COMMISSIONER FOR HUMAN RIGHTS

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Constitutional Tribunal
Warsaw

File no. K 20/20

Procedural document

of the Commissioner for Human Rights

In response to the letter of the Constitutional Tribunal of 16 September 2020 (delivered to the Commissioner on 17 September 2020), I would like to inform you, that pursuant to Article 16 par. 2 point 3 of the Act of 15 July 1987 *on the Commissioner for Human Rights* (Journal of Laws of 2020, item 627; hereinafter: the Act on CHR) and pursuant to Article 63 par. 2 of the Act of 30 November 2016 *on the organization and procedure of proceedings before the Constitutional Tribunal* (Journal of Laws of 2019, item 2393; hereinafter: the Act on the Constitutional Tribunal), **I hereby declare my participation in the proceedings before the Constitutional Tribunal** in the case arising from the motion from a group of MPs to the 9th term Sejm of the Republic of Poland dated 15 September 2020 (file No. K 20/20).

A group of MPs petitioned for the provision of Article 3 par. 6 of the Act on CHR to be declared incompatible with:

- the provision of Article 2 of the Constitution of the Republic of Poland, i.e., the principle of a democratic state of law and derived therefrom the principle of citizens' trust in the state and in the law it enacts, as well as the principle of justice,

- the provision of Article 209 par. 1 of the Constitution of the Republic of Poland, specifying the term of office of the Commissioner for Human Rights.

I would like to present the following position of the Commissioner for Human Rights regarding this case:

- Article 3 par. 6 of the Act on CHR **is compatible** with Article 2 of the Constitution of the Republic of Poland, i.e., the principle of a democratic state of law and derived therefrom the principle of citizens' trust in the state and in the law it enacts, as well as the principle of justice,
- Article 3 par. 6 of the Act on CHR **is not incompatible** with Article 209 par. 1 of the Constitution of the Republic of Poland, specifying the term of office of the Commissioner for Human Rights.

RATIONALE

I. Formal aspects

1. The Constitutional Tribunal, in a letter dated 16 September 2020, notified the Commissioner for Human Rights of the commencement of proceedings based on the motion of a group of MPs to the Sejm of the 9th term in the case ref. No. K 20/20 (date of delivery of the letter from the CT to CHR Office: 17 September 2020). At the same time, in same letter, the Tribunal, citing Art. 63 par. 1 and 2 and Art. 42 pt. 10 of the Act of 30 November 2016 on the organization and procedure of proceedings before the Constitutional Tribunal, set a deadline for the Commissioner to declare his/her participation in the proceedings before the CT and present a written position on the case by 30 September 2020. The Commissioner for Human Rights would like to emphasize that the Constitutional Tribunal's appointment of a deadline in such a manner violates a number of statutory provisions.

2. First, pursuant to the first sentence of Article 63 par. 2 of the Act on Constitutional Tribunal, the Commissioner for Human Rights is subject to the provisions of Article 63 par. 1 of the Act on Constitutional Tribunal, with the exception of petitions in cases referred to in Article 37 par. 1 point 1(d) of the Act on Constitutional Tribunal (motions of the President of the Republic of Poland for preventive control of constitutionality, addressed to the CT). The CT letter of 16 September 2020 referred, inter alia, to Article 63 par. 1 of the Act on Constitutional Tribunal as the legal basis for setting the deadline for the Commissioner for Human Rights. In the second sentence, this provision states that the President of the Tribunal may set a deadline for a participant in the proceedings to present a written position. However, the second sentence of Article 63 par. 2 of the Act on Constitutional Tribunal, as regards the period prescribed for the Commissioner, has been formulated by the legislature in a way that must be regarded as a *lex specialis* relative to the general provision of Article 63 par. 1 of the Act on Constitutional Tribunal ("The Commissioner for Human Rights, **within 30 days from the date of delivery of the notice**, may declare his/her participation in the proceedings and present a written position on the case"). Thus, the Commissioner for Human Rights is the only entity with respect to which the legislature has decided to exclude the right of the President of the Constitutional Tribunal to set a deadline - other than 30 days - for the submission of a written position on a case before the CT.

3. Moreover, it should be emphasized that Article 63, paragraph 1, sentence 2 of the Act on Constitutional Tribunal allows the President of the Tribunal to set a deadline:

1) exclusively for presenting a written position on a case, and

2) exclusively with respect to a participant of the proceedings.

4. Thus the President of the Tribunal cannot, under the second sentence of Article 63 par. 1 of the Act on Constitutional Tribunal, set a time limit for the Ombudsman to declare his/her participation in proceedings before the CT (i.e., in practice cut this limit by half at his/her discretion, for example, as in the present case). **The possibility of setting a time limit for the Commissioner only applies to the presentation of a written position on the case, but not to the declaration of participation in the proceedings** - as provided for, in a manner not providing for exceptions, in Article 63 par. 2 of the Act on Constitutional Tribunal.

