

ODIHR HCNM Handbook on Observing and Promoting the Participation of National Minorities in the Electoral Process

**Taking Stock of Recent Developments in
the Normative Policy Fields and EOMS
across the OSCE region**

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Abstract

This article provides an overview of the *ODIHR HCNM Handbook on Observing and Promoting the Participation of National Minorities in the Electoral Process*. It includes a brief but important discussion of some recurrent issues that have been identified in election observation across the OSCE region with respect to national minority participation. These findings informed the drafting of the *Handbook*, which, however, due to its format, does not provide illustrations of particular situations. Thus, this article complements the *Handbook* by providing references to the concrete examples from the OSCE area.

Keywords

national minorities – election observation – electoral systems – right to vote – right to stand for office

i. Introduction

In 2001, the Office for Democratic Institutions and Human Rights of the Organisation for Security and Co-operation in Europe (OSCE ODIHR) published “Guidelines to Assist National Minority Participation in the Electoral Process” (2001 Guidelines). Its main objective was, by explaining the advantages and disadvantages of available options, to give OSCE participating states advice on how they can implement the Lund Recommendations on the Effective Participation of National Minorities in Public Life (Lund Recommendations) with respect to electoral processes.

The *Handbook on Observing and Promoting the Participation of National Minorities in the Electoral Process* that was published in September 2014 was much anticipated for two reasons. First, there was a need to take stock of recent developments in normative and policy fields. Second, the publication presented an opportunity to provide up-to-date guidance on ODIHR methodology on observing national minority participation.

Election observation is not only about the observation of elections as such; it is also about fostering change in areas where improvement may be necessary. In line with this thinking, the new publication puts more emphasis on the link between observing electoral processes and promoting participation of national minorities.

This article has a twofold aim: it gives an overview of the publication, and it includes a brief but important discussion of some recurrent issues concerning national minority participation that have been identified by ODIHR election observation missions (EOMs), via election observation across the OSCE region. These findings informed the drafting of the *Handbook*, which, however, due to its format does not provide illustrations of particular situations. Thus, this article complements the *Handbook* by providing references to concrete examples from the OSCE area. (These examples can usually be found in the footnotes.)

ii. Structure of the Handbook

The *Handbook* contains four chapters. The first chapter introduces relevant OSCE commitments and other applicable international and regional standards on the participation of national minorities in electoral processes. The two chapters that follow are based on the relevant four Lund recommendations related to participation of national minorities in the electoral processes. Chapter 2 considers fundamental civil and political rights that are relevant to the participation of national minorities in electoral processes. Chapter 3 discusses:

(1) the impact of different electoral systems, (2) options that exist in these systems to enhance minority participation, (3) special measures that can be taken either to ensure representation of national minorities when less intrusive instruments fail or to rectify particularly egregious cases of non-representation due to discrimination or other

factors. The *Handbook* concludes with a chapter that outlines the methodology used by ODIHR election-observation missions (EOMS). This practical part is aimed primarily at election observers who observe elections in the OSCE region.

The *Handbook* builds on the 2001 Guidelines by including new material on the development of international standards and jurisprudence. It is also informed by the new HCNM thematic recommendations that were issued since 2001, especially the Ljubljana Guidelines on Integration of Diverse Societies (2012).

1. Approach

The *Handbook* espouses a holistic approach to national minority participation in public life, echoing the *Ljubljana Guidelines on Integration of Diverse Societies*, which calls upon participating states to achieve not only formal representation of minorities in public life but also to render their participation meaningful in terms of voice, influence and inclusion. This is important for electoral processes, especially if a country opts to introduce special measures. Over and over again, one sees, across the OSCE region, that special mechanisms – even those that at face value should facilitate minority representation – do not always result in giving minorities either a full voice or meaningful influence over the issues that concern them, and do not always allow minorities to participate on an equal footing in the broader political deliberations in society.

The essence of this holistic approach to national minority participation, and its advantages in contrast to an approach that relies on special mechanisms, will now be further explained.

