THE
CARTER CENTER

Pre-Election Statement of the International Election Observation Mission to Nepal's 2013 Constituent Assembly Election

The Carter Center

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On June 6, 2013, the Interim Election Council of Ministers announced the date of Nov. 19, 2013, for Nepal's second constituent assembly election. This announcement was followed by a prolonged stalemate over the formation of a government for the election period, as well as the date and system for the election. The first constituent assembly had been dissolved without the promulgation of a new constitution on May 27, 2012.

Carter Center observers report that the technical aspects of the electoral preparations are largely on schedule, and the campaign environment thus far, in general, has been open, allowing candidates and parties to freely organize public rallies to convey their message to potential voters. The Center is nevertheless concerned about the tight schedule for electoral preparations, the still unresolved issues surrounding voter identification, sporadic incidents of confrontations between supporters of rival party/candidates, and the looting of campaign and voter education materials. In addition, there continues to be uncertainty surrounding the activities and plans of parties opposed to the polls, which have called for a 10-day *bandh* (strike) from Nov. 11-20.

As election day approaches, the Center calls on political parties and their candidates to abide by the Election Commission of Nepal's (ECN) Code of Conduct and on the election commission to ensure the timely delivery of materials and to resolve outstanding issues of voter identification. The Center also urges protesting parties to respect the right to freedom of movement and the right of all citizens to participate in public affairs.

The Carter Center launched its international election observation mission to Nepal on Sept. 25 with the deployment of 12 long-term observers from eight countries. In mid-November, 51 short-term observers from 27 countries will join them to observe voting and counting.

The Carter Center is observing the November 2013 Nepal constituent assembly election at the written invitation of the ECN and the chairman of the Council of Ministers, Khil Raj Regmi.

The Center will provide an impartial and independent assessment of the electoral process to be made available to the Nepali public and the international community through periodic statements and reports, available at www.cartercenter.org. The Center's observation mission is conducted in accordance with the *Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers* that was adopted at the United Nations in 2005 and has been endorsed by more than 40 election observation groups. The Center assesses the electoral process based on Nepal's national legal framework and its obligations for democratic elections contained in regional and international agreements.[1]

Introduction

Nepal is currently preparing for its second constituent assembly election to be held on Nov. 19, 2013. The election aims to restart the country's stalled constitution drafting process after the failure of the first constituent assembly to adopt a new constitution within its regular and extended tenure that ended on May 27, 2012.[2] On March 13, 2013, leaders of four major political parties signed an 11-point agreement to end Nepal's prolonged constitutional and political crisis, after political parties had earlier failed to agree on an electoral government. The agreement led to the formation of an Interim Election Council (IEC), chaired by the sitting chief justice Khil Raj Regmi, replacing the caretaker government, and the passage of a 25-point ordinance by the president to remove constitutional hurdles. A High Level Political Committee (HLPC), a loose alliance of Nepal's largest political parties, was subsequently formed to support the council. On June 13, 2013, the IEC announced that the constituent assembly election would be held on Nov. 19, 2013. Both the appointment of the chief justice as chair of the IEC and the announcement of the election date was publicly opposed as unconstitutional and illegitimate by several smaller parties, including a 33-party alliance led by the Communist Party of Nepal-Maoist (CPN-M), which continues to call for its boycott. After several rounds of negotiations with the government and HLPC failed, the CPN-M and the Federal Democratic National Front affiliated Federal Limbuwan State Council (FDNF affiliated FLSC) in eastern Nepal have intermittently threatened to disrupt the election.[3]

[1] As cited in this statement, these include the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Indigenous and Tribal Peoples Convention, and UN Human Rights Committee (UN HRC) General Comment 25.

[2] Elections to a Constituent Assembly had been part of the Comprehensive Peace Agreement between the CPN(Maoist) and the Seven Party Alliance interim government in November 2006 that officially ended the decade-long armed conflict in Nepal. After several postponements the election were eventually held on April 10, 2008. The Constituent Assembly failed to promulgate a Constitution within the tenure following intense disagreements over the form of federalism and system of governance to be adopted.

