

# **Electoral System Design and Affirmative Action for Ensuring Women’s Human Rights and Gender Equality**

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Nepal is in the final stage of writing a new democratic constitution. It is being drafted through a specially designed Constituent Assembly with all sovereign powers that are needed to do the job.

The new constitution is being framed in the background of five earlier constitutions that were experimented in Nepal throughout different points of history. This latest endeavor is supported by the Interim Constitution, which was promulgated in 2007 in the background of the consistent efforts for reform, the mass movement – II and the decade long Maoist "People’s War". The role of women in the reform process, especially for women’s rights and gender equality, has always been significant.

The objective of the change this time, apart from consolidating democracy and human rights, is the determination to progressively restructure Nepal in order to resolve the existing problems of the country relating to class, caste and *gender*. In this context, the country has already been defined as a federal republic, monarchy has been dismantled, and the constitutional pledge has been made towards “[bringing] an end to discrimination based on class, caste, language, *gender*, culture, religion and region by eliminating the centralized and unitary form of the state.” This pledge has been intended to make sure that “the state shall be made *inclusive* and restructured into a progressive, democratic federal system.”

As the process of constitution building stands right now, a new constitution is expected to come by May 27, 2012. However, a few issues before the Constituent Assembly have become contentious because of differences on the perspective of leading political parties, the pressure groups and other concerned stakeholders. These issues must be solved in order to finalize the new constitution. One such outstanding issue is the electoral system that Nepal needs to adopt to respond to the aspiration of equality, inclusion and affirmative action. The concerns of women in the ongoing dialogues on designing an electoral system and affirmative actions is a major aspect of the debate. In this context, it is crucial to enhance the conceptual clarity of political decision makers regarding the most suitable design for the electoral system and affirmative actions on women’s human rights and gender equality.

This paper evaluates the work accomplished thus far on the electoral system as it stands in the CA thematic committee reports, and develops a position paper on gender responsive electoral system and affirmative actions in the context of state restructuring in Nepal. The objective is to ensure that the electoral system design in the new constitution protects and promotes the entitlements of the Nepalese women in the restructured state.

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## **Women and Electoral System under the past constitutions**

The electoral system of Nepal has traditionally been the *First Past the Post System* (FPTP). It is an analogy to horse racing where the winner of the race is the first to pass the "post" on the track after which all other runners automatically and completely lose (that is, the payoff is "winner-takes-all"). The main feature of the system, as suggested in the analogy, was that the winning candidate was the one who gained more votes than any other candidate. Candidates had no need to get a majority of the votes cast, just more than anyone else. The winner remained winner even if this was not an absolute majority of valid votes. All other votes counted for nothing. The system used single member constituency and the voters voted for candidates rather than political parties. The advantage of the system was that the voting used to be simple and easy to understand. Election results were quickly calculated - only 'first past the post' won. Errors in calculations were minimal.

The 1990 Constitution specified that all political parties must have at least 5 percent female candidates in the election to the House of Representatives, the Lower House, and at least three women in the Upper House. Although it recognized the socioeconomic disadvantage faced by women, and incorporated this provision to provide some political support to women, the impact was minimal. In fact, it appeared as giving legitimate power to the political parties to keep the women candidature to the stipulated 5 percent. There were some nominal provisions under electoral statutes for nomination of women in the local government units like VDCs and DDCs. But they too were too low to produce any effect. Ensuring representation of women this way alone was not adequate for representing 50 percent of the population in the electoral bodies.

The system adopted by the Interim Constitution for the Constituent Assembly elections in 2008 was a major departure from the 1990 constitution. It provided for the use of a mixed electoral system in which the *First Past the Post System* (FPP) existed in parallel with Proportional Representation (PR) System. The government of the day was enabled to nominate 26 members in the 601-member unicameral house.

The first of the mixed electoral system was used to elect one member from 240 constituencies and the second system for the election of the remaining 335 members. It was not necessary for the candidate in the FPTP category to be a member of any political party, and the candidate who won the most votes won the seat in the CA. In the PR-list seats, the members were elected through a single electoral constituency using one ballot that all voters nationwide obtained. It was compulsory for political parties participating in the PR election to register with the Election Commission. Each party was required to submit a closed list of candidates to the Election Commission prior to the elections in order to have their political party symbol displayed on the ballot.

The PR system was unique. While independent candidates were not permitted to participate, voters in the PR system could only vote for parties as a whole and thus could have no influence on the order in which party candidates were elected. Each party was free to decide who among the closed list should be picked based on the seats it was able to win. However, parties were supposed to ensure that the candidates they selected meet the quota requirements for the representation of women, dalits, oppressed castes/indigenous ethnic groups, backward regions, madhesis and "others." The Interim Constitution empowered the Election Commission to reject the lists that did not comply with the quotas, and required the parties to re-submit the lists that complied with the requirement.

The *Constituent Assembly Members Election Act 2007* had clear provisions on the issue of inclusion. As far as FPTP election was concerned, it required that the political parties participating in the elections must take into account the principle of inclusiveness while nominating the candidates. On PR election, it required that the lists submitted by the parties must contain at least 50 percent of female candidates and some variously defined percentage of candidates from marginalized groups (as stated above). Article 63 (5) stated:

Notwithstanding anything in Clause (4), a minimum of one-third of the total number of candidates nominated shall be women, taking together the number of candidates on the basis of proportional representation pursuant to sub-clause (b) of Clause (3) and the number of candidates pursuant to sub-clause (a) of the clause.

The provision was a great leap forward. The 2008 elections brought many visible changes in the electoral scene in terms of representation and inclusion of women and members of deprived communities, but some problems were also identified in its implementation:

- Even though the Election Commission had clearly directed quota provisions for the PR-list election, the majority of the parties failed to allocate the legally required number of seats to members of traditionally excluded groups.
- Most political parties contesting the CA election also failed to give appropriate representation to women in the FPTP election. Article 7(4) of the Act stated that at least thirty-three percent of FPTP candidates shall be women.
- The provision of the Interim Constitution (Art 63.5) that women must overall constitute at least 33 percent of candidates for both the FPTP and PR elections were not complied with.
- There was no proportional representation to women when nominating 26 members to the CA by the government.

