

**ON THE CONSISTENCY OF THE PROVISION OF  
ART. 13, SEC. 2, POINT 3 OF THE ACT OF 14.4.2000  
ON INTERNATIONAL AGREEMENTS WITH THE  
CONSTITUTION OF THE REPUBLIC OF POLAND –  
DELIBERATIONS IN LIGHT OF ARGUMENTS  
PRESENTED IN THE JUDGEMENT OF THE  
CONSTITUTIONAL TRIBUNAL IN CASE NO. K 33/12**

**Jakub Bennewicz\***

**ABSTRACT:** The paper discusses a problem of consistency of the art. 13 sec. 2 point 3 of the Polish Act of 14.4.2000 on international agreements with the Constitution of the Republic of Poland. The provision mentioned above introduces a case, in which a ratified agreement is amended by an agreement approved by the Polish Council of Ministers in so-called “simplified procedure”. That procedure means that the national process of entering into such agreement ends with giving a consent of the Government for signing it and no further steps to be bound by it need to be taken. International agreements adopted in the simplified procedure are not subject of ratification, therefore – according to the Polish constitutional system – they are considered as acts of internal law. Consequently, the application of art. 13 sec. 2 point 3 of the Act of 14.4.2000 on international agreements leads to a situation, in which – in the hierarchy of the Polish national

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\* Chief Legislative Counsel at the Government Legislative Centre in Warsaw, Department of Administrative Law and Lecturer at the Lazarski University in Warsaw.

law – an amended agreement is a source of universally binding law, but amendments made to its text are not. In this regard the relation between the amended and the amending provisions becomes unclear. Doubts concerning consistency of the discussed provision of the Act of 14.4.2000 on international agreements with the constitutional rule of indistinguishability of the rank of amended and amending acts of law and the procedure of adopting them are the main subject of deliberations in this paper.

In accordance with article 13, sec. 2, Point 3 of the Act of 14.4.2000 on international agreements<sup>1</sup> (hereinafter referred to as “IAA”) the consent of the Republic of Poland to be bound by an international agreement may be expressed by signature, an exchange of notes or in any other way prescribed by law, even if the purpose of such an agreement is to amend an already binding agreement, including an appendix thereto, and such an amendment does not fulfil the conditions arising from article 89, sec. 1<sup>2</sup> or article 90<sup>3</sup> of the Constitution of the Republic of Poland. This provision is interesting not as much due to the procedure, which is used to express the consent of the Republic of Poland to be bound by such an agreement in international relations – since this issue is rather non-controversial – as due to the national procedure and implications for the Polish legal system, arising from the choice of this “simplified procedure”. It seems that the problem of consistency of article 13, sec. 2, Point 3 IAA with the Constitution of the Republic of Poland should be analysed in two steps: firstly it is worth considering the case in which agreement accepted in the simplified procedure amends a ratified agreement. This leads to general remarks on admissibility – in the light of the Polish constitutional system – of amending any legal act in a different procedure and by means of a legal act of a different rank than the one originally adopted.

First and foremost, in accordance with the provision cited above, the consent to be bound by international agreement in the procedure set out in article 13, sec. 1 IAA means that approval described in article 12, sec. 3 of this Act is made by giving consent described in article 6. In case of

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<sup>1</sup> Polish OJ item 443, year 2000 item 1824, year 2010 item 1395 and year 2011 item 676.

<sup>2</sup> See: M. Safjan, L. Bosek (eds.), *Constitution of the Republic of Poland. Volume II. Commentary on art. 87 – 243*, C. H. Beck, Warsaw 2016, pp. 103-118.

<sup>3</sup> See: M. Safjan, L. Bosek (eds.), *Constitution of the Republic of Poland. Volume II. Commentary on art. 87 – 243*, C. H. Beck, Warsaw 2016, pp. 118-140.