5. Finally, Article 63 par. 1 sentence 2 of the Act on Constitutional Tribunal refers only to setting a time limit for a participant in the proceedings. Meanwhile, as per Article 42 pt. 10 of the Act on Constitutional Tribunal, referred to in the letter of the CT of 16 September 2020, the Act on Constitutional Tribunal states that the Commissioner for Human Rights is a participant in the proceedings before the CT **if he/she has declared his/her participation in the proceedings.** Therefore, a thorough analysis of the provisions of the Act on Constitutional Tribunal makes it clear that the Commissioner only becomes a participant in the proceedings after declaring his/her participation in the proceedings before the CT, which he/she can decide on within a statutory period of 30 days of receipt of the notice. The President of the Tribunal may not set any other time limit for the Commissioner, nor may he/she set a time limit for the submission of a written position before the Commissioner for Human Rights has even become a participant in the proceedings before the CT,

6. Second, the preamble to the Constitution of the Republic of Poland requires loyal cooperation between public powers. The principle of loyal cooperation between public powers has been confirmed in the jurisprudence of the Constitutional Tribunal itself (see the decision of the CT of 20 May 2009 in the case No. Kpt 2/08). In the opinion of the Commissioner for Human Rights, the Constitutional Tribunal setting a deadline for joining the proceedings before the CT shorter than the statutory deadline of 30 days violates this constitutional principle and indicates more a pretence of compliance with the principle of cooperation between public powers than actual compliance. Such an infringement of this constitutional principle is directed against the Parliament and the President, as it is they who passed and signed the law setting the deadline for the Commissioner, and against the Commissioner himself - reducing the deadline by half certainly does not facilitate the task of carefully examining the petitions submitted by a group of Members of Parliament. Therefore, in essence, this infringement is also directed against the group of MPs who are denied the right to have their arguments, presented in the motion of 15 September 2020, examined carefully and thoughtfully.

7. Nevertheless, the Commissioner for Human Rights, in view of this constitutional principle and loyalty to the constitutional court, to the other participants in the proceedings and to citizens, has decided to join the present proceedings in case K 20/20 within the deadline

envisaged by the Constitutional Tribunal in its letter of 16 September 2020.

II. *Ratio legis* of the contested norm and its constitutionality against historical background

8. According to the original wording of the Act (Article 2, par. 1 of the Act of 15 July 1987 on the Commissioner for Human Rights - Journal of Laws. No. 21, item 123) the Commissioner was appointed by the Sejm at the request of the Presidium of the Sejm. The term of office of the Commissioner lasted four years from the date of adoption of the resolution on his/her appointment (Article 2 par. 3 of the Act on the Commissioner for Human Rights in its original wording). The Act of 7 April 1989 on amending the Constitution of the Polish People's Republic (Journal of Laws No. 19, item 101) added Article 36a to the Constitution of the Polish People's Republic, as a result of which the Commissioner for Human Rights obtained the status of a constitutional body. In addition, however, the procedure for appointing the Commissioner for Human Rights was significantly altered. Pursuant to Article 36a, par. 2 of the Constitution of the Polish People's Republic, the Commissioner for Human Rights was appointed by the Sejm with the consent of the Senate for a period of 4 years.

9. Following the modification of the procedure for appointing the Commissioner for Human Rights, introduced by the constitutional provision, it was also necessary to amend the Act on the Commissioner for Human Rights. This amendment was enacted by the Act of 24 August 1991 amending the Act on the Commissioner for Human Rights, the Code of Criminal Procedure, the Act on Supreme Court and the Constitutional Tribunal (Journal of Laws No. 83, item 371) in order to adapt the content of the Act on the Commissioner for Human Rights to the provisions of the Constitution of the Republic of Poland, which, as should be emphasized regarding the appointment of the Commissioner, remained unchanged also under the Polish Constitution of 2 April 1997 (the only difference is the extension of the term of office of the Commissioner to 5 years).

10. As a result of these amendments, Article 2a par. 1 was introduced into the Act, according to which the Commissioner for Human Rights is appointed by the Sejm with the consent of the Senate upon a motion of the Speaker of the Sejm or a group of 35 MPs. Article 2a par. 6 of the Act on the Commissioner for Human Rights added by this amendment, still in force since 19 September 1991 in its unchanged wording (only the structure of the Act on CHR has been changed - currently it is the Article 3 par. 6 of the Act on CHR), stipulates that the current Commissioner shall perform his/her duties until the new Commissioner takes office.

11. Such a solution stems from a conscious legislative decision, as the draft amendment to the Act (print no. 723) originally prepared by the Justice Committee of the 10th Sejm in this respect provided for the new CHR to be appointed at least two months before the end of the current Commissioner's term. However, in the course of work in the Senate, the legislators realized that this solution, precisely because of the need to reach an agreement of both chambers of parliament when appointing the Commissioner who is a constitutional body, also does not provide effective protection against a situation in which such an agreement would not be reached before the end date of the Constitution-defined term of office. Hence, the Senate

submitted an amendment in this regard, it being the content of Article 3 par. 6 of the Act on the Commissioner for Human Rights, which is currently being challenged by the Petitioners, and the amendment was fully approved by the Sejm (cf. the stenographic report of the session of the Sejm on 21, 22, 23 and 24 August 1991, pp. 477-479).

12. In light of the above, the statement presented in the motion, saying that „the provision of the Act on CHR was not adjusted to the new political order of the Republic of Poland" is therefore not true. It was adjusted by the Act of 24 August 1991, and the legislators, being aware of the fact that, due to the requirement of cooperation between the two independent chambers of parliament (the Sejm and the Senate) in the course of the procedure of appointing the Commissioner for Human Rights, the constitutional term of office may be exceeded, have introduced a statutory provision allowing for further undisturbed functioning of the institution until the two chambers reach agreement. One advantage of such a solution is that the person hitherto performing the function of the Commissioner derives his/her authority to continue performing the function of the constitutional body exclusively from the will of the parliament - both its chambers, i.e. the Sejm and the Senate. This solution provides a very high degree of legitimacy for the person entrusted with the function of the constitutional body safeguarding rights and freedoms - Commissioner for Human Rights. This very legitimacy and a high level of parliamentary trust justify the continued service of the person who has held the position of Commissioner for the 5-year term until such time as a new person - the CHR of the next term - is elected.

