Changes in the Structure and Scope of Foreign Service Activity

Studies of the Central European Professors' Network
ISSN 2786-2518 (Print)
ISSN 3094-2896 (Online)

Changes in the Structure and Scope of Foreign Service Activity

Edited by

Paweł Czubik



MISKOLC – BUDAPEST | 2026

STUDIES OF THE CENTRAL EUROPEAN
PROFESSORS' NETWORK

Changes in the Structure and Scope of Foreign Service Activity

ISBN 978-615-7027-71-8 (printed version)
ISBN 978-615-7027-72-5 (pdf)
ISBN 978-615-7027-73-2 (epub)

https://doi.org/10.54237/profnet.2026.pccssfsa



Published by
Central European Academic Publishing
(Miskolc, Hungary)
1122 Budapest, Városmajor St. 12 (Hungary)

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Design
IDEA PLUS (Elemér *Könczey*)
Kolozsvár / Cluj-Napoca (Romania)

Prepress
CEA UM

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Notes on the Contributors

Editor and Author

Paweł Czubik is a Judge of the Supreme Court; Full Professor in legal studies. His scholarly activity focuses on public international law, in particular consular law, as well as selected issues of private international law and international civil procedure. He graduated in law from the University of Warsaw (1996), obtained a PhD in Legal Sciences at the Jagiellonian University (2000), and post-doctoral degree (habilitation) at the University of Silesia (2012). On 11 February 2021, he received the highest academic title – full professor of law. Since 2019 he has held the position of the Head of the Chair of Public International Law and European Law at the Institute of Law in Cracow University of Economics. He was a member of the National Notary Council (2015–2018). From 2013 to 2017, he was a member of the Legal Advisory Committee to the Polish MFA. From 2016 to 2018, he was an ad hoc judge of the ECtHR. He was an expert of the Polish Sejm on, inter alia, the Consular Law Act (2015) and the Foreign Service Act (2017). He has authored nearly 350 academic publications. He is a laureate of numerous awards, including the Magyar Érdemrend tisztikereszt – Hungarian state medal received from the President of Hungary (2023). In 2025 he received doctor honoris causa title of the University of Miskolc. ORCID: 0000-0003-0268-8665

Authors

Endre Domaniczky is a researcher of legal history and international law. He currently works as head of the Consular Office of Hungary in Melbourne, Australia. Before this posting he served in Canberra, Melbourne and Sydney as well. He received his PhD in law from the University of Pécs, where he obtained habilitation in 2023. He was Senior Researcher at the Ferenc Mádl Institute of Comparative Law between 2019 and 2026, and from 2018 he teaches consular law and law of diplomacy at the Faculty of Law, University of Pécs. He has published ten books in Hungarian and English including Professor Ferenc Mádl, late President of Hungary's biography in two volumes. His main fields of interests are consular law, history of diplomacy, rights of associations and constitutional history of Australia and the South Pacific. ORCID: 0009-0007-4623-7598

Łukasz Piebiak is a Polish judge and legal scholar. He serves as a judge at the District Court for the Capital City of Warsaw and as a member of the National Council of the Judiciary of Poland. He received his PhD in law and has extensive professional experience in the judiciary and public administration. From 2015 to 2019, he served as Undersecretary of State at the Polish Ministry of Justice, where his responsibilities included the organisation of the judiciary and international legal cooperation. He is President of the Association 'Lawyers for Poland' (Prawnicy dla Polski). His main fields of interest include civil procedure, the recognition and enforcement of foreign judgments, the organisation of the judiciary, international judicial cooperation, and issues related to the functioning of the foreign service. ORCID: 0000-0001-5771-6921

Tomasz Rzymkowski holds a doctorate in law from the John Paul II Catholic University of Lublin (KUL). He is an Assistant Professor at the Faculty of Law and Administration of the War Studies University (Akademia Sztuki Wojennej) in Warsaw. He served as a Member of the Sejm of the Republic of Poland during its 8th, 9th and 10th terms and was a member of the National Council of the Judiciary from 2015 to 2018. From 2021 to 2023 he held the position of Secretary of State at the Ministry of Education and Science and Government Plenipotentiary for the Development and Internationalisation of Education and Science. His principal academic interests include the history of law and constitutional law. ORCID: 0009-0000-1167-2361

Anna Szarek-Zwijacz is Assistant Professor at Cracow University of Economics (CUE). She graduated in law from the Catholic University of Lublin (CUL), at the same university she obtained her doctoral degree (in 2007). She was a researcher at CUL (1999–2022), since 2022 she has been employed in the Chair of Public International Law and European Law at the CUE Institute of Law. She cooperated with The Law and Treaty Department of Ministry of Foreign Affairs of the Republic of Poland (2004–2005 and 2009–2012 as an author of expert opinions concerning the work of International Law Commission on reservations to treaties). Since 2018, she has worked in the Law and Legal System Office of the Chancellery of the President of the Republic of Poland. She is an author and co-author of several academic publications in public international law, her research focuses on the law of treaties, human rights and diplomatic and consular law. ORCID: 0000-0002-5178-7865

Rafał Stasikowski studied law in Łódź, Giessen, and Regensburg; holds a doctorate in law (2003); a judge of the common courts and currently a judge of the General Administrative Chamber of the Supreme Administrative Court (since 2019); Assistant Professor at the University of Silesia in Katowice (2005–2019); and, since 2019, a professor at the Nicolaus Copernicus Superior School in Warsaw. He has been a scholarship recipient under European Union and Bavarian state government academic programs. He is the author of over 50 scholarly works, including seven monographs covering administrative law, administrative procedure, judicial-administrative procedure, and the science and theory of administration. Hozzáadni: ORCID: 0000-0003-2428-1452

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Introduction

Paweł Czubik

Since its inception, diplomacy has been an integral part of how a state functions. Even the earliest state structures used diplomacy to achieve fundamental objectives. It gained particular significance in the declaration and conclusion of wars, as well as in the formation of alliances. Dynastic marriage diplomacy played a significant role. As civilisation developed, diplomatic standards became more formalised. The importance of a state's diplomatic service depended on the position of its ruler. This was particularly significant during the Middle Ages, when various precedence mechanisms were established. The rivalry between the Empire and the Papacy polarised diplomatic relations around the world at that time. Modern diplomacy emerged against the backdrop of relations between Italian city-states and took on a more organised form. This form was effectively cemented by the Congress of Vienna in 1815; indeed, modern diplomatic law is based on the models accepted at that time. The major codification of diplomatic law in the form of the 1961 Vienna Convention on Diplomatic Relations involved codifying the norms of customary international law established through state practice. Today, it is the only universally binding written source of international law in this field.

Although diplomatic law is generally quite stable, its normative structure adapts to changing realities within the framework of existing models. Other, less formalised forms of diplomatic contact, devoid of the traditional trappings of 'Viennese' diplomacy, are also beginning to play an increasingly important role. This is not only about economic diplomacy, but also the involvement of other state bodies, such as lower-level and judicial bodies, in relationships that were previously the preserve of diplomatic channels. Nevertheless, contemporary diplomacy remains the domain of state activity.

Consular relations have a much more complex legal basis. They are grounded in the norms of international law, such as bilateral consular conventions and the 1963 Vienna Convention, as well as numerous other international agreements concerning

Paweł Czubik (2026) 'Introduction'. In: Paweł Czubik (ed.) *Changes in the Structure and Scope of Foreign Service Activity,* pp. 17–19. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2026.pccssfsa_0

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specific aspects of consular activity. Most importantly, they are also based on the domestic laws of the states that send consuls. Consular activities have changed significantly over the centuries, and these changes continue to occur today, accelerating even further. Initially, consuls served as representatives of merchants, but they also later served as officials exercising jurisdiction over their compatriots. Strictly jurisdictional functions, such as consular jurisdiction and capitulation treaties, are no longer encountered today. Paradoxically, however, these have been replaced by consular functions of an assistive nature, relating to citizens deprived of their liberty abroad. Consuls perform a range of public law administrative functions on behalf of the sending state abroad. This assistance includes issuing passports and other documents to citizens. Consuls perform a wide range of functions in which they act as representatives of various authorities of the sending state abroad, including in matters of private law. Thus, their activities also include those of a civil registrar, sworn translator and notary. Changes in this area simply reflect changes in the domestic law of the sending state. These evolve over time in response to technological advances, the conditions of European integration and so on. Furthermore, certain restrictive measures regarding foreign nationals' and foreign documents' access to their sending state remain in effect. Consuls issue visas to foreign nationals and admit documents issued abroad into the legal sphere of the sending state through legalisation procedures. However, a significant reduction in this activity is currently evident in light of the liberalisation of legal transactions. The consulate's protective functions now clearly predominate, and in addition to national and international law, European Union law also provides a basis for such activities. The consuls' role in guaranteeing political civil rights to citizens abroad, primarily the right to vote in external elections, is growing.

The chapters included in this monograph address various aspects related to the evolution of diplomatic and consular relations between states. These include historical-legal analyses and discussions of current activities, particularly those of the consular service. For the most part, these analyses are based on Polish (as well as Hungarian) practice. The authors address issues typical of international law, as well as areas of domestic law that particularly impact consular activities. These activities are performed as a classic function of state administration, albeit abroad. The rules of the sending state's administrative law play a significant role in their operation. The substantive provisions of the sending states' administrative and civil laws also play a significant role in the consular service's operations. Consuls operate within the territory of the receiving state, but under the legal framework of the sending state. Consequently, analysing the evolution of legal provisions affecting consular relations sometimes involves examining norms from various areas of the sending state's substantive law. Special attention was given to European Union law in these deliberations. Its significance in shaping contemporary consular and diplomatic relations is growing. Not only does it lead to the liberalisation of relations (sometimes rendering consular activity unnecessary in relations between integrated EU member states), it also creates a framework for cooperation among national services (as in the

case of so-called European consular protection). There are also visible attempts to establish a European Union foreign service, separate from those of the member states. While the structures established thus far do not seek to replace national diplomacy, their future form will depend on the extent of political integration.

The future of diplomatic and consular relations depends on the political situation as well as economic development. Technological progress will undoubtedly play a significant role in this regard, as a number of consular services will become redundant in a world of cashless transactions and remote data and document transfers. Perhaps the future foreign service will consist solely of a service that provides specific assistance to citizens in crisis situations. For now, however, a transitional phase prevails. Many activities are performed less frequently, but have not ceased entirely, while new, previously unknown activities are emerging. This state of evolution has always characterised the work of the foreign service, and it continues to do so today.

Chapter 1

Evolution of Foreign Service Activities in Treaties and National Legislation



Paweł Czubik

Abstract

This study examines the chief trends in recent changes in diplomatic law, driven by the evolution of international law – most notably, the development of human rights protection systems that profoundly affect the internal legal order of states – as well as the demands of economic development and the increasing international movement of individuals. The analysis focuses on selected changes in consular law norms at both the international and domestic levels. These include issues such as access to consuls for persons deprived of liberty, civil status records, notarial functions, legalisation of documents, maritime activities, administrative tasks, and voting abroad. In principle, the scope of consular functions may be modified and expanded to meet the needs of the receiving state, provided the functions are grounded in international law or are not opposed by the receiving state. Considering the breadth of the subject, this analysis is confined to selected consular functions where the evolution of norms is particularly evident.

Keywords: diplomatic protection, consular care, consular legalisation of foreign documents, right of access to the consul, civil status consular acts, election-related consular activities, maritime activities of consuls

Paweł Czubik (2026) 'Evolution of Foreign Service Activities in Treaties and National Legislation'. In: Paweł Czubik (ed.) *Changes in the Structure and Scope of Foreign Service Activity*, pp. 21–66. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2026.pccssfsa_1

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1. Introduction

Both diplomatic and consular laws are among the oldest branches of cross-border legal frameworks. However, these two fields differ significantly in their construction. Diplomatic law is a classical field of international law, whereas consular law extends beyond the bounds of international law. This is because consular law results from the interplay between international law and the domestic legal systems of both the sending and receiving states, which jointly determine the legal status and scope of consular activity.

A defining characteristic of any field of law is its evolution over time, although the pace and extent of change are not uniform. Importantly, international law exhibits a relatively high degree of permanence over time. This is largely because the creators and addressees of its norms are typically the same entities – sovereign states. The process of developing written international law is inherently lengthy and often involves complex international negotiations, even when codifying existing customary norms.[1] Consequently, fields such as diplomatic law are characterised by a fundamental stability in their norms.

Consular law, while incorporating general norms of an institutional nature (e.g. immunities or the appointment of consuls) grounded in international law, is predominantly based on domestic law and thus, subject to considerable variability over time. This variability primarily pertains to all activities performed by consuls on behalf of the sending state within the territory of the receiving state. Despite occurring in the receiving state, these administrative and civil law services are *de jure* performed within the legal jurisdiction of the sending state, that is, according to the rules of this state's legal system. Any change in the legal framework of the sending state that governs these activities typically results in an automatic adjustment in the scope of consular duties. Consequently, changes in the consular law norms of a particular sending state are often a direct and predictable outcome of amendments to its civil or administrative laws. Therefore, these changes are neither rare nor unexpected.

Moreover, the scope of changes in consular law is shaped by international law, and particularly in recent decades, European law. International legal norms often contribute to enhancing the protection of individuals through consular activities, thereby raising protective standards. This aligns with the evolving, human-centred transformation of the institution of diplomatic protection. However, international law also plays an eliminative role in some areas of consular activity. It can render certain consular functions superfluous by introducing liberalised solutions in legal

1 The development of customary law within classical international law relies on the enduring application of specific practices that gradually acquire legal recognition. In the areas under analysis, this repetition and longevity are particularly evident, as the foreign services of certain nations have engaged in these practices for centuries – a subject that has been extensively examined in scholarly research.

transactions, such as those governed by treaty-based arrangements. These developments significantly modify the scope of a state's consular obligations over time.

Notably, although the scope of legal obligations under diplomatic law, as prescribed by international law, is generally uniform or nearly identical across states, the scope of obligations under consular norms varies considerably. In practice, these obligations differ significantly in various bilateral relationships. This disparity stems from the differing nature of the sources of law governing the two fields.

2. Sources of Diplomatic Law Versus Sources of Consular Law

Diplomatic law is characterised by its reliance on a single primary treaty source. The Vienna Convention on Diplomatic Relations[2] serves as a foundational document of a quasi-constitutional nature in this field. It addresses all institutional aspects of diplomatic practice, including the establishment of diplomatic relations, appointment and ranks of heads of missions, size of diplomatic personnel, as well as immunities, privileges, and facilities.

However, the Convention does not provide a detailed regulation of diplomatic functions – it only defines them in broad terms. This lack of specificity is not surprising, considering that the tasks of diplomats are often shaped by political considerations[3] and conducted with a degree of discretion. The nature of these activities makes it difficult to formalise or publicise their mechanisms, assuming such mechanisms exist at all in a precise or repeatable form. Diplomatic functions are inherently adaptive, responding to current needs, and influenced by a range of factors. Consequently, it is unsurprising that neither the Convention nor any other instrument of international law establishes a detailed catalogue of diplomatic functions. Additionally, bilateral diplomatic conventions, unlike their consular counterparts, do not play a role in diplomatic law. At most, states may enter into brief bilateral agreements to establish diplomatic relations, however, once executed, these agreements typically lack independent normative value.

2 Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961 (UNTS 1965, vol. 500, No. 7310, pp. 95–222).

3 German jurisprudence has historically employed the concept of political appraisal when addressing foreign service activities. See Judgement of the Reichsgericht, 22 June 1937, ref. III 213/36, Fontes Juris Gentium, vol. II, p. 77.

Customary international law naturally plays a significant role in diplomatic law, particularly in addressing issues not fully regulated by the Vienna Convention.[4] However, regarding diplomatic functions, the existence of precise customary law norms is difficult to assert.

An exception to the sources of law outlined above is found in regional treaties within the Latin American region, specifically concerning the institution of diplomatic asylum.[5] These treaties represent a unique and specialised source of law. Nonetheless, their lack of precision, combined with the inherently political nature of asylum, raises numerous interpretative challenges – as evident in both state practice[6] and international jurisprudence.[7]

The role of domestic law in diplomatic law is limited, serving primarily to implement and occasionally elaborate on international law norms. For instance, the domestic norms of the sending state[8] typically govern diplomatic ranks and the appointment process for heads of mission. However, the domestic norms of the receiving

4 For example, the recognition of a diplomat as *persona non grata* (in the ordinary mode, which equires the diplomat's departure from the receiving state within a reasonable period – typically interpreted as 2-3 weeks) is only partially regulated under Art. 9 of the Vienna Convention. Additionally, states sometimes employ the 'extraordinary mode', rooted in international customary law, which mandates immediate departure from the receiving state, typically within 24–48 hours (Satow, 1922, p. 378). In such extraordinary cases, the deadline is occasionally explicitly stipulated (Sutor, 2019, p. 217).

5 Simultaneously, it is noteworthy that within the doctrine, there is an effort to distinguish the classical right of 'diplomatic asylum' (droit d'asile), which grants protection to individuals facing political persecution, from the 'right of refuge' (droit de refuge), which is often collective and temporary in nature, applied in emergency situations (Salmon, 1996, pp. 233 et seq.). However, the underlying mechanism remains identical, and in practice, it is impossible to differentiate these forms of assistance within a diplomatic mission (as was the case during the provision of asylum in the Spanish Civil War of the 1930s – see: von Glahn, 1965, pp. 246–247). Therefore, Professor Moore's observation on the ambiguity of the concept appears to remain pertinent: 'No legal term in common use is perhaps so lacking in uniformity and accuracy of definition as the 'right of asylum'' (Moore, 1906, p. 291).

6 See UN General Assembly, Question of Diplomatic Asylum: Report of the Secretary-General, 22 September 1975, A/10139 (Part II).

7 See Asylum Case (*Colombia v. Peru*), Judgement of 20 November 1950, ICJ Rep. 1950, pp. 266–389; Request for Interpretation of the Judgement of 20 November 1950 in the Asylum Case, Judgement of 27 November 1950, ICJ Rep. 1950, pp. 395–404; Haya de la Torre Case (*Colombia v. Peru*), Judgement of 13 June 1951, ICJ Rep. 1951, pp. 71–83. Currently, the issue of diplomatic asylum is once again before the International Court of Justice (ICJ). Two cases, essentially involving a claim and counterclaim (Embassy of Mexico in Quito (*Mexico v. Ecuador*) and Glas Espinel (*Ecuador v. Mexico*) were registered in 2024 and are under consideration in 2025.

8 See, for example: the Polish Act of 21 January 2021, on Foreign Service (consolidated text: Official Journal – Polish promulgator of legal acts, 2024, item 1691).

state generally mirror international law provisions related to immunities, privileges, and entitlements, ensuring proper application of these norms at the national level.[9]

The development of overly complex domestic laws in this area can create barriers, potentially resulting in contradictions with international law or an inability to effectively address situations within the international legal framework.[10] Such complications may ultimately diminish a state's capacity to fully leverage international legal norms. Therefore, considering the normative simplicity of the diplomatic law system, combined with the ever-changing nature of political practices among states, significant evolution of norms governing diplomatic functions is unlikely. Instead, only minor adjustments to their scope can reasonably be anticipated.

Consular law differs significantly from diplomatic law in terms of its legal sources. As an area of international law, consular law exemplifies a multi-source framework. The Vienna Convention on Consular Relations,[11] often considered fundamental to this field, plays a markedly different role from the Vienna Convention on Diplomatic Relations. Although the Diplomatic Convention serves as a comprehensive treaty regulating diplomatic matters universally,[12] the Consular Convention is not universally applied in many bilateral state arrangements. In such cases, detailed consular issues are addressed through bilateral consular conventions, which are particularly numerous among Central European countries.[13] These conventions contain precise provisions ensuring the performance of various consular functions, which are intended to assist citizens and linked to the execution of the sending state's domestic laws. In the absence of a bilateral agreement, customary international law norms directly govern consular functions. These norms are partly reflected in the European

9 See, for instance: the relevant provisions of the Polish Code of Civil Procedure (Journal of Laws of 2024, item 1568, Arts. 1111–1115), which address immunities, including diplomatic immunities. By contrast, the Hungarian Code of Civil Procedure (2016. évi CXXX, törvény a polgári perrendtartásról) states in Art. 632 that 'this act shall not affect the scope of diplomatic or other immunity or the specific procedural rules pertaining to diplomatic or other immunity'.

10 For example, the emerging restrictions in the sending state's domestic law regarding the appointment of the same person as the head of mission for other states effectively limit the sending state's own actions concerning norms established by public international law (see Art. 6 of the Vienna Convention on Diplomatic Relations).

11 UNTS 1969, vol. 596, No. 8638, p. 261.

12 Except, as noted earlier, for the specific details concerning diplomatic asylum.

13 For example, Poland has 40 bilateral consular conventions, many of which were concluded after the Vienna Convention entered into force with respect to Poland. Similarly, Czechia, despite being much smaller than Poland, has a comparable number of such agreements (see: Fenyk and Ondruš, 1997, pp. 146–147). Russia, by contrast, has approximately 80 such conventions (Plotnikova, 1999, p. 25). Virtually every country worldwide has at least a few such agreements; even those that have not concluded new ones since their accession to the Vienna Convention (e.g. Germany) continue to maintain and effectively apply bilateral treaties concluded earlier.

Convention on Consular Functions,[14] although the formal scope[15] of this treaty remains limited.[16]

The Vienna Convention on Consular Relations does not explicitly regulate the mechanisms for performing consular functions. Instead, it identifies certain functions requiring notification from the receiving state to the sending state's consul. These include the detention of a citizen of the sending state (Art. 36), cases involving unprotected minors, the death of a citizen, or accidents involving ships or aircraft (Art. 37). In this context, the Convention frames such functions as privileges of the consul to receive relevant information. Despite its lack of detailed procedural rules, the Vienna Convention on Consular Relations is significant as it lists and classifies consular functions.[17] It distinguishes between two categories: those guaranteed by international law, which do not require the receiving state's consent, and those requiring at least tacit consent or the absence of objection from the receiving state.[18]

The traditional classification of consular functions divides them into two categories: *jus protectionis* and *jus avocandi* (sovereign acts of the state); *jus protectionis* refers to assistance activities primarily aimed at safeguarding the interests of the sending state's citizens and, occasionally, the interests of the state itself; *jus avocandi* involves the execution of sovereign acts of the sending state within the legal framework of the receiving state. Although this division does not meet the strict criteria of a logically separable classification – meaning the boundary between these two types of activities is not always clear – most actions can be readily categorised. For instance, *jus protectionis* actions are distinctly protective in nature, providing assistance to citizens of the sending state who are in need. In contrast, *jus avocandi* actions involve the application of the sending state's laws by an accredited official within the receiving state's territory. These actions are aimed at resolving legal-administrative or civil-law matters significant to the sending state's legal system. Notably, their application is not strictly limited to the sending state's citizens. Such actions may also grant individuals from the receiving state or third countries access to the sending state's legal system within the context of the receiving state.[19]

14 European Convention on Consular Functions (European Treat Series ETS 1967, No. 061).

15 Maryan Green, 1972, pp. 176–178.

16 At present, this agreement is binding on only five countries worldwide (having entered into force on 9 June 2011 – it is not binding on Poland or Hungary). Nonetheless, this Convention should, to a significant extent, be regarded as reflecting customary international law. Conversely, the additional protocols to this Convention – Protocol to the European Convention on Consular Functions concerning the Protection of Refugees (ETS No. 061A) and Protocol to the European Convention on Consular Functions relating to Consular Functions in respect of Civil Aircraft (ETS No. 061B) – have not entered into force. The first protocol has received only three of the five required ratifications, while the second has obtained only two.

17 This convention aimed to formalise and institutionalise matters concerning consular relations. During the preliminary negotiations, it was agreed that the exercise of consular functions would not be codified within this framework, leaving such issues to a potential future convention. The European Convention on Consular Functions later attempted to address and supplement these aspects.

18 Xílotl Ramirez, 1987, pp. 134–135.

19 Some of these activities are even explicitly designated for non-citizens, such as visa-related activities.

The performance of consular functions by the foreign service of the sending state does not necessarily impose an obligation on the receiving state to guarantee their execution. For certain functions, at least tacit acceptance by the receiving state is required.[20] This principle is sometimes referred to as the 'Danish clause'. Consular functions governed by the Danish clause are contrasted with those guaranteed by international law, which the receiving state has no authority to influence. In general, functions guaranteed by international law are often associated with *jus protectionis*, whereas those subject to the Danish clause typically fall under *jus avocandi*. However, this is not a strict rule, as some *jus avocandi* functions are also guaranteed by international law.[21]

Moreover, the above distinction influences the legal basis and the manner in which these functions evolve. The development of *jus protectionis* functions, guaranteed by international law, primarily depends on changes to the relevant international legal norms. In contrast, the evolution of *jus avocandi* functions is largely driven by changes in the domestic law of the sending state.

3. Diplomatic Functions

The evolution of diplomatic law has been driven by the development of other branches of international law, particularly the human rights protection system, which is deeply embedded within the domestic legal orders of states. Consequently, diplomatic law exhibits a degree of evolutionary variability that is otherwise uncommon in its traditional norms. The evolving mechanisms of human rights protection have necessitated the extension of diplomatic protection to increasingly diverse situations, often previously unrelated to traditional diplomatic practices. However, owing to the shared functions of foreign services (both diplomatic and consular), such activities are predominantly integrated into the framework of consular assistance.

This evolution has led to a clear expansion not only in the scope of assistance provided, but also in the range of individuals protected. Diplomatic assistance, previously limited to certain categories, now extends to personal situations that were historically excluded. Consequently, this expansion can create conflicts with domestic

20 In practice, this approval is granted by the receiving state through an *exequatur* issued by the receiving state's Ministry of Foreign Affairs to the consul of the sending state, based on the consul's letters of credentials.

21 For example, these include visa and passport functions, the performance of which by the receiving state's consul is, in principle, guaranteed by the norms of customary international law (as reflected in Art. 5(d) of the 1963 Vienna Convention on Consular Relations). These functions are not necessarily equated with assistance activities, although passport-related actions can sometimes be interpreted in this way (see: Lauterpacht, 1947, pp. 336–340). Conversely, other document-issuing activities, such as visas or national identification cards, are definitively not of this nature.

law. For example, if diplomatic protection is extended to individuals from a third state or the receiving state owing to their connections to the sending state, the receiving state's involvement and potential objections become inevitable.

Thus, the standard of protection has become somewhat distorted. Notably, the distinction between diplomatic and consular assistance has never been particularly clear in legal doctrine. For instance, E. Denza highlights the absence of a definitive boundary between diplomatic and consular functions,[22] particularly in matters of assistance.[23] Earlier legal scholars also questioned the practicality of separating these two forms of protective activities. They rejected the traditional view that consular activity was limited by an inability to engage with central authorities.[24] Today, the notion that consuls act solely for the benefit of individuals and diplomats exclusively for the benefit of the entire community has been largely abandoned. While older doctrine confined consular activity to the local level[25] – implicitly reserving central-level actions for diplomats[26] – the Vienna Convention on Consular Relations, particularly in Art. 38, has partially erased these limitations.[27] The Convention has broadened the scope of potential consular intervention,[28] by expanding the consular offices' capacity to engage directly with central authorities.

The division of the assistance-related activities of the foreign service based on *diritto di reclamo* (the right to address the authorities of the receiving state) has become increasingly outdated.[29] Today, the distinction between diplomatic and consular protection, particularly in relation to violations of international law and the methods of implementing protection at the national level, reveals significant differences. Specifically, diplomatic protection typically requires the exhaustion of domestic remedies as a prerequisite,[30] whereas consular protection does not depend on this requirement and can be pursued independently of such exhaustion.

In older Polish doctrine, the distinction between diplomatic and consular activities was often framed within the broader context of their general characteristics.

22 Denza, 2008, p. 33.

23 However, B. Sen regards consular assistance activities – particularly those involving consular contact with persons deprived of liberty – as a component of diplomatic protection (Sen, 1979, p. 342).

24 Stowell, 1909, pp. 62–63.

25 Local intervention and appearance before local courts within the consular district are evident from the respective formulations of Art. IX in the regulations drafted by the International Law Institute for the consular agents conventions of 1889 and 1896, as well as in the draft Art. 5 of the U.S. codification.

26 Thuleweit, 1928, p. 6.

27 While communication with central authorities under this provision was indeed subject to possible treaty and customary restrictions, its introduction in practice marked a significant change in the scope under analysis, effectively blurring the distinctions between consular and diplomatic functions in this regard.

28 Maresca, 1966, pp. 366–367.

29 Ibid., p. 356.

30 Ibid., pp. 359–360. Similarly, the 'clean hands' principle may apply as a condition for the application of rules governing diplomatic protection, whereas it does not extend to the rules governing consular aid.

Diplomatic activity was viewed as comprehensive,[31] including all disputes and possessing a 'creative' nature, whereas consular activity was considered selective, focused on specific cases, and of an 'executive' nature.[32] Moreover, the concept of consular protection, when interpreted purely historically, is virtually non-existent. The institution of the consul evolved from a private-law role (as an advisor to foreign merchants) into a public-law institution, gradually assuming – and sometimes exclusively performing – diplomatic functions related to advancing state interests abroad. In essence, modern consular assistance functions are an extension of what were once considered diplomatic functions.

Considering the above, a fundamental shift in the model of diplomatic assistance to citizens abroad has become apparent. Today, such assistance is generally provided without a clear distinction between diplomatic and consular standards. What was considered a natural distinction half a century ago has now been significantly blurred. This shift has been influenced, in part, by the increasing integration of foreign services in many countries. In many legal systems, the distinction between diplomatic and consular services has effectively disappeared. Consequently, the standards for diplomatic assistance[33] – at least to the extent they are observable externally[34] – are often based on consular frameworks.

However, diplomatic interventions can, in at least two instances, extend beyond the scope of consular activities. First, diplomatic intervention may not be limited to individual cases. For example, diplomats, following traditions of protecting persecuted religious groups,[35] may intervene on behalf of persecuted or marginalised minorities within a society. However, such interventions are typically justified by political objectives and broader considerations rather than strictly legal or individualised concerns.

The development of the human rights protection system has revealed new, previously unrecognised levels of violations within individual countries. This evolution

31 Libera (1958, p. 10) observes that a citizen is generally never the subject of a diplomat's interest, even when a consul is present in the district.

32 Sarna, 1928, p. 49.

33 See Vermeer-Künzli, 2007, pp. 48–49.

34 Certainly, as noted, many diplomatic activities are challenging to classify and assess owing to their inherently political nature.

35 This is most evident in 17th- and 18th-century source texts that outline diplomatic duties. For example, F. de Callières, in his renowned work 'The Art of Diplomacy' ('De la manière de négocier avec les souverains', first published in 1716), highlights certain diplomatic duties that would be classified as consular protection today. He writes: '[A minister] ought to protect all the subjects of his master, who are in the same country with him; to procure for them, in his house, the free exercise of religion which the Prince whom he serves possesses; to let them take shelter in his house when they are under any misfortune, and unjustly persecuted; to adjust all the differences and quarrels that happen among them; to relieve them in their wants; and to live with them in the same manner as a good father lives with his children' (de Callières, 1983, p. 183). Interestingly, Nahlik (1971, p. 77) notes that providing diplomatic assistance to co-religionists (when the sovereign's official religion differed) was considered praiseworthy, whereas protecting one's own subjects was regarded as improper (sic!).

has created potential opportunities for protective diplomatic interventions that would have been inconceivable centuries or even decades ago. However, whether a straightforward correlation exists in this regard is doubtful. Instead, the modern assumption that all states are 'civilised' – a notion that is arguably a legal fiction, particularly when considering examples such as parts of the Islamic world – has influenced the direction of international legal norms. These norms, grounded in the principle of non-intervention in the internal affairs of sovereign states, often counteract potential diplomatic interventions, such as those aimed at protecting persecuted Christian communities. Paradoxically, this legal fiction has contributed to a significant civilisational regression in addressing such issues.[36]

Such interventions, whether at a group or individual level, are generally not undertaken by consuls. This is because consular protective activities are typically limited to assisting citizens of the sending state in individual situations, within the boundaries set by relevant international law norms.

It is important to emphasise that diplomatic intervention may occur when consular efforts prove insufficient or ineffective. The scope of such interventions is often kept confidential. For instance, diplomatic interventions are commonly observed in cases where European or U.S. citizens face the death penalty or severe corporal punishment in certain Asian countries after knowingly or unknowingly becoming involved in drug trafficking.[37] Diplomatic practice offers numerous examples of similar situations.[38]

The general trend in changes within diplomatic protection – and perhaps even more so in consular activity[39] – reflects a departure from the classical understanding of protection. According to Art. 1 of the 2006 draft by the International Law Commission,[40]

36 The right to intervene on religious grounds, such as in cases of persecution of co-religionists, has historically been considered an exception to the principle of non-intervention (Mamiani, 1862, pp. 201 et seq.).

37 Diplomatic intervention can enable the reclassification of charges and, depending on the prominence of the state involved and the public response to the case (and thus its *de facto* political significance), can even lead to the suspension of criminal prosecution and the extraction of those arrested from the receiving state.

38 A classic example is the intervention by the UK in the Muhammad teddy bear case in 2007. This involved extraordinary diplomatic efforts in response to allegations against a British citizen, an English teacher, in the notorious Muhammad teddy bear blasphemy case in Sudan. (The case ended, as a result of the sharp intervention of British diplomacy, with the apology of the citizen by the Sudanese president – however, she was forced to leave the country for her own sake). See: Lee and Quigley, 2008, pp. 121, 160.

39 This is evident, for example, in the provisions of the EU directive and, consequently, in the solutions adopted by European countries as part of its implementation.

40 Notwithstanding some doctrinal criticism of the ILC's work on this matter and the content of the draft itself (see: Sandorski, 2006, pp. 28–31), it can generally be regarded as reflecting customary law to a significant extent.

> diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State, with a view to the implementation of such responsibility.[41]

This traditional reasoning remains evident in recent International Court of Justice (ICJ) rulings, such as the Diallo case, which dealt with consular activity.[42] However, contemporary practice reveals an expanded scope of protection. This includes not only citizens, but also non-citizens with personal ties (e.g. family members of citizens) or material ties (e.g. residency) to the protecting state.[43] Additionally, such assistance – particularly in cases of mass evacuation during emergencies – frequently includes groups of foreigners from the Euro-Atlantic cultural sphere. Paradoxically, these modern standards, in their updated form, echo the mechanisms of jurisdictional assistance from the capitulation era.[44]

The above considerations do not alter the fundamental premise that, under international law, a state's obligation to assist its citizens abroad is an obligation of means, not an obligation of result. Thus, the sending state is not legally bound under classical international law (without addressing potential obligations under domestic or European law) to provide actual assistance to its citizens abroad. However, the receiving state is obliged under international law not to hinder diplomatic assistance on its territory when it involves the citizen of the sending state. Yet, there is no corresponding international legal obligation requiring the state of nationality to provide assistance. Any perceived changes in this regard are, in my view, illusory. Clearly, at the level of domestic law (e.g. a country's constitution),[45] there may indeed be provisions obligating the state to protect its citizens abroad. However, such obligations are not guaranteed under the framework of international law.

Another institution of diplomatic law worth mentioning – one that is particularly specific as it has no parallel in consular regulation – is diplomatic asylum. Although this institution, rooted in history and tracing back to the sacred temple asylums

41 Official Records of the General Assembly, 61st Session, Supplement No. 10, A/61/10.

42 The ICJ explicitly considers 'protection' as an action aimed at holding another state accountable for a violation of law (including increasingly expansive human rights) committed by that state against a natural or legal person over whom the intervening state exercises protection based on a bond of citizenship or affiliation (see ICJ Reports, Diallo judgement of 24 May 2007 – Preliminary Objections, paras. 39, 40).

43 See, for example: Art. 22 of the Austrian Consular Act (Bundesgesetz vom 22. Mai 2019 über die Wahrnehmung konsularischer Aufgaben [Konsulargesetz- KonsG] StF: BGBl. I Nr. 40/2019 (NR: GP XXVI AB 512 S. 70. BR: AB 10161 S.892.).

44 Staude, 1900, pp. 23–26. For example, under the 1535 capitulation, the French consul in Turkey provided assistance to any Christians who were not subjects of the sultan.

45 Such a provision is characteristic of nearly all constitutions in Central and Eastern European countries (for instance, it appears in Art. 36 of the Polish Constitution).

of antiquity,[46] is inherently humanitarian in nature, its contemporary legal impact appears to be rather limited. The ongoing dispute in international law over the legitimacy of diplomatic asylum – persisting even within the Latin American context, where it has a treaty basis, let alone in the universal sphere – ensures that its application, and particularly any potential expansion of its scope, faces significant resistance from states whose nationals seek asylum. Historically, diplomatic asylum has always been used, although in limited circumstances, as a protective mechanism. It has not only served individuals accused of political crimes, but also those persecuted for various reasons, including issues of broad political significance, such as the persecution of entire national groups.[47]

Remodelling diplomatic asylum in this direction cannot be explicitly ruled out, although it appears unlikely.[48] Moreover, the limited technical and financial capacities of diplomatic missions weigh against such changes. Evidently, the scale of diplomatic asylum is, and likely will remain, small in the foreseeable future. Moreover, it would be challenging to identify a cohesive group of countries supporting such changes *in abstracto*. However, in special situations, increased acceptance of diplomatic asylum often arises spontaneously, irrespective of time or place.[49] Nevertheless, it appears improbable that this fascinating institution of diplomatic law will undergo significant evolution in the near future, particularly in a way that would lead to substantial changes in the norms of international law.

4. Consular Functions

4.1. Access to the Consul for a Person Deprived of Liberty as the Primary Mechanism of Consular Assistance

In consular law, legal and human factors play a role similar to their counterparts in diplomatic law. However, consular activities – being public and, unlike diplomatic

46 See Bolesta-Koziebrodzki, 1952, p. 56; Jakab, 2016, p. 17; Burczak, 2005, pp. 27–36; Mossakowski, 2000, pp. 58 et seq.; Traulsen, 2004, pp. 9–85.

47 For example, in the 1990s, the Polish Embassy in Jakarta, Indonesia, provided assistance on two occasions within its premises to several individuals from then Indonesian-occupied East Timor. This diplomatic asylum was later transformed into territorial asylum – although not in the country granting the diplomatic asylum – as the asylum seekers were transported to Portugal. See: Sutor, 2010, pp. 270–271.

48 See Värk, 2012, p. 257; Thebes, 2012, pp. 913–914; Den Heijer, 2013, p. 400.

49 A notable example is the extensive use of diplomatic asylum by nearly 40 diplomatic missions in Madrid during the Spanish Civil War of 1936–37. These missions, including embassies and legations from 36 countries, provided assistance to more than 12,000 people, with significant support from the communists. Among the leaders in this effort was the Republic of Poland, whose diplomatic mission sheltered 400 individuals during this period. See Ciechanowski, 2000, p. 551.

activities, less influenced by foreign policy considerations – tend to exhibit greater predictability in their evolution. In particular, consular activities of an assistance-related nature, such as consular aid and consular protection, have significantly advanced in recent years through the development of the right of access to the consul.

Historically, these actions in international law originated from the consul's judicial role under the framework of consular jurisdiction, which was a widespread institution in international law from the 10th century and, in some contexts, persisted into the second half of the 20th century (including arrangements based on capitulation treaties).[50] Under this system, consuls were often guaranteed access to their state's citizens who were deprived of liberty, particularly in cases where consular jurisdiction extended to criminal matters, enabling consuls to exercise judicial authority over such individuals. Despite the decline and eventual disappearance of the jurisdictional basis for these practices, the mechanisms ensuring consular access to detained citizens have not vanished. However, the purpose of the consul's involvement shifted – from judicial functions to provision of aid. Today, consuls are informed of the detention of a citizen to enable them to undertake protective activities, if necessary.

Although historically these issues were unquestioned, individualising the right of access to the consul has become prominent in recent years, significantly increasing the procedural importance of this matter. Provisions concerning the right of access to the consul for persons deprived of liberty, as regulated by Art. 36 of the Vienna Convention on Consular Relations of 24 April 1963, have become a recurring topic in the jurisprudence of the International Court of Justice (ICJ) over the past two decades. Five cases have been initiated on this issue,[51] four of which resulted in substantive rulings. However, it is noteworthy that, despite the uniformity of the legal norm at issue – rooted in consular law and forming part of the criminal process frameworks of the Convention's state parties – the seriousness of the cases and the scope of legal problems raised in these disputes varied significantly. In general, international jurisprudence has helped establish certain standards for consular assistance. For instance, it has underscored the necessity for the receiving state to notify consular officials before a person deprived of liberty is formally charged and brought to trial.

From a doctrinal perspective of international law, the most distinctive cases concerning the right of access to the consul were the last two: the Diallo and Jadhav

50 See Lippmann, 1898, p. 135; Martens, 1874, p. 433; and Piggott, 1907, passim.

51 Breard, Case concerning the Vienna Convention on Consular Relations (*Paraguay v. United States of America*), Order of Provisional Measures, 9 April 1998 (subsequently withdrawn); LaGrand Case (*Germany v. USA*) – Judgement, 27 June 2001, General List No. 104; Case Concerning Avena and Other Mexican Nationals (*Mexico v. USA*) – Judgement, 31 March 2004, General List No. 128; Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), Judgement of 30 November 2010, General List No. 103; Jadhav Case (*India v. Pakistan*), Judgement, 17 July 2019, General List No. 168.

cases.[52] Unlike the first three cases on this subject handled by the ICJ – all against the United States – these later cases involved different states and presented unique legal issues. The earlier cases against the United States primarily centred on implementing international law at the domestic level, although this was not the sole jurisprudential issue, and they were somewhat repetitive in the legal questions analysed. In contrast, the Diallo and Jadhav cases differed significantly in the nature of the problems they addressed, making them particularly valuable for academic research. The earlier cases also attracted substantial public attention, largely owing to their association with the death penalty in the USA.[53] In these cases, the failure to provide consular notification was invoked as a basis to reopen proceedings, typically expecting to avoid the imposition of the same penalty upon retrial – although with no success. In contrast, in the Diallo case, the crime was economic in nature, and the issue of the death penalty was absent. The Jadhav case did involve the death penalty,[54] however, the matter was less central to the legal arguments.[55]

52 The considerations in this section are based in part on the text by the author – see: Czubik, 2021, pp. 213–236.

53 However, this view is mistaken, as the normative scope of the provisions being complained of applied equally to any form of deprivation of liberty involving a foreigner – whether connected with suspected minor crimes or violations of migration laws – and not solely to deprivation of liberty in cases leading to the imposition of the death penalty. Such a misconception could easily arise from the numerous reports and in-depth analyses in the scientific press regarding cases such as Breard, LaGrand, or Avena.

54 In contrast, this issue was not decisive in the Diallo case, where the criminal acts underlying the mitted consular notification were primarily political and economic in nature. Moreover, owing to its multifaceted nature, the case is rarely associated in public opinion with the problem of consular notification. An important added value of the Diallo case was the affirmation of the formal necessity of notification, even in situations where the fact that a foreigner has been deprived of liberty is widely known within the country.

55 Indeed, this marginalisation is 'compensated' for by an extensive (94-page) separate opinion by Judge Cançado Trindade, presented as a type of manifesto. This opinion, characterised by a fair dose of postmodern mannerism and limited scientific value (apart from its foundation in opposing the death penalty), was drafted on the occasion of the 20th anniversary of the 1999 Inter-American Court of Human Rights Advisory Opinion. (See: Inter-American Court of Human Rights Advisory Opinion OC-16/99 of 1 October 1999 Requested by the United Mexican States: The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Available at: https://hrlibrary.umn.edu/iachr/series_a/OC-16ingles-sinfirmas.html (Accessed: 17 February 2026)).

This was owing to the unique nature of the conviction, as the individual in question was not a common criminal.[56]

The issue of the right of access to the consul provides a valuable comparative framework for examining the relationship between the Vienna Convention on Consular Relations and bilateral consular agreements. The regulation of this right differs between the Vienna Convention and bilateral treaties. Specifically, consular notification under bilateral agreements – irrespective of their date of adoption[57] – typically diverges from the mechanism established in the Vienna Convention. Under Art. 36 of the Vienna Convention, the mechanism is conditional (optional), meaning that notification to the consul depends on the request or consent of the individual deprived of liberty.[58] In contrast, bilateral agreements generally establish mechanisms that do not make consular notification contingent on the individual's consent. Instead, these agreements prioritise a technical approach, often mandating notification within precise time limits specified in the treaty. Interestingly, mandatory notification reflects a historically established legal and customary standard, whereas the optional notification mechanism introduced by the Vienna Convention represents a more modern innovation.[59] This approach, which ties the individual's entitlement to their willingness to cooperate with the consul, was designed to streamline the

56 The Jadhav case raised the issue of the application of consular notification in instances involving the detention of a spy. Irrespective of the ruling, the case should be viewed as having been incorrectly decided. The ICJ failed to consider the existence of a bilateral agreement between the parties concerning consular notification obligations. This agreement, rather than Art. 36 of the Vienna Convention, should have been applied. Notably, the bilateral agreement's jurisdiction, which extended beyond the provisions of the Vienna Convention, would have resulted in the ICJ lacking jurisdiction over the case. Furthermore, in determining the necessity of immediate notification of deprivation of liberty, the ICJ did not adequately address the fact that the starting point for the time limit should be the date when it was established that the detainee was a citizen of a specific foreign state – a determination that was particularly challenging in Mr Jadhav's case.

57 There are only sporadic instances of bilateral agreements providing for optional rather than mandatory consular notification. For example, Poland has concluded such an agreement with Australia (Agreement on Consular Relations between the Republic of Poland and Australia, dated 7 May 1991 – text available in the online treaty database of the Ministry of Foreign Affairs). However, this agreement has not entered into force.

58 The proper implementation of the right of access to a consul, as outlined in Art. 36 of the Vienna Convention, requires that once a citizen of the sending state is deprived of liberty in the receiving state, the authorities of the receiving state must promptly inform the individual of their right to request consular notification. If the detained foreign national desires such contact, the authorities of the receiving state must immediately notify the consul of the sending state about the detention of their citizen.

59 Subsequently, other international treaties – particularly those where consular matters were ambiguously regulated – began to adopt this solution. However, in strictly consular agreements, the standard practice, even after the Vienna Convention came into force, was mandatory notification. The best example of this is the European Convention on Consular Functions of 1967, which explicitly provides for mandatory notification in Art. 6. In exceptionally rare cases, optional provisions appeared in bilateral treaties concluded before the adoption of the Vienna Convention. See: Lee and Quigley, 2008, p. 143, note 24; cf. Whomersley, 1985, p. 265.

process of providing consular aid and avoid situations where it would be unproductive because the individual clearly does not wish to cooperate with the consul.

When the Vienna Convention was adopted, as a treaty addressing primarily the institutional rather than the functional aspects of consular law, it was clear that bilateral treaties – long a tradition in interstate relations – would retain their significance. It was essentially assumed that the broad spectrum of interstate relations involving consular functions would continue to require regulation through separate agreements, primarily the traditionally concluded bilateral consular conventions. The Vienna Convention largely left many aspects of consular practice unaddressed, omitting significant issues of consular activity entirely. Consequently, the continued validity of the full range of bilateral agreements concluded prior to a state's accession to the Vienna Convention was a natural and expected outcome. Moreover, many states continued to conclude bilateral conventions after acceding to the Vienna Convention – a logical and understandable practice considering the Convention's limited scope of application.

The Vienna Convention explicitly addressed other treaties governing consular law in Art. 73. This provision recognised both agreements binding on states-parties before the Convention's adoption – affirming the continued validity of existing arrangements – and agreements that states-parties may conclude in the future, whether on a bilateral or multilateral basis, after becoming bound by the Convention's provisions. Consequently, a bilateral agreement that functions as a *lex specialis* in relation to the Vienna Convention's provisions (including those concerning the consul's right of access to a person deprived of liberty) is permissible as long as its provisions confirm, supplement, or expand the scope of the Convention's application.[60]

It is important to consider the provisions of the Vienna Convention on the Law of Treaties,[61] particularly Art. 41, which governs agreements that modify multilateral treaties between only some of the parties, and to assess whether such modifications conflict with Art. 73 of the Vienna Convention on Consular Relations. Art. 73 of the Consular Convention, when viewed through the lens of Art. 41 of the Convention on the Law of Treaties, outlines the scope of modifications that are permissible – or at least not prohibited – under a multilateral treaty. These include agreements that confirm, supplement, or expand the provisions of the Convention, provided that they do not impair the rights of other parties under the treaty or hinder their ability to fulfil their obligations. As a general rule, treaty practice dictates that amendments of a 'confirmatory, supplementary, or elaborative' nature must not repeal or alter provisions in a manner incompatible with the effective realisation of the treaty's object

60 See Declaration of Judge Iwasawa (Jadhav case), para. 13. The judge observed that even if the 2008 bilateral agreement restricted access to consular assistance for individuals suspected of espionage, its application was nonetheless precluded by Art. 36 of the Vienna Convention, owing to the provisions of Art. 73 of the Vienna Convention.

61 UNTS 1980, vol. 1155, No. 18232, pp. 331–513.

and purpose. Thus, from a teleological perspective, the contents of Art. 73 and Art. 41 can generally be regarded as compatible.

However, it is worth considering whether Art. 41 of the Vienna Convention on the Law of Treaties grants parties engaging in treaty-making broader options[62] than those allowed under Art. 73 of the Vienna Convention on Consular Relations. This question is significant because Art. 41 does not explicitly emphasise the full dispositiveness of the standard it provides, a point typically reflected in phrases such as 'unless the treaty provides otherwise'.[63] However, it appears that Art. 41, while allowing for the possibility of modification through bilateral agreements – or the prohibition of such modifications within the treaty – implicitly assumes that the treaty may also permit modifications under specific conditions. This interpretation is logical, as establishing a right to modify a multilateral treaty inherently allows for the possibility of conditioning such modifications within the treaty itself. This reasoning is justifiable if one does not interpret Art. 73 of the Vienna Convention on Consular Relations rigidly as a prohibition against modification.

It is worth examining whether the provisions of Art. 73 of the Vienna Convention on Consular Relations and Art. 41 of the Vienna Convention on the Law of Treaties have fundamentally different scopes of application and pertain to distinct factual situations. Art. 73 generally does not allow for the modification of the Vienna Convention through bilateral agreements, if 'modification' is understood as a change to the essential substance of the rights and obligations established by the treaty. Such an understanding of modification appears consistent with Art. 41 of the Vienna Convention on the Law of Treaties. Consequently, Art. 41 is arguably inapplicable to the regime of the Vienna Convention on Consular Relations, as it pertains to treaties that explicitly permit modification or make it explicitly impermissible. In contrast, Art. 73 of the Vienna Convention on Consular Relations effectively allows only agreements that confirm, supplement, or expand its provisions. Here, 'supplement',

62 See Sawicki, 1998, p. 39.

63 Regarding treaties permitting modification, such a statement appears in Art. 41(2), which addresses the obligation of parties concluding a modifying treaty to notify other parties of their intention to conclude the agreement and of the modifications it introduces. Within this context, it is debatable whether Art. 73 of the Vienna Convention should be interpreted as a provision enabling treaty modification while simultaneously providing a special mechanism that does not require notification to other states parties. This is particularly questionable considering that Art. 41 stipulates such an obligation unless the treaty explicitly provides otherwise – and it is difficult to interpret the silence of Art. 73 as 'providing otherwise'. In practice, states do not notify other parties to the Vienna Convention about their bilateral consular agreements. Furthermore, the norm arising from Art. 41(2) in conjunction with para. 1(a) appears to apply only to specific modifications explicitly provided for in a treaty, where the normative layer undergoes a distinct determination, leading to effects clearly different from those of the original treaty. This does not extend to general modifications within the scope of the basic treaty that do not impact the effectiveness of its norms. Notably, bilateral consular conventions are predominantly designed to regulate issues that are generally unaffected by the Vienna Convention, such as classic consular functions. Their areas of overlap with the Vienna Convention typically align with its provisions and objectives, rather than contradict or diverge from them.

'expand', or 'extend' imply introducing additional measures that do not alter the original provisions in a way that affects their fundamental purpose or essence. Thus, Art. 73 prohibits modifications that would undermine the core purpose or integrity of the original provisions.

The adoption of the clear and unambiguous interpretation outlined above is not strongly supported by state practice, which generally regards as permissible modifications that go significantly beyond merely confirming, supplementing, or expanding the content of the Vienna Convention on Consular Relations. Consular law is replete with examples of such modifications referring to Art. 36, and legal scholarship has the tools to analyse the extensive state practice in this area.[64] Moreover, this practice is reflected in national laws, which often impose specific obligations on the authorities of receiving states. In general, states approach Art. 73 with a relatively liberal perspective, treating it as allowing any *legis specialis* modifications arising from bilateral treaties. In practice, these modifications frequently extend well beyond the mere confirmation, supplementation, or expansion of the provisions of Art. 36 of the Vienna Convention.[65] The sheer scale of bilateral treaties addressing consular matters worldwide raises the question of whether Art. 73 of the Vienna Convention has been effectively rendered obsolete (*desuetudo*), even from its inception. This de facto erosion could be attributed to the widespread acceptance of a customary norm permitting the conclusion of bilateral agreements that substantially interfere with or depart from the provisions of the Vienna Convention.

In bilateral agreements, states commonly adopt a mandatory notification mechanism. From the perspective of Art. 73 of the Vienna Convention on Consular Relations, this effectively eliminates the individual's right to initiate consular notification, as provided in Art. 36(1)(b) of the Convention. Introducing a mandatory notification obligation renders the individual's right to decide on the initiation of consular notification largely illusory.[66] Although this approach may raise ethical concerns of both legal and human dimensions,[67] it is procedurally sound. From the

64 Representatives of the doctrine addressing this issue generally support the concept that, in situations of conflicting norms, the provisions of bilateral conventions take precedence, often at the expense of the individual's rights. See: Aceves, 1998, p. 266; cf. Springrose, 1999, pp. 186, 189. Additionally, Marcantonatos (1974, p. 170) explicitly emphasises full compliance with Art. 73(2) of the Vienna Convention, noting the substitution of the optional mode for the obligatory mode. This approach reflects the common practice of states entering into bilateral agreements.

65 Cf. Kho, 1994–1995, pp. 275–276.

66 Bilateral conventions, including some concluded by Poland, occasionally introduce an obligation to inform the individual about the notification made (thereby recognising the individual's right to be informed about it). However, these provisions do not establish any right for the individual to initiate relevant actions by the receiving state. From a procedural perspective, this is essentially a normatively empty solution, as it imposes no substantive procedural obligations. Nonetheless, such provisions are not uncommon. Cf. Art. 31(2) of the Polish-Iraqi Consular Convention (Journal of Laws 1982, No. 27, item 194).

67 Certainly, there may be individuals deprived of liberty who explicitly do not wish for such notification (e.g. refugees or similar cases). In some situations, this could harm their sense of security or even pose a threat to their family members remaining in their country of citizenship.

standpoint of procedural guarantees, such mandatory notification ensures the consul's participation in the criminal process and facilitates the aid or protective actions provided for under national and international law. As such, this solution cannot be considered defective.

Another commonly employed solution in bilateral agreements is the specification of the deadline for notifying the consul of the detainee's state of nationality. This approach is used in various ways, ranging from immediate notification to more flexible timelines.[68] Some agreements drastically shorten the notification deadline, requiring it to be completed within 24 or 48 hours after detention; others significantly extend the deadline, often reflecting the peculiarities or technological capabilities of the states parties at the time the treaties were concluded.[69] However, such measures do not undermine the essence of consular notification. In this context, the ICJ has rightly emphasised that, as a general rule, notification should occur before procedural decisions are made that could affect the detainee's status or result in charges being brought against them. This timing ensures that the individual has the opportunity to clarify their procedural position and respond appropriately, safeguarding their rights within the legal process.[70]

In future, we are certain to witness a form of competition between the optional and mandatory models of the right of access to a consul by individuals deprived of liberty. Both models have their advantages and disadvantages. The mandatory model undoubtedly provides stronger protection for the individual, assuming they wish to contact the consul. Further, it reduces the potential for abuse by the receiving state, which is more likely with the optional model, where authorities could claim that the detainee was unwilling to notify the consul.[71] However, the optional model better

68 See Sawicki, 1998, p. 132; Płachta, 2003, pp. 106 et seq.; Williams, 1980, pp. 240–241. The most common practice among states is a three-day deadline for notification.

69 Hence, it is not surprising to find notification deadlines of up to three weeks in agreements with developing countries. In the 1960s and 1970s, when many of these agreements were concluded, such countries often lacked the technical means to make notifications within shorter timeframes. For instance, the Polish–Iraqi Convention provides for a seven-day notification deadline. Furthermore, even today, the procedures for transmitting official correspondence in territorially extensive countries (e.g. Brazil) frequently result in missed deadlines. This issue was starkly evident during the 2020 Polish presidential election, particularly with postal voting abroad (see: Supreme Court Order I NSW 93/20 of 27 July 2020, regarding Z.J.J.'s election protest against the election of the President of the Republic of Poland).

70 However, this does not imply immediacy or the necessity of notification prior to any hearing (see: Avena Judgement, para. 85). As the ICJ correctly observed in the Jadhav case (Jadhav Case, Judgement, 17 July 2019, para. 113), such assessments must be made *ad casum*, considering the varying circumstances of different foreigners deprived of liberty. However, in that case, the ICJ determined that a delay had occurred. This conclusion is debatable, as the court failed to specify when the receiving state became aware of the spy's actual foreign nationality – from which knowledge the obligation to promptly undertake consular notification would have arisen.

71 The practice surrounding Art. 36 demonstrates that abuses are widespread in some Third World countries. For example, detainees are often informed in a language they do not understand, without access to an interpreter, and their lack of response is interpreted as unwillingness to contact the consul.

safeguards individual rights, including the right to refuse consular notification. Considering the growing recognition of individual rights in international law, this model appears to be increasingly favoured in state practice. This shift often occurs despite the provisions of bilateral agreements, which typically adopt the mandatory model as *lex specialis* and should, in theory, prevail.[72] Thus, although there may be a trend towards strengthening the optional model, the actual scope of the mandatory model's application remains difficult to assess. This is because only violations of the optional notification mechanism under Art. 36 of the 1963 Vienna Convention on Consular Relations have been the subject of international disputes.[73] To date, all cases brought before the International Court of Justice have involved this optional model.

