

OSCE/ODIHR Submission of Information about an OSCE Participating State or Partner for Co-operation under Consideration in the Universal Periodic Review Process

Participating State: Poland

UPR Working Group Session and Date of Review: 41st Session, 7-18 November 2022

Background

1. Poland has been a participating State in the Organization for Security and Co-operation in Europe (OSCE) since 1973 and has thus undertaken and recently reaffirmed a wide range of political commitments in the “human dimension” of security as outlined in relevant OSCE Documents.¹
2. The OSCE Office for Democratic Institutions and Human Rights (ODIHR) has been mandated by OSCE participating States, including Poland, to assist them in implementing their human dimension commitments. ODIHR assistance includes election observation and assessment activities as well as monitoring and providing assessments, advice and recommendations relating to implementation of commitments in the fields of human rights, democracy, tolerance and non-discrimination, and the situation of Roma and Sinti in the OSCE area.
3. The present submission provides publicly available country-specific information that may assist participants in the Universal Periodic Review process in assessing the situation in Poland and its implementation of past recommendations, as well as to formulate new recommendations that may be relevant to enhancing the enjoyment of human rights and fundamental freedoms in Poland.

Legislation reviewed by ODIHR

4. Upon request by authorities of an OSCE participating State, OSCE field operations or OSCE institutions, ODIHR reviews draft or enacted legislation of OSCE participating States on topics relating to the human dimension of security for its conformity with OSCE commitments and other international standards.² In 2016-2022, the following relevant legal opinions (on topics other than elections) were issued on legislation or draft legislation of Poland. Due to the high number of opinions and word limit of this submission, only the most important concerns are mentioned.

Reform of the judiciary:

Reform of the National Council of the Judiciary (NCJ)

¹ OSCE Office for Democratic Institutions and Human Rights, *Compendium of OSCE Human Dimension Commitments: Volume 1, Thematic Compilation (third edition)*, <http://www.osce.org/odihr/elections/76894> and *Compendium of OSCE Human Dimension Commitments: Volume 2, Chronological Compilation (third edition)*, 2011, <http://www.osce.org/odihr/76895>; OSCE Summit Meeting, Astana 2010, *Astana Commemorative Declaration: Toward a Security Community*, 3 December 2010, <http://www.osce.org/cio/74985?download=true>.

² The legal reviews and opinions, often produced in co-operation with the Council of Europe’s Commission for Democracy through Law (Venice Commission), are available at www.legislationline.org. Basic information about the constitutional system and human dimension-related legislation of Poland is also available in English on www.legislationline.org.

5. In two opinions published in May and November 2017,³ ODIHR reviewed the proposed amendments to the Act on the NCJ regarding the system of appointments of the NCJ members, later adopted in December 2017. They provide the legislature, rather than the judiciary, the power to appoint the 15 judge-representatives to the NCJ. Thus, 23 of the 25 NCJ members are now appointed by the Polish executive or legislature or are members thereof. ODIHR concluded that this allows legislative and executive powers to exercise decisive influence over the process of appointing the judicial members of the NCJ (and NCJ's composition in general) and, indirectly, the process of judicial appointments made by the NCJ, thus jeopardizing the NCJ's independence and judicial independence in general. Both the European Court of Human Rights and the Court of Justice of the European Union (CJEU) have raised similar concerns.⁴ ODIHR thereby reiterates its recommendation:

- to reconsider the amendments adopted in 2017 entirely and ensure that the judicial members of the NCJ are appointed by the judiciary.

Reform of the Supreme Court of Poland

6. In its 2017 and 2019 opinions on the reform of the Supreme Court,⁵ ODIHR questioned the re-structuring of the Supreme Court and establishment of two new Chambers: an “Extraordinary Control and Public Affairs” and a Disciplinary Chamber. ODIHR noted in particular that all the judges of these chambers were appointed at the same time upon the selection by the newly formed NCJ whose lack of independence raises concern, this again raises concern regarding these Chambers’ independence and impartiality and that of its sitting members. Such concerns are shared by the European Court of Human Rights and the European Court of Justice (ECJ).⁶ ODIHR thereby reiterates its recommendation:

- to reconsider the amendments adopted in 2017 entirely which resulted in re-structuring of the Supreme Court and establishing Extraordinary Control and Public Affairs and Disciplinary Chamber, with a view to ensure genuine independence of the judicial bodies.

Reform of Disciplinary Rules and Procedure against Judges

7. In its 2017 opinions on judicial reform, ODIHR raised serious concerns regarding the provisions envisioning the executive power’s involvement in disciplinary proceedings against judges, as reiterated in its *Urgent Interim Opinion on the Bill amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019)*.⁷ As noted by ODIHR, the proposed Bill,

³ OSCE/ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland, 5 May 2017; and ODIHR Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017), 13 November 2017, Section 7.

