The Legal Nature of Consuls Immunity

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Abstract: Whenever is talked about the immunities and privileges of the consuls, it must bear in mind that this institution is of particular importance in international law, especially in consular law. Otherwise, the immunity as a concept means exemption from an obligation. In the legal point of view, the content of the nature of the immunity itself consists to explain a particular status of a subject at a certain time. This paper aims to explain the meaning and the importance of the consuls immunity based on various literature and in domestic and international legal acts i.e. Havana Convention on Consular Agents (1928), Vienna Convention on Consular Relations (1963), European Convention on Consular Functions (1967), Convention on Special Missions (1969), on which are foreseen all rights and obligations of consuls that they exercise during the performance of the mission in the receiving state. What is characteristic in the performance of the consular activities is the case when the sending state does not have diplomatic representatives in the receiving state. This consists of giving the opportunity for performation of diplomatic affairs by the consuls, which implies the consent of the receiving state, but always preserving consul status. It should be noted that among immunities and privileges that are invoked by consuls and which are universally acknowledged, but there are some cases that remained to be regulated by bilateral agreements between states.

Keywords: Diplomatic Agent; Consul; Convention; Immunity.

1. History of the Institution of Consuls and its Immunity

Historically, it can be said that the origin of consuls were from Ancient Greece. Greek city-states (polis) had some so-called *proxies* who were charged with some consular functions. However, most authors associate the development of the institution of consuls especially with the period of international trade development. Traders of Italian, French, Spanish cities during the Middle Time have practically

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chosen to appoint a person as arbitrator in trade disputes, who they called consular judges or commercial consuls. They cared about were maintaining order within their colonies and sometimes exercised jurisdiction over their compatriots on the basis of the principle of personal competence. After the wars of the Crusades, traders of European states elected one of their compatriots for consulship in their native countries. Their competences have been expanded, especially by capitulation agreements which were linked between Christian states, first with the Ottoman Empire and later with many eastern states. Under these agreements the consuls exercised full of civil and criminal jurisdiction over all compatriots who lived in or passed through those states and were entitled to the protection of the rights, life and property of their compatriots. This regime, which has been an expression of inequality between christian states on the one hand, and the Ottoman Empire and other states, was abandoned for the first time by the Soviet Union after the October Revolution, when Lenin withdrew from unequal treaties of Tsarist Russia, or cancelled by international agreements such as with Turkey (Treaty of Lausanne, 1923), Egypt (Montre Agreement, 1927), with China (1943), etc. However, even after the Second World War, the International Court of Justice (1952) decided that the US had the right to exercise consular jurisdiction under the agreement with Morocco (1836) in all civil and criminal matters between US citizens (Gruda, 2003, p. 236).

The consular institution has marked a significant development during the 20th century through the development of trade and its opening in many countries in the world (China, Japan, etc.). Thus, their main function now is to oversee the trade and navigation of their state and to protect the commercial interests of their citizens. At the end of the 20th century almost all states have established consular services, but the consular law and practice have achieved a high degree of uniformity. This service in most countries, initially was separated from the diplomatic service, but both were under the control of the foreign ministry. Due to its close connection between diplomatic and consular functions, it can be said that in all countries these services are joined with the aim to form a unique external service, so many diplomats today exercise consular functions (Gruda, 2009, p. 262).

Consular and diplomatic missions, according to Law for Foreign Affairs of North Macedonia[1] are headed by the consular officer, respectively, by the honorary

[1] With the constitutional changes in 2018 the name of "Republic of Macedonia" was replaced with new name "Republic of North Macedonia", and the contest with Greece was closed.

consular officer. In this regard it is important to emphasize the notion of "permanent mission" which means representations of our country in other countries as well as in international organizations, which exercise their activities under the Vienna Convention on Diplomatic Relations (1961), Vienna Convention on Consular Relations (1963), and other international agreements (LFAM, article 2, paragraph 4). In Law for Foreign Affairs of Albania, we can find the notion of "diplomatic mission" which means the institution of representation of Albania in the receiving state or in any international organization (LFAA, article 3, paragraph 4). While, according to the Law for Foreign Affairs of Kosovo, we also can find the notion "diplomatic mission", but with more detailed content. Accordingly, under this law the "diplomatic mission" is the embassy or any other officer who represents Kosovo in another state or international organization by the meaning of the Vienna Convention on Diplomatic Relations (1961) or by the Vienna Convention on Consular Relations (1963), or who represents Kosovo as part of a mission of two or more states, and to which office are given all privileges and immunities which enjoyed by law in diplomatic missions under the Vienna Convention on Diplomatic Relations (LFAK, article 2).

