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THE POLISH PRACTICE REGARDING THE PROMULGATION OF INTERNATIONAL AGREEMENTS BETWEEN 1945 AND 2017

Abstract:

This article presents the Polish practice of promulgation of international agreements since the end of World War II. It shows that the practice is at variance with the law and makes it difficult to determine the current legal situation vis-à-vis international agreements in Poland. In the conclusions the author puts forward de lege ferenda proposals which could improve the Polish promulgation practice.

Keywords: promulgation, international agreement, Polish practice, international law

INTRODUCTION

In Poland, promulgation is a prerequisite for a normative act to enter into force, a principle introduced in Poland over 500 years ago.¹ For more than 200 years now, promulgation has been done by means of publication in official journals.

As regards international agreements, two spheres must be distinguished. In terms of international law, the promulgation of an international agreement by the contracting parties is of secondary importance. Under Article 24 of the Vienna Convention on the Law of Treaties of 1969,² “[a] treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.” In the Polish legal system, however, in order to become directly effective, in other words to have the capacity to confer rights and obligations derived from it on individuals, an international agreement must be officially promulgated.³ Therefore, while promulgation of an international

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¹ See the constitution *De constitutionibus novis per proclamationem publicandis*, passed by the Sejm of the Kingdom of Poland on 3 May 1505.

² Journal of Laws (Dz. U.) of 1990, No. 74, Item 439.

³ See e.g. A. Wyrzumska, *Umowy międzynarodowe. Teoria i praktyka* [International agreements. Theory and practice], Wydawnictwo Prawo i Praktyka Gospodarcza, Warszawa: 2006, pp. 563–566 and K. Działocha in: L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of Poland.

agreement in Poland is not required to make it binding on the State, it does determine its effectiveness within the Polish legal system.

The authors of the currently applicable Polish Constitution of 2 April 1997⁴ took this distinction into account. Under the Constitution, proper promulgation is a prerequisite for the entry into force of acts of domestic law (statutes, regulations and enactments of local law). As regards international agreements, the Constitution only stipulates that “international agreements ratified with prior consent granted by statute shall be promulgated in accordance with the procedures required for statutes” and that “the principles of promulgation of other international agreements shall be specified by statute.” At the level of statutory law, in turn, the rules of promulgation of international agreements are not covered by the Act of 20 July 2000 on Promulgation of Normative Acts and Some Other Legal Acts⁵ and instead are regulated in the Act of 14 April 2000 on International Agreements⁶ and in the Regulation of the Council of Ministers of 28 August 2000 on the Implementation of Some Provisions of the Act on International Agreements.⁷ Pursuant to these laws, ratified international agreements, as well as related executive and amending agreements, are promulgated in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw Rzeczypospolitej Polskiej*). Other agreements are promulgated in the Official Gazette of the Republic of Poland (*Dziennik Urzędowy Rzeczypospolitej Polskiej Monitor Polski*).

Apart from these two official journals, information on the international agreements concluded by Poland can be found in the online database of treaties maintained by the Polish Ministry of Foreign Affairs: the Internet Treaty Base (*Internetowa Baza Traktatowa*). While the database is incomplete, it nonetheless includes many more international agreements than those promulgated in the official journals.

1. PROMULGATION OF INTERNATIONAL AGREEMENTS IN POLAND BETWEEN 1945 AND 1989

During the communist period (1945–1989), international agreements were not considered legitimate sources of law, and the practice of publishing them in official journals illustrates this very well. The Internet Treaty Base contains 2561 international agreements concluded between 1945 and 1989,⁸ and only 862 of them were published in the Journal of Laws or in the Official Gazette. This means that only 33 per cent of the international agreements concluded by the Polish People’s Republic were announced in the relevant official journals.

Commentary], vol. I, Wydawnictwo Sejmowe, Warszawa: 1999, commentary to Article 88 (p. 10) and to Article 91 (pp. 2-3).

⁴ Journal of Laws (Dz. U.) of 1997, No. 78, Item 483, as amended.

⁵ Journal of Laws (Dz. U.) of 2016, Item 296, as amended.

⁶ Journal of Laws (Dz. U.) of 2000, No. 39, Item 443, as amended.

