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Competence of the honorary consul as an administrative body based on estonian example

La competencia del cónsul honorario como un órgano administrativo con base en el ejemplo estonio.

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Abstract

The roots of the institute of honorary consul derive from the classical antiquity. The Vienna Convention on Consular Relations enacted both the institution of career consul as well as honorary consul. Honorary consul is an institution with long history based on international customary law, whose activities, importance and meaning have been changing over the centuries according to needs and developments of law. The appointing of honorary consuls is related to the consent of both the sending country and the receiving country to allow honorary consuls; whereas it has not been perceived that the institution itself would be in threat of dissolving in the near future – vice versa – there is a certain tendency referring to the significance of it. The paper, based on Estonian experience analyses whether the honorary consul performs public functions and whether certain constitutional limits apply in delegating public functions to honorary consuls as private persons. The state, has a dilemma in deciding whether the necessity of performing consular functions in certain area overweight the risks which may accompany the delegation of consular functions to a private person who is a citizen of a foreign state. In Estonia, a honorary consul is appointed and his or her competence is assigned by the directive of the Minister of Foreign Affairs, the direct authorization is laid down in an administrative act. Even though an honorary consul undergoes through strict regulation and follows specific instructions, its eventual tasks are

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performed independently. The difference of delegating tasks to notaries is different as in case of honorary consul, the method of functional delegation prevails.

Key words: *Honorary consul, Competence, International law, Public functions.*

Resumen

Las raíces del instituto del cónsul honorario se derivan de la antigüedad clásica. La Convención de Viena sobre Relaciones Consulares aprobó tanto la institución de la carrera de cónsul, así como el Cónsul Honorario. Cónsul Honorario es una institución con una extensa historia basada en el derecho consuetudinario internacional, es importante mencionar que sus actividades, importancia y significado han ido cambiando a través de los siglos según las necesidades y la evolución del derecho. El nombramiento de los cónsules honorarios se relaciona con el consentimiento tanto del país de origen como del país receptor para así aprobar los cónsules honorarios; mientras que no se haya percibido que la propia institución estaría en peligro de disolverse en un futuro cercano –o viceversa - hay una cierta tendencia con referencia a la importancia de la misma. El siguiente artículo, basado en la experiencia de Estonia, analiza sí el cónsul honorario ejerce funciones públicas y sí ciertos límites constitucionales se aplican en la delegación de funciones públicas a los cónsules honorarios como personas privadas. El Estado presenta un dilema al decidir si la necesidad de llevar a cabo las funciones consulares en cierta área sobrepasa los riesgos que pueden acompañar a la delegación de las funciones consulares para una persona privada que es ciudadana de un Estado extranjero. En Estonia, un cónsul honorario es nombrado y su competencia es asignada por la directiva del Ministro de Asuntos Exteriores, la autorización directa se establece en un acto administrativo. Aunque un cónsul honorario se somete a una regulación estricta y sigue las instrucciones específicas, sus tareas son realizadas de forma independiente. La delegación de tareas a los notarios no es igual que delegarlas al cónsul honorario, el método de delegación funcional prevalece.

Palabras clave: *Cónsul Honorario, Competencia, Derecho internacional, Funciones públicas.*

The Entity and Competence of Honorary Consul
The incipiency and development of honorary consul as an institute

The roots of the institute of honorary consul derive from the classical antiquity, from the time of development of commercial and economic relations. 2 The essence equivalent to contemporary substance of honorary consul, and of later established career consul, was developed in medieval European cities. The prevalent change of substance in consular sphere took place in the 16th century, where, instead of choosing consuls from local merchants, some countries began to appoint their own consuls to foreign states.3 This put a start to principal difference between appointed consuls (in the future: career consuls) and consuls selected from the community of the country of destination (in the future: honorary consuls). The former started to perform certain diplomatic functions, whereas they were granted limited amount of immunities and privileges. Appointing consuls with a citizenship from the sending state to foreign states gradually became more popular; and between 18th and 19th century it was thought, contrary to previously prevalent viewpoint, that an honorary consul might get involved in a conflict of interests if he were a citizen of the country of destination,4 which caused the increasing preference of appointed consul system. The latter capacitated to greater governmental control over the consular activities.[5]