When examining the evolution of norms regarding the right of access to the consul, it is clear that they have become one of the most enduring and reliable elements of international law in ensuring fair criminal proceedings. At first glance, it may appear that the optional model is the widely accepted and dominant solution. However, this perception arises from a particular error in perspective. Public awareness tends to focus on situations where the receiving state fails to provide notification to the foreigner, resulting in the consul being uninformed. Later, the foreigner often identifies the violation of their individual rights and raises it during legal proceedings. In contrast, the mandatory model does not grant an individual right to initiate consular notification – its application occurs exclusively within the sphere of interstate relations. Violations under this model typically remain unknown to both the detained individual and public. Consequently, the mandatory model is less visible, although this does not imply that it is any less effective. Doubtlessly, the European consular protection,[74] while not explicitly adopting either the optional or mandatory model, tends to promote the unification of standards among states.

72 This is evidenced by the adoption of such a model by states in various secondary international conventions and soft law instruments. For example, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988, reflects this approach. Similarly, the Basic International Recommendations on the Treatment of Foreign Prisoners, adopted in 1984 by the United Nations Committee on Crime Prevention and Control, promote these principles. Furthermore, this model is mirrored in multilateral human rights assistance treaties. For instance, Art. 16(7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly resolution 45/158 of 18 December 1990, replicates this framework.

73 If the disputing states are also parties to the Optional Protocol to the 1963 Vienna Convention on Consular Relations, which establishes the compulsory jurisdiction of the International Court of Justice for disputes arising under the Convention, they are obligated to resolve such disputes through the ICJ.

74 Currently, the rules governing consular protection in European countries stem from the implementation of Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC (OJ L 106, 24.4.2015, pp. 1–13). This directive aims to implement the objectives outlined in Art. 20(2)(c) TFEU and Art. 23 TFEU. However, it addresses only consular assistance and does so in a limited and piecemeal manner. Diplomatic protection remains entirely outside the scope of the directive's regulation.

However, it must be acknowledged that the practical application of the right of access to the consul under European consular protection remains limited in scale. Whether notification will be applied in such cases – or applied at all – depends on the receiving state, particularly in the context of third-country regulations governing consular protection.[75]

The influence of the human rights assistance system on the development of consular law norms is clearly evident. Although the consular norms in question do not constitute a human right (they can be regarded as an individual right), they are often considered part of the broader guarantees of a fair trial and are widely perceived as such. However, this perception can be misleading, as it is primarily associated with serious crimes (e.g. those punishable by death penalty). In reality, this perception overlooks the vast majority of cases – numbering in the hundreds of thousands daily – where national consuls worldwide apply Art. 36 of the Vienna Convention or mandatory notification mechanisms.

4.2. Legalisation as an Example of a Disappearing Activity

As late as the 1950s, a significant aspect of consular activity involved responsibilities directly related to trade and customs. Until that time, consuls played a fundamental role in the trade process.[76] These duties ranged from promotional activities, such as fostering economic connections between entities in the receiving and sending states, to more practical tasks that facilitated the exchange of goods between countries. Since the interwar period of the 20th century, efforts had been underway to modify the traditional scope of consular functions connected with foreign trade. Consular activities not only included issuing or certifying (legalising) consular invoices, but also often entailed preliminary customs control, such as estimating the value of exported goods. Consuls were frequently required to assess the value of products for customs purposes, sometimes based on provided samples.[77] These responsibilities were difficult in practice, as they demanded substantial expertise in commodity science, pricing policy, and a thorough understanding of local market

75 A country can completely disregard EU mechanisms, as they are not binding on third (receiving) countries. EU member states should inform third countries about the mechanisms of European consular protection. However, it is noteworthy that the notification of such activities *in favorem tertii*, as outlined in Art. 8 of the Vienna Convention on Consular Relations, may be unrecognised if the notification lacks specificity – that is, when both the assisting state and the state on whose behalf the assistance is provided are not individually identified. This imprecision, coupled with a formula allowing European consular protection based on the choice of the European citizen, can lead to challenges in its recognition.

76 See Horstmann, 1886, pp. 24–25.

77 See United States Consular Regulations. A Practical Guide for Consular Officers and also for Merchants Shipowners and Masters of American Vessels in All Their Consular Transactions, 1868, p. 391. Cf. Lloyd Jones, 1906, p. 8.

prices. Unsurprisingly, there was widespread reluctance among consuls at the time to perform these complex tasks.[78]

The adoption of the Convention relating to the Simplification of Customs Formalities, signed in Geneva on 3 November 1923 (Journal of Laws of 1931, No. 106, item 819), under the auspices of the League of Nations, was met with approval, particularly within the consular community. Art. 11, para. 8 of the Convention stipulated that consular actions should not, in principle (although not mandatorily), apply to certificates of origin for goods. Art. 12, para. 3 further provided that the cost of a visa for consular invoices should be as low as possible. Over the 20-30 years of its implementation, the convention largely contributed to the decline of these onerous consular activities. In addition, many states, aligning with the 'spirit' of the Convention, negotiated bilateral treaties that further liberalised consular activities in this domain.

During this period, specific administrative activities – such as the issuance of documents guaranteeing cross-border movement of goods, sometimes based on inspections – gradually disappeared. Yet consuls continued to issue customs invoices independently. However, to expedite their work, they often accepted such documents issued by local offices or chambers of commerce, merely stamping them with the appropriate seals as proof of authentication. This sealing process – referred to as 'legalisation' – became a critical condition for the acceptance of a foreign document within the legal framework of the sending country. The consular seal ensured the document's transition from the legal jurisdiction of the receiving state to that of the sending state. This process was intrinsically linked to the concept of 'power' or 'evidentiary force', whereby a foreign document, through consular activity, was endowed with the same evidentiary status as a domestic document in the sending country's legal system. Legalisation represented the formal acknowledgment by the receiving state that its public documents could be extended evidentiary validity within the sending state's legal framework, equalising their legal standing with equivalent domestic documents.

The emergence of legalisation mechanisms for foreign documents – initially focused primarily on what would today be classified as commercial and customs documents[79] – served two chief purposes, likely guaranteed in parallel. On the one hand, these mechanisms aimed to ensure the security of legal transactions. The legalisation clause, functioning as a form of *exequatur* for foreign documents, acted as a guarantee of their acceptance. Although such acceptance was often unreliable in practice, the clause provided some level of assurance regarding the evidentiary, formal, and, in certain jurisdictions, substantive legal aspects of the document and the actions it reflected. Using a foreign legalised document, its holder acquired a

78 Cf. Regulation Prescribed for the Use of the Consular Service of the United States, 1881, p. 215.

79 See the terminology used in Art. 1 of the Hague Abolition Convention, where this term is explicitly utilised. Notably, the terminology in question also aligns with that used in the GATT.

sense of enforceability of the rights to the goods specified in the document within the territory of its intended use – a sense that was sometimes not entirely justified by the actual circumstances or the presumed scope of its validity. On the other hand, states benefited financially from this process by collecting fees for legalisation. Thus, these activities served dual purposes: fiscal and protective. In essence, they resembled customs duties, which *ab initio* had analogous objectives.[80] Over time, the scope of such consular activities expanded to include documents pertaining to other civil or administrative legal actions intended to have effect in the sending state. This type of activity remains a distinct feature of consular practice to this day. The core consular functions related to commercial and customs matters have, as a result of numerous international initiatives, largely become a thing of the past.[81]

As a rule, the receiving state determines the extent to which a foreign document must be legalised. In some cases, the legalisation of all foreign documents is required;[82] in others, this requirement is tied to the principle of reciprocity,[83] limited to certain categories of documents,[84] or entirely waived. In the latter scenario, foreign public documents are recognised with evidentiary power equivalent to domestic documents without any need for legalisation.[85] Consequently, there are significant differences worldwide in how countries approach the recognition of foreign documents' evidentiary force relative to domestic ones. In countries where all official documents are granted equal probative force *ex lege*, consular services typically do not engage in the practice of applying legalisation measures.

80 Bartoszewicz, 1998, p. 89.

81 The legal system under the General Agreement on Tariffs and Trade (GATT), and now the World Trade Organization (WTO), has adopted specific legal arrangements exempting certain documents from legalisation requirements – see GATT Art. VIII. Cf. the Recommendation of 7 November 1952 on the Abolition of Consular Formalities and Code of Standard Practices (GATT Basic Instruments and Selected Documents, First Supplement). See also: Czubik, 2004, pp. 100–107. Bilateral agreements introduced additional liberalisation mechanisms, which not only abolished the legalisation requirement but also provided, for example, free legalisation of certain categories of documents –an arrangement that was economically unprofitable. For instance, Arts. 1 and 2 of the 1934 Belgian–Bulgarian Agreement (Agreement Between Belgium and Bulgaria Concerning the Issue and Legalisation Free of Charge of Copies of Entries in the Civil Register on Behalf of Indigent Persons and Concerning the Legalisation Free of Charge of Copies of Similar Entries Made on Behalf of the Public Authorities, Sofia, 26 October 1934, LNTS of 1934–1935, vol. CLV, item 3572) provided for free legalisation of certain documents for indigent persons and public authorities. However, this agreement did not address the issue of customs or commercial documents.

82 This is exemplified by the German legal framework (Sec. 438 of the Zivilprozessordnung of 1877) and the Hungarian legal framework (Art. 593 of the Code of Civil Procedure).

83 For instance, in the Austrian model, Sec. 293 para. 2 of the Zivilprozessordnung of 1895 (Gesetz vom 1. August 1895, über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten, RGBl. Nr. 113/1895) provides a relevant example.

84 This is the case under Polish law – Art. 1138 of the Polish Code of Civil Procedure limits this requirement solely to documents concerning the transfer of ownership of Polish real estate and to documents whose authenticity is contested by a party during the proceedings.

85 This is also the case in Denmark, for example – see Biscottini, 1961, p. 665.

Notably, international law has favoured the elimination of the legalisation requirement since the 19th century. Since then, bilateral agreements on legal aid began to emerge, often abolishing the need for legalisation between states. Modern states, particularly those in Central and Eastern Europe,[86] are typically parties to several or even dozens of such agreements, which effectively remove the requirement for consular legalisation, however, do not prohibit consuls from performing this act upon request. However, in practice, legalisation is generally not conducted for consuls of states bound by these bilateral agreements.

The reduction of legalisation activities has also occurred at a universal level through multilateral conventions aimed at abolishing the requirement to legalise specific (often narrowly defined) categories of documents.[87] The most significant treaty addressing this issue is the Hague Convention of 5 October 1961, adopted under the auspices of the Hague Conference on Private International Law.[88] Officially titled the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents,[89] it applies to nearly all public documents.[90] Rather than abolishing consular legalisation outright, the Convention replaces it with the issuance of apostille certificates by the competent authorities of the state where the document originates. However, the Hague Convention does not apply to relations between states that are parties to a bilateral legal aid agreement providing for the abolition of the legalisation requirement. Such bilateral agreements take precedence as a *lex specialis* over the provisions of the Hague Convention, as explicitly acknowledged in Art. 3(2) of the Convention.

Recently, the issue of abolishing the requirement for document legalisation has also become the subject of European Union regulations.[91] However, the relevant regulation applies only to documents within its specified scope, primarily civil status records and documents related to electoral rights. In addition, nearly every EU legal instrument addressing civil jurisdiction includes provisions exempting all documents

86 Poland, for instance, is bound by legal aid agreements with nearly 40 countries worldwide (including Hungary), which fully abolish the requirement to legalise documents.

87 For example, the ICCS Convention on the Exemption from Legalization of Certain Records and Documents, signed at Athens on 15 September 1977 (ICCS No. 17), provides such provisions. See also: the European Convention on the Abolition of Legalisation of Documents Executed by Diplomatic Agents or Consular Officers (ETS 1968, No. 063).

88 This institution initially functioned as a cyclical international conference starting in 1893 and was not characterised by international legal subjectivity. The decision to transform it into an international organisation was made only after World War II, with the change being definitively implemented in 1955 – see: di Cesari, 2002, pp. 151–153.

89 UNTS 1965, vol. 527, No. 7625, pp. 189–203.

90 Documents excluded from its scope are instead covered by other treaties (e.g. the *Council of Europe Convention* for documents prepared by diplomats or consuls) or by systemic frameworks (e.g. GATT/WTO rules for trade and customs documents).

91 Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No. 1024/2012 (OJ L 200, 26 July 2016, pp. 1–136).

transferred across borders between EU member states from any form of consular legalisation or certification, including apostille clauses under the Hague Convention. These exemptions apply under the conditions set forth in each specific instrument.[92]

4.3. Notarial Activities

International law explicitly permits consuls to perform notarial acts.[93] Although the receiving state theoretically retains direct authority over the scope of such functions and may even oppose some or all these activities by consular officials of the sending state, such opposition is rare in practice. This is largely owing to Art. 5(f) of the 1963 Vienna Convention on Consular Relations, which includes notarial acts, such as civil status acts, under the Danish clause. According to it, the performance of these acts by consuls from the sending state requires at least the tacit approval (i.e. the absence of objection) of the receiving state. Traditionally, the sending state enjoys significant freedom in this regard. Simultaneously, it retains full discretion to either forego such consular functions entirely or limit their practical application to a significant degree.

Analysing Art. 15 of the European Convention on Consular Functions reveals that it allows consuls to perform notarial acts either for the benefit of citizens of the receiving state or for any person, irrespective of nationality, provided the civil law act has legal consequences within the territory of the sending state.[94] This provision appears to align with the principles of customary international law.[95] Certainly, the consul performs these actions according to the law of the sending state, acting as a civil law notary for their own country while operating beyond its borders. Through these activities, the consul facilitates access for interested parties – primarily citizens – to the legal framework of their sending state.

Sending states typically impose limitations on the scope of notarial activities that their consuls can perform. This is often owing to consuls lacking the specialised

92 See Art. 74 of Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201, 27 July 2012, pp. 107–134).

93 See, for instance: Lee and Quigley, 2008, pp. 228–231; Torroba Sacristan, 1993, pp. 295–350; Núñez Hernández and Martí Martí, 2009, pp. 518–541; Anghel, 1996, pp. 399–402.

94 See Art. 15: '1. A consular officer shall be entitled to draw up or receive in notarial form or in such similar form as may be laid down by the law of the sending State: a acts and contracts concerning exclusively nationals of the sending State; b contracts of marriage provided that at least one of the parties is a national of the sending State; c acts and contracts notwithstanding that none of the parties concerned is a national of the sending State, provided that such acts and contracts relate to property situated within that State or are intended to have effect within that State. 2. The acts and contracts referred to in the preceding paragraph shall have judicial effect in the receiving State only to the extent that there is nothing contrary thereto under the law of that State. 3. When the law of the sending State requires the administration of an oath or affirmation, a consular officer shall be entitled to administer such oath or affirmation'.

95 A very similar provision is found in Polish law under Art. 28 of the Consular Law.

training and resources necessary to undertake the full range of tasks typically associated with civil law notaries in the sending state.

The need to clearly define the boundaries of consular functions is influenced by the potential for citizens to demand specific services that consuls may not be equipped to provide. This often leads to the adoption of statutory regulations that self-limit the scope of consular activity by foreign service officials. However, in most cases, a general regulation granting consuls discretionary authority to decide whether a specific consular action is appropriate – particularly if the same goals can be achieved by other means – is sufficient to address these issues.

Notably, consular activity cannot be directly equated with domestic notarial practices. Access to consular services is often influenced by factors not present in the domestic context,[96] such as logistical challenges or political considerations arising from the relationship between the receiving and sending states. These external factors can significantly impact and, in some cases, restrict consular activity. Hence, situations often arise where applicants are redirected to the legal framework of the receiving state, particularly for tasks that are exceptionally time-consuming or difficult for the consul to perform.[97]

Furthermore, domestic laws vary significantly in how they limit the scope of a consul's notarial activities, typically by defining a closed catalogue of permissible notarial functions. However, a limited catalogue does not necessarily imply a narrow range of functions.[98] States retain the flexibility to expand or modify this catalogue as needed through legislative changes. Consular notarial acts are inherently flexible instruments, applied by individual sending states according to their specific needs – such as the size of their emigrant population or the intensity of legal transactions with foreign countries. Consequently, these practices neither conform to a uniform global standard, nor is there a clear, precise trajectory in the development of consular notarial functions.

96 Under Polish law, certain civil law notary activities require registration in a closed intranet system. This system can only be accessed by notaries or courts within Poland, as access from abroad is restricted for security reasons.

97 Such an effect is achieved by refusing to perform the act. Refusal applies, naturally, to notarial acts that are contrary to the law of the sending state. Additionally, some legal frameworks explicitly provide for the possibility of refusal. For example, Art. 23 of the Belgian Consular Code (Loi portant le Code consulaire (C-2014/15009), 21 December 2013, Belgisch Staatsblad/Moniteur Belge, 21 January 2014, 2nd edn., pp. 4987–5000) allows a consul to refuse to perform a notarial act in cases of factual or legal difficulty. Similarly, Art. 35(2), point 3, of the Polish Consular Law provides the right for a consul to refuse to perform an act if it would require 'disproportionately large expenditures', particularly when the applicant could perform such an act much more easily under the local law of the receiving state.

98 In addition, it should be noted that, alongside typical notarial activities, ancillary activities are performed, which are customarily handled by civil law notaries in sending countries. These include, for example, the deposit of property or documents – see: Art. 72 of the Swiss Ordinance Verordnung vom 7. Oktober 2015 über Schweizer Personen und Institutionen im Ausland (Auslandschweizerverordnung, V-ASG), (AS 2015 3879), text: www.fedlex.admin.ch/eli/cc/2015/654/de). Cf. Arts. 23–24 of the Polish Consular Law.

4.4. Civil Status Acts

Acts of civil status (and those of a similar nature)[99] are commonly regarded as integral to consular practice. However, these are also the consular activities that most frequently encounter opposition from the receiving state. Such opposition, or outright refusal, to permit certain activities is observed even within the European Union and the broader European legal space.

The requirement for the receiving state's consent to perform consular functions related to civil status issues is rooted in the European Convention on Consular Functions.[100] This international law instrument, despite its relatively limited scope of application, represents a successful codification of customary law governing the exercise of consular functions.[101]

Considering the necessity of at least tacit consent from the receiving state to perform actions covered by the Danish clause, the performance or non-performance of such actions by consuls generally does not raise significant issues between states.[102] However, cases do exist – including in Polish practice[103] – where receiving states restrict consuls' ability to perform civil status acts, either wholly or in part. Such restrictions primarily stem from differences in the legal definition of marriage, conditions for its conclusion, or the inclusion of same-sex unions within the concept of marriage. In some cases, restrictions arise from the receiving state's requirement for uniformity in the form of marriage within its territory, which may preclude consular involvement in these matters.[104] Consequently, consular actions related to civil status

99 Notably, civil registration system is not universally adopted worldwide. Many nations do not use a state-run registration system, instead relying on alternative systems maintained by religious authorities. For instance, Poland did not establish civil status registries until the 1940s.

100 European Treaty Series No. 061 – see: Art. 13: '1. A consular officer shall be entitled to: a draw up or record documents on the birth or death of nationals of the sending State or any other documents concerning the civil status of such nationals; b celebrate a marriage, provided that at least one of the parties is a national of the sending State, that neither of them is a national of the receiving State and that there is nothing in the law of the receiving State which would prevent the celebration of the marriage by the consular officer. 2. The issue of the documents referred to in para. 1.a shall not involve exemption from any obligation imposed by the law of the receiving State'.

101 See, for example: Maftei, 2016, p. 106.

102 This contrasts with certain actions under international law, where states may primarily question the authoritarian nature of specific consular actions (e.g. the issuance of visas) or the classification of actions per analogiam to those not explicitly covered by provisions such as the Danish clause. A notable example is the dispute over consuls issuing national cards, such as Hungarian Cards or Pole Cards, which are considered activities of a passport-visa nature and thus guaranteed by international law. Issues surrounding the Pole Card were highlighted in Belarus and, prior to 2004, in Lithuania by the foreign service of the Republic of Poland.

103 It is worth noting the practical limitations imposed in this regard by Switzerland and Germany. Switzerland does not permit consuls of the Republic of Poland to perform civil status-related actions, except for transmitting Swiss civil status records to Polish civil registration offices. Similarly, Germany does not allow Polish consuls to undertake actions involving the issuance of documents confirming fitness for marriage.

104 See Arroyo Montero, 1991, p. 83.

must be understood as contingent on the receiving state's regulations, and such actions are not performed to the same extent, or at all, in every receiving state.[105]

Moreover, national regulations of sending states concerning consular functions in the field of civil status vary significantly. In some countries, consuls are authorised to prepare civil status records,[106] whereas in others, consuls merely receive declarations (e.g. of marriage) and forward the documents to the national civil status registry. There is no uniform practice in this regard.[107] Typically, consuls also act as intermediaries in transferring foreign civil status records to their home country. These documents are then subject to transcription, whereby the content of the foreign record is transferred into the domestic civil status registry. This process most often results in the creation of a national secondary civil status record.

The extent of potential changes in the field of civil status registration is challenging to predict. Ideological conflicts between states over the concept of marriage, the permissibility of same-sex marriages, and related issues hinder the unification of practices. Although at first glance civil status registration may appear less contentious[108] than, for example, notarial acts, in reality, the opposite is often true. Nevertheless, with the increasing global migration, the volume of consular activities related to civil status is likely to remain substantial. This will be the case even if the number of receiving states that restrict consuls from performing such activities continues to grow. Notably, nearly half of the countries worldwide lack a formal civil status registration system, relying instead on religious records or administrative medical records to serve this purpose. In such states – which generally do not oppose consular activities of this nature on their territory – the consul's role becomes particularly significant.

105 Sometimes the reasons for refusal are political in nature – for example, the United States' refusal to recognise marriages performed before Japanese consuls – see: *Miko Jung v. Rokusaburo Navaya* (47 NYS 2d 48, NY City Dom. Rel.Ct. 1944), American International Law Cases, vol. 10, pp. 176–177.

106 Here it is worth noting the regulations, such as the Romanian Regulament consular 1999 (Hotărârea 760/1999 privind aprobarea Regulamentului consular – Dată act: 16 septembrie 1999, Monitorul Oficial No. 468 of 27 September 1999, amended in Monitorul Oficial No. 778 of 22 November 2010, see Art. 17) or the Belgian Consular Code (Art. 8), which provide for consuls to perform actions related to civil status.

107 For example, in Poland, until the 1980s, consuls of the People's Republic of Poland were authorised to register civil status records under the Decree of 25 September 1945, Law on Civil Status Records (Journal of Laws 1945, No. 48, item 272) and the subsequent Decree of 8 June 1955, Law on Civil Status Records (Journal of Laws 1955, No. 25, item 151). Currently, under the Act of 28 November 2014 – Law on Civil Status Records (i.e. Journal of Laws 2023, item 1378, as amended), and previously under the Act of 29 September 1986 – Law on Civil Status Records (Journal of Laws 1986, No. 36, item 180), consuls are limited to actions involving the transfer of statements and documents to Poland for the preparation of a civil status record by the relevant national office.

108 During the period of capitulation treaties, it was assumed that the grant of jurisdiction in Egypt implicitly included, under the *de maiori ad minus* principle, the authority to perform civil status functions, such as accepting marriage declarations. Cf. McDougall, 1949, pp. 358 et seq.; see also the decision of the German Reichsgericht of 3 March 1930 (279/29 VIII) – FJG, vol. II, pp. 114, 219.

4.5. Administrative Activities

If we assume that consular functions are subject to significant variability over time owing to changes in the internal laws of the sending state, the situation appears different for many administrative actions. Although administrative law frequently evolves in the practice of states, the nature of administrative consular activities remains remarkably stable. The substantive aspects of administrative law conducted by consuls – such as the grounds and conditions for issuing visas, the types of personal identification documents, or passports – are subject to ongoing changes, however, the underlying principles have remained consistent for centuries. For example, the purpose of issuing visas and passports remains the same. The fundamental rules governing these processes have not changed. Similarly, formal adjustments in administrative law, such as introducing appeal procedures against a consul's visa decision (addressed further below), do not substantially alter the core nature of consular functions.

Certainly, the frequency of certain administrative activities may change over time, and in bilateral arrangements between states, some activities may not be performed. However, the essence of these activities remains unchanged, with variations occurring primarily in technical details.[109] Typically, consuls perform administrative actions involving the issuance of documents that confirm the applicant's status, such as citizenship of the sending state or membership in its predominant ethnic group,[110] professional entitlements (e.g. seaman's books), or civil status (e.g. fitness for marriage). Moreover, consuls may facilitate actions related to property rights, such as vehicle or vessel registration, or enable cross-border operations, such as transporting personal weapons or repatriating human remains. These administrative actions,

109 Consuls today are undergoing a significant process of computerisation in their activities, which has notably accelerated procedures for issuing documents, including administrative documents. All activities of a jus avocandi nature (such as administrative and notarial functions) should be regarded as highly susceptible to the application of new technologies. These technologies not only streamline, but also substantially expedite the process of performing such activities.

110 These are national cards, commonly issued in Central European countries, often through consular actions. These cards confirm the holder's affiliation with the national group dominant in the sending state but do not confirm or grant citizenship of the sending state.

alongside the consul's other judicial functions, are among the most frequently performed.[111]

Administrative activities evolve over time, driven by the intensification of integration processes. The consul's authority to issue visas loses practical relevance when visa-free travel agreements are established between countries. Similarly, in the case of passport-free travel and the absence of border controls, the need to issue passports for citizens of the sending state diminishes. The scale of changes in this area in recent years has been substantial. However, as certain activities decline, new responsibilities often emerge, particularly those related to the issuance of travel documents or personal identification. The absence of passport requirements is naturally associated with an increase in activities involving the issuance of identity cards and emergency travel documents,[112] which are essential for enabling travellers to continue their journeys from the receiving state to the sending state in cases where their original documents are lost or stolen.

As a rule, consuls are obliged, after irrefutably establishing a person's citizenship and identity, to issue documents that at least allow for their return to their country of origin. However, visa decisions can be discretionary.[113] In many countries, consuls make such decisions autonomously, with minimal external oversight or judicial review of their correctness.[114] In Europe, it has become standard practice to allow appeals of a consul's negative visa decision to a court. However, considering that

111 These activities are not discussed in this chapter. However, it is noteworthy that, apart from the rarely applied amicable jurisdiction in maritime matters (see further below), consuls generally perform a stable range of functions. These include the transmission and acquisition of documents abroad, the taking of evidence, the recording of testimony from witnesses and parties to proceedings (without using coercive measures), and the transmission of requests for judicial aid. In closely cooperating countries, some judicial aid activities are conducted through direct court-to-court contacts. Nevertheless, the overall scope of these consular functions has remained relatively stable over time, with few foreseeable changes. The consul remains a convenient authority for facilitating voluntary actions in court proceedings. See Art. 26 of the Act of 25 June 2015 – Consular Law (consolidated Journal of Laws 2018, item 2141, as amended); cf. Art. 19 of the Romanian Consular Regulation.

112 European law provides specific solutions in this regard – see Council Directive (EU) 2019/997 of 18 June 2019 establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP (OJ L 163 of 20 June 2019, pp. 1–12). According to this directive, consuls of Member States may issue EU Emergency Travel Documents (ETDs) to unrepresented citizens of other EU countries. These documents are issued based on a unified model and under standardised rules.

113 The practice of U.S. consuls in this regard is particularly notable. See Vroom, 1986, pp. 363 et seq.; Wildes, 1989, pp. 887 et seq.; Hager, 1991, pp. 203 et seq.

114 However, see, among others, the ruling in *USA for the Use of Adelaida Garcia (Jesus Ortiz) v. Vernon McAninch (Paul M. Miller)* Consul General (Consul) of the US at Santo Domingo – Dominican Republic et al. (435 F.Supp.240, E.D.NY, 1977, AILC vol. 26, pp. 266–270). Although the case was premised on the principle that visa denial fell outside the jurisdiction of the court, the court addressed the issue of possible jurisdiction over the consul's actions concerning individual damages. The criminal liability of a foreigner for making false statements to a consul during a visa application is another issue. Under U.S. law, even when the act is committed abroad, it can be jurisdictionally appropriate based on the 'principle of protection'. See *Rocha et al. v. U.S.* (U.S. District Court, Southern District, California, 29 March 1960, Court of Appeals, 2 March 1961; ILR, vol. 32, p. 113).

jurisdiction in such matters typically is assigned to an administrative court in the sending state, the practical likelihood of a citizen of the receiving state successfully challenging a decision is minimal. This standard could be viewed as a superficial assertion of a democratic sending state's commitment to judicial review, even when it concerns actions by state authorities affecting foreigners in a foreign legal context. Clearly, this standard is inherently limited – it is practically impossible to establish any meaningful jurisdiction, such as that of a court in the receiving state, over these matters.

Administrative activities of particular importance in the era of increased global mobility include those related to the transportation of deceased citizens' remains.[115] These activities involve issuing documents necessary for the repatriation of the body to the sending country. The issuance of these documents – an administrative function – often requires preliminary factual actions, such as participating in the identification of the deceased and sealing coffins for cross-border transport. Clearly, these tasks are not among the most agreeable for consuls. Despite this, conventions aimed at eliminating the requirement for consular involvement in the transportation of corpses have not garnered the level of interest from states one may expect.[116]

As of today, 23 European countries, including 17 EU member states (majority of them), participate in the convention framework established by the Council of Europe system, namely the Strasbourg Convention of 26 October 1973.[117] From Central Europe, only the Baltic States, Slovakia, Slovenia, and Czechia are parties to this treaty. In the first decade of the 21st century, the European Commission encouraged 12 EU member states that had not yet joined the convention to do so. However, among these, only Czechia decided to take this step at that time.

The Convention streamlines the process of repatriating the remains of a citizen of a state party from the state party where the death occurred to their home country, eliminating the need for consular acts typically required in such cases. The transportation of the corpse is conducted under the conditions outlined in the Convention, using a special *laissez-passer* certificate. This certificate is prepared strictly according to the model specified in the annex to the Convention. Under this system, the consular certificate that would ordinarily be issued by the consul of the destination

115 The actions of consuls in the transportation of corpses have deep historical roots – see Stuart, 1952, p. 337.

116 Transportation of cadavers in developing countries is subject to heightened scrutiny owing to its frequent use as a cover for drug trafficking. The absence of consular involvement in overseeing these activities is often regarded by states as a greater risk compared with transports conducted based on a laissez-passer issued by the sanitary authorities of the country of origin.

117 Agreement on the Transfer of Corpses, Strasbourg, 26 October 1973, European Treaty Series No. 80.

country is replaced by the *laissez-passer*, which is issued by the competent authorities in the country from which the transport originates.[118]

Liberalisation measures in this field date back to the League of Nations era, with the solutions of the Strasbourg Convention modelled on those of the earlier International Convention on the Transportation of Corpses.[119] The Strasbourg Convention, considered a more modern framework, was adopted to replace the outdated Berlin Convention, as noted in its Explanatory Report.[120] Despite this, the Berlin Convention remains active, with 15 countries, including 9 EU member states, as parties. Notably, Romania, Czechia, and Slovakia from Central Europe are among these. Some countries are parties to both conventions, which offers the broadest liberalisation of regulations in this area. Far from being a defunct agreement, the Berlin Convention saw its most recent accession in 2023, when San Marino became a party.[121] By comparison, the most recent accession to the Strasbourg Convention occurred in 2012, when Czechia joined. Interestingly, current parties to the Berlin Convention include countries outside Europe, such as Congo, Egypt, and Mexico.[122]

Both agreements are highly similar, utilising virtually the same administrative sanitary certificate to replace consular activities. When countries participate in both convention mechanisms (as is the case with Czechia and Slovakia), the provisions of the later Strasbourg Convention are typically applied. Neither agreement precludes the adoption of more liberal rules through bilateral agreements or decisions made with mutual consent in special cases. This is explicitly stated in Art. 10 of the League of Nations-era agreement and Art. 2 of the Council of Europe Convention, which clarify that the conventions set the maximum formal requirements that may be imposed.[123]

118 According to Art. 8 of the Convention, states parties are required to notify the authorities authorised to issue the laissez-passer. However, not all states, including some community states, have fulfilled this obligation (see the list of declarations and notifications: http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=080&CM=8&DF=5/31/2007&CL=ENG&VL=1, as of 1 June 2007). The authorities responsible for issuing the necessary document vary significantly, ranging from local police units, as in Norway, to regional authorities, such as in Austria, and most commonly to central authorities, such as the Ministry of Health or an equivalent institution.

119 The Berlin Convention concerning the Conveyance of Corpses, signed in Berlin on 10 February 1937 (LNTS vol. CLXXXXIX (199), pp. 313–325), provides regulations on the transportation of human remains across borders. For additional details, see https://www.fbiic.gov/public/2008/apr/Disaster_Victim_ID_Guide.pdf.

120 Explanatory Report to the Agreement on the Transfer of Corpses Strasbourg, 26 October 1973. See rm.coe.int/16800c96c9.

121 For information from the depositary, the German Foreign Ministry, see: www.auswaertiges-amt.de/resource/blob/248440/9eec4ac243b61c8dbf2e8702fdb0a089/statusliste-en-data.pdf.

122 Paradoxically, the participation of the latter two, more exotic countries – nations of considerable tourist importance – in this treaty represents a significant contemporary value of the Convention, which was created during the League of Nations era. This relevance is tied to the international passenger traffic that, *nolens volens*, includes the transport of corpses across borders.

123 *Nota bene*, states sometimes use bilateral agreements of a technical nature concerning the transportation of corpses. Such agreements are often initiated by airlines. For instance, Poland has such an agreement with the United States.

In the future, further liberalisation within the European Union in this area can be anticipated. EU regulations may effectively render such consular arrangements obsolete within the Union. However, in relations between an EU country and a non-EU country, the Strasbourg and Berlin Conventions will likely remain relevant mechanisms for liberalisation. A reasonable degree of flexibility in these cases can be achieved by acceding to both treaties, as several EU countries have done. However, Poland and Hungary have thus far refrained from joining these conventions.

4.6. Maritime Activities of Consuls

Historically, consuls' maritime activities in international law were multifaceted,[124] including a combination of functions related to the sending state's activities at sea. They were primarily commercial in nature, but also extended to civil law – such as when a consul facilitated the transfer of ownership of a maritime vessel or the establishment of liens on such property – and even to criminal law, when consuls performed policing duties aboard ships.[125]

These maritime activities experienced a resurgence in international law during the era of capitulation treaties[126] and the age of significant geographical discoveries. These functions incorporated elements of both *jus protectionis* (what Professor Sarna refers to as the right to consular intervention)[127] and *jus avocandi*.

At one time, consular activities included verifying the legitimacy of a ship's flag, which involved issuing flag certificates. Moreover, consuls exercised nautical sanitary authority, had the authority to clear ships commercially, assisted captains and crews in their interactions with local entities, and provided aid in rescuing ships. Specific procedures required interaction with consuls in cases of shipwrecks or collisions, during which consuls often had jurisdictional powers. Further, they acted as intermediaries in securing bottomry loans (taken to complete a voyage, typically at high interest rates and secured by a lien on the ship). In such cases, consuls provided consent on behalf of the sending state, serving as the flag state. Additionally, consuls played a key role in ship condemnation proceedings, which involved the sale of a ship under special circumstances, such as when repairs were deemed impossible. The consul's sovereign powers extended over captains, crew (including the prosecution of

124 See Elias, 1953, p. 34.

125 See the ruling of the German Bundesgerichtshof of 21 June 1962 (III ZR 57/61), issued under Section 33 of the Consular Act. This ruling highlights the strict police authority of consuls over seafarers, including the right to apprehend them and forcibly return them to the ship (Fontes Iuris Gentium, vol. V, p. 91).

126 Often, after the abolition of capitulatory jurisdiction, states incorporated symmetrical provisions for amicable jurisdiction in new consular conventions that were no longer capitulatory in nature. For instance, Japan included such provisions in its consular conventions with Germany and Belgium. Through the application of the most-favoured-nation clause, these powers were subsequently extended to consuls of numerous other states – see: Munch, 1986, p. 765. The Turkish authorities followed an analogous practice – Kunke, 1918, pp. 159–160.

127 Sarna, 1945, pp. 77–78.

deserters), and passengers. Amicable consular jurisdiction in civil cases and criminal jurisdiction over the ship's crew were also widely exercised at that time.[128]

The increasing automation of a seagoing vessel's interactions with its flag port has significantly reduced the role of the consul. Originally, consuls had extremely broad powers in maritime affairs, however, these have been considerably narrowed over time. Nevertheless, unlike various commercial and customs-related activities, maritime activities of an administrative nature have not been fully abolished.[129] However, the contemporary phenomenon of 'flag states' often being artificial constructs, particularly with the widespread use of flags of convenience, has rendered many consular powers envisioned in earlier frameworks practically irrelevant. For states that maintain a merchant fleet under their own flag, consuls primarily engage in administrative tasks, such as issuing documents that confirm seafarers' rights and the status of vessels. Today, the reduction in consular maritime functions stems not so much from international legal norms but rather from diminished reliance on state flags owing to the influence of free-market economics and global economic development. Consequently, these functions have been reduced to basic administrative duties, and even these are conducted by the consuls of only a few countries worldwide.[130]

4.7. Election-related Activities

With the increasing mobility and migration of citizens from sending states – both professional and temporary (such as tourism) – the ability for citizens to vote abroad has become significant in recent years. On the one hand, this practice is considered as a positive way to maintain a citizen's ties with their country of origin. On the other hand, it is criticised as excessively costly, allowing participation in the

128 See U.S. jurisprudence, which on the one hand prohibits coercive measures by consuls, such as the arrest of crew members (In re Aubrey, 26 Fed. 848 E.D.La 1885, AILC, vol. 9, pp. 464–467), while on the other hand recognises the civil law effects of consular actions and the possibility of amicable jurisdiction between captains and crew (The Marie, 40 Fed. 286, D.Ore. 1892, AILC, vol. 9, pp. 468–470).

129 Amicable jurisdiction, in theory, over labour matters between a ship's captain and crew remains applicable in certain cases – see: West India Fruit and Steamship Co. Inc. et al. (U.S., National Labor Relations Board, 16 February 1961, ILR, vol. 34, pp. 69, 75–76), which references the 1938 U.S.-Liberia Consular Convention. This jurisdiction also follows from the wording of some bilateral consular conventions that are in force (Trawczyński, 1988, pp. 105–106). Such provisions are characteristic of older regulations in the internal consular law of various states (Antokoletz, 1948, p. 179). For some Latin American countries, similar regulations date back to the early or mid-20th century. See also: Feller, Hudson, 1933, passim.

130 The Polish consular service, despite Poland's access to the sea, practically does not perform maritime functions. This is largely limited to the operation of commercial vessels and passenger ferries under the Polish flag within the Baltic region. Essentially, the full administrative servicing of these vessels occurs in home ports, eliminating the need for consular activity in cities such as Stockholm, Helsinki, Tallinn, or Riga. Meanwhile, ocean-going vessels owned by Polish legal entities, which are controlled by Polish entities, typically fly the flags of foreign countries.

political system by individuals who, having voluntarily left their home country, may be largely unaware of its current political situation. Consequently, models for voting abroad vary significantly.[131] They range from granting broad entitlements to vote in almost all types of elections, to restricting voting rights to individuals who pay taxes in the sending state, to entirely excluding the possibility of holding elections abroad. In most countries, the impact of votes cast abroad on electoral outcomes is typically minor,[132] although there are notable exceptions.[133]

Such activities require the explicit consent of the receiving state. Without this consent, elections cannot be held abroad.[134] International law does not establish any standards in this area and clarifies that there is no international legal obligation for states to facilitate voting abroad, nor is there a recognised human right to vote from abroad.[135] However, a citizen cannot be restricted from returning to their home country to cast their vote. When elections are conducted in the external voting format, the organisational responsibilities – such as overseeing the voting process, managing follow-up activities such as vote counting, and sending election documentation to the appropriate authorities in the sending state – typically fall to the consular office of the sending state.[136]

The regaining of independence by the states of Central and Eastern Europe reinforced tendencies towards statolatry. The absence of an independent state during the communist era was compensated for by a series of initiatives on a scale unfamiliar to countries whose sovereignty had not been interrupted. These efforts included

131 See Skotnicki, 2012, passim.

132 Poland presents a unique case in this regard. External voting has never had the capacity to influence the overall outcome of Polish elections. The results would have remained unchanged irrespective of whether external voting took place or not.

133 An exception to this general trend is Moldova, where the outcome of the presidential election was significantly influenced by external voting – see: Bucoń, 2020, p. 165.

134 Poland has accumulated significant experience in this area in recent years. The 2020 Polish presidential election occurred during the COVID-19 pandemic, when strict regulations were in effect in many countries. Some countries refused to allow voting altogether, such as Chile (see Order of the Supreme Court of the Republic of Poland of 30 July 2020, I NSW 219/20). Others permitted only correspondence voting, facilitated by consulates, as in the case of Canada (see: Order of the Supreme Court of the Republic of Poland of 27 July 2020, I NSW 1098/20).

135 Judgement of 15 March 2012, *Sitaropoulos & Giakoumopoulos v. Greece*, app. 42202/07.

136 An interesting contrast is provided by the Swiss solution, where the consular service merely forwards the register of voters abroad to Switzerland. Eligible voters can then either receive an election package sent from Switzerland to their foreign address or travel to Switzerland to vote in person – provided they declare their intention to do so at least six weeks before the election, to prevent the package from being dispatched (see: Art. 13 of the Swiss Consular Regulation). Notably, under Swiss law, if voting materials sent abroad on time arrive late or if a returned ballot reaches the electoral municipality too late, the voter cannot derive any legal claim from this delay (see: Art. 12(4) of the same regulation). This system highlights that the principal challenge of voting by mail abroad lies in the performance of foreign postal services, over which consuls of the sending country have no control. A significant number of electoral protests during the 2020 Polish presidential election – organised primarily by correspondence owing to COVID-19 restrictions in many receiving states – concerned the non-delivery of election packages by foreign mail services, as seen in Brazil (see: Order of the Supreme Court of the Republic of Poland of 27 July 2020, I NSW 93/20).

extending diplomatic protection, establishing related obligations, and introducing mechanisms such as voting abroad. At the time, these changes appeared justified, considering the significant migration of job seekers to the wealthier parts of Europe and across the Atlantic. However, after decades, a noticeable loosening of citizens' connections to their home countries is evidenced by, among other things, declining voter turnout. This trend raises questions about the continued relevance of maintaining voting rights for citizens abroad.

In some countries, a significant number of citizens reside in neighbouring countries – referred to as the 'near abroad'. This phenomenon is linked more to border changes following World War I and World War II than to voluntary economic migration. In such cases, the established mechanism of external voting in national elections has strong justification.

Although the democratisation of Euro-Atlantic countries (particularly in Central Europe) has contributed to the development of a certain standard for external voting, each country retains unique approaches and practices.[137] Consequently, the future application and development of external voting mechanisms in individual countries are unlikely to follow a uniform trajectory.

5. Summary

The future direction of changes in the scope of diplomatic and consular functions is difficult to predict with certainty. However, it is likely that the influence of human rights protection norms, particularly those addressing standards for deprivation of liberty, will persist. This would reinforce the existing standards of diplomatic assistance and ensure continued access to consular support for individuals deprived of liberty. Moreover, it is possible that such protections will increasingly extend to categories of individuals beyond the citizens of the sending state, evolving into a standard of protection for citizens of all democratic ('civilised') states. The growing efforts by states to evacuate such individuals en masse suggest that this trend will likely continue. In this context, the conclusion of international agreements – potentially even on a universal scale – can be anticipated.

The future trajectory of diplomatic asylum is more uncertain. Although it is conceivable that the legal and humanitarian policies of sending states may lead to an increased use of this form of asylum, it is difficult to imagine states openly advancing the notion that diplomatic asylum constitutes a universal customary norm under international law.[138]

137 See Krasnowolski, 2015, passim.

138 Although, in fact, the status of diplomatic asylum cannot be entirely ruled out, considering its use in exceptional situations across de facto every region of the world.

Regarding the evolution of consular law, it can be reasonably assumed that the influence of the sending state's domestic law on the scope of consular functions will increase. While the influence of the receiving state's law will not be entirely minimised, a certain reduction in its impact is highly likely. This is because greater computerisation of legal actions – which is expected to continue – will diminish the receiving state's ability to control the scope of functions performed by the consul. Consequently, objections raised by the receiving state when granting exequatur on the consul's letters of commission, particularly regarding functions covered by the Danish clause, are likely to become increasingly rare. Currently, such objections are uncommon and are primarily limited to certain civil status functions. However, as the trend towards automation progresses, such objections will likely become even less frequent.

Computerisation will undoubtedly lead to an expansion in the scope of consular activities, particularly in administrative and legal functions. Through consuls, individuals abroad will increasingly gain access to domestic proceedings that were previously inaccessible. However, in most cases, consuls will act as intermediaries for the issuance of domestic administrative decisions rather than as the issuing authorities. Many countries are also likely to leverage computerisation to expand consular functions related to notarial or civil status matters, although the specifics will depend on the domestic legal frameworks of individual sending states.

Simultaneously, some consular functions will likely disappear from state practice. The near-universal adoption of the Hague Convention on the Abolition of the Requirement of Legalisation for Foreign Public Documents suggests that a fully universal regime in this area will eventually be established. Consequently, consular legalisation of documents will become a thing of the past, joining capitulatory consular jurisdiction – which ceased in the early 1970s[139] – as another significant institution of consular law consigned to history. This shift will likely occur even before the 100th anniversary of the Hague Convention.

Moreover, the consular service may favour the widespread adoption of treaties liberalising the transportation of corpses or, ideally, a single universal treaty addressing this issue. However, the feasibility of such a treaty appears limited, although decisions on this topic at the European Union level remain a plausible possibility.

However, the future of consular electoral functions is difficult to predict. Practices vary significantly among states, and differing trends are evident in individual sending states and in proposed *de lege ferenda* reforms. Countries such as Poland and

139 L.T. Lee considers 1 December 1971, as the date marking the final extinguishment of capitulatory powers, coinciding with Britain's announcement of relinquishing its jurisdictional rights in the Persian Gulf (Lee and Quigley, 2008, pp. 15–16). The U.S. had already relinquished its capitulatory powers earlier, abandoning its jurisdictional rights in Morocco in 1956. Interestingly, as late as 1951, capitulatory arrangements were included in the Treaty of Friendship, Commerce and Navigation between Britain and the Sultanate of Muscat (now Oman), which, as noted by F. Munch (1986, p. 765), was the last capitulatory treaty ever concluded. This treaty, along with all others in the region, expired 20 years later.

Spain, which heavily use external voting mechanisms via their consular services, face considerable domestic criticism of this practice.[140] Critics argue that citizens residing abroad for extended periods, often with minimal connection to their home country's political realities, should not influence electoral outcomes. Conversely, democratic states that entirely forgo external voting mechanisms face criticism for denying their expatriate citizens a voice. Currently, there is no recognised human right to vote abroad. Considering the substantial costs associated with organising such elections and their often negligible impact on domestic politics, it is unlikely that general or even European-level demands for universal external voting rights will materialise in the near future.

140 Bartosik, 2016, p. 205.

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Chapter 2

New Challenges in Consular Work: The Case of Hungary, from the 1980s to 2023

Endre Domaniczky

Abstract

The study presents the impact of Hungary's relationship with the European Union on the structure and functioning of the Hungarian consular service. It shows that the modernisation of the Hungarian consular service – with the ratification of the 1963 Vienna Consular Convention in 1987 – had already started before the change of regime. As a result, after 1989, the consular service adapted more easily to the new challenges and tasks that followed Hungary's independence and EU integration. The harmonisation of EU law already led to significant changes in consular tasks during the Antall government. Moreover, EU accession itself led to a significant transformation of national foreign policy objectives. As a result, a small consular network was initially set up, but after 2010 it was rebuilt in line with the new policy objectives determined on national level and then significantly expanded after 2014. However, the study also explores not only the changes in the organisational structure, but also the changing and then expanding consular tasks and the potential for improvement in EU cooperation.

Keywords: Hungary, European Union, consular service, EU delegations, EEAS

Endre Domaniczky (2026) 'New Challenges in Consular Work: The Case of Hungary, from the 1980s to 2023'. In: Paweł Czubik (ed.) *Changes in the Structure and Scope of Foreign Service Activity*, pp. 67–105. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2026.pccssfsa_2

1. Introduction

Hungary regained its independence in 1989, and Soviet troops withdrew from the country in 1991. From a consular point of view, however, the fine-tuning of the Hungarian foreign affairs structure had already begun. With the incorporation of the 1963 Vienna Consular Convention[1] of 1987 into Hungarian law (hereinafter: VCC), bilateral agreements in the consular field were largely replaced by international standards. With the adoption of the 1963 VCC the sending and receiving of honorary consuls became possible again. By the time the Republic was proclaimed on 23 October 1989, the first Hungarian Honorary Consul – in Melbourne, Australia – had already been in service for four months.[2] The next milestone came in 1990, when, following the first free elections, a new structure for the Foreign Ministry was established, based on the priorities of the government's programme, including accession to the European Economic Community.

The date of Hungary's accession to the European Union (1 May 2004) – when 'ferry country (…) finally docks on the Western coast'[3] – is thus in fact only a milestone, even if the most significant one, on the path the Hungarian foreign administration and consular service embarked on in the mid-1980s, following the reforms of Gorbachev (Glasnost). This study presents the most important events and the epochal boundaries of this process, which lasted for some four decades (1985–2024). In doing so, it focuses on the concepts of the structure and responsibilities of consular service. Where did the Hungarian consular service start from and where has it reached by now, and what opportunities does it have for the future? In the following, we will focus on answering these questions.

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2. Shadows of the Past (1945–1989)

Soviet troops arrived in Hungary in 1944, and the country was gradually occupied by the Soviets in stages. The majority of the Foreign Ministry's staff were replaced within a short time, and the organisational structure was also restructured. The Honorary Consular Network, which had previously formed the backbone of the consular service, was disbanded in 1950. The extent of the change is illustrated by a data set from 1938. In that year, 'there were seven Hungarian Consulates General (Vienna, Cologne, Milan, Montreal, Munich, New York and Istanbul), eight

1 Decree-Law No. 13 of 1987 promulgating the Convention on Consular Relations, adopted in Vienna on 24 April 1963.

2 Anonymous, 1989, p. 4.

3 President Ferenc Mádl's declaration on the occasion of the accession to the European Union [Mádl Ferenc köztársasági elnök nyilatkozata az Európai Unióhoz való csatlakozás alkalmából], in: Becker, 2004, p. 172.

Consulates (in Cleveland, Danzig, Cluj, Bratislava, Sao Paulo, Trieste, Winnipeg and Zagreb), five lower-ranking official consular missions and 87 honorary consular missions abroad'.[4] In other words, 20 professional consular posts and 87 honorary consular posts, i.e. the Hungarian consular service then had 107 units abroad. Even in the mid-1980s, when the number of consular cases increased significantly, the Hungarian consular network still had 'a total of 10 (professional) consular representations'[5] abroad. This is a step backwards even if we consider that embassies can also carry out consular activities under the 1961 Vienna Diplomatic Convention (hereinafter: VDC),[6] and Hungary, which actively developed its diplomatic network in developing countries in the 1970s and 1980s, has made use of this possibility. While it is common to argue that an independent Hungarian foreign affairs organisation began to take shape before the Battle of Mohács,[7] and that Hungarian interests were also represented in the joint Austrian-Hungarian Foreign Ministry,[8] it is important to note and even independent Hungary has maintained its own foreign affairs network since 1918.[9] However, the years following World War II resulted in significant disarray concerning consular institutions and staffing.[10]

What makes the balance positive is, on the one hand, the acceleration of decolonisation in the 1960s,[11] which led Hungary to establish diplomatic relations with a number of former colonies, followed in many cases by the opening of foreign missions.[12] On the other hand, the mass tourism that began in the 1960s was also to the benefit of the Hungarian diaspora living abroad. This resulted in an increase in visa issuances. As more Hungarian residents travelled abroad, the number of classic cases rose, leading to a greater demand for services within the consular network.

4 Gresznáryk, 1977, p. 33.
5 Éliás, 1986, p. 119.
6 Cf.: VDC Art. 3, para. 2. For explanation of the VDC, see: Denza, 2016.
7 We should mention István Brodarics (1470c–1539), who was later one of King John I's most accomplished diplomats, also responsible for foreign affairs as chancellor of King Louis II before the Battle of Mohács. See: Kasza, 2015 for his biography.
8 See also the Historian Éva Somogyi's related studies. The data she has collected clearly show that 'the proportion of Hungarian nationals in the joint foreign ministry and diplomatic corps increased from 15-20% in the 1890s to 26-30% on the eve of the World War'. Somogyi, 2004, p. 669. See also: Horváth, 2020, pp. 100–109.
9 For details, see the People's Act No. 5 of 1918 on the independent Hungarian foreign affairs administration. It is also worth emphasising here that, although the Hungarian foreign affairs administration has a long tradition, in 1918, in a country on the verge of bankruptcy, everything had to be built from scratch. As a newspaper article of the time proudly noted: 'The Hungarian state, as far as its financial strength could convince it, built up a worldwide consular network'. Anonymous, 1922, p. 4. For the history of the consular service between 1918 and 1945, see, among others, Pritz, 1989, pp. 149–178; Pritz, 1995, pp. 215–243.
10 So we can only speak of Hungarian continuity in foreign affairs from 1945 at the latest.
11 For more information see: Herczegh, 1962.
12 'At the end of 1970, we had diplomatic relations with 89 countries and consular relations with two. There were Hungarian foreign missions in about 60 countries (embassies, embassies, consulates general, UN missions, etc.)'. Anonymous, 1971, p. 1.

By the mid-1980s, it had become clear that the demand for consular services would remain and grow in the long term, and that it would not be possible to respond adequately to this increased demand simply by expanding the embassy system. The ratification of the 1963 Vienna Consular Convention consequently ensued primarily for professional, rather than ideological reasons, and was intended to strengthen the organisational system. Following the ratification of the VCC, the consular institutional system became a three-tier system, which made it possible to distribute cases proportionally and, because of the international acceptance of the VCC, to strengthen international consular cooperation, which had previously been difficult and less effective on the basis of consular agreements concluded mainly on a bilateral basis. However, the ratification of the VCC only began to have an impact in the 1990s (after the regime change). In the 1990s, a network of Hungarian honorary consulates began to be established, reviving the former Austro-Hungarian model in certain areas.[13] During this time, legislation was also created to govern the operations of this new type of consular service.

3. The Consular System of Independent Hungary (1989–2004)

3.1. About the Legal Sources

If we consider the ratification of the VCC in 1987 as a direct precursor to the change of regime, we can denote 23 October 1989 as the starting date of the consular system of independent Hungary. The *constitution*al amendment[14] that entered into force on that date included the right to consular protection[15] among the fundamental constitutional rights – and also contained several other provisions of consular significance. Most of these were related to citizenship,[16] but the constitutional amendment also brought changes in the area of passport legislation[17] and in the area of immigration law enforcement.[18] The declaration of state responsibility[19] for Hungarians

13 For example, in the Australian continent, see: Domaniczky, 2019, pp. 257–261; Domaniczky, 2018. pp. 341–362.

14 Cf. Act XXXIV of 1989, Art. 34. (Hereinafter 'Act' refers to Hungarian legislative acts, unless otherwise specified).

15 Art. 69 (3) of Act XX of 1949.

16 Art. 69 of Act XX of 1949 declared – in accordance with international conventions – the prohibition of deprivation of citizenship and the expulsion of Hungarian citizens from their homeland (Art. 69(1) of the Act).

17 Following the constitutional amendment, the right to return home from abroad (Art. 58(1)).

18 Cf. the section on the right of asylum (Act XX of 1949, para. 65(1)).

19 Art. 6(3) of Act XX of 1949.

living 'outside the borders' also brought changes of emphasis, and the effects were felt not only in the diplomatic world but also in consular offices.[20]

Although the declaration of consular protection in the constitution was one of the first steps of the new system, the detailed rules were only laid down in law relatively late, in 2001.[21] Until then, attempts were made to fill the legal gap by means of subordinate legislation or normative instructions (so-called consular instructions) which do not constitute legislation, but this practice is of concern both in terms of legality and the visibility of the norm. A similarly curious practice has resulted from the application of earlier legislation, dating from before World War II. This was also the case in other areas in Hungary before the regime change,[22] but an example can also be found in the case law of the consular service.[23]

However, the pace of *legislation* in other areas relevant to consular work has been faster. The new Passports Act was passed in 1989[24] and the Citizenship Act in 1993.[25] The law on civil status records was amended in 1991 – but again, comprehensive legislation was only adopted after 2000.[26] A new law on address administration was adopted in 1992, and on the entry of foreigners in 1993. As regards the organisation of the consular service, the legislator decided to place the provisions requiring statutory regulation within the Consular Act. In addition, ministerial decrees were issued on the honorary consular network, the certification duties of consuls, consular fees, consular protection activity[27] which provided for the application of certain laws as background legislation where necessary.[28]

20 After 1989, Art. 6(3) of the Constitution laid down two obligations for the government: to 'feel responsibility', i.e. to follow the events in the Hungarian diaspora and actively represent their interests; and to 'promote' the diaspora's relations with Hungary. Both of these obligations have consular implications, since the main person responsible for information and data collection on the local Hungarian community at the mission is the consul, whose activities in this area are also permitted under Art. 5 of the VCC.

21 Cf. Act XLVI of 2001 on Consular Protection.

22 Cf. the afterlife of the Trade Act of 1875 or Act V of 1930, on the basis of which a new, market-friendly company law, Act VI of 1988, could be created. For more on this, see: Verebics, 2020, pp. 2–9. Professor Sárközy mentioned a similar technique from the 1970s, for more details see: Révai, 2009, pp. 151–153.

23 Cf. Act X of 1940 was used from the mid-1980s until the creation of the Notaries Act in 1991, but it was occasionally referred to even later, until the entry into force of the Consular Protection Act in 2001, which repealed it, cf. Act XLVI of 2001 on Consular Protection, Art. 23.

24 Act XXVIII of 1989. However, the passport valid for all countries of the world ('world passport') was introduced before the change of regime by Decree 25 of 1987.

25 Act LV of 1993.

26 Until 2010, the basic legislation was Act No. 17 of 1982.

27 Until the 2001 Consular Act was enacted, the 1963 Vienna Consular Convention was referred to as the enabling legislation in several cases (see: Decree 2/1995 (III. 24.) of the Ministry of Justice, Decree 2/1998 (XII. 9.) of the Ministry of Justice, Decree 4/2000 (IX. 27.) of the Ministry of Justice).