A number of OSCE participating states use special measures. These may include mandatory minority quotas on party lists, separate national minority voting lists (effectively a variation of a reserved-lists system) and even special mechanisms of appointment of minority representatives to the parliament. However, these mechanisms are not ideal. They each have advantages and disadvantages that depend on political context and the particular situation of a specific minority. Their impact on genuine inclusion should be considered, as they may result in symbolic representation, in the “compartmentalisation” of ethnic politics or in the displacement of minority issues to the margins of political life. Some of these mechanisms significantly decrease the electoral base of minority parties and force minority voters to make an often-difficult choice between ethnic votes and national votes. Yet in other cases, such arrangements can have an adverse effect on representation of some minority groups that might have benefited from a more equitable electoral system and/or from other special measures that are more responsive to minority needs.

Such “low performance” of some instruments that are designed to help national minorities undermines the trust of national minorities in electoral and wider political processes.

What is often missing in designing special measures (taking into consideration their necessity and proportionality) is an assessment of how such measures correspond with the overarching principle of inclusion. A well-known HCNM position is that the representation of minorities is better served when the public interest is aligned with the long-term objective of inclusiveness. This vision reflects the ideal of an integrated society, in which minorities are members of or vote for parties that are not exclusively organized on ethnic lines and are sensitive to and supportive of their concerns, thus allowing representatives of national minorities to partake in all aspects of public life.

The principle of inclusion also requires that states adopt specific, targeted policies to ensure that everyone has adequate opportunities to effectively participate in democratic decision-making. As part of this, states should

strive for adequate representation of the diverse groups – including national minorities – in all relevant public administration and decision-making bodies, including elected bodies. The broader aim of building an inclusive society should act as a guiding principle when such measures are designed (and when they are assessed). Any special measure should be used sparingly and as a last resort when other measures prove not to work.

Special measures can be part of the toolbox of specific and targeted policies which are discussed at length in the *Handbook* in relation to minorities' participation in the electoral process. Often, however, these measures are neither effective enough nor inclusive enough.

States and other actors in the electoral system should also be more attuned to the use of various elements that are available in their electoral systems to make minority-sensitive adjustments where possible and needed. If done with the principle of inclusion in mind, such investments will pay off by bringing about a tangible and lasting positive effect on the participation of national minorities in electoral processes. For example, political parties could consider ways to identify minority representatives, particularly women, through dialogue with local communities. Or they might promote nominations from national minorities on candidate lists and thereby encourage their participation in party structures. They can also include in their political platforms local issues that would resonate with national minorities. The HCNM supports this approach.

Last, but not least, in order to be adequate, the representation need not be mathematically proportional; it should instead aim to reflect the composition of society. Care should be taken to ensure that numerically small groups also have opportunities to participate effectively. However, as argued above, effective representation cannot be achieved only through participation of national minorities in the electoral processes and their representation in elected bodies. If it is to be effective, the inclusion policy should permeate all spheres of public life.

2. Some Examples of Issues Dealt with in the Handbook and Relevant Aspects of the Situation in the OSCE Region

A. Electoral Systems

As is widely known, there are no international standards on election systems. The choice of an electoral system is considered to be a sovereign decision of each state. The trivialisized formula is that within the OSCE region, all electoral systems are acceptable so long as they comply with OSCE commitments. However, it should be acknowledged that the choice of an electoral system is fundamentally an outcome of a political process and that resulting choices are hardly neutral. A democratic electoral system should allow an open, inclusive and transparent process that involves a wide array of election stakeholders, including minorities. Such an inclusive process is of paramount importance to ensure meaningful representation of minorities in elected posts and the discussion of different options. Ultimately, as mentioned above, democratic states should strive to adopt an election system that is aimed at the most representative and inclusive government possible. This is especially important for national minorities, who might not otherwise have adequate representation, voice and influence, even in objective, numerical terms. This is why, for the success of minority participation, it is extremely important that national minority concerns are accommodated within a particular national electoral system.

The extent to which an electoral-system design might impact national- minority representation depends greatly on country-specific context. The *Handbook* provides a discussion of three main categories of electoral systems:

(1) majoritarian systems of representation, which are characterized by competition between individuals; (2) proportional systems, which are characterized by competition between political parties represented by lists of candidates; and (3) mixed systems, known as parallel or mixed-member systems. The choice of these models always has an impact on the representation of minorities, although this impact will differ with context, as discussed earlier in this article.