The system of career consuls similar to today's system, according to which the consuls are state public servants whose job presupposes periodical missions to foreign states and whose job description entails, more narrowly, consular assignments, and more widely, the representing of the state, developed only in the 19th century. Initially, the system of career consuls was completely independent of a diplomatic system, whereas these two were combined in different states only at the end of the 19th to beginning of the 20th century.[6] To abridge – the diplomatic relations evolve in a very high governmental level and are in their nature political, while consular affairs evolve in the administrative level and are usually not of political nature.[7]

In parallel with the division of consular institution, the general rights and obligations of the career consuls and honorary consuls were changing over the centuries. The preliminary competence, which was mainly the extraterritorial judicial power,8 was gradually reduced, and consuls were rather acting as representatives of their states ordered to protect the commercial and business interests of the sending state and its citizens. In order to briefly summarize the essence of consular activities, it might be said that they have performed different functions over time, some of which are in certain ways still perceptible today. Among the latter

2 Värk, R. Sissejuhatus rahvusvahelisse õigusse. Tartu: Tartu Ülikooli Kirjastus 2005, p. 175.

3 Lee, L.T., Quigley, J., p. 6.

4 Lee, L.T., Quigley, J., p. 515.

5 *Ibid.*, p. 6.

6 Sen, B., p. 245-246.

7 Land, K. Diplomaatiline õigus ja konsulaarõigus. - Kiviorg, M, Land, K, Miil, K, Vallikivi, H. Rahvusvaheline õigus. Tallinn: Juura 2007, p. 119.

8 See also: Lee, L.T., Quigley, J., lk 7-16.

are the development of diplomatic, political, commercial and business relations, and the functions of maritime law and judicial power.[9]

The biggest substantial changes to consular services were brought by the first half of the 20th century (World Wars, Russian Revolution, Spanish Civil War). The post World War II immigration and emigration brought forth the former problems and constrictions of the consular work.10 The focus of the institution shifted from resolving questions on international trade to providing assistance to citizens. In the interim between the World Wars, the marital and commercial spheres were gradually delegated to diplomats, as these areas were directly involved with the political and economic relations of the states, and thus the business diplomacy became more professionalized. Taking care of its citizens and enforcing their rights started to become the main domain of the consuls.[11]

Due to the nature of the events in the beginning of the 20th century, there were certain alterations as regards the main focus of the initial project of the Vienna Convention on Consular Relations, "the Consular intercourse and immunities,"[12] which was finally adopted in 1963, and shifted the prominence of consular sphere from the development of trade relations to protection of citizens.

In the light of the changes, most importantly due to the creation of the system of career consuls and its vigorous development, the importance of honorary consuls was reducing and the beginning of the 20th century reflected the popular opinion that the institution of honorary consul was deemed to perish.[13] There were two main sides – firstly, states which were in favour of honorary consuls; and secondly, states which disfavoured them. The significance of honorary consuls was foremost seen by smaller states (e.g. Finland, the Netherlands, Switzerland), who extensively used the honorary consuls for the purpose of representing their own interests, and saw the institution as being particularly efficient for countries with scarce national resources. In the opinion of small states whose seafarers were active sailors, their men needed individual contact persons or aiders in nearly every major port; however, such an ambition was quite impossible to have been funded from state resources.[14] Oftentimes, many states had to choose between whether to appoint an honorary consul to represent their state in a foreign state or a region, or not to be represented at all.[15] For instance, in 1957,

9 Lee, L.T., Quigley, J., lk 3.

10 Melissen, J. The Consular Dimension of Diplomacy. - Melissen, J., Fernandez A.M. (eds.) Consular Affairs and Diplomacy. Martinus Nijhoff Publishers 2011, p. 9-10.

11 Heijmans, M., Melissen, J., p. 5.

12 Zourek, J. Report on Consular intercourse and immunities, Special Rapporteur - Yearbook of the International Law Commission, vol. II 1957, document nr A/CN.4/108. See: http://www.un.org/law/ilc/index.htm (30.03.2013), p 72.

13 Lee, L.T., Quigley, J., p. 18-19, Publications of the League of Nations, V. Legal, 1927, V 7, p. 4. Zourek, J., p. 80.

14 Do Nascimento e Silva, G.E. The Vienna Conference on Consular Relations. - International and Comparative Law Quarterly, Vol 13, Issue 4, 1964, p. 1223.

15 Lee, L.T., Quigley, J., lk 18.

Belgium had 385 honorary consuls and 53 career consuls; the Netherlands 470 honorary consuls and 66 career consuls and Nordic Countries had 1896 honorary consuls and 94 career consuls.