28 Thus, for example, in the case of the duties of consuls in connection with the preparation of certificates, the 1940 Act on the authentication of documents and later the 1991 Notaries Act had to be applied as background legislation.

Table 1: Adoption of new sectoral laws relevant to consular work (overview table)[29]

Regulatory area	Year of the new law	Year of issue of previous legislation
consular protection	2001	–
passport issuance	1989, 1998	1987
citizenship matters	1993	1957
birth registration	2010	1982
migration of foreign nationals	1993, 2001, 2007	1982
consular legalisation matters	2001	1940

Table 2: Levels of regulation affecting the main areas of consular work (overview table)[30]

Regulatory area	Act	Government decree	Ministerial decree	Ministerial instruction	Other
consular exams	●		●	●	
consular data management	●				
consular ranks	●				
consular official work	●				
consular protection	●		●	●	
honorary consuls	●				
consular tariffs	●		●		
consular translations			●		
consular legalisation matters	●				
birth registration	●	●	●		
passport management	●	●	●		

29 The table was compiled by the author.
30 The table was compiled by the author.

Regulatory area	Act	Government decree	Ministerial decree	Ministerial instruction	Other
address administration	●	●	●		
citizenship matters	●	●			
visa matters	●	●			● (EU regulation)
residence permits	●	●			

Throughout the 1990s, regulations were also continuously being drawn up setting out the details of the new system. These took two main forms: implementing regulations for sectoral laws, and government or ministerial decrees which expanded on the subject matter necessary for the operation of the consular service or regulated a specific legal detail.[31]

The gaps in the evolving legal framework were filled by *consular instructions*. The consular instructions are usually based on customary law, dating back to the early period of the establishment of the Hungarian rule of law, the age of Dualism (1867–1918) that followed the Compromise of 1867. At that time, the executive was considered to have general powers of instruction. In exercising this power, it was bound by law. But where 'relations are not governed by law (…), obedience to the supreme authority (…) is obligatory and unconditional'.[32] By this time, jurisprudence had already perceived that the right to give instructions was more prevalent in the case of foreign employment than in other areas of public administration. 'Such are in particular offices which are based on trust without any objective rule. The diplomatic and foreign affairs officials of the state (...) occupy positions which are not subject to the ordinary official relationship, but depend purely on the trust of the appointing executive power (...)' – summarised the insights of the great Hungarian public lawyer of the dualist era, Győző Concha.[33] Currently, there are two forms of consular instructions: a) explanatory or norm-substituting, which expounds the meaning of a given piece of legislation or task; b) normative, which contains a requirement (usually involving a positive action) for a given person or group of persons (to do something, issue a document, obtain a birth certificate, etc.).

Finally, for the sake of completeness, it should also be mentioned that previously, in the pre-computer era, consular instructions communicated verbally were common (in the case of foreign missions, usually by telephone). In the post-computer

31 In Hungary, according to the issuer, there are several types of regulations. The relevant regulations for consular administration under the legislative law in force during the period under review were the Government Decree and the Ministerial Decree. Cf. Act XI of 1987 on Legislation (Arts. 1–10, 16, 46–49, 53–56.).

32 Concha, 1893, p. 68.

33 Concha, 1893, pp. 68–69.

era, instructions without a registration number are considered equivalent, even if they cannot be retrieved in the mail system.[34] It is important to note that the responsibility for carrying out such instructions rests with the consul, so it is always advisable to ask for instructions in writing in order to justify your own procedures. The need to request instructions in writing is not only for human reasons, but above all, because these cases are almost invariably international in nature and the consul, being at the bottom of the chain of command, in most cases does not see the full picture immediately or at all, and is therefore unable to assess the impact and consequences of his or her action.

On the basis of the above, the most important features of the legislation necessary for the functioning of the consular service of Hungary, which has regained its independence, can be identified as follows: a) the creation of laws to provide a legal framework started before the regime change; b) the new laws were not drafted all at once, but over a period of about 15 years (1987–2002); c) the absence of new laws has been filled by case-law primarily in two ways: consular instructions that do not constitute legislation and ministerial decrees that do; d) if the nature of the task required a legal background, and there was no socialist law on the subject, they had no problem referring to the legislation adopted under the pre-socialist system.

3.2. About the Consular Service

The consular service is nothing more than the totality of officials performing consular duties at headquarters and in foreign missions, including the minister and the honorary consul.[35] The modernisation of the consular service essentially began in the mid-1980s, the first step being the ratification of the 1963 Vienna Consular Convention, referred to above. The expansion of the operational levels of the consular service was thus a foregone conclusion at the time of independence. Subsequently, the main issue became the size of the network: a) how large should it be: how many elements should it consist of; b) what structure should it operate in: should there be special consulates, if so, according to what criteria should they be classified as being special, how many levels of consular networks should operate in which countries (where should there be consulates-general, professional consuls, or consulates led by honorary consuls); c) how many consulates should be independent units and how many should continue to operate as part of an embassy; d) the extent to which the different interests and needs of the Hungarian diaspora affect the development of the consular network; e) the extent to which the Hungarian consular network can make use of the possibilities offered by the 1963 Vienna Consular Convention, i.e. whether and to what extent consulates can handle ‘commercial, economic, cultural

34 In my own consular practice, even in the 2010s, I encountered both types of consular instructions given over the phone and instructions without a file number.

35 For a precise Hungarian definition of consular service, see Act XLVI of 2001 (Art. 2(1)).

and scientific'[36] matters in addition to purely consular matters. If so, where and what kind of specialised diplomats should be posted, and who should have the authority to employ them (the Ministry of Foreign Affairs or another body)?

From the point of view of independent Hungary, the most important question was therefore the size of the consular network. This, as we have seen above, was also linked to a number of other structural issues. In addition to these, there was of course the issue of consular staff continuity from the outset. Should there be a need to replace staff in the network, and if so, to what extent and over what period? To what extent are replacements necessary for a new approach? If they are absolutely necessary, how will their implementation affect the smooth running of business, which has always been a primary concern for consular affairs?

As regards the size of the consular network, it is clear that it continued to grow in the 1990s compared to the previous period. This was partly for professional and partly for personnel reasons. At the beginning, it was not possible to see how quickly the disintegration of the former political blocs would progress and where it would stop. On the other hand, in the region immediately neighbouring Hungary, there have been major changes in state borders,[37] the first phase of which lasted until the turn of the millennium,[38] but which are still ongoing.[39] Thirdly, the country's new system of alliances took longer to develop and, fourthly, the national policy aspects, which are key to the consular network, have not been negligible, but have been on the agenda of successive governments in Budapest with varying degrees of importance.

In addition, the number of visas to be issued and the number of Hungarian citizens requiring consular assistance had to be taken into account. Regarding the first issue, there have been significant changes since the country gained independence. The visa requirement has been largely eliminated and the new legal regime has been modelled based on Western European models from the outset. This means that some of the former visa issuing centres (such as the Consulate General in Sydney, Australia) have been left without their visa function, while other places (such as St Petersburg, Russia) have been left with a large visa workload. The number of nationals in need of consular protection increased significantly following the lifting of travel restrictions. In addition, Hungarian nationals have ventured further and

36 Cf. Art. 5(c) VCC.

37 The break-up of Czechoslovakia, which was peaceful, and the break-up of Yugoslavia, which led to a decade-long armed conflict (the Yugoslav Wars).

38 The Yugoslav Wars between 1991 and 2001 were followed by further territorial changes. Montenegro seceded from Serbia in 2006 and Kosovo in 2008.

39 See the war in Ukraine and its background. It is worth noting here that the issue of borders was already fraught with tensions at the time of the break-up of the Soviet Union in 1991. Cf. an excerpt from one of Gorbachev's speeches on Ukraine's independence: 'Gorbachev announced at a meeting of the Soviet Supreme of the Soviet Union that the Russian leaders' position was that if Ukraine remained within the Union there would be no conflict on the Russian-Ukrainian border, but if it continued to insist on leaving the Union, this could lead to unforeseeable consequences because of territorial problems'. Anonymous, 1991, p. 46.

further afield over time, first to Western European countries and then to various exotic destinations.

Each of the above processes unfolded gradually over a period of several years, which, with the intervening changes of government and the resulting shifts in strategic emphasis, made it difficult to respond immediately. For this reason, Hungarian foreign policy tactics in the first decade and a half (1987–2002) were in favour of a wait-and-see approach and slow change. Some embassies were closed, others opened, honorary consuls were appointed in an increasing number of places, and economic offices were preserved. Since the organisational system remained essentially intact, staffing was also only touched upon in a fragmentary fashion. The two key words were 'to ensure staff rejuvenation' and 'to preserve institutional memory'. Both concepts offered a wide range of possibilities for successive governments to recruit new people and retain the old guard. In terms of staffing, it is therefore also worth emphasising continuity, at least until 2002, after which the outlines of a more robust political governance in the foreign affairs field began to emerge.

There is one other direction for development worth mentioning, as its beginnings also date back to the post-1989 period. It is the electronification of paper records, currently called digitisation. In order to carry out its advocacy work quickly and professionally, the consular service needs access to data from several administrative registers. The three most important of these are: a) the personal data and address register; b) civil registers; c) travel documents register. To this end, the use of computers started in the 1980s, first on an ad hoc basis and then for certain workflows (e.g. printing of birth certificates). For a long time, the possibility for consular staff to access these records remotely and directly was still a dream. At that time, only postal correspondence and telephone messaging were possible. Another important development was the establishment of a consular registration system, which would be able to register both cases and the procedural actions associated with them, by case number. Although progress was made in both areas during the period under review, it was not until the second half of the 2000s and, globally for the whole network, until the 2010s, that significant results could be seen.[40]

In the light of the above, the most important changes affecting the consular service of Hungary, which has regained its independence, can be identified as follows: a) structural changes in the consular service started already during the socialist period; b) the changes were triggered not only by changes in the political environment but also by changes in social habits; c) on the most important issue for the development of the consular service, i.e. the size of the network, no clear decision was taken at the time, and the decision-maker chose to wait and see in the light of political events; d) a similar decision was taken regarding the staffing of the consular service: in addition to rejuvenation, it was also considered important to maintain the previous staff.

40 See more below (under the title of 'The Place of Consular Services in a New Foreign Affairs Concept (2014–2024)').

3.3. About the Consul's Duties

The consul's duties should also be briefly mentioned, for several reasons.

a) On the one hand, consular functions have undergone several – significant – changes during the 20th century. Thus, the consul who, after the regime change in 1989, will be the recipient of numerous powers and the central figure of the Hungarian consular service, will only vaguely resemble his or her colleague of the early 20th century in terms of their tasks!
b) On the other hand, the 1963 Vienna Consular Convention, which was taken into Hungarian law in 1987, contains a specific and detailed catalogue of consular tasks. Thus, the formerly customary law and bilateral consular conventions have been replaced by a specific, normative catalogue, which gave the contracting states – including Hungary – a wide latitude in defining consular tasks.
c) Thirdly, the regime change also triggered various processes in the diaspora, which was one of the main areas of activity for Hungarian consuls in the second half of the 20th century.[41]

Ad a) From the point of view of our topic, it is important to emphasise that the main task of the consul at the beginning of the 20th century – when Hungarian consular functions were still performed within the Austro-Hungarian consular service – was to represent commercial interests and to adjudicate.[42] Already after the Compromise of 1867, Hungarian legislation provided for consuls to perform official duties, for example in the field of citizenship (1879),[43] birth registration (1894)[44] or passport administration (1903).[45] In the absence of an independent Hungarian Ministry of Foreign Affairs, legislative tasks of this kind were the responsibility of the individual departments, most often the Ministry of Justice.

The peace treaties that ended World War I, however, not only brought the end of the common state, the common foreign ministry and the Austro-Hungarian consular

41 See more Domaniczky, 2025a, pp. 87–113.

42 Consular adjudication was not part of the common affairs, so it could – in theory – have been developed independently. Cf. Szabó, 2022, p. 42. In contrast, the representation of commercial interests was considered a common matter (Art. 8 of Act 12 of 1867), but at the same time, plans were made on the Hungarian side – primarily in scientific guise, for example within the framework of the Hungarian Geographical Society – to explore Hungarian interests of its own. However, when the opportunity arose to implement these plans (after World War I), Hungary was no longer able to represent them. For the existing plans in relation to Australia and the South Pacific, see Domaniczky, 2024b, pp. 12–13.

43 Cf. para. 31 of Act No. 50 of 1879 on the acquisition and loss of Hungarian citizenship.

44 Cf. Art. 79 of Act No. 33 of 1894 on State Birth Registers, as well as Decree No. 2800/1906 of the Hungarian State Registry Office on the establishment of the necessary deviations from the procedure to be followed by diplomatic representatives, consuls and their deputies as Hungarian State Registrars, and Decree No. 2600/1906 of the Hungarian State Registry Office on the registration and certification of births and deaths occurring aboard ships.

45 Cf. para. 8. of Act No. 6 of 1903 on the Passport Act.

service, but also brought about significant changes in consular tasks. In the Treaty of Trianon of 1920, Hungary renounced all capitulation rights to the Austro-Hungarian Monarchy[46] and thus the legal basis for consular jurisdiction was abolished.[47] The other important task of the Austro-Hungarian consular service, the protection and representation of commercial interests, could only be fulfilled in a haphazard way by Hungary, which had been operating under difficult financial conditions for many years – although the legislator, when the Hungarian Foreign Ministry was established, made this the most important task of the consulates.[48] At the same time, great numbers of people were emigrating, partly from the parts annexed to other countries and partly from the remaining state-territory, some of them settling in other countries, but also haunted in their new lives by the legal situations that had arisen in their former lives. The Hungarians who emigrated inherited and made wills, sold and acquired property even as citizens of their new homeland. Thus, one of the first tasks of the independent Hungarian consular service became the handling of official matters, which had previously been a marginal task – but it was only after World War II that these tasks became a dominant part of consular competences.[49] Secondly, since the consul could easily build up contacts within the diaspora through official affairs, the consuls were also responsible for the preparation of (comprehensive) reports on Hungarian communities abroad.[50] These diaspora-related tasks were completed in the second half of the 20th century, when – after 1945 and 1956 – tens of thousands of people set out again and settled abroad. Consuls were then mainly responsible for political reporting,[51] but continued to carry out the official duties they had already been assigned.[52]

A significant change in these (official) tasks occurred in the second half of the 1960s, when Hungarians who had previously fled abroad began to travel as citizens

46 Cf. Part IV of Act No. 33 of 1921, specifically paras. 81, 86 and 94.

47 It is worth noting that the Monarchy was still working on the structure of the consular court system in 1917, cf. Act 19 of 1917 on the extension of the validity of Act No. 31 of 1891 on the regulation of consular jurisdiction and the amendment of certain provisions of the same Act. For an assessment see Lers, 1904; Antal, 2004, pp. 5–52.

48 The People's Act No. 5 of 1918 formulated this so that 'Hungarian consular offices in foreign districts shall serve mainly the interests of the domestic economy (…)' (para. 6 of the People's Act No. 5 of 1918).

49 For more information, see: Ustor, 1978, p. 378.

50 See also Domaniczky, 2025a, pp. 87–113.

51 From the second half of the 1940s, the Hungarian state authorities began to take an increasingly keen interest in the political sympathies and political movements of Hungarians living abroad. Wherever the rules of the host state allowed it, 'mood reports' on organisations of the diaspora were regularly prepared, which most often had to be written by the consul, who was the person who knew the local Hungarians and their organisations best. The practice of 'political mood reports' only ceased definitively with the regime change of 1989.

52 Cf. for example the provisions of the Citizenship Act that came into force during the Rákosi dictatorship: paras. 9 and 10 of Act LX of 1948 on Hungarian Citizenship, and paras. 20, 27 and 28 of BM Decree 600/1949 (I. 23.) on the enactment and implementation of Act LX of 1948 on Hungarian Citizenship.

of another country. The issuing of visas, and later the replacement and exchange of passports for visiting family members abroad, also fell to the consuls. Although the number of cases rose steadily until 1989, these tasks remained manageable until the change of regime, as until 1989 the possibility for Hungarian citizens to leave Hungary was limited.

Table 3: Hungarian citizens' foreign trips[53]

Year	**Number of foreign trips abroad** (in thousand)
1937	220
1964	1500
1988	10800
1989	14500
2023	c. 18000

One of the most important tasks of the consular service was to ensure access to the same quality of services in all regions. This was mainly possible through diplomatic negotiations due to t he small size of the country. Hungary, like most socialist countries, sought to conclude bilateral consular agreements with as many countries as possible, which regulated the privileges and immunities of consuls on the one hand, and their duties and the scope of their activities on the other. The possibilities for consular service thus depended on the success of the negotiations with the country concerned. A significant change in this respect was the accession to the 1963 Vienna Consular Convention, which contained normative rules on both consular privileges and immunities and consular functions. As far as consular functions are concerned, the 1963 VCC defined consular functions in broad terms and thus gave states considerable leeway. The ratification of the VCC does not preclude the conclusion of bilateral consular conventions, and in fact explicitly encourages the conclusion of such conventions.[54] The VCC states that '[n]othing in the present Convention shall preclude states from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof'.[55]

In practice, this section has helped to make the VCC the basic convention, since bilateral consular conventions have gone beyond the VCC and have defined their own content in relation to it.

Ad b) Returning to consular functions, let us examine the relevant section of the Convention![56]

53 The table was compiled by the author.

54 Accordingly, Hungary has concluded consular conventions even after the ratification of the VCC. See, for example, the consular conventions concluded with Kazakhstan (Act VI of 2006), Cyprus (Act V of 2000), Portugal (Act LXXVI of 2006) or Russia (Act X of 2003).

55 Art. 73(2) of the VCC. (Parts in italics are my own highlights (E.D.)).

56 Art. 5 of the VCC.

Consular functions consist of:

a) protecting, in the receiving state, the interests of the sending state and of its nationals, both individuals and corporate bodies, within the limits permitted by international law;
b) furthering the development of commercial, economic, cultural and scientific relations between the sending state and the receiving state and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
c) ascertaining by all lawful means the conditions and developments in the commercial, economic, cultural and scientific life of the receiving state, reporting thereon to the government of the sending state and giving information to persons interested;
d) issuing passports and travel documents to nationals of the sending state, and visas or appropriate documents to persons intending to travel to the sending state;
e) helping and assisting nationals, both individuals and corporate bodies of the sending state;
f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving state;
g) safeguarding the interests of nationals, both individuals and corporate bodies of the sending states in cases of succession mortis causa in the territory of the receiving state, in accordance with the laws and regulations of the receiving state;
h) safeguarding, within the limits imposed by the laws and regulations of the receiving state, the interests of minors and other persons lacking full capacity who are nationals of the sending state, particularly where any guardianship or trusteeship is required with respect to such persons;
i) subject to the practices and procedures obtaining in the receiving state, representing or arranging appropriate representation for nationals of the sending state before the tribunals and other authorities of the receiving state, for the purpose of obtaining, in accordance with the laws and regulations of the receiving state, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;
j) transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending state in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving state;
k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending state in respect of vessels having the nationality

of the sending state, and of aircraft registered in that state, and in respect of their crews;

l) extending assistance to vessels and aircraft mentioned in subpara. (k) of this article, and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving state, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen insofar as this may be authorised by the laws and regulations of the sending state;

m) performing any other functions entrusted to a consular post by the sending state which are not prohibited by the laws and regulations of the receiving state or to which no objection is taken by the receiving state or which are referred to in the international agreements in force between the sending state and the receiving state.

It is evident from the first reading that the section consists of one long list of thirteen items. On closer examination, however, the text can be broken down into three larger sections:

ba) general terms of reference;

bb) specific terms of reference;

bc) general authorisation to update consular tasks.

The *general terms of reference* aim to define the scope of consular competence. To this end, Art. 5, points a) to c):

a) state that the consul's basic duty is to protect the interests of natural and legal persons belonging to the sending state (consular protection);

b) stipulate that the consul may be active in other areas of cooperation in addition to his or her advocacy duties, in particular 'furthering the development of commercial, economic, cultural and scientific relations';

c) has a fundamental right to freedom of information and information on all these activities (right to report).

Under the *specific terms of reference*, the legislator lists the areas of consular protection and the most important tasks related to them (Art. 5, points d) – e) of the VCC). Since the VCC was drafted in the early 1960s, it covers both the old and the new 'world', i.e. the former and the modern tasks of the consul.

Two of the former functions of the consul are mentioned in the section: the power of supervision and inspection of vessels (Point k)) is one of the oldest functions of the consul. Point l)), a remnant of the former consular jurisdiction, allows the consul to settle 'all disputes of any kind' of the ship's crew ('between the master, the officers and the seamen'). The importance of the protection of consular interests is not only emphasised in the general terms of reference (Point a)) but is also specifically set out in the specific terms of reference as a general duty to provide assistance

(Point e)). Closely linked to this point is the protection of the interests of minors and incapacitated persons. As it is a specific task, it is also specifically mentioned in the text (Point h)).[57]

The tasks expected of the consultant in the modern world (which were new in 1963 but customary in 2024) are:

1) issuing travel documents and visas (Point d));
2) civil status matters (Point f));
3) notarial matters (Point f));
4) probate cases (Point g));
5) judicial and administrative assistance (Point j));
6) consular representation in judicial and administrative proceedings (Point i)).

The last two points need some elaboration. The VCC provides that legal aid may be provided on the basis of contracts, but in the absence of contracts, it may be provided by any other means (i.e. based on customs or reciprocity!). Although there have been a number of legal assistance conventions in the six decades since the VCC was drafted, Hungarian consular practice has remained essentially unchanged: the consul will always forward requests for legal assistance to the appropriate authorities whenever possible. However, it is important to emphasise that in these cases the consul has no substantive decision-making power (as in the majority of the tasks listed in Art. 5) but must only forward the requests as a kind of postman.

The VCC mentions consular representation in judicial and administrative matters among the consular tasks. However, it is important to emphasise – and Hungarian practice has taken the same position – that such representation is limited in time and subject matter: it can only be temporary and involve taking measures that are indispensable until the action of the right holder. In other words, this provision also falls more within the scope of the consul's general duty to provide assistance.

Finally, the last point (Point m)) of Art. 5 sets out a *general authorisation* for consular functions. The consul may perform any other functions conferred on him by the sending state, provided that they are not prohibited by the law of the receiving state, or are not opposed by the receiving state, or are provided for by international agreements between the sending and receiving states. The rule is clear, but why is it necessary? Firstly, to adapt the consul's tasks to changes over time. This section will, for example, be the legal basis for consular functions in relation to diasporas if there is a significant Hungarian diaspora in the host country.[58] Furthermore, this section will also allow the consul's tasks to be adapted to regional specificities.

In the light of the past and present tasks of the consul, the following observations can be made about the changes in the tasks of Hungarian consuls: a) the tasks of the Hungarian consul have changed significantly several times during the 20th century;

57 So, in Art. 5, the consul's general duty of assistance is set out in two points, (e) and (h).

58 For example, (*inter alia*) there is a significant Hungarian diaspora in the United States of America, Canada, the United Kingdom, Germany, Austria and Australia.

b) the changes in the remit were partly due to historical events and processes and partly to changes in legislation; c) most of the tasks known today as consular tasks, although they existed before, became a dominant part of the consular portfolio in the second half of the 20th century; d) the creation and then widespread adoption of the 1963 Vienna Consular Convention, while encouraging the conclusion of bilateral consular conventions, paved the way for the standardisation of consular functions.

4. The Impact of EU Accession on the Hungarian Consular System (2004–2014)

4.1. The Road to EU Accession

The Hungarian government had been trying to move closer to Western European integration – officially known as the European Union only since 1993 – even before the regime change. The most important result of this was the conclusion of a trade and economic agreement with the EEC in 1988, the first of the COMECON countries to do so, followed by the establishment of diplomatic relations in the same year. However, although the 1989 regime change opened up several other options for the country,[59] the Hungarian people finally chose the Euro-Atlantic integration, which they confirmed by two referendums.[60] Before joining the EU, the three main goals of the foreign policy strategy of independent Hungary were: a) Euro-Atlantic integration, which implied joining the various institutions and the EU; b) the development of a new system of good neighbourly and regional relations; c) the development of a new national policy towards Hungarians living beyond the borders, especially Hungarian communities in neighbouring states. EU accession in 2004 made it necessary to rethink all elements of this strategy. The primary objective, Euro-Atlantic integration, has been achieved, while the second objective, neighbourhood and regional relations, has largely become intra-EU relations, especially after Romania's accession in 2007.[61] To a significant extent, this has also affected Hungarian policy towards

59 For example, the declaration of neutrality, which was advocated by Hungarian Prime Minister Imre Nagy in 1956. For the foreign policy options open to Hungary, see: Gazdag, 2021, pp. 87–88.

60 In the 1997 referendum on Hungary's accession to NATO, more than 85% of those present voted in favour. In the 2003 referendum on Hungary's accession to the European Union, more than 83% of those present voted in favour.

61 After 2007, of Hungary's seven neighbours, only Ukraine and Serbia remained outside the European Union, but both are currently candidates (Serbia: since 2012, and Ukraine: since 2022).

Hungarian minorities beyond the borders – mainly because it initially appeared[62] that minority issues and disputes within the European Union would become more manageable.[63]

By joining the EU, Hungary became a member of a political-economic community that sought to create closer integration between the countries of the continent.[64] The reform processes[65] that have been dragging on for many years have stalled at several points, but there is no doubt that they have facilitated communication between Member States and made it easier to establish various forms of cooperation. EU standards have been introduced into national legislation and the EU's organisational structure has begun to organise an autonomous EU external action service.[66] In the following, we will examine the impact of these developments on the functioning of the Hungarian consular service, the areas in which it has become easier and more difficult to operate, and the directions for further development that have emerged over the past two decades.

4.2. The Emergence of EU Law in Consular Work

Aspects of EU law were already present in Hungarian consular work long before EU accession. The 2001 Consular Act stated in its final provisions that the legislator would ensure the conformity of Hungarian legislation with EU law by issuing ministerial decrees.[67] The approximation of legislation accelerated after 2004, and EU legislation gradually appeared in all areas of consular work. Perhaps most recently

62 The Copenhagen criteria adopted by the European Council in Copenhagen in 1993 included 'respect for and protection of minority rights' as a condition for EU membership. The Hungarian jurist Ferenc Mádl, who has been researching the legal framework of European integration for decades, considered the Copenhagen criteria to be a half-solution from the very beginning. In contrast, he believed – and has stated this in all his political positions – that, in view of the large number of minorities (now known as autochthonous, national minorities and ethnic groups) in almost all EU Member States, it was not sufficient to examine the respect and protection of minority rights only when new members joined the EU, but that uniform minority assessments should be carried out at certain intervals, under the same conditions for all EU members, and that the implementation of the findings should be monitored at a later date. The treatment of the Minority SafePack Initiative, one of the few successful European citizens' initiatives, by EU institutions has shown that the EU is currently committing to real minority protection only in words. See also: next footnote.

63 The EU's handling of the Benes decrees case demonstrates its disinterest and insensitivity to real minority issues. For the application of the Benes decrees in Slovakia in 2020 see for example: Ablonczy, 2022; Fiala-Butora, 2022, pp. 171–193.

64 Point 1 of the EU Treaty, originally introduced by the Maastricht Treaty in 1992.

65 The reform packages are marked by the major treaties: Maastricht (1992), Amsterdam (1997), Nice (2001), Lisbon (2007).

66 Cf. 2010/427/EU: Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service.

67 Act XLVI of 2001, para. 24

in the area of consular protection and visa policy, where they have become very important in a short period of time. The former include the possibility of issuing a European temporary passport (ETD)[68,69] and assistance to EU citizens in distress (including assistance in evacuation).[70] In the case of the visa processing, the legislation on the Visa Information System (VIS) and the EU's Visa Code started to be applied in Hungary in the form of an EU regulation.[71] A number of directives relating to the movement, crossing and residence of persons were transposed by the Hungarian Parliament in two Acts in 2007.[72] However, the EU legislation has brought significant changes not only to the substantive and procedural rules for issuing visas, but also to the infrastructure of consular offices. After Hungary's accession to Schengen, it became inevitable to ensure a high level of security at visa issuing offices (e.g. security locked doors, bulletproof windows, alarmed visa issuing rooms), which led to a significant restructuring of the consular infrastructure in several places.

The most significant change in passport administration came after Hungary's entry into the EU: the introduction of biometric passports.[73] The introduction of changes to both the appearance and the content of Hungarian passports started in 2006, took several years and was fully implemented in 2011, following the introduction of biometric passport applications in the Pacific.[74] Later, also thanks to EU legislation, the appearance and content of Hungarian ID cards changed significantly.[75] The ID card used for identification purposes in Hungary should be mentioned here for two reasons: firstly, because after Hungary became a member of the EU, many of its non-EU neighbouring countries also accepted it as a travel document (e.g. Croatia before 2013 or Serbia (still)), and the changes to the ID card are

68 From the beginning, the Government Decree (Government Decree No. 197/2006 (27.IX.)) uses the term 'European travel document (ETD)', but since the ETD is in practice a temporary passport, I prefer to use this term in the text.

69 For more on the ETD, see: Csatlós, 2017, pp. 7–14; Csatlós, 2019, pp. 10–20.

70 Cf. the following decisions: the Decision of the Representatives of the Governments of the Member States, meeting within the Council of 19 December 1995 on the protection of citizens of the European Union by diplomatic missions and consular posts and the Decision of the Representatives of the Governments of the Member States, meeting within the Council of 25 June 1996 on the creation of a temporary travel document.

71 See Regulation (EC) No. 767/2008 concerning the visa information system and the exchange of data between Member States on short-stay visas (VIS regulation), and Regulation (EC) No. 810/2009 establishing the EU's Visa Code.

72 See Act I. of 2007 on the entry and residence of persons with the right of free movement and residence and Act II of 2007 on the entry and residence of third-country nationals (the latter was replaced in 2023 by a new Act (Act XC of 2023 on the general rules for the entry and residence of third-country nationals)).

73 See Council Regulation (EC) No. 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States.

74 The first Hungarian biometric passports in the South Pacific region were issued by the author of this article in the second half of 2011, as the Hungarian Consul in Canberra.

75 See Council Regulation (EC) No. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items; Kiss and Szegő, 2017, pp. 54–65.

therefore also considered as a change to the travel document. On the other hand, for certain citizenship procedures, it was also possible to apply for an ID card at consular offices abroad after 2011, so the changes to the law on ID cards to comply with EU legislation have clearly affected the consular service. The first part of the changes, the possibility to apply abroad and the introduction of biometrics, came in the first half of the 2010s, while further developments will make the possibility to apply for an ID card in consular offices almost complete by the early 2020s.

Euro-Atlantic integration and Hungary's membership in the EU have also had an impact on the functioning of the Hungarian consular service, not only through EU rule-making, but also through opportunities such as the availability of EU funding. The best example is the creation of the consular service's own electronic database, the Consular Information System (CIS), the development of which started well before EU accession in 1999 under the PHARE programme. Thanks to the CIS, a growing part of the document flow, which had previously been carried out in a number of isolated systems in different filing books, has become electronic, which has significantly accelerated consular procedures. Although it was a national system, the most significant improvements have been and are still being made in the light of EU and Schengen regulations. In the long term, the system has evolved from a filing system into a closed system for multi-directional communication and data transmission, and has become compatible with several national and EU systems.[76]

The Hungarian civil registry system has also been affected from two sides by EU accession. On the one hand, the modernisation of the system has been achieved with EU support,[77] and on the other hand, thanks to EU regulations, the usability of Hungarian birth certificates abroad has been increased.[78] The implementation of the latter has imposed some additional burdens[79] on the Hungarian consular service, but the benefits – mainly in terms of facilitating the administration of Hungarian clients abroad – are much more significant. The situation is therefore similar to the CIS: the development, which was implemented with the help of EU funding, had to be made suitable for handling EU-compliant forms. The development itself, the electronic birth register, has brought significant changes not only in Hungarian civil registry offices but also in Hungarian consulates abroad – but only in the period after 2014,

76 For CIS, see F. Tóth, 2021a, p. I/305.

77 Ministry of Interior of Hungary, no date.

78 For the legal background to the apostille exemption and the annex on multilingualism, see: Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No. 1024/2012.

79 More specifically, the implementation of Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 has been both a relief and a challenge for the Hungarian consular service. Not having to use the apostille for documents used in EU Member States has had the effect of reducing and speeding up the paperwork (and has also made the administration cheaper), while the addition of the multilingual form to the birth certificate has made the procedure somewhat more complicated (but its usefulness is beyond question!).

as the Electronic Registration Book (ERB)[80] was only launched in 2015 and it took years to load the system with data and to implement the necessary improvements for full operation. The main impacts of the ERB on consular work are as follows:

a) the involvement of consuls in birth registration. Whereas previously, with a few exceptions, consuls were only involved in the civil status procedures as collaborators, filling in forms, validating signatures, verifying data, transmitting forms and copies and sometimes also providing the necessary translations, from the second half of 2010 onwards, in some consulates they have also been responsible for entering and recording data in the system. The breakthrough is still only partial, but the direction of progress is clear: sooner or later all consuls will have to be involved in the full range of civil status procedures;
b) the electronic issuance of civil status documents. Previously, the relevant Hungarian registrar issued the birth, marriage and death certificates from the paper registration books and sent them by courier to the consulate indicated by the client in his or her application. Following the launching of ERB, the consul abroad can now print out the certificates directly for the clients. This means that applying for Hungarian (birth/marriage/death) certificates abroad has become much faster, easier and cheaper in a short time. Thanks to electronic development on the one hand, and on the other hand because the consul has become the master of the matter, instead of his former intermediary role.[81]

Thus, we have witnessed a two-way process: besides the application of EU rules directly affecting the consular field, the database developments that fundamentally affect the work of the Hungarian consular service were implemented with EU support, and during the implementation, particular attention had to be paid to compliance with EU rules and compatibility with other Member States and EU systems.[82] We have also seen that the developments themselves started before Hungary's accession to the EU, but were largely carried out in the period 2004–2014. However, their impact – to which we will return in the next chapter – was almost entirely felt in the period 2014–2024.

80 For ERB, see: F. Tóth, 2021b, p. I/276.

81 Unless it is pre-2015, data that still needs to be transferred from the paper register to the electronic civil status system. In such a case, the registrar holding the register is responsible. The consul will therefore have to wait and continue to be referred to another person, but in practice such cases – foreign related – are usually taken in advance.

82 See for example, in the case of CIS, access to the Schengen Information System and the Visa Information System. At the Member State level, the compatibility of CIS with the passport register, the Hungarian address register and the civil status register is worth mentioning.

4.3. Broadening the Scope for Cooperation

After 1989, Hungary not only built new relations with Western Europe, but – as we have seen from the foreign policy strategy of the time – it also made a strong effort to establish closer cooperation with regional partners. The best known of these was the Visegrád Group, established in 1991, which initially consisted of three, and subsequently four members. This – political – agreement was later complemented by a trade (CEFTA) and then an education and research (V4 Fund) co-operations. Without the accession of the states of the region to the European Union, a regional association with several legs could probably have been created, which – as a 'small EU'[83] – could have opened the way to foreign policy cooperation. The EU's 'eastern enlargement' in 2004 and subsequent accessions have made it clear that regional relations should be cultivated and developed within the EU and Euro-Atlantic cooperation. The V4 has also continued to exist within the EU because of the protection of the interests of its members, and the common interests of the V4 states have in some cases been able to be reflected, at least at the planning level, in the area of consular relations (Visegrad House project).[84] Finally, the V4 has remained a loose political cooperation, clearly as a result of the accession of the states of the region to the EU,[85] which, despite the fact that the possibilities for cooperation between the Member States within the European Union are much wider than before, can be deepened in certain areas on a case-by-case and more permanent basis.

4.3.1. Areas of Consular Protection and Visa Issuance

From the point of view of consular work, the most topical areas of cooperation are consular protection and visa issuance. While in the former areas, the sub-areas and depth of cooperation are primarily determined by the common interest of Member States, in the case of visas the same is imposed – normatively – by EU legislation.[86]

First, let us review the main areas of consular cooperation, as they were summarised in the mid-1990s in the form of Council decisions,[87] not binding but

83 A 'certain degree of unification of the Central European countries' was already mentioned in an early essay of the great Hungarian jurist Ferenc Mádl, written in the early 1950s, see: Domaniczky, 2024a, p. 437.

84 The Visegrad Houses pilot project was implemented in Johannesburg (South Africa) (2011), but the V4 countries are also planning to set up jointly run Visegrad Houses in other locations (Mongolia, Vietnam) to provide the infrastructure for their consular work. See also: https://www.visegradgroup.eu/home/documents/presidency-programs/innovative-visegrad (Accessed: 17 February 2026); Anonymous, 2010, p. 30.

85 Only one institutionalised form has emerged, the V4 Fund, established in 2000 and based in Bratislava, Slovakia.

86 There is an overlap between the two areas, for example where the spouse of an EU citizen needs an EU visa to enter the EU in case of evacuation.

87 See Art. 5 of Decision 95/553/EC and Decision 96/409/CFSP. See also: Becánics, 2018, pp. 149–168; Becánics, 2015, pp. 9–23. See also: Moraru, 2019, pp. 417–462.

facilitating coordination: a) assistance in the event of death; b) assistance in the event of a serious accident or serious illness; c) assistance in the event of arrest or detention; d) assistance to victims of violent crime; e) assisting EU citizens in distress and repatriating them (evacuation); f) European travel document (ETD).

Although the UK's exit from the EU (Brexit) and the outbreak of the coronavirus pandemic, which has led to numerous travel restrictions, have had a significant impact on passenger numbers, EU citizens still make nearly 100 million trips a year (2024) to countries outside the EU[88] and nearly 20 million EU citizens – more than 4% of the EU population – currently live outside the EU.[89] In significant areas such as Africa, Inner Asia or the South Pacific, the consular network of EU Member States is still incomplete. All of this clearly shows that in the field of consular protection, the EU has already tried to find solutions to real problems after the inclusion of European citizenship in the Maastricht Treaty (1992). Previously, these problems could only be dealt with on the basis of the 1963 Vienna Convention, through bilateral consular agreements or by applying the principle of reciprocity.

Of the above list, the last two, the issuance of temporary travel documents and evacuation, are obviously the most important and largest volume activities. In the case of the ETD, it is sufficient to refer to EU citizens visiting African landlocked countries (e.g. South Sudan, Central African Republic) or the South Pacific islands (e.g. Samoa, Tuvalu), whose return home, if they run into difficulties, is made possible by this temporary travel document.[90] The success of the cooperation is also confirmed by the fact that the ETD will be available in a new format from 2025.[91] As for evacuations, there are many success stories from the last three decades of cooperation between Member States to bring people out of crisis situations, whether following the Arab Spring (in Africa or Asia) or more recently in the Middle East. In these tasks, Hungary has played a prominent role to the best of its ability.[92]

88 This is expected to grow dynamically in the coming years (there are currently 1 billion trips per year within the EU!).

89 For earlier data, see Schiffner, 2012, pp. 506–532. See also: Eileen Denza's book chapter as part of the Commentary on the EU Charter of Fundamental Rights.

90 The legal background and jurisprudence on the scope of eligibility is not yet clear. To give an example, let us consider a Hungarian citizen living in Hungary who, during his previous stay in Australia, married a lady of Philippine nationality. After that he and his wife get into trouble on the Indonesian island of Bali. Who is entitled to consular protection and evacuation by the EU: himself only, or together with his wife? Raising the question a little more practically: can the wife of a Hungarian citizen in the Philippines board a plane sent by the Hungarian state? And can she board an aircraft sent by another EU Member State? For the EU Member States' practice, see: Csatlós, 2019, pp. 112–114.

91 See also Council Directive (EU) 2019/997 of 18 June 2019 establishing an EU temporary travel document and repealing Decision 96/409/CFSP.

92 For example, in 2011, during the Hungarian EU Presidency, Hungary evacuated 29 Romanian, 27 Hungarian, 20 Bulgarian, 8 German and 6 Czech citizens from Libya (for a description of the case, see: F. Tóth 2021b, p. I/339; Wagner, 2011, pp. 6–8).

In practice, the details of the evacuation (e.g. the designation of the lead state)[93] are agreed upon through *local EU consular cooperation*, coordinated by the local EU delegation, if there exists one in the country. Meetings are chaired by the consul of the country holding the rotating EU Presidency. However, local EU consular cooperation also serves as a permanent forum for consultation, where in fact any consular issue involving several EU Member States can be raised and discussed. The most frequent topic are, of course, Schengen matters and data. This means not only specific issues but also, for example, regular feedback on the functioning of local visa representation agreements.[94] In some places, a V4 group may also function as a forum for reconciliation of interests within local EU consular cooperation, but its effectiveness depends largely on the current state of cooperation between the V4 countries.[95]

4.3.2. The Legal Aid Conventions

Mutual legal assistance treaties are a traditional area of consular work, the earliest such treaties being concluded by Hungary in the mid-19th century. 'Mutual assistance treaties are international conventions which provide for the reciprocal execution of requests for the performance of certain official acts between the courts and other authorities of the contracting states'.[96] In addition to criminal and civil conventions on judicial proceedings, there are increasingly more conventions on mutual assistance in a number of areas (e.g. taxation, service of documents, civil registry) which cover the activities of individual public authorities. These conventions are generally intergovernmental, but EU legislation has already reached the borders of this area. Whether we think of the so-called Brussels IIa Regulation[97] or the 2016 EU Regulation on the simplified use of public documents,[98] there is a certain degree of standardisation from a consular point of view, with the aim of speeding up administrative procedures and making it easier for EU citizens to

93 See European Union guidelines on the implementation of the consular Lead State concept (2008/C 317/06) and Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC.

94 For example, Hungary is represented in Australia and New Zealand by Switzerland for Schengen visa matters. For the visa representation agreements in force for Hungary, see the website of the Hungarian Consular Service: https://konzinfo.mfa.gov.hu/vizumkiadas-magyarorszag-neveben (Accessed: 18 October 2024).

95 In Australia, for example, a V4 cooperation on diplomatic matters worked very well between 2011 and 2015, allowing V4 consuls to work more closely together on consular matters.

96 Szondy, 1947, pp. 484–485.

97 Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, is mentioned here because it was the legislation in force during the period under review (2004–2014).

98 See Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No. 1024/2012.

deal with their affairs. Whether by reference to these or not, there is still room for improvement in this area for Member States. Firstly, in relation to third countries, where the EU's more favourable negotiating position than that of the Member States promises greater success in concluding legal assistance treaties (in which the EU can then act as an independent player in its own right, alongside the Member States), secondly, in simplifying certain procedures and forms within the EU, which the EU can easily achieve through its own legal instruments, and thirdly, within the EU, Member States or a group of Member States can more easily reach agreements with each other on a particular issue (e.g. birth registration matters).

4.3.3. Other Delegation and Representation Agreements

Hungary itself recognised the potential for cooperation within the EU relatively early on. The 2012 Amendment to the 2001 Consular Act reads that 'the legal conditions for closer cooperation with the consular services of EU partners will be created by allowing Hungarian consular officers to provide diplomatic supervision of documents issued by the authorities of the host state not only in Hungary but also, by agreement, for use in the Member States of the European Union'.[99] For example, on the basis of this section, the Hungarian Trade Office in Taiwan provides diplomatic endorsement of public documents issued by the Taiwanese authorities for use in Bulgaria.[100] For the time being, the Consular Act does not allow for such agreements in other cases, but the model exists and is a clear help for small Central European countries, so that in the medium term legislation in this area – for example for certain certificates, for which the practice is already permissive[101] – is expected to move in a positive direction.

4.4. The Possible Role of the EU External Action Service (EEAS) in Consular Work

The creation of the European Union's external action service was already foreseen in the European Constitution.[102] However, it was only set up in 2010, following the strengthening of the powers of the High Representative for Foreign Affairs (Lisbon Treaty, 2009).[103] From a consular perspective, EU delegations initially served as insti-

99 Explanatory notes to the proposal of the Act CLXIX of 2012, para. 5.

100 Although currently not permissible by consular law, the related field of super-legalisation, the legalisation, would also lend itself to the development of similar cooperation.

101 This is the case of *certificates of existence* (Art. 14 (1) (c) of Act XLVI of 2001), where in some cases the Hungarian consul also certifies the authenticity of the signature on forms issued by pension authorities of other countries.

102 See European Constitution, Art. III-296.

103 Although there is no space here to elaborate further, it is worth emphasising the positive impact of the Lisbon Treaty on practical consular work and EU consular cooperation. For a general overview, see: Wouters and Duquet, 2011, pp. 3–20.

tutions providing the administrative background for local EU consular cooperation. However, the crises of the 2010s and the early 2020s have shown that the consular background of the EU external action service, which is essentially a diplomatic service, needs to be strengthened as soon as possible. The EEAS crisis centre in 2022 was born out of this realisation.

In the consular field, the EEAS, for the time being, focuses on strengthening the cooperation necessary for consular protection, and filling in the gaps in the competences of the Member States. Some developments, such as the deployment of an EU consul in the larger EU delegations or the creation of a separate EU consular information portal, would seem to be a logical step in the current situation, but are hampered mainly by the desire to preserve the competences of the Member States.

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5. The Place of Consular Services in a New Foreign Affairs Concept (2014–2024)

5.1. On the External Relations Strategy

Joining the EU has achieved one of Hungary's most important foreign policy objectives. Accession not only meant the realisation of a foreign policy goal, but also required significant changes in the other two elements of foreign policy strategy – relations with the United States and regional relations. However, the new foreign policy priorities were slow and gradual to emerge; the uncertainty was mainly driven by intense domestic political infighting. In the six years between accession in May 2004 and the formation of Viktor Orbán's second government, four governments succeeded each other in quick succession,[104] focusing primarily on economic policy, and foreign affairs, including consular functions, that were reshaped accordingly.

In the field of foreign affairs, continuity was made even more prominent by the new involvement of law professor and former Foreign Minister, János Martonyi. However, the importance of political aspects in the measures of the 3rd Orbán government (2014–2018), which took office in 2014, increased compared to previous government cycles, and this change was also emphasised by the change of ministers in the field of foreign affairs.

The talented young communications specialist who took office at that time, Péter Szijjártó, is now the EU's longest-serving Foreign Minister – with nearly three full

104 At the time of accession to the EU (1 May 2004), Péter Medgyessy (elected in 2002) was still Prime Minister, but in the autumn of 2004 Ferenc Gyurcsány formed a government (1st Gyurcsány government, 2004–2006). After the elections in 2006, Gyurcsány remained Prime Minister (2nd Gyurcsány government, 2006–2009). After the resignation of Ferenc Gyurcsány, Gordon Bajnai functioned as Prime Minister until the next general elections (Bajnai government, 2009–2010).

government cycles behind him.[105] Thanks to the personal (and structural) stability, it was also possible to implement profound changes that affected the infrastructure, personnel and tasks of the consular service.

5.2. Key Issues for Infrastructure Change

The pre-2010 government's spending cut plans included a foreign affairs austerity package. A prominent element of this were the foreign mission closures announced by the Bajnai government. 'Initially, 42 embassies and consulates were to be closed down, but this number was eventually reduced to 12 (4 embassies, 8 consulates-general)'.[106] However, Viktor Orbán – as leader of the opposition at the time – had already predicted that 'if they win the elections, they will certainly restore (…)'[107] some of the foreign representations. 'After all, wherever there is a significant number of Hungarians, we have a duty to maintain state representation, which is a link that we simply cannot give up', said President László Sólyom during his visit to Sydney, Australia.[108] This initially meant cutting back and preserving a network of over 100 missions, which in 2008 the previous government had tried to fix at between 80 and 100. Around 2010, it was not a question of ideological debate, but of deciding, on the basis of professional arguments, a professional question that had already arisen around 1985, namely how large a network of foreign missions a country of this size and endowment could maintain.

Table 4: Hungarian missions abroad after the regime change of 1989[109]

Year	Number
1990	88
2006	90
2010	88
2024	147

However, after 2014, as the concept of political governance became more pronounced, the network of external representations also took on a representational function. The subsequent increase in size reflected the ambition of a confident

105 See MTI, 2023.
106 Csapó, 2009, p. 4.
107 Anonymous, 2009, p. 11.
108 Anonymous, 2009, p. 11.
109 The table was compiled by the author.

country that wanted to assert itself in world politics in its own right.[110] The enlarged Hungarian network has also been given a number of new tasks – for example, in the conducting of elections[111] – but its greatest benefit is undoubtedly in terms of consular administration and consular protection. Wherever Hungary opens a new mission, ensuring consular functions has so far been a priority. By *de facto* dividing the foreign affairs staff into domestic and foreign staff, the increased demand for professional personnel has also been dealt with – based on previous experience.

Within the continuously growing consular network – thanks to the accelerated development of the legal framework for digitalisation since 2010 – the interconnection of various registers of particular importance from a consular perspective has been practically completed. It is primarily due to this that in the majority of consular procedures, the processing times have been significantly shortened in the 15 years since 2010,[112] and the range of available services has been continuously expanding.[113]

5.3. Transforming the Role of the Consul

All this leads to another area, the issue of staffing. On the one hand, the increase in the number of consular posts requires an increase in the number of consular staff. On the other hand, the increase in the number of cases that can be handled

110 According to international data, Hungary had 104 foreign representations in 2016 and 140 in 2023 (146 in 2024), moving up from the 30th to the 20th place in terms of the size of the international network of foreign representations. In other words, after 2010, the size of the Hungarian network was comparable to that of smaller Central European countries, and now it has more constituents than the foreign representation network of Poland, traditionally the strongest player in the region (and growing). For international figures, see: https://globaldiplomacyindex.lowyinstitute.org (Accessed: 29 October 2024), for slightly different Hungarian data see: https://konzinfo.mfa.gov.hu/kulkepviseletek/osszes (Accessed: 29 October 2024), and Annex 1 of the Decree 3/2017 (28.II.) of the Ministry of Foreign Affairs on the classification of missions and the detailed rules for the calculation of the basic foreign currency salary and reimbursement of expenses for persons on long-term foreign service (which lists 166 Hungarian missions as of 13 November 2024).

111 For more information, see: Domaniczky, 2025b.

112 I would just like to give you a striking example from my own practice. In 2011, in Canberra, Australia, it took approximately 21–30 days to obtain a Hungarian certificate of good conduct, which is a significant time compared to its 90-day-validity. From 2015, we were able to issue this certificate electronically, with official translation, on the spot, which in most cases was done within 2 working days. Similar results could be mentioned for example in the area of birth certificates. Another example, from New Zealand: in 2011 we issued passports with a one-year-validity, which took about 7–12 weeks to renew (as we did not have a local embassy in Wellington). After we started issuing biometric passports in 2011, and I organised the first consular reception day in New Zealand, we were able to issue 10-year passports from 2012 and the processing time was reduced to 5–6 weeks. And now, 10-year biometric passports – obtained at the Hungarian Embassy in Wellington, which opened in 2015 – can arrive with a turnaround time of 2–4 weeks.

113 Just to give you a few examples from my own practice: in 2011, we were able to deal with a few basic issues – in several steps – for the most important types of cases (passport, visa, authentication, birth, marriage and death registration). In 2018, we were able to handle dozens of case types – mostly in a one-step-process – at the then-opened Sydney Consular Office.

at consulates shifts consular tasks away from diplomacy and towards administrative work. In other words, the consul is becoming more and more of an administrator, and the consular office is moving from being a diplomatic office to a place of administration. After 1989, the number of cases increased severalfold as global tourism as a phenomenon affected the Hungarian citizens, and has continued to rise. As the number of consular cases increases, cases and clients increasingly lose their individuality and become numbers and data. This is a worldwide trend that is also having an impact in Hungary. After 2010, the government responded by simplifying consular work. The tasks of a consul are, according to the VCC, multifaceted, but according to the Convention (Art. 5), there is no obstacle to some consuls specialising in certain tasks. Thus, after 2010 – but especially from 2014 – the mostly uniform consular functions and competences before 2010 started to diverge and the use of specialised consuls and specialised diplomats became common. At the same time, the 'ordinary' consul retained his or her official functions and became an administrative employee working abroad, whose main task was to ensure a swift and professional conduct of business. At the same time, and especially following the acceleration of technological developments after 2014, consular offices have become a counterpart to domestic (governmental) administrative centres[114] abroad.

5.4. Re-evaluating the Role of Consular Work in Foreign Affairs

In addition to changes in infrastructure and staffing, the role of consular work itself has also been reassessed, and these changes have been particularly noticeable after 2014. Previously, consular work covered a type of administrative activities that was rarely given news value, and even then, it was communicated at lower, professional levels. After 2014, however, a minister skilled in communications began to take charge of some consular affairs. This involved not only cases of consular protection that sometimes entailed greater publicity, but also the expansion of the consular network and possibly the communication of consular cooperation. This level of publicity, the elevation of consular affairs to the political sphere, initially seemed unusual, but in several cases – for example, during evacuations or during the period of COVID pandemic – it proved to be particularly effective. In addition to emphasising Hungarian achievements and national efforts, however, the government also – much more quietly – supported EU cooperation in consular matters. Hungary actually participates and plays a role in all consular cooperation that is useful for

114 These governmental offices are called 'kormányablak' (government window) in Hungarian. 'The metropolitan- and county government offices (…) are the territorial state administration bodies of the Government with general competences. They are implementing government functions at the territorial level, and carrying out general state administration powers towards the customers. Government offices – led by government commissioners appointed by the Prime Minister – are operating in each county and the capital city of Budapest'. See more https://kormanyhivatalok.hu/en (Accessed: 9 January 2025).

Hungarian citizens (such as issuing documents or visas), even if this does not appear as a separate, independent topic in the rhetoric.

5.5. Characteristics of the Last Decade

Against this background, the main features of the post-2014 decade in terms of consular work can be summarised as follows: a) the large and steady expansion of the Hungarian diplomatic network has opened up great opportunities for the consular service, which could be an advantageous position in future EU-cooperation regarding consular matters; b) after 2014, compared to the previous period, the (inter-) connection and digitisation of the consular databases accelerated, which created a quick, professional and one-step ('one-stop shop') handling of a significant caseload; c) the transformation of consular offices from diplomatic premises to administrative offices has accelerated, and with it the separation and standardisation of consular tasks also accelerated.

It is important to underline that, although all these changes have been implemented at national level, the country has also used significant EU funds to implement some elements (such as the digitisation of consular databases) and the expansion of the consular network has also had to take into account EU standards (for example, in the establishment of new consular posts). In other words, despite the increasing national character, the impact of EU funds and standards on the Hungarian consular network was also detectable in the period under review.

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6. What Does the Future Hold?

At the end of our lengthy discussion, we have seen that the European Union has in fact had an impact on the functioning and development of the Hungarian consular service since 1989. This impact is constantly growing and is spreading to more and more areas, even if it is not clearly reflected in government rhetoric or national news. The EU impact is mainly – directly or indirectly – reflected in legislative provisions, but Member States, including Hungary, can also regularly use EU financial resources for various developments. However, the greatest advantage and scope for action, in both the short and long term, lies in the field of cooperation in different consular matters.

The basic question is in what areas and what powers could be exercised at EU level in the consular field. Some of these areas are considered below, *de lege ferenda*.

6.1. Different Forms of Consular Information

The quality of consular information is crucial for the realisation of consular protection. Currently, this task is in the hands of the Member States, which means that, although crisis situations (i.e. natural disasters or armed conflicts or terrorist attacks) most often affect EU citizens from several Member States at the same time, each EU Member State is responsible for providing information to its own nationals. This means that for every trip to a third country, a citizen of a given Member State can rely on their own national consular service and its information. An even more absurd case of this is when EU citizens are endangered in a busy intra-EU destination. This could be, for example, an act of terrorism, where some EU citizens (who are nationals of the Member State concerned) are required to follow the instructions of their national government departments, while other EU citizens are required to follow the instructions of their national consular service.

As keeping national competences – especially those that are visible in the communication channels – in the Member States is quite popular, there is no prospect of progress in the short term. Even though it would be relatively easy to come up with a compromise that would ensure a win-win situation for all actors. For example, if all national consular services had a separate window on their websites where news from the EEAS Crisis Centre could be published – in an unchanged form in all Member States. An EU directive could be used to ensure that copies of national consular protection data sheets are also sent to the EU's external services – as they would have to be requested from Member States in the event of an immediate intervention anyway. And if there is already a single EU consular information point, a telephone version of this could be launched on a trial basis – in different languages. In this way, the framework for an EU consular information mechanism could be gradually defined, without prejudice to the competences of the Member States, and could be built upon further in a second phase.

6.2. Areas of Consular Protectio

Obviously, consular information is already part (or a precondition) of consular protection, but the most frequent area (with around 500–1000 cases per year)[115] is the issuing of the Emergency Travel Document (ETD), which is primarily administered by national consular authorities. Here, due to differences in national practices, it would be particularly useful if the EU External Action Service could take on a coordinating role, which could reduce the number of documents issued incorrectly or without legal basis. For example, the EU crisis centre could also provide a telephone service by consular experts, even by setting up teams of 2-3 people from each Member State, who would have access to the necessary databases and could assist with the issuance of the document.

115 The 2017 data is cited in Csatlós, 2017, p. 9.

In most cases, the evacuation also requires action under the auspices of the EU, because EU citizens can be brought to safety more quickly and efficiently than if the Member States were to act individually. However, an immediate hotline is usually only needed during the emergency period – and this can generally be ensured within the framework of local EU consular cooperation. During the evacuation, the closure or relocation of Member States' foreign missions is often also a question, which frequently requires political consultations, which take place in Brussels. Here, we could expect the process to be accelerated by the involvement of EU delegations (see below).

6.3. The Scope for Developing EU Delegations

The most important point of my proposals is aimed at creating a consular 'leg' of the EU external action service. Here, we may primarily encounter Member States defending their national competences, and secondly, it would be necessary to justify whether there is any justification at all for establishing an independent consular office in EU delegations.

Reversely: since the local EU and local Schengen consular cooperation meetings are regularly held in the buildings of the EU delegations, it would be fortunate, given the nature of the tasks, if each EU mission concerned had a person who is experienced in consular work from his or her own practice, who has already encountered visa issuance issues or evacuation at the national level and is aware of consular interest protection tasks from the practical side. So the consular department itself (even if this meant just one person or a diplomat who had previously done consular work) would have a reason to exist.

However, if such a department were to be established, it would be interesting to see what tasks it could still perform or take over in the longer term. The first place would certainly be given to the issuance of EU ETDs, since the network of EU delegations covers all regions of the world. Their involvement in the issuance of *Schengen visas* could also be considered, since these representations must comply with higher security standards, anyway. The staff of the EU consular department could also be involved in signature authentication, which has already caused difficulties for more than one Member States in providing them in remote regions. However, while the requirement for understanding the signed text might also arise in the case of signature authentication, this criterion does not apply in the case of copy authentication. They could probably also participate in the issuance of birth, marriage and death certificates of EU Member States, provided that the civil registry system of the given Member State is capable of handling electronic birth certificates (for example, Hungary has been able to do this since 2015).