international agreements concluded in the complex procedure – either by ratification, or by approval – the authority entitled to conduct negotiations or the minister in charge of the dossier, which concerns issues involved in the agreement, having obtained from the Council of Ministers the consent for signing them, based on article 6, sec. 3 IAA, submits an application for the consent from the Council of Ministers to ratify or approve the agreement. The national process of entering into an agreement in the simplified procedure ends with the issuing, by the Council of Ministers, of a resolution on giving consent for signing the agreement. No further steps to express consent to be bound by such an agreement needs to be undertaken. Since all international agreements are either ratified or approved, also the type described in this paper must belong to one of these categories. Therefore, in accordance with article 13, sec. 2 IAA the Council of Ministers simultaneously, in the same resolution, gives its consent to sign an international agreement concluded in the “simplified procedure” and approves it, somewhat *ex ante*. International agreements, into which the Republic of Poland enters in the procedure established in article 13, sec. 1 IAA – also agreements amending other agreements, described in article 13, sec. 2, Point 3 IAA – will therefore always be approved, irrespective of the procedure, in which the expression of consent to be bound by an agreement, which is being amended, was made. As a consequence, in light of the regulations described above, one can imagine a case (such cases have occurred occasionally and examples are described below), in which a ratified international agreement is amended by another agreement, approved in accordance with article 13, sec. 2, Point 3 IAA. As mentioned above, there is no doubt that – in light of the international obligations of the Republic of Poland, as well as validity of such a contract among state-parties – such a procedure of entering into an agreement amending a ratified international agreement is permissible and the changes made in such a manner are legally binding. Possible doubts, however, relate to the integrity of the Polish internal legal order and to consistency of such a solution with article 87, sec. 1<sup>4</sup> of the Constitution of the Republic of Poland.

The Constitution contains no exhaustive catalogue of sources of internal law. Nevertheless, there is a closed catalogue of sources of universally binding law and in accordance with article 87 of the Constitution this consists of: the Constitution, statutes, *ratified* international agreements

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<sup>4</sup> See: M. Safjan, L. Bosek (eds.), *Constitution of the Republic of Poland. Volume II. Commentary on art. 87 – 243*, C. H. Beck, Warszawa 2016, pp. 51-88.

and regulations, as well as enactments of local law in the territory of the organ issuing such enactments. Since only the legal acts listed above are considered as sources of universally binding law, *a contrario* other legal acts – also *approved* international agreements should be viewed as parts of the open catalogue of sources of internal law.<sup>5</sup>

Therefore, as a result of the expression of consent of the Republic of Poland to be bound in the simplified procedure by agreement amending a ratified international agreement, the amending provisions have the effect of internally binding law and, at the same time, they are deprived of the value of direct application, as stated in article 91, sec. 1 of the Constitution. It leads to a situation in which – in the hierarchy of Polish national law – the amended agreement is a source of universally binding law, but the amendments made to its text are not. As a consequence, the relation between the amending and the amended provisions is at least unclear. Furthermore it must be said, that provisions amending any legal act, after their entrance into force, are being fulfilled and make a permanent change in the text of the original act. And since this original act is universally binding and the amending provisions are deprived of this value, it raises a question as to the character and status of this amended legal act. Is it still universally binding? And if so, is this universally binding character applicable to the whole or to the unaltered part of the act only? Finally, who and in what manner decides on this issue and what rules should apply? Is such an important issue as the legal force of a legal act to be decided *a casu ad casum*, after a detailed assessment each time?

These reflections are not of a purely theoretical nature and without any legal implications. They give rise to a justified question on the catalogue of entities, which are bound by a legal act of such a nature and therefore on the legal force of such an act. It is obvious that internal acts – as opposed to universally binding legal acts – are binding only for entities subordinate

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<sup>5</sup> One can find another, controversial view in the literature, treating approved international agreements as one of the sources of universally binding law in the Polish legal order. The said view is based on the wording of article 9 of the Constitution of the Republic of Poland, which states “The Republic of Poland shall respect international law binding upon it” (See: J. Sozański, *Prawo traktatów [Law of treaties]*, Iuris, Warszawa–Poznań 2008, p. 266). This view is supposedly supported by the fact, that all international agreements, even approved ones, should be promulgated. It seems however, that such an interpretation of article 9 of the Constitution is too far-reaching, especially in the context of the closed catalogue of the sources of universally binding law included in article 87 of the Constitution. Therefore this view is rather isolated in doctrine.

to the authority which issued them. Hence, the range of actors to whom a draft international agreement would create rights and obligations is one of the key factors taken into account by the Polish authorities while deciding whether such an agreement should be ratified or whether sole approval is enough (to set aside the conditions arising from international law). In light of the Polish system of sources of law and the nature of different types of legal acts it seems that international agreement may be approved only if it does not create any obligations for individuals, including natural and legal persons. Otherwise, individual entities, not subordinate to the authority which concluded the approved agreement, might – as it seems – effectively undermine, on the grounds of Polish national law, obligations to act or to refrain from action, imposed by such an agreement. This would lead to a peculiar dualism: on the grounds of international law, between the subjects of such a law, such an agreement would be legally binding and would create a legal effect but at the same time citizens of one of the state-parties thereof could effectively question the legality of imposing obligations on them by such an agreement.