13. The Commissioner for Human Rights also wishes to challenge the general assumption expressed by the Petitioners that a provision of the law which was passed before the effective date of the 1997 Constitution (i.e. before 17 October 1997) should be considered, so to say, ex officio, to be incompatible with the Constitution. In the motion, this thesis was expressed by the Petitioners at least twice: „In the opinion of the Petitioner (...) there is currently a legal provision in the legal system which is not adapted to the provisions of the Constitution, **and thus** incompatible with it, significantly older than the Constitution itself". (pp. 3 and 13 of the motion). First, it should be noted that the Constitution of the Republic of Poland of 1997 itself provided for a special adjustment mechanism in Chapter XIII „Transitional and Final Provisions". As per Article 236, par. 1 of the Constitution of the Republic of Poland, within 2 years from the date of the Constitution entering into force, the Council of Ministers shall submit to the Sejm such draft laws as are necessary to apply the Constitution. In this light, it is difficult to assume that the laws with respect to which the Council of Ministers had not submitted draft amendments, upon the date of Constitution entering into force, or the expiry of the aforementioned two-year period, somewhat automatically become inconsistent with the Constitution of the Republic of Poland. Moreover, absence of an adjustment initiative by the Council of Ministers should be regarded as a positive assessment of the unchanged regulations as meeting the new constitutional standards. Certainly, laws passed before the date of the Constitution entering into force are still presumed to be constitutional on the same terms as laws passed after that date.

14. To share the thesis of the Petitioners that the existence of a provision „much older" than the Constitution of the Republic of Poland in the legal system, which thus causes „considerable normative dissonance" (p. 13 of the petition), determines its unconstitutional character and,

consequently, the necessity to remove such a legal regulation from the legal system, could have extremely serious consequences for the stability of law in the Republic of Poland. Sharing such a view would mean that a „significant normative dissonance" is also caused by incompatibility with Constitution of many important laws passed before 1997 and largely unchanged after the date of 1997 Constitution entering into force, such as the Act of 17 May 1989 on guarantees of freedom of conscience and religion (Journal of Laws of 2017, item. 1153 as amended), or the Act of 9 May 1996 on the exercise of the mandate of deputy and senator (Journal of Laws of 2018, item. 1799 as amended), as well as international agreements signed and ratified before that date, such as the concordat between the Holy See and the Republic of Poland signed in Warsaw on July 28, 1993 (Journal of Laws of 1998 No. 51, item. 318). For these same reasons, the Petitioners' view on the defectiveness of normative acts older than the Polish Constitution should be categorically disqualified.

15. The provision of art. 36a of the Constitution of the Republic of Poland was held in force by virtue of Article 77 of the Constitutional Act of 17 October 1992 on mutual relations between the legislative and executive power of the Republic of Poland and territorial self-government (Journal of Laws No. 84, item 426) repealing the Constitution of the Republic of Poland of 22 July 1952.

16. Article 209 par. 1 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended) has retained the principle that the Commissioner for Human Rights is appointed by the Sejm, with the consent of the Senate, for a period of 5 years. Therefore, as previously indicated, the only change was the duration of the term of office of the Commissioner for Human Rights. The rationale for the desynchronization of the terms of office of the Commissioner for Human Rights and those of the Sejm and Senate was to separate the CHR office from any given parliament, i.e. in practice from a given parliamentary majority. The objective of constitutional disparity between the term of office of the Commissioner and the term of parliament was to ensure the highest possible degree of independence - from the current political power in the country – in exercising the function of a human rights protection body (as per, among others, M. Dybowski, commentary on Article 209 of the Constitution of the Republic of Poland, in the: M. Safjan, L. Bosek (red.), *Konstytucja RP. Tom II, Komentarz Art 87- 243*, p. 1440).

17. Both under Article 36a of the Constitution of the Republic of Poland and Article 209, par. 1 of the Constitution of the Republic of Poland, there was a provision which stipulated that the incumbent Commissioner for Human Rights would perform his/her duties until the new Commissioner takes his/her office.

18. Such is also the established Polish constitutional practice of almost thirty years. Prof. Ewa Łętowska served as Commissioner for Human Rights until 12 February 1992 (the resolution to appoint her was adopted on 19 November 1987 and the Act on Commissioner for Human Rights came into force on 1 January 1988, with the exception of Article 18 par. 2 and Article 27, which came into force upon publication), Prof. Tadeusz Zieliński served from 13 February 1992 to 7 May 1996, Prof. Adam Zieliński served from 8 May 1996 to 30 June 2000, Prof. Andrzej Zoll served from 30 June 2000 to 14 February 2006, Prof. Irena Lipowicz served from 21 July 2010 to 9 September 2015. Only Dr. Janusz Kochanowski was Commissioner for

Human Rights for a period shorter than the constitutional term, due to his tragic death in the Smolensk catastrophe on 10 April 2010.