⁴ European Court of Human Rights, *Reczkowicz v. Poland*, 43447/19, judgment of 22 July 2021. See CJEU, Judgment of 15 July 2021 in *Commission v. Poland (Disciplinary regime for judges)*, C-791/19.

⁵ OSCE/ODIHR Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017), 13 November 2017; and ODIHR Urgent Interim Opinion on the Bill amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019), 14 January 2020.

⁶ European Court of Human Rights, *Dolińska-Ficek and Ozimek v. Poland*, 49868/19, judgment of 8 November 2021, where the Court also found that the process of appointment of the Extraordinary Control and Public Affairs Chamber’s judges was “unduly influenced by the legislative and executive powers” and “was itself incompatible with Article 6 § 1 of the Convention”; and regarding the Disciplinary Chamber, *Reczkowicz v. Poland*, 43447/19, judgment of 22 July 2021. See also Court of Justice of the European Union, Judgment of 6 October 2021, C-487/19.

⁷ OSCE/ODIHR Urgent Interim Opinion on the Bill amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019), 14 January 2020.

finally adopted on 23 January 2020, is inherently incompatible with international standards on judicial independence. ODIHR therefore reiterates its key recommendations:

- reconsider entirely the prerogatives given to the executive in the disciplinary procedure against judges, which are not in line with the principles of judicial independence and of the separation of powers;
- remove the provisions preventing judges or courts from questioning the powers of state bodies, including the review of the validity of judicial appointments and those imposing disciplinary liability for judges in such cases;
- ensure that no provision of the legal framework on the judiciary as amended should be worded or interpreted as excluding or limiting the discretion of Polish courts of any instance from requesting a preliminary ruling from the CJEU should they consider it necessary;
- remove provisions that introduce a new ground of disciplinary liability for judges in case of “*public activities that are incompatible with the principles of judicial independence and the impartiality of judges*” and more generally remove new substantive disciplinary grounds that are too vague, imprecise and/or broadly-worded;
- not entrust the responsibility for lifting immunity of judges to the Supreme Court Disciplinary Chamber.

Absolute Prohibition of Torture

8. In its *Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation*⁸ (22 May 2018), ODIHR recommended:

- to amend the definition of torture to ensure that it is broad enough to encompass all acts against a person’s integrity that have been qualified as torture and other ill-treatment under international law, and to include all the elements envisaged by Article 1 of the UN Convention against Torture; and
- to ensure that relevant legislation expands on the State’s full responsibility for all acts of torture committed in any territory under its jurisdiction, when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Participation of persons with disabilities in political and public life

9. In its *Opinion on the Legal Framework Governing Participation of Persons with Disabilities in Political and Public Life in Poland* (20 December 2020),⁹ ODIHR made the following key recommendations:

- repeal existing discriminatory provisions across the legislation allowing for the deprivation of legal capacity of persons with disabilities, to comply with the Convention on the Rights of Persons with Disabilities; and
- enable the full realization of freedoms of assembly and association by amending applicable laws to ensure persons with disabilities can organize assemblies and found and join associations since currently only persons with full legal capacity

⁸ OSCE/ODIHR Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation, 22 May 2018.

⁹ OSCE/ODIHR Opinion on the Legal Framework Governing Participation of Persons with Disabilities in Political and Public Life in Poland, 12 December 2020.

have such rights.

International Protection and Asylum

10. In its *Urgent Opinion on Draft Amendments to the Aliens Act, and the Act on Granting Protection to Aliens on the Territory of the Republic of Poland* (10 September 2021),¹⁰ ODIHR concluded that the Draft Act, now adopted, unjustifiably restricts the possibility of seeking international protection and asylum. ODIHR recommended in particular:
- to reconsider the proposed administrative procedure since it fails to provide the requisite safeguards and guarantees, including due to limiting grounds for requesting international protection and the lack of individual risk assessment of the cases that persons present to border guards, thus potentially leading to a violation of the obligation to prevent indirect *non-refoulement*; and
 - to ensure that existing provisions do not allow forced expulsion by executive order that may also lead to collective expulsion based on a written protocol which merely documents the illegal crossing of the person onto the territory of Poland.