These problems explain the scope for reform in the nature of the electoral system. Any improvement of the system in this background should also try to resolve the problems that have been already identified.

### **The concept of proportional inclusion**

Article 21 of the Interim Constitution, which guaranteed the right to social justice in the following manner, helped develop a fundamental principle of proportional inclusion in Nepal:

Women, *Dalits*, *Adivasi Janjatis*, *Madhesi* communities, oppressed groups, the poor farmers and labourers, who are economically, socially or educationally backward, shall have the right to participate in state structures on the basis of principles of *proportional inclusion*.

The search for an acceptable definition of inclusion is going on. It is generally accepted that "inclusion" means recognizing and implementing the entitlements of those who have been historically locked out or ignored from the process of participation in the state structures, whatever the reasons. The act of inclusion means a deliberate effort to discontinue exclusion and all of the socio-political drawbacks exclusion gives birth to or sustains - i.e. gender

discrimination, ethnic inequality, handicapism, etc. The cause of inclusion also involves assuring that all support systems are available to those who need such support. Providing and maintaining such support system is a civic responsibility of state, not a favor. In the emerging discourse, which is clear from Article 21, inclusion refers to *proportional inclusion*, which means that the state shall recognize the share of population of a particular group in the national population when determining the amount of inclusion needed in the state structures. Where the numbers of the positions to be filled in or officials to be elected are very few, for example only one, two or three, inclusion may only mean the obligation of maintaining ‘diversity’ as much as possible. In such a situation, it would be difficult to ensure proportional representation to all creed or communities who could have genuine claims of inclusion. This more or less seems to be the spirit of proportional inclusion. The rest of the jurisprudence is yet to be developed.

The spirit of Article 21 of the Interim Constitution has been carried forward in the committee level preliminary thematic drafts of the new constitution as discussed below.

### **Women’s rights and gender equality under the draft constitution**

The making of integrated draft of the new constitution of Nepal is in progress in the Constituent Assembly. However, from what has already been accomplished so far at different thematic committee levels, the scenario of women’s rights and gender equality is expected to advance significantly.

To begin with, let it be pointed out that Article 3 of the draft of the *Committee on Fundamental Rights and Directive Principles*, one of the eleven thematic committees at the Assembly, generally repeats what were established as the right to equality and non-discrimination under the Interim Constitution and other previous constitutions of Nepal.

The right to equality under the new draft (hereafter CFRDP draft), includes guarantee for equality before the law and equal protection of the laws. The State is not to discriminate against any citizen in the application of general laws on grounds of religion, colour, caste, tribe, gender, sexual orientation, biological condition, disability, health condition, marital condition, pregnancy, economic condition, origin, language, region, ideological conviction or other similar grounds.

There is a significant “*affirmative action proviso*” attached to the above provision. It clarifies that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of women, *dalits*, *adiwasis janjatis*, madhesis or farmers, workers, oppressed regions, Muslims, backward class, minority, marginalized and endangered communities or destitute people, youths, children, senior citizens, gender or sexual minorities, disabled or those who are physically or mentally incapacitated and helpless people, who are economically, socially or culturally backward. Even though the proviso (as it appears) is clumsy, and requires classification at least in two groups, it is clear that the draft leaves ample scope for affirmative action for the weaker sections of Nepal’s people.

Additionally, another provision maintains that the State shall not discriminate among citizens on grounds of religion, color, race, caste, tribe, *gender*, sexual orientation, biological condition, disability, health condition, marital condition, pregnancy, economic condition, origin, language or region, ideological conviction or other similar grounds.

What has been proposed under the right to equality sets the scene for gender sensitive electoral system as well.

## **Rights regarding social justice – the principle of proportional inclusion**

An additional dimension to the right to equality devised by the CFRDP draft is the right to social justice.

Article 27 states that “women, *dalits*, madhesis, *adiwasis janjatis*, minorities and marginalized, muslims, gender and sexual minority communities, disabled people, youths, backward class, farmers and workers and oppressed groups, who are socially backward, shall have *the right to participate in state structures on the basis of the principles of proportionate inclusion*. The economically destitute citizens shall be given priority while making provisions pursuant to this clause.

Article 27 is flawed in the sense that it has tried to group historically marginalized people with the marginalization being created by the process of development, or failed development. However, the net effect of the provision is that the principle of *proportionate inclusion* is to apply to make sure that these deprived sections of the people have the opportunity to participate in the state structures.

This provision thus enables women to claim *proportional inclusion* in all state structures. This *proportional inclusion* is also expected to apply in the context of the electoral system as well. There is no exception attached to this formulation. Thus what has been guaranteed by the Interim Constitution in the sense of 33 percent representation of women is intended to go over this benchmark and reach “50 percent” in the new constitution.

### **Women’s Rights in changed context**

The preliminary draft of the *Committee on Fundamental Rights and Directive Principles* (hereafter CFRDP draft), which is also one among the eleven thematic committees at the Assembly, also deals with the rights of women as a separate right.

Building on Article 20 of the Interim Constitution, which ensured the “Rights of Women” as a separate title for the first time in Nepal’s constitutional history, the CFRDP draft added two new rights in the components of Women’s Rights. They are the *rights of women for proportional participation in all agencies of the state mechanism on the basis of inclusiveness*; and every woman’s right to special opportunity in education, health, employment and social security on the basis of positive discrimination. This draft has special value because it is proposed by the Committee which is the principal Committee for fundamental rights provisions in the new constitution. The full text of the CFRDP draft is as follows:

#### **23. Rights Regarding Women:**

1. Every woman shall have equal ancestral right without any gender discrimination.
2. There shall be no gender discrimination against women, in any form.
3. Every woman shall have the right regarding reproduction.
4. No physical, mental, sexual, psychological or other form of violence or exploitation shall be inflicted on any woman on the basis of religious, social, cultural tradition, custom or any other grounds, and such an act shall be punishable by law and the victim woman shall have the right to receive proper compensation.

5. *Every woman shall have the right to proportionate participation in all agencies of the state mechanism on the basis of inclusiveness.*

6. *Every woman shall have the right to special opportunity in education, health, employment and social security on the basis of positive discrimination.*

The term “ancestral right” in clause (1) as it has been understood encompasses the context of the inheritance of property, citizenship, lineage, and so on. However, a clarification might be necessary.