19. The aforementioned well-established constitutional practice is intended to ensure undisturbed functioning of the constitutional body of the state and is closely linked to the procedure for appointing the Commissioner for Human Rights, autonomously determined by the Sejm on the basis of Article 112 of the Constitution of the Republic of Poland. Pursuant to Article 29 par. 1 of the resolution of the Sejm of the Republic of Poland of 30 July 1992 – Standing Orders of the Sejm of the Republic of Poland (M. P. of 2019, item 1028 as amended), the Sejm appoints the Commissioner for Human Rights. Pursuant to Article 30 par. 1 of the Standing Orders of the Sejm, which in this respect is a repetition of the Act on CHR, the motion to appoint a given person to the position of Commissioner of Human Rights is submitted by the Speaker of the Sejm or at least 35 MPs. The motion is submitted to the Speaker of the Sejm within 30 days before the end of the term of office or within 21 days from the date of dismissal or expiration of the mandate (art. 30 par. 3 points 1-2 of the Standing Orders of the Sejm). Speaker of the Sejm directs the motion to appoint a given person to the position of Commissioner to the competent committee of the Sejm for opinion. Another interested committee may delegate its representatives to the meeting of that committee. The committee presents its opinion on the motion in writing to the Speaker of the Sejm. The Speaker of the Sejm then orders for the print containing the committee's opinion to be delivered to MPs (Article 30 par. 5-7 of the Standing Orders of the Sejm). The Sejm may consider the motion to appoint the Commissioner for Human Rights no earlier than the day after the date of delivery of the print containing the committee's opinion to MPs. The Sejm may, however, in special cases, curtail the proceedings by considering the motion without sending it to the competent committee or by considering the motion on the day of delivery of the print containing the committee's opinion to MPs (Article 30 par. 8 and 9 of the Standing Orders of the Sejm). However, it follows from Article 30 par. 4 of the Standing Orders of the Sejm that a vote on a motion to appoint the Commissioner may not take place earlier than on the seventh day after delivery of the print containing the candidatures to MPs.

20. Sejm's resolution on the appointment of the Commissioner for Human Rights is immediately sent by the Speaker of the Sejm to the Speaker of the Senate (Article 3 par. 3 of the Act on CHR). It follows from Article 3 par. 4 of the Act on the Commissioner for Human Rights, as well as from Article 91 par. 1 point 1 of the resolution of the Senate of the Republic of Poland of 23 November 1990 - Rules and Regulations of the Senate (M. P. of 2018, item 846 as amended) that the Senate expresses its consent to appoint the Commissioner within one month from the date on which the resolution of the Sejm was forwarded to the Senate. Failure to adopt a resolution by the Senate within one month constitutes expression of consent.

21. The procedure for appointing the Commissioner for Human Rights, due to the impossibility of obtaining the parliamentary majority required by law, may be prolonged and, as a consequence, it may not be possible to appoint a new Commissioner before the end of the term of the incumbent Commissioner for Human Rights.

22. Moreover, an analysis of the above mentioned provisions of the Standing Orders of Sejm and Rules and Regulations of Senate indicates that even an efficiently conducted procedure of

appointing the Commissioner, adhering to the deadlines specified in these Regulations, will always lead to the fact that it would be impossible to appoint a new Commissioner before the end of the incumbent Commissioner's term of office. All the more so because the Commissioner must take an oath before the Sejm (Article 4 of the Act on the Commissioner for Civil Rights Protection) prior to commencing his/her duties. Hence, Article 3 par. 6 of the Act on the Commissioner for Human Rights has an obvious rationale, as it not only prevents disruption in the functioning of the constitutional body protecting rights and freedoms, but also ensures that, until a new Commissioner is appointed, those duties are still performed by the person with the strongest legitimacy, coming directly from both chambers of parliament.

23. It should be emphasized that in the doctrine of constitutional law the legal solution challenged by the Petitioners is accepted unambiguously and without any doubts. For example, it is stated that such a solution „precludes a situation in which an office as important as CHR would have no holder". (B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej*. *Komentarz,* Warsaw 2009, p. 909).

24. Contrary to the position presented by the Petitioners, the scope of Article 209, par. 1 of the Constitution of the Republic of Poland and Article 3, par. 6 of the Act on the Commissioner for Human Rights do not overlap. These provisions do not regulate the same matter at the constitutional and statutory level at all. The matter which is regulated by Article 209, par. 1 of the Constitution of the Republic of Poland is included in the Act on the Commissioner for Human Rights in Article 5 par. 1. This provision states that the term of office of the Commissioner for Human Rights is five years, starting from the date of taking the oath before the Sejm. It regulates both the beginning of the term and its duration, setting it at five years. Article 3 par. 6 of the Act on the Commissioner for Human Rights regulates the matter which remains outside the scope of the regulation contained in Article 209 par. 1 of the Constitution of the Republic of Poland. The Constitution does not determine how the constitutional body - in this case the Commissioner for Human Rights - operates if no new Commissioner has been appointed by the Sejm, with the consent of the Senate, before the end of the current Commissioner's term of office. The scope of Article 209 par. 1 of the Constitution of the Republic of Poland and Article 3 par. 6 of the Act on Commissioner for Human Rights are therefore separate and, contrary to the Petitioners' erroneous belief, there is no collision between them.

25. Obvious inadequacy of the control template of Article 209 par. 1 of the Constitution of the Republic of Poland, as invoked by the Petitioners, results in the conclusion that Article 3 par. 6 of the Act on CHR is not inconsistent with Article 209 par. 1 of the Basic Law.