[3] Several parties who originally opposed the election, including Madhesi People Rights Forum-Nepal (MPRF-Nepal) and Federal Socialist Party-Nepal (FSP-Nepal) have since agreed to join the electoral process.

Legal Framework and Electoral System

A sound legal electoral framework is essential for the effective administration of democratic elections that adhere to national law and international obligations.[4] The legal electoral framework in Nepal has its base in the interim constitution of 2007 and various separate laws and ordinances. In addition, the Election Commission of Nepal (ECN) has issued a number of directives, rules, and codes of conduct to regulate the process.

The interim constitution of 2007, which originally foresaw only one constituent assembly election, was modified by a presidential order in March 2013 in order to remove legal barriers to holding a new constituent assembly election, at that time planned for June 2013. These issues were mostly related to institutional aspects of the political crisis, voter eligibility, and updating electoral provisions. Apart from these changes, the legal framework for the 2013 constituent assembly election is very similar to that of 2008. Despite an agreement to adjust the electoral system, negotiations to facilitate the participation of a number of smaller parties which had been threatening to boycott the election led to a reversion in September 2013 to the same mixed system that was in place for the 2008 constituent assembly election: 240 seats elected in first-past-the-post races; 335 seats elected through proportional representation in a single nationwide constituency; and 26 seats selected post-election by the council of ministers.

Under international standards for democratic elections, voters must be able to freely choose their representatives. Although the mixed electoral system in Nepal is in principle sound, the legal provision for political parties to choose, after the determination of results, which candidates will receive proportional representation mandates limits the right of voters to freely choose their representatives, since voters do not know at the time of voting which candidates will be selected by the parties.[5] Similarly, the provision for 26 members to be selected by the government after the election undermines the basic right of representation.[6]

The legal framework overall provides for all major aspects of the election process; however, the lack of cohesiveness makes it somewhat difficult to understand for candidates, voters, election officials, and observers, and there are repetitions, conflicts, and occasional gaps in the directives and regulations. The delimitation of first-past-the-post constituencies was affected by conflicting constitutional provisions, and despite the new population data gathered in the 2011 census, constituency boundaries remain unchanged since 2008. Gaps in the legal framework include a lack of reference to observers during the opening of polling stations, no explicit requirement to check voters for indelible ink before providing them a ballot (despite a requirement to apply it), no provision for spoiled ballots, and no ballot reconciliation procedure mandated during the counting process.

[4] ICCPR, article 2; UN HRC General Comment 25, paragraphs 5, 7, 9, 19, 20.
[5] Despite an ECN proposal, this aspect of the law was not changed prior to the 2013 elections.
[6] In General Comment 25 on Art 25 of the ICCPR, the UN Human Rights Committee noted that "Participation through freely chosen representatives is exercised through voting processes…"

The Code of Conduct for political parties, candidates, government, media and NGOs is positive overall, in that it sets clear ground rules for participants which if enforced will contribute greatly to an election process in line with international standards. For instance, several articles deal with the prevention of abuse of state resources during the campaign, including interference by officials. In some instances, however, the Code of Conduct is overly restrictive, including a ban on opinion polls during the campaign period, a ban on graffiti paintings and banners, and requirements that election materials (pamphlets, flags) be of a specific format. Such provisions are at variance with Nepal's international obligation to restrict freedom of expression only when strictly necessary. Regrettably, new draft provisions in the Code of Conduct to strengthen campaign finance regulation by obliging first-past-the-post and proportional representation candidates to disclose the sources of campaign funding were dropped from the final version.

The right of citizens to participate in the public affairs of their country, including through election observation groups, is a key international obligation for democratic elections.[7] Election observation is provided for by Nepal's legislation. However, the 2013 ECN directive on election observation is problematic in terms of restrictions placed on observers, particularly national observers. The directive requires that observers be at least 21 years old and have specific educational qualifications. These requirements are more stringent than the requirements to become a voter and therefore impinge upon the right of some citizens to take part in the public affairs of their country. The initial provision that required observers to observe outside their home constituency has, however, been changed to apply to only the polling center where an observer is supposed to cast his/her vote, after strong criticism from observer groups and international organizations. This positive change is commended by The Carter Center. The Supreme Court had earlier agreed to hear a lawsuit filed by EOC, a national observer group, against the ECN policy.

