

**Motion to the Polish Constitutional Court  
concerning interim powers of the Ombudsman**

MEMORANDUM

6 October 2020

**Background information**

On 9 September 2020, the 5-years term of the current Polish Ombudsman (*Rzecznik Praw Obywatelskich*, Commissioner for Human Rights) Adam Bodnar, has ended. Although the appointment procedure has started, the Parliament did not select a new person for this position. Thus, following the well-established practice and article 3.6 of the Ombudsman Law, Adam Bodnar stays in the office as an acting Ombudsman until the appointment of the new one. Pursuant to article 3.1 of the Ombudsman Law, the Ombudsman is appointed by the Sejm with prior approval of the Senate upon motion of the Marshal of the Sejm or a group of 35 deputies. The ruling majority does not have a majority in the Senate, therefore the appointment requires a compromise with the opposition.

**The motion for abstract control to the Constitutional Court**

On 17 September 2020 the group of Polish MPs affiliated with the ruling party, Law and Justice, lodged an abstract motion to the Constitutional Court stating the unconstitutionality of article 3.6 of the Ombudsman Law: *'The current Ombudsman performs his duties until the new Ombudsman takes up his position'*

Parliamentary deputies argue that remaining in the position of the Ombudsman after the expiry of the 5-years term of office specified in the Constitution is inconsistent with:

- Article 2 of the Constitution (principle of a democratic state ruled by the law, the principle of the protection of legitimate expectations);
- Article 209.1 of the Constitution (specifying the term of office of the Ombudsman).

They claim that this provision has not been amended after the 1997 Constitution entered into force and the actual duration of the term of office of the Ombudsman goes beyond the 5-years term of office provided for in the Polish Constitution; it violates the prohibition of creating a law that would introduce so-called *deceptive legal institutions*. Moreover, in their view the Constitution does not provide or the possibility of specifying the length of the Ombudsman's term of office by means of a legislative act and does not state *expressive verbis* the need to ensure the continuity of the Ombudsman's work. Therefore, the Ombudsman, performing his duties beyond the constitutional term of office, acts not as a constitutional body, but as a *falsus procurator*, exposing citizens to unforeseeable negative effects; this provision leads to a violation of the dignity of the office.

## **Hearing before the Polish Constitutional Court**

The hearing before the Constitutional Court to review the motion of the parliamentary deputies has been already scheduled. It will take place on 20 October 2020 (No. of the case K 20/20). Taking into account previous practice of the Court, the judgment will be announced on the same date, just after the hearing. The judicial panel to review the case is composed of 5 judges: Julia Przyłębska (President of the Constitutional Court), Stanisław Piotrowicz (judge-rapporteur, former president of the Sejm Committee on Justice and Human Rights), Justyn Piskorski (so-called “double judge”), Rafał Wojciechowski and Wojciech Sych. All the judges have been nominated to the Court between 2015 and 2019.

The Ombudsman took the advantage of joining the case before the Constitutional Court. On 30 September 2020 the Ombudsman presented its position, claiming that Article 3.6 of the Ombudsman Law is in compliance with the Constitution.

The Ombudsman requested OSCE ODIHR to prepare a comprehensive, comparative legal opinion on the matter. The opinion will be ready on 15 October 2020. The Ombudsman is also in contact with different international bodies, such as the CoE, FRA, OHCHR, European Network of National Human Rights Institutions and International Ombudsman Institute. They are currently considering different forms of taking the position in the case.

## **Legal assessment of the case by the Ombudsman**

Selection and appointment rules, such as art. 3.6 of the Ombudsman Law, are aiming to ensure continuity of the institution and independence from government. It is the responsibility of the appointing authorities (including Sejm and Senate) to ensure a proper and timely appointment of the new Ombudsman. According to different *soft law* instruments such arrangements should be in place so that the post of the head of any National Human Rights Institution institution does not stay vacant for any significant period of time.

Since 2015 due to the unconstitutional changes, the judicial and legal status of three members of the Constitutional Court is questionable (so-called “double judges”). The adjudicating panel in this case includes one person which, in the light of the above, is not entitled to adjudicate in the Constitutional Court. However, despite the motion to exclude Justyn Piskorski to be submitted by the Ombudsman, most probably he will be part of the judicial panel.

The principle of continuity of holding the office is a well-known practice within the Polish legal system also for other constitutional entities’ work (i.a. the Children Ombudsman, President of the Supreme Audit Office, President of the Polish National Bank) and until now its constitutionality was not challenged. There were situations in the past when the Ombudsman was serving even more than 7 months after the expiry of the term (e.g. Andrzej Zoll who waited for replacement by Janusz Kochanowski).

In the opinion of the Ombudsman, the judgment of the Constitutional Court may have far-reaching consequences. Declaring the provision unconstitutional means that Adam Bodnar will

not have a legal basis to perform as the Ombudsman. Due to the publication of the judgment in the Official Journal, there will be no legal basis for the Ombudsman to perform any longer in the position.

The question is whether the Deputy Ombudsman will be able to still hold the office and to continue the work of the Office. This situation may also affect daily activities of the Ombudsman office. It is possible that all letters, opinions, applications (including motions and pleadings submitted in judicial proceedings) would be declared by other state institutions as invalid.

In a second step, it is possible that after the Constitutional Court judgment, the Ombudsman Law would be amended in such a way as to enable the ruling majority to appoint a person *acting* as the Commissioner, even if the Constitution does not foresee such a position (e.g. such person would be indicated by the President of the Republic). Most probably such regulation would aim to exclude the Senate from the procedure of appointing the new Ombudsman.

Please note that the Ombudsman in Poland is performing different additional functions, which might be important for international institutions. It is “equality body” under the EU Anti-Discrimination Directives, monitoring body under the UN CRPD and the National Preventive Mechanism under OPCAT.

### **Political background**

On 10 August 2020 the deadline to submit candidates for the new Ombudsman expired. The ruling majority did not indicate any candidate - most probably due to internal tensions within the camp. On this date, only the opposition submitted the candidate – Ms. Zuzanna Rudzińska-Bluszcz. She has support of almost whole parliamentary opposition and more than 800 NGOs. However, Sejm did not make a voting on her candidacy yet. It seems that the ruling majority does not want to wait for rejection of the candidacy and then start of the new procedure. The motion to the Constitutional Court and later possible amendment of the Ombudsman Law seems to be like a “shortcut” to fill-in the Ombudsman position, to decrease its status and to by-pass the Senate in the process of nomination of the new Ombudsman.