III. Ensuring continuity of operation of constitutional bodies of the state

26. At this point it should be noted that equivalent statutory solutions have also been adopted in relation to other constitutional state bodies, whose holders are appointed through the cooperation of independent bodies of public law. According to Article 205 par. 1 of the Constitution of the Republic of Poland, the President of the Supreme Audit Office is appointed

by the Sejm, with the consent of the Senate, for a 6-year term of office, whereas Article 16 par. 1 of the Act of 23 December 1994 on the Supreme Audit Office (Journal of Laws of 2020, item 1200) stipulates that after the expiration of the term of office, the President of the Supreme Audit Office shall remain in office until the new President of the Supreme Audit Office takes up the position.

27. Such a situation has already occurred several times in the history of the Supreme Audit Office. After the expiration of the constitutionally defined term of office, the duties of the President of the Supreme Audit Office (NIK), were performed until appointment of a new President by, *inter alia*: Janusz Wojciechowski (from 22 June 2001 to 20 July 2001), Mirosław Sekuła (from 21July 2007 to 22 August 2007), Krzysztof Kwiatkowski (from 27 August 2019 to 30 August 2019).

28. In light of Article 227 par. 3 of the Constitution of the Republic of Poland, the President of the National Bank of Poland is appointed by the Sejm, upon the recommendation of the President of the Republic of Poland, for a term of 6 years. However, under Article 9a par. 1 of the Act of 29 August 1997 on the National Bank of Poland (Journal of Laws of 2019, item 1810, as amended), it follows that after the end of the term of office of the President of the NBP due to its expiration, the incumbent President of the NBP shall remain in office until the new President takes up his/her duties.

29. Incidentally, it should be noted that a regulation corresponding to Article 3 par. 6 exists in the act regulating the operation of the second Ombudsman provided for in the Polish Basic Law - next to the CHR - i.e. the Ombudsman for Children (the institution has its constitutional basis in Article 72 par. 4 of the Constitution of the Republic of Poland). The provision of Article 4 par. 6 of the Act of 6 January 2000 on the Ombudsman for Children (Journal of Laws of 2020, item 141) states that the current Ombudsman shall perform his/her duties until the new Ombudsman takes the oath, subject to Article 8 par. 1, i.e. situations in which the Ombudsman for Children is dismissed before the end of his/her term of office (e.g. as a result of resignation or conviction for an intentional crime).

30. In fact, therefore, the motion submitted by a group of MPs was directed not only against the contested Article 3 par. 6 of the Act on Commissioner for Human Rights, but also against the entire system of Polish law in the scope in which it guarantees continuity of the exercise of power by state bodies and, consequently, against the constitutionally expressed principle of ensuring the reliability of the operation of public institutions, as expressed directly in the preamble to the Constitution of the Republic of Poland.

31. In particular, the thrust of the motion was also directed at the relevant provisions of the Act on the Supreme Audit Office and the Act on the National Bank of Poland. Thus, the Petitioners seek to challenge the undisturbed operation of these constitutional bodies, undermining the continuity of their functioning, as there is no doubt that the cited provisions of the Act on the Supreme Audit Office and the Act on the National Bank of Poland, as well as Article 3 par. 6 of the Act on Commissioner for Human Rights, challenged by the Petitioners, are intended to guarantee the continuity of proper operation of constitutional state bodies. Therefore, they are intended to guarantee the undisturbed performance of the constitutional duties by these bodies. The real purpose of these provisions, which provide for the further performance of duties by

persons leading the respective constitutional bodies, is not, after all, to protect the persons performing these functions or to guarantee their rights - as it is described by the Petitioners („the provision of Article 3 par. 6 of the Act on CHR constitutes (...) an entitlement of the incumbent Commissioner", p. 5 of the motion). - but to protect Article 203 and Article 204 of the Constitution of the Republic of Poland in scope relating to the Supreme Audit Office, to protect Article 80 and Article 208 par. 1 of the Constitution of the Republic of Poland in scope relating to the Commissioner for Human Rights, and to protect Article 227 par. 1 of the Constitution of the Republic of Poland in scope relating to the National Bank of Poland. The aforesaid constitutional provisions define the tasks of these bodies which, in the name of the fundamental interest of the state and its citizens, are to be performed without interruption and constitute an axiological rationale for the legal solutions adopted in the discussed scope; in particular, they do not allow the continuous performance of these tasks to be disrupted or even stopped as a result of the failure of other state bodies to reach an agreement on the appointment of a particular person to carry out the functions of a constitutional body.

32. The Petitioners' challenge of the aforementioned legal model, ensuring continuity in the performance of their constitutional functions, may lead to paralysing not only the operation of a particular body, but even to paralysing and destabilizing the entire country - the Republic of Poland. Disallowing the incumbent President of the National Bank of Poland to continue to perform his functions, in the absence of an agreement on the choice of his/her successor, may result in preventing the National Bank of Poland from performing in a normal manner its constitutional functions comprising, as per Article 227 par. 1 of the Constitution of the Republic of Poland, the fact that the National Bank of Poland has the exclusive right to issue money and to determine and implement monetary policy; the National Bank of Poland is also responsible for the value of Polish currency.

33. Such a situation has already occurred several times in the history of the National Bank of Poland. Presidents of NBP who continued to perform their functions after expiration of their constitutionally defined term of office, until the election of a new President, included Prof. Hanna Gronkiewicz - Waltz (from 31 December 2000 to 9 January 2001) and Prof. Marek Belka (from 12 June 2016 to 20 June 2016).