EU consuls could also be involved in performing certain consular protection tasks (for example: visiting a detained EU citizen, preparing a report on their condition), as well as in preparing for evacuation.

The performance of these tasks would only seemingly infringe on the competence of the Member States' consular services, since in reality the EU consular office could only act in an auxiliary capacity, in order to facilitate the life of EU-citizens and their cases' administration, alongside the Member States' consular services, if the latter's services are more easily and cheaply available (for example in certain areas of Central Asia or Central Africa or in Oceania). However, each Member State has its own sensitive data and types of cases. For example, citizenship data or decision-making materials related to the issuance of national visas and residence permits are particularly sensitive – each Member State could continue to retain these within their exclusive competence.

7. Summary

As can be seen from the above, EU membership offers national consular services a number of opportunities for modernisation and fast and cost-effective cooperation, not only in the short and medium term, but also in the long term. However, cooperation can be established not only horizontally, but also vertically, between the EU and Member State levels, since the main goal is to fill the concept of EU citizenship, which has existed for decades, with content, in which the EU could cooperate not only as a regulatory authority, but also – if consular departments of EU delegations were to be established – as a partner.

This would not necessarily mean that the EU's influence would become unilateral. On the contrary: the EU could continue to act – within the framework of COCON[116] – as a regulatory authority, or – by providing for various infrastructural supports – as a donor. The establishment and operation of EU consular departments could make this role more diverse – provided that the Member States also find this form of cooperation positive and forward-looking.

116 It is a working party on consular affairs coordinates consular cooperation within the EU. For its tasks, see www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-consular-affairs (Accessed: 10 January 2025).

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Chapter 3

Expansion of Diplomatic and Consular Actors under Polish Law

Łukasz Konrad Piebiak

Abstract

This article analyses the expansion of the categories of persons entitled to perform diplomatic and consular functions under Polish law, particularly given the 2015 Consular Law Act and subsequent legislative reforms. Traditionally, the sphere of external representation has been reserved for career diplomats. However, Polish legislation progressively includes actors of a different professional or institutional character. This study begins with a detailed examination of the institution of the honorary consul, whose roots reach back to ancient Greece. Its modern Polish regulation, notably Arts. 120–134 of the Consular Law Act, grants a broad scope of functions including limited notarial powers. This article critically evaluates these provisions, identifying potential risks for legal certainty and state prestige. It then explores new models of economic and trade diplomacy following the 2017 reform introducing the Polish Investment and Trade Agency, and its foreign trade offices, emphasising the tension between corporate efficiency and the need for diplomatic legitimacy. Subsequently, it analyses proposals for involving judges, prosecutors, and notarial professionals in consular and diplomatic support roles, particularly in sensitive family and criminal cases involving Polish citizens abroad. The discussion continues with cultural diplomacy, outlining the role of Polish Institutes and the Adam Mickiewicz Institute, and concludes with an examination of uniformed service representatives (military attachés, police, and border liaison officers) who combine operational duties with diplomatic representation. Finally, it outlines *de lege ferenda* postulates aimed at strengthening professionalism, coherence, and constitutional guarantees within Poland's foreign representation system.

Łukasz Konrad Piebiak (2026) 'Expansion of Diplomatic and Consular Actors under Polish Law'. In: Paweł Czubik (ed.) *Changes in the Structure and Scope of Foreign Service Activity*, pp. 107–140. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2026.pccssfsa_3

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Keywords: consular law, honorary consuls, trade diplomacy, delegated judges and prosecutors, cultural diplomacy

1. Introductory Remarks

The basic normative act regulating diplomatic and consular activities in Poland is the Law of 25 June 2015, the Consular Law (hereinafter, pr.kons).[1] In this study, I deliberately leave out of its scope the regulations contained in the Foreign Service Act of 21 January 2021 (hereinafter, u.sł.zagr).[2] While also referring to the issues of performing activities for the Republic of Poland and its citizens abroad, u.sł. zagr focuses on the service and diplomatic relations performed by professional diplomats comprising the foreign service corps. Rather, this article aims to familiarise the reader with the legal environment that allows the use, in the diplomatic and consular service, of persons other than those traditionally associated with it who perform the functions of an ambassador or professional consul. Further, it seeks to signal the need to change the legal status in this regard by formulating *de lege ferenda* postulates.

2. Honorary Consuls

Honorary consuls are the first of the groups of people who, without being professionally connected with the diplomatic and consular service, have been equipped with important competencies traditionally belonging to the competence of professional consuls. The institution of an honorary consul is not a particular Polish specialty. Rather, it originated in ancient Greece. The progenitors of today's honorary consuls were proxenos. These were citizens of another polis, who received an honorary title from that polis; however, this entailed the duty of taking care of the citizens of the polis which gave him this title and representing its interests in the polis where he resided.[3] Currently, it finds its place in the legal systems and practice of operation of most countries, perfectly complementing and expanding, in the interests of both the sending state and its citizens but also the receiving state, the activities performed by

1 Ustawa z dnia 25 czerwca 2015 r. – Prawo konsularne, Dz.U. 2023 poz. 1329 [Act of 25 June 2015 – Consular Law, Journal of Laws of 2023, item 1329].

2 Ustawa z dnia 21 stycznia 2021 r. o służbie zagranicznej, Dz.U. 2024 poz. 1691 [Act of 21 January 2021 on the Foreign Service, Journal of Laws of 2024, item 1691].

3 Czubik and Kowalski, 1999, pp. 17–18; Kleczkowska, 2015, pp. 165–179.

the professional consular apparatus. Unfortunately, it has not been codified at the international level. Contrary to the demand made by the Portuguese delegate during the work on the Vienna Convention on Consular Relations of 24 April 1963,[4] no definition of the concepts of professional and honorary consul was introduced into it.[5] As the literature points out, the effect of this procedure is to leave states free to define these institutions. However, as Czubik and Kowalski aptly state:

> There can be no doubt that states here do not have full freedom in defining these institutions. The practice of states, however, which differs as to the detailed solutions - with regard to, first of all, honorary consular officers - is identical as to the basic general principles relating to this institution (op. cit.)... in this sense, one can speak of the customary separation of these institutions and thus the definition of their conceptual meaning.[6]

While the proxenos may be regarded as the first historical embodiment of the honorary consul, similar intermediary figures appeared in the commercial republics of medieval Italy, where cities such as Venice, Genoa, and Pisa appointed mercantile agents abroad who simultaneously protected local traders and acted as informal diplomatic intermediaries. These early forms of consular representation reveal the long-standing practice of delegating state functions to private individuals of high social standing, especially in situations where the state lacked the resources or infrastructure to maintain a permanent official presence abroad. The tradition survived in the early modern period; expanding maritime and colonial powers – France, the United Kingdom, the Netherlands, and later, the United States – relied on merchants, shipowners, or local elites to fulfil consular tasks in distant ports, particularly outside Europe. In this sense, the honorary consul may be considered not an exception to the evolution of consular law, but rather a historically rooted and continuously adapted element of diplomatic practice.[7]

The modern rise in the importance of honorary consuls is also linked to the extraordinary expansion of global mobility, tourism, and trade in the 20th and 21st centuries. States with limited diplomatic networks have increasingly relied on honorary consuls to maintain a minimum level of representation. Meanwhile, even states with extensive networks, such as France, Italy, or the United Kingdom, use honorary consuls as an instrument of economic, cultural, and public diplomacy. According to available estimates, more than 90 states today maintain official honorary consular networks. Moreover, the total number of active honorary consuls worldwide exceeds 20,000, making them the most numerous category of persons performing consular functions globally. Simultaneously, the absence of uniform legal regulation

4 Journal of Laws of 1982, No. 13, item 98.
5 Staszewski, 2015, pp. 94–95.
6 Czubik and Kowalski, 1999, p. 61.
7 Leira and Neumann, 2017, pp. 223–235.

at the international level produces considerable diversity in national legislation, particularly regarding appointment procedures, admissible nationality, remuneration, immunity, disciplinary liability, and scope of functions.[8]

According to Art. 120 of pr.kons:

> An honorary consul of the Republic of Poland, hereinafter referred to as an 'honorary consul,' may be a Polish citizen or a foreigner permanently residing in the host country, possessing high authority and giving the guarantee of performing actions in accordance with the interests of the Republic of Poland.

According to Art. 121 of the pr.kons, 'The following classes of honorary consuls are established: 1) honorary consul general; 2) honorary consul; 3) honorary vice consul; 4) honorary consular agent'.

The key is the scope of the duties of the honorary consul. This is wide in Polish law; according to Art. 129 pr.kons:

The honorary consul supports the consul to whom he is subordinate, in terms of:

1) to protect the rights and interests of the Republic of Poland and its citizens in the host country;
2) to develop friendly relations and cooperation between the Republic of Poland and the host country;
3) strengthening ties between the Republic of Poland and Polish citizens, persons of Polish descent and persons declaring belonging to the Polish Nation, residing in the host country;
4) to develop and deepen economic, scientific, technical and cultural cooperation between the Republic of Poland and the host country, and to promote the Polish economy, science and culture and the Polish language;
5) providing consular assistance.

In a comparative perspective, the Polish legal model belongs to the group of normative systems that grant honorary consuls a broad mandate, but still clearly distinguishes between professional and honorary status. A stricter approach is visible in the legislation of Germany, where honorary consuls (Honorarkonsuln) are formally appointed by the Federal President on the recommendation of the Federal Foreign Office; their authorisation is significantly narrower in the field of notarial functions and civil-status certifications.[9] In contrast, the French system assigns honorary consuls (consuls honoraires) a much wider scope of administrative authority, including the possibility of issuing emergency travel documents, registering civil status events, and even exercising limited judicial functions in overseas collectivities.[10] The United States adopts a different model entirely: Its honorary consuls are

8 Stringer, 2007, pp. 5–18.
9 Bundesrepublik Deutschland, 1974.
10 Ministère des Affaires étrangères et du Développement international, 2013.

foreign nationals accredited by the U.S. Department of State but are strictly prohibited from performing most sovereign acts, as the U.S. constitutional system does not permit delegation of such authority to private individuals. Thus, the honorary consul, although present globally, is far from being a uniform legal institution.[11]

Moreover, in accordance with Art. 134 of pr.kons, the Minister of Foreign Affairs of the Republic of Poland may entrust an honorary consul, at his request, with the performance of certain notarial acts. That is, at the request of a Polish citizen or public administration body in the Republic of Poland, such a consul may then: prepare and certify excerpts, copies, excerpts and copies of documents; certify the authenticity of the signature and handwriting mark; and certify the date of presentation of a document, of a person's remaining alive or in a certain place.

As indicated in the doctrine:

> As for the performance of notarial activities, in accordance with Article 134 of the pr.kons, Article 33 of the same law also applies to honorary consuls, which stipulates that written authorization from the minister responsible for foreign affairs, granted in consultation with the minister of justice, is needed to perform the activities specified in Article 28(1) of the pr.kons. It seems that the need to obtain the approval of two ministers to perform notarial activities may constitute another 'sieve' for the selection of individuals who will be able to cope with these new functions. And if the assessment of an honorary consul's qualifications on appointment turns out to be flawed, the minister responsible for foreign affairs may change the scope of the honorary consul's consular functions (with the consul's consent - Article 124 pr.cons.). Secondly, Art. 134 pr.kons. states that entrusting the performance of notarial functions shall be done only in 'justified cases'.[12]

From the justification of the bill, it appears that such a case can be indicated by the honorary consul himself in the application, and that it can be a significant distance of the consular office headed by the honorary consul from the nearest professional consul or demand manifested by the Polish communities.[13]

The debate surrounding the extent of honorary consular authorisation is not unique to Poland. In the United Kingdom, honorary consuls operate under the Foreign, Commonwealth & Development Office (FCDO), and are expressly excluded from all forms of notarial intervention, even simple certification of signatures, precisely because of concerns about liability and legal certainty.[14] The Spanish model, in contrast, allows honorary consuls, subject to prior authorisation by the Ministry of Foreign Affairs, to legalise signatures and certify documents of commercial

11 U.S. Department of State, 2023.
12 Kleczkowska, 2015, p. 177.
13 Seventh Sejm, p. 53 Print No. 3290. [Online]. Available at: https://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=3290 (Accessed: 18 April 2026).
14 United Kingdom Parliament, 2014.

character, and receive and forward civil registry and passport applications in areas without a resident career consulate. However, they are not considered civil registry officials and may not exercise general notarial functions, which remain reserved to career consular officers.[15] The argument repeatedly raised in parliamentary and academic discourse is that the economic usefulness of honorary consuls, especially in trade promotion and tourism, often leads states to expand their functions beyond strictly consular tasks, risking a blurring of the line between public authority and private interest.

While the catalogue of activities of an honorary consul under Art. 129 pr.kons. does not raise major doubts, for it can be considered a certain worldwide standard, entrusting honorary consuls to perform even a limited catalogue of notarial activities raises a legitimate objection. The Polish notary's position is the position of a notary in the Latin notarial system: He is a highly specialised, independent, licensed public officer who watches over the security of legal transactions. This is in contrast to the Anglo-Saxon model of public notary, whose role is essentially limited to certifying documents and who does not need to have (and usually does not have) a legal education. For example, all real estate transactions in the Republic of Poland must, on pain of nullity, be conducted through notaries who draft notarial deeds. Notarial deeds cannot be drawn up by an honorary consul of the Republic of Poland; even a professional consul will draw them up, according to Art. 28 (3) pr.kons., only after its draft has been approved and authorised by the Minister of Justice (which, *nota bene*, the author has repeatedly done in 2015–2019 in the place of the Minister of Justice). However, when performing notarial acts that can be entrusted to an honorary consul, several dangers arise from certain aspects: the potential incompetence of the honorary consul (who does not need to have any special training or legal education, but may even have a poor understanding of the Polish legal system, especially when he or she is a citizen of the host country); and the dishonesty of the same, for it does not take much imagination to visualise the consequences of, for example, certifying the handwriting of a signature. For instance, it does not take much imagination to visualise the consequences of, for example, certifying the authenticity of a signature or being alive on a specific date in the area of inheritance law.

The introduction of this widely criticised solution in 2015 was accompanied by a heated discussion both in the professional and popular press, and in parliament where, besides the above-mentioned dangers, the prevalent problem of preserving the impartiality of honorary consuls was raised. While conducting business or professional activities, they very often use these powers for the benefit of such activities

15 Ministerio de Asuntos Exteriores y de Cooperación, 2007.

but not necessarily for their legality and the prestige of the sending state.[16] However, the provision was still enacted[17] and the *de lege ferenda* remarks should unequivocally advocate its repeal.

Concerns regarding potential abuses are not theoretical. Several high-profile controversies in recent decades have involved honorary consuls engaging in criminal activities under the cover of consular status, including cases of tax fraud, illegal arms trade, and money laundering identified in the United States, Germany, and Sri Lanka.[18] A 2023 investigative report by the International Consortium of Investigative Journalists documented more than 500 honorary consuls worldwide who had been accused of offenses ranging from corruption to supporting sanctioned regimes. This reveals the structural risks of a system that grants diplomatic privileges to individuals not employed or routinely vetted by the state apparatus.[19] Some policy-makers and investigators have called for an international register of honorary consuls and common vetting standards, as disclosed in global investigative research and European policy-impact reports.[20] Although no such reform has yet been implemented, the debate illustrates the tension between the flexibility and vulnerability of the institution.

Currently, the information published on the official website of the Polish government[21] shows that Poland has established about 250 honorary consuls.[22] Clearly, the institution is growing in popularity for over the past 20 years, as their number has almost doubled from 141 active honorary consuls appointed in 2005.[23] A similar

16 See, inter alia, Resolution No. IX/18/2015 of the National Notary Council of 9 May 2015 on the draft Consular Law. [Online]. Available at: https://orka.sejm.gov.pl/Druki7ka.nsf/0/28B5FD8DD67F6242C1257E4D0021C1D4/%24File/3290-003.pdf (Accessed: 18 April 2026), which states, among other things, that: 'The applied solution means de facto depreciation of notarial activities. It involves entrusting the performance of these activities – performed on behalf of the Republic of Poland – which should be performed by a person who has the character of a person of public trust in this regard – to a foreigner (who is most often an honorary consul). This involves a high risk of damage to the prestige of the RP. It should also be noted that such solutions in relation to honorary consuls are characteristic of countries where there is no notary public (and only public notaries operate, who, not being lawyers or persons of public trust, but being only 'certifying', are completely mistakenly identified with notary public). In the opinion of the NSC, this provision (i.e. the current Art. 134, together with the related Art. 135) should be removed from the law in its entirety.'

17 See more on the discussion of this solution and the circumstances of its enactment in Czubik, 2015, pp. 92–98.

18 Cenziper et al., 2022.

19 International Consortium of Investigative Journalists, 2023.

20 European Commission, 2023.

21 See: https://www.gov.pl/web/gov/katalog-jednostek (Accessed: 18 April 2026).

22 See the annex to the announcement of the Minister of Foreign Affairs of 11 September 2024 on the list of organisational units subordinate to or supervised by the Minister of Foreign Affairs (M.P. of 2024, item 811).

23 Szczepanik, 2005, p. 243.

expansion has happened in other Central European states. Hungary, for example, maintains 244 honorary consuls worldwide,[24] while the Czech Republic increased its network from 123 honorary consuls in 2003 to 216 by mid-2019, indicating a regional trend of externalising consular functions to non-professional actors to reduce budgetary pressure while increasing state visibility abroad.[25] Whether this development strengthens or weakens the overall credibility of consular activity largely depends on the regulatory safeguards and supervision mechanisms adopted by each state.

3. Trade Diplomacy

Another group of people who, without formally being members of the corps of the diplomatic and consular service, should play an important role in the field of economic diplomacy – supporting the economic development of Poland as a sending country – are the employees of specialised agencies located within diplomatic and consular representations. Traditionally, in Poland, as in many other countries, these were units like the offices of commercial counsels, in which some staff (i.e. at least the commercial counsels) themselves held diplomatic rank. Dissatisfaction with the often meagre results of the Economic and Commercial Departments inherited from the communist People's Republic of Poland that functioned at embassies led to a change in the system. Consequently, since 18 August 2017, the Law of 7 July 2017 on the Performance of Tasks in the Field of Promotion of the Polish Economy by the Polish Investment and Trade Agency Joint Stock Company[26] (hereinafter, the PAIH Law) has been in force. It states: 'The Agency's tasks referred to in Art. 2 may be performed with the assistance of foreign trade offices established and operated by the Agency in a legal and organisational form depending on the legal and economic conditions of the place of their establishment, including capital companies.' Today, these offices have been established in 57 countries, with some of them, such as the United States, having more than one.[27]

This solution has undoubted advantages, which is the functioning within the framework (at least theoretically less susceptible to the influence of current political conditions) along the lines of the classic commercial company, which is a joint-stock company; thus, it should be oriented to the efficient and economic achievement of the results for which it was established. However, its main drawback is the lack

24 Kovács, 2020, p. 248.
25 Ministry of Foreign Affairs of the Czech Republic, 2004, p. 148; Ministry of Foreign Affairs of the Czech Republic, 2020, p. 54.
26 Journal of Laws of 2022, item 1985.
27 PAIH, no date.

of direct and visible external environment connection with the sending country, which is typically ensured by the possession of diplomatic degrees by the staff and functioning within the framework of a network of diplomatic-consular missions. Of course, much depends on the specific conditions operating in the specific host countries. Still, this detachment from the official structures of the sending state in many cultural circles, and where the economy is closely linked to political power, hinders the goals that these entities are supposed to serve. In other words, in many markets, the lack of direct diplomatic support prevents or significantly hinders even the most competitive companies from entering and operating. Even the efforts of the most specialised agencies of PAIH operating in a given market will not change this because they lack the tools that, under the circumstances, guarantee economic success.

This structural limitation is particularly evident in regions where the economic system is intertwined with political patronage and where long-term business decisions are conditioned on high-level political endorsement.[28] In such markets, common in the Middle East, Central Asia, Africa and parts of Latin America, the ability to 'open doors', secure meetings with key decision-makers, or remove administrative obstacles often depends not on commercial expertise alone but on diplomatic presence. Numerous empirical studies show that in environments where political actors retain decisive control over market access and regulatory decisions, companies supported by embassy-based commercial counsellors enjoy significantly higher levels of institutional access and are better able to mitigate political-economic risks.

Reports by the Organisation for Economic Cooperation and Development (OECD) and United Nations Trade and Development (UNCTAD) underline that in politically centralised economies, diplomatic status functions as a form of institutional leverage, allowing commercial counsellors to intervene at ministerial or agency level in ways that private-sector trade offices cannot. The United Kingdom's Department for International Trade (DIT), in its Frontier Economics evaluation of trade promotion instruments in 2017, similarly found that diplomatic posts play a critical role in establishing credibility, particularly in markets characterised by opaque decision-making or high barriers to entry.[29]

Germany, France, Italy, Japan and South Korea all maintain integrated embassy-based trade sections, combining diplomatic authority with technical economic expertise. OECD comparative studies of trade promotion from 2019 and 2020 show that these hybrid systems consistently outperform decentralised or agency-only models, especially in 'relationship-driven' economies where political endorsement is often a prerequisite for long-term commercial engagement. In this context, the absence of embassy-linked commercial counsellors significantly limits Poland's ability to match the institutional support deployed by competing states.[30]

28 Czarnecka-Gallas, 2012, pp. 62–73.
29 Kostecki and Naray, 2007, pp. 19–20, 29–30.
30 Lee and Hudson, 2004, pp. 343–360.

In other words, in many markets, the lack of direct diplomatic support prevents or significantly hinders even the most competitive companies from entering and operating, which even the efforts of the most specialised agencies of PAIH operating in a given market will not change because they lack the tools that under the circumstances guarantee economic success. This diagnosis is consistent with international data: According to OECD analyses, the effectiveness of national trade promotion structures strongly correlates with the degree of integration between economic agencies and diplomatic networks.[31]

An additional problem is that, as it is estimated that dozens of international agreements regulating the economic cooperation of the Republic of Poland with other countries list Economic and Trade Departments as units, these agreements have not been renegotiated to replace them with offices of PAIH. This makes it difficult (and sometimes even impossible) to take advantage of the opportunities created by these agreements. In many cases, these bilateral treaties grant specific procedural rights or cooperation mechanisms exclusively to 'economic departments of embassies' or 'commercial sections'; these legal entities no longer exist in the Polish system.[32]

Since assuming that the offices of PAIH, as a commercial law company, would be the successors of the formally liquidated economic diplomacy agencies of the Republic of Poland (which were the Economic and Trade Departments) would be impossible, this creates an uncertain legal situation. In several agreements, the designation of the competent authority is not merely formal but determines eligibility for participation in joint committees, arbitration mechanisms, or preferential access to host-country ministries. Without amendment, these treaty-based instruments may remain inaccessible to PAIH.[33]

This begs the question of whether the choice of reforming an admittedly unsatisfactory part of the Republic of Poland's functioning abroad made in 2017 is appropriate and should not be redefined.

The reform undertaken in 2017 was intended to address the long-standing fragmentation of Poland's external economic instruments, which since the early 1990s had been dispersed among several ministries, trade promotion foundations, and sectoral agencies. The post-1989 transformation created a dynamic domestic private sector. However, the institutional architecture supporting exporters and investors remained largely unchanged, reflecting the logic of the communist-era system rather than the needs of a market economy. In this context, the liquidation of ministerial trade offices and their replacement with a centralised network of foreign offices operated by PAIH was conceived as a way to strengthen operational flexibility, emphasise business orientation, and facilitate cooperation with private partners abroad.[34]

31 Volpe Martincus and Sztajerowska, 2019, pp. 20–21, 25–29.
32 Kuźniar, 2025, pp. 510–530.
33 Schmalenbach, 2017.
34 Arak, 2024, pp. 507–522.

Yet, this administrative centralisation simultaneously broke a decades-long structural link between economic diplomacy and the formal diplomatic service, which historically had ensured continuity, political backing, and a clearly recognisable state identity in international markets. In systems with strong traditions of state-led economic diplomacy such as France, Japan, or South Korea, commercial agencies operate in immediate proximity to diplomatic structures, ensuring that political signals and economic initiatives reinforce each other.[35]

In many countries, similar reforms were conducted differently. Germany, Japan, and the United Kingdom reorganised their trade and investment promotion systems over the past twenty years, but retained strong and institutionalised connections between economic agencies and the diplomatic corps. German Trade & Invest, while a separate legal entity, operates directly within the strategic framework of the Federal Ministry for Economic Affairs and Energy, and cooperates closely with the network of German embassies, which remain the primary carriers of diplomatic authority.[36] Likewise, Japan External Trade Organization functions as a semi-public body but maintains extensive personnel exchange with the Ministry of Foreign Affairs and the Ministry of Economy, Trade and Industry, ensuring unified representation in politically sensitive markets.[37] The United Kingdom's model under the Department for Business and Trade (DBT) explicitly integrates trade officers into embassy teams, combining private-sector methods with the diplomatic reach of the FCDO.[38] Compared to these solutions, the Polish model appears significantly more separated from state authority than common in major economies.

Another structural weakness of the PAIH model is the limited diplomatic protection available to its foreign offices. Staff working in a commercial-law company cannot benefit from the immunities, privileges, and secure access channels enjoyed by diplomatic personnel.[39] In many markets, including large economies in Asia and the Middle East, access to ministries, regulatory agencies, and key decision-makers is conditioned on formal diplomatic status, or at least, on operation under an official governmental mandate. This structural asymmetry may undermine the effectiveness of Polish businesses seeking regulatory clarity, dispute resolution, or entry into sectors controlled by public authorities. Furthermore, the absence of diplomatic rank among PAIH personnel affects perceptions of credibility and seriousness: Foreign partners, particularly in emerging markets, often assume that only

35 UNCTAD, 2023, pp. 188–205.

36 Bozoyan, 2025, p. 1.

37 Japan External Trade Organization, 2020.

38 According to DBT, its United States network operates from the British Embassy in Washington and other consulate-generals, supporting United Kingdom businesses with 'expertise and contacts through our extensive network of specialists […] and staff in the British Embassy in Washington'. [Online]. Available at: https://www.gov.uk/world/organisations/department-for-business-and-trade-in-the-usa (Accessed: 18 April 2026).

39 Vienna Convention on Diplomatic Relations, Arts. 22–37.

embassy-based officials can represent genuine state interests or provide reliable governmental guarantees.[40]

Equally problematic are the information flow and institutional coordination. Prior to 2017, commercial counsellors, although not always effective, were at least integrated into the internal reporting systems of embassies. This ensured that the information gathered on local markets, political risk, and regulatory developments reached the Ministry of Foreign Affairs. Under the new model, foreign offices of PAIH send their reports exclusively to the agency's headquarters, while embassies and consulates have no automatic access to this data. Such institutional separation may hinder strategic planning, as economic intelligence collected by PAIH is not systematically linked with the political and security assessments conducted by diplomatic posts.[41]

This stands in contrast to best practices recommended by the OECD, the European Commission, and UNCTAD, which emphasise the centrality of integrated one-network systems in modern economic diplomacy, especially for medium-sized economies that must optimise limited resources.[42] Moreover, the fragmentation of information can lead to duplicated efforts, inconsistent messaging to potential investors, and delays in identifying emerging risks or opportunities; more cohesive systems can effectively mitigate such problems.

Meanwhile, the idea that the PAIH offices operate in a purely business-oriented manner does not fully match reality. Their effectiveness often depends on informal support from embassy staff – ambassadors, consuls general, or political sections – who provide institutional legitimacy and facilitate access to host-country authorities. Paradoxically, the very deficiencies created by the structural separation between PAIH and the diplomatic corps must be compensated by ad hoc cooperation at the local level, highlighting the fundamental interdependence of economic and political diplomacy.[43]

Long-term strategic concerns also arise. The fact that many bilateral agreements still refer to Economic and Trade Departments – entities that no longer exist – may lead to legal uncertainties; in extreme cases, it may create situations where Poland cannot fully enjoy the rights or mechanisms established under these agreements. Renegotiating dozens of bilateral treaties or memoranda is a lengthy and politically sensitive process, requiring high levels of diplomatic engagement. Until such renegotiations occur, PAIH offices may find themselves unable to rely on the full scope of cooperation instruments technically available to Poland on paper.[44] This legal vacuum can gradually weaken Poland's position in international trade negotiations

40 Reiterer, 2006, pp. 223–243.
41 van Bergeijk, 2018, pp. 95–125.
42 OECD, WTO and UNCTAD, 2013, pp. 5–8.
43 Riordan, 2003, pp. 129–136.
44 Emerson, 2004, pp. 13–15.

or in implementing economic cooperation frameworks dating back to the 1970s, 1980s, or 1990s.[45]

Finally, a key question remains whether the 2017 reform should be reassessed. An increasing number of experts highlight the need to rebuild closer links between trade promotion structures and the diplomatic service, possibly through hybrid models allowing for the coexistence of PAIH's business flexibility with the diplomatic authority of embassy-based officers.[46] Such an approach would not require abandoning the post-2017 system entirely but would instead restore a level of integration necessary for effective operation in politically complex markets. A thorough evaluation of the reform, considering comparative international models and the experience accumulated over the past several years, seems indispensable if Poland intends to strengthen its economic presence globally and ensure that its institutional architecture adequately supports the ambitions of Polish enterprises.[47]

4. Professionals (Judges, Prosecutors, and Notaries)

Another of group of interest are the various types of specialists who, at least in some countries where Polish diplomatic and consular posts face specific problems whose solution may be too great a challenge for their classical staff, could assist with the diplomatic staffs' work by effectively helping to protect the interests of the Republic of Poland and its citizens. Art. 7(8) of the u.sł.zagr. states: 'Whenever the law refers to a delegated employee, it means a person designated by a minister other than the minister in charge of foreign affairs or the head of a public finance sector unit, who performs the duties of support staff or service staff at a foreign post as determined by the designating authority'. To bring this issue closer, I focus on one of the most serious problems hindering the functioning of Polish citizens abroad, which the author personally encountered in 2015–2019 while serving as undersecretary of state at the Ministry of Justice in charge of, among other things, common justice and the international relations of the ministry.

The problem at the time was (and, unfortunately, still is) the existence of numerous transnational disputes regarding the issue of residence and custody of a child of a Polish citizen living abroad in a situation of dispute between his parents. Moreover, the institutions of foreign countries, obliged to assist the family, would abuse their powers and take children out of the custody of their parents, often including Polish citizens, and transfer them to specialised state institutions or foster families, including those from a completely different cultural background.

45 Łazor, 2018, p. 95.
46 UK Department for International Trade, 2022. pp. 4–6, 39–40, 52, 90–94.
47 OECD, 2023, pp. 5–6.

While such cases involve litigation resolved by both Polish and foreign family courts (sometimes contradictory), they also generate media interest and diplomatic tension. This is because not all states respect (or at least not to the same extent) international legal obligations, including those under the Convention on the Rights of the Child, signed by most of them and adopted by the United Nations General Assembly on 20 November 1989 in New York.[48] This convention includes, among other things, Art. 10(2), according to which:

> A child whose parents reside in different countries shall have the right to maintain regular, except in extraordinary circumstances, personal relations and direct contacts with both parents. To this end, and in accordance with the obligation of States Parties under the provision of Art. 9, para. 2, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to return to their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary for the protection of national security, public order, public health and morals, or the rights and freedoms of others, consistent with the other rights recognized in this Convention.

Due to the sensitivity of the issue, cases of this and similar types should be handled not only in the courts but also by diplomatic and consular representations with the utmost care and sensitivity, and using knowledge and experience that professional diplomats most often do not possess. The intersection of family law, international private law, and inter-institutional cooperation makes these cases uniquely complex. Moreover, the operations of child protection agencies in some states, although legitimate in the internal legal order, often raise serious concerns from the perspective of proportionality, cultural competence, and respect for parental rights in cross-border situations. The absence of Polish-speaking professionals, capable of communicating with the affected families and assessing the factual circumstances further exacerbates the risk of misunderstandings or procedural disadvantages.

In this situation, in 2015–2019, the idea emerged, in governmental spheres, to use the institution of the delegated worker to delegate to Polish posts located in countries where problems of this kind were the greatest (Norway, Germany, and the United Kingdom) to family judges with experience not only in jurisprudence but also often as clerks in the Ministry of Justice (for it is there, as judges delegated to the Ministry of Justice, that they usually coordinate the activities of the Ministry in this area). The belief was that judges with practical expertise in family and guardianship law, with procedural experience and the knowledge of international cooperation mechanisms (including Hague instruments) could serve both as advisors and operational support for consular staff. They could provide analytical assessments, participate in discussions with foreign agencies, and ensure that the legal position of Polish citizens was correctly understood and presented.

48 Journal of Laws of 1991 No. 120, item 526.

Note that the institution of a judge delegated to perform administrative duties at the Ministry of Justice has a long and good tradition in Poland. It was used in the period after Poland regained independence in 1918 until the outbreak of World War II. Even the communists occupying Poland in 1945–1989 did not abandon it. After Poland regained independence, it continued to be used and is still used today. The idea of delegating judges to perform administrative duties at the Ministry of Justice (and, for more than a dozen years, other institutions affiliated with that ministry, including the National School of the Judiciary and Public Prosecution, an institution that prepares candidates for judicial and prosecutorial service, and provides continuing education for judicial and prosecutorial personnel; or those supervised by that ministry, such as the Justice Institute, which is a think tank of the Ministry of Justice) is a simple consequence of entrusting that office with the administrative supervision of the entire general and military judiciary.

This historical continuity is not accidental: The Polish system traditionally relied on the professional, apolitical expertise of judges to ensure that ministerial supervision did not violate judicial independence. Delegated judges brought into the ministry an insider's understanding of judicial work, enabling them to evaluate systemic problems, like delays, inefficiencies, structural misallocations, with a perspective unavailable to civil servants or political appointees. Their presence in administrative structures also mitigated the risk of political interference by ensuring that supervision remained rooted in constitutional principles and long-standing legal culture.

As part of the Minister of Justice's administrative oversight of the entire general and military judiciary, activities need to be performed at the interface of pure administration, such as the organisation of the court network, investment tasks, and budgeting, with those already very close to the judiciary's mission, which is the administration of justice (i.e. the resolution of disputed cases by independent courts composed of independent judges). These issues require not only unique competences, which are almost exclusively possessed by judges as they acquire these during many years of judicial work in the courts, but also sensitivity allowing to reconcile obvious requirements related to ensuring constitutional[49] and convention guarantees to the sub-judge;[50] this involves using supervisory measures, such as vetting or visiting the activities of the court, or even a demand to initiate by the Minister of Justice

49 Art. 45(1) of the Constitution of the Republic of Poland (Journal of Laws of 1997, No. 78, item 483): 'Everyone has the right to a fair and public hearing without undue delay by a competent, independent, impartial and independent court'.

50 Art. 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1993, No. 61, item 284): 'Everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial court established by law in deciding his civil rights and obligations or the merits of any accusation in a criminal case brought against him. Proceedings before the court shall be public, but the press and the public may be excluded from all or part of a court hearing for reasons of morality, for reasons of public order or state security in a democratic society, when the welfare of minors requires it or when it serves to protect the private lives of the parties, or in special circumstances, within the limits deemed absolutely necessary by the court, when publicity would be detrimental to the interests of justice'.

(who receives thousands of complaints from dissatisfied parties of various types of court proceedings) disciplinary proceedings against a judge who, for example, due to incompetence or laziness, has been convicted of a crime. Due to incompetence or laziness, for example, leads to the gross protraction of ongoing proceedings with respect to judicial independence. This means that this supervision and the measures used within the framework of this supervision can in no way encroach on the judicial sphere, within which judges are independent.

The skilful reconciliation of these challenges faced by every apparatus of every (regardless of political provenance) Minister of Justice is made possible by the constitutional position of the judge. Besides his competence and unique knowledge of how the courts really function, he has the right, unlike any civil servant, to refuse at any time to carry out the order of any superior in the ministry structure, including, for example, ones that the delegated judge believes is illegal. A delegated judge can resign from his delegation at any time with immediate effect; thus, the next day, he returns to his home court and again starts performing his normal judicial work. Thus, the possibilities of pressure on his decisions (e.g. politically motivated) are much less than the pressure that can be exerted on a civil servant; when a judge refusing to carry out an unlawful order returns to his court, the civil servant risks losing his job, which is his source of livelihood for himself and his family.

Hence, since the pre-war period, one of the deputy ministers of justice, the one responsible for overseeing the general judiciary, must, by law, be a delegated judge. It is he who, with the help of other judges delegated to the Ministry of Justice, performs administrative oversight activities over the general and military judiciary precisely so that they are not carried out by a professional politician such as the Minister of Justice or his other political deputies, or at their behest by civil servants who fear to oppose unlawful orders because of the possibility of losing their jobs. The author held such a position from 2015 to 2019.

Concurrently, the long-standing tradition of delegating judges to the Ministry of Justice created a reservoir of highly specialised personnel capable of handling legal matters at the interface of domestic and international law. Their experience in cross-border legal cooperation, participation in negotiations, and involvement in legislative processes naturally predisposes them to roles requiring diplomatic sensitivity. Unlike many legal systems, Poland historically cultivated a model in which judicial expertise supported the executive in matters requiring a deep understanding of the administration of justice. Hence, the idea of deploying judges to diplomatic and consular missions was not an accidental or experimental concept, but the logical extension of a long-established institutional philosophy.

The system of delegation of judges is complemented by the prohibition, resulting from the Constitutional Court's judgment of 15 January 2009, K 45/07[51] of a judge delegated to the Ministry of Justice or other political institutions; Art. 77 Sec. 2b

51 Journal of Laws of 2009. No. 9, item 57.

of the Act of 27 July 2001, Law on the Common Court System[52] (hereinafter, u.s.p.) states that:

> A judge may not combine the function of adjudication with the performance of administrative duties in the Ministry of Justice or other organisational unit subordinate to the Minister of Justice, the Chancellery of the President of the Republic of Poland, the Chancellery of the Prime Minister or the office serving the minister responsible for foreign affairs.

The *ratio legis of* this prohibition stems from the Constitutional Court's obvious observation that during the period of delegation to an institution of a political nature such as the Ministry of Justice, a judge performing official duties is obliged to perform the instructions of his superiors. This cannot be reconciled with his constitutional position and the attribute of independence to which he is entitled in the judicial sphere.

By the same token, he cannot concurrently be an element of the executive power as an official in a ministry that is part of the executive branch and a holder of another segment of state power, which is the judiciary. The constitutional architecture of Poland, rooted in the classical Montesquieu-inspired separation of powers, demands a clear demarcation between judicial independence and executive loyalty. The Constitutional Court merely reaffirmed this principle by emphasising that no judge can simultaneously remain independent and subject to ministerial instruction.

To allow judges to perform specialised duties in diplomatic and consular posts of the Republic of Poland, the u.s.p. was amended, as of 12 August 2017, by introducing the provision of Art. 77 Sec. 1(2b), which states:

> The Minister of Justice may delegate a judge, with his or her consent, to perform the duties of a judge or administrative activities in an office serving the minister in charge of foreign affairs – at the request of the minister in charge of foreign affairs.

In terms of effectiveness in carrying out the tasks entrusted to such judges, the prognosis was good; the above-described competence of delegated judges and their systemic status, so desirable in the Ministry of Justice and its affiliated agencies, would also be a great enhancement in relations with the competent authorities of foreign countries.

Regrettably, such delegation has never happened to date. Officially, this has been hindered by alleged legislative inadequacies because it has been argued that the delegation of a judge to the Ministry of Foreign Affairs is not the same as the delegation of a judge to perform activities outside the borders of the Republic of Poland within the network of diplomatic and consular posts, and the legislation would have to be amended to do so. Meanwhile, it is unofficially known that this is because the

52 Journal of Laws of 2024, item 334.

Minister of Foreign Affairs has never submitted an application for the delegation of a judge to the Minister of Justice because the professional diplomats who would be assisted by such a delegated judge were reluctant to do so. Thus, so far, this institution remains unused, which makes it impossible to verify, in practice, the assumptions behind its introduction into the Polish legal system.

Besides judges, note that sometimes, the highest-class specialists in matters in the area of criminal law in the broadest sense, and combating crime and international cooperation in criminal matters, are prosecutors. Therefore, they, in accordance with Polish law and constitutional tradition, can also be and are delegated to the Ministry of Justice, dealing especially with legislation in the area of criminal law and organisation of the work of the prosecutor's office; in Poland, the Minister of Justice is simultaneously the Prosecutor General. Further, for example, they are involved in extradition, which is a traditional power of the Minister of Justice not just in the Polish legal system. Considering the complexity of modern international criminal cooperation, including extradition, mutual legal assistance, transfer of sentenced persons and cross-border investigations, the expertise of prosecutors could substantially support diplomatic missions in countries where such matters arise frequently or where systemic obstacles hinder effective cooperation.

In a situation where Polish judges specialising in family cases could appear in some Polish diplomatic or consular posts on a delegation basis, officers of the Polish army, police, and other services have been functioning there for a long time (more on this later). In some situations, the diplomatic and consular staff may also need to be supported with the knowledge and experience of the delegated prosecutor. For the time being, however, this is impossible because the Law of 28 January 2016, Law on the Public Prosecutor's Office (hereinafter, p.prok.)[53] in the catalogue. In principle, according to Art. 106, which normalises the institution of delegation of the public prosecutor, no agencies of the Ministry of Foreign Affairs are present, including diplomatic or consular posts. As it seems justified here, one may reasonably formulate a postulate for the amendment of Art. 106 of the Public Prosecutor's Code by adding to it a provision modelled on Art. 77 of the Public Prosecutor's Code to strengthen, with representatives of this institution, those Polish offices too which, due to special conditions in a given country, need it.

Completing this catalogue, note that within the framework of *de lege ferenda* postulates, a proposal definitely worth considering is supporting the staff of Polish consular posts in the performance by consuls of their notarial functions by employing, in them, persons who have completed notarial training but did not pass or did not attempt to pass the final notarial exam. These persons, being professionally prepared to perform notarial activities, would certainly perform them within the framework of their consular functions at a professional level unattainable for professional consuls. This is even more true for honorary consuls, who, as a rule, do not even have a legal education, and not to mention specialised preparation for performing

53 Journal of Laws of 2024, item 360.

notarial activities. They can provide invaluable assistance to them and entities that, for various reasons, cannot perform these activities with a notary based in the territory of the Republic of Poland.

As indicated in the related literature, such a solution is inspired by the French solutions, where professional lawyers (including judges and people with experience in working in a notary's office) are employed in the foreign service could successfully work in Poland not only for the reasons indicated above, but also given the insufficient number of candidates for notaries compared with market needs.[54] The French model demonstrates that embedding legal professionals within foreign service structures significantly increases the quality of notarial and quasi-notarial acts performed abroad, reduces the risk of errors, and expands the trust of local authorities and the Polish diaspora in consular actions. The adaptation of such a model to Polish conditions can require limited legislative amendments but would result in a substantial improvement in the legal security of Polish citizens abroad.

In addition, adopting such a solution can serve not only the practical needs of consular offices but also the broader systemic objective of enhancing the professionalism of Polish foreign service structures. Many states, particularly those with strong civil law traditions, rely on legally trained personnel in their embassies and consulates to perform authentication, certification, and advisory functions. These specialists effectively bridge the gap between domestic legal systems and the needs of citizens abroad. For Poland, which maintains a large and highly mobile diaspora, the creation of a semi-notarial corps within consular structures could significantly reduce the burden on consuls and minimise the legal risks associated with improperly executed notarial acts.

Such a solution would also fit well within the logic of Art. 134 of the pr.kons., which already permits entrusting consuls with the performance of certain notarial acts. Yet, as practice and doctrine emphasise, entrusting such competencies to persons without complete legal training carries considerable risks. The literature highlights instances in which consular staff, acting in good faith but without full legal insight, committed procedural errors that would have been easily avoided by a professional trained in notarial practice. Consequently, supplementing consular teams with individuals completing notarial training, even if they did not ultimately obtain the title of notary, can fill a gap between the growing demand for legal-technical services abroad and the limited capabilities of the existing consular framework.

Moreover, note that the presence of such specialists can support consuls in handling more complex legal matters which require familiarity with formal requirements and documentary practice, such as inheritance declarations, powers of attorney, marital property agreements, or certifications needed for cross-border civil status proceedings. The growing mobility of Polish citizens has resulted in a notable increase in the number of these cases and consular posts are increasingly struggling to meet these expectations, particularly where local legal systems impose complex

54 Czubik, 2019, pp. 17–19.

requirements. In this sense, the proposed reform would not only enhance procedural security but also strengthen the prestige of consular offices by improving the quality and reliability of the services they provide.

A broader comparative perspective demonstrates further arguments in favour of the reform. In several European Union (EU) Member States, notably France, Italy, and Spain, consular structures have long employed legally trained specialists who support consuls in performing tasks that in their domestic systems would be reserved for notaries or other legal professionals. These states recognised early that the complexity of cross-border legal transactions requires the presence of highly skilled personnel capable of managing formalities on a level equivalent to that expected domestically. Poland, despite having a strong notarial tradition, remains more conservative in assigning legal roles to consular offices abroad, although the needs of its citizens have grown substantially over the last two decades.

Extending this reasoning, the presence of such specialists can also alleviate the burden on the Ministries of Foreign Affairs and Justice, both of which are often consulted when consular officials encounter legal questions beyond their expertise. This would ensure faster decision-making, reduce institutional bottlenecks, and improve legal certainty. Moreover, by placing trained quasi-notarial personnel directly within consular posts, Poland would approximate the model already recommended in contemporary diplomatic management literature, which stresses the importance of professional diversification within foreign service structures.

Finally, it is worth situating these considerations within the broader context of the evolution of diplomatic and consular functions. Contemporary foreign service institutions increasingly rely on mixed professional teams rather than exclusively career diplomats. This trend reflects the growing complexity of international relations, where consular protection, cross-border family law, criminal cooperation, migration management, and international commerce increasingly require domain-specific expertise. Diplomats alone, even the most capable, cannot reasonably master all of these highly specialised fields. Thus, the Polish proposals discussed here align with global tendencies acknowledging that effective foreign policy requires multidisciplinary staffing models which integrate legal, economic, cultural, and technical expertise.[55]

In this regard, the deployment of judges, prosecutors, and legally trained notarial specialists should not be perceived as a departure from diplomatic tradition, but rather as its natural extension. Historically, consuls were not only representatives of state authority but also key legal intermediaries in foreign jurisdictions. Over time, the strict professionalisation of diplomatic services sometimes resulted in an overly narrow understanding of consular functions – one that underestimated the need for technical legal knowledge indispensable in a globalised world. Therefore,

55 Haynal et al., 2013, pp. 1–5.

reintroducing specialised legal personnel into consular structures restores an older, classical conception of consular work, consistent with long-standing European traditions.[56]

In conclusion, the proposals for de lege ferenda reform, including the delegation of judges to foreign posts, possibility of delegating prosecutors, and employment of legally trained notarial specialists, represent coherent and realistic steps toward improving the functioning of Polish diplomatic and consular posts. They can directly address systemic challenges already identified in practice, increase the legal protection of Polish citizens abroad, and raise the substantive quality and prestige of Polish consular services. Moreover, these proposals remain fully consistent with the broader trajectory of administrative modernisation and professional specialisation observable across diplomatic services internationally.

5. Cultural Diplomacy

Another classic field of activity performed within diplomatic and consular missions is cultural activity. Examples of institutions promoting a country's cultural achievements abroad are well known, with the best-known ones being the British Council, French Alliance Française, or Spanish Cervantes Institute. This path has also been used in Poland to expand the cultural offer of the agencies of the Polish state directed abroad beyond the classic framework resulting from the performance of official duties by employees of Polish diplomatic and consular posts.

Over the past decades, cultural diplomacy has increasingly become a pillar of a state's soft power, understood as the ability to shape the preferences and perceptions of foreign societies through the attractiveness of its culture, values, and achievements. Many scholars emphasise that in the 21st century, cultural prestige often plays a role equal to or even greater than military or economic influence in determining a state's international position.[57] In this context, the Polish state, seeking to build a positive and modern image of the Republic of Poland abroad, counteract negative stereotypes, strengthen ties with diasporas, and cultivate awareness of Polish heritage, gradually constructed a multilayer institutional system supporting cultural presence overseas. This system operates in parallel with classical diplomacy, creating a complementary channel of influence.

The situation in this regard is somewhat reminiscent of the above-described construction of the functioning of Polish economic diplomacy; the Economic and Commercial Departments were abolished and replaced by the Offices of PAIH. Still, some, generally the larger ones, still employ people dealing with economic and commercial

56 Lee and Quigley, 2008, pp. 3–25, 258–276, 541–548.
57 Nye, 2004, pp. 1–12.

issues, and those involved in the promotion of Polish culture abroad. The restructuring in both spheres, economic and cultural, arose from the attempt to modernise instruments available to the Polish state, and adapt them to the expectations of foreign partners and audiences. However, cultural diplomacy, unlike economic promotion, remains more closely integrated with the Ministry of Foreign Affairs due to the symbolic dimension of culture, which is inseparable from national identity and state representation.[58]

The basic activity in the area of promoting Polish culture is carried out through a network of Polish Institutes or Institutes of Polish Culture, of which 26[59] are currently located in various parts of the world, especially in the largest and most important countries such as the United States, China, Russia, India, or Japan, and in those with a large Polish diaspora, such as Germany, France, the United Kingdom, Spain, Lithuania, Belarus, Ukraine, or Israel. They are under the authority of the Minister of Foreign Affairs and operate based on international agreements. Polish Institutes and Institutes of Polish Culture, like diplomatic and consular posts (including honorary consulates), are directly subordinate to the Minister of Foreign Affairs and function in direct connection with Polish diplomatic posts sometimes even acting as cultural departments of embassies such as in Belgium or China.

In practice, these institutions are the primary instruments of Poland's cultural presence abroad. They organise exhibitions, concerts, film screenings, lectures, conferences, educational workshops, and numerous long-term thematic programs. Their activities correspond to strategic objectives of Polish foreign policy, including strengthening Poland's visibility, promoting contemporary Polish creativity, and maintaining contact with cultural elites of host countries. In many capitals, they serve as recognisable hubs of cultural life comparable to Western counterparts.[60]

Where their degree of separation is greater, for example, when the headquarters of the institute is located in a locality with no Polish diplomatic post, such as in Düsseldorf (Germany), they closely cooperate with the staff of Polish diplomatic and consular missions. What they have in common is that the staff employed therein have the status of employees of official agencies of the Polish state. This provides institutional legitimacy, a feature illustrating the non-functionality of the economic diplomacy model described earlier.

In 95 countries with Polish diplomatic missions, while Polish Institutes or Institutes of Polish Culture have not been established, cultural sections of varying size are present. These units implement similar tasks, albeit with limited capacity. Consequently, Poland's cultural presence abroad remains asymmetrical.

58 Cull, 2019, pp. 24, 61–62.

59 See the annex to the announcement of the Minister of Foreign Affairs of 11 September 2024 on the list of organisational units subordinate to or supervised by the Minister of Foreign Affairs (M.P. of 2024, item 811).

60 Ang, Isar and Mar, 2015, pp. 365–381.

Completing the overall picture in the area of culture is the activity of Polish state cultural institutions located in Poland, whose statutory tasks include activities in the field of promoting Polish culture abroad. These include the Polish Film Institute, Book Institute, Zbigniew Raszewski Theatre Institute, Frederic Chopin National Institute, and Adam Mickiewicz Institute. The very names of these institutions illustrate the profile of their activities; they are engaged in the promotion and organisation of cultural events in the areas in which they specialise, like film art, theatre art, literature, and music.

Only last of them, the Adam Mickiewicz Institute, is not so obvious, and thus, requires an introduction. It is a state cultural institution operating based on the Act of 25 October 1991 on the organisation and conduct of cultural activities,[61] established on 1 March 2000 by the Minister of Culture and National Heritage and supervised by him.[62] It is a cultural institution specialising in activities abroad unlike the others mentioned above, where foreign activities are only a part of the activities performed.

According to Sec. 4(1) of the Statute granted by the above-mentioned Minister: 'The purpose of the Adam Mickiewicz Institute is to present the Polish culture abroad and initiate international cooperation and cultural exchange in line with the statement of the foreign policy and foreign cultural policy of the Republic of Poland'. The Sec. 4 para. 3 of the Statute states: For the purposes of accomplishing the objectives stipulated in these Articles of Association, the institute shall cooperate mostly with:

1) entities in charge of developing and pursuing the state policy regarding international cooperation and cultural exchange;
2) foreign diplomatic missions in Poland and foreign culture, science and media institutions; research centres and non-governmental organisations; and
3) representatives of local and foreign cultural, scientific, research and media sectors.

The institute's programs (including major thematic seasons, touring exhibitions, and international residencies) demonstrate increasing professionalisation. It simultaneously functions as an executor of national cultural policy, and a mediator between public institutions, civil society, and international cultural partners.

It also plays a crucial role in digital cultural diplomacy. The platforms it operates, including *Culture.pl*, reach millions of users globally. Digital formats such as virtual exhibitions, online festivals, or streaming projects allow Poland to expand its soft power beyond traditional geographical constraints. Research shows that states using digital cultural diplomacy achieve broader and more diversified influence networks.[63]

61 Journal of Laws of 2024, item 87.
62 https://iam.pl/en/about-us/adam-mickiewicz-institute (Accessed: 18 April 2026).
63 Cull, 2019, pp. 143–165.

Looking ahead, cultural diplomacy in Poland is likely to expand along several axes:

a) strengthening long-term strategic planning,
b) deepening cooperation with diaspora communities,
c) enhancing digital tools,
d) integrating cultural diplomacy with public diplomacy,
e) supporting regional initiatives, and
f) developing public-private partnerships in the cultural sector.

These processes indicate that cultural diplomacy has become an indispensable component of Poland's international presence.

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6. Uniformed Services

The last group of people who, without being strictly members of the diplomatic and consular staff, perform important activities for the Polish state are representatives of various types of uniformed services. Of course, this area is not a purely Polish peculiarity. The global standard is the existence in diplomatic missions of military attachés and police liaison officers who facilitate the establishment of relations with relevant agencies of the host state in the area of internal and external security. As a rule, they are not subject to acceptance by the host state, but the basic act of international law in this area, which is the Vienna Convention on Diplomatic Relations, drawn up in Vienna on 18 April 1961 (hereinafter, the Vienna Convention).[64] It clearly states in Art. 7: 'Subject to the provisions of Arts. 5, 8, 9 and 11, the sending State may appoint at its discretion the staff of the mission. For military, naval and air attachés, the receiving state may require that their names be submitted to it in advance for its consent.'

In practice, the attaché system has long been recognised as an indispensable instrument of defence diplomacy. States rely on it to maintain continuous situational awareness, foster interoperability with partner countries, and ensure that their defence policies are coherently communicated abroad. The presence of uniformed personnel at diplomatic posts also strengthens crisis-response capabilities in situations requiring coordinated military–civil actions, such as evacuations, repatriations, or the provision of consular assistance in conflict zones.

The legal basis for the functioning of professional soldiers in the structures of Polish diplomatic missions is Art. 27 of the u.s.zagr., according to which:

(1) The official relationship and the resulting rights and obligations of soldiers and officers of the Military Counterintelligence Service and the Military Intelligence

64 Journal of Laws of 1965 No. 37, item 232.

Service serving in foreign missions are determined by separate regulations. (2) The persons referred to in paragraph 1, designated to perform the tasks of the Minister of Defence in a foreign post shall be given the diplomatic rank of: 1) defence attaché (military, naval, aviation) or 2) deputy defence attaché (military, naval, aviation). (3) The Minister responsible for foreign affairs and the Minister of Defence shall determine, by order, the specific rules for the performance of official duties by the persons referred to in paragraph 1, as well as the organization and functioning of defence attachés in foreign missions, taking into account the provisions of the Act of March 11, 2022. on Defence of the Fatherland (Journal of Laws of 2024, item 248, 834, 1089, 1222, 1248 and 1585) and the Act of June 9 2006 on the service of officers of the Military Counterintelligence Service and the Military Intelligence Service (Journal of Laws of 2023, item 2098).

As defence attachés increasingly perform analytical, representational, and coordination functions, their role expands beyond the traditional observation of host-state forces. They now facilitate procurement projects, defence-industry cooperation, and bilateral training activities, and support dialogue within the North Atlantic Treaty Organization and EU defence formats. Their advisory function towards ambassadors is particularly significant, ensuring that diplomatic representations maintain strategic coherence with national defence policy.

According to Art. 203 of the Law of 11 March 2022 on Defence of the Homeland[65] (hereinafter, u.o.o.):

> 1. A professional soldier may be designated or directed to perform professional military service outside the country. (2) To perform professional military service outside the country shall designate: 1) the Minister of Defence – professional soldiers in service positions with the rank of colonel (commander) to the rank of general (admiral) and to which he designates under the provisions of separate laws; 2) the head of the organizational unit responsible for human resources – other professional soldiers. (3) The Chief of the General Staff of the Polish Armed Forces directs to perform professional military service abroad. (4) During the performance of professional military service outside the country, the professional soldier shall be subject to the authority determined by the Minister of Defence. During the performance of official tasks outside the state, a professional soldier may be subordinate to, respectively, depending on the place of professional military service: 1) the head of the foreign post in which he was assigned to perform professional military service; 2) the head of the foreign post in which he was assigned to perform professional military service; 3) a Polish military representative – in the case of service in a position in the Polish military representation to an international organization or to an international military structure, to the armed forces or to other defence structures of foreign countries.

65 Journal of Laws of 2024, item 248.

The specific rules for the performance of service by professional soldiers in the defence attaché office that are part of the structure of Polish embassies are regulated by the Ordinance of the Council of Ministers of 27 March 2024 on the performance of professional military service outside the country[66] issued pursuant to Art. 203(8) of the u.o.o. The organisation and functioning of defence attaches is regulated by an order issued jointly by the Ministers of Foreign Affairs and National Defence dated 27 June 2022, on specific rules for the performance of official duties by soldiers and officers of the Military Counterintelligence Service and Military Intelligence Service serving in foreign missions of the Republic of Poland, and the organisation and functioning of defence attaches in foreign missions of the Republic of Poland[67] issued pursuant to Art. 27 (3) u.s.zagr. This is an act common to 'ordinary' professional soldiers and officers of the Polish military intelligence services, namely the Military Intelligence Service and Military Counterintelligence Service.

