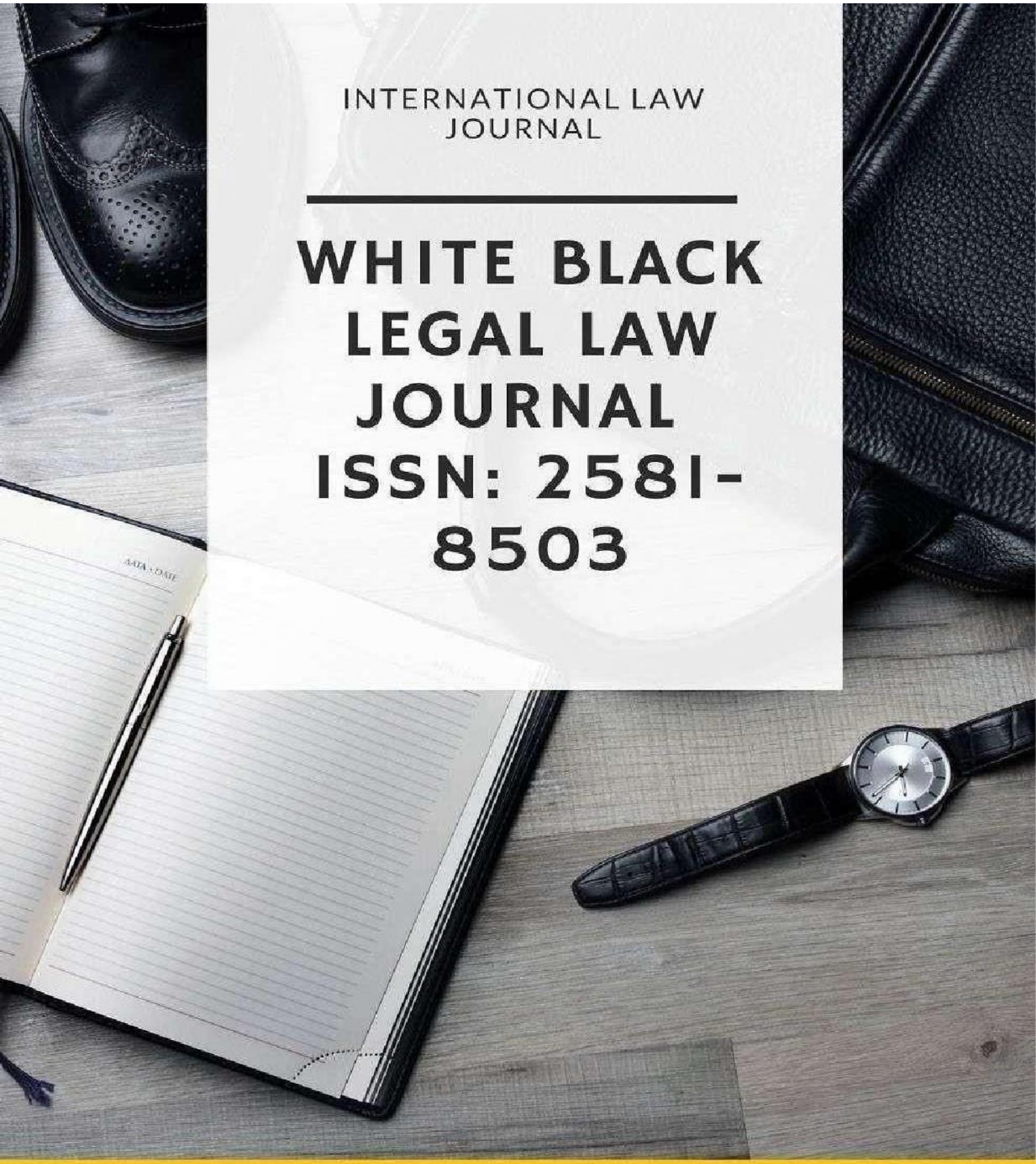

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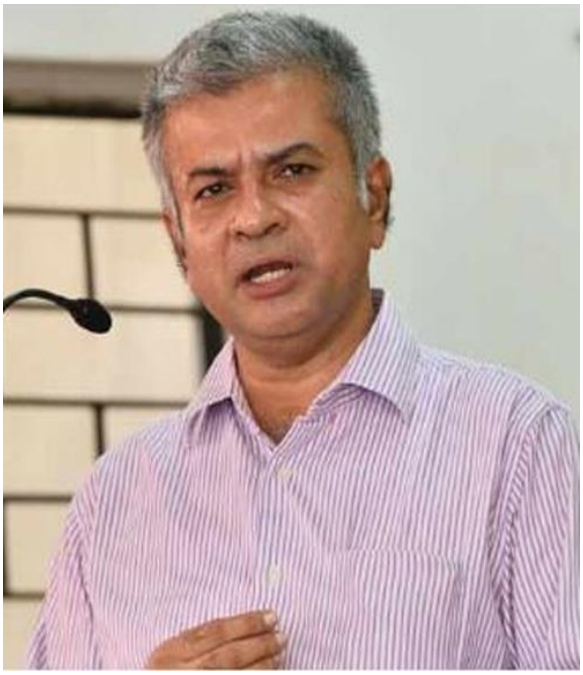

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

CHANGING THE NOTION OF ACT OF STATE UNDER INTERNATIONAL LAW

AUTHORED BY - POOJA PHULARI*

ABSTRACT:

Sovereign supremacy is changing due to the emergence of the concept of the Global Village. Act of State is - an established principle, as it has emerged centuries ago. The legal maxim, 'rex non potest peccare', (king can do no wrong) forms the basis of the modern-day principle of act of state. This principle is well established under the English Law. In most of the independent states, the sovereign power of the state is given more importance than any other foreign laws. Any act of the sovereign enforced within its territory, affecting any individual or sovereign beyond its territory cannot be sued in any court of law. With the emergence and growth of international trade and commerce, in recent centuries, the question of the sovereign power of the state started changing. Like all men are equal, all sovereigns are equal and no one is above another. The divine right of the sovereign state is being questioned. The absolute right of Sovereignty is been replaced with the limited right of sovereign immunity.

The researcher would like to focus on the status of sovereign supremacy is changing in the 21st century. All men are equal, likewise all states are equal. Similarly, all laws are equal. International law has led to the need for supreme law to govern the states. Some uniform rules must be made at the international level, to govern the inter-state acts, and to restrain sovereign supremacy. The main objective of this research is to analyze the changes in the concept of the act of state concerning International Law. Further, the researcher also aims to study the concept along with the evolution of the said concept and to have a comparative analysis of 'Act of State' and 'Sovereign Immunity.'

KEYWORDS: International Law, Sovereignty, State Sovereign

ACT OF STATE

Act of state means that any action committed in the capacity of a sovereign power cannot be questioned by the courts. The English principle, 'The King can do no wrong', forms the basis of the act of state. The act committed by the sovereign, and any other person acting as the representative of the sovereign are immune from the judicial proceedings.