Nepal has an international obligation to provide effective remedies for violations of rights and to ensure that there are adequate venues for addressing election complaints.[8] The complaints and appeals system was assessed in 2008 as being confusing and often non-transparent. It was therefore underutilized, meaning that claims of electoral violations were often not dealt with appropriately. During the current electoral process, few written complaints have been filed at the constituency level. Nevertheless, Carter Center observers have noted that returning officers do not have a uniform understanding of the complaints mechanism and that some political parties have stated that they do not have sufficient information on filing complaints or that they do not have confidence in the complaints and appeals system.

Election Management

An independent and impartial election management body that functions transparently and professionally is internationally recognized as an effective means of ensuring that citizens are

[7] ICCPR, Article 25 (a). UN HRC General Comment 25, paragraphs 20 and 26.
[8] ICCPR, Article 2.3, and UN HRC General Comment 25, paragraph 20.

able to participate in a genuinely democratic electoral process.[9] It is also the responsibility of an election management body to take necessary steps to ensure respect for fundamental electoral rights, as defined in international and national law.[10] After a brief period in early 2013 with no commissioners, the ECN is now fully functioning with five commissioners appointed, and decisions are made on the basis of consensus. This contributes to building public confidence in the integrity of the election.

Despite the constitutional crisis, the tight timeframes for conducting a November election in a geographically complex country, and threats of poll disruption by some boycotting parties, the ECN has thus far kept the technical side of the process largely on schedule while acting in an impartial manner. There are still major challenges to be addressed in ensuring adequate voter education, in the distribution of all materials and the effective training of polling and counting officials, especially in the face of ongoing security threats. The ECN has prepared an extensive voter education campaign. Although ECN public service spots are being aired on TV and local FM stations, other voter education campaign efforts have been limited with low visibility in the field. The Center's observers have been informed of ongoing or completed training of voter education volunteers in several districts visited, but little activity was taking place as most interviewed district election officers (DEOs) reported that they had not yet received the voter education materials. Where voter education was already underway, observers noted that volunteers had no specific targets for numbers of voters to contact and were largely left to devise their own program.

While the ECN has worked transparently for the most part during election preparations, it has not permitted observers to be present for the printing of the ballots, citing security concerns. Making all steps of the process fully open to observation is an important step in building and maintaining public confidence in the integrity of the process, as well as a central point in the *Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers.*

Party and Candidate Registration

The effective implementation of the right to stand for elective office ensures that voters have a free choice of candidates.[11] For this reason, any conditions placed on political party and candidate registration processes should be reasonable and non-discriminatory.[12] Overall, party and candidate registration took place under conditions that allowed parties and individuals to register without undue obstacles, giving voters a wide choice of political options (over 122 parties were registered for the proportional representation race and 6,128 first-past-the-post candidates, among them 667 women and 1,115 independent candidates). The few cases of refusal of registration (eight parties and six first-past-the-post candidates) appeared to be well grounded. In some constituencies in eastern Nepal, first-past-the-post

[9] UNHRC, General Comment No. 25, paragraph 20.
[10] UN HRC General Comment 25, paragraph 20.
[11] ICCPR, Article 25 (a). UN HRC General Comment 25, paragraph 15.
[12] UN HRC General Comment 25, paragraphs 15 – 17.

candidate registration was hampered or tense due to strikes or threats of violence by boycotting groups but was successfully conducted throughout the country.

States must ensure the ability of all citizens to participate in public affairs and should take positive measures to end discrimination or lack of opportunity in practice.[13] This applies to all persons, but there are additional specific international obligations regarding the rights of women and indigenous groups.[14] In this context, the minimum representation quotas for women, members of indigenous groups and others introduced in the legal framework for the 2008 are positive. However, relatively few candidates for the first-past-the-post races are women or from indigenous groups, and some of those who have been nominated have reportedly been assigned constituencies with a low likelihood of victory. The ECN returned most of the initially submitted proportional representation candidate lists to the political parties for correction due to not meeting the quotas.