⁷ Journal of Laws (Dz. U.) of 2000, No. 79, Item 891.

⁸ Accessed 30 May 2017.

The Articles of Agreement of the International Bank for Reconstruction and Development concluded in Bretton Woods on 22 July 1944 are a good example of the problems that result from this practice of promulgating only a few selected international agreements. The Polish authorities ratified the Articles of Agreement on 24 February 1946. The act of ratification and the text of the agreement were published in the Journal of Laws,⁹ alongside a relevant government statement.¹⁰ In 1950, Poland withdrew from the International Bank for Reconstruction and Development, and again a relevant government statement was published in the Journal of Laws.¹¹ In 1986, Poland once again became party to the Articles of Agreement of the International Bank for Reconstruction and Development, but no information of this fact was published in any of the Polish official journals. Furthermore, no amendments to the said agreement were ever promulgated. Official information would therefore suggest that Poland is not party to the agreement in question. And even if one was to learn from some other sources that Poland has in fact rejoined it, the Polish official journals do not contain the current version of the provisions in force; therefore, one can only access the original, outdated version.

2. PROMULGATION OF INTERNATIONAL AGREEMENTS IN POLAND AFTER 1989

After 1989, there was generally some improvement in the Polish practice of promulgating international agreements. There were even attempts to make up for some of the neglect in the previous period. For example, the agreement between the governments of the Polish People's Republic and the Hungarian People's Republic on international road transport, concluded in Budapest on 18 July 1965, was promulgated in the Official Gazette in 2003.¹²

The Internet Treaty Base contains 2262 international agreements concluded after 1 January 1990, but only 1448 of them (64%) were published in the Journal of Laws or in the Official Gazette.¹³ While this constitutes a substantial improvement compared to the previous period, in terms of what is actually required by the applicable law this practice should be subjected to criticism.

Among the agreements that have never been promulgated, there is a significant group of agreements concerning the binding force of the existing international agreements. Generally speaking, the majority of these agreements were concluded in the 1990s, but only a very small number of them were properly promulgated. A major example of such non-promulgated agreements would be the one concluded by the governments

⁹ Journal of Laws (Dz. U.) of 1948, No. 40, Item 292.

¹⁰ Journal of Laws (Dz. U.) of 1948, No. 40, Item 293.

¹¹ Journal of Laws (Dz. U.) of 1950, No. 23, Item 207.

¹² Official Gazette of 2003, No. 4, Item 36.

¹³ Accessed 30 May 2017.

of Poland and Germany on the expiry of the international agreements between Poland and the German Democratic Republic. This agreement was signed in connection with Article 12 of the Treaty on the Final Settlement with Respect to Germany (between the Federal Republic of Germany and the German Democratic Republic, France, the Soviet Union, the United Kingdom and the United States; so called the Two Plus Four Agreement). In the former agreement, the two parties declared that 114 agreements between Poland and the German Democratic Republic expired, and subsequent agreements added another 10 prior agreements to that number. A dozen or so of these rescinded agreements had been promulgated in the Journal of Laws,¹⁴ but the relevant rescinding agreements were not promulgated in any official journal in Poland. For some unknown reason they are not even available in the Polish Internet Treaty Base, while Germany, in turn, has published these agreements in the relevant edition of its own official journal – the *Bundesgesetzblatt*.¹⁵

Shortly after the unification of Germany, another of Poland's neighbours, namely Czechoslovakia, split into two independent countries. This development was naturally accompanied by negotiations concerning the validity of existing international agreements signed by Czechoslovakia. The protocol of 29 March 1996 on the succession of bilateral agreements and the revision of the system of treaties between Poland and the Czech Republic, concluded by the governments of Poland and the Czech Republic, rescinded 11 agreements. This protocol however was not promulgated in any Polish official journal.¹⁶ The same is true of the protocol of 8 July 1993 concluded by the governments of Poland and Slovakia on the validity of bilateral international agreements between Poland (Republic of Poland, Polish People's Republic) and Czechoslovakia (Czechoslovak Republic, Czechoslovak Socialist Republic, Czech and Slovak Federal Republic) between 1918 and 1992 in the relations between the two countries,¹⁷ under which 15 agreements concluded by Poland and Czechoslovakia were dissolved with respect to relations between Poland and Slovakia.