The preliminary draft recommended by the *Committee on State Restructuring and Division of State Powers* (hereafter CSRDSP draft) has also suggested a separate provision on women’s rights. The motive behind proposing this provision is to make sure that the restructured state brings forward the women’s participation in the state by way of affirmative action provisions that remedies the faults with the system hitherto this day. Apparently, what it has proposed is in someway important than what has been proposed by the CFRDP draft (as noted above).

Among other things, the CSRDSP draft guarantees the rights of proportionate representation along with inclusion based on population at all level and at the composition of the state. It also ensures special provisions of proportionate representation and participation of women at the leading positions in policy making level shall be fixed. Apart from this, there is specific provision making sure that proportionate representation of *madhesi* women, women from indigenous community, and minority and dalit women will be made in all rights guaranteed to women.

Article 14 of the preliminary draft states:

#### **14. Women's rights**

(1) Women shall have following equal rights.

- (a) Equal right to man in parental properties, citizenship, descent and family affairs
- (b) Right to share equal protection and benefit in the eyes of laws
- (c) Right to get equal remuneration for same job
- (d) Right to divorce

(2) Apart from the rights mentioned in sub-article (1) women shall have following rights [as well].

- (a) Reproductive health and rights regarding reproduction
- (b) Right of safe motherhood

(3) Nepal Government shall make arrangements for the need of means and resources to the provisions in Clause (a) and (b) of sub-article (2)

(4) Apart from the rights mentioned in sub-article (1) and (2) women will be ensured with following special rights and opportunity in the areas given below.

*(a) The rights of proportionate representation along with inclusion based on population at all level and at the composition of the state.*

(b) They shall have special rights in the areas of education, health, employment and social security.

*(c) Special provisions of proportionate representation and participation of women at the leading positions in policy making level shall be fixed.*

*(5) The proportionate representation of madhesi women, women from indigenous community, and minority and dalit women will be made in all rights ensured to women.*

In similar vein Article 15 of the CSRDSP draft deals with Dalit rights, and proposes the following features as well:

*(2) The laws will regulate additional three and five percent representation in federal and state composition by making provisions for proportionate representation of Dalit on the basis of population at federal, state and local level political structure.*

*(3) Special arrangements shall be made by laws on the basis of inclusion and proportionate representation for empowerment, representation and participation of Dalit in civil service, police and army including other areas of employment.*

*(4) The proportionate representation of hilly Dalit, Madhesi Dalit and Dalit women will be made in all rights received by the Dalit community.*

Article 19 of the CSRDSP draft has an important provision on review and observation of special rights. It states that the Government of Nepal shall review and re-assess the implementation of special rights to women and *dalit* community and its impact based on human development index in each 10 years along with national census.

All these drafts on the rights of women need further drafting input. It is clear, however, that they do not leave any space for less than proportional electoral system for women and other groups included in the list of entitlements.

### **Electoral System (in making)**

The underlying principles behind the objective of *proportion inclusion* in the fundamental rights jurisprudence of Nepal as stated above will have clear impact on the proposal of the electoral system under the draft constitution.

Unfortunately, the draft of the *Committee on Determination of Forms of Governance of the State* (hereafter the CDFGS draft) is the weakest of all thematic committee drafts prepared by the Constituent Assembly.

On the form of government under the new constitution, the draft has three different proposals from three different groups in the said committee. Firstly, there is a proposal for the presidential system of the Maoist model, in which the president is elected directly by the people. Secondly, there is another proposal that backs up the Nepalese version of the Westminster model of

parliamentary government with some modifications based on recent experience. The third proposal is modeled along a president elected after every election by two third majorities of the total members of the lower house of the federal legislature within 30 days of the date of the general election or the date of the office falling vacant.

Presidents are supported by vice presidents in all models. As far as the provincial forms of government are concerned, they are parliamentary, wherein the provincial chief is appointed by central government, and the chief ministers are appointed by the unicameral legislature. As far as the third layer is concerned, it is based on presidential make up. There is complete darkness as to special autonomous structures supposed to exist in each province. Thus, the lack of clarity on the form of government also had the impact on the choice of electoral system. Each option had a proposal for the electoral system – although none of them had been implemented diligently.

The draft of the *Committee on Determination of the Form of the Legislative Organs* (hereafter the CDFLO draft) proposes a bicameral legislature for the federal government.

The lower house of the bicameral legislature is House of Representatives. It is to consist of one hundred and fifty-one members. Seventy-six of those members are to be elected by FTTP method, and seventy-five members shall be elected by proportional election. The House of Representatives election will be conducted via adult-franchise and secret ballots. For the purpose of the election of members to the House of Representatives, seventy-six election constituencies shall be fixed throughout the country, and one representative from each election constituency shall represent his/her constituency in the House of Representatives.

As political parties select candidates for election to the House of Representatives, the CDFLO draft provides that law shall ensure that women, *madhesi, tharu, dalit, indigenous peoples, janajati, muslims, backward classes, regions, minorities, and other communities* are equally represented on the basis of population. There is a contradictory provision in the CDFLO draft, which maintains that following the House of Representatives elections, in case women do not constitute at least one-third of the elected representatives in accordance with these provisions, an arrangement shall be made to ensure that at least one-third of the representatives are women. This has to be re-drafted keeping in view the jurisprudence of proportional inclusion as proposed by several drafts on rights of women.

The upper house of the bicameral legislature at the centre is National Assembly. This is supposed to consist of fifty-one members as follows with six year tenure: (a) thirty-eight members to be elected by the Provinces (in equal) numbers as prescribed by law; (b) *thirteen members to be elected by the House of Representatives pursuant to law, on the basis of the system of proportional representation, by means of single transferable vote, from amongst minorities, women, caste groups, language groups, religions, backward groups or other communities that have not been able to participate in the House of Representatives; people of high reputation who have rendered prominent service in various fields of national life; and experts.*

The National Assembly has been proposed as a permanent House. The principle of inclusiveness shall be always taken into account in the constitution of this house. The tenure of office of one-third of its members shall expire every two years.