At the same time, there were opinions that the institution of honorary consul was completely redundant. There were some states who did not have any honorary consuls appointed to foreign states (for instance, China), as well as states, which did not have any appointed honorary consuls, but which nonetheless accepted them in their states (for instance, the USA).[16] Additionally, there were some states which, inspired by the dissensions, started to increase the number of career consuls while closing their existing honorary consuls (for instance, Uruguay, Iraq);[17] moreover, some started demanding assertions from the honorary consuls that the latter would not use their position for solely individual business purposes.[18] In order to find a compromise between the two opposing sides either favouring or disfavouring the honorary consuls19, the Vienna Convention on Consular Relations enacted both the institution of career consul as well as honorary consul, so as to grant the states the liberty to decide whether they accept honorary consuls on their territory and whether they decide to appoint honorary consuls to foreign states themselves (Art. 68).

In spite of the widely spread preferences of the 20th century seeking to abolish the institution of honorary consul as a perishing relict, after the entry into force of the Vienna Convention on Consular Relations it has been perceived that the honorary consuls are, especially for smaller states, of crucial importance; therefore, it is very unlikely that their abolishment could take place today.20 Proving the practical need for honorary consuls is the presumption that in 2005 there might have been around [20] 000 honorary consuls in the world.[21] Should it be financially worthwhile in a particular area, the primary consular institution led by honorary consul will most likely be substituted with the consular institution led by career consul; nevertheless, in other circumstances, it is still more reasonable for a state to appoint an honorary consul than not to be represented at all.

Appointing an honorary consul is an example of lucrative representation of a state in a foreign state or in a certain region – for one thing, honorary consuls do not receive remuneration, and for another, the state does not have to maintain honorary consuls from its resources since an honorary consul is able to cover its own operation expenditures. One of the downsides of honorary consuls is the fact that they are performing their consular obligations in parallel with their other responsibilities; due to that, as a rule, their rights and obligations are more restricted than those of career consuls. As an exception, one can refer to Brazil, giv-

16 Sen, B. lk 260. Lee, L.T., Quigley, J., introduction.

17 Lee, L.T., Quigley, J., p. 516.

18 Sen, B., p. 259-260.

19 Lee, L.T., Quigley, J., p. 518.

20 Do Nascimento e Silva, G.E., lk 1219. Lee, L.T. Consular Law and Practice. New York: Frederick A. Praeger 1961, p. 305.

21 Stringer, K.D., lk 67, referred to You are Appointed. - Hindustan Times, 31.10.2005.

ing their honorary consuls substantially the same rights and obligations that apply to career consuls.[22] Owing to the complexity and versatility of consular relations, many states organize regular trainings and conferences for career consuls, which in many cases contribute to the existing disparity between the competence of honorary consuls and career consuls.[23] Some states have offered trainings and information days also to honorary consuls (amongst others, Estonia), which certainly increases their credibility in performing their consular functions.

Changes in the consular sphere during the second half of the 20th century were not so encompassing has they had been in the first half of the century. The developments in the consular field of the last decades are rather linked to the changing surrounding environment – the interest of and pressure by the media, as well as stronger protection of interests by individuals[24] can be referred to as the determinants which growingly influence the development of the consular sphere. The demand for consular protection is gradually growing from the 1990s; people travel more, amongst them are representatives of bigger risk groups – youngsters and elderly people – whereas they travel to risk areas, where the threat is more imminent and therefore the need for protection more probable.[25] Accompanying the open world are frequent contacts with kidnapping, forced marriages, natural disasters, which all increase the need for a more efficient and accessible consular protection.

Thus, in the form of consular relations we can see an institution with long history based on international customary law, whose activities, importance and meaning have been changing over the centuries according to needs and developments of law. The appointing of honorary consuls is foremost related to the consent of both the sending country and the receiving country to allow honorary consuls; whereas it has not been perceived that the institution itself would be in threat of dissolving in the near future – vice versa – there is a certain tendency referring to the significance of it. The most important codification of the consular relations, including the enacting of the institution of honorary consul, took place in 1963 in with the Vienna Convention on Consular Relations. Today, the institution of honorary consul, as well as its competence, is regulated both by the aforementioned Convention as well as harmonizing national laws.

Honorary Consul in International Law

The legal theory generally refers to the relationship between international and national law by the use of two different theories – monism and dualism. According to monism, international

22 Lee, L.T. Quigley, J., p. 527.

23 *Ibid*., p. 114-115.