¹⁴ Including, for example, the Agreement between the Polish People's Republic and the German Democratic Republic on legal proceedings in civil, family and criminal matters, signed in Warsaw on 1 February 1957, Journal of Laws (Dz.U.) of 1958, No. 27, Item 114.

¹⁵ See *Bekanntmachung über das Erlöschen völkerrechtlicher Übereinkünfte der Deutschen Demokratischen Republik mit Polen vom: 21. Juni 1993*, Bundesgesetzblatt Teil II of 1993, p. 1180; *Bekanntmachung über das Erlöschen völkerrechtlicher Übereinkünfte der Deutschen Demokratischen Republik mit Polen vom: 16. Dezember 1993*, Bundesgesetzblatt Teil II of 1994, pp. 249, 320; *15. April 1994*, Bundesgesetzblatt Teil II of 1994, p. 725; *16. Februar 1995*, Bundesgesetzblatt Teil II of 1995, p. 322; *Bekanntmachung der deutsch-polnischen Vereinbarung über das Außerkrafttreten der Vereinbarung mit der Deutschen Demokratischen Republik über die gegenseitige Verleihung von Nutzungsrechten an Grundstücken zum Zwecke der Errichtung von Gebäuden für Generalkonsulate beider Staaten vom 6. Januar 1998*, Bundesgesetzblatt Teil II of 1998, p. 101; and *Bekanntmachung über das Außerkrafttreten völkerrechtlicher Übereinkünfte der Deutschen Demokratischen Republik mit Polen vom 5. August 1998*, Bundesgesetzblatt Teil II of 1998, p. 2596.

¹⁶ The protocol is available in the Internet Treaty Base (<https://traktaty.ms.gov.pl/getFile.php?action=getfile;0&iddok=6859>; accessed 30 May 2017).

¹⁷ Available at: <https://traktaty.ms.gov.pl/getFile.php?action=getfile;0&iddok=7705> (accessed 30 May 2017).

In the first half of the 1990s, similar agreements were also concluded with China¹⁸ and Mongolia,¹⁹ and these were also not promulgated in any Polish official journal.

One of the few examples of the proper promulgation of such agreements is the agreement between Poland and Latvia concerning the bilateral agreements of 1922–1938, concluded in Warsaw on 10 February 1997, which was in fact promulgated in the Journal of Laws.²⁰

Another large group of agreements of this type are those concluded with the countries which emerged after the dissolution of Yugoslavia. The agreements concluded during the first period, in the 1990s, were not promulgated in any Polish official journal, and include, *inter alia*:

- Agreement of 1 March 1995 on succession in the relations between Poland and Slovenia of the bilateral agreements concluded by Yugoslavia and Poland between 1922 and 1991,²¹ which upheld 17 agreements and rescinded 7;
- Agreement of 13 April 1995 between Poland and Croatia on succession of bilateral agreements,²² which upheld 18 agreements and rescinded 4;
- Agreement of 15 November 1996 between Poland and the government of Yugoslavia (presently the Republic of Serbia) on the agreements that remain in force,²³ which upheld 23 agreements.

The agreements concluded during the next period (2006 – 2009) were promulgated and include, *inter alia*:

- Agreement between the government of Poland and the Council of Ministers of Bosnia and Herzegovina on the legal succession of Bosnia and Herzegovina with regard to the agreements concluded between Poland and the Socialist Federal Republic of Yugoslavia, signed in Sarajevo on 22 December 2006;²⁴
- Agreement between Poland and the Republic of Macedonia regulating bilateral treaty relations, signed in Warsaw on 9 May 2007;²⁵
- Agreement between Poland and Montenegro regulating bilateral treaty relations, concluded in Podgorica on 23 April 2009.²⁶

¹⁸ See the Agreement between Poland and the People's Republic of China on the revision of the bilateral agreements concluded before 31 December 1993, which rescinded 4 agreements between the two countries (available at: <https://traktaty.msz.gov.pl/getFile.php?action=getfile;0&iddok=13918>; accessed 30 May 2017).