In the provinces, the proposal of the CDFLO Committee is to establish unicameral legislatures with five year tenures. According to Article 44 of the CEDFLO draft, no more than thirty five members shall be elected to the Provincial Assembly on the basis of the population density of



each province. Eighteen members shall be elected by direct election, and seventeen members shall be elected from proportional election.

Following the direct and proportional elections, in case women do not constitute at least one-third of the elected representatives, law shall be introduced pursuant to the proportional election provision to ensure that at least one-third of the Provincial Assembly representatives are women. Again this is another contradictory provision. This has to be re-drafted keeping in view the jurisprudence of proportional inclusion as proposed by several drafts on rights of women. The method for determining election constituencies and the number of members to the Provincial Assembly shall be prescribed by the Law.

As political parties select candidates for election to the Provincial Assembly, law shall ensure that women, *madhesi, tharu, dalit, indigenous peoples, janajati, Muslims, backward classes, regions, minorities, and other communities* are equally represented on the basis of population. The term "other communities", which has come under controversy, means all communities except the abovementioned ones.

The undercurrents of all the literatures produced by the Constituent Assembly so far prescribe the inclusive/proportionate participation for all.

### **Some crucial outstanding issues**

These arrangements do not lead the analysts anywhere. They will have to be trimmed down once the Constituent Assembly takes the decision on what form of government Nepal is going to finally adopt. The role of legislature depends on the form of government to a significant extent. Similarly, the arrangements at local level will influence the provincial structures, and this in turn will affect the structure at the national level.

It is important that the nature of the federal system that Nepal is going to embark on is decided first. There is close connection with the structure of state and parliament and electoral system.

Leaders at the dispute resolution subcommittee under the CA's Constitutional Committee (CC) have finally agreed in December 2011 to adopt a mixed electoral system in the new constitution. This is the same system that had been provided for by the Interim Constitution. A meeting of the dispute resolution subcommittee, represented by key leaders from major political parties, decided to adopt this system. The leaders are, however, yet to finalize the percentage to distribute between the proportional representative system and the first-past-the-post (FPTP) system.

Leaders said they are mulling over two options. A group of members are for allocating 60 percent of the total numbers for FPTP and 40 percent for proportional representation. But some CA members closely involved in settling disputes in constitution writing said they are likely to end up sharing 50 percent of the weight to each system. The meeting also fixed voting age at 18 years.

The Constitutional Committee (CC), which is the principal drafting organ of the Constituent Assembly, has decided to adopt bicameral legislature. It has decided to adopt House of Representatives and National Assembly in the new constitution at national level.

With the resolution of the nature of electoral system that remained as one of the knotty issues in constitution writing, the leaders have now agreed to concentrate their discussions on determining the system of governance. The political parties have not been able to decide whether to adopt a

presidential system or Westminster parliamentary model or a system power-sharing between the head of state and the prime minister like in France or any other system of governance. The situation is so fluid that making conclusions on the basis of this is dangerous at this hour.

### **Women and Electoral system under new constitutional states**

Some new constitutions of the world may be looked into for references on how they have managed with women and electoral system. Given the slow rate at which the representation of women in decision-making bodies around the world is increasing, various positive action measures, such as electoral quotas, have been proposed or implemented to address the present gender imbalance in decision-making. Governments and political parties have experimented with different types of quotas; electoral quotas may be constitutionally or legislatively mandated or take the form of voluntary political party quotas. They usually set a target or minimum threshold for women, and may apply to the number of women candidates proposed by a party for election, or they may take the form of reserved seats in the legislature.

The South African Constitution adopted in 1996, which is very often in debate in Nepal, adopted PR closed list system for an electoral system at national and provincial level of government. At the local government level, the country has a mixed electoral system where half of the councilors are elected through a PR list process while the other half is elected through local representation at ward level (that is, by a FTTP system). The Constitution does not provide for quotas to ensure adequate representation of women in elected public bodies, nor are any legal quotas established for national or provincial elections. Section 11(3) of the local government statute called Municipal Structures Act specifies that, as far as councilors elected by proportional representation from party lists, "every party must seek to ensure that fifty per cent of the candidates on the party list are women and those women and men candidates are evenly distributed through the list".

There is currently an ongoing debate on whether the electoral system should be revised. While proportionality is assured, the proponents of the electoral change argue that members of parliament (MPs) are more accountable to their political parties in the PR system, therefore eliminating the basic tenet of accountability in a democracy. In other words, the setback of this system is the power of the party in determining representation and the benefits that accrue to people elected to positions of leadership in legislatures. This scenario creates a political milieu whereby it is in the interests of the aspirant and the elected politicians to behave in ways that please the party leadership, rather than constituents.

The latest constitution reconsidering the electoral system is the Constitution of Kenya, 2010. A new Elections Bill, 2011 is being drafted there to give full effect to the provisions of the Constitution on the Electoral System and Elections. What is being proposed is also to be looked into in the context of the result of the post election violence in 2007 – especially its conduct and management.

The electoral system of Kenya before 2010 was characterized by the first past-the post system: winning by a simple majority, wherein the losers combined may have more votes than the winning candidate. Very few women had the opportunity to get elected in this system; and nomination of 12 legislators by the President was done in this FTTP background. On the delimitation of boundaries, the constitution emphasized population as the main criteria. In practice, serious gerrymandering and population inequality were also frequently reported. The winning party could have practically fewer votes, but more constituencies. The electoral management body was to be appointed exclusively by the executive President. There used to be

concerns on the appointment of questionable chairmen. The guarantee of constitutional independence remained in theory. As such, the practice lacked public confidence.

In Kenya, as in many other countries, management of elections required use of public officers, the public resources, unequal access to public media, and use of public security law. The election date was determined by the President. Corruption and violence was rampant. There was no limit on campaign spending. Mega corruption scandals used to be tied to election financing. The issue of non enforcement of the election offences law remained in the election system. The use of violence as a campaign tool also existed. There were questions on resolution of electoral disputes. Slow determination of the electoral petitions characterized the situation. There was lack of faith in the electoral dispute resolution mechanisms.

