

Placing the Strengthening of Democracy at the Heart of the Election Commission's Agenda

Strengthening Constitutionalism in Nepal



Placing the Strengthening of Democracy at the Heart of the Election Commission's Agenda

Strengthening Constitutionalism in Nepal

Copyright ©2022, Niti Foundation

This note has been developed by Niti Foundation with support from the National Endowment for Democracy. It is part of a series that explores how Nepal's constitutional bodies can strengthen constitutionalism.

Cover Photo: (left) The Annapurna Express, (center) Bikram Rai, (right) New Spotlight

Design: Square Studio

Foreword

This note on the Election Commission of Nepal (ECN) has been produced by Niti Foundation — a Nepali not-for-profit public interest organization that accompanies locally-led policy reform, in partnership with the National Endowment for Democracy.

Election management bodies, such as the ECN, are important actors for the promotion and protection of democracy in any democratic nation. It is, therefore, critical to consider the ways in which the ECN can promote and further strengthen democracy beyond the exercise of a free and fair electoral process. This note was commissioned with this purpose.

This note analyses: the necessity of independent electoral management bodies; the operational and normative roles of the ECN in the protection of democracy; and strategies and reform initiatives that the Commission could consider in both the election and non-election period to ensure sustained democracy in Nepal.

We are grateful to Bipin Adhikari — the lead author of the note; George Varughese and Mohan Das Manandhar for strategic oversight and review; Iain Payne for analytical and written contributions; Sushav Niraula for drafting and editorial support; and Sneha Ghimire and Ranju Bista for editorial support.

We also thank Swati Jhaveri and the other participants of the workshop on ‘Fourth Branch in South Asia’ for valuable comments.

The note has been previously published in *Nirwachan Smarika* (Election Souvenir) — the ECN journal. We are grateful to the ECN for their overall support during the course of the study.

We hope that this note is a useful baseline for further examination of the role of the Election Commission in the democratic consolidation of Federal Nepal.

Abbreviations

CSO	Civil Society Organization
ECN	Election Commission of Nepal
EMB	Electoral Management Body
FPTP	First Past the Post
HoR	House of Representatives
PR	Proportional Representation
PRI	Policy Research Institute
NOTA	None of the Above

Contents

1. Introduction	1
2. Independent Electoral Management and Democratic Consolidation	3
3. Functions, Duties, and Powers of the Election Commission of Nepal	6
3.1. Operational or Technical Roles	7
3.2. Normative Role Related to Protecting and Promoting Democracy	7
4. Challenges before the Election Commission	9
4.1. Creating a National Election Policy	9
4.2. Streamlining Existing Laws and Procedures	10
4.3. Reforming the Political Parties Act 2017	10
4.4. Ensuring Constant Coordination between the ECN and Political Parties	11
4.5. Implementing Standard Electoral Dispute Resolution Procedures	11
4.6. Regulating and Monitoring Campaign Finance	11
4.7. Providing Regular Civic Education beyond Technical Voter Education	12
4.8. Fostering Inclusion and Participation in Electoral Systems and Processes	12
4.9. Providing Voting Rights to Non-resident Nepalis	14
4.10. Incorporating a NOTA Option	14
4.11. Other Areas for Reform	14
5. Afterword	15

1. Introduction

Elections are the cornerstone of a competitive, plural political system. By exercising adult suffrage, the sovereign people of a democratic country establish their government and institutionalize democratic and accountable governance. It is for this reason that elections are led and conducted in every democratic country by (usually independent) electoral bodies or other such institutions that may accomplish this job independent of the influence of the incumbent government.¹

In Nepal's case, the Nepal Interim Government Act 1951 — the country's first codified Constitution was the first to provide for an election commission in Nepal. The Election Commission was supposed to conduct elections for a constituent assembly that was to be formed with a mission to write a new constitution. Subsequently, the Constitution of the Kingdom of Nepal 1959 was enacted under the king's authority. No sooner than this Constitution was enacted, it was withdrawn by the king due to the distrust between the king and the democratic forces. A new Constitution of Nepal was enacted in 1962 by the king, without any support from the political parties. The latter Constitution was not democratic like the 1959 Constitution and envisioned a 'party-less' system. Neither of the 1959 and the 1962 constitutions provided for any independent constitutional body to conduct elections and election-related work. Such a body, if it was considered necessary at all, was to be created through legislature. In 1966, the first amendment to the 1962 Constitution changed this.

