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THE HISTORY OF THE FORMATION AND DEVELOPMENT OF THE INSTITUTION OF DIPLOMATIC IMMUNITIES AND PRIVILEGES IN THE UNITED STATES

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The subject of study. Throughout the historical period of the development of diplomatic law, an institution of immunities and privileges was formed, the content and scope of which were determined by the level of diplomatic relations between states and the development of public administration.
The rules of national law also have a significant impact on the procedure for exercising diplomatic immunities and privileges. Many states have adopted legal acts regulating the foundations of the diplomatic service. For example, in the United States, after joining the Vienna Convention on Diplomatic Relations of 1961, the Law on Diplomatic Relations of 1978 was adopted, based on the rules of this Convention.
The article examines the history and development of diplomatic immunities and privileges, the formation of the US diplomatic service and the content of current national laws in the US.
The purpose of the study is the identification of problems in the practice of implementing diplomatic immunities and substantiate the hypothesis that it is necessary to develop the legislation on diplomatic immunities and the diplomatic service in the United States.
The methodology of the study. The methodology of the study includes general scientific methods (analysis, synthesis, description, systematization) and special scientific methods (formal legal and comparative legal methods). In addition to this, historical method was also applicable.
The main results. Based on the results of the study, were disclosed significant discrepancies between the national legal regulation of the US diplomatic service and the rules of international law, which leads to massive violations of diplomatic immunities and privileges by the US authorities.
Conclusions. Diplomatic immunity is a guarantor of the effective operation of foreign relations bodies on the territory of the host state, however, in practice, there are often cases of their violation by the authorities of the host state and cases of abuse of diplomatic immunities and privileges by their carriers. The granting of a special legal status, personal inviolability and other privileges and immunities is in no way equated to absolute impunity for employees of foreign relations bodies in case they commit illegal acts.

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1. Introduction

Under "diplomatic immunity" presumed the set of diplomatic immunities and privileges that are granted to a diplomatic mission and its members. Immunity "immunitas" in translation from Latin means "independence", "non-susceptibility", i.e. exemption from the jurisdiction of the receiving State, and under the privileges understand special legal advantages, benefits.

According to the rules of international law, diplomatic immunities and privileges are granted by the sending State to ensure the effective activity of these bodies on the territory of the receiving state. The receiving state, in turn, undertakes to provide all conditions for the observance and protection of the full scope of the granted immunities and privileges. These rules, according to the scholar B. Sen, which are of ancient origin as diplomacy itself [1, p. 80], are essential to the conduct of the relations between independent sovereign states. As a rule, they are given on the understanding that they will be reciprocally accorded, and their violation by the receiving State would lead to mirror actions on the part of another contracting State and damage the level of bilateral relations between them.

Hugo Grotius, in his book «On the Law of War and Peace»1625, stated the following: “There are two maximas in the law of nations concerning ambassadors, which are generally accepted as an established rule: firstly, ambassadors must be received, and secondly, they must suffer no harm” [1, p.14; 2]. Since its recognition, diplomatic immunity has too often become a convenient vehicle for abuse, making diplomats who enjoy such privileges members of an "overly protected class" [3, p.18]. In an effort to confront this problem, the United States Congress enacted the Diplomatic Relations Act of 1978.

Several factors affected the adoption of the Diplomatic Relations Act [4, p.356-357]. First, the Diplomatic Relations Act was prompted by a dual approach to the scope of immunities and privileges granted. On the one hand, the Statute of 1790, which provided for a broad scope of immunities and privileges to all categories of members of diplomatic missions, regardless of their belonging to the highest or lowest level of diplomatic members, and on the other, the current norms of the Vienna Convention on Diplomatic Relations of 1961. Convention 1961 provided for a certain scope of immunities and privileges in respect to each category of diplomatic personnel. The Diplomatic Relations Act of 1978 brought many of the norms of national law applicable to the diplomatic service in accordance with the Vienna Convention of 1961, thereby eliminating existing conflicts.

The second factor that accelerated passage of the 1978 Act was the excessive number of diplomats in the United States receiving diplomatic immunities and privileges to the maximum extent possible. At the time of passage of the 1978 Act, the number of persons in the United States able to claim absolute immunity exceeded 30,000, from the valet to the ambassador[1].