To equip a policy-maker or an election observer, the *Handbook* discusses various elements of systems that produce different results on minorities and majorities depending on the size of national minority communities and their geographic concentration or dispersal. One important element that influences the dynamic of participation is the degree of integration of society. Often the degree of integration determines not only the degree of political inclusion but also the political or electoral strategies that are pursued by different minority groups. Moreover, the degree of integration may change over time, which would require a built-in adjustment mechanism to allow the fine-tuning of some specific elements of an electoral system or the abolition or introduction of special measures.

Specific elements of electoral systems that facilitate minority participation should be clearly differentiated from special measures for persons who belong to national minorities. Although they have the same goal, they work differently, as specific elements that facilitate participation of national minorities do not introduce exceptions from the rules concerning the functioning of the general electoral system. Since these elements of electoral systems are applied to all equally, they are less intrusive and less rigid. The experience of election observation shows that participation of national minorities in electoral processes can easily be fostered by adjusting specific elements of electoral systems; however, such mechanisms are still under-used across the OSCE region. The *Handbook* encourages policy-makers to look into such options.

Specific elements may include:

a) Low thresholds

An essential condition for this specific measure is that one or several minority parties actually pass it. However, the effect can differ with context. If a number of seats allocated to eligible political parties is determined at the national level, the system will indeed ensure representation that is proportional to the votes cast both for national minorities and other parties. In other words, representation will not depend on geographic concentration. If regional thresholds are applied countrywide, these can adversely impact the representation of minority parties at the national level. However, mathematical thresholds that are too tight can effectively prevent national minorities from gaining adequate representation—even in situations where the legal threshold is sufficiently low. Election observation shows that, in many OSCE countries, such thresholds are set increasingly high and are not attainable for minority parties. Other not-so-visible restrictions include, for example, high thresholds for the collection of signatures to register a candidate.

b) Preferential Voting

Electoral systems that provide the possibility of preferential voting, such as alternative-vote (av) or single-transferable-vote (STV) systems, enable voters to indicate how they would vote if their preferred candidate lost by indicating second, third and subsequent choices. These systems are usually more inclined to accommodate minority interests. However, they can be quite complicated. Trust in these systems can also be an issue. The potential of this measure to promote national minority participation also remains underused and not well researched, although it can be an option for many multi-ethnic states in the OSCE region that are looking for ways to increase national minority participation in the electoral processes.

c) Boundaries of Electoral Districts and Equitable Representation of Minorities

The boundaries of districts should be drawn so that local residents have an opportunity to elect candidates who they feel truly represent them. For this reason, boundaries of electoral districts can be and are of critical importance for national minority representation in many OSCE participating states. However, boundaries of electoral districts are not usually drawn to ensure equitable representation of minorities; they are instead often designed to dilute the minority vote or to create situations in which minorities cast more votes than necessary for the election of a candidate from a district, thus effectively wasting their votes.

B. Language Proficiency

The *Handbook* gives guidance on issues that affect the right to stand for public office: e.g., proficiency in the state language as a requirement for candidates in parliamentary and local elections and heads of state and/or government. The relevant guideline is based on Paragraph 7.5 of the Copenhagen Document, where the OSCE participating states are committed to, “respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination”. The issue is a recurrent topic in election observation reports from Central Asia and other parts of the OSCE region.

The *Handbook* adheres to the following rule: The legislation should provide for clear, minimum, objective and reasonable criteria for transparent evaluation of language fluency when proficiency in the state language is required of heads of state and/or government. Notwithstanding the need to learn the official language or languages of the state concerned, language requirements for the registration of aspiring candidates in parliamentary and local elections raise issues of compatibility with Article 15 of the FCNM, as they may negatively affect the participation of persons who belong to national minorities. Excluding candidates from running for seats in a national or local legislature on purely linguistic grounds could also violate Article 25 of the International Covenant on Civil and Political Rights. There have been instances in which the application of such requirements has been found to be in violation of international standards.

C. Citizenship

While states usually limit to their own citizens the rights to vote and to stand in national elections, this approach may constitute a human-rights problem if citizenship and electoral legislation are unduly restrictive. In particular, this can be a source of tensions with respect to states in which the population includes a large share of non-citizen permanent residents, including persons who belong to national minorities. This issue has been the focus of considerable attention in the OSCE area for years. While citizenship requirements can be applied in relation to parliamentary elections, participating states are encouraged to provide non-citizens who belong to national minorities with the opportunity to vote and to stand as candidates in local elections. In addition, access to citizenship should be inclusive and non-discriminatory. Disproportionate restrictions on access to citizenship may take different forms. For example, it may be administratively difficult or financially burdensome for members of some ethnic groups to become citizens.