Under the Constitution of India, the President and the Governor shall not be answerable to any court for the exercise and performance of the powers and duties of their office, or for any act done or purporting to be done by them in the exercise and performance of those rights and duties.[1] Under the civil procedure code, no ruler or former Indian state may be sued in any court except with the permission of the Government of India.

Any person injured by any act of state was not entitled to sue any authority or sovereign himself. Later in the past two centuries, the principle of state responsibility evolved. Under this principle, the state was made liable for the acts of the state or sovereign and also for the acts of representatives of the sovereign. The act of the state was termed as original responsibility, while those of its representatives were held to be the vicarious liability of the State.

STATE RESPONSIBILITY

The modern-day concept of state responsibility developed with International law. Initially, states were only regarded as the subjects of International law; thus the states were endowed with the responsibility to ratify the international rules and to enforce them in municipal laws. Before international law, the sovereign was under no obligation under any law. But international law established a check upon the sovereign activities too. The rules of international law as to State responsibility concern the circumstances in which and the principles whereby the injured state becomes entitled to redress for the damage suffered.[2]

The absolute exclusion of the sovereign from any obligation changed at the Hague Convention of 1907. If a belligerent State violates the rules of war, it shall be responsible for the payment of compensation. It shall also be responsible for acts committed by persons of its armed forces.[3] State responsibility has developed in various fields like for injury to aliens, for acts of

[1] Art 300 of the Constitution of India
[2] JG Starke, *Introduction to international Law,* 293(10th edn, 1989)
[3] Art 3, Hague Convention 1907

individuals, for acts of mob violence, for acts of insurgents, for acts of government organs, etc. Under the state responsibility for the acts of government organs or any representative, earlier the state was not responsible for such acts. However, under the principle of strict liability, the state was considered to be liable for the acts committed by its representatives or government organs. The state has been brought under the purview of liability for acts of its representatives, but the state can only be held responsible for the acts committed by its representatives or governmental organs working within its official duty. Any representative committing an act in the capacity of a private person doesn't amount to the state's responsibility.