The ECN postponed the deadline for the registration of candidates [for the first-past-the-post races] by one week at the request of the council of ministers.

Voter Registration and Voter Identification

A comprehensive and inclusive voter registration process is a key part of ensuring universal suffrage and the enjoyment of the fundamental right to vote and the right to be elected.[15] Voter registration reform was the priority recommendation of The Carter Center and other observation organizations following the 2008 constituent assembly election, due to the widespread lack of confidence in the accuracy of the voter rolls. The ECN addressed the problem by creating an entirely new voter register with biometric data, based on voluntary registration through nationwide registration drives, and succeeded in registering 12,147,865 voters (i.e., citizens 18 years and older). This was, however, short of its initial goal of 14.7 million voters and further still from the estimated 16 million potentially eligible Nepali voters, based on the 2011 census. A positive step resulting from the March 2013 amendment of the interim constitution of 2007 has been that most 18 year olds are now eligible to vote, this being in accordance with a Carter Center recommendation. By ECN decision, all registered citizens who turned 18 years of age by July 15 are eligible to vote.

Under Nepal's international obligations, it is required to facilitate registration and remove barriers to registration. A continuing, sensitive issue for voter registration in Nepal has been proof of eligibility. The Supreme Court ruled in 2011 that under Nepali law only a citizenship certificate could be used to prove that an individual was a citizen and therefore eligible to vote. While this requirement excluded non-Nepali citizens, it also made it difficult for citizens who lacked the documents needed to obtain a citizenship certificate, particularly among historically marginalized communities, married women, and the landless. In line with the Supreme Court's decision, the authorities took steps to improve access to this document,

[13] UN HRC General Comment 18, paragraph 10.
[14] ICCPR, Art 3; CEDAW, Art 7; and ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), Art. 6.1(b)
[15] ICCPR, Article 25(b); and UN HRC General Comment 25, paragraph 11.

including sending mobile distribution teams to each district, amending the citizenship law to allow children of people who obtained citizenship by naturalization to obtain citizenship, and amending voter registration rules to allow people registered for the 2008 constituent assembly election to be included on the voter list without a citizenship certificate.

The ECN instituted an "out of district" registration program to allow internal migrants unable to prove residence in their new district to remotely register for their home district, thereby removing an initial barrier to registration. It is unclear to what extent this measure will effectively enfranchise migrants, however, since they must vote in their home constituency and may be unable to travel for election day. While voter registration was conducted correctly overall, often in difficult conditions, the percentage of errors – e.g., misassigned polling locations, incorrect identifying information – is unknown as no audit of the voter register was conducted prior to this election.

Voter identification remains an issue. The new voter rolls contain a photograph of each voter, which will assist polling staff in identifying voters. After some mixed messages regarding the distribution of voter ID cards, the ECN has recently indicated that it is going ahead with a plan to print and distribute the 12.1 million voter ID cards by election day, in some cases by making them available at polling stations. Most DEOs met by Carter Center observers have expressed concern about the delay in distributing voter ID cards. If distribution goes ahead, considerable control will be necessary to ensure that each voter's ID card is distributed only to that voter in order to prevent fraudulent usage. It is unclear whether or not the ECN will have an education campaign to deal with potential confusion by voters as to whether or not the ID cards are necessary to vote.

No steps have been taken to prevent parties from setting up tables at polling locations to assist voters in finding themselves on the voter roll. In addition to this being unnecessary with the new format of the voter rolls, this practice led to problems in some polling locations in 2008, and The Carter Center recommended that it be eliminated in future elections.