D. Language of Election Campaigns

Paragraph 32.5 of the 1990 OSCE Copenhagen Document states that, “persons belonging to national minorities have the right [...] to disseminate, have access to and exchange information in their mother tongue”. The *Handbook* also reflects ECtHR’s position in *Şükran Aydın and Others v. Turkey* (No. 49197/06) from 22 January 2013. In this case, the court accepted that, in principle, states are entitled to regulate the use of languages during election campaigns. The ECtHR noted, however, that a total prohibition of the use of unofficial languages coupled with criminal sanctions is not compatible with freedom of expression.

The language of campaigns has also come to the attention of ODIHR election observation missions in recent years. In 2013 in Bulgaria, the election code restricted the use of languages other than Bulgarian for campaigning, which is at odds with OSCE commitments and other international standards. Also, some concerns were raised in the recent election observation report on Albania.

E. Language of Official Electoral Materials and Ballots

International instruments also recommend the provision of official election materials including ballots in minority languages. Paragraph 32.5 of the 1990 OSCE Copenhagen Document can also be mentioned here, as it concerns not only dissemination and exchange of information but also access to information in minority mother tongues. Paragraph 12 of the 1996 UNHRC General Comment 25 on Article 25 of the ICCPR recommends that, “information and materials about voting should be available in minority languages”. Paragraph 12 of General Comment No. 25 (1996) to Article 25 of the ICCPR by the UN Human Rights Committee requires that, “Positive measures should be taken to overcome specific difficulties, such as [...] language barriers [...] which prevent persons entitled to vote from exercising their rights effectively. Information and materials about voting should be available in minority languages.”

Many OSCE participating states lack a clear rule or direct prohibitions in their legislations on this issue, thereby making room for abuse, omission or neglect. For example, voter information and ballots in the recent presidential elections in Mongolia were printed only in the Mongolian language, contrary to international standards. In fact, some states do publish very few such materials just to show some compliance with this standard while flaunting it in essence. A good practice is to adopt a clear requirement to publish such materials in minority languages, as is done in the Czech Republic, where election law requires municipalities to publish electoral information in the language of any minority that represents more than ten percent of its citizens. This was applied in recent elections in thirty municipalities with the Polish minority, three with the Ukrainian, two with the Slovak, and one with the German minority.

F. Self-Identification

Minority rights include the right of individual members of minority communities to choose to be treated or not to be treated as minorities. No disadvantages shall result from such a choice or from the refusal to make one. No restriction should be placed on this freedom of choice. Article 3, Paragraph 1, of the FCNM, states that, “Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice”. The Ljubljana Guidelines on Integration of Diverse Societies (Guideline 6) states that, “Identities are subject to the primacy of individual choice through the principle of voluntary self-identification”. Overall, this is not an issue in the majority of OSCE participating states, but it is still problematic in some contexts. In the recent parliamentary elections in Croatia, the ODIHR’s limited-observation mission report noted that, “The secrecy of the vote may have been compromised in some instances by the potential ease with which national minority constituency voters could be identified”.

G. Special Measures

Recourse to special measures is considered justified if certain groups or categories of people have traditionally experienced systemic disadvantages or if *de facto* inequalities persist. It is important to note that, under international law, such measures are not prohibited by the principle of non-discrimination if there is an objective and reasonable justification for their application (the principle of proportionality) and if the measures do not run counter to other guaranteed human rights. States enjoy a large margin of appreciation in adopting special measures. Although

parliamentary representation is not the only and perhaps not even the most effective form of minority inclusion, it is surely symbolically the most important. Minorities who are represented at a national, regional or local level, even if only descriptively, are more likely to feel that they have a stake in society and that their voices can be heard.

There are three main categories of special measures. Any requirements to implement special measures for national minority representation should be proportionate to the aim pursued and should ensure that data protection and voluntary self-identification standards are fully respected.