34. An attack on performance of these functions should be viewed as a blow to the heart of the Polish state, or in a more optimistic scenario, as a practical application of the theory of unravelling state institutions, formulated by Professor Andrzej Zybertowicz. In this respect, the motion of 15 September 2020 filed by a group of MPs of the 9th term of the Sejm should be seen as at least surprising, given the wording of the oath that, in accordance with Article 103 par. 1 of the Constitution of the Republic of Poland, each MP must take in front of the Sejm before starting his or her mandate: "I do solemnly swear to perform my duties to the Nation diligently and conscientiously, **to safeguard the sovereignty and interests of the State**, to do all within my power for the prosperity of the Homeland and the well-being of its citizens, and to observe the Constitution and other laws of the Republic of Poland".

35. Additional support in this respect is provided by the content of the preamble to the Constitution of the Republic of Poland of 2 April 1997, which states, among other things, the need to "ensure diligence and efficiency in the work of public bodies". In its judgment of 16

December 2009 (Case No. Kp 5/08), the Constitutional Tribunal noted that “the normative character of the preamble is manifested in various aspects. First of all, it has an interpretative dimension, indicating the manner of understanding both the remaining constitutional provisions, as well as the entire system of Polish law (...).Second, the normative character of the preamble's provisions is related to their use in the process of building constitutional norms, by extracting from them the content elements for the construction of the norm (the so-called “concomitant application situation” (...) Third, the normative significance of the preamble to the Constitution may lie in direct expression of a normative constitutional principle”.

36. In the preamble to the Constitution of the Republic of Poland, the diligence and efficiency of public institutions (including, therefore, the Commissioner for Human Rights) is directly linked to the guarantee and not the restriction of individual rights. (“Desiring to guarantee the rights of the citizens for all time, and to ensure diligence and efficiency in the work of public bodies”). Excluding the incumbent Commissioner for Human Rights from performing his/her duties until the new Commissioner takes office would lead to weakened protection of individual rights. From an individual's perspective, it would mean limiting the possibility of using the means of protection of freedoms and rights set forth in Article 80 of the Constitution of the Republic of Poland (“In accordance with principles specified by statute, everyone shall have the right to apply to the Commissioner for Citizens' Rights for assistance in protection of his freedoms or rights infringed by organs of public authority.”).

37. Moreover, as pointed out by the Constitutional Tribunal in its judgment of 9 March 2016 (case No. K 47/15), and this view also applies to the Commissioner for Human Rights, "the freedom of the legislator regarding the implementation of the requirement to ensure diligence and efficiency of the operation of a public institution is greater with respect to institutions that are still in the process of being established, and the only legal basis for their operation is provided by legislative provisions. In the case of institutions whose existence is provided for in the Constitution of the Republic of Poland and which have been operating at least since its entry into force, the freedom of the legislator to shape their legal basis is much narrower. The legislator, on the one hand, is bound by the principles, norms and constitutional values that determine the position of such an institution in the system of state bodies, as well as the constitutional provisions shaping its organization and principles of operation. On the other hand, the legislator cannot lower the hitherto existing level of diligence and efficiency of a public institution". Deciding, that the incumbent Commissioner for Human Rights cannot perform his/her duties until a new Commissioner has been appointed would constitute such a very decrease in the efficiency and diligence of the Commissioner for Human Rights.

38. The above comments lead to the conclusion that the solution adopted in Article 3, par. 6 of the Act on Commissioner for Human Rights by the legislator (i.e., by the Sejm with the consent of the Senate), and approved by the President by signing the Act, has strong axiological support in the principle of the efficiency of public authorities stemming from the preamble of the Constitution of the Republic of Poland and serves to protect the constitutional rights of the individual (Article 80 of the Constitution of the Republic of Poland) as well as related constitutional tasks of a body safeguarding the law, which is the Commissioner for Human Rights (Article 208, par. 1 of the Constitution of the Republic of Poland).

IV. Ensuring continuity of operation of the human rights protection body in international standards

39. *The Paris Principles* of the United Nations Organization (UN)[1], adopted by General Assembly resolution 48/134 of 20 December 1993, determine the minimum standards that National Human Rights Institutions (NHRI) have to meet in order to operate effectively and independently. In order to clarify the current meaning and scope of the *Paris Principles*, the Sub-Committee on Accreditation (SCA) regularly develops *General Observations*[2], which determine the practice of the Sub-Committee's operation.

40, The Sub-Committee on Accreditation, when assessing NHRI's compliance with the UN *Paris Principles*, takes into account both constitutional provisions and other legal acts related to the NHRI. It is the practice of many European countries that constitutional provisions are very limited and are supplemented by national legislation. It is also a common practice that the provisions governing the transitional period after the end of the term of office of the head of a given national human rights institution (ombudsman, advocate, defender of rights - the names of these bodies vary significantly) is found in laws and not in the Constitution.