The functioning of the latter is regulated by the provisions of the Act of 9 June 2006, on the service of officers of the Military Counterintelligence Service and Military Intelligence Service[68] (hereinafter, u.s.f.). According to its Art. 15:

> 1. An officer may be entrusted, for a period of up to 6 months, to perform official duties in another position. In such case, the officer's emoluments may not be reduced. (2) An officer, when it is justified by the performance of the tasks of the Internal Security Service (SKW) or the Internal Security Service (SWW) respectively, with his/her consent, may be delegated to perform official duties outside the SKW or the SWW, after being transferred to the disposal of the Head of the SKW or the Head of the SWW respectively. The provisions of Art. 13 shall not apply. (3) The Minister of National Defense shall define, by way of regulations, separately for the Internal Security Service and the Internal Security Service, the conditions and procedure of secondment, the rights and obligations of an officer during secondment, the amount and manner of payment of emoluments and other pecuniary benefits to which a seconded officer is entitled, taking into account the place, as well as the nature and scope of his/her official tasks performed outside the Internal Security Service or the Internal Security Service, as well as shall determine, taking into account the provisions on the protection of classified information, the specific rights and obligations of an officer performing service outside the country.

In fulfilling the statutory delegation, the Ordinance of the Minister of Defence of 29 September 2006 on the secondment of an officer of the Military Intelligence Service to perform official tasks outside the Military Intelligence Service[69] and Ordinance of the Minister of Defence of 29 September 2006, on the secondment of an

66 Journal of Laws of 2024, item 480.
67 Official Journal of the Ministry of Defence, 2022, item 107.
68 Journal of Laws of 2023, item 2098.
69 Journal of Laws of 2023, item 1384.

officer of the Military Counterintelligence Service to perform official tasks outside the Military Counterintelligence Service[70] were issued. They regulate, in detail, the powers and duties of officers of these services seconded outside their structure, including to Polish diplomatic missions, and within their structures at the defence attaché office.

Finally, based on the Police Act and u.s.zagr, and the Agreement on the Principles of Operation of Police and Border Guard Liaison Officer Positions at Foreign Posts of the Republic of Poland, concluded in Warsaw on 24 March 2016 between the Ministers of Foreign Affairs, and Internal Affairs and Administration (hereinafter, the 2016 Agreement),[71] and the Agreement of 11 October 2007 between the Commander in Chief of the Police, Commander in Chief of the Border Guard, and Head of the Customs Service on the joint use of Police and Border Guard liaison officers by the Police, Border Guard, and Customs Service (hereinafter, the 2007 Agreement),[72] 11 liaison officers are currently present in key countries from the perspective of the tasks of the Polish police and other civilian uniformed services: Ukraine, Germany, France, the United Kingdom, Turkey, Norway, Hungary, Italy, Spain, Georgia, and the United States. Until recently, they also operated in Belarus and Russia; however, due to interstate tensions, their mission was terminated in 2020 and 2022, respectively.[73] The Border Guard currently has its own liaison officers in Germany and Ukraine, besides two officers who represent the entire EU by serving as European Return Liaison Officers in Uzbekistan and Vietnam.[74]

Liaison officers represent a practical response to modern transnational threats such as cybercrime, trafficking networks, terrorism, irregular migration, and organised criminal activity. Their effectiveness lies not only in their operational knowledge but also in the trust-based relationships they develop with foreign services; these relationships are impossible to build through purely diplomatic channels.

The Police Liaison Officer represents the Police (and, if necessary, other uniformed services subordinate to the Minister of Internal Affairs and Administration, or the Customs Service subordinate to the Minister of Finance). He is an officer of the Police or Border Guard as a service subordinate to the Minister of Internal Affairs

70 Journal of Laws of 2014, item 1036.

71 Unpublished. Available through access to public information.

72 Dz.Urz.KGP of 2007, No. 20, item 153.

73 https://info.policja.pl/inf/wspolpraca-miedzynarod/oficerowie-lacznikowi/52161/Oficerowie-lacznikowi-Policji.html (Accessed: 18 April 2026).

74 https://www.strazgraniczna.pl/pl/straz-graniczna/wspolpraca/1647/Glowne-obszary-wspolpracy-miedzynarodowej-Strazy-Granicznej.html (Accessed: 18 April 2026).

and Administration.[75] However, as a person designated by the Director General of the Foreign Service, he is a *de facto* representative of the Republic of Poland. As a member of the foreign service, he has rank, immunity, and a diplomatic passport.[76] Recall that, according to the Vienna Convention, it is the head of mission or a member of the diplomatic staff, namely persons who have a diplomatic rank (as opposed to administrative or technical staff, whose members do not have such a rank), who can represent the sending state not only before the authorities of the host country but also before any international organisation.[77]

Clearly, the formal status of a liaison officer is significantly different from that of other representatives of the uniformed services undertaking tasks abroad, who are not members of the diplomatic staff specifically because the rules of subordination of liaison officers are dual. According to Sec. 3 of the 2016 Agreement:

> 1. The liaison officer is organizationally subordinate to the head of the foreign post. (2) Instructions given to the liaison officer by the head of the foreign post may not relate to duties arising from service in the Police or the Border Guard or impede the performance of tasks performed for the Minister of Internal Affairs and Administration, the Chief Commander of the Police or the Chief Commander of the Border Guard. (3) Substantive supervision over the performance of tasks by the liaison officer shall be exercised by the competent supervisor. (4) Substantive supervision over the performance of tasks of the liaison officer in cases ordered by the Minister of Internal Affairs and Administration shall be exercised by the Minister of Internal Affairs and Administration. In summary, the status and construction of the liaison officer function can be described as a hybrid construction combining elements characteristic of the status of a uniformed services officer with the status of a diplomat – similar, moreover, to the status of a military attaché.

75 See Agreement 2016: 'Sec. 1 (1) In foreign missions of the Republic of Poland, hereinafter referred to as 'foreign missions', there shall be representatives of law enforcement services supervised by the Minister of Internal Affairs and Administration, hereinafter referred to as 'liaison officers'. Sec. 2(1) Sentence 1 Liaison officers shall be appointed and dismissed by the Director General of the Foreign Service on the application of the Chief Commander of the Police - with respect to Police liaison officers and the Chief Commander of the Border Guard - with respect to Border Guard liaison officers, hereinafter referred to as 'relevant supervisors', submitted after obtaining the approval of the Minister of Internal Affairs and Administration.'

76 See Agreement 2016: 'Sec. 2(7) Upon fulfilment of the conditions set forth in paras. 2–4 and 6, the Director General of the Foreign Service shall confer on a liaison officer, in consultation with the appropriate superior, a diplomatic rank in accordance with the adopted service pragmatics, for the time necessary to perform the tasks of a liaison officer in a foreign post. Sec. 2(9) The Director General of the Foreign Service, in consultation with the appropriate superior, shall, upon application or after consultation with the head of the foreign post, decide on the conferring of further diplomatic degrees on the liaison officer'.

77 See Art. 5(3) of the Convention: 'The head of a mission or a member of the diplomatic staff of a mission may represent the sending state before any international organization'.

Officers designated as liaison officers are treated as a channel for information exchange. The basis for the exchange of information between law enforcement agencies of different countries is provided in Polish law by the Act of 16 September 2011 on the Exchange of Information with Law Enforcement Agencies of European Union Member States, Third Countries, European Union Agencies and International Organizations (hereinafter, u.wym.inf.).[78] According to its Art. 4(1), in principle, this exchange is performed using a single point of contact for all authorised services, as this provision states: 'Within the structure of the Police Headquarters, an organisational unit acting as a contact point for the exchange of information between authorised entities and the entities referred to in Art. 1, para. 1, item 1, hereinafter referred to as the 'contact point', shall be designated.' The point of contact acts not only for the police, as the primary and largest uniformed formation to uphold internal order but also, according to Art. 1(2) of the Law, the entities authorised to exchange information: The Internal Security Agency, Central Anti-Corruption Bureau, Internal Surveillance Bureau (police within the police), Internal Inspectorate of the Prison Service, National Tax Administration, Border Guard, Military Police, and State Protection Service.

Of course, exceptions to this rule exist; a key one is precisely the institution of a liaison officer. Art. 4(3)(2) of this law states:

> Direct exchange of information, bypassing the contact point, between representatives of authorized entities and the entities referred to in Art. 1, para. 1, point 1, in the performance of the tasks of the authorized entity's liaison officer abroad or the liaison officer forming part of the Polish liaison office at the European Union Agency for Law Enforcement Cooperation (Europol), shall be permitted.

Art. 8(2) states:

> The point of contact may provide information to the entities referred to in Art. 1, para. 1, point 1, through liaison officers or other representatives of authorised entities in the entities referred to in Art. 1, para. 1, point 1, and liaison officers or other representatives of the entities referred to in Art. 1, para. 1, point 1, in the Republic of Poland.

Liaison officers may also be members of special missions (i.e. temporary missions representing a state) sent by one state to another state with its consent to jointly consider certain matters with it or perform a specific task towards it. A detailed regulation of the functioning of special missions is contained in the Convention on Special Missions opened for signature in New York on 16 December 1969.[79] In the basic legal act for the Polish police, which is the Act of 6 April 1990 on

78 Journal of Laws of 2023, item 783.
79 Journal of Laws of 1985 No. 48, item 245.

the Police,[80] the institution of a liaison officer is devoted to only one provision: Art. 122a. This article states: 'To a police officer delegated to perform the function of a liaison officer in Polish diplomatic representations regarding the right to emoluments and other monetary benefits and dues, only the provisions concerning employees of Polish diplomatic representations shall apply'.

Liaison officers play an essential role in:

a) supporting criminal investigations involving Polish citizens,
b) locating missing persons,
c) conducting joint operations,
d) monitoring extremist groups,
e) countering illegal migration routes,
f) advising ambassadors in crisis situations, and
g) protecting victims of crime abroad.

Their presence strengthens Poland's position in international security cooperation and ensures that the state may respond swiftly to emerging threats.

7. Concluding Remarks

The above outlined picture of the functioning, in not only Polish foreign missions but also institutions closely cooperating with them, of persons other than members of the professional diplomatic and consular staff does not pretend to be complete. I focused on the principles known to myself from autopsy, as well as those described in the literature, of the functioning of the same within the foreign service of the Republic of Poland, the controversies associated with it and the identified imperfections of the existing solutions, and proposals aimed at eliminating them. Consideration of the issues raised, also within the framework of *de lege ferenda* remarks made in the text, and possible, even partial, consideration of them could well serve to professionalise this important area of activity of the Republic of Poland. This activity is performed outside its borders, and thus, increases its international prestige while facilitating the daily functioning not only of its citizens, who have a constitutional right to care outside its borders,[81] but also all entities that, in any respect, have a need to come into contact with the authorities of the Republic of Poland without visiting it in person.

80 Journal of Laws of 2024, item 145.

81 See Art. 36 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483, as amended): 'During his stay abroad, a Polish citizen has the right to be taken care of by the Republic of Poland'.

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Chapter 4

Changing Role of Diplomatic and Consular Offices: Poland's Experience

Tomasz Rzymkowski

Abstract

The chapter 'Evolution of the Role and Function of Diplomatic and Consular Offices in the Changing Landscape of International Relations: A Historical Perspective on the Experiences of Polish Diplomacy' examines the transformation of diplomacy from ancient times to the present, with a particular emphasis on Poland's experience. The author traces the evolution of diplomatic principles and institutions-from the Peace of Westphalia (1648) and the Congress of Vienna (1815), through to the creation of the League of Nations and the United Nations, and up to the challenges of the digital era. Special attention is given to the development of the Polish diplomatic service after regaining independence in 1918, the structure of consulates in the Second Republic, and their role during World War II. The theoretical part discusses the main functions of diplomacy – representation, negotiation, information, promotion, and protection – and their modern transformations. This chapter argues that contemporary 'neo-new' diplomacy connects states, international organisations, NGOs, corporations, and citizens, while technologies (AI, social media) reshape but do not replace its essence-dialogue and cooperation. The author highlights the importance of soft power, where credibility, trust, and reputation have become key currencies, and effective diplomacy requires flexibility, digital competence, and the ability to adapt to global challenges.

Keywords: diplomacy, international relations, history of diplomacy, diplomatic offices, Polish diplomacy, functions of diplomacy, evolution of diplomacy

Tomasz Rzymkowski (2026) 'Changing Role of Diplomatic and Consular Offices: Poland's Experience'. In: Paweł Czubik (ed.) *Changes in the Structure and Scope of Foreign Service Activity*, pp. 141–172. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2026.pccssfsa_4

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1. Introduction

Diplomacy is a field with a centuries-old tradition, often evoking clear and specific associations. It is commonly linked with politics, the state's activity on the international stage, embassies, or diplomats skilled in navigating interactions with others. While this perception does align with many aspects of reality, the essence of diplomacy has evolved significantly over time, particularly in the 21st-century.

The origins of diplomacy can be traced back to the earliest stages of human civilisation, but its meaning and essence have undergone profound changes over the centuries. A review of the extensive literature on the history of diplomacy reveals broad consensus on the core concept of the term 'diplomacy' yet authors often provide varied definitions and interpretations of its scope and nature.

The following text, which discusses the evolution of diplomacy among states and the consular protection of individuals and the interests of citizens, employs a legal-comparative and historical-legal methodology. Due to the vast scope of the subject matter across the centuries, the author will focus to a significant extent on the experiences drawn from Poland's history in international relations. The example of Poland is particularly original, as it is closely intertwined with the broader history of European diplomatic relations – owing to its geopolitical position between East and West, and to the numerous interests and diplomatic relations among various European and global powers.

Before the partitions, Poland was among the world's major powers – using the terminology of the modern era. However, it is worth emphasising that Poland also served as a kind of laboratory for the transformations occurring in human life and in state systems. Therefore, it constitutes an excellent example of the evolution of diplomatic relations taking place in the world of that time.

The term 'diplomacy' derives from the Greek word *diploma* (Gr. *diplóos* – double), referring to two wax-covered tablets used in ancient Greece to record instructions for envoys dispatched on special missions. These tablets, bound together with thongs, folded in half, and sealed, emphasised the confidentiality of their contents. They served as official documents issued by sovereigns, granting their envoys not only specific instructions but also certain privileges.

The principles of diplomacy, its organisational structures, and the selection of those tasked with its implementation have evolved significantly over the centuries. Among the many historical developments shaping diplomacy, one key turning point stands out: the conclusion of the Peace of Westphalia in 1648. This event marked the conventional beginning of modern diplomacy, distinct from the practices of ancient and medieval times.

However, it was not until the Congress of Vienna in 1815 that the norms of diplomatic law were codified for the first time. This milestone in diplomatic history introduced legal regulations addressing many of its facets. Notably, the rules of the Congress emphasised the principle of sovereign equality among states, enabling a break from earlier practices of precedence that favoured diplomats based on titles, familial

connections, or the status of their sovereigns. The Congress also established uniform ranks for diplomatic representatives, organising them into three distinct groups: 1) ambassadors, legates, or apostolic nuncios; 2) envoys, ministers of equivalent rank, or other representatives accredited to monarchs; 3) *chargés d'affaires*, accredited to foreign ministers and holding the lowest rank among diplomatic representatives.

The 20th century witnessed a significant development of both law and diplomatic practice. The discrediting of backroom alliances and secret diplomacy following World War I highlighted the need for greater transparency. It was reflected in Woodrow Wilson's Fourteen Points of 1918, which advocated for open diplomacy and the rejection of secret agreements. This paved the way for the establishment of the League of Nations – the first general international organisation, which commenced operations in 1920 and marked a major milestone in the development of multilateral diplomacy.

Despite its aspirations, the League of Nations failed to prevent the outbreak of World War II, leading to its dissolution and the establishment of the United Nations in 1945. This organisation was endowed with broader powers and a wider scope. The subsequent process of decolonisation further accelerated the growth of UN membership, the expansion of multilateral diplomacy, and the establishment of diplomatic frameworks by newly independent states. It was under the auspices of the UN that one of the most important documents in the history of diplomacy – the Vienna Convention on Diplomatic Relations – was adopted on 18 April 1961. This landmark legal instrument established a unified framework for modern international relations by codifying norms and practices in diplomacy. Ratified by 193 parties, the Convention set standards for key aspects such as the establishment of diplomatic relations between states, the appointment and classification of diplomatic representatives, diplomatic privileges and immunities, and protocols of precedence. While the Convention also addressed consular relations, their comprehensive regulation was finalised two years later, with the adoption of the Vienna Convention on Consular Relations on 24 April 1963.

The dynamic evolution of bilateral and multilateral diplomacy in the 20th century was closely associated with the increasing professionalisation of the field. This process involved both the expansion of diplomacy's organisational structure and a more rigorous approach to the selection of those who would represent their countries. Regardless of the specific recruitment methods employed by different nations, aspiring diplomats must meet formal criteria such as education, citizenship, verification of mental and physical health, and suitability for foreign service. Beyond these formalities, they must also possess key diplomatic competencies – a combination of knowledge, skills, abilities, and attitudes essential for effective diplomatic practice. Future diplomats must remain attuned to both domestic and international developments and have a solid understanding of the main areas of international relations. Additionally, familiarity with a country's foreign policy direction and historical context is critical. Such extensive knowledge is indispensable in navigating a nation's rapidly changing internal and external environment. A diplomat must

possess the analytical ability to identify connections among diverse phenomena and understand their interactions, even in highly uncertain and volatile circumstances. Information serves as one of the diplomat's primary tools, making proficiency in this area particularly vital. This includes an advanced knowledge of at least two foreign languages and cultural understanding. While English is now widely used as the *lingua franca* in international affairs, proficiency in an additional language provides significant advantages. Knowing the language of another country enhances cultural understanding, fosters deeper connections with its people, and aids in decoding nuanced information – an invaluable skill in diplomacy.

2. The Polish Diplomatic Experience

2.1. Diplomacy as a Weapon of Independence

In the pre-partition period, the Polish–Lithuanian Commonwealth was one of the largest states in Europe, with its territory at its peak exceeding one million square kilometres. An example of diplomatic efforts to preserve the Commonwealth from partition and collapse can be seen in the actions of the Bar Confederates in 1768.[1] On 16 December 1768, under France's guarantee, the Bar Confederates negotiated an informal treaty to establish a Polish–Turkish–Tatar alliance. Art. 4 of this treaty obligated Turkey and the Crimean Khanate not to conclude peace with Russia until the restoration of the Commonwealth's former system of government. The political strategy behind these efforts aimed to persuade Turkey that failure to support the Confederates, who sought to free the Commonwealth from Russian dominance, would in the future undermine Turkey's position on the international stage and leave it vulnerable to the expanding ambitions of Tsarist Russia.[2]

1 The Bar Confederation was a Polish gentry confederation formed in Bar, Podolia, on 29 February 1768, to defend Catholic faith and Polish independence against Russian domination. Its goal was to abolish laws imposed by Russia, especially those providing equality for dissenters. It is considered the first Polish national uprising.

2 Kęder, 2023, pp. 59–71.

During the major national uprisings – the November Uprising[3] (1830–1831) and the January Uprising[4] (1863–1864) – the insurgent governments sought to advance the Polish cause on the international stage by creating foreign representations.[5] Among these efforts, the *Hotel Lambert*[6] emerged as a powerful symbol of 'diplomacy without letters of credence'. Under the leadership of Prince Adam Jerzy Czartoryski, the Hotel Lambert represented Polish independence émigrés and worked to garner support for the Polish cause among the political elites of Western countries. The Polish national elite understood that the conspiracy among the neighbouring powers had led to the partitions and the eventual collapse of the Polish–Lithuanian Commonwealth in 1795. The acumen of this diplomatic conspiracy lay with the Kingdom of Prussia, the greatest beneficiary of the partitions. The erosion of Polish sovereignty began as early as 1706–1709, due to Prussia's diplomatic manoeuvring, culminating in the ratification of the Grzymułtowski Treaty[7] in 1710.

The subordination of Poland to Russia was formalised in 1717. In that year, Tsar Peter I imposed himself as mediator in the conflict between King Augustus II and the rebellious noble society organised as the Tarnogród Confederation.[8] The settlement, enforced by Peter I during the one-day *Silent Sejm* on 1 February 1717, included the reduction of the Polish army to 24,000 troops. In 1719–1720, when an international coalition formed to counterbalance Russia's gains in the Great Northern War,

3 The November Uprising was a Polish national uprising against Russia, lasting from 29 November 1830 to 21 October 1831. The fighting covered the area of the Kingdom of Poland and part of the partitioned land, in particular Lithuania, Zmudia and Volhynia.

4 The January Uprising was a Polish uprising against the Russian Empire, proclaimed by the Manifesto of 22 January 1863, issued in Warsaw by the Provisional National Government. It began in the Kingdom of Poland on 22 January 1863, and on 1 February 1863, in historic Lithuania. It lasted until the autumn of 1864 and encompassed the lands of the Russian partition, including the Kingdom of Poland and the annexed territories. The uprising garnered significant support among the Lithuanian population and partial support from the Belarusian population.

5 Bazylow and Labuda, 1982, pp. 180–330.

6 Established in 1833 in Paris, this monarchist conservative-liberal camp operated in exile following the November Uprising. It primarily comprised the affluent circles of the Great Emigration society and was politically grounded in the provisions of the 3 May Constitution. The camp advocated for Western intervention in the Polish cause. It was founded and led by Prince Adam Jerzy Czartoryski and, after his death, by his son, Władysław Czartoryski. The name 'Hôtel Lambert' began to be used in 1843 when Czartoryski acquired the Hôtel Lambert palace on the Île Saint-Louis, which became the centre of the camp's activities.

7 The Grzymułtowski Treaty was a peace treaty signed on 6 May 1686, in Moscow between the Polish-Lithuanian Commonwealth and the Tsardom of Russia. It reaffirmed and solidified the terms of the Andrusovo Truce of 1667. The treaty was signed on behalf of the Commonwealth by Krzysztof Grzymułtowski, Voivode of Poznań, and Marcjan Aleksander Ogiński, Grand Chancellor of Lithuania.

8 The Tarnogród Confederation was formed by the Polish nobility on 26 November 1715, in Tarnogród to oppose the brutal stationing of Saxon troops in Poland and, consequently, King Augustus II the Strong. Following an unresolved civil war and unsuccessful negotiations in Rawa, the nobility requested mediation from Tsar Peter I of Moscow, whose troops were also stationed in the Commonwealth. The conflict was resolved with the Treaty of Warsaw in 1716, which was subsequently ratified at the Silent Sejm of 1717, ushering in 15 years of peace.

Augustus II attempted to align Poland with these allies, seeking to escape Peter's control. However, the Tsar, with the assistance of Prussia, successfully disrupted the Sejm that was to deliberate Poland's participation. From 1720 until the end of the 18th century, St. Petersburg and Berlin entered into repeated alliances with secret clauses aimed at perpetuating the weaknesses of the Polish state by maintaining the *liberum veto*, 'free' election, and the army's reduced size. While Tsar Peter I aimed to maintain full hegemony over the Republic, the Hohenzollerns advocated partition. Initially, the tsars opposed partition, but this stance changed under Tsarina Catherine II, who ultimately agreed to divide Polish lands.

2.2. Resurrecting Polish Diplomacy

The resurrection of the Polish Republic after World War I owed much to the efforts of officials who had served in the diplomatic corps of the partitioning states, particularly Austria-Hungary and Russia, before they became Polish diplomats. By the end of hostilities in 1918, Poland, despite its formal non-existence as a state, had managed to assemble an impressive diplomatic apparatus.[9] This development was also shaped by decisions made by the partitioning powers, driven by their own interests. One of them was the *Act of 5 November* – a joint manifesto issued in 1916 by the emperors of Germany and Austria-Hungary, which envisioned the creation of a non-sovereign Kingdom of Poland.[10] As part of this arrangement, the Regency Council of the Kingdom of Poland was established in September 1917. Although the council was formally prohibited from engaging in independent diplomatic actions or infringing upon the 'international position of the occupying powers',[11] in practice its scope of activities expanded, culminating in the proclamation of an independent Polish state on 7 October 1918.

In institutional terms, the re-establishment of Polish diplomacy began with the creation of the Ministry of External Affairs,[12] formed during the transitional government of Józef Świerzyński,[13] with Stanisław Głąbiński serving as its first minister. While this marked an important step in organising Poland's diplomatic efforts, it was not the most significant achievement during the partitions. On the eve of Poland's independence, the Polish National Committee, acting in alignment with the Entente powers, played a pivotal role in advocating for Polish interests and laying the groundwork for the international recognition of an independent Polish state.

In November 1918, as hostilities ceased across all fronts of the Great War, the Polish National Committee (*Komitet Narodowy Polski*, KNP) was established in Paris.

9 Sibora, 2013, pp. 121–134.
10 Girzyński, Kania and Kłaczkow, 2016, pp. 56–76.
11 Official Gazette of the Department of Justice of the Provisional Council of State of the Kingdom of Poland, No. 5, 2 October 1917.
12 Decree on the establishment of the Ministries of External Affairs, Military Affairs, Communications and Provisions (Journal of Laws of the Kingdom of Poland, No. 14 of 2 November 1918).
13 Długołęcki, P. and Szczepanik, K. (eds.) 2014, pp. 15–51.

Comprising 13 members and led by Roman Dmowski, it operated with a staff of more than 100 individuals and a comprehensive organisational structure. It addressed a wide range of issues, including legal-political, military, press and propaganda, consular, and administrative-organisational matters. Between 1917 and 1919 alone, the KNP convened over 200 meetings.[14] In addition to the KNP, other notable centres of Polish diplomacy included the Supreme National Committee (*Naczelny Komitet Narodowy*)[15] and the Lausanne Agency (*Agencja Lozańska*).[16] Together, these four institutions developed extensive networks of outposts and representative offices. Among them, the KNP held the most significance due to its diplomatic representation in the capitals of the World War I victors. It was Roman Dmowski who made the strategic decision to align with the war's future victors – it was not a matter of gambling or opportunism but the outcome of profound political analysis.[17]

A pivotal moment in the development of the Polish diplomatic service, which should still be a reference point for Polish foreign service officials, was Poland's participation in the Paris Peace Conference.[18] This endeavour served as a 'reconnaissance-by-battle' of the diplomatic skill and determination of the Polish delegation, led by Dmowski. To maximise the delegation's effectiveness, the Polish Delegation to the Peace Conference was established, working in close coordination with the Bureau of Congressional Work, founded in November 1918 by Franciszek Pułaski and the Ministry of Foreign Affairs in Warsaw. The delegation also collaborated with scientists and trade and economic representatives, leveraging their expertise to substantiate Poland's demands on economic, territorial, nationality, legal, military, and cultural restitution issues. This group of almost 100 experts produced a comprehensive body of work, including official notes, memoranda, and expert reports, that supported the efforts of Polish diplomats. Their contributions also served broader political and public relations goals, helping to strengthen Poland's position in global public opinion.[19] Over the six months of the Peace Conference, the Polish Delegation in Paris not only shaped the immediate outcomes of negotiations but also laid the foundation for the Polish diplomatic and consular corps. As historian Piotr Długołęcki notes, 'In the interwar period, the office of the Minister of Foreign Affairs was held by seventeen individuals, including those who led the ministry without

14 Leczyk, 1966, pp. 76–83.

15 A political organization representing Poles in Galicia, established on 16 August 1914, in Kraków as a result of an agreement among all Polish political factions in the Austrian partition, including conservatives, democrats, national democrats, progressives, peasants, and socialists. It supported the resolution of the so-called Polish question during World War I within the framework of Austria-Hungary, advocating for trialism – the transformation of the Habsburg monarchy into a three-part state comprising Austria, Hungary, and Poland.

16 A news agency operating from 1915 to 1919 in Lausanne, Switzerland, whose purpose was to promote Polish affairs in Western European countries.

17 Dmowski, 1937, pp. 284–299.

18 Landgree-Nielsen, 1979, pp. 354–359.

19 Cf. Przyłuska-Brzostek, 2009, pp. 85–113.

being constitutional ministers, and nearly half of them were associated with the Polish National Committee'.[20]

The existence of multiple centres of Polish diplomacy in the aftermath of World War I occasionally led to challenges in recognising the official representatives of the 'Warsaw government'. For instance, in Bucharest, the *chargé d'affaires* Marian Linde was not recognised as the representative of Jędrzej Moraczewski's government. Instead, Stanisław Kozmiński, representing the KNP, was acknowledged by the Romanian authorities as the legitimate advocate for Polish interests. Contrary to a prevailing perception that Poles were unable to cooperate effectively, the unification of Polish diplomacy was achieved relatively quickly, despite significant political divisions. The Supreme National Committee (*Naczelny Komitet Narodowy*) subordinated itself to the Regency Council, which subsequently transferred power to Józef Piłsudski and dissolved itself. The Lausanne Agency was incorporated into the KNP, which then reached an agreement with Piłsudski to form a government of national unity, headed by Ignacy Jan Paderewski, after which the KNP declared its dissolution.[21] The Ministry of Foreign Affairs in Warsaw assumed direct oversight of Polish diplomatic missions abroad, which had previously been under the control of the KNP. These included key general posts in Brussels, Bucharest, Chicago, London, New York, Madrid, Paris, and Washington. Additionally, consular posts operated in Brazil, Canada, the Scandinavian countries, and civil war-torn Siberia.

The appointment of a consul established an official relationship between the individual and the sending state, and it was exclusively an internal matter for the state concerned. For professional consuls, this relationship came into effect through a unilateral act of appointment by the state. The appointment of honorary consuls was preceded by an agreement between the state and the candidate for the position. The recruitment process, the criteria for eligibility, and the formalities of the appointment were entirely determined by Poland's internal regulations. The act of appointing a consul was a domestic state decision that conferred upon the individual the character of an external state representative, finalised by issuing a nomination document. The first such document was issued on 15 November 1918, by Prime Minister Ignacy Daszyński to Karol Rose. Notably, the Consulate General of the Republic of Poland in Berlin became the first Polish diplomatic post in Germany and the first permanent external representation of the newly independent Polish state. This was a unique application of consular law. Although formal relations between the Allied and Associated Powers and Germany were to resume only after the ratification of the Treaty of Versailles and the formal conclusion of peace, Poland – despite its status as an associate state of the Entente – established 'normal' relations with Germany within days of the armistice that ended hostilities in World War I.

In conclusion, by the time Józef Piłsudski assumed power in Poland, a network of diverse diplomatic and consular representations was already in place, significantly

20 Długołęcki, 2019, p. 19.
21 Michowicz, 1995, pp. 5–10.

easing the establishment of a formal diplomatic service for the resurrected Polish Republic.

2.3. Polish Diplomatic and Consular Offices

An essential and significant expression of state sovereignty is the possession of the right of consulate. This right is an integral aspect of statehood, allowing a nation to maintain diplomatic and consular relations with other states and to participate in the international diplomatic network. The right of consulate, understood as the ability to appoint consuls and receive foreign consuls, is a fundamental element of the rights of members of the international community to establish and sustain relations. Similarly, the right of legation – the right to send and receive diplomatic representatives – is a key component of state capacity. Kazimierz Libera succinctly emphasises this principle: 'Under normal conditions of peace, every state has the right and, at the same time, the correlative duty to maintain relations with other states regardless of their political, economic, and social structure'.[22]

During the Second Republic, Poland maintained consular relations with more states than it did diplomatic relations. Of the 61 states with which Poland had official diplomatic relations, consular ties were also established. However, Poland did not establish diplomatic relations with six states for almost the entire duration of the Second Republic, up until the outbreak of World War II. Additionally, Poland maintained only consular relations with 31 countries. For brief periods, lasting between one and two years, Poland also used the right of legation without consular rights with three countries – Austria, the Netherlands, and Iran. Collectively, these exclusive diplomatic relationships spanned no more than four years in total.[23]

The signing of the so-called Little Treaty of Versailles, also known as the Polish Minority Treaty, on 28 June 1919, marked a significant step in the formalisation of consular relations for Poland and other states. Art. 13 of the *Treaty* confirmed the active and passive right of consulship for the Principal Allied and Associated powers (United States, France, Great Britain, Italy, Japan) on the one part, and Poland on the other, with the application of the most-favoured-nation clause and provisions for the establishment of consulates in the future. The normalisation of consular relations through this treaty provided the basis for Poland's consular agreements with Great Britain and Japan during the Second Republic. For France and Italy, the treaty governed consular relations until bilateral consular conventions were concluded. The United States, however, was not bound by the treaty, as it did not fulfil the conditions of ratification despite being signed. Poland's consular relations with Germany were outlined in Arts. 191 and 279 of the Treaty of Versailles.[24] Its relations with Austria

22 Libera, 1960, p. 121.
23 Pałyga, 1970, p. 49.
24 The Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles, 28 June 1919 (Journal of Laws 1920, No. 35, item 200).

were defined in Arts. 231 and 243 of the *Peace Treaty of St. Germain-en-Laye*,[25] signed on 10 September 1919.

The Second Republic maintained consular relations with 61 countries. The consular network of the Polish state comprised a total of 645 offices of various types and ranks, including 261 Polish consular posts abroad. As Edward Pałyga observed: 'One can risk the claim that in the period of the Second Republic there was actually no international event concerning Poland that would not be reflected in one form or another in its consular relations'.[26] However, the twenty-year span of the Second Republic proved insufficient for the Polish consular practice to fully crystallise, or for the results of this consular work to adequately reflect the efforts of its staff. Nevertheless, the significance of this output became evident during World War II, when Polish diplomats undertook numerous critical tasks. These included facilitating the movement of troops leaving Poland's borders in September 1939, assisting war refugees, ensuring free transit for Polish citizens to safe destinations, and providing financial and organisational support to the Polish government in exile. They also contributed to the creation of Polish military units and worked to maintain international recognition of the Republic's legal and political subjectivity. Polish consuls played an important role in protecting Polish citizens abroad and assisted in the rescue of Jews by issuing documents to facilitate their escape from their countries of residence. This work and the amount of good it did during the dire circumstances of war and occupation cannot be overstated.

The process of establishing a consul in the territory of a foreign state created a legal framework that allowed the consul to act as a specialised organ of international interaction. Consular representation was established to facilitate this interaction, particularly in cases of active relations between two states, primarily based on trade. Its establishment was typically at the discretion of the sending state, although it could occasionally result from initiatives by the potential receiving state. Such initiatives were also undertaken by the authorities of the Second Republic. Following a request from the Ministry of Industry and Trade to establish consulates in Gdynia for Brazil, Ecuador, Colombia, and Peru, the Polish Ministry of Foreign Affairs launched a diplomatic effort. The governments of these countries 'in principle expressed their consent to the opening of honorary consulates in Gdynia'.[27]

25 The Treaty of Peace Between the Allied and Associated Powers on the One Hand and Austria on the Other, the Protocol on the Conditions for the Implementation of Certain Provisions of this Treaty, the Declaration Regarding Damages Resulting from the Sinking of Ships and Cargoes by Austrian Naval Forces During Hostilities, the Protocol of Signature, the Agreement Between the Allied and Associated Powers Concerning Participation in Expenses Related to the Liberation of Territories of the Former Austro-Hungarian Monarchy, and the Agreement Between the Allied and Associated Powers Regarding the Settlement of Reparations Concerning Italy, Signed at Saint-Germain-en-Laye on 10 September 1919 (Journal of Laws of 1925, No. 17, item 114).

26 Pałyga, 1970, p. 6.

27 Act of 29 September 1938, in Archives of the Ministry of Foreign Affairs.

During the Second Republic, it was common to appoint professional consuls who were Polish citizens, and who received remuneration for their consular service, engaging in no other professional activities apart from their role as consul. This approach mirrored the standards applied to consuls admitted in Poland. In contrast, the role of honorary consul followed a different framework, which varied depending on the legislation of the receiving state. Poland both received and established honorary consuls in various countries worldwide. As a rule, honorary consuls did not receive a salary for their services and typically treated the position as a secondary activity alongside their primary profession. Regarding citizenship, an honorary consul could be either Polish or a citizen of the receiving state. In the diplomatic service hierarchy, honorary consuls occupied a distinct position from professional consuls.

During the Second Republic, Polish professional consuls were appointed under the provisions of the Civil Service Act[28] and the Consular Organisation Act.[29] The Civil Service Act stipulated that an official relationship was established upon delivery of a letter of appointment, which specified the official's position, the date of appointment, the location of the office, and the salary grade. The consul's appointment decree was signed by the Minister of Foreign Affairs. Additionally, the individual assuming the post was required to take an oath.

The consul held a dual legal character. On one hand, he was an officer of the sending state operating within the territory of a foreign country, serving as a representative body of the sending state. This role included *jus avocandi* – the consul's authority to summon citizens of his state to fulfil administrative obligations owed to their country, as well as *jus protectionis* – the exclusive right to defend the interests of his state's citizens against the receiving state's authorities or protect their private interests. The mere appointment of a consul by the sending state did not in itself produce effects under international law. Many states formulated letters of commission, which formally confirmed the internal act of appointing a consul externally. These letters served as an expression of the sending state's will for the consul to be accepted in this capacity by the receiving state.[30] In the doctrine and practice of international law, it was customary to obtain the receiving state's consent to the proposed consular candidate before issuing letters of commission. The Second Republic adhered to this practice of prior consultation in most, though not all cases.[31] Letters of commission, issued as formal written acts, outlined the consul's official position, the nature of his duties, and the location of his post. They unilaterally authorised the consul to perform his functions in the receiving state and were issued to consuls general, consuls, and vice-consuls who headed consular representations. The same regulatory framework applied to appointing consular agents.

28 Civil Service Act of 17 February 1922 (Journal of Laws of 1922, No. 21, item 164).
29 Consular Organization Act of 11 November 1924 (Journal of Laws of 1924, No. 103, item 944).
30 Libera, 1960, p. 208.
31 Sarna, 1928, p. 31.

Once appointed, consuls were issued a *brevet* or *patent* – a document analogous to the letters of commission. These documents were subject to prior approval by the receiving state's Minister of Foreign Affairs or required notification to the receiving state's government. Letters of commission used in Polish diplomatic practice detailed the consul's identity, role, and destination and requested the receiving state's government to recognise and establish him in his position, granting appropriate titles and immunities. These ceremonial documents were typically written in Polish or French and transmitted through diplomatic channels. During the interwar period, Poland forwarded these letters to the diplomatic representative superior to the relevant consul, requesting an *exequatur*. The diplomatic representative, via a verbal note, would then present the letters to the receiving state's government to obtain the *exequatur*.

The principle of state sovereignty necessitates obtaining an *exequatur* – the receiving state's prior consent to the establishment of a consular representative, including his seat, rank, and consular district. The *exequatur* served as the receiving state's formal response to the letter of commission issued by the sending state. The process of appointing a consul concluded with the receiving state's free expression of will. However, a notable exception to the principle of free expression of will occurred in the establishment of consular relations between Poland and Lithuania. This situation arose from an ultimatum issued by Warsaw to Kaunas on 17 March, 1938. Within 48 hours, the Lithuanian government accepted the ultimatum and agreed to Poland's terms for the immediate normalisation of relations without any preconditions.

The use of consular law was firmly embedded in the international practices of the Second Republic. In its relations with 34 of the 61 countries with which Poland maintained consular and legation rights, consular representatives of the Republic were established prior to the creation of diplomatic missions. Over time, some of these Polish consular representations were transformed into posts with diplomatic prerogatives, and the consuls themselves either became diplomats or combined both functions, particularly during World War II, for pragmatic reasons.[32] As a result, the consular service of the Second Republic saw the development of a type of consulate with a diplomatic character – a model similar to that used by countries such as Great Britain. In many parts of the world, British consuls were referred to as 'political consuls' due to their possession of political prerogatives. This status likely stemmed from the legacy of the British Empire.

The most common form of recognition between states is the establishment of facts through actions that conclude mutual acknowledgment, where states recognise each other. This recognition may take the form of an explicit, unequivocal statement in a special format or occur implicitly. The most definitive form of mutual recognition of a state's international existence is the maintenance of official relations with that state, whether diplomatic, consular, or commercial. Such interactions constitute

32 Pałyga, 1970, p. 83.

what is known as tacit recognition. Since normal consular relations can only occur between states that recognise each other, the establishment of consular relations with a previously unrecognised state effectively entails recognition. In this context, the granting of an *exequatur* by the receiving state becomes particularly significant. The *exequatur* is an act with which international legal doctrine and practice associate specific legal consequences, including implications for recognition.

A state that does not maintain consular relations with another state may rely on the assistance of a third state. The consular offices of this third state can perform consular functions on behalf of the requesting state and its citizens. Upon proper notification to the receiving state and in the absence of objections, the consular offices of the assisting state may carry out these functions as requested. This arrangement was explicitly provided for in agreements between Poland and other states, such as Art. 23(5) of the Polish-French Commercial Convention concluded in Paris on 9 December 1924.[33] A similar situation arose in 1943 after the Soviet Union severed diplomatic relations with Poland following the disclosure of the Katyń Massacre.[34] The Polish government in London sought assistance from the British government to protect Polish interests and citizens in the USSR. However, the British government refused, as did the U.S. government. Ultimately, the Australian government agreed to provide this protection, which was announced in Moscow, London, and Canberra on 25 May 1943.[35]

The Second Republic also undertook the protection of foreign interests and citizens abroad. The first instance occurred in 1922, at the request of the French government, when Poland facilitated the repatriation of French citizens from Soviet Russia. In 1924, at the request of the Turkish government, Poland agreed to protect Turkish citizens through its consular offices in Yugoslavia. Similarly, Poland provided consular protection for Bulgarian citizens residing in the USSR.

An especially noteworthy aspect of Polish consular activity took place during World War II. Polish consular posts were tasked with providing legal, consular, and social protection to Czechoslovak citizens within their jurisdiction. This effort was part of a collaborative initiative with the Czechoslovak government in London, aimed at laying the groundwork for a post-war Polish-Czechoslovak confederation.[36]

In the context of Polish-Czechoslovak relations, it is worth noting some events prior to the outbreak of World War II. On 24 May 1939, the Polish government declared that it did not recognise Germany's annexation of Czechoslovakia. As a result,

33 Commercial Convention between Poland and France, signed in Paris on 9 December 1924 (Journal of Laws of 1925, No. 67, item 468).

34 The Katyń Massacre, committed by the NKVD, was the execution of approximately 22,000 Polish citizens, including over 10,000 officers, in spring 1940. Recognized by the Polish Sejm as a war crime and genocide.

35 Pałyga, 1970, pp. 123–125.

36 Political concept promoted by the Polish Government-in-Exile during World War II, supported by the government of Great Britain, referencing prewar plans for an 'Intermarium' bloc. Initially envisioned as a confederation including Poland, Czechoslovakia, and Hungary.

the Czechoslovak embassy in Warsaw, along with its consular department, continued to operate, and Czechoslovak consulates in Poland provided assistance to emigrants from the German-occupied territory. At the same time, on 15 March 1939, the Polish government recognised Slovakia as an independent state through an official communiqué. In the same communiqué, sent to Allied countries, Poland announced the appointment of a diplomatic representative to Bratislava, elevating the incumbent Polish consul to the role of *chargé d'affaires*. This move aimed to prevent Slovakia from becoming a German protectorate. Before the outbreak of World War II, Poland, Germany, and Hungary were the only countries to maintain diplomatic representations in Bratislava.

An interesting episode during World War II was the operation of the Kingdom of Italy's consular office in Warsaw. In late October 1939, the post suspended its activities, but under pressure from the Polish embassy in Rome, it was reopened. The office remained operational until 10 June 1940, when Italy entered the war. During its operation, the Italian consulate facilitated the issuance of visas to Poles, allowing them to travel to Italy, and even enabled currency exchanges for the Polish underground through a German bank.[37]

During the Second Republic, 204 consular offices from 56 foreign states operated on Polish territory. In the same period, Poland maintained 261 consular offices in 59 countries. By 1939, Poland had 231 consular posts in 47 countries, while 150 foreign consular posts operated within Poland. Comparatively, in 1928, Poland had only 112 consular posts abroad and 112 foreign consulates on its territory. The Polish consular network during the Second Republic was relatively underdeveloped. Countries such as Spain, Italy, and France maintained nearly ten times as many consular offices as Poland during the same period. Similarly, the number of foreign consular posts in Poland was far below average for a country of this size and population.[38]

2.4. Custom Versus Legal Norms in the Evolution of International Relations in the Second Republic

In the doctrine of international law, there is an ongoing debate regarding the primacy of international agreements over customary law in consular relations. Juliusz Makowski assigns a secondary role to customary law in this context. In his view, customary norms serve to fill gaps in treaty-based international law.[39] This perspective is also reflected in the Vienna Convention on Consular Relations,[40] whose preamble states that customary international law should govern matters not addressed by the convention.

37 Pałyga, 1970, pp. 168–170.
38 Bartoni, 1949, p. 33.
39 Makowski, 1957, p. 105.
40 Vienna Convention on Consular Relations, signed in Vienna on 24 April 1963 (Journal of Laws 1982, No. 13, item 98).

Zygmunt Sarna, on the other hand, argues for the primary importance of customary international law, asserting that treaties are only secondary. According to Sarna, the need to supplement existing customary norms related to consular relations is what gives rise to treaty provisions.[41] Leon Babiński echoes this view, stating that 'in principle, most consular norms are based on custom'.[42] Similarly, Kazimierz Libera emphasises the significant role of customary international law, viewing consular conventions as interpretations of customary principles rather than rigid definitions of the rights and obligations of states and their consuls.[43]

In the Second Republic's relations with other states, despite the large number of consular agreements concluded, customary legal norms played a crucial role. When consular agreements addressed consular law, their provisions primarily concretised pre-existing customary norms of international law. These agreements did not create new consular law but instead confirmed the intention to continue its application while specifying the conditions and methods for implementing existing norms.[44] The leadership of the Ministry of Foreign Affairs of the Second Republic sought to formalise consular conventions – either comprehensively or on specific issues – through bilateral agreements. However, in most cases, this proved neither possible nor necessary, even from the Polish perspective. By 1939, Poland had consular relations with 61 countries, of which 19 had formal agreements related to the maintenance of consulates. In the remaining 42 cases, consular relations were conducted solely on the basis of customary international law. Between the restoration of independence in 1918 and 1924, Poland maintained consular relations with 31 countries, only five of which were based on treaties.[45]

In light of the Polish Constitution of 17 March 1921,[46] the conclusion of a consular convention required confirmation through a ratification act. This process involved the Sejm granting its consent for the President of the Republic to ratify the agreement. The head of state's sanction marked the conclusion of what was often a months-long process that began with the signing of the convention by two plenipotentiaries representing Poland – typically the Polish diplomatic representative in the respective state and a high-ranking official from the Ministry of Foreign Affairs. On occasion, the conventions were signed personally by the ministers themselves, reflecting the high rank of the representative from the other party. The duration of the ratification process varied significantly. The quickest was with Bulgaria, finalised in just four months, while the longest, with Yugoslavia, took three years. However, two

41 Sarna, 1928, p. 36.
42 Babiński, 1949, p. 7.
43 Libera, 1960, p. 68.
44 Ibid.
45 Pałyga, 1970, pp. 15–16.
46 Constitution of the Republic of Poland of 17 March 1921, Art. 49, para. 2 (Journal of Laws of 1921 No. 44, item 267).

agreements – those with Turkey and Manchukuo – remained unratified by the Sejm before the outbreak of World War II.[47]

Most of the Second Republic's consular relations were not based on contractual norms of international law but largely governed by customary international law. These relations were shaped by the relatively brief but substantial history of interactions between Poland and the states with which it maintained consular ties, often as though mutual legal obligations already existed. Throughout the Second Republic's existence until September 1939, consular rights were actively exercised by it 465 times, including the creation of 261 Polish representations abroad. However, among these, consuls were appointed through formal agreements in relations with only 19 countries.[48]

In the post-World War II period, countries withdrawing recognition of the legitimate Polish government in London recognised the communist government in Warsaw. This was demonstrated by the maintenance of consular conventions with the 'Warsaw government' after the war by countries such as France and Belgium. Some states, especially from the area of influence of the Soviet Union, concluded new consular conventions in the 1950s and 1960s.[49]

3. Principles and Functions of Consular and Diplomatic Offices

3.1. The Emergence of Norms in International Consular Law

In the preliminary draft of Art. 1(1) of the Vienna Convention on Consular Relations, prepared by the UN International Law Commission in 1963, it was proposed that 'every state should have the right to establish consular relations with foreign states'.[50] However, Jaroslav Žourek, the Commission's rapporteur, argued otherwise, stating that 'a right does not always have to be matched by a correlative obligation'.[51] In drafting the Convention, the UN International Law Commission drew inspiration from its earlier draft on diplomatic relations, mirroring its structure and many formulations. The legal obligation to establish consular relations, as outlined in the draft, was to arise from actual economic or commercial relationships between states or the presence of a significant group of citizens of one state residing in the territory of another, reflecting an objectively existing trend. It is noteworthy that

47 Pałyga, 1970, pp. 30–31.
48 Ibid., p. 51.
49 Ibid., p. 33.
50 Kafkowski, 1969, p. 215.
51 *Yearbook of the International Law Commission*, 1958, p. 211.

the systematic refusal of a state to establish consular relations with others during peacetime could be viewed as a violation of fundamental principles of international law. For UN member states, this refusal would be incompatible with Art. 1(3) of the UN Charter,[52] which obliges states to cooperate internationally in economic, sociological, intellectual, and humanitarian fields.[53]

The old diplomacy, which lasted until 1914, was closed and secretive in nature, reserved for a narrow circle of professional diplomats. The new diplomacy, which emerged after World War I and was associated with the establishment of the League of Nations and later the United Nations, introduced greater openness and multilateralism, incorporating international and non-governmental organisations into the process. The newest – or 'neo-new' – diplomacy, which has been taking shape since around 2020, is even more open and digital, involving not only states and organisations but also citizens, the media, academic communities, and the private sector.

Defining diplomacy in a way that fully captures its essence is a challenging task. This difficulty arises from its rich history, multidimensional nature, and the varying interpretations of diplomacy in both colloquial terms and academic literature. In public discourse, diplomacy is often misunderstood and associated with tactful yet insincere and cunning behaviour, characterised by the ability to convey unpleasant truths in an engaging manner, or with conduct perceived as hypocritical and discourteous. The broad range of activities and topics encompassed by diplomacy further complicates efforts to define its roles and functions exhaustively. In earlier times, when diplomacy operated in a less dynamic and complex environment, Stanisław Nahlik stated that the primary duty of an envoy was to execute the instructions provided by their sovereign.[54]

The Vienna Convention on Diplomatic Relations made an attempt to systematise diplomacy by outlining the official activities of diplomatic missions, focused primarily on maintaining formal relations with other subjects of international law. Art. 3 of the Convention indicates that the functions of diplomatic representatives acting abroad include:

a) representing the sending State in the receiving State;
b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
c) negotiating with the Government of the receiving State;
d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

52 Act of 31 December 1945, on the ratification of the United Nations Charter signed in San Francisco on 26 June 1945 (Journal of Laws of 1946, No. 2, item 6).

53 *Yearbook of the International Law Commission*, 1958, p. 96.

54 Nahlik, 1981, p. 20.

The Vienna Convention on Diplomatic Relations also allows for the expansion of diplomatic missions' functions to include activities in the consular domain. Consequently, six primary diplomatic functions are defined: representation, negotiation, information gathering, promotion, protection, and consular.[55] Although each of these functions has distinct characteristics, they often overlap and, in many cases, depend on one another.

3.2. Principles of International Relations in the 21st Century

The growing number and increasing involvement of actors on the international stage have turned the modern diplomatic environment into a complex web of interactions between state and non-state entities. International organisations, non-governmental organisations, and the world's largest corporations have become active participants in global affairs. Simultaneously, globalisation processes have broadened the scope of global challenges and issues addressed by diplomacy. While its traditional focus was primarily on matters of war and peace – categorised as 'high politics' – modern diplomacy now encompasses a wide range of issues, including human rights, environmental protection, and economic development, often referred to as 'low politics'. These shifts have rendered the exclusively state-centric understanding of diplomacy increasingly obsolete.

Modern diplomacy, particularly the role of the diplomatic service, is undergoing a period of dynamic transformation shaped by both global changes and the evolving nature of the diplomatic profession. Unlike the relatively stable framework of the Cold War era, today's diplomatic service faces increasingly rapid and complex challenges. Several key trends highlight this shift from a period of relative stagnation to one characterised by rapid volatility.

Diplomacy has traditionally revolved around relations between states, with governments and their envoys serving as the primary actors. Over time, particularly after the end of the Cold War, diplomacy became increasingly diversified. A growing number of actors now influence international processes, reshaping the role of the diplomat. The modern diplomat not only represents their government but also engages in dialogue with a wide range of stakeholders, including representatives from the private sector, civil society, and other non-state entities. Additionally, the practice of 'public diplomacy' has emerged as a crucial tool, enabling states to shape their image and influence perceptions on the international stage.

The technological revolution, particularly the advent of the Internet and social media, has fundamentally transformed the practice of diplomacy. Many international affairs now unfold in virtual spaces, requiring diplomats to adapt and effectively utilise new communication tools. Platforms such as X (formerly Twitter) and Facebook enable the instantaneous transmission of information and the rapid

55 Sutor, 2019, pp. 124–142.

expression of positions. While this can accelerate negotiation processes and enhance transparency, it also carries the risk of escalating tensions.

Modern diplomacy has become more unpredictable than ever. Crises, government changes, rapid geopolitical shifts – such as the war in Ukraine, rising tensions in the Middle East and Taiwan, or changes in the global balance of power – are forcing diplomatic services to respond with greater flexibility and speed. Foreign policy goals are also evolving; instead of lengthy negotiation processes, diplomats are increasingly faced with urgent interventions requiring swift decision-making.

On one hand, modern diplomacy emphasises engagement in multilateral forums such as the UN, G7, G20, and regional organisations, where diplomats must collaborate with a diverse array of actors. On the other hand, certain aspects of diplomacy remain strongly bilateral, particularly in areas like trade, defence, and energy. Changing geopolitical realities, such as the U.S.–China rivalry, require diplomats to simultaneously engage in different types of activities – from multilateral negotiations to direct talks with strategic partners.

Modern diplomacy no longer relies solely on 'classic diplomats' known for conducting traditional negotiations. Today, diplomatic services increasingly include specialists in narrow fields such as cybersecurity, defence, and technology development. Countries now require highly specialised personnel to address emerging international challenges effectively. Historically, diplomacy was viewed as an intricate 'royal politics' game, with diplomats forming an elite group operating discreetly behind closed doors. However, modern demands for transparency, openness, and media engagement have transformed the profession. Diplomats are now expected to be more communicative, responsive to public opinion, and capable of reacting swiftly and effectively to rapidly changing situations.

Modern diplomatic services must possess a broad array of instruments to address contemporary challenges. In addition to traditional tools such as negotiation and mediation, economic measures and even military deterrence are increasingly employed. Furthermore, modern diplomacy is becoming heavily reliant on digital tools. Online diplomacy, the use of blockchain for secure data management, and the application of artificial intelligence for geopolitical analysis are now integral to its practice.

3.3. New Functions of Diplomacy

Diplomacy is often equated with foreign policy, but while the two are closely related, they are distinct. Diplomacy is a narrower concept, functioning as a tool for the implementation of foreign policy. The relationship between the two can be likened to that between tactics and strategy. Foreign policy involves outlining a plan and setting the state's priorities in international relations, whereas diplomacy is the mechanism for executing those priorities.[56]

56 Ibid., pp. 33–34.

The functions of diplomacy can be analysed not only through the activities of diplomats but also in terms of its role in supporting and shaping state foreign policy. In this context, four primary functions of diplomacy can be identified. First, diplomacy helps to define the tasks of foreign policy. This function is continuous, as external conditions frequently change, requiring the constant updating of these tasks. Second, diplomacy has the evaluative function, analysing the actions of foreign states and governments. Accurate evaluation is crucial because misjudging or misinterpreting the behaviour of other actors can lead to flawed assumptions and ineffective policy decisions. The third function is selection: diplomacy identifies common points of interest between states, establishing platforms for agreement and cooperation. At the same time, it seeks to eliminate or set aside issues that create significant differences between states. The fourth function – prescriptive – means that diplomacy determines the most effective methods and means to achieve the objectives of the state's foreign policy at every stage of its implementation.[57]

Diplomacy has undergone numerous transformations over the years, evolving in response to changes in the international environment. Its forms, methods, means, and actors have all adapted to shifting global conditions. The processes of globalisation, coupled with the increasing interdependence and transnational nature of phenomena in recent decades, have driven further changes, affecting every aspect of traditional diplomacy. As international relations have developed, states are no longer the sole actors conducting diplomacy. While they retain a special position in the international system, they now operate within a dynamic environment that includes a growing number and diversity of actors. This evolution has transformed modern diplomacy into a complex web of interactions, involving not only state entities but also transnational, sub-state, and non-state actors.[58]

Robyn Ehryn Williams presents the concept of the 'new-new diplomacy', which she defines as the third phase in the evolution of diplomatic relations, following the so-called 'old' and 'new' diplomacy. According to Williams, the contemporary world is entering a stage in which diplomacy is increasingly shaped by the technologies of the Fourth Industrial Revolution (4IR), encompassing artificial intelligence, the Internet of Things, big data, robotics, and communication technologies. Technological progress, however, does not replace diplomacy; rather, it complements and strengthens it, making it more flexible, open, and better adapted to the demands of a globalised world.[59] In the author's view, this is true – but it represents only a form of diplomacy that continues to evolve. Its material dimension, essence, or the very core of politics, however, remains unchanged.

One of the new participants in supranational international relations is international organisations, which have evolved beyond being mere forums for facilitating diplomacy among individual states. These organisations now develop their own

57 Bryła, 1998, pp. 66–67.
58 Surmacz, 2013, p. 236.
59 Williams, 2022, pp. 27–36.

diplomatic structures, possess international legal subjectivity, and enjoy active and passive rights of legation.[60] A notable example of such a transnational organisation is the European Union. Although its diplomatic service has existed for more than 50 years, the establishment of the European External Action Service (EEAS) marked a significant transformation in its operations. The EEAS formally began its activities in 2011 under the Lisbon Treaty, signed in 2007.[61] Thanks to the European Union's legal personality, its delegations function as EU diplomatic missions, resembling those of sovereign states. The processes of globalisation and the accompanying evolution of international relations have therefore not only led to the emergence of new actors in diplomacy but have also resulted in changes in the scope of diplomatic engagement. This expansion broadens the catalogue of issues that diplomacy and diplomats must address, reflecting the interconnected and multifaceted nature of modern international relations.