The third, very disturbing factor was the frequent acts of violence and other illegal acts exhibited by local citizens toward the persons receiving diplomatic immunities and privileges [5, p.4]. A notable incident was the severe beating of a Liberian diplomat by a gang of youths in New York in 1973 [5, p.4]. The Act was regarded as necessary to temper the attitude developing in the United States that diplomats were an "overly privileged class" [6, p.8].

Fourthly, the adoption of the Act was due to the need to limit the arbitrariness of the unlawful actions of diplomats, who, relying on absolute immunity, able to cause damage to ordinary citizens and at the same time be unpunished. US citizens injured by diplomatic tortfeasors were left without compensation for the damage caused, since there were no legal mechanisms for their protection. The lack of recourse became especially serious in cases of traffic accidents caused by diplomats.

[1] Diplomatic Immunity Legislation. Hearing Before the Senate Committee on Foreign Relations on H.R. 7819, 95th Cong., 2d Sess. 27, 1978.

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2. Formation and development of the USA diplomatic service

The history of the origin of the US diplomatic service can be counted from 1781, when the Department of Foreign Affairs was created by the decision of the US Congress. The first head of the Department was R. Levingston [7]. In addition to the head, only four employees worked in the diplomatic department. However, the amount of work turned out to be colossal, more people were needed to carry out diplomatic tasks. With time, the staff gradually expanded, translators, staff members, secretaries, etc. appeared. [8, p.5]. At first, the Department was accountable to Congress, but later it was transformed into the State Department and carried out its work under the direct subordination of the President of the United States.

According to the US Constitution (Article 2, Section II) the President has the right, with the consent of the Senate, to appoint ambassadors, other official representatives and consuls. The US Constitution not much says about the activities of foreign affairs bodies, but an interesting provision is Article 3, Section II, according to which, in all cases involving ambassadors, other official representatives and consuls, as well as in cases in which the state is a party, The Supreme Court has original jurisdiction.

In the early stages of the formation of the diplomatic service in the United States, there was an acute shortage of qualified personnel. There was no procedure for selecting candidates for vacant positions, there was no clear list of requirements for admission to the diplomatic service, which affected the quality of the work of the State Department. There was a peculiar system of appointments to the highest diplomatic posts, called the "spoil system" (spoil - trophy, booty, benefit). The essence of this system of appointments was as follows, the elected president appointed his friends and allies, demonstrating gratitude for the support rendered to him. However, such appointments often did not take into account qualifications, professionalism and other necessary qualities. In this system of appointments, things often came to absurdities. For example, in 1869, President U. Grant appointed his friend E. Washburn to the post of Secretary of State for a period of only 12 days, so that he could briefly “enjoy the prestige of being” as head of the diplomatic department. With such appointments, the efficiency of the work of the diplomatic department fell sharply, and corruption flourished. As a result, such a system led to a deterioration in the prestige of the United States in the world and contributed to the development of a negative image of the diplomatic department [9, p.50-54]. However, the situation changed in 1883 with the adoption of the Civil Service Act, which was known as the «Pendleton Act». According to the Act of 1883, a competitive procedure for filling positions in the diplomatic service based on the results of the exam was established. The candidates with the highest score were appointed for a probation to test their moral qualities and practical skills. In 1905, US President T. Roosevelt signed a decree establishing an examination system for low-level diplomats. This idea was picked up by a number of higher educational institutions in the United States, which agreed to develop training programs for the diplomatic service.

In the early 20th century, there were major changes in the structure of the State Department. The executives of the body expanded, the position of special adviser to the Secretary of State and director of the consular service appeared; the number of divisions and departments dealing with highly specialized issues, for example, the department for trade relations, the information department, etc. increased; the network of territorial subdivisions expanded - departments for Western Europe, Latin America and the Middle East issues were created.

Another development features of the diplomatic service in the early twentieth century was its rapprochement with the consular service. If before these two services were absolutely separate and the transition from one service to another was practically impossible, then with the adoption of the Foreign Service Act of 1924, which is known as the "Rogers Law", the situation changed dramatically. According to the Act of 1924, the diplomatic and consular services were combined into a single service with a common procedure for hiring and promotion of the career ladder, a single salary was

established for employees of one link and a single retirement age was set at 65 years. Later, with the passage of the Truman Foreign Service Act of 1946, the retirement age for everyone was lowered to 60 years.