41. The UN *Paris Principles* do not contain explicit provisions for a transitional period after the end of the term of office of the head of the NHRI. However, the basic principle governing the selection and appointment of NHRI heads is independence from other public authorities (primarily from the executive) and ensuring the continuity of effective and independent operation of the NHRI. General Observation 2.2 stresses the importance of stability in the mandate of a member of the NHRI decision-making body (such as the Commissioner for Human Rights). Furthermore, the General Observation 2.2. states that terms and conditions of NHRI's service should be equivalent to those with similar responsibilities in other independent State agencies. General Observation 1.1 states, that "the NHRI's role, functions, powers, funding and lines of accountability, as well as the appointment mechanism for, and terms of office of, its members" must be established in a constitutional or legislative text with sufficient detail to ensure the NHRI has a clear mandate and independence. It is in line with the UN *Paris Principles* and SCA practice that, where appropriate, both the relevant constitutional text and the detailed act of law constitute the basic regulation for operation of the NHRI.

42. General Observation 1.8 also refers to basic principles of independence and transparency with regard to selection and appointment of NHRI heads. Importance is emphasized of ensuring "formalisation of a clear, transparent and participatory selection and appointment process of the NHRI's decision-making body in relevant legislation, regulations or binding administrative guidelines, as appropriate". It follows that if such provisions are formalised in national legislation, they must be respected.

43. General Observation 2.1 emphasizes, that "ensuring the security of tenure of NHRI

[1] *The Paris Principles* text is available on UN website https://www.un.org/ruleoflaw/files/PRINCI~5.PDF

[2] *General Observations* are available at: *https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf*

members is consistent with the Paris Principles requirements regarding the composition of the NHRI and its guarantees of independence and pluralism". The above interpretation is applied by SCA during the NHRI accreditation procedure. With regard to the transition period between the end of the term of office and the appointment of a new head of the NHRI, SCA referred to the need to "maintain the continuity and institutional independence" of the national human rights institution. The standards applicable to ombudsmen institutions therefore underline the principle of independence and the need to ensure the continuity of their work in accordance with their legal basis, whether constitutional or statutory.

44. It is a common practice in Europe to have explicit provisions in the NHRI legislation for a transition period between the end of the term of office of the head of NHRI and the beginning of the new head's term. In many cases the head of the NHRI will remain in office until such time as the new head is selected, appointed, or sworn in. Many of these national human rights institutions have been carefully scrutinized by the SCA during the accreditation procedure, which concluded that they are fully in line with the UN Paris Principles (NHRI with the highest status - status A). The SCA is the sole body responsible for assessing the NHRI's compliance with these standards. In 2017 SCA accredited the Commissioner for Human Rights with status A, taking into account, inter alia, the existence of statutory regulations ensuring the continuity of the office's operation, i.e. Article 3 par. 6 of the Act on Commissioner for Human Rights.

V. Ensuring the continuity of the human rights body against the background of comparative law

45. Legal solutions enabling undisturbed operation of national human rights bodies or institutions of the ombudsman (institutions performing functions equivalent to those of the Polish Commissioner for Human Rights) have been adopted and function in legal orders of other European countries as well. The Commissioner for Human Rights would like to present examples from the legislation of other countries regulating this particular issue.

46. In Albania, in accordance with Article 9, par. 1 of the Act on the People's Advocate (Ombudsman), the Parliament shall publish a vacancy notice for this post no later than three months after the end of the term of office [Article 7 of the Act establishes a 5-year term for the People's Advocate]. In such a case, the incumbent People's Advocate shall remain in office until a new Ombudsman is elected.

47. The legislation of the Republic of Azerbaijan provides for a 7-year term of office of the Human Rights Commissioner (Ombudsman) of the Republic of Azerbaijan (Article 4 par. 1 of the Act of 28 December 2001 on the Human Rights Commissioner (Ombudsman) of the Republic of Azerbaijan No 246 -Il KQ)[3]. According to Article 4, par. 3 of this Act, If the new Commissioner is not elected before the day of expiration of term of the previous, the acting Commissioner continues fulfilling his/her functions. In these circumstances the term of the Commissioner is considered to be extended until election of a new Commissioner. It is worth noting that this provision has had a significant practical application. Despite the expiration of

[3] The Act is available on the website of the Human Rights Commissioner (Ombudsman) of the Republic of Azerbaijan: http://www.ombudsman.gov.az/upload/editor/files/Azeri_Constitutional_law_HR_Commissioner_2010_en(1).pdf

her term of office, the incumbent Azerbaijani Human Rights Commissioner, Prof. Elmira Suleymanova, served for additional period of nearly 2 years until the election of a new Commissioner, Dr. Sabina Aliyeva, by Milla Mejlis (Azerbaijani Parliament) on 19 November 2019.

48. In Bosnia and Herzegovina, Article 12 of the Act on the Ombudsman stipulates that an Ombudsman whose term of office has expired shall continue to perform his/her duties until the completion of the procedure for the selection of a new Ombudsman as set out in Article 9 of the Act. In Bulgaria, Article 13 of the Act on the Ombudsman states that the election of the new Ombudsman shall take place no later than two months before the end of the term of office. The incumbent Ombudsman shall perform his/her duties until the date of inauguration of the newly elected Ombudsman.

49. In the Czech Republic, the ombudsman (Defender of Rights), pursuant to § 4 par. 1 of the Act on the Defender of Rights, performs his/her functions after the expiration of his/her term of office until the new Defender of Rights takes the oath.

50. In Denmark, pursuant to Article 1 par. 4 of the Act of 12 June 1996 on the Ombudsman (Act No. 473 as amended)[4], after the end of his/her term the Ombudsman remains in office until the new Ombudsman is elected by the *Folketing* (Parliament of Denmark) and takes up his/her duties. However, the Folketing is obliged to elect a new Ombudsman no later than 6 months after the end of the term of office of the incumbent Ombudsman.