¹⁹ See the Agreement between Poland and Mongolia on the validity of agreements concluded by Poland and Mongolia between 1954 and 1994, which rescinded 7 agreements (available at: <https://traktaty.msz.gov.pl/getFile.php?action=getfile;0&iddok=7314>, accessed 30 May 2017).

²⁰ Journal of Laws (Dz.U.) No. 127, Item 819.

²¹ Available at: <https://traktaty.msz.gov.pl/getFile.php?action=getfile;0&iddok=7796> (accessed 30 May 2017).

²² Available at: <https://traktaty.msz.gov.pl/getFile.php?action=getfile;0&iddok=17640> (accessed 30 May 2017).

²³ The agreement is available in the Internet Treaty Base, but for unknown reasons it is in the database of archival agreements (<https://traktaty.msz.gov.pl/getFile.php?action=getfile;2&iddok=7234>; accessed 30 May 2017).

²⁴ Official Gazette of 2008, No. 52, Item 462.

²⁵ Journal of Laws (Dz.U.) of 2009 No. 27, Item 163.

²⁶ Official Gazette of 2011, No. 74, Item 739.

The last large group of agreements concerning the validity of earlier agreements were those concluded as part of the process of preparation for Poland's accession to the European Union. Here we can clearly see the lack of consistency in the activity of the Polish Ministry of Foreign Affairs: the agreements between Poland and the Czech Republic²⁷ and between Poland and Lithuania²⁸ were not promulgated in any official journal in Poland, while a similar agreement between Poland and Slovakia²⁹ was promulgated.

The following case of an Armenian citizen staying in Poland in the late 1990s provides an excellent example of the problems that may arise from the lack of generally available information on the loss of binding force of an international agreement. Until the dissolution of the Soviet Union, citizens of Armenia coming to Poland did so under an agreement between the Polish People's Republic and the Soviet Union on visa-free travel for citizens of both countries, signed on 13 December 1979 in Warsaw.³⁰ In June 1997, the embassy of the Republic of Armenia in Moscow sent a note to the Polish embassy in Moscow stating that Armenia did not consider itself a successor of the former Soviet Union in international relations. In April 1999, the Polish embassy responded by acknowledging the declaration. In this way the agreement on visa-free travel was deemed to have expired in the relations between Poland and Armenia.

Based on this state of affairs, one of the voivodes issued a decision on the deportation of Ms Karina G., a citizen of the Republic of Armenia, and the decision was upheld by the Minister of Internal Affairs and Administration. However the Supreme Administrative Court of Poland revoked both decisions, arguing³¹ that

public announcement, in a manner prescribed by law, of information on the content of a government statement concerning the loss of binding force of an international agreement is the basic prerequisite of a democratic state governed by the rule of law, the condition of its applicability and the fundamental requirement for determining whether a foreign citizen legally resides in the territory of the Republic of Poland.

The Court emphasised that both at the time the contested decision was issued and at the time of the hearing, no information on the loss of binding force of the said agree-

²⁷ See the agreement in the form of diplomatic notes exchanged by the governments of Poland and the Czech Republic on the expiry of the agreements listed in the appendix to these notes, under which 6 agreements concluded by Poland and the Czech Republic and Czechoslovakia were rescinded (available at: <https://traktaty.msz.gov.pl/getFile.php?action=getfile;0&iddok=15634>; accessed 30 May 2017).

²⁸ See the agreement in the form of diplomatic notes exchanged by the governments of Poland and Lithuania on the expiry of the agreements listed in the appendix on the day of Poland and Lithuania's accession to the European Union (available at: <https://traktaty.msz.gov.pl/getFile.php?action=getfile;0&iddok=14503>; accessed 30 May 2017).

²⁹ See the agreement between Poland and Slovakia on the expiry of some agreements concluded by Poland and Slovakia, Official Gazette of 2004, No. 21, Item 370.

³⁰ Journal of Laws (Dz.U.) of 1980, No. 13, Item 41.