What should therefore be done in a situation in which – in accordance with the letter of article 13, sec. 2, Point 3 IAA – amendments to a ratified international agreement are introduced by an agreement approved in the simplified procedure? If the amended agreement contains provisions imposing obligations on individuals and these provisions are subsequently amended with an internal act, then what will be their binding force? Will they bind the same unlimited range of actors, as it was before the amendment, or will their application be limited and – if so – to what extent? The central state administration authorities concluding amending international agreements in the said procedure often defend themselves from such accusations using the argument that amendments introduced by an approved agreement concluded in the simplified procedure are, as the case may be, of a technical character only and do not interfere with the rights and duties of citizens. That reasoning is reinforced by emphasizing that in accordance with article 13, sec. 2, Point 3 IAA the amendment of a ratified international agreement or of an attachment thereof is possible in the simplified procedure only if the said agreement does not fulfil the conditions arising from in article 89, sec. 1 or article 90 of the Constitution of the Republic of Poland. The argument in question does not answer the concerns connected with admissibility – on the grounds of the Polish constitutional system of sources of universally binding law – of amending a universally binding legal act by means of an internal act. For these doubts are of a

procedural nature and they arise independently from the content of the amending agreement, as well as from the “depth” or specificity of the amending provisions. Finally, article 13, sec. 2, Point 3 IAA lists, among the conditions to amend a ratified international agreement by means of an agreement concluded in the simplified procedure, lack of fulfilment by such an agreement of conditions arising from article 89, sec. 1 or article 90 of the Constitution, that is the conditions for ratification *with prior consent given in statute*. However, the provision is silent when it comes to ratification made without such consent. This means that it theoretically allows for the possibility that the amendment of an international agreement or attachment thereof fulfils the conditions for “small ratification”<sup>6</sup> (e.g. it imposes obligations on individual entities), but is nonetheless only approved in the simplified procedure. This raises fundamental doubts of a constitutional nature, since a ratified international agreement, even if ratification was made without prior consent given in statute, is in the Polish legal order a universally binding act and such acts should be amended only with acts of the same rank.

In the last decade, the above-mentioned arguments were mentioned in several cases by the Polish Government Legislation Centre<sup>7</sup> in the course

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<sup>6</sup> It is a customary name for ratification made without prior consent given in statute. This procedure is proper if the content of the agreement does not fulfil the requirements arising from article 89, sec. 1 and article 90 of the Constitution and the agreement itself foresees the need for ratification or allows it and, at the same time, special circumstances justify such action. These special circumstances should be interpreted – in the light of Polish internal law – first and foremost the need of acquiring the status of a universally binding source of law by the agreement. Agreements, which the Republic of Poland enters into in the procedure of “small ratification” differ, with regard to legal effects, from agreements ratified with prior consent given in statute, in having no priority over the statute if they are contrary to its provisions. After their publication in the Official Journal of Laws of the Republic of Poland they become an integral part of the Polish legal order and are applied directly (provided that their application does not require passing a statute). See: J. Bennewicz, *Proces zawierania umów międzynarodowych [Process for Conclusion of International Agreements]* [in:] J. Krawczyk (ed.) ‘Procedury tworzenia aktów prawnych’ [Procedures for Creation of Legal Acts], C. H. Beck, Warszawa, 2013, pp. 361-364.