51. In Georgia, Article 7 par. 1 of the Act on the Public Defender of Georgia stipulates that the term of office of the newly elected Public Defender of Georgia starts from the day following the end of the term of office of the incumbent Public Defender of Georgia, if the new Defender was elected before the end of the term of office of the incumbent, or from the day following the day of election of the new Public Defender of Georgia, if he/ she was elected after the end of the term of office of the incumbent. According to Article 9 par. 3 of the Act, the First Deputy Public Defender of Georgia performs the duties of the Public Defender of Georgia until the election of a new Public Defender of Georgia. In this case, the First Deputy is covered by the immunity and legal guarantees of the Public Defender of Georgia. Thus, the Georgian legislation provides for a different mechanism of ensuring continuity of the work of the Office of the Public Defender of Georgia, however, it clearly defines the way of performing the duties of the Public Defender of Georgia after the expiration of the term of office of the current Public Defender of Georgia (the term of office of the Georgian ombudsman is 6 years).

52. A similar solution is envisaged by Latvian legislation. According to Section 5 (3) of the Act on the Ombudsman, the deputy Ombudsman performs the duties, functions and tasks of the Ombudsman - during the period of suspension or termination of the term of office of the incumbent Ombudsman respectively - until a new Ombudsman is elected by the Sejm (Saiema).

53. The Serbian legal system contains a similar legal solution. Article 16 of the Act on Protector of Citizens of the Republic of Serbia (Ombudsman) stipulates that in the event of

[4] The Act is available on the website of the Danish Ombudsman: https://en.ombudsmanden.dk/loven/

termination of the term of office of the current Protector of Citizens, the deputy appointed by him/her shall perform the functions of Protector of Citizens until a new Protector is elected.

54. Also the Act on the Spanish Ombudsman - Defender of the People (*Defensor del Pueblo*) in point 4 of Chapter II provides that in case the office of the Defender of the People becomes vacant, the highest Deputy in the hierarchy of office shall perform the duties of Defender of the People until the election of a new Defender by the Cortes (Spanish Parliament).

55. Another similar solution is provided by the Act on the Office of the Ombudsman of Montenegro. According to Article 14 of this law, the deputy ombudsman shall perform the function of the ombudsman after the end of his/her term of office until a new person is elected for this position. Similar solutions are also provided for in the Republic of Northern Macedonia (Article 5 of the Act on Ombudsman) and Slovenia (Article 17 of the Act on Ombudsman).

56. In Kosovo, Article 13 par. 3 of the Act on the Ombudsman states that the incumbent ombudsman and his/her deputies shall perform their duties until a new ombudsman and his/her deputies are elected.

57. In Lithuania, Article 7 par. 4 of the Act on the Seimas Ombudsman's Office stipulates that the incumbent Seimas Ombudsman shall hold office until a new Seimas Ombudsman is elected.

58. In the Republic of Moldova, according to Article 5 par. 5 of the Act on the People's Advocate (Ombudsman), the People's Advocate holds office until his/her successor takes office. This does not apply only in cases where the former People's Advocate was removed from office, in accordance with Article 14 of said Act, before the end of his/her term. In this respect, therefore, it is a regulation similar to the Polish Act on the Ombudsman for Children.

59. In Portugal the Ombudsman is appointed for a 4-year term. In accordance with Article 6 par. 2 of the Act on the Ombudsman, the incumbent Ombudsman shall hold office after expiration of his term until the new Ombudsman takes office.

60. The legislation of the Russian Federation provides that the Commissioner for Human Rights is elected for a 5-year term of office, beginning on the date of taking the oath. However, under Article 10 of the Act on the Commissioner for Human Rights, this term of office expires on the day the new Commissioner takes the oath. This means that the incumbent Commissioner for Human Rights remains in office until the new Commissioner takes office, even if the period of his/her term of office as defined in the law has already expired.

61. In Romania, Article 8 par. 4 of the Act on the Ombudsman stipulates that the incumbent ombudsman performs his/her functions until the date on which the newly elected ombudsman takes the oath.

62. In Ukraine, the Ukrainian Parliament Commissioner for Human Rights (Ombudsman), in accordance with Article 9 of the Act on the Commissioner, remains in office until the date on which the newly elected Ukrainian Parliament Commissioner for Human Rights takes the oath.

63. The above analysis of the legislation of other countries that have institutions for protection of human rights similar to the Commissioner for Human Rights (it should be noted that e.g. the Federal Republic of Germany or the Republic of Italy do not have a similar institution at national level) shows unequivocally that the vast majority of the legal systems provide for the

continuation of the duties of the incumbent holder of the office (ombudsman) after the expiration of his/her constitutional or statutory term. In some countries, in order to achieve the goal of ensuring the continuity of the institution's operation - and thus to ensure effective protection of human rights - the function of the ombudsman is to be performed by a deputy until the new ombudsman takes office. Thus, in every case there are legal mechanisms ensuring the continuity of operation of the institution safeguarding human rights, important for a democratic state, after the end of term. Therefore, repealing Article 3 par. 6 of the Act on CHR, challenged by the Petitioners, in absence of another positive legal solution to ensure continuity of operation of the CHR office, will constitute a negative exception on a European scale.

Wherefore, in view of all of the above, and in view of the need to ensure effective protection of rights and freedoms in the Republic of Poland, I hereby submit as first above written.

Adam Bodnar