Traditional diplomacy primarily focused on matters of 'high politics', which encompassed issues of war and peace, such as resolving territorial disputes and establishing borders. However, the end of the Cold War, accompanied by the shift away from a bipolar international order and the transformative effects of globalisation, led to an expansion of diplomacy's scope. This shift brought increased attention to issues categorised as 'low politics', including global challenges such as environmental protection, human rights, and economic development. Addressing these issues often requires multilateral cooperation among states and the involvement of non-state actors.[62] However, since Russia's aggression against Ukraine, there has been a notable resurgence of 'high politics' in international relations.

Dynamic changes in the international environment have significantly influenced the operation of traditional diplomacy, both within and beyond the state. The emergence of new issues in the public domain has created the need to involve additional actors with specialised expertise in specific areas of diplomacy. Increasingly, ministries outside of foreign affairs conduct their own diplomatic activities through their specialised departments, with representatives – experts in cultural, scientific, or economic matters – joining diplomatic missions alongside attachés, who were the first specialists integrated into diplomatic services. This growing thematic complexity of diplomacy and the need for expert support in conducting intricate international negotiations have made it increasingly common to see representatives from other ministries in diplomatic missions.[63] For example, more than half of the personnel employed in American embassies today come from outside the State Department.[64]

Some countries have gone even further by creating new thematic ambassador roles to address specialised international concerns. Denmark, for instance, has appointed

60 Bierzanek and Symonides, 2005, p. 172.
61 Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2008), Official Journal of the European Union, vol. 51, C 115.
62 Surmacz, 2013, p. 241.
63 Panek, 2023, pp. 63–64.
64 Surmacz, 2013, p. 242.

an Ambassador for Technology tasked with representing the Danish government in the technology sector, building relationships with industry representatives, and delivering presentations at global forums and conferences on technology-related issues. The growing involvement of new players and the heightened demand for diplomatic expertise raise questions about the evolving role of professional diplomats. Many scholars of international relations argue that, despite the increasing participation of government and private-sector actors in diplomacy, professional diplomats remain critical. They play a vital role in executing a country's foreign policy and managing its international relationships. Moreover, the expansion of official visits, combined with the expertise of professional diplomats, reduces the cost of such engagements and enables faster responses to emerging threats, as seen in the context of the ongoing war in Ukraine.

The advent of new communication tools has significantly altered the hierarchy and distribution of power among various actors involved in diplomacy. In particular, social media has increased interaction between policymakers – both external and internal – and the public. Foreign policy decisions now attract greater attention and engage a growing number of people, making diplomacy more accessible, transparent, and interactive.

However, these advances also bring new challenges. The digital revolution in information and communication technologies has transformed not only how people communicate and act but also how they think and interpret reality. The shared understanding of fundamental beliefs about how the world operates has become increasingly fragmented. This rapid development of information and communication technologies, coupled with the rise of social networks, has given birth to a new type of diplomacy – variously referred to as virtual diplomacy, e-diplomacy, cyber diplomacy, or digital diplomacy. Its essence lies in maintaining social, economic, and political interactions through electronic means rather than face-to-face communication.[65] However, despite the advantages, such as increased reach and speed, modern technologies also have limitations. Unlike face-to-face interactions, digital communication often lacks the nuanced understanding of context and the ability to build trust – both of which are critical to effective diplomatic activity.

Modern technologies influence not only the way communication takes place but also the role of diplomats. The contemporary diplomat should possess digital competencies, understand the mechanisms of artificial intelligence, be able to analyse data, and respond in real time. AI, data analysis, and automation can streamline decision-making processes, support negotiations, and increase the effectiveness of actions, though they also require continuous skill development and adaptation to new tools.

Williams notes that the foundation of diplomatic law remains the 1961 Vienna Convention; however, its provisions no longer fully address the challenges posed by digitalisation, cybersecurity, and the development of artificial intelligence.

65 Kosienkowski and Piskorska (eds.), 2014, pp. 105–142.

The author therefore advocates for updating international legal frameworks and for engaging governments, scholars, and technology creators in the development of new principles for the responsible use of AI in international relations.[66]

Permanent diplomatic missions, such as embassies, nunciatures, or high commissions, remain the most vital instruments of diplomacy and, along with foreign ministries, form its organisational foundation. A permanent diplomatic mission is an organ of the sending state, established with the consent of the receiving state to perform diplomatic functions. Essentially, it serves as the 'office' of the head of the diplomatic mission, supported by a team of substantive officers and technical and administrative staff who are officials of the sending state. While the mission operates under the authority of the sending state, it holds no legal subjectivity under the domestic law of the receiving state. It enjoys diplomatic immunity and is protected from prosecution under the jurisdiction of the receiving state, ensuring the inviolability of their operations and personnel.

The parameters for organising and operating the international environment, often referred to as the Late Westphalian environment, have undergone significant changes. This modern environment combines foundational aspects of the traditional Westphalian order with new features shaped by the processes of globalisation and fragmentation.[67] According to Mark Pietraś, the Westphalian international order was characterised by the following features: nation-states as the primary form of political organisation, creating a centralised system of states; the principles of territoriality and sovereignty were core attributes of this order, granting states exclusive sovereign power over their territories while excluding external interference from other sovereigns; international law replaced religion as the binding force of the international community; and the balance of power mechanism became the main tool for regulating the functioning of the international system.[68] However, the Westphalian order proved insufficient for effectively managing the complexities of the modern international system. Its transformation has been driven by factors such as globalisation, fragmentation, and the technological revolution, which have fundamentally altered the ways in which information is shared and communication is conducted. These forces have not only modified the Westphalian system of international relations but also reshaped the mechanisms of international community control, including diplomacy.

In the modern international environment, states are no longer the sole actors in international relations. Alongside states, sub-state, supra-state, and non-state actors have emerged as significant players. Despite this diversification, states remain the most important actors in diplomacy, with their traditional diplomatic institutions and the implementation of foreign policy through established channels of official communication. The second group of actors consists of international organisations.

66 Williams, 2022, pp. 27–36.
67 Pietraś and Marzęda, 2008, pp. 317–332.
68 Pietraś, 2021, pp. 30–31.

Initially designed as forums to facilitate diplomacy among states, they have evolved into key players in diplomatic activities. With international legal subjectivity, they exercise the right of legation not only passively but also actively, engaging directly in international relations. A third category of actors includes sub-state entities such as regions and cities. Their international activities, often referred to as 'paradiplomacy' in the literature, involve active engagement in global affairs. These sub-state units establish extensive networks of international cooperation and have dedicated bodies to represent their interests abroad. The scope, form, and degree of institutionalisation of such activities largely depend on the political and legal competencies granted to these entities under national regulations. The fourth group comprises non-state actors, whose growing involvement in international relations is reshaping the nature of diplomacy. These actors contribute to the creation of a transnational level of diplomacy, which transcends the traditional state-centric model.

Cooperation among government officials or public servants from different countries to address mutual policy challenges is increasingly organised through horizontally structured intergovernmental regulatory networks. As Anne-Marie Slaughter aptly notes, such networks are a defining feature of the 21st-century international order, with their participants embodying a model of 'new diplomats'.[69] Alongside intergovernmental networks, professional networks comprising experts with recognised knowledge and experience in specific fields – known as 'epistemic communities' – also play a critical role.[70] The growing complexity of global governance has gradually shifted diplomatic activities toward actors with specialised expertise. Functioning within these networks often requires members to adopt international roles that transcend national boundaries. As Kanishka Jayasuriya observes, this denationalisation of diplomacy challenges the traditional 'Westphalian' concept of diplomacy as purely representing national interests.[71]

The evolution of diplomacy's subject and object structure has also changed its addressees. It now targets not only the governments of other countries but also their societies, underscoring the growing significance of public diplomacy. Public diplomacy extends beyond traditional state-to-state interactions and includes shaping public opinion in other countries, fostering interactions among social groups and their interests, reporting on foreign events, and analysing their impact on policy. It can be defined as 'a bilateral, dialogic form of international communication aimed at audiences abroad, conducted through both mass media and direct channels. Its purpose is to shape or promote a positive image of the country, including influencing public opinion to cultivate favourable attitudes toward the sender's country'.[72] This approach also leverages additional resources, such as the activities of non-governmental organisations and institutions, to enhance its reach and effectiveness.

69 Slaughter, 2004, pp. 36–64.
70 Haas, 1992, p. 3.
71 Jayasuriya, 2004, p. 15.
72 Ociepka, 2008, p. 12.

While states remain the primary actors on the international stage, technological advancements have allowed international organisations to expand their influence. Nevertheless, these organisations largely continue to serve as venues for states to make collective decisions. The second technological revolution, however, has significantly benefited transnational corporations. By reorganising their internal structures, these corporations have emerged as important participants in international relations, wielding substantial influence across global economic and political landscapes.[73]

Lester Bowles Pearson emphasised the role of diplomacy and international cooperation as fundamental tools for maintaining peace. He believed that diplomacy in the nuclear age should take on a new character – being more open, multilateral, and morally responsible. Pearson saw the task of diplomats as creating an atmosphere of mutual understanding and promoting humanitarian values that counteract the logic of fear and militarism. He regarded effective foreign policy as a necessity for supporting and understanding public opinion. As a proponent of an active role for Canada on the international stage, Pearson pointed out that smaller states can play a significant role in maintaining peace through mediation initiatives, participation in UN peacekeeping missions, and promoting international law. Diplomacy in the nuclear age must become a diplomacy of collective responsibility, rather than merely a struggle for national interests. In a world where war could mean the annihilation of all humanity, the most important task for diplomats is to prevent conflicts, build trust, and develop international cooperation.[74] In this regard, he was a precursor to deterrence policy, utilising diplomacy in situations threatening global conflict or even the extinction of humanity.

The rapid development of modern information and communication technologies (ICTs) has brought about fundamental changes in the way we inform and communicate. This transformation is not only a significant factor in the evolution of contemporary diplomacy but also a driving force behind a revolution in its practice.[75] Similar to the debates sparked during the era of Lord Palmerston, discussions today often include predictions about the decline of traditional diplomacy. However, more moderate perspectives argue that while the institution of diplomacy is inherently conservative and slow to adopt technological advancements, it remains flexible and has demonstrated a long history of adapting to changing realities.[76]

Three key aspects characterise the interactions between modern technologies and diplomacy. First, ICTs are reshaping the environment in which diplomacy operates. Second, they provide new tools for executing core diplomatic functions.[77] Third, they have become the subject of diplomatic activity, as states and international

73 Papp, Alberts and Tuyahov, 1997, pp. 28–29.
74 Pearson, 1965, pp. 12–34.
75 Moses and Knutsen, 2001, pp. 355–380.
76 Hocking, 2002, pp. 18–24.
77 Surmacz, 2014, pp. 17–43.

organisations address issues such as regulations governing the use of emerging technologies and industrial property rights. In the context of diplomacy, modern technologies primarily facilitate direct communication, enhance access to information, enable the dissemination of information, support virtual cooperation, and improve mobility and the speed of response.[78]

Joseph S. Nye Jr., the originator of the concept of soft power, offers reflections on the evolution of this idea in the era of the information revolution and the challenges posed by authoritarian states. Nye defines soft power as the ability to achieve desired outcomes through attraction and persuasion rather than coercion or payment. A state possesses soft power when it can make others want the same things it wants – when its culture, values, and policies are admired. The sources of soft power are culture, political values, and foreign policy, provided they are perceived as credible and morally justified.

Nye emphasises that in the age of the information revolution – characterised by the rapid decline in the costs of processing and transmitting data, widespread access to the Internet, and social media – the significance of soft power increases. In a world saturated with information, attention and credibility become the key resources, rather than mere possession of information. In this context, a state's reputation and the trust in its messaging matter more than ever. Propaganda, fake news, and manipulation may yield short-term effects, but in the long run, they undermine the credibility and trust that form the foundation of effective public diplomacy.

According to Nye, democratic states should not respond by imitating authoritarian methods but should instead defend their credibility, openness, and pluralism, which are the sources of their soft power. Honesty, free media, civil society, and the capacity for self-criticism are the most effective tools for democracies to build attractiveness. Nye points out that in the past, similar values helped the West win the Cold War, as ideas of freedom and openness attracted people behind the Iron Curtain. In a critical reflection on Nye, one could also emphasise the importance of respect for a nation's own identity, traditions, and culture. Building political and legal reality on the axiology of a given nation and state, while respecting minority rights, constitutes elements that contributed to the West's victory over the Soviets in the Cold War.

In conclusion, Nye asserts that soft power remains a key element of international politics, even as its instruments and context evolve. In the era of digital media and disinformation, a state's strength is determined not only by its military or economy but also by its ability to inspire, persuade, and earn trust. In a world of information overload, credibility becomes the true currency of power, and openness and transparency are the most effective defences against manipulation.[79]

The modern international environment has witnessed a significant increase in the flow of information, people, and goods. For diplomatic practice, this has led to a heightened emphasis on consular functions. New communication tools have made

78 Kurbalija, 1999, pp. 188–189.
79 Nye, 2019, pp. 7–20.

the diplomatic environment and processes more transparent. The public is now more informed about diplomatic activities, and electronic media serve as platforms for dialogue and feedback between diplomats, citizens, and the international community. The outcomes of these interactions increasingly influence foreign policy decisions.[80] However, greater transparency in diplomacy does not eliminate the need for secrecy or confidentiality. Many diplomatic activities, particularly those involving sensitive state issues, require discretion and compromise. Modern communication technologies have made information a critical source of power and influence, reshaping how states engage on the global stage. 'Soft power' – the ability of a state to influence others through the appeal of its culture, policies, and ideology rather than through coercion or payment[81] – has gained prominence in this new landscape. Traditional diplomacy conducted exclusively between state governments is no longer sufficient. Public diplomacy, as a tool of soft power, is becoming increasingly important.[82] It extends beyond traditional diplomatic channels, encompassing the formation of public opinion in other countries, the engagement of social groups and their interests, and the reporting of foreign events and their impact on policy.[83]

Jean-Robert Leguey-Feilleux presents diplomacy not as a set of rigid rules and protocols, but as a living field of international activity that evolves alongside the political, economic, and technological development of the world. The core functions of diplomacy – representation, negotiation, communication, and the protection of state interests – remain constant; it is the ways in which these functions are carried out that must adapt to contemporary challenges, such as globalisation, the increasing role of international organisations, the emergence of non-state actors, and the development of information technologies.

From the Westphalian system, in which nation-states were the primary actors in international relations, through the era of bilateral diplomacy and secret agreements, to the contemporary age of multilateral diplomacy – where organisations such as the UN, the European Union, and the WTO play a key role – the practice of diplomacy has continuously evolved. Processes such as decolonisation, the Cold War, and the establishment of numerous international institutions have led to a shift from traditional bilateral relations toward a more complex web of interdependence among states and organisations.[84]

Changes in the international order typically lead to corresponding transformations in the institutions operating within it. The primary drivers of these changes include globalisation, fragmentation, and the information revolution, which collectively prompt a redefinition of sovereignty as well as structural and functional adjustments within the international community. The emerging international order is

80 Arendarska, 2012, p. 47.
81 Nye, 2007, pp. 7–20.
82 Ociepka, 2008, pp. 69–108.
83 Data from: http://www.publicdiplomacy.org (Accessed: 29 December 2024).
84 Leguey-Feilleux, 2009, pp. 23–45.

marked by both continuity and change. It incorporates fundamental elements of the traditional Westphalian order while introducing new, qualitatively distinct parameters. This hybrid international order has, in turn, resulted in the hybridisation of the institutions that operate within it.[85]

4. Conclusion

Contemporary diplomacy has undergone a significant evolution. From a closed and secret practice reserved for a narrow circle of professionals, through the open and multilateral diplomacy that emerged after World War I, to the current digital and inclusive form that involves not only states but also non-governmental organisations, the media, the private sector, and citizens. Technological progress, including the development of artificial intelligence, data analysis, and automation, does not replace diplomacy but complements it, making it more flexible and open. At the same time, it requires modern diplomats to possess digital competencies and the ability to continuously develop skills and adapt to new tools.

The foundations of diplomatic law, such as the 1961 Vienna Convention, remain crucial; however, contemporary challenges related to digitalisation, cybersecurity, and artificial intelligence require updating international legal frameworks and close collaboration between states, scholars, and technology developers. Equally important is Joseph Nye's concept of soft power, according to which, in the digital and information era, credibility, reputation, and the ability to attract and persuade others become more decisive than military or economic power alone. Democracies should defend their values, such as pluralism, openness, and free media, rather than imitate authoritarian methods, as honesty, civil society, and the capacity for self-criticism are the most effective tools for building a state's attractiveness.

Modern diplomacy must consider not only traditional bilateral relations but also a complex web of interdependence involving international organisations and non-state actors. This reflects responses to globalisation, decolonisation, and the emergence of new international institutions. Despite dynamic technological and organisational changes, the core functions of diplomacy – representation, negotiation, communication, and the protection of state interests – remain unchanged. What must adapt are the ways these functions are carried out in a world where attention, trust, and credibility have become key resources, and where openness and transparency constitute the most effective defence against manipulation and disinformation.

The modern diplomatic service, despite its traditional roots, is becoming increasingly flexible, diverse, and oriented toward faster responses to evolving geopolitical and technological realities. To remain effective, diplomacy must continue adapting

85 Surmacz, 2015, p. 137.

to the challenges posed by globalisation, digitisation, and the growing influence of non-governmental organisations and non-state international actors. Diplomacy is no longer the exclusive domain of major states and international institutions; it has transformed into a more decentralised process, demanding new competencies and skills from diplomats.

The processes of globalisation, advancements in communication and information technologies, and the expanding role of multilateral diplomacy are fundamentally reshaping the significance, structures, and functions of permanent diplomatic missions in bilateral relations. These shifts have led many analysts and researchers to draw parallels with foreign ministries, questioning their relevance and even labelling them as outdated or unnecessary. Several key factors are cited in the decline of bilateral missions: a) the increased prominence of heads of state and government in diplomatic activities, bypassing permanent missions for resolving many issues; b) the growing autonomy of sectoral ministries in foreign policy and diplomacy; c) the evolution of diplomatic subject matter, with greater emphasis on 'low politics' issues such as economic and social concerns, leading to the rise of multilateral diplomacy; d) the heightened international activity of non-state actors; e) modern communication technologies, which also reduce the need for permanent missions as intermediaries; f) the declining prestige of foreign ministries.

These changes signify a shift from 'club diplomacy', characterised by a small number of players, hierarchical structures, traditional communication methods, and low transparency, to 'network diplomacy,' which involves a larger number of participants, flatter organisational structures, the adoption of new communication tools, and increased transparency. As a result, the primary task and challenge of 21st-century diplomacy is to effectively manage complexity.[86]

86 Cooper, Heine and Thakur, 2013, pp. 21–25.

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Chapter 5

Protection of European Union Citizens Abroad: Legal Framework and New Challenges

Anna Szarek-Zwijacz

Abstract

One practical benefit of being a European Union (EU) citizen is the right to be protected by diplomatic and consular authorities of any Member State in a third country where the citizen's own Member State is not represented. The primary aim of this study is to examine the contemporary framework of EU law regarding the protection of European citizens abroad and to answer the question of how this law affects the internal law and practice of EU Member States. By analysing normative rules, it seeks to review the evolution and scope of this protection. It presents the transposition of relevant EU law by the EU Member States on the example of Poland (with some references to other Central European States). The research also covers the effectiveness of the European External Action Service, including its EU Delegations, in relation to European consular protection, as well as the practical aspects of the application of Directive 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the EU in third countries. As many problems and ambiguities in the application of these regulations have been revealed, particularly during the large-scale crises that have occurred in recent years (COVID-19 pandemic, military conflicts in various parts of the world, etc.), in December 2023, the European Commission proposed to amend Directive 2015/637 in order to strengthen EU citizens' right to consular protection. The proposal is also subject to analysis in this paper in order to assess the possibility of producing its intended outcomes, including enhanced legal clarity, streamlined cooperation, greater effectiveness of consular service, higher standards of consular support, and response to crises.

Anna Szarek-Zwijacz (2026) 'Protection of European Union Citizens Abroad: Legal Framework and New Challenges'. In: Paweł Czubik (ed.) *Changes in the Structure and Scope of Foreign Service Activity*, pp. 173–206. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2026.pccssfsa_5

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Keywords: EU citizenship, consular assistance, diplomatic protection, protection of EU citizens abroad, European External Action Service, European consular protection, consular cooperation

1. Introduction

Citizens of a particular State are under its protection while abroad. Under international law, such protection of citizens has two forms: diplomatic protection and consular protection (or rather, consular assistance).[1] The creation of the concept of European Union (EU) citizenship and its incorporation into the Maastricht Treaty resulted in establishing a new level of protection for citizens of EU Member States when they are travelling or living in a third (non-EU) country, which is based on what was previously reserved for them under national constitutional systems[2] and respected under international law. The external dimension of EU citizenship has been expressed in the provision that EU citizens would be entitled to protection by diplomatic and consular authorities of any Member State in a third country where the citizen's own Member State is not represented by an embassy or a consulate. This right is set out in Arts. 20(2)(c) and 23 of the Treaty on the Functioning of the European Union (TFEU)[3] and in Art. 46 of the Charter of Fundamental Rights of the European Union (CFR).[4] To give effect to this right, the acts of secondary EU law are established; currently the relevant rules are contained in Directive 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the EU in third countries adopted on 20 April 2015.[5] The Member States had to transpose the Directive into their national legislation, which means bringing into force the laws, regulations, and administrative provisions necessary to comply with this Directive.

The primary aim of this study is to examine the contemporary framework of EU law regarding the protection of EU citizens abroad and to answer the question of how this law affects the internal law and practice of EU Member States. First, it requires determining the scope of the right of EU citizens to be protected abroad.

1 Künzli, 2006, p. 321.
2 Kozłowski, 2020, p. 150.
3 Treaty on the Functioning of the European Union, consolidated version, Official Journal C 326/47, 26 October 2012.
4 Charter of Fundamental Rights of the European Union, Official Journal C 326/391, 26 October 2012.
5 Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, Official Journal L106/1, 24 April 2015.

As it is commonly called 'right to diplomatic and consular protection', the study, first, clarifies the scope of these two concepts: consular protection and diplomatic protection, which are strictly established under international law and State practice. Further considerations focus on detailed legal analysis of primary and secondary EU law concerning the protection of EU citizens abroad. The main part of the study is devoted to examining the implementation and practical application of the rules contained in Directive 2015/637, including its transposition into the national legislation of Member States, as demonstrated by the example of the Republic of Poland. The subsequent sections of the study address the role of the European External Action Service (EEAS) and its Delegations in the protection of EU citizens abroad and indicate the 'weak points' of the present regulations revealed in practice in recent years, particularly during large-scale crises strongly involving the consular protection of unrepresented EU citizens in third countries. Significant gaps in the existing consular protection framework – in particular, deficiencies in the current coordination and cooperation mechanisms among Member States' consular services – reinforced demands for improving the system. On 6 December 2023, the European Commission brought forward a proposal for a Council directive to amend Directive 2015/637 in order to achieve greater clarity and the overall effectiveness of consular protection for EU citizens in third countries, the analysis of this proposition is included in the last section.

2. Consular Protection and Diplomatic Protection – Clarification of the Scope of Concepts

In international law, diplomatic protection and consular protection/assistance are two completely different legal concepts.[6] As is noted in the doctrine, despite these differences, semantic confusion occurs in their application: 'diplomatic protection' in common language means, in most cases, a consular protection action.[7]

Consulates are an ancient institution with a varied history.[8] Protection of nationals has always been important and is now the most basic function of the consul.[9] The terms 'consular protection' and 'consular assistance' are not directly used in the Vienna Convention on Consular Relations 1963, although in Art. 5 of this Convention, which is devoted to consular functions, such activities are listed as follows: (a) protecting in the receiving State the interests of the sending State and of its

6 Vigni, 2017, p. 587.
7 Farias de, 2021, p. 209.
8 Much more than permanent diplomatic missions, but, as will be explained, diplomatic protection is not strictly connected with diplomatic missions. About the historical development of consulates and their functions, see e.g. Zourek, 1957, pp. 72 et seq.
9 Lee and Quigley, 2008, p. 116.

nationals, both individuals and bodies corporate, within the limits permitted by international law and (b) helping and assisting nationals, both individuals and bodies corporate, of the sending State.[10]

In international law doctrine, both the terms 'consular protection' and 'consular assistance' are used. It is, therefore, useful to consider the conceptual difference between them and whether they can be used interchangeably. According to Patrizia Vigni, both international norms and practice confirm that the distinction between consular assistance and protection is unnecessary. However, the definition of 'consular assistance' is most frequently adopted and 'includes all the forms of protection that individuals have the right to enjoy when they happen to face problems on the territory of a third country'.[11]

In fact, 'consular assistance' seems to be a better term to describe consular activities conducted for citizens staying abroad, broader than only 'consular protection'. It combines two elements: helping and protecting (of both individuals and legal persons). For instance, this term is used by the British Foreign, Commonwealth & Development Office (FCDO):

> Consular assistance describes the support and help the FCDO can provide to British nationals if they get into difficulty whilst living or travelling abroad (…). This includes, for example, supporting those who have lost their passport, been a victim of crime or who have been hospitalised or arrested.[12]

It is also used by the International Organization for Migration: 'Consular assistance is the aid provided by the consular (…) agents of a State to its nationals abroad', and 'Consular assistance is the assistance rendered by States to their nationals, and in some cases to non-nationals (based on bilateral or multilateral agreements), including those who find themselves in difficulties in a foreign State'.[13]

10 Vienna Convention on consular relations, done at Vienna on 24 April 1963 (entered into force on 19 March 1967), UN Treaty Series, vol. 596, p. 261.
11 Vigni, 2017, p. 587.
12 Foreign, Commonwealth and Development Office, 2022.
13 IOM UN Migration, 2021, pp. 3–4.

The term 'consular assistance' may also be derived from internal law, such as Polish Consular Law 2015.[14] According to Art. 20(1) of this regulation, a consul 'provides assistance' to a Polish citizen, in particular, in the event of:

a) a serious accident or serious illness;
b) an arrest or detention of that citizen;
c) an act of violence of which a Polish citizen has fallen victim;
d) the death of a Polish citizen;
e) a need for a sudden return of a Polish citizen deprived of financial resources to the Republic of Poland or to the country of residence.

Unlike the terms 'consular protection' and 'consular assistance', which remain undefined in international legal documents, such a definition can be found in relation to diplomatic protection. In 2006, the International Law Commission completed its work on codifying the topic of diplomatic protection by adopting the Draft Articles on Diplomatic Protection (DADP).[15] Articles start with a definition of diplomatic protection. According to Draft Article 1, it:

> (…) consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

Therefore, diplomatic protection is primarily related to the international responsibility of States, and 'diplomatic action' is one possibility to exercise this protection – but not the only one. ILC further explains that this article 'views diplomatic protection through the prism of States responsibility and emphasizes that it is a procedure for securing the responsibility of the State for injury to the national flowing from an internationally wrongful act'.[16]

The development of human rights has raised the question of whether diplomatic protection is a human right. In other words, it is a question of whether a State has an obligation to provide such protection in a given situation or whether it remains the sole decision of that State. Traditionally, under 'classic' international law, diplomatic protection has been considered an exclusive State right in the sense that a State exercises diplomatic protection in its own right because an injury to a national is considered an injury to the State. That was because 'in the early years' of international law, an individual had no rights in the international legal order, and this fiction was the only means to protect him at the international level.[17] Today, the situation is sig-

14 Ustawa z dnia 25 czerwca 2015 r. Prawo konsularne, Dz.U. z 2023 r. poz. 1329 [Act of 25 June 2015 Consular Law, uniform text published in Official Journal 2023 item 1329].
15 United Nations, 2006.
16 DADP, point 5, p. 27.
17 DADP, point 3–4, p. 27.

nificantly different because of the development of human rights and the mechanism of their protection. According to Jan Sandorski, the right of a citizen to diplomatic protection by his State arises from the rights and privileges that States guarantee to their citizens in their constitutions. He points out that very often in these constitutions there appear provisions clearly creating a citizen's right to diplomatic and consular protection. This is evidence of State practice, which is increasingly accompanied by the conviction that the rules created in this way are international customary law norms or at least customary law norms *in statu nascendi*.[18] He stresses that the traditional understanding of diplomatic protection as a State right only, and not a human right, is very unfortunate: the citizen is then 'objectified', 'doomed to the mercy and disgrace' of the State. J. Sandorski also states that in truly democratic States, the citizen should not be treated as a subject dependent on the good or bad will of the State, but as an important 'subjectified' element of the State, who is entitled to protection when his or her basic rights have been violated.[19]

However, as ILC stressed, Draft Article 1 of the DADP containing the contemporary definition of diplomatic protection 'is formulated in such a way as to leave open the question whether the State exercising diplomatic protection does so in its own right or that of its national – or both'.[20] Moreover, in the commentary on Draft Article 2 of the DADP,[21] it is underlined that a State has the right to exercise diplomatic protection on behalf of its national, but it is under no duty or obligation to do so. What may oblige a State to extend diplomatic protection to a national is its internal law, but international law imposes no such obligation.[22] It is an approach known from the famous *Barcelona Traction* case, in which the International Court of Justice stated, *inter alia*, that 'The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease'.[23] Despite the development of human rights, this approach is still dominant in contemporary international law, and an attempt to establish a general international obligation for States to exercise diplomatic protection of their own nationals abroad is, unfortunately, still 'wishful thinking'.[24]

In the abovementioned text, the expression 'diplomatic protection' is used in its formal sense, as defined by the ILC. However, the same expression is also used informally to indicate the assistance provided by diplomatic missions to their nationals[25] for the following two reasons. First, the Vienna Convention on Diplomatic

18 Sandorski, 2006, p. 20–21.
19 Ibid., p. 133.
20 DADP, point 5, p. 27.
21 Art. 2 of the DADP concerns the right to exercise diplomatic protection.
22 DADP, point 2, p. 28.
23 Barcelona Traction, Light and Power Company, Limited (*Belgium v. Spain*), Second Phase, Judgment of 5 February 1970, ICJ Reports 1970, point 79, p. 45.
24 Salazar Albornoz, 2006, p. 407. Differently: Sandorski, 2006, p. 20.
25 Denza, 2018, p. 466.

Relations 1961[26] lists among the basic functions of diplomatic missions 'protecting in the receiving State the interests of the sending State and of its nationals' (Art. 3(1) b). Second, it is a 'shortcut': the diplomatic missions may also perform consular functions by their consular section (Art. 3(2)).

As follows from the presented definition of diplomatic protection, a State may exercise it, *inter alia*, through diplomatic action. This action covers, according to the ILC, 'all the lawful procedures employed by a State to inform another State of its views and concerns including protest and request for inquiry or negotiations, aimed at the settlement of disputes'.[27] Such activities may be performed by diplomatic agents (but also by other State organs). However, 'diplomatic protection does not include *démarches* or other diplomatic action that do not involve the invocation of the legal responsibility of another State such as informal requests for corrective action'.[28] Therefore, not all actions taken by diplomats to protect nationals will meet the requirements for diplomatic protection – only those that concern international responsibility.

It should also be stressed that diplomatic protection is an instrument of 'last resort'. States are much more cautious in using it mainly because of political reasons; they are not eager to spoil relations with the other country, even if the latter has violated international law. Consequently, diplomatic protection is rarely used by States than diplomatic actions not involving international responsibility and incomparably less frequently than everyday consular assistance. The violation must be exceptionally serious for the State to agree to turn it into an action of international responsibility.[29]

Summarising this part of the considerations, diplomatic protection in the formal sense must be connected with the responsibility of States for an internationally wrongful act. Some forms of diplomatic protection in the formal sense may be exercised by a State through the actions of its diplomatic agents, but the aim of the action must be to invoke the legal responsibility of the other, in practice, the receiving State. Other activities of diplomatic agents that involve the protection (only) of the interests of their nationals in the receiving State can be called 'diplomatic protection' only in its informal meaning. In most cases, the term 'diplomatic protection' is used simply as a shortcut to the performance of consular functions by the consular sections of diplomatic missions.

26 Vienna Convention on Diplomatic Relations, done at Vienna on 18 April 1961 (entered into force on 24 April 1964), UN Treaty Series, vol. 500, p. 95.
27 DADP, point 8, p. 27.
28 DADP, point 8, p. 28.
29 Farias de, 2021, p. 210.

3. Protection of EU Citizens Abroad Under EU Treaties

The Treaty of the European Union established a unique institution: EU citizenship, which is different in its nature from, and not a substitute for, national citizenship.[30] It is an *ipso jure* status of citizens of any EU Member States, and whether an individual is a national of any given Member State is decided exclusively by the national law of the State concerned.[31]

From the very beginning, among the rights arising out of EU citizenship was the right to enjoy, on the territory of a third country in which the Member State is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State.[32] This novel right[33] was established to give more practical substance to the new concept of citizenship and to strengthen the international identity of the EU in third countries.[34] Art. 23 of the TFEU, specifically dedicated to this issue, also provides for an obligation for EU Member States to adopt the necessary provisions and start the international negotiations required to secure this protection. The abovementioned right of EU citizens guaranteed in the TFEU is additionally reinforced by the wording of Art. 46 of the CFR,[35] which is similar to the main content of Art. 23 of the TFEU.

When analysing the protection of EU citizens abroad, the first issue that needs to be clarified is the scope of protection they are entitled to. The following question arises: does European citizenship include the right to diplomatic protection? This is particularly important in the context of the common use of the term 'diplomatic and consular protection' to describe this entitlement, both in the doctrine[36] and in European Commission official documents[37] and on the official website[38] that may cause confusion. The main reason for this appears to be the title of Art. 46 of the CFR, that is, 'diplomatic and consular protection'. However, a careful analysis of the wording of Art. 23 of the TFEU shows that this article only concerns a form of protection that requires assistance from the diplomatic or consular authorities of (other) Member

30 According to Art. 9 of the TEU (Treaty on European Union), '(…) Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship'. Treaty on European Union, consolidated version, Official Journal C 326/13, 26 October 2012.

31 Csatlós, 2016, p. 264.

32 Currently Art. 20(2)c TFEU (ex-Art. 17 of the TEC – Treaty on European Community).

33 Kostakopoulou, 2020, p. 75.

34 Denza, 2014, p. 1183.

35 Art. 46 of the CFR Diplomatic and consular protection: Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

36 E.g. Wrońska, 2009, pp. 198–210. Some authors even use only the term 'diplomatic protection' in relation to the right enshrined in Arts. 20 and 23 of the TFEU, see: Schrauwen, 2008, pp. 61–62.

37 E.g. Green Paper, Diplomatic and consular protection of Union citizens in third countries, COM (2006) 712 final, Brussels, 28 November 2006.

38 European Commission, n.d.

States – which is not the same as the combination of 'diplomatic protection' and 'consular protection'. It should be stressed that in the content of Art. 23 of the TFEU (as well as in the sole content of Art. 46 of the CFR), the terms 'diplomatic protection' and 'consular protection' are not used.[39]

The second cause of misunderstanding may be the very use of the word 'diplomatic' in the content of Art. 23 of the TFEU. As Patrizia Vigni notes, 'in fact, the word seems to associate diplomatic protection with the functions of diplomatic agents, while neither diplomatic nor consular organs usually exercise diplomatic protection in international practice'.[40] The drafters of Art. 23 of the TFEU, thereby, bring together two functions and activities that are distinct and subject to different rules under international law.[41] However, there is a reason for such a formulation of Art. 23 of the TFEU: the simultaneous use of the adjectives 'consular' and 'diplomatic' is to create the possibility for EU citizens to choose between the authorities to which they will refer, justified by the fact that not only consular posts but also consular departments in diplomatic missions are entitled to perform consular functions.

Nevertheless, the answer to the question of whether EU citizenship results in the right to diplomatic protection by the other Member States is negative primarily because of the very essence of what diplomatic protection is. One key element of the definition of diplomatic protection is that a State invokes the responsibility of another State for an injury caused by an internationally wrongful act of that State to a person that is a national of the former State. European citizenship itself does not provide a sufficient link to fulfil the requirement of nationality that is obligatory when a State wants to exercise diplomatic protection in favour of the person concerned. Whether a Member State is entitled to provide diplomatic protection for EU citizens who are not its nationals cannot be resolved unilaterally by the EU since EU law binds only the Member States – and not third States. Therefore, it has been argued that actions taken by a Member State on behalf of the nationals of another Member State should be recognised by third countries on the same premise as recognition of State assistance under international law.[42] Of course, there may be arguments that consular protection can also be provided to citizens of another State only with the consent of the host country. Nevertheless, under international law, such a situation has already been foreseen. According to Art. 8 of the Vienna Convention on Consular Relations 1963, upon appropriate notification to the receiving State, a

39 Although, for example, the German version of Art. 23 of the TFEU refers to 'diplomatic and consular protection' – 'diplomatischer und konsularischer Schutz', for more about this, see: Bogdandy von and Arndt, 2011 point 16. Such language seems to include diplomatic protection – but this would be (or more precisely: this is in fact) inconsistent with the content of Art. 20 of the TFEU in German version, which speaks about protection by the diplomatic and consular authorities (Recht auf Schutz durch die diplomatischen und konsularischen Behörden eines jeden Mitgliedstaats). Therefore, it is difficult to assume that this is an evidence of the inclusion in Art. 23 of the TFEU, the right to diplomatic protection.

40 Vigni, 2017, p. 588.

41 Ibid., p. 587.

42 Shuibhne, 2023, p. 221 (in reference No. 193).

consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State. The practice of consular services by one State on behalf of another is, for example, common among countries of the Commonwealth: The UK, Canada, and Australia, with extensive overseas consular representation, have for many years performed consular functions on behalf of smaller Commonwealth States.[43] However, unlike consular protection, there is neither legal basis nor a practice of exercising diplomatic protection by a State in relation to persons who are not its nationals.[44] As Annemarieke Vermeer-Künzli stressed, 'diplomatic protection on behalf of a non-national is extremely unlikely to be accepted under current international law'.[45]

Taking into account the abovementioned arguments, it should, therefore, be concluded that the right of European citizens 'to protection by the diplomatic or consular authorities' means the right (only) to consular protection (assistance), which should be conducted by embassies or consular posts, and not the entitlement to both consular protection and diplomatic protection. In other words, existing EU norms do not allow diplomatic protection within the meaning of the phrase 'protection by the diplomatic or consular authorities' of another Member State contained in Art. 23 of the TFEU.[46] It is confirmed by the subsequent legislative instruments concerning the protection of EU citizens on the territory of third States that are focused on cases in which prompt and effective consular assistance is needed by EU citizens.

4. Protection of EU Citizens Abroad under EU Secondary Law – Council Directive 2015/637 and Other EU Legal Acts

Before the entry into force of the Lisbon Treaty, the EU citizenship's right to equal protection in third countries was, according to Madalina Moraru, 'the 'odd one out' right in the toolkit of EU citizenship rights, due to its being subject to different institutional and policy instruments, and decision-making rules compared with internal EU citizenship rights'.[47] The implementation regime of this external dimension of EU citizenship was based on the intergovernmental model – two decisions that were

43 Denza and Wickremasinghe, 2023, p. 277.

44 With the reservation that this applies to diplomatic protection in the formal sense – the invocation of international responsibility of States (presented in point 1 of this article) and not to the undertaking of temporary protection of the interests of one State and its nationals on the territory of the other State, which is permitted according to Art. 46 of the Convention on Diplomatic Relations 1961: 'A sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals'.

45 Vermeer-Künzli, 2011, p. 968.

46 Vigni, 2017, p. 591.

47 Moraru, 2019, p. 424.

intergovernmental agreements: Decision 95/553/EC of 19 December 1995 regarding protection for citizens of the EU by diplomatic and consular representations[48] and Decision 96/409/CSFP of 25 June 1996 on the establishment of an emergency travel document.[49] Both the abovementioned documents were criticised for establishing only minimal general guidelines that Member States had to respect when ensuring equal consular protection abroad for unrepresented EU citizens, which could not provide effective protection. Decision 95/553/EC entered into force only after 7 years (on 3 May 2002), after a long process of ratification by the 15 contemporaneous Member States, demonstrating the inconsistent attitude of States and obstacles in the debate on increased EU cooperation in regards consular assistance.[50] In the doctrine, it was assessed that the ambiguous, open-ended formulations and wide discretionary powers awarded to the Member States, without safeguards for the EU citizens' rights, confused rather than clarified the practical implementation of the EU citizenship right to equal protection abroad.[51]

The key changes have occurred because of the entry into force of the Lisbon Treaty, which has empowered the Commission to propose directives for implementing the EU citizenship right to equal protection in third countries.[52] As Erzsébet Csatlós notes, it 'has completely redefined, directly and indirectly, the EU's consular protection policy by seeking to overcome the limits of intergovernmental cooperation'.[53] Two years later, in 2011, the Commission put forward its proposal for a directive that relies primarily on the cooperation of Member States.[54]

Council Directive 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries was adopted after prolonged negotiations.[55] It is based on some crucial European values and affirms consular protection[56] of unrepresented EU citizens under the same conditions as nationals as a fundamental right and an expression of European solidarity, which provides an external dimension to the

48 Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations, 1995.

49 Decision of the Representatives of the Governments of the Member States, meeting within the Council of 25 June 1996 on the establishment of an emergency travel document, 1996.

50 Okano-Heijmans, 2010, p. 18.

51 Moraru, 2019, p. 423.

52 According to (current) Art. 23(2) of the TFEU.

53 Csatlós, 2022, p. 119.

54 Commission Proposal for a Council Directive on Consular protection for citizens of the European Union abroad, COM(2011)881 final, Explanatory Memorandum.

55 Kostakopoulou, 2020, p. 88. About the long and difficult road to the Directive's adoption, see: Moraru, 2019, pp. 420–429.

56 In the context of the previous considerations on the scope of the right to protection of EU citizens abroad, it is worth noting that the Directive's preamble refers only to consular protection – and not to diplomatic and consular protection – despite the direct reference to Art. 46 of the CFR (Diplomatic and consular protection).

concept of EU citizenship and strengthens the identity of the EU in third countries.[57] The primary goal of the Directive is to establish the mechanisms for coordination and cooperation needed to give practical effect to Art. 23 of the TFEU. In the doctrine, it is stressed that the key challenge was 'achieving an appropriate balance between effectiveness and legal certainty for citizens, on the one hand, and respect for (and sensitivities around) national prerogatives in the provision of consular assistance, on the other'.[58]

The obligation of Member States' embassies or consulates to provide consular protection to unrepresented citizens under the same conditions as to their own nationals is the core provision of the Directive (Art. 2). Unrepresented EU citizen refers to every citizen who holds the nationality of a Member State not represented in a third country (Art. 4). Protection is also guaranteed to their family members (Art. 5). Even though the latter are not EU citizens themselves, they are entitled to protection to the same extent and under the same conditions as non-EU family members of citizens of the assisting Member State.

To apply the Directive, it is crucial to determine what constitutes an unrepresented Member State. Pursuant to Art. 6, it is not only an obvious situation when a Member State has no permanent embassy or consulate established in a third country but also when it has no embassy, consulate, or honorary consul there, which is effectively in a position to provide consular protection in a given case. The Directive also confirms that unrepresented EU citizens can choose the Member State embassy or consulate from which they seek protection (Art. 7(1)).

The Directive outlines the types of consular protection granted: it may include, *inter alia*, the following situations: (a) arrest or detention, (b) being a victim of crime, (c) a serious accident or serious illness, (d) death, (e) relief and repatriation in case of an emergency, and (f) a need for emergency travel documents (Art. 9). The above list shows that the drafters acknowledged and sought to address 'the very different circumstances that can necessitate assistance for Union citizens in third countries, ranging from 'day-to-day situations, such as in case of serious illness or when being victim of a crime' to large-scale crises and emergencies'.[59] It should also be stressed that the situations are enumerated in a non-exhaustive manner, which means that unrepresented EU citizens are also entitled, in a non-discriminatory manner, to other types of consular assistance that Member States provide to their own nationals.

In the subsequent provisions of the Directive, the principles and measures involved in organising assistance at different levels are established: cooperation and coordination between Member States' diplomatic and consular authorities, between Member States' authorities at the central level, and with the EU, more specifically, the Commission and the EEAS. In particular, the Directive codifies the 'Lead State' concept that was previously adopted by the Council as conclusions in June 2007 and

57 Preamble of the Directive, Recital 3.
58 Shuibhne, 2023, p. 223.
59 Ibid., p. 223.

specified in the Guidelines in 2008.[60] According to Recital 23 of the Directive, the term 'Lead State' refers to 'one or more Member State(s) represented in a given third country, and in charge of coordinating and leading the assistance of unrepresented citizens during crises'.

The Directive regulates also the reimbursement of cost, with the general rules that the assisting Member State may ask for the reimbursement of costs from the unrepresented citizen's Member State of nationality (not from the unrepresented citizen directly) and that unrepresented citizens shall undertake to repay to their Member State of nationality the cost of consular protection, on the same conditions as the nationals of the assisting Member State. The unrepresented EU citizen assisted repays his or her Member State of nationality for the cost of consular protection if so requested (Art. 14(1) and (2)). There is also a facilitated procedure provided for crisis situations (Art. 15).

EU Member States were given three years to transpose the Directive, that is, to bring into force the laws, regulations, and administrative provisions necessary to comply with it. The date of 1 May 2018 – the date of the final transposition – is considered a milestone reached in the development of EU citizenship policy because the Directive is the very first EU secondary instrument implementing one of the core EU citizenship rights – the right to equal protection outside the EU.[61]

One of the most common situations when European consular assistance is provided, also mentioned in Directive 2015/637, is the loss of a passport or travel documents, which can cause significant distress to unrepresented citizens in third countries. From 2002,[62] on the basis of Decision 96/409/CFSP, embassies and consulates of EU Member States may issue Emergency Travel Documents (ETD) to unrepresented EU citizens. During non-crisis situations, the need for an emergency travel document is even the main case of assistance provided by Member States to citizens of other Member States.[63] ETD is a single-journey document, allowing the bearer to return home, or, in cases of exceptions, to another destination, in the event that they do not have access to their regular travel documents because, for example, they were stolen or lost. Another destination could be, for example, a neighbouring or similarly close country where the unrepresented citizen's Member State of nationality has an embassy or consulate. Despite the existing possibility of issuing these documents, there was a need to establish, in the form of a directive, simplified procedure for

60 EU guidelines on the implementation of the consular Lead State concept, Official Journal C 317/6, 12 December 2008.

61 Moraru, 2019, p. 417.

62 Decision 96/409/CFSP came into force on 28 November 2002, Decision 96/409/CFSP of 25/6/96 on the establishment of an emergency travel document. [Online]. Available at: https://www.consilium.europa.eu/pl/documents-publications/treaties-agreements/agreement/?id=1996128 (Accessed: 10 January 2025).

63 Report from the Commission to the European Parliament and the Council on the implementation and application of Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, 2022, p. 13.

cooperation and coordination between the assisting Member State and the unrepresented citizen's Member State of nationality in this regard. On 18 June 2019, the Council adopted a Directive establishing an EU ETD.[64] The Directive introduced a new, more secure EU ETD format and simplified the formalities for unrepresented EU citizens in non-EU countries whose passport or travel document has been lost, stolen, or destroyed. After the adoption of the necessary technical specifications in December 2022,[65] Member States are currently transposing the Directive into national law and will apply it as of December 2025.[66]

5. Transposition of Directive 2015/637 by EU Member States: the Example of Poland

The adoption of Directive 2015/637 coincided with the parliamentary work on the largest amendment to consular law in Poland that has taken place in the last 40 years. The new Consular Law was adopted on 25 June 2015 and repealed the Act on the Functions of Consuls of the Republic of Poland of 13 February 1984.[67] The need to adapt the consular regulations in Poland to the obligation to provide assistance to unrepresented EU citizens in the third States as established in Arts. 20 (2) c and 23 of the TFEU was one of the main arguments mentioned in the formal justification for the new act.[68] Before the new law was adopted, European consular assistance, including assistance in emergency situations, was not specifically regulated in Polish legislation.[69] Poland recognised Decision 95/553/EC as an international agreement concluded in a simplified form (without approval or ratification) and the norm embodied in the Decision as self-executing.[70] The exercise of consular protection by

64 Council Directive (EU) 2019/997 of 18 June 2019 establishing an EU ETD and repealing Decision 96/409/CFSP, Official Journal L 163/5, 20 June 2019.

65 Commission Implementing Decision (EU) 2022/2452 of 8 December 2022 laying down additional technical specifications for the EU ETD established by Council Directive (EU) 2019/997, Official Journal L 320/47, 14 December 2022.

66 Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Art. 25 TFEU on progress towards effective EU citizenship 2020–2023, 2023, p. 36.

67 Ustawa z dnia 13 lutego 1984 r. o funkcjach konsulów Rzeczypospolitej Polskiej, Dz. U. z 2015 r. poz. 389 i 539 [Act on the Functions of Consuls of the Republic of Poland of 13 February 1984, uniform text published in Official Journal 2015 items 389 and 539].

68 Republic of Poland Parliament (Sejm), 7th term, No. 3290, justification, p. 3 [Druk Sejmowy Nr 3290 Sejmu Rzeczypospolitej Polskiej VII kadencji, uzasadnienie, s. 3].

69 A broad and detailed information on Polish law and practice concerning consular assistance (including protection of EU citizens abroad) before the new PCL was adopted is presented in: Consular and Diplomatic Protection Legal Framework in the EU Member States, CARE (Citizens Consular Assistance Regulation in Europe) Project, 2010, pp. 347–370.

70 Ibid., p. 350.

the Polish consular posts for the citizens of another EU State in a third country took place mostly based on bilateral agreement on mutual representation, such as three agreements on representation concluded with Lithuania concerning the representation in the Maghreb States (Algeria, Morocco, Tunisia).[71] Poland also took actions regarding consular assistance in cases of military conflict. After the Russian attack on Georgia in 2008, Polish Ministry of Foreign Affairs organised evacuation flights for Polish citizens, which also extended to nationals from other EU countries.[72] There were also situations in which Polish citizens were assisted within the framework of European consular protection.[73]

Legislative work on the new consular law at the governmental level began in 2014, and the project was submitted to the Polish Sejm on 27 March 2015; therefore, the first version of the new act included provisions that were in line with Decision 95/553/EC, which governed the protection of contemporaneous EU citizens abroad. EU Directive 2015/637 was adopted on 20 April 2015, while parliamentary work was still in progress; thus, it was possible to introduce amendments to the draft new Polish Consular Law taking into account the new EU regulations. During the debate on these amendments in the Sejm subcommittee, it was pointed out that because of this, Poland could become the first country to implement the provisions of Directive 2015/637.[74] The information that this act implements the Directive is placed in a reference to the title of the act in its officially published text.[75]

The final version of the new Polish Consular Law (PCL) contains several provisions that directly concern providing consular assistance to EU citizens by Polish consuls.[76] Art. 21(1) PCL asserts the following:

> To the same extent as a Polish citizen, the consul shall provide consular assistance to a citizen of a European Union Member State that does not have a diplomatic representation or consular office on the territory of the receiving State that is not a European Union' Member State, or if it is unable to provide consular assistance to this citizen in a given case.

Thus, the primary obligation of Poland as an EU Member State provided in Art. 23 of the TFEU was implemented. Art. 21(1) of the PCL is also consistent with Art.

71 Ibid., pp. 353–354.

72 A total of 365 people were evacuated, including 275 Poles as well as, for example, 45 Czechs, 7 Estonians, 5 Britons, and 5 Slovaks, ibid., p. 358.

73 After the earthquake in Haiti in January 2010, Polish citizens were evacuated by other EU Member States: 3 by France, 1 by Germany, and 1 by Spain, ibid., p. 357.

74 The broadcast of the subcommittee meeting is available at: https://www.sejm.gov.pl/Sejm7.nsf/transmisja.xsp?documentId=65B703152A1E3ECAC1257E60002D117E&symbol=TRANSMISJA_ARCH&info=T.

75 Supra note 14.

76 The Consular Law entered into force on 1 November 2015, but it was determined that the provisions concerning the protection of EU citizens by Polish consuls would apply from 1 May 2018 (the date by which the Directive 2015/637 was to be implemented).

6 (in conjunction with Art. 4) of the Directive, provided that the Polish act does not directly mention an honorary consul, who is effectively in a position to provide consular protection in a given case.[77] It should be stressed that Art. 2(2) of the Directive leaves it to each Member State to decide whether it applies the Directive to Honorary Consuls, and Poland is one of nine Member States with national laws not explicitly specifying whether they apply the Directive to Honorary Consuls (from Central European States, Estonia and Slovenia are also in the same position).[78]

The PCL also includes provisions about the following:

a) the possibility of the Polish consul forwarding the request for consular assistance of a EU citizen to a consular post or diplomatic mission of another EU Member State, if it is competent to provide such assistance and if such action does not violate the rights and interests of that citizen (Art. 21(2) PCL);
b) cooperation and coordination of activities of Polish consuls with the EU Member States and the EU (Art. 21(3) PCL);
c) rules for providing financial assistance by the Polish consul to EU citizens and the reimbursement of costs from the unrepresented EU citizen's Member State of nationality (Art. 41 PCL);
d) procedure of reimbursing costs when the EU Member State has provided consular assistance, including financial assistance, to a Polish citizen (Art. 42 PCL).

The PCL provisions are supplemented and clarified by the regulation of the Minister of Foreign Affairs of 17 April 2018 on financial assistance provided by the consul of the Republic of Poland to citizens of EU Member States.[79]

Regarding financial reimbursement for assistance provided to unrepresented citizens, Member States may establish different procedures. Poland is one of (only) six countries (also including Estonia in Central Europe) that seek reimbursement from the Member State of nationality, while the other countries apply mostly the principle

77 According to Art. 6 of Directive, 'a Member State is not represented in a third country if it has no embassy or consulate established there on a permanent basis, or if it has no embassy, consulate or honorary consul there which is effectively in a position to provide consular protection in a given case'.

78 European Commission, 2021, p. 42.

79 Rozporządzenie Ministra Spraw Zagranicznych z dnia 17 kwietnia 2018 r. w sprawie pomocy finansowej udzielanej przez konsula Rzeczypospolitej Polskiej obywatelom państw członkowskich Unii Europejskiej [Regulation of the Minister of Foreign Affairs of 17 April 2018 on financial assistance provided by the consul of the Republic of Poland to citizens of European Union Member States], 2018.

of requesting direct reimbursement from an assisted unrepresented EU citizen (i.e. Bulgaria, Czech Republic, Romania, Slovenia, Slovakia).[80]

An issue worth paying special attention to is the lack of a provision in the PCL under which the Polish consul could provide consular assistance to family members, who are not themselves EU citizens, accompanying unrepresented EU citizens in a third country. However, this does not mean that Poland did not implement Art. 5 of the Directive regarding EU citizens family members. According to the wording of this article, consular protection shall be provided to those persons, but only

> (…) to the same extent and under the same conditions as it would be provided to the family members of the citizens of the assisting Member State, who are not themselves citizens of the Union, in accordance with its national law or practice.

The PCL has no provisions on providing consular protection to family members of Polish citizens who are foreigners (do not have themselves Polish citizenship); thus, it may be assessed that Poland has the same policy regarding family members of its own citizens as family members of EU citizens. Poland is one of three EU Members that do not provide consular assistance to the family members who are not themselves EU citizens, accompanying unrepresented EU citizens in a third country – the other two countries are Bulgaria and Estonia.[81]

However, the transposition of Directive 2015/637 into the Polish legal system also contains certain gaps and inconsistencies indicated in the Polish literature on the subject.[82] First, the inconsistencies of the scope of consular assistance were pointed out, resulting from differences between the list of situations entitling to consular assistance contained in Art. 20(1) of the PCL and the list of types of consular assistance contained in Art. 9 of the Directive. This refers to two of the six types of assistance mentioned *expressis verbis* in the Directive:

- assistance in the case of 'being a victim of crime' (Art. 9(b) of the Directive), which corresponds to assistance in the case of 'an act of violence' of which a [Polish] citizen was the victim under the PCL;
- 'relief and repatriation in case of an emergency' (Art. 9(e) of the Directive), which corresponds to assistance 'in the event of a need for a sudden return of a citizen deprived of financial means' under the PCL.

In both cases, the scope of protection is narrower in the PCL than in the Directive. 'An act of violence' is a narrower concept than that of 'a crime' mentioned in the Directive, as there are many types of crimes that do not involve violence. In the

80 Annexes to Study to support the preparation of an impact assessment on a potential EU policy initiative on the coordination & cooperation measures to facilitate the exercise of the EU citizens' right to consular protection, Framework Contract JUST/2020/PR/03/0001 for Evaluation, Impact Assessment and Related Policy Support Services in the Justice and Consumers Policy Areas (Lot 1), European Commission, 2021, p. 60.