<sup>7</sup> The Government Legislation Centre is a national unit, subordinate to the Prime Minister. Its main tasks include: coordinating the legislative actions of the Council of Ministers, the Prime Minister and other governmental administration authorities. The Centre prepares – from a legislative point of view – governmental draft legal acts and other governmental documents, provides them with legal and legislative opinions on governmental draft legal acts, ensures the participation of the Council of Ministers and

of inter-ministerial consultations of draft international agreements amending ratified agreements, conclusion of which was proposed in the simplified procedure by the draft promoter. Since one of the main tasks of the Centre is giving legal-legislative opinions on governmental draft legal acts, including international agreements, and diligence on consistency of these acts with the Polish legal order (especially with the Constitution) as well as with EU and international law, its role is also to point out doubts of a systemic and constitutional nature, regarding the choice of the proper procedure, in which the Republic of Poland should enter into international agreements. With regard to the Protocol<sup>8</sup> between the Government of the Republic of Poland and the Government of the Republic of Azerbaijan amending the Agreement<sup>9</sup> between the Government of the Republic of Poland and the Government of the Republic of Azerbaijan on co-operation in the field of defence, signed in Warsaw on the 30.3.2005, such doubts were raised twice, in an internal correspondence with the Minister of National Defence of the Republic of Poland. The amended agreement had been ratified without prior consent given in statute, which did not prevent the draft promoter from proposing expressing the consent to be bound by the amending Protocol in the simplified procedure, by signing, which was criticised by the Government Legislation Centre. As a counter-argument, the draft

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the Prime Minister in proceedings conducted by the Constitutional Tribunal, analyses judgments of the Constitutional Tribunal, promulgates, on behalf of the Prime Minister, the Official Journal of the Republic of Poland and the Official Journal of the Republic of Poland (called “Monitor Polski”) and carries out other tasks (as set out in article 14b and article 14c of the Act of 8.8.1996 on the Council of Ministers – Polish OJ year 2012 item 392 and year 2015 item 1064).

<sup>8</sup> The Protocol has not been promulgated in the Official Journal, despite the duty to do so *forthwith*, as stated in article 88, sec. 3 of the Constitution of the Republic of Poland in connection with article 18, sec. 1 of the Act of 14.4.2000 on International Agreements. Furthermore, it is not available in the Internet Treaty Base of the Ministry of Foreign Affairs. Although – in accordance with § 13 sec. 1 of the Regulation of the Council of Ministers of 28.8.2000 on carrying out some of the provisions of the International Agreements Act (Polish OJ item 891) the minister in charge of the dossier, related to issues involved in the agreement, should provide the minister in charge of foreign affairs with the signed original of the said agreement. Furthermore, it is worth mentioning, that the Council of Ministers gave its consent to sign this agreement by means of Resolution No. 205/2015 of 29.10.2005 (unpublished). Therefore, the text of the Protocol is available only in internal documentation of the government administration authorities involved in the process of its conclusion.

<sup>9</sup> Polish OJ year 2010 item 1347.

promotor indicated only that the procedure of expressing the consent to be bound by the Protocol was consistent with article 13, sec. 2, Point 3 IAA and that the content and character of the amendments proposed in the said Protocol did not imply the necessity of the ratification. The official letter did not, however, include any reference to the remarks of a constitutional and systemic nature presented by the Government Legislation Centre, which, in particular, concerned inconsistency between the habit of amending universally binding acts by internal acts and the constitutional rule of compatibility of the rank and form of the amended and the amending act. The main argument of the Ministry of National Defence indicated that the amending Protocol did not fulfil the conditions for ratification made with prior consent given in statute, arising from article 89, sec. 1 and article 90 of the Constitution of the Republic of Poland. The said Protocol involved only a change of authorities responsible for carrying out the agreement and it included a reference to a separate agreement on the protection of classified information by the parties. In view of the draft promoter it was the *content* of the amending Protocol (which did not fulfil the criteria of the ratification – regardless whether with or without prior consent given in statute – itself indeed) which was the key factor to decide on the lack of necessity of ratification. The remarks of a formal and legal nature made by the Government Legislation Centre were, however, ignored.

The dispute between the draft promoter and the Government Legislation Centre in a similar case, concerning *the Agreement between the Government of the Republic of Poland and the Government of the United Kingdom of Great Britain and Northern Ireland concerning the mutual protection of classified information, signed in Warsaw on 18.8.2006*<sup>10</sup> also included a substantial analysis of the content of the draft amending agreement, which led to the conclusion that its wording does not hold to the ratification. The Government Legislation Centre again pointed out the need for the ratification of the amending agreement, due to the fact that in this very procedure the Republic of Poland expressed its consent to be bound by the original agreement. In an internal correspondence with the Government Legislation Centre, the Internal Security Agency – similarly to the Ministry of National Defence in the case described above – invoked article 13, sec. 2, Point 3 IAA and a very limited number of previous cases when amendments of ratified agreements were concluded with the use of the said provision which created a dangerous precedent. Once again

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<sup>10</sup> Polish OJ year 2007 item 985.

the remarks of a formal and legal nature emphasized by the Government Legislation Centre were ignored.