In this background, the Independent Review Commission on the General Elections, 2007 (also known as Kriegler Commission) was appointed in 2008. It was given the mandate to examine the weaknesses of the constitutional and legal framework on elections; the structure, composition, independence, capacity and functioning of the Electoral Commission of Kenya; the electoral environment and the role of political parties, civil society, the media and observers; the organization and conduct of the 2007 elections; the integrity of the vote tallying and counting, and to recommend the necessary electoral reforms.

The report submitted by the Commission advised that the first past the post electoral system posed serious challenges and distortions in Kenya. It pointed out that disparity in voting populations violated the equality principle of democracy. The Commission was said to be appointed in a defective manner, leading to lack of independence. It bore the primary responsibility for the flawed 2007 elections. The electoral dispute resolution mechanism was also defective. There was urgent need to review the constitutional and legal framework on elections.

It is in this background that the principles of the new electoral system were determined. Article 81 of the new constitution ensured freedom of citizens to exercise their political rights. Not more than 2/3 of the members of elective public bodies shall be of the same gender. Fair representation of persons with disabilities has been provided for. Apart from these features, universal suffrage based on the aspiration for fair and equal vote and free and fair elections have been guaranteed, which includes secret ballot, free from violence, intimidation, improper influence and corruption; elections conducted by an independent body, and transparent procedures. The election shall be administered in an impartial, neutral, efficient, accurate and accountable manner.

In the new system, the provision of the FPTP remains as the primary electoral feature. However proportional representation has also been introduced. There is a devolved system with the 47 Counties. Each County has an elected Executive and County Assembly. The Parliament is made up of the National Assembly and a Senate. The National Assembly is made up of: 290 members each elected by the registered voters of single member constituencies; 47 women, each elected by the registered voters of the counties, each county constituting a single member constituency. Other 12 members will be nominated by parliamentary political parties by use of party lists according to their proportion of members of the National Assembly to represent special interests (youth, persons with disabilities - pwd, workers). The Senate is made up of 47 members each elected by the registered voters of the counties, each county constituting a single member constituency. 16 women will be nominated by political parties by use of party lists according to their proportion of members of the Senate. 2 members (man and woman) will represent the youth elected on the basis of proportional representation by use of party lists. 2 members (man and woman) representing pwd elected on the basis of proportional representation by use of party lists.

The County Assemblies consist of: members elected by the registered voters of the wards; each ward constituting a single member constituency. The number of special seat members highlighted the necessity to ensure that no more than 2/3 of the assembly is of the same gender, nominated by political parties on the basis of proportional representation by use of party lists. Further, the number of members of marginalised groups including pwd and youth are set by legislation and nominated by political parties on the basis of proportional representation by use of party lists.

The Independent Electoral and Boundaries Commission members are competitively recruited, professional qualifications set out and high moral character and integrity has been set as other qualifications. Vetting by Parliament is necessary for them. Security of tenure has been guaranteed. Constitutional requirement the Boundaries Commission is not subject to direction or control.

On delimitation of boundaries, the constitution has introduced “population quota” – which is obtained by dividing the population by the number of constituencies. Article 89(5) states: “The boundaries of each constituency shall be such that the number of inhabitants in the constituency is as near as possible, equal to the population quota...). Art 89(6) adds: “The number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin on not more than: (a) 40% for cities and sparsely populated areas; (b) 30% for other areas. The constitution also requires periodic review of constituency boundaries (8-12 years). The date for the elections is now set by the Constitution. Art 101(1) requires elections to be held on the second Tuesday of August every 5th year.

On political parties, Article 91 provides for formation of political parties and the principles to be observed. Provision is also made for state funding of political parties through the Political Parties Fund. For the first time, Article 85 of the Constitution allows independent candidates.

There is also reform in the system of resolution of electoral disputes. Jurisdiction to hear and determine disputes on the election of the president is vested in a newly created Supreme Court. The other electoral disputes are to be determined by the High Court with an Appeal to the Court of Appeal. The entire judiciary has been reconstituted and a transparent and public appointment procedure introduced. For judges and magistrates in office before the promulgation of the new constitution, there is a requirement for vetting by an independent body to determine suitability to continue serving.

The government is presently preparing new legislation to fully operationalize the new constitution. Among the legislation relevant to elections include: The Elections Bill, 2011; registration of voters; conduct and management of elections; voting by citizens outside Kenya; and resolution of election disputes. The Elections Bill 2011 provides for constituting the Electoral Management Body, qualification of members, powers, independence, funding and the Political Parties Bill, 2011 deal with qualification for registration and grounds for de-registration. It will also provide for party-hopping; funding of political parties; resolution of disputes. The campaign financing Bill, 2011 provides for regulation of campaign financing both by political parties and candidates.

*Morocco* is another new example in the constitutional development and electoral system. It is a *de jure* constitutional monarchy with elected parliament. With the 2011 constitutional reforms, the King of Morocco, still retains few executive powers whereas those of the prime minister have been enlarged. The election follows the closed list proportional representation system (with a 6 percent threshold) using the largest remained method. There are two types of list, local and national. 305 seats are allocated for the local lists spread over 92 electoral districts, while the

national list consists of 90 seats, putting the total number of deputies at 395 - 70 more than the last election. The national list consists of a 60 seats list reserved for women and another of 30 seats for candidates under 40. The list follows the same proportional representation system but on the level of the country. There is nothing attractive in the Moroccan constitution by way of inputs to Nepal.

The representation of women and youth in Morocco was increased by a law after the 2011 constitutional reforms. Sixty seats were reserved for women and thirty for candidates under the age of forty, according to the law passed by the Council of Ministers. The list system is such that parties make a list of candidates and voters choose from among those lists as opposed to electing each individual politician to office. Candidates were elected from party lists, and the election barrier had been lowered to 3% to allow smaller parties to be represented in parliament.