1. Special Threshold Requirement for National Minorities

Lund Recommendation No. 9 foresees a mechanism that introduces more favourable (legal) thresholds for national minority parties. For example, national minority parties can be exempted from the need to surpass a legal threshold to qualify for seat allocation or can benefit from a lower legal threshold than other parties to obtain registration or representation. For example, such exemptions exist in Germany and in Poland for lists of minority parties. In Italy, special thresholds apply for lists of recognized linguistic minorities exclusively in regions with special status. In some countries, lower thresholds for the registration of parties representing minorities can be found, as can special requirements for lower or no voter quorum for the participation of political parties. However, such special threshold requirements are rarely found elsewhere. The same is true about use of special conditions for privileged funding of minority parties. A related issue is the requirement demanding that parties have been registered in the whole country or in the majority of administrative units. Such requirements may not be conducive to national minority representation, and their political parties can be exempted for that reason. Relieving minority parties from such burdensome registration requirement may constitute a special measure in the spirit of Lund Recommendation No. 9. It should be noted that in some OSCE participating states, parties based on ethnic or communal affiliation are not allowed, which runs against international standards on freedom of association (examples include Kyrgyzstan, Kazakhstan, Georgia, Russian Federation, Bulgaria and Greece).

2. Dual Voting

States have considerable discretion as to how they achieve effective participation by national minorities. Though the principle “one person one vote” is among the most fundamental of rules governing democratic electoral systems, a dual voting system can be used in some cases to promote representation of a minority community. In such a system, voters that belong to a national minority may legally be granted special entitlement to elect a minority representative via a second vote in addition to their regular vote. Typically, in order to introduce such a measure, there should be evidence that no other less-intrusive mechanism will be effective, and that this instrument is flexible enough to not block further changes that might be needed if the situation changes. Usually, it concerns only numerically small communities. Currently only two countries have a dual voting system in place. Slovenia has this arrangement for Hungarian and Italian national minorities, and Cyprus has it for a number of religious groups. The representatives of these groups only have a consultative vote, however. Croatia has a constitutional provision to this effect that can potentially be utilized.


3. Reserved Seats

The representation of smaller communities can be also achieved in elected bodies through the use of reserved seats. Reserved seats are usually contested among minority communities and are filled by people who represent these minority communities. This mechanism may be combined with other special measures, such as over-representation, whereby minorities are allocated more (reserved) seats than they usually are entitled to if population size is the only criterion. Creation of one special district is also a possibility. As with other special measures, they often

lead only to symbolic representation. They may also be perceived as reinforcing differences between minorities and majorities. The arrangements for reserved seats often link with the requirement that minorities are registered in one way or another. Such registration should be voluntary and based on the principle of self-determination.

An example of a functioning reserved-seats system can be found, for example, in Croatia. Eight members of the Croatian parliament are elected from the twelfth constituency, which encompasses the entire country. Candidates in this constituency are elected by voters who belong to twenty-two recognized minorities in Croatia: the Serb minority elects three MPs, the Hungarians and Italians elect one MP each, and the Czech and Slovak minorities jointly elect one MP. All other minorities elect the final two MPs. The ethnicity of the voters is listed in the voter registry, which is provided by the registrar's office that maintains Croatia's vital records. During elections, voters who have officially declared that they belong to one of the recognized minorities in Croatia may choose to vote either for a generally applicable list or for a national minority list; a voter of unspecified or non-declared ethnicity may vote for either a generally applicable list or for any minority list. A recognized minority or a voter who has declared an ethnic identity other than Croat may vote only for a generally applicable list. The system has the consequence that MPs from this constituency are often elected with a considerably lower number of votes than those from the ten territorial constituencies.

Along with HCNM thematic recommendations and other international instruments, the *Handbook* is an important tool for states and other actors to achieve the goal of national minorities' full and meaningful participation in the electoral process, thus to contribute to more just, inclusive and stable societies. The *Handbook's* point of departure is that, in order to facilitate the electoral participation of minorities, states should consider introducing provisions in their electoral laws and, if necessary, make appropriate arrangements to facilitate minority representation in elected bodies, with the view to amplify their voice, to create meaningful influence and to foster inclusion. It is important to underscore the fact that the extent to which an electoral system might influence national-minority representation depends considerably on the country-specific context. National minorities may also adopt various strategies for their participation in public affairs, including participation in the political process. It should not be assumed that such interests are restricted to choices exclusively based along community lines.



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