According to Law for Foreign Affairs of North Macedonia, the diplomatic and consular missions are part of the organization of the ministry for foreign affairs, and the systematization of jobs with the ministry and in the diplomatic and consular missions is done by the decision of the minister for foreign affairs. Consular posts under the above law are divided into: consulate-general, consulate, consular office and honorary consulate (LFAM, article 25).

From a legal point of view consuls are divided into professional consuls or career consuls (*consules missi*) and honorary consuls *(consules electi)*. Professional consuls are civil servants and consular officers, which are regulary employed in their state. They are regular nationals of the sending state and have special training. While, honorary consuls are authoritative persons, and they are often nationals of the state where they act as consuls. They do not receive a salary for their work as they carry out for their consular duties in addition to their regular jobs. There are states that appoint only professional consuls, such as France, but most states nominate both types of consuls, depending on the importance of the consular district (Gruda, 2009, p. 263). As was mentioned before, we can conclude that the most reasonable in performing of consular duties would be selection of professional consuls, due to their experience achieved as a result of performing of consular duties.

Heads of consular posts are divided into four classes, namely: consuls-general, consuls, vice-consuls, and consular agents (VCCR, article 9). The rank between them is determined by the class and date of receiving of the exequatur. Honorary consuls take rank in each class, after professional consuls. It is important to mention that all consuls in one city make the consular body, respectively, the dean who is the oldest by rank (Gruda, 2003, pp. 237-238). Otherwise from the Vienna Convention on Consular Relations (1963), Havana Convention on Consular Agents (1928) in article 2 is not foreseen any criteria for the appointment, respectively ranking of consuls into different classes, but this is up to concerned state to regulate it under domestic law. Therefore, it can be said that there is the same rank of consuls according to Law for Foreign Affairs of North Macedonia. Thus, the consuls are divided into four classes: consuls-general, consuls, vice-consuls, and consular agents. Such separation also exists in the Law for Foreign Affairs of Albania and Law for Foreign Affairs of Kosovo.

As for the conditions for appointment of consuls, it is not up to international law, but it is the domestic law which requires possession of certain qualifications for professional consuls. The sending state gives to newly appointed consular officer a consular patent so-called *Lettre de provision*. The first two categories take it by the head of state or by the prime minister, and rarely by the minister for foreign affairs, and the third category in each case by the minister for foreign affairs. The consular patent, as a rule contains: name and surname of consul, his category and consular rank, consular district (which must regularly respond to administrative and political division in a state) and the consular headquarters. This is submitted to the state in whose territory the chief of consulate will exercise his functions through diplomatic channels (diplomatic representatives-minister for foreign affairs) or other appropriate manners (Gruda, 2003, p. 238). However, the appointment of consular employees shall be made in order to protect the rights and interests of their nationals of the sending state (ECCF, article 2). From this point of view we can see that besides diplomatic representatives who intend to represent their state in international relations that once defends the interests of their citizens in the receiving state, it can be freely stated that the role and function of the consuls also has that role but with restricted content.

Consular admission shall only take place if the receiving state provides the so-called *exequatur*, which implies permission of exercise of the function and in the same is a evidence of its acceptance. The so-called *exequatur* may be withdrawn or refused at any time. The state which rejects the *exequatur* is not obliged to

communicate the reasons for the rejection to the sending state. The receiving state may at any time to notify the sending state, which any consular officer is *persona non grata* or is not acceptable. In this case the sending state is obliged to revoke the consul or to terminate his functions at that consulate. Otherwise, or in the event of delay, the receiving state may withdraw the *exequatur* for the person concerned or cease to consider him as a member of the consular staff (Gruda, 2003, p. 238).

According to Law for Foreign Affairs of North Macedonia, the Government upon the proposal of the minister for foreign affairs, gives the so-called *exequatur* to the head of the consular post (LFAM, article 89).

Immunities are important for the consular institution. In order to prevent the receiving state from interfering with their work, consuls enjoy certain privileges (Quigley, et. al., 2010, p. 4). Therefore, every public function enjoys certain immunities and privileges in internal and international level, which are valid for the limited and unlimited time, depending on the function that enjoys, and it is important to mention that immunities are important and are a special institution of law. In exercise of consular functions, it is normal to enjoy immunity, which at the same time discharge them of certain responsibilities within the receiving state, but even in this case it should consider the degree of criminal liability, which may eventually be avoided from the legal immunity.