**The use of electoral quotas makes possible historical leaps in women's political representation.** In fact, it is much more widespread as a constitutional norm than is commonly held. Quotas for public elections have been recently introduced by such diverse countries as Sweden, South Africa, France, Uganda, Argentina and Bosnia and Herzegovina. An electoral gender quota system sets a minimum of percentage of women, or either sex, in each political party's candidates for public election, e.g. 30 or 40 percent. Rwanda is an example of the new trend to use electoral gender quotas as a fast track to gender balance in politics. Other parliaments, however, still have very few women elected. Three types of gender quotas used in politics: reserved seats (constitutional and/or legislative), legal candidate quotas (constitutional and/or legislative), political party quotas (voluntary). While reserved seats regulate the number of women elected, the other two forms set a minimum for the share of women on the candidate lists, either as a legal requirement or a measure written into the statutes of individual political parties. In some countries, quotas apply to minorities based on regional, ethnic, linguistic or religious cleavages.

Moreover, party quotas are increasing around the world. Some political parties in more than 50 countries around the world have now introduced their own quota regulations requiring a certain minimum of candidates for public elections to be women. The Swedish Social Democratic Party's "every second a woman" and "parite" (France, Belgium) are other names for quota systems. The South African ANC requires 50 percent women on the Party's lists. It has used the PR system internally to ensure that the lists are representative of marginal and minority groups in the country. It claims that it attempts to transform society hence the party's guidelines for its internal list processes that is used to elect MPs reflects key objectives of creating a united, non-sexist, non-racial and democratic society. The guidelines normally include factors such as geographical 'representivity', racial, ethnic, linguistic representation, skills, interest groups, 50% representation of women in all party structures (as noted above) in order to comply with the party's Constitution. While most quotas regulations around the world target women, some are formulated via gender neutral way, i.e. requiring no more than 60 and no less than 40 percent of either sex.

The concept of double quota is sometimes used about a quota system that not only requires a certain percentage of *women* on the electoral list, but also prevents that the women candidates are just placed on the bottom of the list with little chance to be elected. Costa Rica, Argentina and Belgium are examples of countries with legal requirement of double quotas. "Placement mandates" or rules about the rank order of candidates, especially at the top of the list, are other terms for the same phenomena. The provision of "Zebra stripe listing," along with "every first a woman" or "every second a woman" makes significant impact.

Although constitutional amendments and electoral laws appear to have more force, they are not necessarily better than party quotas when it comes to implementation.

### **Inputs to the ongoing debates in Nepal**

These examples, while important, have their own contexts. Quotas for women entail that women must constitute a certain number or percentage of the members of a body, whether it is a candidate list, a parliamentary assembly, a committee, or a government.

While South Africa is a big exception, the system as one can see generally aims at ensuring that women constitute at least a "critical minority" of 30 or 40 percent. The South African case is not much relevant here because the constitution builders in Nepal have already decided to adopt the mixed electoral system and not to rely on PR closed lists alone.

As Nepal has already shown its readiness to go to proportional inclusion as a matter of right, this trend, even though encouraging in the world, falls behind Nepal's constitutional determination. The fundamental rights provisions that were explained above leaves no doubt in Nepal that the quota is for proportional inclusion, which is at least 50 percent in the case of women.

Similarly, previous notions of having reserved seats for 33 percent in aggregate, representing an all-embracing category of "women," is no longer considered sufficient. There are explicit proposals now that the requirement of 'inclusion' must be addressed even within the women as a category (recognizing proportionality of women from *janjati*, *dalit*, *madhesi*, and so on within the group).

### **Provisions required in the text of the draft constitution**

As the mixed electoral system has already been agreed, it will need to be defined in the new constitution in the context of the jurisprudence devised by the CFRDP draft to make sure that the fundamental right of proportional representation is complied with. To make a point, there is no dissenting opinion on what has been proposed by the concerned articles reproduced above on the right to proportional representation.

- In the mixed electoral system, as agreed, 60 percent of the total number of seats at all levels of national and provincial elections should be allocated for proportional elections, and the remaining 40 percent for the FTTP system.
- The provision on FPTP elections for 40 percent of the total number of seats must be informed by the fact that without quotas, i.e. 50 percent, women are sure to be under-represented in single-member constituency systems. This provision will also honor the right to proportional representation already agreed in the CFRDP draft as a fundamental right.
- The 60 percent of the seats apportioned for proportional elections makes sure that the extra ten percent serves as compensatory arrangements for the failings of the FTTP elections to produce results proportional to the women. As there is no dispute over the fact that candidature does not guarantee representation in the FTTP elections, this proposal for additional ten percent is a gentle reassurance for equal representation to men and women.

- The multi-member constituency systems are more favorable for the election of women than the single member constituency systems in the FTTP elections. They allow parties to put up a balanced slate of candidates in each constituency as they are not forced to select one candidate only. The multi-member constituencies are large constituencies electing more than one representative and are generally more conducive to the election of women and other groups than smaller constituencies.
- Traditionally, the FPTP system has benefited male politicians more than their female counterparts. This problem can be solved immediately by making provisions like exclusive constituencies designated for women candidates on rotational basis where the election is held only among women candidates of different political parties. The system of rotation will make sure that no reserved constituency is going to be a permanent constituency for women. This system may be adopted for 10-15 years (assuming that the status of women's representation will improve and become proportional after the development of adequate number of women leaders during this period).
- In most countries adopting the proportional representation system with closed lists the candidate lists are ranked by the parties before the elections. This enables the voters to know who would be elected if a party wins seats. The parties cannot change that order after the elections. It is essential therefore that the new constitution requires that in every closed list of ten candidates, the first, third, fifth, sixth, eighth and tenth candidate in the closed lists is a female candidate, so that there is enough clarity to the voters on who are getting elected out of this ranking. This also ensures that the result to a great extent achieves the target of 60 percent representation under proportional category. As the first candidate is going to be the woman candidate, it will have positive gender effect on the part of smaller parties as well.
- Quotas should also be applied at different stages of selection process into elective positions of decision making such as legislative/parliamentary executive, and municipal/local government officials, and governments of the special autonomous regions (as the third level of Nepal's federal system).
- There is already a draft provision that if the President at the national level is a man, the position of the Vice President should be reserved for a winning woman candidate and *vice versa*. This is not enough as it is possible that women might continue to be relegated to the position of vice-president in the power struggle. Therefore, there should be an explicit provision that the position of President or Vice President shall not be given to the same sex in the next term. This should apply in the context of Speaker/Deputy Speaker, Chairperson/Deputy Chairperson, Commissioner/Deputy Commissioner, and all other similar positions in the provincial and local levels (including at the level of special autonomous regions when they are developed under the new constitution).
- Unlike in the past, any seats left for 'nominations'<sup>2</sup> to any of the national, provincial or political elective structure under the constitution must be used not only to ensure equal representation (50 percent) to women, but also to augment the imbalance in achieving proportional representation, where it is lacking due to the results of the FTTP elections. A

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<sup>2</sup> For example, Article 63(3)© of the Interim Constitution 2007 provided for such provision: "Twenty-six members nominated by the Council of Ministers on the basis of consensus from among distinguished persons and persons from among ethnic and indigenous groups who fail to be represented as a result of elections under sub-clause (a) and (b) who have made significant contributions to national life."

considerate use of this provision when needed can not only help the constitutional objectives of such nominations but also to achieve equal representation to women.