Ultimately, doubts on the consistency of article 13, sec. 2, Point 3 IAA with the Constitution of the Republic of Poland could be resolved by the Constitutional Tribunal which is the only institution in Poland entitled to examine the consistency of the provisions of statutes with the Constitution. The problem in question, however, was never the subject of an analysis provided by the Tribunal because the proper motion regarding such a case was never submitted. However, the judgement of 26.6.2013 (Case No. K 33/12)<sup>11</sup> may be helpful in these deliberations, since the Tribunal analysed – however, in a different context – the problem of the choice of the right procedure of expressing consent by the Republic of Poland to be bound by international agreements and – which is even more important in the light of this publication – the admissibility of amending international agreements in a different procedure than the one used to enter into the original agreement. The key problem for the issues in question, which was analysed by the Tribunal, was whether an amendment to an international agreement, which was ratified in the procedure described in article 90 of the Constitution (that is the procedure required for the ratification of an agreement delegating the powers of organs of the state authority in certain matters to an international organization or an international organ), undertaken by means of an international agreement ratified in the procedure described in article 89, sec. 1 of the Constitution (that is the “ordinary” ratification, with prior consent given in statute), was admissible. The Tribunal stated that the Act of 11.5.2012 on the ratification of the European Council Decision of 25.3.2011 amending article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU)<sup>12</sup> is not inconsistent with article 90 in connection with article 120 first sentence *in fine* of the Constitution of the Republic of Poland and article 46, sec. 6 of the Treaty on the European Union<sup>13</sup>. In other words, the decision of the European Council introducing changes to the Treaty on the Functioning of the European Union, which was ratified in the procedure set out in article 90 of The Constitution, could be ratified in the procedure set out in article 89, sec. 1 of the Constitution. In any case such a solution was not

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<sup>11</sup> Polish OJ year 2013 item 825. OTK ZU 5A/2013 item 63.

<sup>12</sup> Polish OJ item 748.

<sup>13</sup> Polish OJ year 2004 item 864/30 with subsequent amendments.

inconsistent with the Constitution of the Republic of Poland. Obviously, the considerations of the Tribunal presented in the statement of reasons of the judgement are different in substance from the core of the issue discussed in this paper, since the judgement was given on the relation between an amending agreement concluded in the procedure set out in article 89, sec. 1 of the Constitution and the amended agreement concluded in the procedure set out in article 90, not on amending ratified agreements by agreements concluded in the simplified procedure. Nevertheless, the common ground in both these cases was the problem of admissibility of amending international agreement – or, wider, of any legal act – in a different procedure than the one in which the original act was introduced. In the statement of reasons the Tribunal concluded that:

“...the lawmaker, while deciding upon the procedure, in which the statute containing the permission for ratification of an international agreement (article 89, sec. 1 or article 90, Sec 2-4 of the Constitution) should be passed, must rely on (...) an analysis of the content of the agreement and its results. The choice of the procedure is determined by the nature of provisions that are being introduced. (...) Article 90 of the Constitution may be applied when the condition of delegating ‘the powers of organs of a state authority in certain matters’ to an international organization or international organ is met.”

The Tribunal unambiguously supported therefore a literal interpretation of article 89, sec. 1 and article 90 of the Constitution and examination of the content of any agreement (also an amending one) on a case-by-case basis, in search of provisions which would delegate the powers of the organs of a state authority in certain matters. Thereby, the Tribunal rejected the concept according to which each agreement which is to amend an agreement ratified in accordance with the procedure set out in article 90 of the Constitution, shall be ratified with the use of the same procedure – regardless of its content – solely due to the fact that it modifies the original agreement which creates the need for aligning the procedure of ratification of the amended and the amending act. The Tribunal explained, that:

“Not every agreement affecting the manner in which state organs execute their powers or reducing or changing them by imposing new obligations on state organs, means delegating powers, as described in article 90 of the Constitution. Accepting a different approach would lead to the overlapping of the scope of article 89 and article 90 of the Constitution almost completely. It would contravene the intentions of the rational lawmaker, who assumed that in case of issues important from the point of view of the Constitution, causing modifications to

powers of organs of a state authority, the procedure set out in article 89, sec. 1 of the Constitution is proper and the procedure set out in article 90 applies only in cases concerning the delegation of powers.”