24 Heimans, M., Melissen, J., p. 5.

25 Melissen, J., p. 5.

and national laws combine one unified legal system, while dualism treats international law and national law as two separate legal systems. International law regulates the relations between the states, while national law regulates the relations between the state and its citizens or private relations between the latter.

R. Värk has found that Estonia mostly follows the monistic approach, and thus, the international law forms an integral part of Estonian national legal order.[26] The Commented Edition of the Estonian Constitution, however, finds that according to the norms of the Constitution of the Republic of Estonia, it is possible to argue for both the monistic and dualistic approach.[27] On the one hand, Estonian legal practice has been very opened to international law; whereas on the other hand, Estonian courts have been rather moderate in directly enforcing the principles of international law. The main rule still holds that the widely accepted principles and norms of international law are directly applicable in Estonian legal system, and thus these norms can be relied on in Estonian courts. §3 (1) (2) of the Estonian Constitution therefore holds that the principles of international law have the authority, next to national legal norms, to enforce rights and obligations on Estonian public authorities and private persons.

R. Maruste specifies the aforementioned by claiming, "[I]n case of a monistic system, the norms of an international treaty can be implemented directly, there is no need for separate reception of national acts to enact them, although the latter might be done for the purpose of their more efficient implementation."[28] The same viewpoint is presented by the Estonian Supreme Court, who has found that not every single international treaty is directly applicable in Estonian courts.[29] In order for the courts to apply an international treaty, the treaty must be clear and concrete enough; furthermore it must be directed to regulation of national relations. There is no reason to apply an international treaty if national law regulates correspondent questions in an adequate manner (RKHKo 24.10.2002, 3-3-1-43-02 p 12; RKHKo 20.12.2002, 3-3-1-58-02 p 11).

Taking the aforementioned in account, it might be claimed that the Vienna Convention on Consular Relations regulating the activities of honorary consuls forms, after Estonia's accession, a part of Estonian national legal system; therefore, if national law does not regulate certain legal issues with adequate precision, it is possible to apply the Convention directly; whereas the latter applies to the Estonian court system as well. For that reason, a more thorough treatment of norms, regulating the honorary consuls and their activities in given Convention, is justified.

Prior to the conclusion of the Vienna Convention on Consular Relations in 1963, consular relations were based on national legal acts and on bilateral and regional consular treaties.[30]

26 Värk, R., p. 60.

27 PS commentaries § 3 p. 3.4, lk 71.

28 Maruste, R., p. 73.

29 Annus, T. Riigiõigus. Tallinn: Juura 2006, p. 206.

30 Zourek, J., lk 76; Lee, L.T., Quigley, J., p. 16.

The substance of consular relations and activities was, however, foremost dependent on customary law. The Vienna Convention on Consular Relations is thus in principal an attempt to codify customary law.[31] Despite the latter, the consular affairs are till today largely based on customary law, in view of the fact that the Convention has not been able to adapt to recent developments in the field.[32] Even though consular law is in many states regulated by national norms, consular assistance is one of the spheres which content has to be substantially developed by customary law even today. Therefore, the functions of consuls are continually dependent on international law, customs, treaties, national norms, as well as consular instructions. Moreover, the functions of consuls are changing depending on time and needs.[33] For instance, consuls are being granted superior competency in states where there is no diplomatic representation.[34]

According to Article 1 (2) of the Vienna Convention on Consular Relations, consular officers (consuls) are divided into two categories: first being professional consuls – career consular officers and second being honorary consular officers. Even though there are separate paragraphs in the Convention applying to each category, paragraph 1 of the Convention applies to them both. Article 5 of the Convention lays down the consular functions of both types of consuls. Although the Convention grants similar competence to both career consuls as well as honorary consuls, each state has the right to assign very different functions to their consular posts where the career consuls or honorary consuls are working. Article 5 of the Convention provides an extensive right to differentiate between the competence of both types of consuls as well as differences arising from the receiving state and from other circumstances – the latter clause grants the power of decision over defining the functions to the sending state, whilst such power must be concerted with the receiving state.[35]

The Vienna Convention on Consular Relations does not define who is an honorary consul, it is rather effectuated based on customs and traditions. As can be drawn from the previous chapter, the early institution of consuls is rather similar to today's institution of honorary consuls, although honorary consuls, unlike career consuls, are not equally accepted internationally. The powers of honorary consuls have originally differed from state to state, and as a rule, they have been narrower than powers of career consuls, which in turn constituted to the fact that while drafting the Convention, the limits of honorary consuls' functions were left pending and for the states to decide which functions are to be performed by the honorary consuls and which are not.36 According to the Article 68 of the Convention, the institution of honorary consular offices has an optional character – the sending state decides whether and who they will appoint as honorary consular officer and the receiving state must be informed