Mandate of the Commissioner for Human Rights, and Media Freedom

11. In its *Urgent Opinion on the Effect of Legislative Acts Introducing a State of Emergency on the Mandate of the Commissioner for Human Rights* (HRC) (15 November 2021),¹¹ ODIHR reviewed the legal acts introducing a state of emergency in two Polish provinces. When the state of emergency ended, amendments to the Law on Protection of the National Border were adopted,¹² which introduced the possibility for the Minister of Interior to impose restrictions that closely mirror the provisions reviewed by ODIHR, in particular those prohibiting presence and free movement in restricted areas. Therefore, ODIHR's key recommendations remain relevant:
- revise the state of emergency related regulations to ensure that the mandate of the HRC is unhindered throughout the period of state of emergency and beyond, in order to monitor, record, react to, and report on blatant human rights violations, ensuring HRC's full and unhindered access to persons deprived of their liberty, and that persons seeking international protection have the possibility to appeal to the HRC;
 - review all existing provisions which may allow for a complete ban of the media in restricted areas and instead consider providing regulated access based on objective criteria, and clear and transparent procedures.

Election-related activities

Parliamentary Elections, 13 October 2019

¹⁰ OSCE/ODIHR [Urgent Opinion on Draft Amendments to the Aliens Act, and the Act on Granting Protection to Aliens on the Territory of the Republic of Poland](#), 10 September 2021.

¹¹ [Urgent Opinion on the Effect of Legislative Acts Introducing a State of Emergency on the Mandate of the Commissioner for Human Rights](#), 15 November 2021.

¹² [Law on Protection of the National Border](#) (in Polish).

12. Based on a Needs Assessment Mission (NAM) held in July 2019, ODIHR recommended the deployment of a Limited Election Observation Mission (LEOM). The Statement of Preliminary Findings and Conclusions of the LEOM to the 2019 Parliamentary elections, issued on 14 October, concluded that the elections “were prepared well, but media bias and intolerant rhetoric in the campaign were of significant concern. While all candidates were able to campaign freely, senior state officials used publicly funded events for campaign messaging. The dominance of the ruling party in public media further amplified its advantage. Election Day was orderly, although secrecy of the vote was not always enforced. Timely publication of preliminary results ensured transparency”.¹³ The final report of the LEOM made 25 recommendations of which the following selection is of particular importance:¹⁴
- review the legal framework to ensure the independence and impartiality of electoral institutions including the National Election Commission (NEC);
 - take measures to separate government administration and party campaigning, including by amending legislation to adequately define and regulate campaigning by public officials, and to explicitly prohibit the abuse of state resources in election campaigns;
 - revise relevant legislation, including the criminal code, to provide for clear mechanisms for authorities to prevent and counter instances of hate speech;
 - ensure that the public broadcasters present all parties in an impartial and objective manner;
 - repeal all provisions that envisage the criminal prosecution of defamation, libel, insult and slander in favour of civil sanctions;
 - amend the Election Code to include legal requirements for equitable, balanced and impartial coverage of the campaign in public media;
 - remove all restrictions on the electoral rights of persons with intellectual or psychosocial disabilities.

Presidential Election, 28 June and 12 July 2020

13. The constitutionally mandated election coincided with the outbreak of the COVID-19 pandemic and was rescheduled from 10 May 2020 due to this. As none of the candidates achieved the required number of votes to be elected in the first round, a second round was held on 12 July. The Statement of Preliminary Findings and Conclusions of the Special Election Assessment Mission (SEAM) to the 2020 presidential elections, which was issued on 29 June, concluded that the election “was administered professionally despite the legal uncertainty during the electoral process”. After the second round, the Statement of Preliminary Findings and Conclusions issued on 13 July concluded that “the second round of the Polish presidential election was well managed despite gaps in regulation of important aspects”.
14. The decision to continue with the holding of the election necessitated legal and practical adjustments (see below ODIHR opinions on Polish Presidential Election).
15. Before both rounds of the election, the campaign was characterized by negative and intolerant rhetoric further polarizing an already adversarial political environment. In an evidently polarized and biased media landscape, the public broadcaster failed to ensure balanced and impartial coverage, and rather served as a campaign tool for the incumbent.

¹³ [ODIHR LEOM Final Report for the 13 October 2019 Parliamentary Elections](#).

¹⁴ In paragraph 25 of the 1999 OSCE Istanbul Document, OSCE participating States committed themselves “to follow up promptly the ODIHR’s election assessment and recommendations”. See also the ODIHR Electoral Recommendations Database.

Inexpedient timeframes for processing complaints and appeals inhibited the means of legal redress between the two rounds.¹⁵

16. The final report of the SEAM made 27 recommendations of which the six below were considered a priority:
 - ensure that any changes to the electoral legislation, including under emergencies, are formulated and adopted well in advance, as a result of an open process allowing sufficient time for a meaningful public debate and ensuring the principle of stability of law;
 - amend legislation to define and regulate campaigning by public officials, and to explicitly prohibit the abuse of state resources;
 - ensure that the management of the public broadcaster is selected through a transparent, competitive process and that legal safeguards for its financial sustainability and autonomy are enacted;
 - establish an independent oversight body with adequate powers to expeditiously redress campaign finance-related complaints and enforce sanctions;
 - legally guarantee the independence of the National Broadcasting Council and require the authority to actively monitor the broadcast media;
 - review the Election Code to provide for an effective remedy regarding complaints challenging the election results after the first round.