In the 60s of the twentieth century, the program "New Diplomacy" was developed, the main goal of which was to expand diplomatic relations between states in the field of education and culture. The State Department was tasked to directly supervise the exchange programs for foreign students for internships at US universities. By the 1980s, there were about 35 presidents and prime ministers in the world who at one time studied in the United States [10].

In 1981, the Foreign Service Act was adopted. The Act stated, "Congress considers, that a career Foreign service based on professionalism, serves the national interests and is necessary to assist the President and the Secretary of State in their conduct of the foreign affairs of the United States[2]."

The beginning of the new millennium for the US diplomatic service was marked by new terrorist threats, which could not but affect the structure of the State Department. In order to ensure information security, the Multi-State Information sharing and analysis center (MS-ISAC) was created.

In 2005, US President George W. Bush issued the directive NSPD-44, which required the Secretary of State to lead and coordinate all efforts of the US government, including all relevant departments and agencies, to stabilize and restore "complex emergencies in fragile states", including Iraq[3]. Following this directive, Secretary of State C. Rice proposed a project called "transformational diplomacy", the main idea of which was to send diplomats to "hot spots" in different parts of the world in order to stabilize the situation inside the country.

Today, the United States has more than 200 diplomatic and consular offices abroad.

3. The rules of national law applicable to the institution of diplomatic immunities and privileges in the USA

The first legal act regulating the activities of foreign relations bodies of the United States was adopted in 1790[4].

National judicial practice had a significant impact on the adoption of the Act of 1790. In the second half of the 18th century, the US Supreme Court in Republica v De Longchamps adopted the concept of complete diplomatic immunity. Chief Justice McKean stated that the person of diplomatic staff is inviolable and sacred. Ill-treatment, threat to life, as well as causing harm to employees of a diplomatic mission is a violation of international law[5]. This provision served as the basis for the adoption of the Act of 1790. By adopting the “De Longchamp Rule”, according to which the immunity of diplomats is almost absolute, this law thus granted diplomats and their families immunity from the criminal, civil and administrative jurisdiction of the host states [11].

As a result, diplomats had not been arrested, detained or prosecuted in any form. In addition, under the 1790 Act, any action against a diplomat or a member of his family is a criminal offence. The punishment for such a violation was a penalty or imprisonment for a period of three years [12, p.107; 13].

The granting by Congress of absolute immunity to diplomats under the Act of 1790 was dictated by the historical realities of that period. The diplomatic prestige and luxurious lifestyle of the ambassadors of the 16th-18th centuries required large personal costs [14, p.252]. The represented states practically did not pay the work of diplomats. The diplomat was forced to engage in commercial activities in order to finance the activities of the embassy. Consequently, no distinction was drawn between the official and private entrepreneurial

[2] Foreign service law - S.443.1981. Congress official website. URL: https://www.congress.gov/bill/114th-congress/senate-bill/243/text (date of access: 12.03.2022)
[3] Directive NSPD-44. Emergency Assistance in Unstable States. Congress’s library official website. URL: https://www.congress.gov/bill/115th-congress/house-bill/244 (date of access: 12.03.2022)
[4] Legislative act. The functioning of a foreign service.1792. Official website of the Library of Congress. URL: https://www.congress.gov/bill/115th-congress/house-bill/392 (date of access: 12.03.2022)
[5] Republica v De Longchamps. 1784. 1 U.S. (1 Dall.) 111

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activities of a diplomat in the national law of the United States. In practice, the private business activities of diplomats were not protected in any way, and often, the personal property of diplomats was subjected to executive actions by decision of national courts in order to satisfy creditors' claims. However, the 1790 Act prohibited creditors from bringing suit to the national courts in respect of the acts of diplomats committed during their terms of office. It was believed that the requirement for a diplomat to respond to private claims is a form of coercion and unjustified interference in his functions [15, p.120].

The 1790 Act also provided an exemption from criminal jurisdiction for diplomats. Diplomats could not be judged, any executive actions were prohibited against them by decision of national courts throughout the entire period of their tenure [16, p.170].