31 Land, K., lk 120; Lee, L.T., Quigley, J., p. 21.

32 Heimans, M., Melissen, J. p. 9.

33 Lee, L.T., Quigley, J., p. 108.

34 Sen, B., p. 268.

35 Sen, B., lk 268.

36 Zourek, J., lk 103.

of it and grant an acceptance of the assignment. Even though each state is free to decide whether it will receive honorary consuls on its territory and whether to appoint them abroad, it is still necessary, even after ruling in favour of honorary consuls on the national level, to act in accordance with the clauses of the Convention.37

Due to the fact that Estonian law regulates the formal consular functions quite distinctively, the next part of the work will analyze how the powers of honorary consuls are regulated in Estonian domestic law.

At this point, the functions of honorary consuls in Estonian law are being closely observed, since, as was elucidated in the previous part, the limits to powers of honorary consuls must be foremost found in national legislation, taken into account the provisions of the Vienna Convention on Consular Relations as well as customary international law.

Honorary Consul as an Administrative Body

In summary, it is viewed whether the honorary consul is, by its nature, the delegate of public tasks according to the Estonian national law; whether the functions it performs are public functions and whether by virtue of the aforementioned, comparable constitutional limits apply in delegating public functions to honorary consuls and in national delegation of public functions to private persons. In analyzing the functions of honorary consuls, the existing regulation of Consular Act in the Republic of Estonia is considered as an underlying piece of legislation whereas the conformity of the delegated tasks with the constitution will be observed based on both, existing functions, as well as those functions which, at the moment, are only being performed by the consular officer, and which, however, are not being performed by the honorary consul. The purpose of the latter is to analyze, whether the Consular Act encompasses any other public functions which, if necessary, could be delegated to the honorary consuls, or vice versa, which should certainly not be delegated.

According to §15 (1) of the Estonian Consular Act, honorary consul is is an official, appointed for a specified or an unspecified term by the Estonian Minister of Foreign Affairs, and who performs consular functions within the limits of his or her competence.[38] The consular functions are derived from the Consular Act and Article 5 of the Vienna Convention on Consular Relations, while the exact scope of the tasks will be determined by the directive of the Minister of Foreign Affairs (§18 (1) of the consular Act). The consular functions are determined in Chapter 4 (Provision of Consular Services) and Chapter 5 (Provision of Consular Assistance) of the Consular Act, whereby it is clearly regulated which functions are to be performed by both, consular officers as well as honorary consuls, and the consular functions that must only be fulfilled by consular officers.

37 Lee, L.T, Quigley, J., lk 517.

38 KonS (RT I 19.12.2012, 13)

By taking into account the abovementioned, that the consular functions are derived from the law and from an international convention to which Estonia is a signatory party, the honorary consul performs its functions pursuant to law, which is a form of delegating public functions. Since in the interest of the state, the main administrative authority, who must perform consular functions, is the consular officer who performs public functions, it might be argued that present functions are public functions. The primary public function for which the consular functions are imposed, is the protection of Estonia as a state, its citizens and the interest as well as rights of its legal persons in a foreign state (§13 (1) of the Estonian Constitution; §1 (1) (1) of the Estonian Consular Act); and the secondary function is to provide consular services and consular assistance to aliens and under certain circumstances to foreign citizen (§1 (1) (2) of the Consular Act).

§13 (1) second sentence of the Estonian Constitution provides that it is the duty of the state to grant its citizens protection abroad. The material scope of it encompasses foremost the diplomatic protection of Estonian citizens abroad; nevertheless, it also covers other means of protections, which do not explicitly indicate diplomatic protection. What it concerns, are the fundamental rights of a citizen, meaning that above all, the state is obliged to ensure its citizens protection, whereas §9 (2) of the Estonian Constitution does not exclude that the protection derived from § 13 (1) second sentence expands to legal persons. Therefore, the constitutional right for protection of the state is primarily applicable to Estonian citizens and under certain circumstance applicable to Estonian judicial persons. Providing consular assistance and consular services to aliens and foreign citizens is not and obligation of the state specifically arising from the constitution; nevertheless, it might be argued that by depriving certain individuals from the state's protection – individuals who are not Estonian citizens, but documented by Estonia, the owners of an alien's passport, stateless persons – might lead to violation of their fundamental rights provided that Estonian would deprive them of protection abroad. However, since the consular protection of aliens is not in the centre of attention in given paper, it will further not be touched upon.The performers of consular functions are consular officers and honorary consuls. A consular officer, according to §9 (1) of the Estonian Consular Act is a public servant in a diplomatic post, who has passed trainings for consular officers (§11) and obtained qualification and special qualification of consular officers (§10) and whom the secretary general has authorized to perform consular functions. The consular officer is officially involved with the state and is subjected to supervisory control (§13 of the Consular Act). The honorary consul is not in official state service. Even though the honorary consul is appointed by the Minister of Foreign Affairs, he or she is not in foreign service (§15 (4) of the Consular Act) and does not receive remuneration from the Estonian state (§15 (7)). Therefore, a justified question arises – if the honorary consul performs public functions, is it the delegation of public functions and does this cause the honorary consul performing public functions to be an administrative body?