And further:

“The cited provision lacks additional reservation, that the procedure foreseen in article 90 of the Constitution applies also to all amendments to such an agreement. *A contrario* it should be therefore acknowledged that if the amending agreement does not concern the delegation of powers, the procedure set out in article 90 does not apply. This kind of *a contrario* reasoning is enhanced by the constitutional axiology and teleological interpretation of article 90 of the Constitution. The fundamentals of the constitutional axiology indicate that the substance of the concept of lawmaker excludes the possibility to use the procedure set out in article 90, sec. 2 of the Constitution to every amendment to the agreement.”

The Tribunal, using the argument of axiology of the Constitution and teleological interpretation of its article 90 (and in other parts of the statement of reasons of the discussed judgement – also invoking the rules of favour for the process of European integration and of cooperation between the states), notes therefore that if the lawmaker’s intention was that amendments to the agreement ratified in the procedure set out in article 90 needed to be introduced each time in the same procedure, then this rule should be stated in the same provision directly. Such a theory may be astonishing, especially if we take into account that there are no provisions in the Constitution that would directly command the introduction of amendments to statutes or regulations by means of legal acts of the same rank. Such necessity arises in connection with the constitutional rule, *interpreted* from the provisions of the Constitution; in jurisdiction and doctrine one cannot find the call for explicit expression of the said rule in the Constitution. Lack of an unambiguous provision containing such a rule is not equivalent to a general lack of a *legal rule*, which states the need to amend legal acts in the same procedure which was used to adopt them. The Constitutional Tribunal explained though in a statement of reasons of the said judgement<sup>14</sup> why, in reference to international agreements, it adopted different standards, by stating, that:

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<sup>14</sup> Case No. K 33/12, *supra*.

“the thesis that a legal act adopted in a certain form, should be amended in the same form, cannot be seen as a binding legal rule, being in force with regard to all legal acts mentioned in the Constitution. Such a principle can be observed in the Polish legal order (e.g. with regard to statutes), however, it cannot be applied to the interpretation of article 90 of the Constitution. Adoption of such a thesis is possible if we deal with one, prescribed form of the legal act. In such a case amendments to this act should be undertaken in the same form. In the case of international agreements their conclusion, ratification and termination may occur using different procedures.”

The Tribunal derives the concept, according to which there is a breach in applying the rule of compatibility of the rank of the amended and the amending act with regard to international agreements, from numerous different procedures of their conclusion. The Tribunal yet does not explain why international agreements, regardless of the fact that they may be concluded in different procedures, are exempt from the same rule which applies to any other legal act. It has a particularly important meaning in the context of article 13, sec. 2, Point 3 IAA, which allows the amendment of ratified international agreements by approved agreements, that is making changes in universally binding legal acts by internal acts.

The thesis presented in the statement of reasons of the discussed judgement<sup>15</sup> are controversial, as is evidenced by the fact that *five* judges in the panel of 13 gave their *dissenting opinions* and thus cast a shadow over the conclusions involved in the judgement. In the context of the remarks already made, dissenting opinions given by Judge Teresa Liszcz and Judge Marek Zubik are especially interesting. Judge Liszcz pointed out, that there is:

“presumption, well established in our legal culture, that amendments made to a legal act require procedure correspondent to the one, in which it was created, as far as nothing else arises from the law. In case of international agreements, that are the source of universally binding law, the ratification is an indispensable part of the legislative process. The Constitution does not settle the procedure for the ratification of amendments to agreements described in article 90, sec. 1 of the Constitution, which means that one should apply one of the procedures set out in article 90, sec. 1 or 2 of the Constitution to the ratification of amendments to this kind of international agreement.”

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<sup>15</sup> Case No. K 33/12, *supra*.