However, the exemption from the criminal jurisdiction of the host state does not mean absolute impunity for diplomats in case they commit illegal acts. Diplomatic agents remain subject to the jurisdiction of the sending state. The receiving state may, in case of a crime committed by a diplomat, inform the government of sending state about this, and in some cases demand that his immunity be waived by the authorities of the sending state in order to further bring the latter to justice in accordance with the legislation of the receiving state [17, p.170]. However, if the crime is of a serious nature, for example, participation in a conspiracy to overthrow the government, the host state has the right to impose restrictions on him and expel him from the country [18, p.181]. According to lawyer Hurst, such actions that the state can take in self-defense are not the exercise of criminal jurisdiction [19, p. 218-225]. The complete exemption of a diplomatic agent from local criminal jurisdiction seems to be a fully justified requirement for the unhindered exercise of his official functions, otherwise it would hardly be possible to guarantee his safety.

The host State also has the responsibility to ensure the inviolability of the diplomatic premises. The obligation to protect the premises meant that the host State must take all appropriate measures that may be necessary to prevent damage to the embassy building or any invasion into the premises of the mission. US Supreme Court in United States v. Hand [20, p.62] expressed the opinion that an infringement against the premises of a foreign mission is equal to an infringement on sending state and that precautions should be taken against pressure from the crowd and, if measures were not taken, an apology should be made to the mission. Increased security measures should be provided in case of mass demonstrations and protests near the embassy building [21, p.56-57]. The receiving state needs to establish a certain area around the premises of the embassy where any demonstrations or protests are prohibited. The US Congress, in a joint resolution approved on December 15, 1938, prohibited any protest action within 500 feet of embassy buildings located within the District of Columbia[6].

The role of the Act of 1790 gradually began to weaken. This became especially acute after the World War II. Against the background of the strengthening of diplomatic relations between the United States and other states, there was a certain negligence of diplomatic immunities and privileges. US national courts began to accept cases involving current diplomats or directed against diplomatic missions. In Agostini v. DeAntueno, a New York state court assumed jurisdiction in a proceeding to recover the leased premises of a diplomatic envoy[7]. Characterizing the suit as a proceeding in rem, the court ruled that real property held by a diplomatic officer in a receiving state and not pertaining to his diplomatic status was properly subject to local laws.

Another serious problem related to the employees of diplomatic missions was the impossibility of holding them accountable in connection with traffic accidents. The 1790 Law did not provide any exceptions from criminal jurisdiction in case of diplomats' involvement in traffic accidents, and often the victims of such accidents were left without compensation for the damage caused.

In April 1974, in one such incident, the Attache of the Panamanian embassy inadvertently ran a red light and collided with a car carrying Dr.

[6] 22 U.S.C.A., para 2SSA

[7] 199 Misc. 1950. 191, 99 N.Y.S. 2d 245

Halla Brown[8]. Dr. Brown was paraplegic and her expenses for the treatment amounted to more than two hundred thousand dollars, but the Panamanian embassy and government refused to compensate for the damage.

Such incidents served as an impulse for soon adoption of the Diplomatic Relations Act of 1978 by the US Congress, in accordance with which the measures of responsibility of diplomats for illegal acts committed by them on the territory of the host state were tightened.

4. USA Diplomatic Relations Act of 1978

The United States was among the forty-five countries that initially signed the 1961 Vienna Convention on Diplomatic Relations. The Senate approved the Vienna Convention in 1965 and it entered into force in 1972. The scope of immunities and privileges for employees of diplomatic missions that provided by The Act of 1790 was broader than that which was provided by Vienna Convention of 1961.

Within six years of US accession to the Vienna Convention on Diplomatic Relations in September 1978, the US passed a new Diplomatic Relations Act. The primary purpose of the 1978 Act was to bring U.S. law in accordance with the 1961 Vienna Convention on Diplomatic Relations.

This Act eliminated existing contradictions in national law, in particular, unilateral preferences for American diplomats.

One of the changes introduced by the 1978 Act is the claim rejection mechanism by national courts in the presence of immunity. In other words, the court under the new law must reject any claim against a person who has immunity. However, any mission member or member of his family who enjoys the immunities and privileges under the 1961 Convention or the 1978 Act must comply with the requirements arising from the rules established by the President of the United States.

The Act established the requirement for mandatory liability insurance for all employees of foreign missions and members of their families, in relation to the risks arising from the operation of any motor vehicle, vessel, or aircraft in the United States.