Campaign Environment

In addition to being open and transparent, a genuinely democratic election requires a campaign period in which rights such as freedom of opinion and expression, freedom of association, freedom of movement, security of the person, and access to information are respected and upheld by all stakeholders of the election.[16]

Carter Center observers report that in general the campaign environment thus far has been open, allowing candidates and parties to organize public rallies and assemblies freely and to convey their message directly to potential voters. Reported violations of the ECN's Code of Conduct mostly referred to unauthorized vehicle use by candidates on the campaign trail. However, a number of more serious violations have been reported; among them sporadic confrontations between supporters of rival party/candidates and incidents of looting of

[16] ICCPR, Articles 9, 12, 19, 22; and UN HRC General Comment 25, paragraph 25.

campaign or voter education materials by poll-opposing parties.[17] Lately, there have also been arson attacks on parked vehicles used by candidates and poll-opposing parties have tried to hamper visits of top-level national leaders of the four major parties to more remote districts by announcing and enforcing regional-level *bandhs.* Yet, these sporadic and increasing incidents, and attempts at obstructions have not to date had a significant impact on the campaign environment overall.

There is no public campaign funding in Nepal, and political parties therefore rely on party member contributions, the personal resources of nominated candidates and/or donations for campaign expenditures. Many first-past-the-post candidates rely on their own resources for campaign expenditures and receive little or no financial support from their parties. This is at times cited as a reason for the failure of political parties to nominate more women in the first-past-the-post races. Although specified spending limits are in place, monitoring compliance is a continuing challenge.[18] The Carter Center urges parties and candidates to adhere to spending limits and urges the ECN to publish campaign finance reports after they are received in order to make this element of the process more transparent.

Security Environment

The right to personal security is a fundamental right and includes the protection of voters, candidates, poll workers, and observers from coercion, intimidation, and violence during an election.[19] In the 2008 election, Nepal experienced acts of electoral violence, voter intimidation, and booth capturing. More recently, poll-opposing parties obstructed the voter registration process in March 2013.

In district visits prior to the Dashain festival period (in the second week of October), Carter Center observers reported that the security environment was calm. This also held true for districts the government had classified as sensitive. Since then, a number of reports of confrontations between supporters of rival parties/candidates and sporadic incidents of looting of campaign or voter education materials by poll-opposing parties have emerged. (See campaign section.)

The activities and plans of poll-opposing parties, chief among them the CPN-M and the FDNF-affiliated FLSC in eastern Nepal, present the biggest element of uncertainty in the security environment for these elections. There have been mixed messages regarding their strategy and whether they will attempt to actively disrupt, or peacefully boycott the election. In spite of assurances by CPN-M chairman, Mohan Baidhya, given on Oct. 10 that the party

[17] The investigation in the shooting on Oct. 4 of Mohammad Alam, a candidate for UML from Bara district and prominent Muslim leader, - arguably the most serious incident thus far - is still ongoing and it is unclear whether the assassination was related to the election or not.
[18] In the past enforcement of audit requirements and public disclosure mechanism has been notoriously weak. See Martin Chautari, February 2012, "Political Finance and the Public Right", Briefing Paper No. 6.
[19] ICCPR, Art 9. "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

will adopt a “gentle” approach and not forcefully disrupt the election, reports of sporadic incidents of looting or destruction of campaign or voter education materials or assaults continue.[20] The FDNF-affiliated FLSC in the east appears to have taken a more aggressive stance, having announced a program to ‘ban’ candidates from entering their constituencies in the east starting from Oct. 19. Significantly, both groups have called for a nationwide shutdown from Nov. 11- 20, potentially impacting logistical preparations for the election. The Carter Center urges all protesting parties to do so peacefully and to respect the rights of all citizens to freedom of movement, peaceful assembly, and participation in public affairs.

The Center’s observers noted that particularly in mountain districts and remote areas of the hills (but also to some extent in the Tarai), the difficult terrain and lack of road access poses challenges for security forces to respond as well as for the transportation of sensitive polling materials. Several interlocutors expressed concern that voter intimidation or obstructions on election day might not occur at the polling location, but rather on the way there, with the scope and ease of such obstructions amplified in rural and remote areas.[21] Conversely, in the eastern and central Tarai, the open border with India and links of certain candidates to armed groups and criminal gangs is understood to be a potential security risk.