The act of insurgents means a revolution against the government. In the case of insurgency, the state is not responsible for the act committed by the insurrectionists. It is under obligation to prevent and crush insurgent activities. But the state becomes responsible even in case of insurrections for injury caused to any foreign nationals.

The state is responsible for injuries caused to an alien as a consequence of riots, civil strife, or other internal disturbances if the constituted authority was manifestly negligent in taking the measures that in such circumstances are normally taken to prevent or punish the acts in question. [4] The state responsibility increases even more if the foreign national is the officer of the State or the person representing the United Nations.

SOVEREIGNTY

A territory is considered as a state under international law, only if the state has sovereign authority and a defined territory. A sovereign state is not subordinate to any other state and is supreme over the territory under its control. Its commands are necessary to be obeyed by all men and associations within its territory.[5] The word sovereign has its origin in the word *soverain*[6], which had its origin from *suprifus*[7], which meant supreme authority, having no other authority above it. The concept of the State having absolute power to prepare and enforce laws for themselves was termed as sovereignty for the first time by French Jurist, Jean Bodin, in his work known as Republic in the year 1577. Thus, this concept evolved during the Renaissance period in Europe.

[4] Ian Brownlie, *Principles of Public International Law*, 440(2nd edn, 1973)
[5] Dr. N V Paranjape, *Studies in Jurisprudence and legal theory*, 193 (8th edn, 2016)
[6] French word
[7] Latin word

According to Bryce, Legal sovereignty lies in that authority, be it a person or a body, whose expressed will shall bind others, and whose will is not liable to be overruled by the expressed will of anyone placed above him or it.[8] Sovereignty is the supreme, irresistible, absolute, uncontrolled authority in which the 'jurist summi imperi' resides. –Blackstone[9]. Bentham has defined a Sovereign as a person or a group of persons to whose will a political community (i.e. *subjects*) is supposed to be in disposition to pay obedience, in preference to any other person.[10] Lloyd has defined sovereignty as a practical device of law and politics whereby effect is given to the practical need in any community for some final or ultimate authority.[11] Thus, the meaning of sovereignty can be understood after studying definitions given by various jurists. It states that sovereignty is absolute power enjoyed by an individual or body to formulate rules for a given society. Today, most of the countries in the world enjoy state sovereignty. State is the sovereign which formulates the rules and implements them within the territories of the state, for the proper functioning of the society. Most of the countries of the world enjoy their independence and have declared them as sovereign states. Sovereignty is the daily operative power of framing and giving efficacy to the laws". -Woodrow Wilson.[12]

CONDITIONS FOR A STATE TO BE SOVEREIGN

According to Kelson, A community is recognized as an international person, if it fulfills the following four conditions[13]:

a) Politically organized,

b) Definite territory,

c) Independence,

d) Permanent Continuous community.

Thus, indirectly his definition of recognition of state has mention of sovereignty. Kelson noted that the state must be independent and politically organized, which are ingredients of sovereignty. Grotius defined Sovereignty as the sovereign political power vested in him whose acts are not subject to any other and whose will cannot be overridden.14 Sovereignty means that there is a relationship between the people of a certain territory. It is characterized as, a state

[8] Bryce: Studies in History and Jurisprudence, 53 vol II
[9] William Blackstone, *Commentaries on the Laws of England* (1765)
[10] Bentham, Law in General 18 (1985)
[11] Lloyd, *Introduction To Jurisprudence* (2010)
[12]Woodrow Wilson and the Doctrine of Sovereignty, 325 (1918) available at http://speeches.empireclub.org/62671/data last seen at 20/09/2018
[13]Dr.SK Kapoor, *International law and human rights*,87 (2008)
[14] Edward Spannaus, *Grotius and the sovereignty of Nations* 10(1980)

having the power to regulate the life of the community, which is free from external interference and receives recognition as a person in International law.15 According to Dr. Garner, the following are the characteristics or attributes of Sovereignty: (1) Permanence, (2) Exclusiveness, (3) All-Comprehensiveness, (4) Inalienability, (5) Unity, (6) Imprescriptibility, (7) Indivisibility, (8) Absoluteness or illimitability, (9) Originality.[16]

The authority of the state to regulate laws was not questioned by any other authority, until the development of the International Law. The sovereign supremacy of the state was unquestionable. The state was a single independent entity. Other state entities did not have any power to question a state over its stringent or lenient policies. The states were bound to each other only when they would enter into some contractual relations. But even due to such relation, the contracting states were not under complete obligation, it was merely contractual obligation.