In addition to compulsory insurance, the Act also allows a victim involved in a traffic accident to sue the insurance company in US national courts rather than against the mission member, who enjoys immunity. Dickinson v Del Solar stated that an insurance company cannot rely on the privileges and immunities of a diplomat to avoid liability [22].

One of the main omissions of this Act is that it does not provide a compensation for damages resulting from abuses of diplomatic immunity other than those related to the use of any motor vehicle, vessel, or aircraft. Under US law, granting diplomatic immunity to a person is within the exclusive jurisdiction of the executive branch. President Jimmy Carter delegated this function to the Secretary of State in 1978. The power of the Secretary of State to grant or deny immunity is a strictly political decision and is not subject to judicial review. Critics have questioned the State Department administration over the determination of diplomatic status.

At the end of the twentieth century, the State Department actively participated in the work on the adoption of bills related to diplomatic immunities and privileges. So, in 1987, the State Department promptly intervened in the debate of Congress on the passage of the bill that intended to limit diplomatic immunity. The State Department's Chief of Protocol, Ambassador Selwa Roosevelt, presented her position on the issue to the Senate Foreign Relations Committee. Ambassador Roosevelt noted that “diplomatic immunity existed to assure that diplomatic representatives are able to carry out the official business of their governments without undue influence or interference from the host country. Immunity enables them to work in an environment of freedom, independence, and security.” [23, p. 206-207]. In connection with this postulate, the Chief of Protocol stated that the State Department could not support a bill which would narrow diplomatic immunities and privileges. However, she pointed out that steps have been taken to prevent abuses of diplomatic immunities and privileges by the carriers themselves.

During the hearings on the passage of the Act, it was proposed to create a claims fund,

[8] House Hearings. 1977. 95th Cong., Ist Sess. 188-90. P 80-81.

managed by the State Department, which would compensate the victims of diplomatic immunity abuses [24, p.393]. Solarz, a representative of the New York Congress, supported the idea of creating a claims fund to fill the gaps in the Act [24, p.409]. The advantage of this fund would be that the rights of citizens could be protected without hindering the diplomat's ability to continue his activities.

However, despite all efforts, this project did not find support. The main question was who should bear the financial burden to support the fund.

In 1988, the Senate Foreign Relations Committee proposed Bill № S.1437. The main idea of the bill was to waive immunity from criminal jurisdiction for certain types of crimes of diplomatic missions' employees and consular offices located in the United States [25, p.351]. Unilateral deprivation of immunity from criminal jurisdiction will prevent the effective functioning of foreign missions [26, p.357-358]. Such innovations are contrary to international legal norms and violate mutual obligations between states in providing favorable conditions for the functioning of foreign missions.

5. Conclusion

Based on the results of the study, it can be stated that one of the significant problems of the diplomatic service has been and remains the issue of staffing. To eliminate this problem, a number of legal acts were adopted establishing the procedure for appointment to diplomatic posts, and a list of qualification requirements for candidates was developed. According to the new rules, in order to enter the diplomatic service, it is necessary to pass an exam. These new rules laid the foundation for the professional training of personnel for the diplomatic service; the leading US universities developed special programs for their training. However, despite such an integrated approach, there is still a staff shortage.

Another significant problem in the activities of the State Department is the absence of a clear distinction of the functions of the foreign policy department with other key state structures, such as the CIA, in the implementation of foreign policy. The activities of the State Department are highly dependent on the tactics of implementing foreign policy chosen by other law enforcement agencies. Often, in practice, members of diplomatic missions or other foreign bodies of external relations are authorized to play the role of an observer in various hot spots where the presence of Americans is, in their opinion, a kind of guarantor of stability.

It is impossible to discuss the problem of frequent violations by the US authorities of the norms of international law and mutual obligations assumed in relation to foreign missions located on the territory of the United States. A cover for such violations is the provision of the US Diplomatic Relations Act of 1978, according to which the President, on the basis of reciprocity, may grant foreign missions and their members a scope of immunities and privileges broader or narrower than that provided by the Vienna Convention on Diplomatic Relations of 1961. Such reservations in national legislation undermine the foundations of international law and create a very dangerous precedent when a state, under the guise of national law, may selectively comply with international law, thereby threatening general security.

Thus, according to the results of the study, it is obvious that the US diplomatic service needs further improvement and strengthening of the role of international law in order to maintain a favorable climate in both bilateral and multilateral diplomacy.

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