By taking into account the analysis from the previous chapter, having made clear that in case a private person performs public functions, he or she is acting outside the service relation-

ship, is a person with passive legal capacity and is personally responsible for the performance of public task, he or she is an administrative body. Therefore, there is a need to answer to the question whether the honorary consul is a person with passive legal capacity and what his or her responsibility in performing public tasks is.

In order to analyse the question more thoroughly, the institution of notary, representing a private person as an administrative body, as freelance official, must be taken as a comparison.[39] A private person as a body in public law does not represent the state as an employer.[40] Neither does it embody an administrative authority, which acts in the name of state, since notaries (similarly to for instance bailiffs and to sworn translators), perform their functions individually and on their own account. While performing their occupational commitments they are independent of the state and do not receive remuneration from the state directly but charge their fees on the bases and to the extent prescribed by law.[41] Even though a notary is not subjected to supervisory control, the Estonian Ministry of Justice has an obligation to supervise the professional activities of notaries (§1 (1) (3); § 5 (1) of the Estonian Notaries Act).

Attention should be paid to the opinion of P. Press, stating that a notary is not a classical representative of liberal professions, since the professional activity of a notary is fully regulated by law. It is rather a profession with economical independence and freedom.[42] This assertion brings us back to the institution of honorary consul. The rights and obligations of an honorary consul are also fully regulated by the Vienna Convention on Consular Relations as well as the Estonian Consular Act, on account of which, a justified question might arise – is the honorary consul an independent administrative body or is it an administrative authority acting in the name of the state (similarly to a consular officer), especially while taking into account that an honorary consul must also perform its functions according the instructions of the Ministry of Foreign affairs and the representation located in the receiving state (§18 (1) of the Consular Act). The latter indicates that unlike notary, honorary consul is not materially independent of the state (the Ministry of Foreign Affairs) and is not free in its actions of translating or implementing the provisions of procedural law.[43] On the other hand, honorary consul, unlike consular officer, does not issue certificates or perform any other functions on the state's behalf but rather on their own behalf. He or she must perform its tasks personally (§21 (2) of the Consular Act). Although an honorary consul is a representative of the state, the latter must be viewed from an international aspect, since Estonia appoints an honorary consul to a foreign state and the honorary consul receives the right to perform its consular duties if the receiving state has granted an authorization (exequatur) (Article 12 of the Vienna Convention on Consular Relations; §8 of

39 Aedmaa, A. jt. 2004, lk 43. Andresen, E., 2003, p 7. PS kommenteeritud väljaanne § 14 p. 2.2.2, p. 192. Press, P. Notari ametikohustused ja vastutus. Master thesis: Tartu 2006. P. 12.

40 Merusk, K., Koolmeister, I., p. 68.

41 Andresen, E. 2006, p. 602.

42 Press, P., p. 13-15.

43 Andresen, E. 2001, lk 223; Press, P., lk 30; RKHKo 26.09.2000 3-3-1-35-00 p. 1

the Estonian Consular Act). The exequatur confers the honorary consul powers which the latter can enjoy in his or her dealings with the officials of the receiving state.[44]

From national aspect, it is fairly more important to note that even though an honorary consul undergoes through strict regulation and follows specific instructions, its eventual tasks are performed independently and he or she has the right to decide whether and what kind of public tasks permitted by law to perform.[45] The Ministry of Foreign Affairs (or the foreign representation in the receiving state) has the authority to provide directions and necessary information to perform certain tasks, although it might depend on whether an honorary consul requests such data, since the Ministry of Foreign Affairs does not have automatic information on the consular activities an honorary consul is performing. Moreover, an honorary consul has the final decision in whether and how to use the information obtained from the Ministry as well as whether and how to perform the task.46 An honorary consul is obliged to give an overview of the performed consular tasks (§18 (3) of the Estonian Consular Act), however, as a rule it is done retrospectively and the Ministry of Foreign Affairs does not have the report of activities in real time. §19 of the Consular Act provides the organizational independence, which means that an honorary consul has an independent administration and accounting system, he or she establishes the organization of work of a consular post and covers all the expenses of the consular post autonomously.