The 1966 amendment created a constitutional provision for an election commission for the first time. After the restoration of a multi-party system in 1990, the Commission was refashioned into a powerful independent body by the democratic Constitution of the Kingdom of Nepal 1990. This Election Commission was given institutional continuity by the Interim Constitution of Nepal 2007 that was promulgated following the 2006 People's Movement, which overthrew the monarchy. The Constitution of Nepal 2015, which was adopted by the second Constituent Assembly, again gave continuity to the Election Commission as a constitutional body, with its powers and responsibilities further broadened under a federal constitutional framework.

The Election Commission of Nepal (ECN) has been able to exercise significant electoral powers quite successfully under the new three-level federal system in Nepal. Local level elections were conducted in three phases on 14 May, 28 June, and 18 September of 2017 for 35,221 positions in 753 local units. Elections to provincial assemblies and the federal House of Representatives (HoR) were held in two rounds on 16 November and 7 December 2017. The National Assembly election was held on 7 February 2018. The first election cycle under the new Constitution also consisted of elections for the President of Nepal in March and the Vice President in April 2018.

1 ACE, 'Electoral Management' (The Electoral Knowledge Network, 19 January 2022) <<https://aceproject.org/ace-en/topics/em/ema/ema02/>> accessed 19 January 2022.

The success of the ECN is remarkable amidst Nepal's ongoing democratic challenges. These challenges come from feeble democratic commitment from political parties, extremism, declining standard of the rule of law and public accountability, slow social transformation, and corruption. While the election period that occurs every five years constitutes of a key aspect of the ECN's role, the intervening non-election period is also critical for the Commission to expand on its normative role of democratic consolidation. The ECN, cannot be expected to only perform mere technical administration of elections. It also has to see itself as playing a wider instrumental role in the continued consolidation of Nepali democracy. This is understood by the ECN, as evidenced by its third five-year strategic plan where the Commission articulates that its organisational goal to 'extend to every citizen the opportunity to freely exercise their right to vote during free, fair, impartial, legitimate and efficient elections' and thereby 'contribute to the strengthening of democracy and the enhancing of good governance'.²

The objective of this note is to review the status and operations of the ECN beyond the technical management of elections and explore its broader teleological role of contributing to the strengthening of democracy in Nepal. In doing this, the note will explore the following questions: How is the strengthening of democracy — and not simply the execution of elections — contained within the ECN's operational agenda? How, in its day-to-day operations, has the ECN sought to promote democratic values and commitments? What kinds of resources does it deploy in service of these ideals? Beyond these activities, how may the ECN better foster democratic values and commitments? What kind of activities and modes of operation can the ECN embrace with the state and civil society? What constraints stand in the ECN's way? The goal of this exploration is to place the strengthening of democracy at the heart of the ECN's agenda.

In maintaining the above focus, this note does not seek to suggest that election management is not the core element of the ECN's constitutional role. However, by exploring the ECN's instrumentality beyond mere election management, this note seeks to highlight the greater role that the ECN can embody towards the consolidation of Nepali democracy under the present constitutional legal framework.

2 Nepal Election Commission, 'Third Five Year Strategic Plan 2076/77 - 2080/81' (2019) <https://www.election.gov.np/uploads/Pages/1594191104_np.pdf>.

2. Independent Electoral Management and Democratic Consolidation

Independent electoral management bodies (EMBs), like the ECN, have increasingly been understood to be important institutions — comprising part of a ‘fourth branch’ of the state — that can help guarantee and strengthen democratic consolidation, and act as bulwarks against democratic decay.³ Tarunabh Khaitan, for example, argues that an independent EMB ‘is going to be necessary to guarantee a minimal constitutional commitment to representative democracy’.⁴ Generally speaking, EMBs are understood to perform a custodial role by taking elections out of the hands of the political branches and thereby insulating against partisan attempts to undermine electoral fairness.⁵ Democracy guardianship, as done by an EMB, is thus largely seen to be accomplished through the independent administration of elections (i.e., determining who is eligible to vote, overseeing ballot qualification, conducting polling, counting, and tabulating votes).