Whenever is talking about the immunities and privileges of consular employees, it can be said that they do not enjoy the same immunities and privileges as diplomatic agents.[1] The reasons for this should be sought even from the past, namely from the historical development of the consular service, the restrained approach of certain states regarding the role of consular officers and the manner of legal regulation (Марковски, 2016, p. 250). Consuls are not diplomatic representatives, they do not represent the state in international relations in total, but have limited competences, both in territory and function terms. Therefore, they do not enjoy the same position as diplomatic representatives, and in practice no state treats them the same as diplomatic representatives. Since they are appointed by the sending state and have the *exequatur*, which means they have been accepted by the receiving state as agents of the sending state, in relation to private persons, their position varies, and lies between the privileges of diplomatic representatives and foreigners (Gruda, 2009, pp. 267-268).

[1] According to VCDR, article 1, paragraph 5 the notion "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission.

However, unlike the immunities and privileges of diplomatic representatives, which are foreseen in international law and currently recognized by a large number of international law subjects, it turns out that the question of the immunities and privileges of consular officers is still regulated by bilateral agreements or by the laws of states (Марковски, 2016, pp. 250-251). Therefore, many states have preferred to conclude bilateral agreements with aim to suit their requirements and these are more liberal scale of privileges and not of immunities (Feltham, 1998, p. 53). As a result, in today's practice, there are a large number of such agreements, which have restrictive, but in some cases, extensive approaches, with the aim harmonizing diplomatic immunities and privileges. Of course, the principle of reciprocity has an important role in the regulation of bilateral agreements. The efforts of the International Law Commission and some theorists regarding equality of consuls immunity with diplomats has not received full support so far from the International Community. The adoption of the Vienna Convention on Consular Relations (1963), presents an important document in regulation of this matter. During the drafting of the convention, it has been given attention to the application of the principle relating to the interpretation of common law, then, to the setting of norms and to the establishment of progressive principles which contain a large number of agreements. In this regard, the highest degree of regulation of consular problems has been achieved, while at the same time giving the possibility of improving consular law. However, it remains to be seen that the number of immunities and privileges to which consular officers can be called, respectively the inviolability of the consular archive and other official activities, are universally accepted. While other issues which were mentioned above depend on the provisions of bilateral agreements, namely to national legislation and the practice of state (Марковски, 2016, pp. 250-251).

1.1. Immunity of Consular Premises

Consular buildings are inviolable. The authorities of the receiving state shall not enter that part of the consular premises which is exclusively for the purposes of the work of the consular post, except with the consent of the head of the consular post or by the person designated by him or by the head of the diplomatic mission of the sending state. This consent of the head of consular post may however be assumed in case of fire or other disaster, which requires rapid intervention. Therefore, the receiving state is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance

of the peace of the consular post or impairment of its dignity. The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending state (VCCR, article 9, paragraph 1-4). Unlike to the Vienna Convention on Consular Relations (1963), in some cases the inviolability of the consular premise enjoys absolute immunity, but in some states this right is not envisaged (Марковски, 2016, p. 251). As a result of the lack of absolute immunity of consular premises, it also makes controversial the meaning and importance of the so-called "consular premises immunity", namely that these states lack many rules and legal principles that relate entirely to the inviolability of consular premises or otherwise saying there is no need to talk about the immunity of consuls when their personal side is violated.

Also, the Vienna Convention on Consular Relations (1963) includes the right of the sending state the use of its national flag and coat-of-arms in the receiving state. Also, the national flag of the sending state may be flown and its coat-of-arms displayed on the building occupied by the consular post and at the entrance door thereof, on the residence of the head of the consular post and on his means of transport when used on official business. Namely, in exercise of the right are taken into consideration the laws, regulations and usages of the receiving state (Dembinski, 2017, pp. 45-46).

1.2. Inviolability of the Consular Archives and Documents

One of the general rules accepted concerning the immunities and privileges of consuls is the inviolability of consular archives and documents. This implies the inviolability of all materials, regardless of the time and place in which they may be, or where they pass. It is important to note that, except to the inviolability of the consular archive, are included also consular books, citizen registers, documents, certificates as well as diplomatic correspondence, including coded documents and their numbers (Марковски, 2016, p. 251). Therefore, the consular archives and documents of a consular post headed by an honorary consular officer shall be inviolable all times and wherever they may be, provided that they are kept separate from other papers and documents and in particular from the private correspondence of the head of the consular post and from any person who works with him, and

from the materials, books or documents relating to their profession or trade (Jazbec, 2008, pp. 202, 213).