INTERNATIONAL SCENARIO

International Law is regarded as the law of the nations. State sovereignty can be divided into two parts- internal sovereignty and external sovereignty.

Internal sovereignty means that the state has a unified authority, which has the power to regulate the laws and community. External sovereignty means the state has no external interference. It is independent of other states.

International law is the law that regulates the states. It creates an obligation over the States. Earlier, states were only the subject of International Law. Later with development certain non-state entities and individuals were given recognition as the subjects of international law. Though international law has a history of over 400 years, modern international law has developed during the second half of the last century. World War II ended with devastating effects on the world, due to which a need was felt to regulate state policies. Prima facie, this seems to be a good idea, to regulate the state policy and to maintain peace within the states. On detailed analysis, it can be observed that various state policies and principles are hampered due to the policies of international law.

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[15] Timothy Endicott, *The Philosophy of International Law* 254 (1st edn, 2010)

[16] Sovereignty: Meaning and Characteristics of Sovereignty, Political Science, available at http://www.politicalsciencenotes,com/essay/sovereignty-meaning-and-characteristics-of-sovereignty/254 last seen at 19/09/2018

Initially, it was formulated with the main aim to maintain peace in the world and to avoid war or any tension between states. Later as the scope of International Law started growing, various problems were faced. Many jurists opined that International Law is not a true law. If we consider the definition of law given by Salmond, the law is the body of principles recognized and applied by the State for the administration of justice. Thus, laws are rules or principles that are applied by the State to achieve the end goal of dispensing Justice. International law also hampers the concept of sovereignty. Law is recognized or enforced by the statute, but International law is the unmodified law having no statute as such. Therefore, the validity of international law as true law was questioned and still is an issue of debate.

International law is regarded as the law of nations. The international law works through the international organizations. The concept of state sovereignty is that the state has the authority to regulate the laws within its territory. With the growth of international law, it regulates state policies. If an international covenant or agreement has been accepted after discussion. The states are under obligation to incorporate the regulations of the agreement into their laws. Thus, international law is emerging as an obligatory force over the state, hampering its sovereignty. This has become a debatable issue worldwide.

The opinion of the jurists who had earlier opposed sovereignty has been relied upon and the status and validity of international law as well as that of sovereignty has been upheld. It was argued that HLA Hart has opined that if a state's sovereignty is limited by rules of international law, it can still be sovereign. He opines that the state is formulated by individuals within a territory, according to law, with a defined degree of independence.[17]

Internal sovereignty was criticized as most state follows the democratic form of government, the authority is not unified, but it is scattered into different organs. Though there is no external interference in the state activity, there is no unification of power. The organs that formulate the law, which enforce the law, and dispense justice are separated. This raises the question of absolute internal sovereignty. External sovereignty means the political independence of the state. The working of the state is conducted by the population of the territory and not by any other external force or under the influence of any foreign state.

It has been strongly argued that theoretically the principles of sovereignty, constitutionalism,

[17] HLA Hart, *The Concept of Law,* 55 (1961)

and rule of law are not incompatible but they co-exist in various states. The functioning of the state is not hampered or there has not been an adverse effect upon the state's functioning. This was used as a strong point to put forth the arguments in support of International Law. The main contention of the argument was that, though principles of sovereignty, and constitutionalism can co-exist with internal sovereignty, therefore even the principle of external sovereignty and international law can co-exist and achieve the goal of maintaining peace and order in the world.
According to the United Nations Charter in 1945, the erection of the United Nations was for development the and construction of an autonomous, global, increasingly integrated legal order of constitutional quality claiming supremacy that has profoundly modified state sovereignty.[18] After the havoc of the two World Wars, colonialism was discarded; territorial integrity of borders and political autonomy and wars for extending the territory were established. If such a decision was not taken then the World would have also faced the Third World War, thus International Law was not discarded. The enforcement and incorporation of human rights was the idea reflected in the Chapter of the United Nations. As the rights of human was the central idea, the Charter was accepted by most of the countries.

A new approach towards the concept of State Sovereignty can be observed after the ratification of the Charter of the United Nations. The first interpretation of the charter shifts focus from the concept of Sovereignty to Sovereign equality.[19] This has led to the classification of the view towards acceptance of International law and the global political system, based upon the concept of changing sovereignty regimes: cosmopolitan, monist, and pluralist.[20]

The Charter declares it to be supreme over the international treaty law. And incorporates customary international law.[21] Thus, accordingly UN Charter is an autonomous legal order. if this is co-related to the grundnorm by Kelson, then the UN Charter would be the grundnorm of the global political system. This establishes the Charter as the Constitution of the community, replacing the Constitution of the State as the grundnorm. This change in grundnorm shall change the status of the state from primary source of application to secondary source of application. The states would have to follow the Charter, before following its own territorial Constitution.