According to §6 of the Estonian State Fees Act,[47] a body charging a state fee is a state or local government agency, or a rural municipality or city secretary who, pursuant to law, is required to perform an act. An honorary consul may receive remuneration fees to the extent established by the rate of state fee. It is not a state fee even though it is remuneration for performance regulated by the public law. The author thinks that unlike in case of the state fee, the recipient of service has the right to demand counter performance, even though there is no civil law contract. Only the state or a delegate who exercises its conferred powers to collect fees has the right to collect state fees;[48] however honorary consul has not been conferred with such powers.

The fact that honorary consul is not a state public servant was affirmed back in 1999, during the drafting of the Consular Act, when bringing the institution of honorary consul to the scope of the act was justified by stating, "in order to see honorary consuls as part of the overall system, honorary consuls should somehow be involved in the system and defined in a way which would reflect their cohesion to foreign representation. At the same time, an honorary consul cannot be seen as Estonian public servant."[49] The explanatory reports of the latest

44 Zourek, J. 1957, p. 88.

45 KonS eelnõu SE 378 seletuskiri, p. 11.

46 *Ibid.*, p. 20, § 39

47 RLS (RT I 17. 04. 2013, 12)

48 RKHKo 14.12.2011 3-3-1-72-11, p. 10, 11. RKPJKo 08.10.2007 3-4-1-15-07 p. 17. RKTKo 20.06.2008 3-2-1-55-08 p. 10.

49 Estonian parliament session: Available in Estonian: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=981540022 (05.04.2013)

changes in the Consular Act refer that even though honorary consuls are largely equalized with consular offices, they are formally not public servants. Therefore, taking into account the abovementioned, the author sees that an honorary consul might still be referred to as an administrative body.

The State, by delegating public functions to honorary consuls, leaves to itself certain responsibility, including the function of state supervision, in order to ensure the lawful performance of the functions (§81, §18 (2) of the Estonian Consular Act). The compensation of damage arising from the professional course of work of an honorary consul does not, according to the Estonian State Liability Act exempt an honorary consul from personal liability. Given amendment, according to which the State Liability Act is applicable in case of compensation of damages arising from the performance of public functions of an honorary consul entered into force in 01.01.2011. The explanatory report for a draft act including such amendment, states that once the act comes into force, an honorary consul, similarly to consular officers performing public functions, is liable pursuant to civil, criminal and administrative procedures. The author of given work does not agree with the aforementioned statement, since a consular officer engaged in employment relationship with the Ministry of Foreign Affairs is liable pursuant to §12 (2) of the State Liability Act, whereas an honorary consul is liable pursuant to §12 (3) of the State Liability Act. The difference stands in the fact that on the basis of §19 (3) of the State Liability Act, the person referred to in §12 (2) of the same act (therefore a consular officer) is liable to a public authority only if the damage was caused wrongfully. The author considers an honorary consul to fall within the scope of §12 (3) of the aforementioned act and a recourse claim may be filed even in a no-fault liability case. Nonetheless, §19 (2) of the Estonian State Liability Act, according to which the compensation is reduced if satisfying a claim of recourse in full would be unfair, is applicable regarding both consular officers and honorary consuls. The fact that the abovementioned amendment of the Consular Act of Estonia replaced the term “person” with the term “official” in §15 (1) does not seem to alter the situation in the eyes of the author, since regardless of whether to refer to an honorary consul as a person or an official does not transform him or her neither a public servant nor changes his or her relation with the state. Even §11 of the Code of Administrative Offences applicable before the current Administrative Procedure Act until 2002, had a functional definition to “official” – “An official is a person who has an official position in an agency, enterprise or organization based on any form of ownership and to whom administrative, supervisory, managerial, operational or organizational functions, or functions relating to the organization of movement of tangible assets, or functions of a representative of state authority have been assigned by the state or the owner.”50 Such an approach has not changed up until today; rather it has been confirmed with the entry into force of the Administrative Procedure Act in 01.01.2002, where the definition of an administrative authority is also presented via functional approach (§8 (1) of the Estonian Administrative Procedure Act and with the Estonian Anti-Corruption Act (§2 (1) which came into force only in 01.04.2013.