Judge Liszcz, contrary to the Tribunal, argues that there is no explanation for applying different standards to international agreements than to other legal acts. Therefore, if there is an uncontroversial and deeply-rooted Polish constitutional rule to amend legal acts in the same procedure according to which they were adopted, there is no reason to allow for exceptions to that fundamental principle with regard to international agreements and the numerous procedures of their conclusion by the Republic of Poland should not be a deciding factor. Even more clear on this issue was the Judge of the Constitutional Tribunal Marek Zubik. In his *votum separatum* he notes a serious problem connected with the interpretation accepted by the Tribunal, according to which the necessary condition to accept the fact that the principle of amending legal acts in the same procedure in which they were adopted concerns also international agreements, would be stated directly in article 90 of the Constitution that any changes to an agreement ratified in the procedure set out in the said provision need to be introduced each time in the same procedure. At the same time, the Judge questions the view that lack of expression of such a necessity in the provision in question is equivalent to the intention of the lawmaker to give the authorities freedom of choice in the matter of procedure which applies to amendments of international agreements. Judge Zubik claims, that:

“a narrower view on the application of the procedure stated in article 90 of the Constitution [than the interpretation that this provision allows not only for commencement of membership in an international organisation, to which the powers of organs of state authority in certain matters are delegated, but also for introduction of any crucial amendments to the original agreement, such as modifications of its cornerstones or giving up the membership – JB] may lead to a situation in which the original content of an international agreement ratified in the special procedure, would be changed by numerous amendments introduced by means of international agreements ratified in accordance with article 89 of the Constitution. The moment in which numerous but minor amendments to the text of the agreement would constitute a huge change in substance, which – if introduced independently – would undoubtedly require (...) ratification made in accordance with the procedure set out in article 90, could be untraceable. Thus article 90 of the Constitution could become hollow and the consent of the Polish State, given in such way, could be undermined.”

Thereby, Judge Zubik points out that even if one could accept the hypothetical possibility to amend international agreements in another procedure than the one in which they were concluded, it would imply difficulty

in setting the limits of “depth” and contents of the amendment, which – if exceeded – would undoubtedly require the same procedure as the one applied in reference to the original agreement or – if not reached – would allow for the simplified procedure. The same danger applies to article 13, sec. 2, Point 3 IAA, which allows for the introduction of changes to international agreements – even ratified ones – in the simplified procedure, while setting only one, vague condition of lack of fulfilment of conditions arising from article 89, sec. 1 or article 90 of the Constitution of the Republic of Poland. In this case, we additionally face a hypothetical difficulty in establishing, which part of an international agreement amended in such a manner still has the attributes of a universally binding legal act or of an internal legal act. Or perhaps the amendment caused the whole act to become either universally or internally binding? Moreover, Judge Zubik questions the thesis described in the discussed judgement<sup>16</sup> that each time before deciding upon the procedure in which the Republic of Poland should express its consent to be bound by an international agreement amending other agreements, one should analyse the content of such an agreement and verify whether the conditions described either in article 90 of the Constitution – in relation to the case being subject to the discussed judgement – or the conditions for a “small” or “large” (one with prior consent given in statute) ratification – which regards the issue of article 13, sec. 2, point 3 IAA discussed in this paper – are fulfilled. As opposed to the Tribunal, Judge Zubik emphasizes in his dissenting opinion that the same procedure as to the original agreement should apply to the amending agreement *automatically*, as a result of a Polish rule of amending legal acts using the same procedure in which they were adopted. Hence, the judge writes:

“errant assumption that each decision on the choice of the procedure of giving consent to the ratification of an international agreement (...) should be connected with an analysis of the content of such an agreement and proving that the agreement delegates further powers to an international organization (international organ). This assumption is correct only in the case of the original international agreement, that is the accession treaty or treaty establishing an international organisation. In case of agreements amending previous international agreements, the procedure as to consent for ratification should be – as a general rule – convergent with the one, in which the consent in relation to the original agreement was given. (...) a general assumption functioning in our legal culture and expressed i.e. in constitutional

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<sup>16</sup> Case No. K 33/12, *supra*.

provisions that all legal acts and legal transactions in general – if it is legally admissible – should be, as a general rule, amended in the same procedure, in which they were originally adopted to the legal system or in which they produced legal effects, should be adopted as the starting point to further deliberations (this is how e.g. article 118-123 of the Constitution apply to amending statutes); similarly, the procedure for issuing regulations set out in statutory authorisation, described in article 92, sec. 1 of the Constitution, is applied to amendments of such regulations (...). This rule has been rooted in Polish parliamentary law for years. Many times has the use of this rule allowed for the overcoming of obstacles of a procedural nature in a situation in which the lawmaker did not expressly determine the rules of terminating, modifying or undertaking actions that have effects opposed to the effects of actions, which they concern. (...) Use of another procedure in case of modification or termination of a legal act (...) is always of a unique nature and may occur only if there is a vivid and unambiguous legal basis for such an exception from this general rule of law described by me above (e.g. article 235 of the Constitution – with regard to the procedure on preparations and enactment of the Constitution of 1997; article 149, sec. 2 second sentence of the Constitution – with regard to the termination of the regulation of the minister by the Council of Ministers; (...)). Consequently, I do not share the view undermining the presumption that amendments to international agreements should be made in the same procedure in which the ratification of the original agreement was made.”