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[18] B. Fassbender, *The United Nations Charter as Constitution of the International Community*, Columbia Journal of Transnational Law, 36 (1998) 579
[19] B Fassbender, *Sovereignty and Constitutionalism in International law*, 115-45 Sovereignty in Transition (2013)
[20] Jean Cohen, *Sovereignty in the context of globalization: A Constitutional Pluralist Perspective'* The philosophy of International Law, 270 (1st edn, 2010)
[21] Article 103, Charter of United nations,1945

The monist approach is that of the acceptance of a global political system based upon human rights and the principle of sovereign equality. The UN Charter would be the basis of such a system, and it would be treated as supreme to the sovereign states.

The dualist or pluralist approach accepts the existence of the sovereign states. The principle of sovereign equality is majorly reflected in this approach. The UN charter is regarded as a legal principle in the purview of external sovereignty, while the constitution of the state would be the legal principle internally within the state. The basic idea is to acknowledge the existence of the autonomous legal orders – of sovereign states and the global political system. Constitutional pluralism involves the normative idea that what is required in acknowledging and handling competing claims to authority coming from national and supranational constitutional sites is an ethic of political responsibility premised on mutual recognition and respect.[22] Even if the pluralist approach is broadly accepted, the UN Charter will be the constitution, but an efficient organization like the government at the state level to implement the laws is missing. Either a global political organization must be brought into force, but then it is not technically possible to conduct elections for such organization as for the government in every state; or supremacy of the State sovereign must be accepted and the International law must be regarded as subordinate to the State Sovereign. The Sovereign status of the UN Charter could be regarded as the subordinate to sovereign. There has been a revolt against the Constitutionality of International Law, as there are no codified provisions of International Law. The state is compelled to incorporate the provisions decided by international organizations into the municipal laws. The states are implementing the laws even without their clear assent to provisions of International Law. This has created unrest among the state sovereign, as they cannot exercise their right to freely implement the policies for the well-being of the subjects of that particular state. An attempt has been made to reduce this unrest among the states by implementing the sovereign equality principle. The present status of sovereignty protects the special status of the member states, the legitimacy of the domestic system, and the relationship between the citizen and the government. This relationship between the citizen and government is far more important than the survival of International Law. If the citizen refrains from trusting their government, the survival of the government will be endangered, this would hamper the existence of the Sovereign State. Thus, International Law must recognize the external as well as internal sovereignty of the state.

[22] N Walker, *Constitutional Pluralism*, 337 Modern Law Review 65 3(2002)

CHANGING SCENARIO

Until the advent of International law, the Act of state was the liability of the state towards its actions; more particularly towards the acts of the sovereign. The Sovereign was regarded as the absolute authority within the territory of the state. The laws made by the Sovereign were not challenged by any other authority. However, after the emergence of International law, the Sovereign started losing the absoluteness in its authority. The international law established a check over the Sovereign. The Act of State which constituted one which cannot be sued in the court of law by any person underwent certain changes. The Acts of State that caused injury to the foreign nationals or persons representing the United Nations were entitled to sue such State for their injury. The State proclaiming war was also made liable to pay compensation to the injured State. The concept of an Act of State was considered to be near to the English maxim that a king can do no wrong. But in present times, it is considered that the King can do wrong and the King is also liable to be sued under the law of the land. Thus, Acts of State do not enjoy absolute protection but it is limited to a certain extent.

CONCLUSION

Thus, it can be concluded that the concept of state sovereignty was near to absolute before the International Law, but after the development of the International Law, this concept of state sovereignty has shifted to sovereign equality. The concept of the Act of State was absolute earlier, but now protection is extended to certain acts of state only. The International law has taken away the absoluteness of the powers enjoyed by the State. The principle of equal status to all the states has been the idea. The concept of the global political system is emerging. The approach of the global political system is based on sovereignty. It has been classified into a monist and pluralist approach. The absoluteness of sovereignty has undergone a drastic change. As the internal sovereignty was not absolute, similarly the external sovereignty has lost its absoluteness and has been imparted with sovereign immunity to each state under the International Law. Thus, the emergence of International law has led to a change in sovereignty from absolute external sovereignty to sovereign equality. The state was not liable to pay compensation to the injured state in war, but now the State proclaiming war is made liable to pay compensation to the injured state. The state is now liable for injury caused to foreign nationals due to any act of representative of State, or act of insurgent or act of government organs.