³¹ Judgement of the Supreme Administrative Court of Poland of 7 December 1999, V SA 726/99, Central Database of Administrative Court Rulings (available at: <http://orzeczenia.nsa.gov.pl/doc/9C76AC5ACC>; accessed 30 May 2017).

ment on visa-free travel in relations between Poland and Armenia had been published, and therefore the decisions on deportation lacked a valid legal basis. The relevant information on the rescission of the agreement was only published in the Journal of Laws as late as over a year after this judgement.³²

The above-discussed judgement thus caused the authorities to realize that it was necessary to terminate certain agreements in the relations with countries that actually were successors to the above-mentioned 1979 international agreement concluded with the Soviet Union. As a result, agreements were terminated with Azerbaijan,³³ Georgia,³⁴ Kirghizstan,³⁵ Tajikistan,³⁶ Turkmenistan³⁷ and Kazakhstan.³⁸ In the relations between Poland and the Russian Federation, the agreement was rescinded on 1 October 2003 under Article 21 Section 2 of the Agreement between Poland and Russia on the conditions of travel of Polish and Russian citizens, signed in Warsaw on 18 September 2003.³⁹ In the relations with Ukraine, the agreement was rescinded under Article 15 of the Polish–Ukrainian agreement on visa-free travel of 25 June 1996.⁴⁰ The latter was not promulgated in any Polish official journal, and there is also no information on rescission of the agreement in question in the relations with Belarus.⁴¹

Another fairly common infringement on the binding provisions concerning the promulgation of international agreements is that these agreements are often promulgated only when they have already entered into force. The promulgation of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, concluded in Brussels on 29 May 2000, and a protocol to this Convention, concluded in Luxembourg on 16 October 2001, is good example of such belated publication. The President of Poland ratified the Convention and the protocol to it on 11 June 2005, and they became binding for Poland on 26 October 2005, but

³² See the government statement of 7 February 2001, Journal of Laws (Dz. U.) of 2001, No. 15, Item 156.

³³ See the government statement of 9 October 2000, Journal of Laws (Dz. U.) of 2000, No. 87, Item 978.

³⁴ See the government statement of 9 October 2000, Journal of Laws (Dz. U.) of 2000, No. 87, Item 979.

³⁵ See the government statement of 9 October 2000, Journal of Laws (Dz. U.) of 2000, No. 87, Item 980.

³⁶ See the government statement of 9 October 2000, Journal of Laws (Dz. U.) of 2000, No. 87, Item 981.

³⁷ See the government statement of 9 October 2000, Journal of Laws (Dz. U.) of 2000, No. 87, Item 982.

³⁸ See the government statement of 7 February 2001, Journal of Laws (Dz. U.) of 2001, No. 15, Item 157.

³⁹ Official Gazette of 2003, No. 51, Item 800.

⁴⁰ Available at: <https://traktaty.ms.gov.pl/getFile.php?action=getfile;2&iddok=7981> (accessed 30 May 2017).

⁴¹ The Agreement between the Government of the Republic of Poland and the Government of the Republic of Belarus on individual traffic, signed in Minsk on 26 August 2003 (Official Gazette of 2003, No. 49, Item 754), does not affect previous agreements.

they were promulgated in the Journal of Laws only on 27 July 2007.⁴² As a result, for two years the agreement was not applied in Poland because it had not been properly promulgated. Such delays constitute violations of international commitments and thus of Article 9 of the Polish Constitution, according to which: “[t]he Republic of Poland shall respect international law binding upon it.”

Another group of irregularities in the promulgation of international agreements in Poland are the shortcomings regarding information on the scope of application of a given agreement between individual countries. For example, as regards the Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998, the only information published in Poland was that of the parties to this agreement (and the declarations made by them) as of July 2002. At that time, 76 countries participated in the agreement. Information on the accession of additional countries has not been promulgated in the Polish official journals. Failing to promulgate information on the ratification or termination of an international agreement, as well as failing to publish information on the reservations and objections submitted by each country, has led to a situation in which official journals cannot be used as a basis to correctly determine the scope of application of an international agreement.

