity should preserve by the government of the country in where they sent.
- 3- Administrative staff, Private Servants, and Assistant of the Mission, e.t.c. the country they are working in, most provide for them Immunity, Legally and diplomatically, and these Immunity should preserve their rights in anywhere under for missions.
- 4- Some Immunity Issues of the Diplomats should exchange between one country to another, in other to make good diplomatic relation between both two countries.
- 5- Families of the Diplomats, and administrative staff, should give vital consideration in any country where sent by their government, such as; health of the Families, Education, and security.
- 6- In the contrary, some Diplomatic Laws, should mixed with the views of Islamic Law, particularly in the place where each of the ambassador came from the majority Muslim country, this will make a good understanding in such a case happened between two countries.

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