1.3. Personal Inviolability of Consuls

The personal inviolability of consular officers does not imply fully amnesty of their actions and the procedures that they undertake in the performance of their mission in the territory of the receiving state (Запрова & Сотироски, 2014, p. 115). According to Vienna Convention on Consular Relations (1963), the consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority (VCCR, article 41, paragraph 1). The definition of "grave crime" that is qualified as a condition of deprivation of liberty or detention of consular officer has broader approach, in order to allow the receiving state to determine itself which criminal offence is grave or not. The purpose is not to interfere with the personal interpretation of the offence weight, which is the basis for the detention or deprivation of liberty of the consular officer, respectively, to count the conditions for qualifying of the offence weight or to be limited to the degree of punishment provided with the criminal offence (Запрова & Сотироски, 2014, p. 115). On the other hand, we have the case when consular officers shall not be committed to prison or be liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect (VCCR, article 41, paragraph 2). If criminal proceedings are instituted against consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case when the consular officers shall not be liable to arrest or detention pending trial, except in the case of grave crime and pursuant to a decision by the competent judicial authority in a manner which will hamper the exercise of consular functions as little as possible. When in the circumstances mentioned before, it has become necessary to detain a consular officer, the proceedings against him shall be instituted with the minimum time of delay (VCCR, article 41, paragraph 1 and 3). In this case, it must be followed the principle of speed, expressed by the state authorities.

Consular employees do not enjoy the same personal immunity, such as consular officers, but in case of deprivation of liberty or detention on remand, public authorities are obliged to notify the head of consular post as soon as possible and to initiate the procedure in the shortest possible time (Запрова & Сотироски, 2014, p. 116). Also, personal immunity does not enjoy service staff. The receiving state is

obliged to notify the head of the consular post in case any member of the service staff to be detained or to initiate criminal proceedings against him. International law recognizes certain privileges and facilities to members of the family of consular officers as well. This right is given with the aim the members of the consular posts to perform their functions without interruption. For the members of consular employees, the ministry for foreign affairs of the receiving state keep records. Therefore, the family members of the consular officer before arriving in the receiving state, they have to notify in advance of their arrival and departure (Запрова & Сотироски, p. 117). Also, in certain situations, if any member is not a part of the consular family, then the ministry for foreign affairs of the receiving state must be informed about this. Not only his closest are considered as a member of the consular employee's family - the family in the narrowest sense, but also the wider circle. Thus, as members of the consular employee's family are considered: spouse, parents, adult sons, married daughters, as well as brothers and sisters who living in the same family. Also, adult boys and girls who are under the care of a consular employee even they do not live together with him as a result of studies in the sending state or in a third state. Therefore, these are also considered members of his family (Запрова & Сотироски, p. 118).

As was mentioned above and in accordance with Article 43 of the Vienna Convention on Consular Relations (1963), it states that the consular officers and consular employee are not fully exempted from the jurisdiction of judicial and administrative authorities in respect of acts performed in the exercise of consular functions in the receiving state. Therefore, they are not fully exempted from the jurisdiction of the judicial authorities and their functions always are exercised under the laws of the receiving state.

Also, the service staff of the consular post does not enjoy immunity from judicial and administrative competence in the receiving state, nor about the actions taken in the performance of certain tasks. The members of the service staff are obliged to testify, otherwise the receiving state may take obligative measures and other sanctions. In fact, they are not obliged to testify about the facts which have been learned during the performance of their duties, and to show materials, such as scripts and documents, which they have been produced during the performance of their official duties. Service staff may be deprived from their immunity only if the sending state allows it in the same manner as for consular officers (Запрова & Сотироски, p. 117). Unlike this, the family members of consular employees do not enjoy immunity from the judicial and administrative of the authorities of the

receiving state, and do not enjoy the right of personal immunity (Запрова & Сотироски, p. 118). Therefore, except diplomatic and consular representatives, personal immunity enjoys the representatives of the sending state in the special mission in the receiving state (CSM, article 31). Also, immunity enjoys persons who exercise public functions within the territory of the receiving and sending state, in which are provided certain rules of their scope.