When analysing the contemporary practice of promulgation of international agreements in Poland, yet one more technical problem needs to be highlighted. Since 1 January 2012, Polish official journals (including the Journal of Laws and the Official Gazette) are published in electronic form. The aforementioned Act of 14 April 2000 on International Agreements stipulates, however, that it is the original document in printed form that constitutes the basis for the promulgation of an international agreement, together with the relevant government statements and, if necessary, a translation into Polish. The editors of the Journal of Laws and the Official Gazette implement this provision by publishing international agreements in the form of image files instead of text files. The texts of documents published in this form cannot, however, be read automatically, which means that they are not indexed by Internet browsers and that specialised software for the blind cannot read them either. It is rather paradoxical that this is also how Poland promulgated the Convention on the Rights of Persons with Disabilities, adopted by the United Nations in New York on 13 December 2006,⁴³ which in Article 49 clearly states: “[t]he text of the present Convention shall be made available in accessible formats.”

CONCLUSIONS *DE LEGE FERENDA*

The findings presented above lead to the conclusion that the Polish practice of promulgating international agreements is in many cases at variance with the binding legal standards. The provisions concerning the promulgation of international agreements

⁴² Journal of Laws (Dz. U.) of 2007, No. 135, Item 950.

⁴³ Journal of Laws (Dz. U.) of 2012, Item 1169 (see <http://dziennikustaw.gov.pl/du/2012/1169/D2012000116901.pdf>; accessed 30 May 2017).

quoted in the introduction to this paper make it clear that the relevant bodies of government administration are required to promulgate international agreements. Promulgation of a ratified international agreement in the Journal of Laws takes place upon the order of the President, and promulgation of other agreements in the Journal of Laws is ordered by the President upon request of the Minister of Foreign Affairs. In these cases the law does not provide for any exceptions to the requirement of promulgating an international agreement. Publication of other international agreements (in the Official Gazette) is ordered by the Prime Minister upon request of the minister heading the relevant branch of government administration. In this case, the law provides for an exception: in exceptional circumstances and for reasons related to a significant state interest, especially to national defence or security of the state and its people, the Prime Minister may, upon request of the relevant minister, refrain from promulgating the agreement in question in the Official Gazette.

What follows from the cited provisions is that the original responsibility for performing the obligation of promulgating an international agreement lies with the President (for ratified international agreements) or the relevant minister (in other cases). The President executes this duty by ordering the promulgation of the given agreement in the Journal of Laws. The ministers, in turn, either send a request for promulgation to the President or Prime Minister or a request to refrain from promulgation. From this moment on, the responsibility for the promulgation rests with the President or the Prime Minister, who perform their obligation by issuing a directive ordering the promulgation of a given agreement (or a directive on refraining from promulgation). Once the directive is issued, the responsibility for the promulgation of the document rests with the government body that issues the relevant official journal (for both the Journal of Laws and the Official Gazette the Prime Minister is the relevant authority).

The available reasons for refraining from promulgation of an international agreement should be set out in more details, for example by providing reference to provisions on the protection of confidential information. Other than that the applicable laws properly define the responsibility for the promulgation of international agreements. The problem is therefore in the enforcement of these provisions. In this respect, there is a gap in Polish law. Promulgation of international agreements has been entrusted to the government administration, but the law does not provide for any procedure for filing a complaint with an administrative court concerning an administrative body's failure to act. The Supreme Administrative Court of Poland ruled on one occasion that promulgation of an international agreement belongs to the category of public administration acts and activities to which an action for failure to act applies,⁴⁴ but the dominant position is that this is not the case.⁴⁵ A *de lege ferenda* proposal should therefore be put

⁴⁴ The Judgement of the Supreme Administrative Court of Poland of 29 May 2003, II SAB 419/02 (available at: <http://orzeczenia.nsa.gov.pl/doc/5242B6E8FA>; accessed 30 May 2017).

⁴⁵ See the judgments of the Supreme Administrative Court of Poland of 16 September 2004, OSK 247/04 (<http://orzeczenia.nsa.gov.pl/doc/F0222759F3>) and OSK 250/04 (<http://orzeczenia.nsa.gov.pl/doc/5C65FECB25>; both accessed 30 May 2017).

forward to include in the applicable laws a procedure for filing complaints with the administrative court concerning a failure to act by public administration with regard to the obligation to promulgate international agreements.

A *de lege ferenda* proposal should also be put forward with regard to the technical issue described in the final part of this study. Both the provision under which only the original document in printed form is the basis for the promulgation of an international agreement as well as the promulgation practice in Poland should be changed – the Polish language versions of international agreements should be promulgated in the same format as all the other normative acts.