Carter Center observers also heard of plans by party representatives to mobilize their youth-wings not only for the canvassing of votes, but also to provide protection for candidates, guide voters to the polling locations, and guard ballot boxes and booths against potential interference. Some told observers that members of their youth-wings are currently undergoing training in crowd management and booth protection. While most assured that their youth wings would be mobilized with restraint, the possibility of large crowds of youth gathering outside the polling location is of some concern. The Carter Center urges political party leaders and candidates to use the official mechanism of the complaints process should any complaint arise and to take measures to calm their supporters.

In view of past experiences and the factors mentioned above - including continuing threats of potential poll disruption - the government in September unveiled an integrated security plan for the election. According to the plan, 40,000 personnel from the Nepal Police, 25,000 from the Armed Police Force and 40,000 Army personnel will be deployed to provide election security. In addition, 45,000 temporary police personnel have been recruited and are currently undergoing a 15-day training to fulfill auxiliary roles during the election. The Ministry of Home Affairs has also ranked different constituencies and polling locations according to their sensitivity.

[20] This included an incident where a female UCPN(M) cadre sustained severe burn injuries in Nuwakot on Oct. 23.

[21] For instance, in Jogbudha VDC of Dadeldhura, a police official pointed out that the access route to some polling locations in the VDC is such that a small number of people with sticks would be able to block the way.

The security of polling officials and materials, candidates, voters, and other stakeholders prior to and during polling day is of utmost importance to the conduct of a credible election and the Center commends the government on taking measures to mitigate the risks.

The Carter Center understands that the recruitment of temporary police and the deployment of the army for the purpose of election security has been a matter of debate. In addition, a clash between temporary police recruits and the police in Bara district on Oct. 21 followed by nationwide demonstrations by recruits the day after an announcement of the reduction of their tenure raises some concern. The Carter Center urges that adequate training is given to temporary police personnel before their deployment and that security at the polling location should be arranged in such a manner that it guarantees that the presence of armed personnel, while acting as deterrent against disruptions, does not intimidate voters or influence them in any manner while exercising their democratic rights.

Recommendations

The Carter Center international election observation mission to Nepal's 2013 constituent assembly election offers the following recommendations to support the conduct of a credible election.

To the Election Commission of Nepal:

- Ensure that accredited international and citizen election observers have access to all parts of the electoral process, including such pre-election activities as the ballot paper printing, all aspects of polling, closing and counting, important public briefings, and post-election activities such as national tabulation of votes.
- Ensure polling officials receive adequate training in advance of election day, especially on the identification of voters, preventing the entry of unauthorized persons, and enforcing voter secrecy.
- Ensure that voter ID cards are distributed personally and only to the individual voter. The ID card should not be a requirement for being able to vote. An education campaign on the ID cards also should be conducted.
- Ensure that polling officials and not political party volunteers identify voters at polling centers.
- Ensure that counting staff are fully trained and consider making provisions for ballot box reconciliation procedures
- Build on efforts to improve voter education, including targeted voter education for specific audiences.
- Ensure that all complaints are dealt with according to law and established procedures.

To Candidates and Political Parties:

- Continue to respect the Election Commission of Nepal's Code of Conduct and reinforce fair practices among party supporters.
- Ensure that party rallies or protest and boycott programs respect the freedom of assembly, freedom of movement and the right to participate in public affairs of all citizens.
- Use official complaint mechanisms for election complaints that may arise and take measure to calm their supporters and call for patience.
- Instruct supporters and youth-wing members to refrain from crowding polling locations or its access routes on election day.

- Ensure transparency of campaign finances.
- Refrain from intimidation or asking for donations forcefully.

To the Government of Nepal:

- Respect the right to abstain from voting and to call for a peaceful boycott, but prevent any disruptions that would prevent citizens from exercising their fundamental civil and political rights.
- Ensure safety and security of voters and candidates.
- Ensure that security arrangements are done in such a manner that they do not intimidate voters.
- Ensure adequate training is given to temporary police personnel before deployment.

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