1.4. Exemption from Taxation and Customs Duties

Consular premises and residences in which the head of the consular post is located, are exempted from all taxes and customs duties regardless of the nature, state, regions and municipalities. However, these exemptions are not applied in the case of compensation for special services such as: payment for internet use, for television, hygiene services, etc. In accordance with the national laws of the states, the payment of turnover taxes must be applied by the sellers, namely, if the receiving state purchasers immovable property, then the profit tax will be paid by the seller of the property, which means exception of the Convention on Consular Relations. If the purchaser is required to pay a profit tax under customary law, then the consular mission is exempted from the same pay. In case of official vehicles of the consular office, they are exempted from road taxes, but this does not mean that they are exempted from paying taxes related to rendered service, such as parking etc. (Запрова & Сотироски, pp. 114-115). The Vienna Convention on Consular Relations (1963) in article 50, paragraph 1, provides that the receiving state shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on: articles for the official use of the consular post, articles for the personal use of a consular officer or members of his family forming part of his household, including articles intended for his establishment. The articles intended for consumption shall not exceed the quantities necessary for direct utilization by the persons concerned. According to article 49 of the Vienna Convention on Consular Relations (1963), Consular officers and consular employees and members of their families forming part of their households shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except: indirect taxes of a kind which are normally incorporated in the price of goods or services, dues or taxes on private immovable property situated in the territory of the receiving state, estate, succession or inheritance duties, and duties on transfers, levied by the receiving state, dues and

taxes on private income, including capital gains, having its source in the receiving state and capital taxes relating to investments made in commercial or financial undertakings in the receiving state, charges levied for specific services rendered, registration, court or record fees, mortgage dues and stamp duties etc.

In case of death of a consular officer or any member of the consular post, the receiving state shall be obliged to allow transfer of the movable property owned by the decedent, except for property which is prohibited to transfer under the laws of the receiving state, and not to pay taxes for the transfer of movable property which is located in the receiving state, because the decedent was in that state as a member of the consulate or a member of the family.

Consular employees and their family members enjoy tax exemptions like consular officers. However, consular employees do not enjoy customs exemptions provided for consular officer. Therefore, the consular officers and their family members enjoy custom exemptions upon first entry, for items foreseen for personal use (Запрова & Сотироски, p. 116). Also, the members of the service staff are exempted from taxes as a result of their services received by the receiving state. However, they do not enjoy customs exemptions, during on their arrival in the receiving state and during their staying in the receiving state. The members of the service staff who are nationals of the receiving state enjoys limited privileges and immunities accepted by the receiving state. For such persons, the receiving state exercises full jurisdiction over them, taking into account to normal functioning of the consulate (Запрова & Сотироски, p. 117). Members of the consular officer's family are exempted from any type of custom goods which are subject for personal use. They are also exempted from customs control of personal baggage. If the authorities of the receiving state suspect that in personal baggage has prohibited items or do not belong to their personal use, then the control may be carried out in their presence or in the presence of the consular officer. Therefore, the family members of the service staff are not exempted from any customs goods (Запрова & Сотироски, p. 118).

1.5. Freedom of Communication

One of the main tasks of consular officers is to inform their state for the economic, cultural, commercial and scientific life of the receiving state. The accomplishment of these tasks is done through regular communication of the consul with his government as well as with the diplomatic representation of the sending state,

through exchange of information, reports and instructions relating to matters within their working circle. In this respect, freedom of communication means the right of the consular officer to use all adequate manners of communication, such as: use of diplomatic or consular couriers, diplomatic or consular bags, diplomatic correspondence, coded documents. On the other hand, the receiving state is obliged to provide free movement of consular baggage respectively, free movement of consular or diplomatic couriers (Марковски, 2016, p. 252). Except, of freedom of communication, the receiving state shall ensure freedom of movement and travel in its territory to all members of the consular post (VCCR, article 34).

Conclusion

The importance of the consular immunity is especially evident in the provision of consular services which are performed by diplomatic persons, but the function of diplomatic persons, is different in the terms of representation of states in diplomatic and consular relations.

Taking into consideration the categorization of consuls in several different classes, certainly, based on the internal laws of the various states, which more closely regulate this matter, it can be said that in the exercise of consular functions, it is more reasonable and more appropriate and substantial is the choice of the professional consuls. This is justified because they have a more specific preparation, always having into consideration the law of the respective state, which always consists in fulfilling of certain conditions, which later put the exercise of consular duties into service. Therefore, as in theory and in practice, it is the domestic law that regulates this matter, so it is left to the states themselves to decide on the basis of their national laws concerning consular services.

What is more specific is that both diplomatic and consular representatives can be declared *persona non grata* by the receiving state, which is not the case in representation of the state in international organizations.

If we take into account the immunity of consular and diplomatic representatives, we can say that the consuls do not enjoy the same immunities as diplomats, because the issue of consuls immunities is still regulated today by bilateral agreements, in addition to international conventions. Therefore, this issue consists in regulating and improving of the consular law, and do not leave aside some issues that are universally accepted.

Therefore, as we noted earlier, the consular representatives do not enjoy the same immunities and privileges as like diplomatic representatives, because the consuls are not diplomatic representatives and do not represent the state in international relations at all, but they are limited in the exercise of their functions, independent of their appointment by the sending state, respecting all formal procedures for them.

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