- There should be clear cut provisions on the chapter on political parties in the constitution for an inclusive, participatory, representative, accountable and transparent organization, where women have *equal/proportional* (50 percent) representation at all level (as in the rest of the state structures). Quota at this level must be constitutionally guaranteed as at the elections at different layers of the political system. The Election Commission should be authorized not to register any party as a national party to take part in the national elections.
- Appointment of women members in the Election Commission and its network in the provinces must be done by keeping in view the *principle of proportional inclusion*. Similarly, appointment of women members in Constituency Delimitation Commission (or whatever is established for constituency delimitation purpose) must be done along the same principle. Its members should be competitively recruited, professional qualifications set out and high moral character and integrity should be set as other qualifications. Appointment of women in these positions will help develop a gender sensitive electoral legal system.
- The new constitution should provide for the National Commission for Women as one of the independent constitutional bodies with general mandate on issues affecting rights of women, equality and proportional inclusion, among other things.
- “Women” in all cases must mean women inclusive of *dalits, janjatis, madhesis*, etc and also disabled women, the third gender and similar other constituencies as well.
- The Constitution should also indicate that the state shall implement a ten-year affirmative strategy to develop women leadership across all levels of government in the country – starting with the local self-government units, special autonomous structures, to the provincial and national level. The strategy should also provide for leadership support training to the women already elected and performing their leadership role.
- The new constitution should also provide for a sunset clause for periodic review of the electoral arrangement, and the affirmative provisions may be discontinued when the objective of equality of opportunity and treatment have been achieved as provided by the *Convention on the Elimination of Discrimination against Women (CEDAW)*, 1979.

These reforms in relation to women will be effective only in the context of an electoral legal system that is free, fair and impartial. Under international standards, men and women have an equal right to participate fully in all aspects of the political process. In practice, however, it is often harder for women to exercise this right, mostly due to socio-economic and political reasons. This necessarily demands reform in the electoral legal regime and management of elections in the country.

In the context of the new constitution, once it is promulgated, the government will have to reform most of the existing statutes giving effect to the electoral system assimilated by the new constitution. These statutes include the Members of House of Representatives Election Act, 2056, Members of Constituent Assembly Elections Act, 2064, Members of Constituent Assembly



Elections (First Amendment) Rules, 2064; Elections (Offence and Punishment) Act 2063, Constituent Assembly Court Act, 2064; Election Commission Act, 2063; Voters Rolls Act, 2063, and Voters Rolls Rules, 2063. These statutes were created in the context of the impending Constituent Assembly elections and have become obsolete now for the elections under the new constitution. Similarly, the experience gained from CA elections must be accounted for in the new electoral statutes to be enacted in the future. While doing this special arrangements may be needed for:

- Electoral security (principal affirmative action for women sensitive electoral system). This should also include state sponsored insurance personal coverage to women standing in the election.
- Management efficiency to deal with the cases of disenfranchisement of voters – especially women voters. The cases of ID cards not tallying voter's list, the residency requirement depriving homeless and rural people working in urban areas, distance factor especially in hills and mountains etc must be dealt with properly.
- Electoral Code of Conduct must be revised to make this a leading instrument to defend the concerns of women in the electoral system. Tendencies of major parties to infringe the code of conduct, especially indulging in violence, manipulating media, involving in recruitment and transfer of personnel relating to security and law and order, misuse of finance, etc should be prohibited.
- Regulation of campaign finance is important for women candidates who don't have personal wealth to contest elections in most of the cases. As such, some provisions like campaign funds for childcare and domestic duties must also be considered.<sup>3</sup>
- Strengthening of partnership among the judiciary, watchdog agencies, especially media and civil society to monitor the violation of code of conduct has become more urgent now than ever.
- Disqualification of the candidature found in criminal offenses, law-breakers and anti-social elements must be enforced in true faith.
- The government entrusted to conduct election should not make any important appointment, transfer and promotion of public officers, should not make major policy decisions and commit the country to financial expenditure unless situation of grave emergency arises. Abrupt changes affect women and their chances in elections.
- Voter education and public information system should be enhanced.

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<sup>3</sup> For example, see Canada Election Act Section 409(1) – “Personal expenses of a candidate are his or her electoral campaign expenses, other than election expenses, that are reasonably incurred in relation to his or her campaign and include (a) travel and living expenses; (b) childcare expenses; (c) expenses relating to the provision of care for a person with a physical or mental incapacity for whom the candidate normally provides such care; and (d) in the case of a candidate who has a disability, additional personal expenses that are related to the disability.