Therefore, the starting point and the legal rule should be to maintain the indistinguishability of the procedure of adopting the amended and the amending act and the exception from this rule should be clearly expressed in the Constitution, not the other way around, as the Constitutional Tribunal stated in its judgement, suggesting that the hypothetical intention of the lawmaker for article 90 to apply also to agreements amending other agreements concluded according to this procedure, should derive from the provision itself. There is no justification for applying different criteria to international agreements than (without any controversy) to statutes or regulations. Furthermore, it should be remembered that the need for analysis of the procedure applicable to the amendment of an agreement in every case – as it was suggested by the Tribunal – gives rise to one more risk. Namely, in case of national legal acts, which are binding only in internal relations, a possible sentence of the Constitutional Tribunal on their incompatibility with the Constitution creates effects only for entities of internal law. International agreements are in force in two planes – in internal and external relations and – as it was highlighted at the beginning – regardless

of the procedure, in which the Republic of Poland expresses its consent to be bound by the amending agreement and compatibility of this procedure with requirements arising from Polish internal law, it will still be binding in external relations with the party or parties to the agreement. What happens, therefore in cases in which the Constitutional Tribunal – after the conclusion of the amending agreement – rules upon inconsistency with the Constitution of the procedure of such a conclusion? It should be assumed that in relations with foreign partners such an agreement would still be binding, but in internal relations not. Lack of transparency in such a case surely would not promote the “*pacta sunt servanda*” rule. As Judge Marek Zubik states in his dissenting opinion to the discussed judgement<sup>17</sup>:

“The need to choose the procedure for ratification of the agreement every time when it concerns the membership of the Republic of Poland in an international organisation, which already obtained the powers of organs of state authority (...) introduces an element of legal uncertainty (...). It causes the need to assess the content of each international agreement on a case-to-case basis. Inevitably, it may cause a legal conflict (...). Such circumstance would not be an issue itself, if the type of procedure foreseen in Polish law guaranteed – at the proper stage of proceedings aiming for the final establishment of Polish international commitments – a juridical-constitutional solution to this conflict. Unfortunately, this is not the case. A hypothetical judgement of the Tribunal as to the unconstitutionality of the procedure of passing a ratification statute, given after the ratification of the agreement it concerns, substantially weakens the international position of Poland and may impede the fulfilment of its international obligations. Therefore, it does not serve the implementation of article 9 of the Constitution.”

In the light of the foregoing it must be stated that the issue of the consistency of the provision of article 13, sec. 2, Point 3 IAA with the constitutional rule of indistinguishability of the procedure of adopting the amended and the amending acts raises serious doubts. It may be said that these doubts are even of a more serious nature than the ones discussed in the judgement of the Constitutional Tribunal of 26.6.2013<sup>18</sup> that concerned the issue of the admissibility of modifying an international agreement concluded in the procedure set out in article 90 of the Constitution of the Republic of Poland by an agreement concluded in the procedure set

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<sup>17</sup> Case No. K 33/12, *supra*.

<sup>18</sup> Case No. K 33/12, *supra*.

out in article 89, sec. 1 of the Constitution. In this case, the core of considerations of the Tribunal was only the *manner* in which the amending agreement should be ratified. It was not in dispute that in any case – both ratification made in accordance with article 90 and article 89, sec. 1 of the Constitution – the amending agreement, as well as the amended one will enjoy – in light of Polish law – the status of a universally binding legal act. With regard to the relation of an agreement concluded according to article 13, sec. 2, Point 3 IAA to a ratified agreement amended by it – as discussed in this paper – one can add the problem of amending a universally binding legal act by means of an internal act. These doubts could be ultimately adjudicated only by the Constitutional Tribunal in a case in which one of the entities entitled to do so applies for investigating the consistency of article 13, sec. 2, Point 3 IAA with the Constitution.

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