81 Ibid., p. 39.

82 See Filipek, 2015, pp. 144–160.

second situation, a citizen must be 'deprived of financial means' to get assistance in the event of a need for a sudden return, while there is no such requirement in the 'emergency' case in the Directive. These two cases were regulated in this way in the PCL because the content of its Art. 21 was drafted before Directive 2015/637 was adopted and aligned with Decision 95/553/EC;[83] this content has not been amended to be consistent with that of the newly adopted regulations. As the list of situations contained in Art. 21 of the PCL entitling to consular assistance is not closed, both a Polish citizen and a citizen of another EU country who is to receive consular assistance under the same conditions should be able to get the assistance of a Polish consul also in cases other than those listed *expressis verbis*. However, a much clearer and favourable situation for the citizens would be if the PCL were appropriately amended so that no such differences existed between the scopes of Art. 21 of the PCL and Art. 9 of the Directive.[84]

6. The Role of the EEAS and its Delegations in the Protection of EU Citizens Abroad

The EEAS was created on the basis of the Treaty of Lisbon and formally launched on 1 January 2011,[85] more than a year after this Treaty entered into force.[86] It is designed as a functionally autonomous body under the authority of the High Representative of the Union for Foreign and Security Policy.[87] Further regulations concerning the EEAS were specified in the Council Decision of 26 July 2010 establishing its organisation and functioning.[88] The EEAS comprises a central administration and EU Delegations to third countries and to international organisations (Art. 1(4) of Decision). Currently, the network of EU Delegations and Offices comprises 144 missions that represent EU worldwide.[89]

This EU institution does not challenge national diplomacy in a material sense but rather at a symbolic level.[90] As Erzsébet Csatlós stresses, EU law does not place delegations and Member States' diplomatic missions and consular posts in a hierarchical

83 Druk Sejmowy Nr 3290 Sejmu Rzeczypospolitej Polskiej VII kadencji, uzasadnienie [Republic of Poland Parliament (Sejm), 7th term, No. 3290, justification], 2015, pp. 14–15.
84 Cf. Filipek, 2015, pp. 154–157, 160.
85 European Union External Action, 2021.
86 More about the creation of EEAS see e.g. Erkelens and Blockmans, 2012, pp. 246–279.
87 Kerres and Wessel, 2015, p. 9.
88 Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU), Official Journal L 201/30, 3 August 2010.
89 European Commission, no date b.
90 Adler-Nissen, 2014, p. 657. On a comparison of EEAS and diplomatic missions of Member States see Kerres and Wessel, 2015, pp. 1–39.

relationship, and their role is complementary.[91] However, as regards the 'institutional machinery for the enforcement of the EU citizenship right to equal protection abroad', according to Madalina Moraru, the Lisbon Treaty 'broke new legal ground' by empowering the EEAS to directly contribute to the protection of EU citizens worldwide.[92] Art. 5(10) of Decision 2010/427 provides that EU Delegations are to support Member States 'in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis'. This is because consular (and diplomatic) protection and assistance still fall within the States' competence and are provided by the EU Member States. The EU itself, as an international organisation, has no competence in this area; therefore, the EU Delegations may provide support to those countries in ensuring protection for EU citizens in third countries at the request of individual Member States.[93] Nevertheless, this support is crucial for an effective crisis response and the practical implementation of the right to consular protection. For supporting coordination and cooperation between the EEAS and Member States in providing consular protection of unrepresented EU citizens in third countries, a Consular Division was set up in the EEAS.[94]

Facilitation and coordination of EU efforts on consular crisis preparedness and response are, in fact, the primary task of the EEAS, both locally in third countries and between EU capitals.[95] The EU Delegations had to pass a real test of effectiveness in 2020, when the COVID-19 pandemic began. The global health crisis had created an urgent need for consular assistance services, mainly the repatriation of EU citizens who were stranded outside the EU (owing to commercial flight restrictions). Of course, individual Member States played the main role in those actions, but the EEAS supported them with their consular assistance to EU citizens through its network of local consular correspondents in the 143 (at that time) EU Delegations, *inter alia*, by providing practical information to EU citizens on their options.[96] As the EEAS informed in June 2020, since the beginning of the COVID-19 outbreak, more than 590.000 people have been flown back to Europe thanks to flights organised by the Member States: this was done at the beginning via commercial flights, but when this option was no longer possible, the European Response Coordination Centre (ERCC) of the Directorate-General for European Civil Protection and Humanitarian Aid Operations (DG ECHO), together with the EEAS and EU Member States, stepped in to assess difficult situations worldwide demanding special assets (flights, ships, etc.). This made it possible to activate the EU Civil Protection Mechanism (UCPM), which coordinated and co-financed up to 75% of the special transport assets mobilised for the repatriation of approximately 60,000 EU citizens to Europe from

91 Csatlós, 2022, p. 120.
92 Moraru, 2019, p. 426.
93 Sutor, 2019, p. 482.
94 Moraru, 2019, p. 426.
95 European Union External Action, 2025.
96 European Union External Action, 2020.

countries worldwide through more than 270 flights.[97] The examples of EU Delegation involvement in the repatriation actions included, *inter alia*, negotiations with local authorities to authorise departures/repatriation flights (Morocco, India, Vietnam, Maldives – by the EU Delegation in Colombo), coordination of repatriation actions of Member States (Kuwait, Saudi Arabia, Montenegro), organisation of the repatriation (Kenia, Uganda, Rwanda), support/facilitation of repatriation actions (Sierra Leone and Liberia, Mauritius), or contribution to maintaining and increasing the number of available seats on commercial flights to Europe (Australia).[98] During the COVID-19 pandemic, almost all EU Delegations were particularly active in the overall coordination of Member States' actions.[99]

In addition to the COVID-19 pandemic, in the last few years, other events have also presented challenges in the field of consular assistance for EU citizens in third States involving EU Delegations and the EEAS, including, in particular, the crisis in Afghanistan, Russia's war of aggression against Ukraine, the crisis in Somalia, and the conflicts in Sudan and in Israel and the Gaza Strip. Their role is of particular significance in those countries where the EU Member States do not have their own missions, such as Eswatini. During the unrest in the summer of 2021 in this country, Member States contacted the EU Delegation, the only EU diplomatic presence in the field, to share information about the presence of their most vulnerable citizens and enquire about the security situation and possible evacuation options.[100]

According to data available from 2022, there were 25 third countries where no Member State had an in-country embassy or consular post; in five such countries, the EU Delegation was the only EU diplomatic presence (Afghanistan, Barbados, Eswatini, Guyana, and Lesotho). In many more third countries, the consular or diplomatic presence by Member States is very low and, thus, at high risk of being overwhelmed if a larger-scale crisis occurs (e.g. in more than half of third countries, a maximum of seven Member States are represented, often with limited resources).[101] In addition, the number of EU Member States' diplomatic missions and consular posts has recently decreased due to *Brexit*. Some EU Member States, similar to the other States, have decided not to maintain their missions, mostly for economic reasons.[102]

97 Ibid.

98 Ibid.

99 Report from the Commission to the European Parliament and the Council on the implementation and application of Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, 2022, p. 15.

100 Ibid., p. 16.

101 Ibid., p. 5.

102 E.g. Polish Ministry of Foreign Affairs finally decided to close Polish Embassy in Khartoum (Sudan), while also intending to accredit a Polish ambassador to Sudan based in Cairo (Egypt). Decision No. 35 of Minister of Foreign Affairs of 26 June 2024 regarding the liquidation of the Embassy of the Republic of Poland in the Republic of Sudan [Decyzja Nr 35 Ministra Spraw Zagranicznych z dnia 26 czerwca 2024 r. w sprawie likwidacji Ambasady Rzeczypospolitej Polskiej w Republice Sudanu, Dz.Urz. MSZ z 2024 r. poz. 33].

Sometimes, they are also forced to close the missions by the receiving State; for example, Russia in the last view months decided to withdraw its consent to maintain by the Republic of Poland two consular posts: the Consulate General in Sankt Petersburg (closed on 8 January 2025)[103] and the consular agency in Smolensk (closed on 31 August 2023).[104] However, regarding third countries, all the Member States have a permanent representation in only five such countries – China, India, Russia, the USA, and the UK – whereas only five of the twenty-seven Member States have representations in more than half of the countries (according to the data from 2021).[105] The Member States that have the largest consular network and are, therefore, represented in the most third countries are France (present in 136 third countries), Germany (127), Spain (103), Italy (101), Sweden (95), and the Netherlands (88). The Member States that have the smallest consular network and are, therefore, represented in the least third countries are Estonia (present in 19 third countries), Luxembourg (19), Malta (19), Cyprus (22), Latvia (22), Lithuania (24), and Slovenia (24).[106] On average, the consular network of all the Member States is lower than the EU Delegations network of the EEAS.[107] It shows how often an EU citizen may not be represented in a third country and, simultaneously, how important a role the EU Delegations may play in providing them consular assistance.

7. How Does it Work? Commission's Assessment of the Implementation and Application of Directive 2015/637

According to the 2023 Eurobarometer on Citizenship and Democracy, 69% of the EU citizens are aware of the right to be protected by diplomatic and consular authorities of any other Member State under the same conditions as those of that State's nationals when they are in a non-EU country in which their Member State of origin does not have representation. A large majority of the respondents (93%) agree

103 Ceremonial ending of the activities of the Consulate General of the Republic of Poland in Saint Petersburg. See Uroczyste zakończenie działalności Konsulatu Generalnego RP w Sankt Petersburgu z udziałem Ambasadora RP w Federacji Rosyjskiej Krzysztofa Krajewskiego i Konsula Generalnego RP Grzegorza Ślubowskiego [Ceremonial ending of the activities of the Consulate General of the Republic of Poland in Saint Petersburg], 2025.

104 Oświadczenie MSZ ws. zamknięcia Agencji Konsularnej RP w Smoleńsku [Statement of the Ministry of Foreign Affairs regarding the closure of the Consular Agency of the Republic of Poland in Smolensk], 2023.

105 Commission Staff Working Document Impact Assessment, accompanying the document Proposal for a Council Directive amending Directive (EU) 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and Directive (EU) 2019/997 establishing an EU Emergency Travel Document, 2023.

106 Ibid., pp. 113–114.

107 Moraru, 2021, p. 2.

that EU Member States should cooperate closely to help EU citizens who need consular protection outside the EU. A similar proportion (91%) agreed that if they were in a non-EU country where their national government had no consulate or embassy and they needed help, they would seek support from an EU Delegation instead.[108] This result shows how strong among the EU citizens the need is to provide effective consular protection for them in third States.

The challenges presented above have reinforced the need to ensure that 'the infrastructure is in place to give effect to EU citizens' rights related to consular protection in practice',[109] particularly by improving the EU legal framework of consular protection concerning preparedness for crises. The European Commission in its Report concerning implementation and application of Council Directive (EU) 2015/637 notes that consular protection is as follows:

> (…) prone to become more relevant in the future as the frequency, severity and duration of crises could increase, notably the crises related to global warming, causing unavoidable multiple climate hazards and presenting multiple risks to ecosystems and humans'.[110] At the same time, it pointed out that recent crises have provided 'a context to identify gaps and reflect on how to strengthen EU citizens' rights related to consular protection and to further facilitate its exercise.[111]

A thorough analysis of the practice of applying the Directive revealed its several 'weak points' requiring changes, most often by clarifying and improving the rules. In regard to the first chapter of the Directive, the following problems (and possible ways to solve them) were pointed out (*inter alia*):

a) problems concerning honorary consuls: although in most Member States, honorary consuls are rarely or never involved in the provision of consular protection to unrepresented EU citizens because of their generally limited powers (also vis-à-vis their own nationals), their role may be essential in crisis situations; in this regard, the way in which Member States inform each other and EU citizens about the existence of honorary consuls and the extent to which they can provide consular protection to unrepresented EU citizens could be improved;
b) problems in determining whether an individual should be considered 'unrepresented', particularly difficulties in determining whether an existing em-

108 Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Art. 25 TFEU on progress towards effective EU citizenship 2020–2023, 2023, p. 36.
109 Report from the Commission to the European Parliament and the Council on the implementation and application of Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, 2022, p. 2.
110 Ibid., p. 2.
111 Ibid., p. 21.

bassy, consulate, or honorary consul is 'effectively in a position to provide consular protection' (e.g. to what extent, a lack of proximity could cause a lack of representation); it was suggested to further clarify the concept;

c) a lack of clarity and understanding regarding the procedure for redirecting applications from unrepresented EU citizens, particularly when an embassy or consulate from which such a citizen seeks consular protection does not recognise itself competent according to the practical arrangement on sharing responsibilities for providing consular protection concluded between Member States; it is stressed that although the Directive allows for bilateral agreements to be put in place between Member States, there seems to be a need to further clarify that this is not a precondition for providing consular assistance to unrepresented EU citizens;

d) cases of unrepresented EU citizens that had been denied consular protection by a Member State when the assistance requested was not one of the listed types in Art. 9 of the Directive, even though this Member State legislation required it to provide such assistance to its own nationals; it is stressed that the types of assistance mentioned in Art. 9 are not exhaustive, meaning that unrepresented EU citizens are also entitled, in a non-discriminatory manner, to other types of consular protection assistance that Member States provide to their own nationals.[112]

Although the Commission evaluated the cooperation between Member States as 'overall effective', it noticed the lack of digital tools, capacity issues notably in times of crisis, and the lack of an explicit legal basis for processing of personal data of EU citizens (including data transfers) leading to delays or even omissions in unrepresented citizens receiving assistance. The Commission also called for strengthening the overall role of EU Delegations, to review the 'Lead State' concept in light of the shortcomings observed during crisis situations, and for more clarity as regards the financial reimbursement procedures in the Directive.[113]

The Commission's conclusions generally coincide with the opinions on the weak points and shortcomings of the Directive, which have been pointed out in the doctrine from the very beginning (already at the preparatory work stage).[114] For example, Paweł Czubik drew attention to the vagueness of the criterion for recognising a person as an 'unrepresented citizen' (although the solution introduced was definitely better than the one in force under the 1995 Decision),[115] and Madalina Moraru pointed out the practical problems of its application.[116] M. Moraru also argued for empowering EU Delegations to provide direct consular assistance services to

112 Ibid., pp. 8–13.
113 Ibid., pp. 14–21.
114 See Czubik, 2013, pp. 37–62.
115 Ibid., p. 48.
116 Moraru, 2021, p. 3.

unrepresented EU citizens.[117] P. Czubik sees it slightly differently and rightly puts forward the idea of separating the matters covered by the Directive and creating a separate regulation for the matters of typically consular activity and the issue of evacuating people in emergency situations, with the latter activity being able to be performed directly by the EU Delegations.[118] However, both authors primarily stressed the lack of instruments in the Directive that would ensure its compliance with Art. 8 of the VCCR, which states that a consular post of the sending State may exercise consular functions in the receiving State on behalf of a third State 'upon appropriate notification to the receiving State' and 'unless the receiving State objects'.[119] In the same context, Erzsébet Csatlós points out the following:

> Consular Directive declares that it does not concern consular relations between Member States and third countries. But it tacitly does - when it obliges Member States to widen the scope of consular agent's activity to protect any EU citizens and non-EU citizen family members. Therefore, an effective protection requires a reflection on bilateral consular agreements with Third States but this is still awaited.[120]

However, the lack of formal consent of third countries to the EU's model of consular protection of unrepresented EU citizens 'seems at first sight to be a theoretical quibble rather than a real impediment to its concrete exercise' because 'third countries have never opposed the exercise of consular protection of EU citizens by non-nationality Member States or the Union'.[121]

8. Need for Changes – the Commission's Proposal to Amend Directive 2015/637

On 6 December 2023, the Commission brought forward a proposal for a Council directive to amend Directive 2015/637.[122] The main goal of the new regulations is to address the previously highlighted deficiencies by enhancing legal certainty, streamlining cooperation, and increasing the overall effectiveness of consular protection for EU citizens in third countries.[123]

117 Moraru, 2019, p. 450.
118 Czubik, 2013, pp. 38–40.
119 Ibid., pp. 41–42, Moraru, 2019, pp. 454–455.
120 Csatlós, 2017, p. 80.
121 Moraru, 2019, p. 455.
122 Proposal for a Council Directive amending Directive (EU) 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and Directive (EU) 2019/997 establishing an EU emergency travel document, 2023.
123 Pittoors, 2024, p. 2.

The proposal clarifies when a Member State is to be considered as unrepresented in a third country because it has no embassy or consulate effectively in a position to provide consular protection. In Art. 6 of the Directive, a new para. 2 has been added, outlining the criteria of effectiveness. These criteria should be applied taking into account local circumstances. They are as follows:

a) the difficulty for the citizen concerned to safely reach or be reached by the embassy or consulate within a reasonable period, taking into account the nature and urgency of the assistance requested and the means available to the citizen;
b) possible closure of the embassy or consulate, including when it cannot be confirmed as operational and accessible within a reasonable period;
c) whether, by redirecting the citizen to the embassy or consulate of his or her Member State of nationality, consular protection would likely be compromised, particularly if the urgency of the matter requires immediate action by the requested embassy or consulate.

Regarding honorary consuls, the proposition clarifies that the presence of an honorary consul of the citizen's Member State of nationality may only be taken into account if the assistance requested by the citizen is covered by the competences of the honorary consul (new Art. 6(1)). This is to avoid citizens being denied assistance with reference to an honorary consul who is not competent to assist them.[124]

The proposition adds a new term 'evacuation' in Art. 9, point e (regarding the scope of consular assistance) to comprehensively cover situations where EU citizens are rescued and moved from areas affected by an emergency to a safe location, which must not necessarily be the territory of a Member State, as well as situations where they are repatriated to EU territory. This extension is certainly needed and is an example of lessons learned from the crises of recent years.

A new wording of Art. 7 is also to be introduced, in which the key principle of an unrepresented citizen's freedom to choose the embassy or consulate she/he asks for protection has been preserved and, in addition:

a) it is clarified that in cases, when an embassy or consulate from which the unrepresented citizen seeks consular protection is not designated as competent according to the specific arrangement concluded between Member States, it is incumbent on this embassy or consulate of Member State approached, not the citizen concerned, to transfer the application to the relevant embassy or consulate;
b) a new paragraph is added concerning crisis situations resulting in numerous applications for consular protection, which allows represented Member States, supported by the EU Delegation, to transfer requests for assistance based on available capacity in crisis situations.

124 Ibid., p. 6.

Most of the lessons learned from the crisis situations of recent years have been reflected in proposals for amendments to Chapter 2 of the Directive, devoted to 'co-operation and coordination'. Member States have been entitled to involve, in their coordination and cooperation measures, their security and military personnel, honorary consuls, and international organisations or diplomatic and consular authorities of third countries (new para. 5 added to Art. 10). The role of EU Delegations has been clarified by establishing a non-exhaustive list of cooperation and coordination tasks with Member States' embassies and consulates in order to contribute to local consular cooperation, crisis preparedness, and response. The new tasks include, *inter alia*, chairing local consular cooperation meetings and coordinating the setting up and agreement of joint consular contingency plans (new Art. 11(1) e and f). The current Art. 13 would be split into two, with Art. 13 focussing on crisis preparedness and the newly added Art. 13a focussing on crisis response. Crisis preparedness would be focused on joint consular contingency plans, which should be established and agreed by the Member States and the EEAS for each third country and then tested within annual consular exercises. To improve the information available on the estimated number and location of EU citizens present in a third country for crisis preparedness and crisis response, the new obligation is provided for Member States to offer their citizens the possibility to register with or inform competent national authorities of their travels to or residence in third countries. It would also make it easier to contact citizens affected by a crisis situation. Regarding crisis response, current 'intervention teams at Union level' would be replaced by 'joint consular teams' composed of experts from Member States, the EEAS, and the Commission services. They shall be available for rapid deployment to third countries affected by a consular crisis (new Art. 13a (2)).

The proposition also introduces an entirely new Chapter 2a 'Provision on information', which is in line with Parliament's earlier request to keep EU citizens better informed. Art. 13b consolidates the various notification requirements already present in Directive 2015/637 and mandates that Member States provide limited statistical data to improve the monitoring of the directive. Art. 13c provides that Member States should take measures to inform citizens of their right to consular protection, listing examples of possible measures that could be taken in this context, such as including information on the right to consular protection in travel advisories.[125]

The rule concerning cost reimbursement would also be changed in order to simplify reimbursements. In particular, it would be possible for unrepresented citizens to directly reimburse costs, under the same conditions as nationals of the assisting Member State, for the service provided by that Member State. Only if this does not occur should the assisting Member State approach the Member State of nationality for reimbursement (new wording of Art. 14).

As consular tasks cover, *inter alia*, sensitive situations such as arrest, incarceration, injury, or being a victim of a crime, it is necessary to ensure that competent

125 Ibid., p. 6.

authorities of the Member States and relevant EU institutions and bodies have access to and can exchange all the necessary information, including personal data, that is required to provide consular protection to EU citizens (Recital 40 of the proposition). Generally, consular assistance operates with a wide range of personal data, the protection of which is also a fundamental right acknowledged by Art. 8 of the CFR.[126] Thus, the new Art. 16a concerning protection of personal data that would be inserted into the Directive is a very needed solution.

The last amendment proposed by the Commission is of crucial importance: it is a new Art. 16b stating that 'Member States shall ensure that unrepresented citizens have an effective remedy under national law in the event of a breach of their rights under this Directive'. According to Recital 44 of the proposition, the goal of this new regulation is to implement a fundamental right to effective remedy for those whose rights guaranteed by EU law are violated, contained in Art. 47 of the CFR,[127] in the context of consular protection. The need to introduce such a possibility has already been indicated in the doctrine. Erzsébet Csatlós noted as follows:

> [t]o protect a right created by European law, judicial remedy shall be available. European citizen who asks for consular assistance from the authorities of another Member State, and receives a refusal which he/she considers unfair or discriminatory, shall have the possibility to appeal to a national judge capable of exercising judicial review of the contested administrative decision.[128]

Thus, effective implementation of the right to consular protection (similar to any other right) requires the existence of an effective remedy in the event of its violation. Nevertheless, it remains an open question what this would look like in practice under the national law of particular Member States, particularly because the Directive does not harmonise the internal law of the Member States regarding the provision of consular assistance. For example, in PCL (similar to Hungarian Consular Act),[129] there are legal procedures established for those consular protection functions, which require the authority to act. When a consular officer takes a decision in the first instance, the appeal is submitted to the Minister of Foreign Affairs.[130] However, not all the tasks and functions of consular protection are considered authority procedures, and no provision exists for denying those kinds of measure that do not explicitly require authority procedures.

126 The lack of such regulations was indicated even before the Directive was to be implemented, *inter alia*, by Erzsébet Csatlós, see Csatlós, 2017, p. 78.

127 According to Art. 47 of the CFR, 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article (…)'.

128 Csatlós, 2017, p. 79.

129 Ibid., p.79.

130 Art. 88 (1) PCL.

The European Parliament on 24 April 2024 adopted by 521 votes to 89, with 17 abstentions, following a special legislative procedure, a legislative resolution on the proposal for a Council directive amending Directive (EU). The Parliament approved the Commission proposal subject to many amendments regarding, *inter alia*, the extension of the protection to recognised refugees and stateless persons and providing special protection for children. The Council would adopt the act after consulting the European Parliament but without being obliged to follow its opinion. The proposal awaits the final decision of the Council.[131]

9. Conclusions

A careful analysis of the provisions of the EU Treaties concerning the protection of EU citizens abroad, particularly the wording of Art. 23 of the TFEU, in the broader context of international law, clearly shows that this 'external face' of EU citizenship,[132] commonly called the right to diplomatic and consular protection, does not include the right to diplomatic protection in its formal sense. Diplomatic protection, according to its international law definition and State practice, must be connected with the responsibility of States for an internationally wrongful act. European citizenship itself does not provide a sufficient link to fulfil the requirement of nationality that is obligatory when a State wants to exercise diplomatic protection in favour of the person concerned. The right of EU citizens 'to protection by the diplomatic or consular authorities' means the right (only) to consular protection (assistance), which should be performed by embassies or consular posts, and not the entitlement to both consular protection and diplomatic protection. It is confirmed by the subsequent acts of secondary EU law concerning the protection of EU citizens on the territory of third States that are focused only on consular assistance.

The very essence of the European consular protection is that EU citizens are entitled to be protected by any EU Member State under the same conditions as the nationals of that State when they are unrepresented in the territory of the third country. In other words, it is a right to equal protection in third countries. Directive 2015/637 does not aim to harmonise national consular protection legislation and practices. Consequently, it does not change the scope of Member States' consular protection of their own citizens. This results from the subsidiary nature of European

131 European Parliament legislative resolution of 24 April 2024 on the proposal for a Council directive amending Directive (EU) 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and Directive (EU) 2019/997 establishing an EU Emergency Travel Document (COM(2023)0930 – C9-0015/2024 – 2023/0441(CNS)); available at: https://www.europarl.europa.eu/doceo/document/TA-9-2024-0336_EN.html (Accessed: 20 January 2025).

132 Kostakopoulou, 2020, p. 75.

citizenship in relation to the citizenship of one's own country. Therefore, when transposing the Directive, Member States do not have to change their own consular law regarding protection for their own citizens – and, for example, their family members – but only extend the scope of assistance to citizens of other EU countries. This can be seen in the example of Poland's transposition of the Directive.

The practice of applying Directive 2015/637 revealed its many 'weak points' that require changes, most often by clarifying and improving the rules, for example, with regard to such crucial issues as determining whether an individual should be considered 'unrepresented'. Moreover, recent large-scale crises have highlighted deficiencies in the current coordination and cooperation mechanisms among Member States' consular services and also between them and EU Delegations, simultaneously showing the strong need to improve the legal framework in order to better use the EU Delegations network for effective crisis response and the practical implementation of the right to consular protection; this is particularly because, on average, the consular network of all the Member States is lower than the EU Delegations network of the EEAS.

The lessons learned from the crisis situations of recent years have been reflected in the proposal of the European Commission to amend Directive 2015/637. The proposal has a wide scope and covers the vast majority of the Directive's provisions. It contains several much-needed solutions that explain and simplify issues identified as causing problems and fill in some existing significant gaps, for example, by adding new provisions regarding data protection. Particularly needed are the new regulations concerning the preparedness and coordination and cooperation of the EU and Member States in times of crises, which would involve strengthening the EU's supporting role and making best use of its unique network of EU Delegations. The proposition also includes a mechanism that may be challenging for Member States: the right to effective remedy, which would be the real test of the effectiveness of the consular protection of EU citizens. However, introducing proposed amendments should result in enhanced legal clarity, streamlined cooperation, greater consular service effectiveness, and heightened standards of consular support and crises response – the effects that are strongly desired and expected in the area of European consular protection, especially in view of foresight studies suggesting that large disruptions to travel and other human activities are likely to increase further, resulting from either man-made events (e.g. wars, conflicts, or social unrest), phenomena linked to global warming (e.g. fires or flooding), or large-scale health crises and epidemics.[133]

133 Pittoors, 2024, p. 28.

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Chapter 6

Administrative Procedure Before the Consul in Polish Law

Rafał Stasikowski

Abstract

On 1 November 2015, the Act of 25 June 2015 – Consular Law came into force, providing a comprehensive framework for the political status, responsibilities, and competencies of consuls, as well as the administrative proceedings conducted before them. The Polish consular procedure exhibits several distinctive features:

First, it constitutes a legal framework separate from the general provisions governing the application of administrative law, as codified in the Code of Administrative Procedure. This separation is not part of a broader decodification of administrative procedure but is justified by the unique circumstances of consular functions – namely, the performance of administrative tasks within foreign jurisdictions and the need to respect the sovereignty of the receiving state.

Second, a characteristic feature of the consular procedure is the lack of comprehensive procedural regulations. Instead, it is supplemented by domestic legal provisions, European Union law, and classical sources of international law, which may modify or supplement consular procedural rules with specific legal solutions.

Third, a core principle of consular procedural law is its simplification compared to general administrative procedures, with an emphasis on protecting the sovereignty of the Republic of Poland. As a result, the consul is not strictly bound by a formalised statutory procedure, enabling significant procedural flexibility and broad procedural rights for parties involved in consular proceedings.

Fourth, the consular procedure governs not only the application of substantive law in both its *sensu stricto* and *sensu largo* dimensions but also the processes of applying the law, including the execution of factual actions and complex sequences of conventional-factual actions.

Rafał Stasikowski (2026) 'Administrative Procedure Before the Consul in Polish Law'. In: Paweł Czubik (ed.) *Changes in the Structure and Scope of Foreign Service Activity*, pp. 207–252. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2026.pccssfsa_6

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Despite certain imperfections and procedural gaps, the legal framework represents a well-considered construct that accounts for both the legal and practical realities of consular operations abroad. The adopted compromise balances three fundamental legal principles across all procedural provisions: the principle of legalism, the principle of flexibility in consular actions, and the principle of establishing the material truth.

Keywords: consular procedure, application of administrative law, consular function, consular jurisdiction, separate procedure, principle of flexibility.

1. Development of the Current Model for Administrative Procedure Before the Polish Consul

To comprehensively evaluate the current legal framework governing the procedural rules for administrative functions performed by the consul of the Republic of Poland, it is necessary to examine the legal landscape prior to the introduction of these regulations.

During the interwar period, the Republic of Poland did not establish specific procedural regulations concerning the activities of its consuls. The primary legislative act governing consular functions was the Act of 11 November 1924 on the Organisation of Consulates and the Duties of Consuls.[1] However, this law did not include provisions regarding procedural rules for administrative proceedings before the consul. It remained in force until 30 June 1984. Art. 18 of this law stipulated that consuls should perform their duties in accordance with Polish law, without violating international treaties and customs, but it did not refer procedural matters to the general rules of administrative proceedings. Furthermore, the Ordinance of the President of the Republic of Poland of 22 March 1928, on Administrative Procedure,[2] which served as the cornerstone for general administrative proceedings, explicitly excluded its application in matters handled by Polish diplomatic and consular posts abroad, including the Commissariat General of the Republic of Poland in Gdańsk (Art. 112c). This exclusion was later reaffirmed by the original version of the Act of 14 June 1960 – Code of Administrative Procedure. Under Art. 194 Sec. 1, item 10, the Code explicitly excluded the application of general administrative procedure in cases handled by Polish diplomatic and consular posts abroad.[3]

The first Polish procedural regulation addressing consular activities was introduced by the Ordinance of the Minister of Foreign Affairs of 4 November 1985 on

1 Journal of Laws No. 103, as amended.
2 Journal of Laws No. 36, item 341, as amended.
3 Journal of Laws No. 30, item 148.

the Detailed Procedure Before the Consul.[4] This regulation was issued based on the authorisation granted in Art. 31(1) of the Act of 13 February 1984, on the Functions of Consuls of the People's Republic of Poland.[5] The 1985 ordinance represented a self-contained and comprehensive procedural framework for consular proceedings,[6] in force from 1 January 1986 to 31 October 2015.

Under the previous legal system, ordinances were issued by the Prime Minister or relevant ministers and could carry normative authority. They were introduced into the legal system based on Arts. 40(2) and 42(2) of the Constitution and could be issued to execute tasks assigned to authorised bodies. Unlike the current legal system, which requires a specific legislative authorisation for regulations implementing a law, ministers were empowered to issue ordinances without a statutory basis. Ordinances could be issued under a general constitutional clause and were not required to be strictly executive in nature or limited to statutory matters.[7]

The change in the political system, including changes to the sources of law, and particularly the adoption of the 1997 Constitution of the Republic of Poland through a referendum – which introduced fully democratic legal solutions – brought about a requirement for statutory authorisation for the issuance of executive acts regulating rights and obligations of the individual. This led to widespread and justified criticism of the aforementioned ordinance, highlighting its potential unconstitutionality.[8] Outside the doctrine, this criticism became formalised and was the subject of interventions by the Ombudsman.[9]

The adaptation of legal regulations to meet the requirements of the 1997 Constitution of the Republic of Poland was addressed in the Act of 22 December 2000 on the Amendment of Certain Statutory Authorisations for Issuing Normative Acts and on the Amendment of Certain Laws.[10] Under Art. 25(5) of this law, the previous provisions were revised, introducing an authorisation for the Minister of Foreign Affairs to issue an ordinance regulating the procedure before the consul. Art. 78 of the same law stipulated that the previous ordinance of 4 November 1985 would remain in force until the new ordinance was issued. However, despite this legislative mandate, the Minister of Foreign Affairs failed to issue the required ordinance for 13 years. Due to this prolonged delay, the Ombudsman filed a request with the Constitutional Tribunal (CT) on 15 April 2014, challenging the constitutionality of Art. 31(1) of the Act of 13 February 1984, on the Functions of Consuls of the Republic of Poland, as well as the Ordinance of the Minister of Foreign Affairs of 4 November 1985 on the Detailed Procedure Before the Consul. The Ombudsman argued that these provisions were incompatible with Art. 92(1) and Art. 93(1) and (2), second sentence, in

4 No. 35, item 233.
5 Journal of Laws. No. 9, item 34.
6 Cf. Frankiewicz, 2003, pp. 96–99.
7 Official Gazette of the Republic of Poland, No. 35, item 233.
8 Wróblewski, 2015, pp. 15–19.
9 The report on the intervention is presented in Czubik and Woźniak, 2008, p. 189–190.
10 Journal of Laws, No. 120, item 1268.

conjunction with Art. 87(1) of the Constitution. In its judgment of 28 October 2014 (K 8/14),[11] the CT fully supported the Ombudsman's position and ruled that the challenged provisions were unconstitutional.

The CT asked a fundamental question: whether a matter of this nature can be regulated entirely by an executive ordinance. In addressing this question, the CT emphasised that

> the requirement to specify by statute certain main aspects of a given matter should be regarded as particularly strict when it comes to determining the forms of activity of public administration that has legal effects for citizens, the rights and obligations of an administrative authority and citizens within the realm of public law, or the citizens' exercise of their rights and freedoms. Proceedings before a consul regard such elements. A consul as a special administrative authority issues administrative decisions in individual cases; at times, the said decisions may be final (e.g. in cases concerning the issuance of visas). The procedure consists in the fulfilment of duties on the part of a given consul within the scope of providing Polish citizens with assistance, as well as it also specifies the rights and obligations of citizens-parties to those proceedings. For this reason, such matters should be regulated by statute. Delegating the entire procedural framework of consular proceedings to regulation by ordinance would grant the executive authority the unchecked ability to determine the conditions, principles, and procedures for interfering with constitutionally protected rights.

Regarding ordinances, the CT emphasised that, under the current Constitution, these should be regarded as internally binding acts. According to the Constitution, such acts have a limited scope of application, as they can only bind organisational units directly subordinate to the body issuing the ordinance. They cannot impose obligations on entities that are not under the authority of the issuing body.[12] The CT held there was no doubt that the Ordinance on Proceedings Before the Consul was inconsistent with Art. 93(1) and (2), second sentence, in conjunction with Art. 87 of the Constitution: 'Not only does the challenged Ordinance lack the character of an internal legal act, but above all it constitutes a legal basis of decisions and other determinations issued with regard to citizens, foreigners as well as legal entities'. The CT further noted that the prolonged validity of this contested ordinance – more than 13 years since the Act on the Amendment of Certain Statutory Authorisations took effect – raises serious concerns about such a practice.

The expiration date for the aforementioned legislation was set for 12 months. However, before this deadline passed, the Consular Law of 25 June 2015[13] came into force on 1 November 2015. This new law comprehensively regulated various aspects,

11 OTK-A 2014, No. 9, item 105.
12 Constitutional Tribunal ruling of 19 October 2010, case K 35/09, OTK ZU No. 8/A/2010, item 77.
13 Journal of Laws, 2023, p. 1329.

including the constitutional position, duties, and powers of consuls, as well as the administrative proceedings conducted before them.

2. The Place of Proceedings Before the Consul in the System of Polish Administrative Procedures and the Sources of Their Distinctiveness

The evolution of procedural rules governing administrative proceedings before the consul is a key factor that defines their distinct position within the broader framework of administrative procedures in the Republic of Poland.

Polish legal provisions have shaped proceedings before the consul, as defined in the Act on Consular Law, as distinct from general regulations governing administrative law processes. This differentiation has been present from the outset of Polish legal regulations, as reflected in Art. 112(c) of the Code of Administrative Procedure, then in Art. 194 Sec. 1 point 10, and further in the amendments effective from 1 September 1980 to the present, particularly in Art. 3 Sec. 2 point 4 of the Code of Administrative Procedure. According to the provision of the last-mentioned article, the Code of Administrative Procedure does not apply to cases within the jurisdiction of Polish diplomatic representations and consular offices.

This distinction introduces different procedural rules for dealing with administrative matters by consuls, even for cases that would otherwise follow the Code of Administrative Procedure within the Republic of Poland. Notably, the provision incorrectly uses the term 'consular office' instead of 'consul' as the administrative authority. The consular office should be understood as an auxiliary body providing personnel and material support, while the consul is the organ of the state with legal authority.

Despite this error, the key issue pertains to whether the exclusion in Art. 3 Sec. 2 point 4 is objective or subjective in character – i.e. whether it applies strictly to proceedings before the consul or to all consular proceedings, regardless of the authority or stage.[14] This matter was eventually clarified by judicial and administrative rulings. In its judgment of 7 October 2004 (ref. OSK 106/04),[15] the Supreme Administrative Court held that

> the exclusion of the application of the provisions of the Act of 14 June 1960 – Code of Administrative Procedure (Journal of Laws 2000 No. 98, item 1071, as amended) from proceedings before Polish consular offices abroad does not mean that this

14 Bogusz, 2021, p. 143.

15 Supreme Administrative Court, Central Database of Administrative Court Decisions (cbosa). [Online]. Available at: https://orzeczenia.nsa.gov.pl/cbo/query (Accessed: 1 November 2024).

exclusion applies to public administration bodies in Poland that control, by way of supervision, the decisions made in individual cases of Polish citizens. In other words, an authority of a higher level than the consular authority, acting in Poland in a supervisory capacity, is obliged to apply the provisions of the Code of Administrative Procedure.

Thus, it has been established that the exclusion in Art. 3 Sec. 2 point 4 is subjective in character, limited to proceedings before the consul, in which case the general rules of the Code of Administrative Procedure do not apply. If a case was initiated before the consul, but it is then handled by higher administrative bodies within Poland (i.e. the Minister of Foreign Affairs of the Republic of Poland), then the procedure will be based on general regulations, i.e. the provisions of the Code of Administrative Procedure. This distinction reflects the legislator's intent to treat cases differently depending on whether they are handled abroad by a consul or domestically by Polish administrative authorities. This principle applies to the substantive handling of cases. Furthermore, Art. 3 Sec. 4 of the Code of Administrative Procedure allows for the application of its provisions regarding complaints and applications in proceedings before the consul, but this does not pertain to the substantive handling of administrative cases or the issuance of legal acts. Therefore, it does not abolish or affect the effectiveness of the adopted rule.

The second structural feature of proceedings before the consul, as adopted in the Consular Law, is the lack of comprehensive procedural regulation.[16] In addition to the provisions of the Consular Law, procedural rules are also derived from other legal sources. Domestically, these include national special laws that govern matters within the consul's jurisdiction, providing additional procedural regulations specific to certain types of cases. From the perspective of international law, relevant sources include European Union law and classical international law, which can modify or supplement the procedural provisions of the Consular Law with specific legal solutions.[17]

In legal scholarship, it is unanimously recognised that the separation of proceedings before the consul is not an example of decodification of the administrative procedure system, which is generally viewed negatively.[18] Rather, this separation has its own specific rationale. Primarily, it is an important factor connected to the performance of the administrative functions and tasks of the Polish State in foreign countries. These functions have a clear legal basis in international law and do not

16 Bogusz, 2021, p. 144.

17 These issues are illustrated by the example of the procedural and legal grounds for visa issuance by consuls (visas can also be issued by other authorities). The procedure varies by visa type and is regulated by the Aliens Act of 12 December 2013 (Journal of Laws), the EU Community Code on Visas (OJ EU L 243 of 15 September 2009, as amended), and consular law. See: Dąbrowski, 2015, p. 45.

18 A negative example is the tax procedure regulated by the Tax Ordinance, widely criticised in the field of law studies.

infringe on the sovereignty of other states. Beyond the formal legal aspect, this issue also involves practical considerations related to the limited material and personnel resources available to consuls abroad, as well as the inherent unpredictability of the scope and nature of tasks the consul may be required to perform.

In contrast, the exercise of public administration by authorities within the Republic of Poland allows for a degree of stability and predictability, with the ability to adjust the administrative apparatus as needed. However, such stability and predictability are absent in the tasks consuls undertake, due in part to the nature of their duties, which extend beyond administrative matters to encompass what is called consular functions. These functions, though not defined by the Vienna Convention of 24 April 1964 on Consular Relations,[19] are outlined in Art. 5, which lists thirteen key responsibilities.[20] As a result, proceedings before the consul need to be structured in a way that grants the consul greater flexibility. Legal scholars point out that while the consul operates on the basis of Polish law, he or she does so within the legal framework of a foreign state.[21] This may be less of an issue in countries aligned with Western legal traditions but could have informal and extra-legal significance in culturally different regions, indirectly influencing the consul's activities.

A more universally significant factor, regardless of cultural context, is the size of consular districts, which often cover large geographic areas, making it difficult for the consul to maintain close contact with parties involved in administrative proceedings. Such circumstances were taken into account when designing consular procedures, which exclude some key elements of standard administrative procedures. For example, the consul cannot be removed from a case within his or her subject-matter jurisdiction. In domestic administrative proceedings, another authority nearby could take over the case if necessary; however, with consular cases, the exclusion of the consul could mean transferring the matter to another consul, possibly from another country. This could jeopardise the interests of the parties more than any concerns about the consul's impartiality, which can be addressed by higher authorities in the second instance if needed. Additionally, such a transfer would conflict with international consular law, which stipulates that consuls handle cases originating within their own consular districts[22] rather than cases transferred from another district due to the exclusion of another consul.

For these reasons, the legal solutions and procedural institutions characteristic of the general regulations in force domestically are not considered adequate for consular activities conducted outside national borders. The guiding principle behind consular procedural solutions is their simplification compared to the general rules,

19 Journal of Laws 1982, No. 13, item 98.

20 See Sawicki, 1992, passim, especially pp. 11–25; Czubiński, 1984, p. 125; Sutor, 1993, p. 28; Czubik and Kowalski, 1999, pp. 91–93.

21 Bogusz, 2021, p. 146.

22 For instance, according to Art. 6 of the Vienna Convention on Consular Relations, in 'special circumstances' and with the receiving state's consent, a consular officer may perform functions outside their consular district.

along with the need to protect state sovereignty, particularly by limiting the access of foreigners to the country's territory (in the context of visa matters). Consequently, the consul is not bound by a rigid statutory procedure that would grant extensive procedural rights to the parties involved, thus introducing restrictions on the consul's discretion.[23] These observations are especially relevant when dealing with foreigners applying for visas.

In other categories of administrative cases, the protection of citizens' procedural rights is ensured by the option to appeal the consul's first-instance decisions, transferring the case to a higher authority (i.e. the Minister of Foreign Affairs), where the appeal will be handled in accordance with the Code of Administrative Procedure, ensuring full respect for citizens' procedural rights.

3. Consul as an Administrative Authority. The Scope of the Consul's Jurisdiction

3.1. Consular Functions

The Consular Law defines the role of a consul by outlining both consular tasks (Art. 1) and functions (Art. 18). According to Art. 10, a consul serves as the head of a consular office or, in the absence of such an office within a consular district, as an appointed consular officer within a diplomatic representation. Art. 18 provides a detailed list of consular functions,[24] indicating that in the course of performing their duties, the consul:

1. protects the rights and interests of the Republic of Poland and its nationals, within the limits permitted by international law;
2. works to promote friendly relations and cooperation between the Republic of Poland and the receiving state;
3. undertakes activities to strengthen ties between the Republic of Poland and Polish nationals, persons of Polish descent, and individuals declaring their affiliation with the Polish Nation residing in the receiving state;
4. advocates for the Polish national minority and the rights and freedoms of individuals belonging to it, within the limits imposed by the laws of the re-

23 See Dąbrowski, 2015, p. 49.

24 On the concept of functions, see: Stasikowski, 2009, pp. 34–36, and literature cited therein.

ceiving state, international agreements, and documents of the Organisation for Security and Co-operation in Europe;
5. oversees, within his jurisdiction, the implementation of international agreements in force between the Republic of Poland and the receiving state;
6. works to develop and enhance economic, scientific, technical, and cultural cooperation between the Republic of Poland and the receiving state, and promotes the Polish economy, science, culture, and the Polish language;
7. provides information to the authorities and public opinion of the receiving state regarding the foreign and domestic policy of the Republic of Poland and developments in Polish economy, science, and culture;
8. familiarises himself with the conditions in the receiving state, particularly regarding its economy, science, culture, and legal system, and provides relevant information to interested Polish citizens, as well as to the appropriate authorities and institutions in Poland.

Although the provisions above do not explicitly state that performing state administration tasks is among the basic consular functions, these tasks should undoubtedly be considered among them. Therefore, they should be clearly identified within the catalogue of consular functions. The Vienna Convention of 24 April 1963 on Consular Relations, an important normative act of international law (reflecting, to a significant extent, the content of customary international law), includes the performance of administrative tasks among consular functions (see Art. 5).[25] However, this appears to result from the broad scope of tasks assigned to consuls. This could have been regulated more explicitly by adding a specific point in the catalogue of consular functions that highlights the performance of administrative tasks as defined by law.

The shortcomings of Art. 18 of the Consular Law are addressed by the legislator later in the Act, specifically in Art. 34, which outlines the consular function of performing administrative tasks outside the Republic of Poland. This article defines a catalogue of such tasks carried out by consuls abroad. Moreover, this is not the only provision relating to the performance of administrative tasks: for example, the provision of financial assistance (Arts. 39 and following) and the provision of aid (Art. 48) should also be regarded as such.

An analysis of these provisions leads to the conclusion that the consul's administrative tasks include both those that, within domestic conditions – i.e. on the territory of Poland – are performed by internal administrative bodies[26] (as listed in Art. 34), as well as those that can only be performed abroad and fall exclusively within the consul's jurisdiction (as specified in Arts. 39 and following, and Art. 48 of the Consular Law).

25 UNTS 1969, vol. 596, p. 261 (in Poland promulgated in Journal of Laws 1982, No. 13, item 98).
26 Cf. Borkowski, 1970, pp. 15–16.

3.2. Administrative Tasks of the Consul

According to Art. 34 of the Consular Law, the consul, under separate regulations:

1. issues, revokes, declares invalid, and refuses to issue passports and temporary passports;
2. issues, revokes, or cancels visas; processes requests for reconsideration, and cancels visa stickers;
3. grants, refuses, or revokes permits for local border traffic;
4. accepts applications for granting, restoring, confirming possession or loss of Polish citizenship, or for consent to renounce Polish citizenship, and transmits them to the competent authority in Poland, and accepts statements regarding Polish citizenship;
5. issues, or refuses to issue, temporary Polish travel documents for foreigners;
6. issues, or refuses to issue, temporary travel documents for citizens of other European Union countries;
7. issues decisions on determining Polish ancestry and decisions on eligibility for a Polish visa for repatriation purposes; grants and pays aid from the state budget, covers the costs of participation in a Polish language course, translates or certifies the translation of foreign documents required for preparing a Polish civil status certificate under Art. 12c(2) of the Repatriation Act of 9 November 2000 (Journal of Laws of 2022, item 1105), and forwards them, along with the application for the civil status record, to the civil registry office selected by the person referred to in Art. 12c(1) of that Act;
8. grants, refuses to grant, or cancels the Pole's Card, issues the Pole's Card, and extends its validity;

8a. issues documents to students and teachers certifying their entitlement to discounted travel in connection with studying or teaching Polish-related subjects, and extends their validity;

9. issues certificates authorising the importation or transportation of weapons through Polish territory and makes entries in the European Firearms Pass;
10. issues certificates for the importation of corpses and remains from abroad;
11. accepts assurances from individuals intending to marry that there are no circumstances precluding marriage;
12. accepts declarations of marriage and statements on the names of spouses and their children;
13. issues certificates confirming that a marriage can be contracted under Polish law;
14. accepts applications for the registration of births or deaths that occurred abroad but were not registered, or when no civil status registration exists in the country of birth or death;
15. accepts the necessary statements for the acknowledgment of paternity;

16. receives name-related applications and statements and forwards them to the competent authority;
16a. receives requests for the transcription of foreign civil status documents and forwards them to the competent authority;
17. performs activities concerning ships flying the Polish flag and their crews, including issuing temporary certificates of Polish nationality and ship safety certificates, and accepts maritime protests;
18. receives applications for permission to serve in a foreign army or military organisation and forwards them to the competent authority;
19. certifies signatures, accepts and transmits to the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation applications to access documents in the archives of the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, applications to issue copies of these documents, or applications to issue objects in the archives of the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation;
20. performs activities related to elections and national referendums;
21. accepts letters and transfers them to Poland, if submitting them to the consul ensures observance of deadlines in proceedings under separate regulations;
22. confirms the creation of a trusted profile on the ePUAP platform.

In most cases, the public administration tasks specified in Art. 34 of the Consular Law are classified as government administration tasks. These are tasks that must be performed uniformly, 'always and everywhere'. Generally, within Poland they are carried out by general administrative bodies. Some are executed by government administration bodies, while others are delegated or entrusted to local government bodies. This means that these tasks are managed by a diverse range of structurally varied government and local government administrative bodies.[27] Their assignment to different bodies was based on providing citizens with easy access to the administration. These tasks are significant from the perspective of civil liberties, rights, and the functioning of Polish citizens outside the borders of the Republic of Poland. Therefore, entrusting them to consuls is considered a sound legal solution.

3.3. The Manner in Which the Consul Deals with a Case or Performs an Administrative Task

In most cases referred to in Art. 34 of the Consular Law, the consul deals with the case directly; in some instances, however, the consul acts as an intermediary, receiving the party's request and forwarding it to the competent authority in Poland

27 Borkowski, 1970, pp. 15–16.

(see Art. 34 points 14–16a, 18, 19, 21 of the Consular Law). These cases vary in nature and are justified by differing reasons. For cases referred to in Art. 34 points 14–16a of the Consular Law, the consul is not formally authorised to maintain or make entries in the relevant registers. This lack of authority is likely due to the requirement for specific qualifications of civil registry office employees. For cases listed in points 18, 19, and 21, the intent is to facilitate handling important matters for citizens residing or staying abroad by designating the consul to accept and forward their letters, requests, etc., to the appropriate authorities. Those making such requests to the consul may do so because of challenges in sending documents by themselves to the competent authority, which includes knowing the necessary address details for correspondence.

Based on the provisions of Art. 34 of the Consular Law, it is essential to distinguish among the issues entrusted to the consul that relate to:

a) an administrative matter resolved by the issuance of an administrative decision (*sensu stricto*);
b) an administrative matter resolved by carrying out an action (administrative matter *sensu largo*);
c) an administrative case in the broadest sense (*sensu largissimo*);
d) the performance of a public task through various actions or sequences of factual and legal actions by the consul.

In the first two types of cases, substantive law is applied. Resolving an administrative case in the strict sense involves applying substantive administrative law *sensu stricto* and culminates in the issuance of an individually specific act of law in the form of a decision (administrative decision, ruling). Conversely, resolving an administrative case *sensu largo* involves performing a material-technical act (e.g. issuing a passport or visa), which falls within the category of law application *sensu largo*.[28] In administrative matters *sensu largo*, an authority issues a specific act or performs a public administration action related to an individual's rights or obligations under the law. Here, the essence of the consul's action lies solely in assigning a right or duty explicitly regulated by law to a specific person.

While drafting acts, the legislator may employ norms of substantive law that are concretised either through an administrative act or through a substantive-technical action.[29] In both types of administrative cases, a party has an interest in the specific application of substantive law to them, either through the formal determination of the administrative-legal relationship via an administrative decision in the strict sense, or through the determination of their administrative-legal position via a material-technical action *sensu largo*. Substantive law norms establish the prerequisites for granting a certain right to an individual and specify the legal form for granting it, thereby resolving the case. Only in these two types of administrative cases do the

28 Cf. Wróblewski, 1988, pp. 42–43.
29 Leoński, 2005, pp. 9–13.

administrative proceedings covered in this study apply. Importantly, the legislator can use either form of concretising a substantive law norm within the same type of case. For example, the legal solutions adopted in the Act of 27 January 2022 on Passport Documents[30] illustrate this. According to this act, acquiring entitlement to a certain type of passport document occurs via a material-technical action, while the cancellation of a passport document may be achieved by either a material-technical action or an administrative decision, and the declaration of invalidity or issuance of a refusal decision is made through an administrative decision. This flexibility demonstrates that a single subjective right of an individual can be concretised in various ways by the legislator.

In general, the tasks listed in Art. 34 of the Consular Law pertain to administrative matters (in both senses), with reservations resulting from the discussion above. However, some cases are not straightforward, as certain tasks may involve complex procedures that complicate the clear legal classification of the case in question.

The consul's handling of administrative matters *sensu largissimo* must be differentiated from cases in which substantive law is applied. This category is not homogeneous and includes tasks that involve accepting certain statements of intent from the parties and, in some instances, forwarding these for further processing by the competent body in Poland. In such cases, there is neither an application of a substantive administrative law norm nor the establishment of the administrative-legal position of a specific individual. However, what is significant here is the initiation of proceedings and the establishment of a new case. This case proceeds with the participation of a specific person, enabling them to address a fragment of reality relevant to themselves, though it does not, or may not ever, establish their administrative rights and obligations. Such cases are covered under Art. 34, points 11–12, 14–16a, and 18–19 of the Consular Law.

Finally, the consul's performance of other public tasks should be distinguished. These activities are addressed to an unspecified audience (a general addressee). They take the form of specific, factual actions performed by the consul, as indicated in Art. 34, points 20–21 of the Consular Law. Such actions, related to the fulfilment of public tasks, occur outside the process of applying substantive law and are executed through factual actions by the consul or sequences of factual and legal actions tied by a common purpose, such as the organisation of elections. Certain procedural provisions under the Consular Law apply to these activities; however, their performance does not culminate in the issuance of a decision.

30 Journal of Laws, 2024, p. 1063.

3.4. Construction of the Legal Basis for the Performance of Administrative Tasks by the Consul

The performance of the aforementioned administrative tasks is based on provisions of competence and substantive administrative law, regulated by separate statutory provisions. Art. 34 of the Consular Law provides the systemic legal foundation, but it does not constitute the basis for defining the consul's specific powers or scope of authority. Therefore, the substantive legal basis for actions in administrative matters listed in Art. 34 of the Consular Law lies within specific laws regulating these issues. Consequently, the provisions of Art. 34 of the Consular Law may be referenced in the legal basis for the consul's actions solely as a supplementary legal basis.

Attention should also be given to the legal solutions arising from Art. 33 of the Consular Law. Art. 33(1) of the Consular Law states that a consul performs activities based on written authorisation from the Minister of Foreign Affairs, and – for activities specified in Arts. 28(1), 31, and 32 – based on authorisation granted jointly by the Minister of Foreign Affairs and the Minister of Justice. However, this provision does not apply to tasks outlined in Art. 34 of the Consular Law. Under the authorisation from the competent minister, the consul may perform tasks including notarial activities, as well as activities related to document translation and legalisation.

It should also be noted that performing a public task generally lies beyond the discretion of the administrative body. If the task is mandatory, the body is obligated to perform it regardless of circumstances. For optional administrative tasks, however, the legislator grants the body the authority to assess their necessity or makes their implementation contingent upon the availability of sufficient resources. Consequently, the provisions of Art. 35(1) and (2) of the Consular Law, which state that a consul may refuse to perform an action that would contravene the law or principles of social conduct (para. 1), do not apply to the performance of public tasks. A consul may refuse to perform an action if its execution: 1) could endanger their own or others' life or health, 2) could result in significant damage, or 3) would require disproportionate expenditure when other options are available to the applicant (para. 2). Public tasks assigned to consuls are aimed to enable citizens exercise their rights and freedoms; their performance inherently aligns with the law and principles of social conduct and serves to uphold individual rights and freedoms. Therefore, these actions cannot be classified as those listed under Art. 35(1) and (2) of the Consular Law. The provisions concerning refusal to perform an action should apply primarily to the consul's notarial actions and translations.

3.5. On Entrusting Consular Functions to a Representative of a Third Country

It is worth highlighting a distinctive legal provision in consular law regarding the authorisation of a diplomatic representative or consul from a third country to perform certain consular functions. Pursuant to Art. 15(1) of the Consular Law, after notifying the receiving state and in the absence of objection, the minister responsible

for foreign affairs may authorise the head of a diplomatic mission or consul from a third country to carry out specific consular duties. Consequently, a Polish consul may also undertake consular functions for a foreign country.

Based on linguistic interpretation alone, it is impossible to determine which functions may be involved, leading to an open conclusion. However, the interpretative process should also include systemic interpretation directives. The wording of the law does not prohibit transferring certain public tasks to international organisations or another state. Such tasks then no longer remain duties of the Polish State but are performed as tasks of an international organisation or another state, with the competent bodies of those entities responsible for execution. However, concluding an international agreement and completing its ratification by law is necessary in this case. Within the Polish legal system, it is impermissible for foreign state authorities to execute administrative tasks assigned to the Polish state under applicable Polish law. This prohibition is rooted in the principle of state sovereignty,[31] upheld in various ways, including the restriction against foreigners working in Polish public administration. For this reason, it is inadmissible to use Art. 15(1) of the Consular Law to transfer the competencies assigned to a Polish body – a consul – to a foreign state body on the basis of a decision of the minister responsible for foreign affairs. Therefore, as the Constitution permits transferring parts of Polish sovereignty solely through an international agreement ratified by law, the conclusion follows that administrative tasks reserved exclusively for Polish state bodies cannot be transferred under the procedure in Art. 15(1) of the Consular Law. However, this does not preclude the possibility of using this procedure to transfer other consular functions, which are not as central to the Polish State's sovereignty as public administration.

3.6. The Consul as a Special Administrative Body

Under the current legal framework, the consul is vested with the authority to deal with administrative matters through specific laws, which establishes the consul as an administrative body. However, given that the consul also undertakes unique administrative tasks – i.e. those that can be performed exclusively by the consul – and that, beyond public administration tasks, the consul also fulfils various consular functions, such as acting as a notary, delivering correspondence, and executing other public tasks of state interest,[32] it is necessary to categorise the consul as a distinct type of administrative body. The Constitutional Court acknowledged this in its judgment on case ref. K 8/14, referring to the consul as a 'special administrative body'[33] but without clarifying what makes it 'special'. Therefore, the consul does

31 On the understanding of the principle of state sovereignty and permissible limitations, see: Garlicki, 2000, pp. 58–59.

32 Cf. Rylski, 2019, pp. 7–35; Wach, 2015, p. 116.

33 It stated, 'The consul, as a special administrative body, issues administrative decisions in individual cases, sometimes with finality (e.g. visa cases)'.

not fit the standard profile of an administrative body, as the role encompasses more than administrative functions and tasks. Indeed, the consul performs duties that go beyond those typically reserved for the state; these are either not conducted within the Republic of Poland due to their objectlessness (see Art. 18 of the Consular Law). Or, if performed, they are carried out by non-administrative entities under state oversight, such as a civil-law notary, who holds a position of public trust, or Poczta Polska, a public utility providing official correspondence delivery services.

Another reason for the consul's unique status as an administrative body is the range of tasks performed, which, domestically, are handled by various separate bodies, both local and governmental. The consul's legal status as an administrative body does not align with the general organisational structure of public administration on the Polish territory. Typically, domestic administration is categorised by conceptual distinctions such as self-government versus government administration, central government versus territorial administration, and – within territorial government – combined versus non-combined administration. None of these classifications adequately capture the legal standing, operational framework, or organisation of the consul as an administrative body. The only undisputed fact is that the consul falls under government administration and represents a component of centralised government administration, although the consul's personal and operational dependencies differ from the traditional centralised model.