50 Parrest, N., Aedmaa, A., p. 16.

Even though the Estonian Consular Act designates since 2011 the state supervision over the actions of honorary consul, the author does not consider it to embody great qualitative change in the supervision of the activities of honorary consul. The drafting of the Anti-corruption Act confirmed the certainty that it is difficult for a representative state to supervise the activities of honorary consul. The termination of the activities of an honorary consul failing to perform his or her functions effectively is the only considerable counteraction.[51] The latter is affirmed by the applicable Consular Act, namely §24 (2), according to which the Ministry of Foreign Affairs will call for the revocation of the consular patent in cases where an honorary consul is, for instance, no longer trustworthy (§24 (2) (3) of the act) or if in the opinion of the Minister of Foreign Affairs, an honorary consul is unable to perform the functions assigned thereto (§24 (2) (4) of the act).

Thus the state, while delegating the public functions to honorary consul, has a dilemma in deciding whether the necessity of performing consular functions in certain area overweighs the risks which may accompany the delegation of consular functions to a private person who is a citizen of a foreign state (§15 (3) of the Consular Act) performing such functions simply on basis of his or her good trustworthiness and respectability (§17 (1) of the Consular Act), or not. Therefore, on the one hand it is a constitutional obligation of the state, pursuant to §13 of the Estonian Constitution, to protect its citizens abroad; and on the other the obligations also include an obligation to protect the fundamental rights, especially the rights to proceedings and order. Both principals are materially designed to protect the fundamental rights of citizens; yet, taking into account the limited resources of a state which render it impossible to have a foreign representation in every state and a consular post (as a structural unit of the Ministry of Foreign Affairs) in every major area of each country, the assigning of honorary consul might definitely be regarded as an optimal solution, especially while taking into account the essence of honorary consul and the limitations arising from the Constitution in performing the consular functions. From the aforementioned we can grasp the idea of why the assigning of honorary consuls is indispensable in the first place; the latter also largely applies to the justification for national delegation – better access to services, knowledge on the specific characters of the receiving state, as well as funds of private persons as additional resources.

Due to the fact that public functions are involved, as well as since the delegation of public functions has rendered honorary consul to an administrative body, it is important to find out in which way such delegation has taken place. Taking into account the fact that the rights and obligations of honorary consul are directly arising from law, the delegation has happened by lawful authorization. Given that honorary consul is appointed and his or her competence assigned by the directive of the Minister of Foreign Affairs, the direct authorization is laid down in an administrative act. The latter represents functional legislation, where the performance of the function is delegated, whereas the state ensures the lawful performance by organizing

51 Zourek, J. 1957, p. 80.

supervision and whereby the official is liable to a public authority on the bases and pursuant to the procedure provided in the State Liability Act. By following the classification as provided by R. Merusk, this would imply delegation of public functions to a private person, whereby the functions are being performed on basis of norms of public law and the private person becomes an administrative body performing the functions in person. Hence, we are dealing with indirect public administration, similar to, for instance, notaries and bailiffs.[52]

A major distinctiveness of notaries is, however, their greater independence from the state. A notary is independent in person, as well as from organizational and material perspective.[53] Honorary consul is not appointed for life, which limits the personal liability. There is no material independence, since the Ministry of Foreign Affairs gives direct instructions how to perform public functions (§18 (1) of the Consular Act). Unlike the notary, the honorary consul is not free to implement and apply provisions of procedural law.[54] However, by ensuring the organizational independence, honorary consuls are granted with the ability to assign their own employees and remuneration[55], as well as personal liability.

Therefore, the honorary consul has certain resemblance to a private person, to whom the state has delegated public functions and who, independent of the state apparatus has become an administrative body by performing public law functions. An honorary consul is personally liable for his or her performances and is independent of the state from the organizational point of view. The tasks delegated to honorary consul stem from the law and the direct delegation is based on administrative act. The reasons for delegation are similar to the justifications for national delegation. By delegating public functions to honorary consuls, we can refer to functional delegation, which is to some extent, yet not entirely, comparable to delegation of public functions to a notary.

52 Merusk, K., 2000, p. 505.

53 Andresen, E. 2001, p. 221.

54 *Ibid*., p. 223.

55 *Ibid*., p. 222.

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