## **References**

### **Statutes**

Members of House of Representatives Election Act, 2056  
Members of Constituent Assembly Elections Act, 2064  
Members of Constituent Assembly Elections (First Amendment) Rules, 2064  
Elections (Offence and Punishment) Act 2063  
Constituent Assembly Court Act, 2064  
Election Commission Act, 2063  
Voters Rolls Act, 2063  
Voters Rolls Rules, 2063

### **Other materials**

Ben Reilly & Andrew Reynolds, *Electoral Systems and Conflict in Divided Societies* (Washington DC, National Academy Press, 1999)

Bipin Adhikari, *Nepal: Design Options for the New Constitution* (Kathmandu: Nepal Constitution Foundation, 2011)

Bhimarjun Acharya, Bipin Adhikari, et al, *Nirbachan Pranali Sudhar* (Lalitpur: National Election Observation Committee, 2065)

Cecilia Bylesjo, Rumbidzai A. Kandawassvika-Nhundu, and Stina Larsrud, *Electoral System and Quotas in Nepal* (Stockholm: International Institute for Democracy and Electoral Assistance, 2010)

Dans S. Felsenthal & Moshe Machover (eds), *Electoral Systems: Paradoxes, Assumptions & Procedures* (New York: Springer, 2012)

David M. Farrell, *Electoral Systems: A Comparative Introduction* (New York: Palgrave, 2001)

DEAN, *Constituent Assembly Election Observation: Final Report* (Kathmandu: Democracy and Election Alliance, 2008)

EC, *Photo Sahit Matdata Namabali Sankalan Nirdeshika, 2067* (Kathmandu: Election Commission, 2067)

EC, *Nirbachan Paryabekshyan Nirdeshika 2064* (Kathmandu: Election Commission, 2064)

EC, *Matdata Shikchhya Swayamsevak Sahayogi Pustika, 2064* (Kathmandu: Election Commission, 2064)

EC, *Rananitik Yojana 2065* (Kathmandu: Election Commission, 2065)

EC, *Bidyutiya Matdan Upakaranka Sambandhama Barambar Sodhine Prasnaharu* (Kathmandu: Election Commission, 2065)

EC, *Sambidhan Sabha Sadasya Nirvachan Aachar Samhita 2064* (Kathmandu: Election Commission, 2064)

EC, *Nirbachan Surakchya Byabasthapan Sambandhi Jankari Pustika 2064* (Kathmandu: Election Commission, 2064)

EC, *Nepalko Samsadiya Nirvachan Darpan* (Kathmandu: Election Commission, 2063)

EC, *Matgarana Nirdeshika 2064* (Kathmandu: Election Commission, 2064)

EC, *Barsik Pratibedan 2063/064* (Kathmandu: Election Commission, 2065)

EC, *Barsik Pratibedan 2066/2067* (Kathmandu: Election Commission, 2067)

EC, *Sambidhan Sabha Sadasya Nirbachan, 2064: Mukhya Nirbachan Adhikrit ra Nirvachan Adhikritko Samikchya Gosti Pratibedan* (Kathmandu: Election Commission, 2065)

GEOC, *Samidhan Sabha Sadasya Nirvachan Paryabekchyan 2064 Pratibedan* (Kathmandu: General Election Observation Committee, Nepal, 2065)

Inter-Part Women's Network, *Submission Given to Constituent Assembly Chairperson* (Kathmandu, 2011) (unpublished)

Karre Vollan, *Nirbachan Pranali Sambandhi Yekikrit Nepal Communist Party (Maobadi) ko Prastabko Sambhabya Samayojan* in Nepal Constitution Foundation Newsletter, Year 2, No. 4 February 2011, P. 7-11 (Kathmandu: Nepal Constitution Foundation, 2011)

Matthew Soberg Shugart & Martin P. Wattenberg (eds), *Mixed Member Electoral Systems: The Best of Both Worlds* (Oxford: OUP, 2001)

NCF, *Bahiskaranma Pareka Samuhako lagi Aabashyak Nyunatam Kota Quota Sambandhi Madhyamargi Samadhan* in Nepal Constitution Foundation Newsletter, Year 2, No. 6 March 2011, P. 1-15 (Kathmandu: Nepal Constitution Foundation, 2011)

Neel Kantha Uprety, *Nepalka lagi Upayukta Nirbachan Pranaliko Chhanot: Yek Bishleshan* in Nepal Constitution Foundation Newsletter, Year 2, No. 4 February 2011, P. 1-6 (Kathmandu: Nepal Constitution Foundation, 2011)

NEMA, *Sambidhan Sabha Sadasya Nirvachan 2064 Paryabekchhyan Pratibedan* (Kathmandu: National Election monitoring Alliance, 2065)

NEMA, *Sambidhan Sabha Sadasya Nirvachan 2064 Paryabekchhyan: Prashikchyak Prashichhyan Nirdeshika* (Kathmandu: National Election monitoring Alliance, 2064)

NEMA, *Constituent Assembly Election 2008: Observation Report* (Kathmandu: National Election monitoring Alliance, 2008)

NEOC, *Observation: Constituent Assembly Election – 2008* (Lalitpur: National Election Observation Committee, 2008)

NEOC, *Sambidhan Sabha Nirvachan – 2064 Nirvachan Paryabekchhyan Pratibedan* (Lalitpur: National Election Observation Committee, 2065)

Nils A. Butenschon & Kare Vollan, *Electoral Quotas and the Challenges of Democratic Transition in Conflict-Ridden Societies* (Oslo: University of Osl, 2011)

NHRC, *Manav Adhikarko Dristima Sambidhan Sabha Nirbachan Anugaman Pratibedan 2065* (Lalitpur: National Human Rights Commission, 2065)

Peter Emerson, *Defining Democracy: Voting Procedures in Decision Making, Elections and Governance* (New York: Springer, 2012)

Pradeep Ghimire (ed), *Nirbachan Paryabekchyan: Utkristha Abhyas* (Kathmandu: National Election Monitoring Alliance, 2065)

Sudhindra Sharma & Pavan Kumar Sen, *Nepalko Samsamayik Rajnaitik Paristhiti – 5 : Matsarvechhyan Pratibedan* (Kathmandu: Interdisciplinary Analysts, 2008)

Surya Dhungel, Bipin Adhikari *et al*, *Commentary on the Nepalese Constitutrion* (Kathmandu: DeLF - Lawyers Inc, 1998)

Wilma Rule & Joseph F. Zimmerman, *Electoral Systems in Comparative Perspective: Their Impact on Women and Minorities* (Westport: Greenwood Publishing Group, 1994)

[http://www.adb.org/Documents/Books/Country\\_Briefing\\_Papers/Women\\_in\\_Nepal/chap\\_04.pdf](http://www.adb.org/Documents/Books/Country_Briefing_Papers/Women_in_Nepal/chap_04.pdf)  
[http://www.idea.int/publications/upload/Quotas\\_LA\\_Report.pdf](http://www.idea.int/publications/upload/Quotas_LA_Report.pdf)