In terms of personal dependency, the consul is appointed by the minister responsible for foreign affairs upon the recommendation of the director general of the foreign service and can be dismissed through the same process (Art. 12(1) of the Consular Law). Consuls are appointed from among consular officers who possess the required qualifications, verified by passing the consular examination (Art. 6 of the Consular Law).[34] Additionally, only individuals who can guarantee the proper performance of consular duties are eligible to become consuls (Art. 11), and they generally carry out consular functions personally, though they may authorise subordinate consular officers in writing to perform functions on their behalf (Art. 16(2) of

34 According to Art. 6(2) of the Consular Law, the consular exam includes:
1. knowledge of the receiving state, cooperation, and relations between the receiving state and the Republic of Poland;
2. knowledge of laws and other regulations governing the consul's activities;
3. knowledge of international law, EU regulations, and international customs related to consular functions;
4. knowledge of the specifics of consular duties in the receiving state;
5. knowledge of Polish policy towards the Polish diaspora in the receiving state;
6. practical skills in handling cases and performing consular duties.

the Consular Law).[35] Consequently, the statutory framework precludes viewing the consul as a politically appointed official; rather, the position is entrusted to professionals with the requisite qualifications, as confirmed by a state examination. This structure limits the minister's discretion in appointing consuls, requiring reliance on a pool of qualified personnel rather than unrestricted decision-making.

Regarding official dependence, the consul is part of the centralised government administration apparatus under the authority of the minister responsible for foreign affairs (Art. 13(1) of the Consular Law). This official dependence includes the minister's right to supervise consular functions, except where a specific provision states otherwise (Art. 13(2)). The act specifies that in exercising supervision, the minister may issue binding guidelines, make recommendations, and request information, explanations, and documents from the consul (Art. 13(3)). However, these guidelines and recommendations may not pertain to substantive decisions made by the consul in specific cases (Art. 13(4)). This arrangement contrasts with classic models of official dependence by explicitly limiting the supervisory powers of the minister to only those specified in the law, thereby prohibiting any additional interference in the consul's activities beyond these statutory confines.

3.7. Consular Jurisdiction

The Consular Law does not reference the concept of territorial jurisdiction; however, the consul is authorised to perform consular functions within a specific consular district, defined as the area designated for consular functions in accordance with the Vienna Convention on Consular Relations of 24 April 1963. These functions may be carried out outside this district only with the consent of the receiving state and upon the consul's receipt of written authorisation from the Minister of Foreign Affairs permitting consular functions beyond the designated consular district (Art. 14 of the Consular Law). According to Art. 53(2) of the Consular Law, territorial jurisdiction is determined based on the party's place of residence or domicile within the consular district or the location of the event that initiated the proceedings.

The consul's substantive jurisdiction is established by national laws governing specific areas of social relations subject to administrative and legal regulation, as well as by European Union regulations and international agreements.[36]

35 According to Art. 16(3) of the Consular Law, in justified cases and with the consent of the Minister of Foreign Affairs, a consul may grant written authorisation for a specified period to perform certain functions to: (1) members of diplomatic-consular staff or auxiliary personnel, as defined by the Act on Foreign Service of 21 January 2021; (2) persons employed at a Polish foreign mission based on a work contract compliant with the receiving country's law or through appointment under the Labor Code Act of 26 June 1974 (Journal of Laws 2022, items 1510, 1700, and 2140, and 2023, items 240 and 641), including those employed for the duration of a family member's official assignment to the mission.

36 Bogusz, 2021, p. 150.

Collectively, these legal provisions underscore the distinctiveness of the consul's systemic status as an administrative body, setting it apart from administrative bodies operating within the Polish borders. This distinction allows the consul to be classified as a unique type of administrative body.

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4. Course of Administrative Proceedings Before the Consul

4.1. General Remarks

The unique and distinctive nature of the administrative procedure conducted by the consul is highlighted by the scope of procedural regulations set out in the Consular Law. These provisions differ significantly from the general Polish procedural norms established in the Act of 14 June 1960 – Code of Administrative Procedure, both in terms of the subject matter addressed and often the content of the legal regulations themselves. Thus, it is essential to consider not only what has been specifically regulated within the Consular Law but also what has been omitted in comparison to the Code of Administrative Procedure. Procedural regulations under the Consular Law are outlined in Part III, which is divided into chapters: 'General Provisions' (Arts. 50–57), 'Processing' (Arts. 58–62), 'Time Limits' (Arts. 63–65), 'Deliveries' (Arts. 66–71), 'Initiation of Proceedings' (Arts. 72–77), 'Evidence' (Arts. 78–80), 'Decisions and Rulings' (Arts. 81–87), 'Appeals, Complaints, and Requests for Reconsideration' (Arts. 88–94), 'Recommencement of Proceedings' (Arts. 95–101), 'Certificates' (Arts. 102–104), and 'Consular Fees and Expenses' (Arts. 105–119).

Compared to the general administrative proceedings regulated by the Code of Administrative Procedure, the Consular Law omits several key procedural regulations. The Consular Law lacks explicit provisions regarding the general principles of consular proceedings and does not include guidelines for excluding a consul or authorised consular employee due to conflicts of interest. Additionally, it does not contain regulations for the participation of parties with procedural rights, nor does it comprehensively regulate the evidentiary process – its provisions are limited to only two types of evidence. Moreover, there are no mechanisms in the Consular Law for appealing against inaction or procedural delays, such as submitting a reminder. It also omits requirements that would oblige a consul to allow a party to review gathered evidence, provide comments, or submit new evidence before issuing a decision. Furthermore, the Consular Law restricts the ability to revoke a final decision solely to the reopening procedure, offering limited recourse for reconsideration.

A distinctive feature of the administrative procedure before the consul is that it encompasses not only the procedure for issuing acts applying the law – similar to the Code of Administrative Procedure – but also includes the procedural framework

for actions performed by the consul.[37] This broader regulatory scope means that the consular procedure is designed to cover a wider range of consular functions within a unified set of provisions. Consequently, the scope of consular procedure is objectively more extensive than that of general administrative procedure, which typically focuses on issuing acts that apply substantive law.

4.2. Parties to Administrative Proceedings Before the Consul

Art. 50 of the Consular Law specifies that a party to proceedings before the consul includes anyone whose legal interests or responsibilities are the object of the proceedings, mirroring part of Art. 28 of the Code of Administrative Procedure. The doctrine indicates that such wording indicates the *ex officio* mode of initiation of proceedings. Additionally, however, Art. 28 indicates that proceedings can be initiated upon request ('a party to proceedings is any person (…) who requires the intervention of a body in respect of their legal interests or responsibilities')[38] Art. 50 does not include such wording that would indicate initiation upon a party's request. The omission is noted as inconsistent, as it does not fully align with the general procedural framework used in the Code of Administrative Procedure, despite the fact that the concept of a 'party' in consular proceedings is materially equivalent to that used in domestic procedures. Moreover, the consul's subject-matter competence generally involves cases initiated at the party's request, while Art. 50 of the Consular Law seems more suited to cases initiated *ex officio*. Although formal initiation of cases *ex officio* is possible after a party application, this approach should ideally be consistent with the consul's typical procedural scope, as outlined in Art. 72(1) of the Consular Law, which specifies that the consul initiates proceedings either at the request of a party or *ex officio*.

The doctrine widely accepts that the concept of a 'party' is fundamentally procedural, meaning that a party only exists within the context of an administrative proceeding. For a proceeding to begin, an administrative case with substantive legal relevance must first exist as the subject matter of the proceeding. Only then can the proceeding be initiated, and a party can formally appear within it. This creates a clear distinction: the party is involved only in the proceeding, not directly with the case itself, although the proceeding addresses the case. The case, in turn, can exist on the grounds of substantive law.[39] The legal solution adopted in Art. 50 of the Consular Law respects this distinction.[40]

The concept of legal interest and responsibility is not defined within the provisions of the Consular Law, necessitating reliance on doctrinal interpretations. The doctrine equates a legal interest with an interest that is either rooted in law or

37 Bogusz, 2021, p. 149.
38 Knysiak-Sudyka, 2017, p. 187.
39 Zimmermann, 1996, p. 77 et seq.
40 See Supreme Administrative Court (NSA) judgment of 21 October 2011, case I OSK 1819/10.

protected by law, thus associated with a specific, generally applicable legal norm. On this basis, one can legitimately seek action from a body (i.e. the consul) in alignment with individual needs and expectations, or, alternatively, request the body's restraint or limitation of actions that contradict the needs of an individual within a particular factual and legal context.[41]

A party's legal interest, understood as an individual's claim against a public body, must meet several criteria: it must be individual, personal, concrete, relevant (in the sense of not being hypothetical or contingent upon uncertain future events),[42] and objectively verifiable.[43] The source of a legal interest lies in the norms of generally applicable law, including substantive administrative law,[44] substantive civil law,[45] and procedural law.[46] Legal interest cannot be derived from the broader realm of law application activities; meaning it cannot be based on civil law claims, contracts, internal statutes, bylaws, corporate regulations,[47] or ongoing proceedings in other administrative, judicial, criminal, or disciplinary cases.[48] Additionally, a person may qualify as a party due to a binding obligation, understood as a specific order or prohibition, sourced exclusively from provisions of generally applicable administrative law.[49]

Polish procedural-legal doctrine has long debated the theoretical concept of a party under Art. 28 of the Code of Administrative Procedure. While a detailed review of this debate is unnecessary here,[50] its conclusions suggest that, under Art. 50 and Art. 54 Sec. 1 of the Consular Law, the legislator favours a more objective concept of a party. Finding that there is no legal interest or obligation during the proceedings will lead to a decision to discontinue the proceedings. A subjective concept of a party assumes that anyone who asserts and is personally convinced that the proceeding involves their legal interest or obligation. The consul's investigation then examines the existence of this claimed legal interest or responsibility. If the consul determines that a legal interest exists, it results in a positive decision; if absent, it leads to a decision to discontinue the proceedings.

A notable limitation of the Consular Law is its omission of provisions that define general procedural capacity, i.e. the criteria determining who may act as a party in consular proceedings. Nevertheless, this gap can be addressed through legal reasoning by deriving procedural capacity from specific legal rights in various administrative contexts. For example, the right to hold a passport, outlined in Art. 5(1) of the

41 See NSA judgment of 10 August 1998, case II SA 742/98.
42 See NSA judgment of 16 October 2012, case II OSK 1125/11; NSA judgment of 26 February 2014, case II GSK 1916/12; NSA judgment of 19 April 2017, case I OSK 1817/15.
43 Klonowiecki, 1938, pp. 10–12, 14, 31, 35–37; Adamiak and Borkowski, 2017, pp. 222–224.
44 See NSA resolution of 3 February 1997, case OPS 9/96, OSNA 1997, No. 3, item 102.
45 See NSA resolution of 28 May 2001, case OPS 1/01, ONSA 2001, No. 4, item 146.
46 Duda, 2008, pp. 184–186.
47 See NSA judgment of 13 October 1999, case IV SA 1349/97.
48 See NSA judgment of 24 September 2009, case II GSK 1074/08.
49 Knysiak-Sudyka, 2017, p. 189.
50 On this subject, see: Gołaszewski, 2018, p. 250 and literature cited therein.

Law of 27 January 2022 on Passport Documents,[51] implies that procedural capacity and standing extend to Polish citizens of any age.

The Consular Law only partially addresses the concept of postulatory capacity, i.e. a party's factual and legal ability to act personally in consular proceedings. According to Art. 57(1) of the Consular Law, a party may act either in person or through an attorney, unless specific actions or provisions require the party's personal involvement. The attorney must be a natural person with full legal capacity, and the power of attorney must be provided in writing. However, in minor cases, the consul has discretion to waive the requirement for a written power of attorney if circumstances clearly indicate the attorney is acting on behalf of the party (Art. 57(2) and (3) of the Consular Law). Notably, the Consular Law lacks provisions addressing situations where parties may lack actual capacity to act independently in proceedings, such as minors, legally incapacitated persons, or those who do not understand the Polish language. This regulatory gap leaves questions unanswered about how these individuals can effectively participate in proceedings.

A particularly interesting provision relating to postulatory capacity, while also regulating a specific evidentiary measure, is Art. 55 of the Consular Law. Under para. 1, the consul may summon a party to appear in person if personal attendance is essential to resolve the case or if a specific legal provision requires it. The distinctiveness of this provision lies in the consequences for non-compliance: per Art. 55(3), if the party fails to appear when summoned, the consul is permitted to leave the application unprocessed. The summons must inform the party of this consequence and of any additional repercussions for failing to appear, if specified in other relevant provisions.

4.3. Initiation of Consular Proceedings

Under Art. 72(1) of the Consular Law, the consul may commence proceedings either upon request from a party or *ex officio*. *Ex officio* proceedings occur in three specific circumstances: (1) to protect the rights of the Republic of Poland and its citizens, (2) as mandated by law, or (3) upon receiving information from the authorities of the receiving state regarding an event that necessitates the consul's intervention, with the consul informing the party of any actions taken.

The commencement date of proceedings varies depending on submission method. For requests submitted in person or by mail, the commencement date is when the request is delivered to the consul. For electronic submissions, the date of commencement corresponds to the issuance of a receipt, as outlined in Art. 41 of the Act of 18 November 2020 on Electronic Delivery (Art. 73(1) and (2) of the Consular Law).

51 According to which, every Polish citizen has the right to possess a passport document (Journal of Laws 2024, 1063).

Requests to commence proceedings must generally be made either orally or in writing, with some cases or specific provisions requiring a written request in paper form (Art. 74 of the Consular Law). A written request must contain the request itself, the party's name, signature, and address of residence. For electronic submissions, a qualified electronic, trusted, or personal signature is required, while paper-based applications must include a handwritten signature. If a request does not meet these formal requirements, it is left unrecognised, as the Consular Law does not provide a procedure for rectifying such formal deficiencies. However, if the application lacks other necessary elements or attachments, the consul will issue a written summons for the applicant to rectify these deficiencies within 14 days, notifying the applicant that failure to do so will result in the application being left unrecognised (Art. 77 of the Consular Law).

These legal solutions diverge from those in the Code of Administrative Procedure, and the rationale for differentiating the weight of specific formal deficiencies in the application is not readily apparent. The approach taken in consular proceedings requires that necessary documents be submitted early, as deficiencies cannot be supplemented once the investigation and evidence stage has begun. This connects with a narrower application of the principle of officialdom in consular proceedings, which rely on only two forms of evidence: documentary evidence (Art. 78 of the Consular Law) and statements made on the record by the party or another individual before the consul (Art. 79 of the Consular Law). The legislator's intention appears to be that a party with a document essential for a favourable decision should provide it at the outset. If a party lacks such a document, it is assumed that the proceedings are likely to end unfavourably for them. Hence, it is more efficient to request these documents at the commencement stage rather than advancing to proceedings with a predictable negative outcome. This preliminary requirement avoids unnecessary procedural steps by enabling the consul to leave incomplete requests unprocessed early in the process.

If the consul lacks the substantive jurisdiction to deal with a case, or if the application has been submitted by a non-party, the consul must inform the applicant of the appropriate body and return the application (Art. 54(1) of the Consular Law). However, if another consul within the same receiving state holds jurisdiction (i.e. the issue is one of territorial rather than substantive jurisdiction), the consul should notify the applicant and forward the application to the proper consul, unless otherwise specified by a special provision (Art. 54(2) of the Consular Law). When faced with deficiencies in substantive or territorial jurisdiction, the consul's initial actions should address these jurisdictional issues, even if the application contains formal deficiencies. An exception to this procedure applies when deficiencies are so significant that the application must be left unprocessed – for instance, if the applicant fails to provide personal data and a residential address, making it impossible to act under Art. 54 of the Consular Law.

4.4. Deadline for the Consul to Resolve the Case

The time limit set for the consul to process a case reflects the unique nature of the consular procedure. The legislator aims, on the one hand, to ensure a prompt resolution for the party involved, while, on the other, introducing flexibility that allows the consul to adapt to the specific circumstances of each case. This balance between expediency and adaptability is captured in Art. 58(1) of the Consular Law, which mandates that the consul should handle the case 'without undue delay', but within thirty days of the initiation of the proceeding. The requirement to proceed 'without undue delay' is intentionally vague, allowing for the consul's assessment of promptness based on the specific factual and legal circumstances of the case, as well as the consul's operational environment.[52] However, regardless of these factors, the case must be concluded within the thirty-day maximum from the initiation date.[53]

Generally, the individual regulations in this area align closely with the legal framework for similar bodies operating domestically. However, the Code of Administrative Procedure provides a more detailed structure concerning time limits for handling cases, distinguishing these based on criteria such as complexity and the scope of investigation required. Conversely, the Consular Law includes unique provisions absent in the Code of Administrative Procedure. Notably, Art. 58(2) allows the consul to extend the basic deadline without specifying an absolute upper limit. This provision states that the consul must notify the party of any circumstances necessitating an extension, setting a new deadline accordingly. Linguistic interpretation of this provision suggests that the consul may extend the deadline indefinitely, as necessary – a flexibility not found in the Code of Administrative Procedure. Systematic interpretation confirms this flexibility. According to Art. 60(1), the consul may request additional information or assistance from public administration bodies in Poland or the receiving state when needed to resolve the case. In such situations, the initial deadline of 30 days (Art. 58(1)) is extended to three months. However, Art. 60(2) stipulates that if resolving the case within this extended period is not feasible, the consul reverts to Art. 58(2), further extending the deadline as necessary. This framework implies that the three-month period under Art. 60(1) is not a definitive cap; if circumstances demand, the consul may continue extending the deadline, provided the party is notified in writing, informed of the reasons, and given a new realistic timeline.

The Consular Law includes specific provisions on calculating, observing, and restoring deadlines in cases of non-compliance. These regulations mirror the general administrative procedure framework, often referencing or replicating it directly. Arts. 63–64 of the Consular Law address the calculation and observance of deadlines, closely aligning with Art. 57 of the Code of Administrative Procedure. Additionally,

52 The Supreme Court (SN) addressed this issue in a civil law context in the resolution of 30 November 1988, case III CZP 48/88, OSNC 1989, No. 3, item 36.

53 Wiktorowska, 2012, p. 79.

Art. 64 the Consular Law governs the restoration of deadlines, largely replicating Art. 58 of the Code of Administrative Procedure.

In essence, the time limit for resolving a case under the Consular Law functions as a procedural deadline. This means that missing such deadlines does not prevent the body from issuing a decision nor does it render the decision invalid.[54] This would differ if the legislator had introduced substantive deadlines with specific legal consequences for non-compliance. The Consular Law does not provide parties with procedural remedies to contest the consul's inaction or prolonged proceedings. Parties can only file a complaint with the consul's immediate superior – namely, the minister responsible for foreign affairs.

4.5. The Course of the Evidentiary Process

Most objections to the legal framework adopted for administrative proceedings before the consul are raised by the provisions governing the evidentiary process, which are, in principle, largely absent. Regulation of this critical phase of the proceeding – essential for the content of the decision – has been limited to defining the types of evidence admissible in consular proceedings.

The core issue examined in this part of the paper is distilled into two questions: (1) whether the course of the evidentiary process can be reconstructed based on the sparse legal provisions, and (2) whether the regulations in the Consular Law are sufficient to stimulate the reasoning processes needed to address the obvious gaps.

An analysis of the legal solutions pertaining to the evidentiary process leads to a negative evaluation of the adopted legal framework. The legislator has regulated only two types of evidence (Arts. 78–79 of the Consular Law) and stressed the importance of facts known to the consul *ex officio* (Art. 80 of the Consular Law), entirely neglecting to regulate the course of the evidentiary process.

In consular proceedings, the reasoning process is based on two types of evidence: documentary evidence and statements from the parties involved. A relevant fact can also be established by a circumstance known to the consul *ex officio*, meaning information derived from records, registers, or lists maintained by the consul. In such cases, the consul determines the relevant fact based on official databases without requiring the party to submit supporting evidence (e.g. documents to confirm certain information; Art. 80 of the Consular Law). For documentary evidence, both private and official documents are acceptable, but only originals are permitted (Art. 78(1) of the Consular Law). A copy may be accepted if it has been verified as identical to the original by a competent body in Poland, the receiving country, or a third country, provided no special provision requires the original.

Official documents prepared in the appropriate form by authorised bodies within their scope of activity carry increased evidentiary weight, as the legislator has deemed them to be reliable evidence of the statements they contain (Art. 78(3)). Statements

54 See NSA judgment of 7 May 1998, case I SA/Ka 1215/96.

made by a party or other individual may also serve as evidence if submitted in a protocol before the consul after a warning of criminal liability for false statements. This protocol must include the date and place of its preparation, the subject of the action, personal details of those involved, the warning about criminal liability and a note confirming that this warning has been communicated, the content of the statement, and signatures of the participants (Art. 79(1) and (2) of the Consular Law).

A party's statement is treated as evidence in the form of a hearing, while a third-party statement serves as a substitute for witness testimony. This unique approach seems to be intended to simplify proceedings, as a formal hearing requires the presence of all parties, whereas statements can be recorded at any time before the consul, even outside formal administrative proceedings. The only requirement is adherence to the formalities stipulated in Art. 79 of the Consular Law.

Such scope of the regulations allows the following conclusions to be drawn:

1. First, proceedings before the consul are based on the principle of material truth.
2. Second, the legislator implicitly prohibits using all possible types of evidence to explain the case, limiting admissible evidence to two types.
3. Third, the responsibility to submit documents lies with the party. However, this does not preclude the consul from initiating and requiring a party to submit certain documents if the case would otherwise remain unprocessed. The same applies to submitting necessary statements, suggesting indirectly that the consul acts as the 'host' of the proceedings. This implies that the principle of officialdom governs these proceedings, albeit in a modified form, as the regulations do not mandate the consul to independently seek necessary evidence. Instead, the consul may impose this duty on the parties. Should a party fail to meet this obligation, the case may remain unprocessed.
4 Fourth, limiting regulation of the evidentiary process to the identification of evidence aims to simplify the proceedings and remove certain procedural rigors from the clarification process that would otherwise bind the body (e.g. notifying a party of a witness hearing and allowing this party to participate). This regulation also grants certain procedural rights to the parties.
5. Fifth, the evidentiary process may take the form of proceedings in chambers, excluding the possibility of an administrative hearing.
6. Sixth, it is the body's duty to evaluate the gathered evidence. This duty is only indirectly derived from the formal rule of *ex officio* evidence evaluation. Since the legislator has specified the method of evaluation, the consul has discretion in evaluating other aspects, such as statements from a party or other individuals. This obligation also stems from the principle of two-instance proceedings, which implies that evidence must be evaluated thoroughly enough

in the first instance to allow for a legal assessment of the decision in the second instance.[55]

In general proceedings, the principle of officialdom[56] – meaning the administrative body's duty to act *ex officio* – defines a conduct paradigm for the body, which includes duties related to: a) directing and conducting all proceedings in the public interest, with the content tailored to each case; b) commencing proceedings and individual procedural actions *ex officio*; c) carrying out procedural actions directly, particularly evidentiary actions; and d) adjudicating incidental (preliminary) and primary issues, even against the will of the addressee. This configuration of the principle stems from the administration's mission to serve the public interest, necessitate *ex officio* action, direct the proceedings, and act as the 'host' in striving to clarify the case, including through additional *ex officio* actions, and ultimately issuing a decision.[57]

Acting as the host of the proceedings, which is central to the principle of officialdom, gives the body discretion over commencing the proceedings and determining their scope,[58] with public interest as the sole criterion. This responsibility also includes the burden of proof, encompassing the legal duty to comprehensively gather evidence to establish a factual basis that reflects reality.[59] Such factual clarity is required to the extent necessary to resolve the case.[60]

In general proceedings, the burden of proof lies with the body, though this does not absolve the party from cooperating in clarifying the case.[61] Many factual circumstances relevant to the case's substantive aspects may only be known to the party, meaning the party's failure to disclose these facts limits the body's ability to investigate. In such cases, where the party remains passive, the body fulfils its duty if it exhausts all reasonable measures based on available and accessible data.

In consular proceedings, the situation is complex. For documentary evidence, submitting it is the party's responsibility, though the consul may initiate this process

55 See Warsaw Administrative Court (WSA) judgment of 23 February 2011, case V SA/Wa 1873/10.

56 In the doctrine, on this topic, see: Klonowiecki, 1938, pp. 67–68; Starościak, 1969, pp. 264 et seq; Iserzon, Starościak and Dawidowicz, 1955, p. 86; Łaszczyca, 2018, pp. 525 et seq; Rozmaryn, 1961, pp. 892–893; Łętowski, 1990, pp. 229–231; Służewski, 1982, p. 44.

57 Cf. Langrod, 1939, p. 18; Klonowiecki, 1938, p. 67.

58 Starościak, 1969, pp. 264–266.

59 On the burden of proof, see: Hanusz, 2004, pp. 182–183.

60 Borkowski et al., 1989, p. 62.

61 The Supreme Administrative Court ruled in the judgment of 26 October 1984, case II SA 1205/84, that 'According to Arts. 7 and 77 Sec. 1 of the Code of Administrative Procedure, the responsibility for gathering and considering all evidence rests with the authority conducting the administrative proceeding. This does not imply that the party is exempt from participating in fulfilling this duty, especially as the failure to prove a specific factual circumstance may result in unfavourable outcomes for the party. However, under the Code of Administrative Procedure, it is unacceptable for the authority to take a completely passive stance, limiting itself only to evaluating whether the party proved the facts underlying its claim, effectively transferring the burden of clarifying the case to the party'.

ex officio. Evidence in the form of statements by a party or another person may also be initiated and conducted *ex officio* by the consul.

The legal solutions adopted are justified by the simplified nature of cases falling within the consul's substantive jurisdiction. This point was already noted in the explanatory memorandum to the draft law,[62] which emphasised the need to avoid introducing complicated procedural rules and instead simplify proceedings to ensure swift case resolution. However, this simplicity in the evidentiary process and procedural flexibility must not undermine the consul's duty to ascertain the truth of the matter. Thus, procedural simplification is permissible only up to the point where it does not endanger the obligation to establish the facts accurately.[63]

4.6. Legal Forms of Dealing with an Administrative Case

The legal form for dealing with a particular type of administrative case results from the substantive law provisions that establish the consul's competence in a given area. In general terms, the consul exercises this competence by either issuing a decision or carrying out a material or technical action. The manner of these actions is governed by procedural rules and conducted within the framework of consular proceedings. It is important to distinguish the resolution of administrative matters from the consul's actions that are mandated by law, such as receiving various statements or performing factual acts. Both forms of fulfilling public duties are regulated by Art. 51 of the Consular Law, which specifies that the consul deals with a case by either performing an action or issuing a decision.

The 'dealing with the case' referred to in Art. 51 of the Consular Law should be distinguished from the performance of public tasks within the consul's cognizance. This does not involve the application of substantive law but rather consists of executing task norms directed at the general public. An example of this is the organisation and conduct of elections and a national referendum (Art. 34, item 20 of the Consular Law).

From the perspective of the legal form criterion of the consul's actions, consular proceedings concerning an administrative matter may conclude in one of the following ways:

a) through a material-technical action, involving the performance of a specific action, such as issuing a passport, visa, or travel document;
b) by issuing a positive or negative administrative decision;
c) by issuing a ruling.

The formal-legal basis for performing an action or issuing an administrative decision is established in Art. 51 of the Consular Law. The content of the action performed or the substantive content of the decision is governed by substantive law

62 See justification for the draft Consular Law, Sejm 7th term, parliamentary print No. 3290.
63 See the views of the doctrine: Borkowski and Krawczyk, 2020, p. 106.

provisions, which define the normative facts and the related administrative-legal rights or obligations arising from the fulfilment of substantive prerequisites. These provisions dictate the type and content of the material-technical action or administrative decision. The performance of an action or issuance of a decision is based on explicit statutory authorisation, with the construction being identical in both cases, differing only in the legal form for resolving the specific administrative matter.

Material and technical actions undertaken within the context of administrative matters are factual actions that produce indirect legal effects – i.e. they generate legal consequences through facts or events.[64] For example, issuing a passport involves a series of factual actions related to preparing the document and delivering it to the party by the consul; these actions do not directly produce legal effects, but possession of the passport grants the holder the legal right to cross state borders. In administrative law, material and technical actions have the following features: a) they are undertaken based on and for the purpose of implementing applicable legal norms, b) they contribute to the execution of the state's tasks, c) they are subject to control of legality, d) they do not directly aim to create, change, or extinguish legal relations, e) nevertheless, they can produce certain legal effects indirectly through facts.[65] Importantly in this context, these actions serve the purpose of executing (implementing) the law, which distinguishes them clearly from administrative decisions, which are acts of applying the law.

An administrative decision, in turn, represents the fundamental form of an administrative act. It can be analysed from the perspective of either substantive or procedural law. In the former, the focus is on the material prerequisites (i.e. the factual circumstances specified by law as conditions for issuing the decision) and the content of the decision. The content of an administrative act affects civil rights and freedoms and decisively shapes the legal situation of individuals, legal entities, and other entities in matters within the scope of public administration tasks.[66] Administrative decisions are acts of applying substantive law, transforming an abstract substantive legal norm (pertaining to a generally defined factual situation in the hypothesis) and a general norm (addressed to a broadly defined group through universal terms) into a concrete (i.e. addressing a specific factual situation) and individual norm (i.e. directed at a fully specified legal subject).[67]

64 Zimmermann, 2006, p. 355.
65 Stahl, 2002, p. 379.
66 Michalska-Badziak, 2002, p. 379.
67 Ochendowski, 2001, pp. 167–178; Zimmermann, 2006, p. 382; Maurer, 2006, p. 212; Dawidowicz, 1965, pp. 285–287; Dawidowicz, 1962, p. 22; Jaśkowska, 1998, pp. 12–13.

From the perspective of substantive law, a decision is an administrative-legal act issued by a body, containing a declaration of its will[68] (as opposed to a declaration of knowledge),[69] expressing the administrative power of the body, which independently (i.e. unilaterally) determines its content based on a substantive norm. In doing so, it disregards the expectations and wishes of the party to the proceedings, who remains outside the structure of public administration.[70] The decision generates legal effects regardless of the party's response to its content,[71] making it a sovereign and unilateral act – yet bilaterally binding. Its addressee is an entity external to the administration. This act produces direct legal effects under administrative law and, in some cases, extends to other areas of law, such as civil law.[72]

From a substantive perspective, the essence of a final decision is to establish, mandate, prohibit, or shape the rights or legal situation of its addressee. Decisions that mandate or prohibit something impose an obligation on the addressee to take a specific action, refrain from an action, or discontinue an ongoing action. Decisions that shape something create, modify, or terminate a particular legal relationship, while determining decisions establish a right or a legally significant characteristic of a specific person.[73]

On a procedural level in general proceedings, an administrative decision 'settles a case' (Art. 104(1) of the Code of Administrative Procedure), meaning it concretises a person's rights or obligations based on a substantive norm (i.e. it precisely defines their content). Additionally, besides settling the case on its merits, it may conclude

68 The provisions of Arts. 82–88 of the Civil Code regarding defects of declaration of intent do not apply to statements of will expressed in administrative decisions, as indicated in the NSA judgment of 3 December 1990, case II SA 740/90: 'The term 'free decision-making' in Art. 82 of the Civil Code refers solely to the formation of intent by the party in a civil-law relationship and does not pertain to the issuance of decisions as individual administrative acts'. In the court's view, it is permissible to declare a part of the decision invalid under Art. 156 Sec. 1 point 2 of the Code of Administrative Procedure due to gross violation of the law.

69 On the distinction between acts of will and acts of knowledge, see NSA judgment of 24 May 2022, case III OSK 949/21, in which the NSA stated, 'In administrative law and administration theory, actions of administration are divided into acts of will and acts of knowledge. Acts of knowledge do not contain normative statements but merely information subject to logical verification (i.e. determining whether it is false or true). In contrast, acts of will include various legal forms of public administration actions that set behaviour norms for specific entities. Acts of will contain normative statements that cannot be logically verified. Their legality can only be assessed as either legal or illegal. This means that the law specifies (more or less precisely) the types of permissible acts of will and the situations, conditions, and criteria for their selection by the authority'.

70 On the external nature of decisions, see: Dawidowicz, 1984, p. 6; Borkowski, 1998, p. 24.

71 Borkowski, 1972, pp. 46–49, noting that the essence of administrative authority emerges from: a) the sequence of two acts of will: the party's act of will requesting initiation of proceedings or a declaration of intent regarding the desired content of the act, and the body's act of will on content that decisively expresses its position; b) the presumption of validity, i.e. legality of administrative decisions; c) the potential use of administrative coercion to enforce the body's act of will. See also: Longchamps, 1964, passim; Ziemski, 2005, p. 516.

72 Zimmermann, 2018, pp. 382–384.

73 Zimmermann, 2018, p. 393, based on Maurer's classification proposal, 2006, pp. 217–218.

the proceedings 'by some other means' (Art. 104(2) of the Code of Administrative Procedure), such as by discontinuing the proceedings. Thus, in the light of the Code of Administrative Procedure, an administrative decision may not always be an act of applying substantive law; it may produce legal effects solely on a procedural level, acting only to end the administrative proceeding in a given instance.[74] Notably, in both doctrinal views and judicial-administrative jurisprudence, these 'other means' of concluding proceedings are understood for example as discontinuance.[75]

Therefore, in general proceedings regulated by the Code of Administrative Procedure, a decision settles a case on its merits, in whole or in part, or otherwise concludes the case in a given instance. The Code links the essence of a decision in a procedural sense to the administrative case and its substantive resolution. The interaction between the procedural dimension, related to the discontinuance of proceedings in a given instance, and the material dimension, related to the substantive resolution of the case and the application of a substantive legal norm, encapsulates the essence of an administrative decision under the Code.[76]

In consular proceedings, the legislator has introduced a slightly different legal approach, defining an administrative decision exclusively as an act of dealing with administrative matters on their merits, that is, an act that settles the case substantively (Art. 51 of the Consular Law). Furthermore, the consul is required to use the form of the decision even to resolve a case 'by other means,' not on its merits (Art. 86(3) of the Consular Law). Consequently, a decision issued by the consul constitutes an administrative act that settles an administrative case substantively, either in whole or in part.

The distinction in Art. 51 of the Consular Law (between dealing with a case by performing an action or issuing a decision) can be analysed through the lens of the legal forms of administrative action, as outlined above, or by adopting the criterion of the legal effects produced. The application of administrative law that results in the issuance of a decision (i.e. the application of law *sensu stricto*) creates a new norm within the legal order – an individual and concrete norm that establishes an administrative relationship. Conversely, settling a case 'by performing an action' (such as issuing a passport) also involves the concretisation of a substantive legal norm, though of a different nature. Here, the statutory norm is concretised by issuing an act or performing an action that establishes an administrative-legal situation.

74 Woś, 2017, p. 373.

75 NSA judgment of 16 February 2009, case II OSK 178/08; in the judgment of 11 January 1994, case SAB/Wr 31/93, ONSA 1995, No. 1, item 29, the NSA noted, 'The initiated administrative proceeding must be concluded by resolving the case. The administrative body resolves the case by issuing a decision unless the procedural regulations specify otherwise (Art. 104 Sec. 1 of the Code of Administrative Procedure). Even if the proceeding has become irrelevant for any reason, the public administration authority cannot abstain from resolving the case. In such a case, it issues a decision to discontinue the proceeding (Art. 105 Sec. 1 of the Code of Administrative Procedure)'.

76 Cf. Zimmermann, pp. 385–386.

This approach can be considered as the application of administrative law in the broader sense (*sensu largo*).

Determining the essence of administrative law application in the strict sense is thus achievable through the theoretical-legal construction of the administrative relationship.[77] Conversely, understanding the essence of administrative law application in the broad sense is possible through the auxiliary construct of the so-called administrative-legal situation. In the doctrine, Franciszek Longchamps understands this concept as the totality of meanings provided by the law for a given subject, with legal obligation and legal possibility as fundamental elements.[78] According to Jan Boć, a legal situation is any social situation of a particular subject, whose components have been shaped by law, either directly or indirectly, due to a specific factual event. The legal relationship serves to outline the relational arrangements of behaviour between two subjects, whereas the construct of a legal situation illustrates the state of rights and obligations of a single subject.[79] Both auxiliary constructs are thus essential for distinguishing between the two types of administrative law application.

In administrative court proceedings, the procedural counterparts to acts or actions are those of public administration that, unlike decisions or rulings, concern powers or duties under the law as specified in Art. 3 Sec. 2(4) of the Law on Proceedings Before Administrative Courts. The criteria contained therein, in spite of encompassing a range of administrative actions that is difficult to precisely characterise, define acts or activities as having the following features:

a) they are sovereign in nature, but they are not decisions or rulings (which are appealable under Art. 3 Sec. 2 points 1–3 of the Law on Proceedings Before Administrative Courts);
b) they occur in individual cases;
c) they are of a public-law nature, as only such administrative actions are subject to review by administrative courts;
d) they relate to powers or obligations established by legal provisions. This requires a close and direct connection between the administrative body's action (or inaction) and the potential for an external entity to exercise a right (or fulfil an obligation) stemming from a legal provision, without an organisational link to the issuing body.[80]

77 I refrain from discussing the extensive scholarly contributions on the essence of both auxiliary constructions, limiting the discussion to views I share and consider suitable research tools for addressing the discussed problem.

78 Longchamp, 1964, pp. 45–47.

79 Boć, 2001, pp. 359–360.

80 See the resolutions of the seven-judge panel of the Supreme Administrative Court: 4 February 2008, case I OPS 3/07, ONSAiWSA 2008, No. 2, item 21; 3 September 2013, case I OPS 2/13, ONSAiWSA 2014, No. 1, item 2; 16 December 2013, case II GPS 2/13, ONSAiWSA 2014, No. 6, item 88. See also Starościak, 1978, pp. 109–110.

It should be noted that acts are more formalised and serve to establish the individual legal effects of a specific substantive law norm. Like decisions, if deemed unlawful, they are subject to revocation. They typically appear as documents such as letters, lists, certificates, registry extracts, fee assessments, customs and tax inspection results, or medical commission rulings. From the perspective of the theory of legal forms of action, they constitute material-technical actions. In contrast, the so-called 'actions' involve ordinary factual activities, such as removing data from a register, issuing documents (e.g. passports or construction logs), processing payments, registering residence, issuing vehicle license plates, or returning a driver's license. Actions are removed from the legal system by declaring them legally ineffective (Art. 146 Sec. 1 of the Law on Proceedings Before Administrative Courts).

In the doctrine concerning the acts and actions referenced in Art. 3 Sec. 2(4) of the Law on Proceedings Before Administrative Courts, it is noted that these terms do not represent two distinct forms of administrative action. Janusz Borkowski, commenting on previous legislation (Art. 16(1)(4) of the now-defunct Act of 11 May 1995 on the Supreme Administrative Court),[81] observed that 'the two terms must refer to individual material-technical actions that produce legal effects through facts'. According to him, these terms cannot refer to civil acts or actions, a view that holds under Art. 3 Sec. 2(4) of the Law on Proceedings Before Administrative Courts, as it pertains solely to acts or actions of public administration. They cannot concern actions of a general nature, nor, as is evident from a linguistic interpretation of this provision, can they apply to administrative actions in the form of administrative decisions or rulings.[82] Attempts to expand this category beyond the provisions listed in Art. 3 Sec. 2 points 2–3 of the Law on Proceedings Before Administrative Courts have been criticised in legal scholarship[83] and were subsequently excluded through an amendment in the form of Art. 3 Sec. 2 point 4 of this Law. Ultimately, this category includes factual actions that produce indirect legal effects (material-technical actions), although of a relatively diverse nature.

Another form of a consul's action that resolves a case is the issuance of a ruling. According to Art. 86 of the Consular Law, the consul may issue rulings in the following situations:

1) on procedural matters arising during proceedings that do not determine the merits of the case;
2) by refusing to perform a requested action;
3) by discontinuing proceedings when they become unnecessary or upon a party's request.

Issuing a consular ruling on procedural issues during the proceedings aligns with the general administrative procedure. However, issuing a ruling to refuse

81 Journal of Laws, 1995, No. 74, item 368, as amended.
82 Borkowski, 1997, p. 7.
83 Bogusz, 2000, p. 59; Łaszczyca, Martysz and Matan, 2005, pp. 366–367.

an action is especially interesting – not so much procedurally, but in terms of the grounds justifying the refusal, as outlined in Art. 35 of the Consular Law (see previous discussion).

Previous considerations established that this may involve actions such as the consul's preparation of a notarial deed. However, it is not permissible for a consul to refuse actions aimed at adjudication, such as issuing administrative decisions.

4.7. Elements of an Administrative Decision

As an act of substantive law application, an administrative decision must meet strict formal requirements regarding its content elements. From the procedural standpoint of consular law, an administrative decision must include: the name of the consul, the date of issuance, the name of the party, citation of the legal basis, the ruling, its legal and factual justification, information about the possibility and procedure for filing an appeal, and the consular officer's signature, along with their name and position (Art. 81(1) of the Consular Law). A specific provision may require additional components to be included in the decision (Art. 81(2) of the Consular Law).

In doctrine and jurisprudence based on the provisions of the Code of Administrative Procedure (specifically Art. 107), which align with the requirements outlined in Art. 81 of the Consular Law regarding the necessary elements of a decision, it is established that the minimum formal requirements for a decision include: the designation of the issuing authority, identification of the addressee, resolution of the case, and the signature of the representative acting on behalf of the body. Letters containing rulings on matters settled by decision are still considered decisions, even if they lack the complete form specified in Art. 107(1) of the Code of Administrative Procedure, provided they include the essential elements needed to qualify as a decision.[84]

A decision that concludes a case has a complex linguistic and substantive structure, comprising four elements: the ruling, its justification, the advisory note, and the signature of the person issuing the decision on behalf of the body. These elements do not form a single sentence in the logical sense. The ruling itself, along with the name of the consul, the issuance date, the name of the party, and the citation of the legal basis, collectively form an individual-concrete norm of behaviour that specifies the content of the administrative-legal relationship, its parties, the date on which it arose, and its legal basis within generally applicable law. All elements of the operative part of the ruling constitute a unified linguistic whole that expresses this norm of behaviour. The operative statement containing the ruling is not an affirmative sentence in the logical sense but rather a binding norm of behaviour. This norm derives its binding force from the universally binding legal norm, although this

84 Supreme Administrative Court (NSA) judgment of 20 July 1981, case SA 1163/81, with commentary by Borkowski, 1982, Nos. 9–10, item 169.

power is limited in scope – applying only to the specific situation regulated by the adjudication – and in its subject matter, affecting solely the party to whom the final decision is directed.

Another essential element of the decision is its legal and factual justification. According to Art. 81(3) of the Consular Law, the factual justification includes, in particular, an indication of the facts the consul deemed proven, the evidence upon which he or she relied, and the reasons for discounting the credibility or evidentiary value of other evidence. The legal justification consists of an explanation of the legal basis, accompanied by references to the specific provisions of law.

From a linguistic perspective, the justification is a structured set of sentences and norms, forming a cohesive whole that establishes the basis for issuing the ruling. It thus presents a 'descriptive-postulatory' argument,[85] intertwining issues from two distinct realms: legal existence and legal obligation, along with elements of extra-legal considerations (such as equity and justice) and aspects of praxeology and the politics of law application.

Under the Consular Law, there are instances where providing a justification may be waived. According to Art. 82(1) and (2), the consul may omit the justification of a decision, either wholly or in part, if a specific provision allows or if required for the defence or security of the Republic of Poland or for the protection of public security and order. Additionally, a decision granting a party's request in full does not require a justification.

Advisory notes take the form of affirmative statements informing the party of legal remedies related to challenging the decision, the option to waive the appeal and the effects of such a waiver, as well as the possibility of applying for cost exemption or legal assistance.

The signing of the decision is a formal expression of the will of the body. It is not a logical sentence, nor does it represent a legal norm. The act of signing marks the symbolic moment of issuance, indicating that the decision has assumed its final formal shape and content. Until the decision is signed, the body is still drafting it and may revisit previous stages or take any action necessary. Legally, signing signifies the body's unilateral statement of intent and the establishment of a new administrative-legal relationship. However, the body is not bound by the decision until it is served or announced to the party (Art. 83(1) of the Consular Law), allowing the decision to be removed from legal circulation if a significant procedural error affecting its content is discovered.

4.8. Ordinary Means of Reviewing the Consul's Administrative Decision

Under the Consular Law, the ordinary means of reviewing a consul's administrative decision include: (a) an appeal against the decision, (b) if a special provision

85 This term was used by Wróblewski, 1988, p. 294.

so provides, a request for reconsideration of a case concluded by the decision, and (c) a complaint against the decision.

According to Art. 88(1) of the Consular Law, a party may appeal the consul's decision to a higher authority, typically the minister in charge of foreign affairs, unless a special provision indicates otherwise (para. 2). The appeal must be filed within fourteen days of serving the decision on the party, via the consul who issued it. The consul then forwards the appeal and case file to the relevant higher authority in Poland, with confirmation of receipt, through diplomatic post or other available communication methods within consular offices or diplomatic missions of the Republic of Poland (Art. 89(2) of the Consular Law). If the consul concludes that the appeal is justified in its entirety, he may issue a new decision revoking or amending the appealed decision, in which case the provision of Art. 89(2) does not apply.

Thus, an appeal under consular law is, as in general administrative proceedings, a relatively devolutive remedy.[86] Competence for considering the appeal is transferred to a higher authority, provided that the consul does not uphold the appeal in its entirety through self-review.

Prior to the expiration of the deadline for appeal, the consul's decision is not enforceable unless a special provision provides otherwise (Art. 90 of the Consular Law). This provision establishes the principle of non-enforceability of a decision before the appeal period expires. However, consular law lacks an explicit provision specifying that an appeal against a consul's decision is suspensive, meaning that filing an appeal would suspend the decision's execution until the appeal is resolved. In contrast, the Code of Administrative Procedure (Art. 130 Sec. 2) explicitly provides such a regulation. Nonetheless, a suspensive effect may be inferred by reasoning *a fortiori*, specifically through *argumentum a minori ad maius*,[87] as this reasoning applies to prohibitory provisions. The prohibition on enforcing a non-final decision implies that, if it is prohibited to execute a decision before the appeal period expires, it is even more prohibited after an appeal has been filed.[88]

It should be stressed again that, as a rule, an appeal is reviewed by the minister responsible for foreign affairs, and its review (including the types of decisions issued in the second instance) follows the general procedural regulations outlined in the Code of Administrative Procedure.

An appeal is the basic remedy, while a request for reconsideration by the consul constitutes a special remedy, which requires a specific legal basis. According to Art. 94(1) of the Consular Law, this remedy is available to a party only in cases described by special provisions, and it is therefore a non-devolutive remedy. This request must be submitted in writing within fourteen days from the date of serving the decision on the party. The consul's decision following a request for reconsideration is final.

86 Kamiński, 2017, pp. 463–464.

87 Cf. Morawski, 2014, p. 250.

88 Cf. resolution of the Supreme Administrative Court of 16 October 2006, I FPS 2/06, ONSAiWSA 2007, No. 1 item 3.

In cases not regulated by special provisions, the provisions of Part III of the Consular Law apply to proceedings initiated by a request for reconsideration by the consul. Consequently, this constitutes a suspensive remedy.

In cases involving the consul's refusal to issue a national or Schengen visa (Art. 76(1) of the Act on Foreigners of 12 December 2013),[89] revocation or cancellation of a national or Schengen visa (Art. 93(1) of the Law on Foreigners), or denial or revocation of a local border traffic permit, an appeal has been replaced by a request for reconsideration by the consul.[90]

A form of contestation of the consul's decision is a complaint. The key difference between a remedy and a complaint lies in the absence of the suspensive effect with respect to decisions subject to a contestation.[91] According to Art. 92(1) of the Consular Law, the consul's decision is subject to a complaint. Thus, in consular law, a complaint may be filed against any decision – a legal approach that differs from general administrative proceedings, where a complaint is permitted only if provided for in the Code of Administrative Procedure. The rationale behind this distinctiveness is difficult to discern.

However, other consular law regulations in this area align with general legal solutions. As in the Code of Administrative Procedure, a complaint must be filed within seven days of serving the decision on the party, and filing a complaint does not suspend the decision's execution. However, the consul who issued the decision may suspend its execution if deemed justified (Art. 92(2) and (3) of the Consular Law). In matters not subject to complaints, the provisions on appeals apply accordingly (Art. 93 of the Consular Law).

The Consular Law does not provide any means of appeal against the consul's actions taken while dealing with a case, such as the issuance of a certificate.[92] An action may be refused under circumstances specified in Art. 35 of the Consular Law, which occurs through a decision (Art. 86(2) of the Consular Law), subject to a complaint. The consul may carry out an action differently than the party expects, and in such cases, the party has no legal remedy. This legal approach in consular law appears appropriate, given the specific nature of consular activities and the limited resources available to meet the expectations of parties abroad. Notably, these are typically minor matters that do not significantly impact the personal rights of Polish citizens abroad and do not prevent their return to the Republic of Poland.

4.9. Extraordinary Means of Reviewing the Consul's Administrative Decisions

The legal solutions regarding extraordinary remedies for verifying consul's decisions appear distinct from those in general administrative proceedings only on the

89 Journal of Laws 2024, 769.
90 More on the nuances of visa appeals cases, see: Dąbrowski, 2015, pp. 46–49.
91 Kamiński, 2017, p. 462.
92 Bogusz, 2021, p. 155.

surface. The Consular Law provides for only one extraordinary means for such verification: the recommencement of proceedings concluded by a final decision. However, it does not include separate proceedings for invalidating a consul's decision. This absence does not preclude the possibility of invalidation. According to the Code of Administrative Procedure, the competent authority to invalidate a decision is a higher-level authority (Art. 157 Sec. 1 of the Code of Administrative Procedure). For consular decisions, this authority is, by default, the minister responsible for foreign affairs. Consequently, any invalidation proceedings for consul's decisions are conducted under the provisions of the Code of Administrative Procedure.[93]

However, the Consular Law regulations on the recommencement of proceedings are not merely a replication of the solutions adopted in general administrative proceedings. Under the Code of Administrative Procedure, recommencement is permitted only in cases concluded by a final decision (Art. 145 Sec. 1 of the Code of Administrative Procedure). In contrast, Art. 95 of the Consular Law allows for recommencement in cases concluded either by a final decision or by the execution of an action. This notably broadens the material scope of recommencement proceedings to include cases ending with a material and technical action. The provision does not specify the issuing authority for the final decision, but it is generally assumed that the consul is to issue it. In instances where a final decision is issued in the second instance by a minister, the legal basis for jurisdiction in the recommencement proceedings will rely on Art. 150 Sec. 3 of the Code of Administrative Procedure.

According to Art. 95 of the Consular Law the proceedings shall be recommenced if:

1. evidence by which the essential factual circumstances of the case were established is discovered to be false;
2. the issuance of a decision or the performance of an action was the result of a criminal act;
3. a party did not participate in proceedings through no fault of its own;
4. evidence or new factual circumstances is discovered that was in existence on the date the decision was issued and that was unknown to the consul;
5. the decision was issued before another body had adopted the position it was required to take by law;
6. the decision was issued on the basis of another decision or court judgment that has since been revoked or amended;
7. the Constitutional Tribunal has ruled that a normative act, on the basis of which a decision was issued or an action was performed, is incompatible with the Constitution, an international agreement, or a law;
8. a court ruling has been issued confirming a violation of the principle of equal treatment, as outlined in the Act of 3 December 2010, on the implementation of certain European Union provisions on equal treatment (Journal of Laws of

93 This view is shared by Bogusz, 2021, p. 155.

2023, item 970), where such a violation influenced the resolution of a case concluded by a final decision or the performance of an action;
9. a decision by the Court of Justice of the European Union has been issued that affects the content of the issued decision.

The adopted legal solution aligns with the provisions of the Code of Administrative Procedure, though the prerequisites for recommencement differ slightly, reflecting the unique nature of consular proceedings. However, the time limits for initiating recommencement proceedings are shorter. A consul's decision or action cannot be rescinded based on the grounds specified in Art. 95(1) and (2) of the Consular Law if five years have passed since the action was performed or the decision was served. For grounds specified in Art. 95(3–9), the limit is three years from the date of execution of the action or serving of the decision (Art. 96 of the Consular Law). By contrast, in the Code of Administrative Procedure, these deadlines are ten and five years, respectively.

The course of recommencement proceedings before the consul closely follows the general principles of jurisdictional proceedings. Recommencement can occur *ex officio* or at the request of a party, but for grounds specified in Art. 95(3) and (7–9), it is initiated only at the party's request. The application for recommencement must be filed with the consul who issued the final decision or performed the action, within thirty days from the date the party became aware of the circumstance justifying recommencement, or in the case of Art. 95 item 3 – from the date the party became aware of the decision or action.

For Art. 95(7), the application must be submitted within one month of the Constitutional Court's decision becoming effective. For Art. 95(9), it must be filed within one month of the publication of the Court of Justice of the European Union's decision in the Official Journal of the European Union. The consul issues a decision either to recommence or refuse to recommence proceedings, against which there is no right of appeal. Additionally, the consul undertakes proceedings to assess the grounds for recommencement and to resolve the case on its merits (Art. 100 of the Consular Law).

These legal provisions differ from those in the Code of Administrative Procedure, where Art. 150 assigns the higher-level authority the power to recommence if the first-instance body's activity is the reason for it. This authority also designates another body to conduct the proceedings.

According to Art. 101 of the Consular Law, after conducting the procedure outlined in Art. 100, the consul shall issue a decision to:
1. refuse to revoke an existing decision or action if no grounds for such revocation are found under Art. 95;
2. revoke the existing decision if grounds for revocation are found, and simultaneously decide on the merits of the case;
3. revoke the action if grounds for such rescission are found.

In the first two cases, it is assumed that an administrative decision is issued, yet questions arise regarding how to conclude proceedings initiated for the execution of an action if the authority finds no grounds for revocation. Generally, an action performed by the consul results in the acquisition of a certain right by an individual. Therefore, revocation of such an action should be formalised by decision, as this ensures the protection of the party's substantive and procedural rights within the recommencement proceedings.

A more complex issue arises when, during recommencement proceedings, the consul finds no grounds to revoke the action. In this case, the formal method of concluding the recommencement proceedings remains unresolved. It should be noted that recommencement proceedings for the execution of an action are initiated by decision. Given Art. 51 of the Consular Law (which reserves the use of decisions for substantive case settlements), it is appropriate that when the body finds no grounds to revoke the action, the proceedings should be concluded with a decision affirming the lack of grounds for revocation. This approach formally terminates the proceedings and establishes the basis for possible review by a higher authority.

There is no legal basis to invalidate an action by reasoning *per analogiam legis* from provisions on the invalidation of administrative decisions under the Code of Administrative Procedure. However, specific provisions contain autonomous regulations for invalidating certain actions, such as the cancellation of visas, passports, and temporary passports.

4.10. Judicial Review of Decisions, Actions and Conduct of Consular Proceedings

Subjecting the consul's activities to administrative court review is a complex and multifaceted matter. Four distinct problem areas emerge: first, the review of consul's formal settlings (i.e. decisions and rulings); second, cases involving the consul's execution of material and technical actions; third, cases related to visas and permits for crossing borders under local border traffic; and fourth, complaints regarding the consul's inaction and delays.

Turning to the first issue, in accordance with Art. 52(1) of the Law on Proceedings Before Administrative Courts, a complaint may be filed with the administrative court only after exhausting all available remedies provided to the complainant by the competent authority. This implies that filing a complaint against a consul's decision is not permissible when an administrative appeal can be filed with the minister responsible for foreign affairs. Where a special provision allows for an application for reconsideration of the case, Art. 52(3) sentence 2 of the Law on Proceedings Before Administrative Courts applies, which prohibits filing a complaint with an administrative court before submitting an application for reconsideration of the consul's decision. These rules apply *mutatis mutandis* to rulings as well. In conclusion, the only way to seek administrative court review of a consul's decision is by challenging

the second-instance authority's decision. This represents a strict application of substantive law, within which an administrative decision was initially issued.

The second group of cases subject to administrative court review involves complaints against acts or actions of public administration that are not administrative acts applying the law but instead relate to powers and duties established by law, as outlined in Art. 3(2)(4) of the Law on Proceedings Before Administrative Courts. These involve applications of substantive law *sensu largo* that result in an act or action directed at a specific person with content derived directly from legal provisions. In such instances, if no specific provision offers legal remedies against the consul's act or action, a complaint may be filed with an administrative court within the timeframe specified in Art. 53(2) of the Law on Proceedings Before Administrative Courts.

Third, under Art. 5(4) and (5) of the Law on Proceedings Before Administrative Courts, administrative courts lack jurisdiction over cases involving:

> visas issued by the minister responsible for foreign affairs or consuls, except for:
> (a) visas specified in Art. 2 points 2–5 of Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009, establishing a Community Code on Visas (Visa Code) (OJ L 243, 15.09.2009, p. 1, as amended),
> (b) visas issued to a foreigner who is a family member of a citizen of a European Union member state, a member state of the European Free Trade Association (EFTA) party to the European Economic Area Agreement, or the Swiss Confederation, as defined in Art. 2(4) of the Act of 14 July 2006 on the entry, residence, and exit of EU nationals and their family members in the Republic of Poland (Journal of Laws of 2024, item 633);
> local border traffic permits issued by consuls.

It should be noted that in these cases, a party may request reconsideration by the consul, which means such a case will never proceed administratively to a second-instance body and therefore will not be subject to judicial-administrative review.

Fourth, a complaint may be lodged with an administrative court against the consul's inaction or delay in a case concluding with a decision or a substantive-technical action (Art. 3(2) points 8 and 9 of the Law on Proceedings Before Administrative Courts). Additionally, it is possible to file a complaint concerning the consul's inaction or delay outside the processes of applying the law in both the narrow and broad senses, as long as specific provisions allow for complaints about such unlawful behaviour. For instance, the consul, as an administrative body, is obligated to provide public information under the Act of 6 September 2001 on Access to Public Information, and the consul's inaction in this matter may be appealed to the administrative court. Cases of this nature can indeed be found in administrative court jurisprudence

5. Summary

The current Consular Law, along with its regulations on administrative proceedings before the consul, represents a significant milestone for the Polish State, marking the first time a procedure has been established that fully embodies the principles of the rule of law and ensures the protection of individual constitutional rights and freedoms. Despite certain imperfections and regulatory gaps in various areas, these legal solutions form a carefully constructed framework that considers the legal and practical aspects of consuls' work abroad. The legislator has also accounted for the actual capabilities of consuls to perform public duties effectively. This compromise reflects three foundational legal principles. First, the entire administrative procedure adheres to the principle of legalism. Second, it incorporates the principle of flexibility in the consul's actions. Third, it mandates that the consul's actions be grounded in established material truth. Together, these competence guidelines enable the consul to uphold the legality of actions and address matters in accordance with material truth.

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