17. Before the presidential election, ODIHR also received two requests from the HRC to review proposed special rules for conducting the presidential election. Both opinions emphasized that amendments to the electoral legal framework should be adopted through a public and inclusive process that respects the principles of legality and the rule of law, allows for a meaningful discussion and facilitates consensus of the key stakeholders. The *Opinion on the Draft Act On Special Rules For Conducting The General Election Of The President Of The Republic Of Poland ordered in 2020 (Senate Paper No. 99) (27 April 2020)*¹⁶ noted, “the Draft Act requires substantial improvements to be aligned with OSCE commitments and other international standards for democratic elections”. In particular, ODIHR made the following key recommendations:
 - adopt amendments to electoral legal framework well in advance of the election to preserve legal certainty and to allow sufficient time for administrative preparations and voter education;
 - reconsider the provision allowing the Marshal of the Sejm to change the election date;
 - retain with the NEC the competencies assigned by the Draft Act to the Minister of State Assets;
 - clearly provide for observation of activities of municipal Precinct Electoral Commissions (PEC) by proxies and citizen observers and to consider providing them with personal protection equipment.

18. In the *Opinion On The Draft Act On Special Rules For The Organisation Of The General Election Of The President Of The Republic Of Poland Ordered In 2020 With The*

¹⁵ The full ODIHR SEAM final report for the 28 June and 12 July 2020 presidential election.

¹⁶ [OSCE/ODIHR legal opinion on the Opinion on the Draft Act On Special Rules For Conducting The General Election Of The President Of The Republic Of Poland ordered in 2020 \(Senate Paper No. 99\), 27 April 2020.](#)

Possibility Of Postal Voting (Senate Paper No. 118) (29 May 2020),¹⁷ ODIHR made the following key recommendations:

- ensure that any decision to cancel in-person voting is taken by the NEC, sufficiently in advance of election day to enable proper implementation of postal voting;
- establish an early deadline for issuing public health guidelines applicable to the electoral process;
- reconsider provisions allowing the Marshal (speaker) of the Sejm to set and change electoral deadlines;
- consider retaining the judicial composition of District Election Commissions (DECs) that is provided for by the Election Code;
- reconsider the proposed reduction of the minimum number of PEC members;
- ensure that electoral committees registered to contest the newly scheduled presidential election are subject to the regular campaign spending limits envisaged by the Election Code;
- ensure that the new timeline for the 2020 presidential election allows for a comprehensive voter information campaign, including information about the new voting arrangements and the protective measures introduced in polling stations;
- ensure that the deadlines for electoral dispute resolution are not shortened unreasonably.

Tolerance and non-discrimination issues

19. OSCE participating States have made a number of commitments to promote tolerance and non-discrimination and specifically to combat hate crime, and ODIHR supports states in their implementation of those commitments. In this context, ODIHR produces an annual report on hate crime¹⁸ to highlight the prevalence of hate crimes and good practices that participating States and civil society have adopted to tackle them. ODIHR also helps participating States design and draft legislation that effectively addresses hate crimes; provides training that builds the capacity of participating States' criminal justice systems and the law-enforcement officials, prosecutors and judges that staff them; raises awareness of hate crimes among governmental officials, civil society and international organizations; and supports the efforts of civil society to monitor and report hate crimes.
20. In respect of the 2020 Hate Crime Report,¹⁹ ODIHR recognized Poland's past efforts in training police on hate crimes through ODIHR's TAHCLE programme and in reporting annual hate crime data to ODIHR. However, based on the available information, it also observes that Poland's hate crime recording and statistics do not sufficiently distinguish hate crimes from other crimes. In addition, ODIHR observed that Poland would benefit from reviewing its existing legal framework in order to ensure that bias motivations can be effectively acknowledged and appropriate penalties can be imposed on the perpetrators.

¹⁷ OSCE/ODIHR Opinion on The Draft Act On Special Rules For The Organisation of The General Election of The President of The Republic of Poland Ordered In 2020 With The Possibility Of Postal Voting (Senate Paper No. 118), 29 May 2020.

¹⁸ <http://hatecrime.osce.org>.

¹⁹ 2020 Hate Crime Report - Poland, 16 November 2021. Only the 2020 report is referenced for this reporting period as the range of reported issues has been expanded and previous reports are not directly comparable. The full list of Main and Complementary key recommendations (KO) is available [here](#). Pre 2020 KOs on hate crime data are available [here](#).