The emphasis placed on independent EMBs is even greater in contexts of ongoing democratic challenge and transition. This is because a politically biased or compromised EMB will struggle to confer credibility on contested electoral matters, which can undermine the legitimacy of the wider political system.⁶ It should come as little surprise that the independent model where the Commission has safeguards from the executive’s whims is the most common institutional model for electoral governance worldwide. This is the case in Nepal, where Articles 246 and 247 of the 2015 Constitution require the government to provide the ECN with necessary assistance to perform its constitutional role.⁷ The ECN also remains institutionally independent from the executive branch of government. The Constitutional Council, chaired by the Prime Minister with representation of the leader of the opposition and Chief Justice of the Supreme Court, among others, recommends the appointment of ECN officials.⁸ These officials are outside the purview of the executive, report to the parliament,⁹ and fall under the impeachment proceedings of the HoR.¹⁰ Despite the legal commitment to the ECN’s independence, there is still a need to be cautious, as it is an EMB’s de facto independence — not merely independence on paper — that positively affects electoral integrity.¹¹

3 Michael Pal, ‘Electoral Management Bodies as a Fourth Branch of Government’ (2016) 21 *Review of Constitutional Studies/Revue d’études constitutionnelles* 85.

4 Tarunabh Khaitan, ‘Guarantor Institutions’ (2021) 16 *Asian Journal of Comparative Law* S56.

5 Pal (n 3) 3.

6 Nic Cheeseman and Jørgen Elklit, ‘Understanding and Assessing Electoral Commission Independence: A New Framework’ (Westminster Foundation for Democracy 2020) 5.

7 Article 247 states: ‘The Government of Nepal, Provincial Government and Local Government shall provide such employees and other assistance to the Election Commission as may be required to perform its functions in accordance with this Constitution.’

8 Constitution of Nepal 2015, Art. 284.

9 *ibid*, Art. 293.

10 *ibid*, Art. 101.

11 Carolien van Ham and Holly Ann Garnett, ‘Building Impartial Electoral Management? Institutional Design, Independence and Electoral Integrity’ (2019) 40 *International Political Science Review* 313, 17.

EMBs' de facto independence and regular electoral cycles are no guarantee that elections will be free and fair in light of poor democratic commitment and practice. This is because core democratic elements — such as better representation of public interest, fairer and more equitable policies, and increased accountability of government — also affect citizens' commitment to voting and the way in which they can (freely and fairly) vote. In other words, without liberty to pursue one's goals — one of democracy's fundamental principles, organizing participation via voting is difficult; this is because democratic elements like freedom of assembly and speech, inclusiveness and equality, right to life, and minority rights not only promote democracy but also make voting relevant and politically effective.¹² William Riker goes as far as to note that these democratic elements are 'moral extensions and elaborations of the features of the method that make voting work.'¹³ In this context, if EMBs are to be guarantors of democracy and not simply guarantors of elections, their focus ought not be only limited to technical concerns related to the organisation of elections; the attention must also be given to the ways that EMBs facilitate democratic values — how they 'breathe life' into democratic rights.¹⁴ This view accords with other writing that illustrates fourth branch institutions' facilitative or supportive roles for democratic consolidation. Seen this way, these writings also nudge the ECN to let the end (democracy) drive the means (the execution of elections) in considering democracy promotion and protection.

This need to let the ends drive the means is also reflected in Christina Murray's writing. In constructing common roles for South Africa's 'state institutions supporting constitutional democracy,' or the 'Chapter 9' institutions, of which the country's electoral commission is one, Murray mentions twin roles: (i) checking/monitoring and contributing to accountable government and (ii) contributing to the transformation of South Africa into a society in which social justice prevails.¹⁵ Murray's first role, which is also considered EMBs' primary role, fits into the first accountability promoting function — ensuring that the electoral process is not undermined. Murray's second role, where the fourth branch facilitates the realisation of transformative constitutional promises, is related to supporting the development of a deeper commitment to fundamental constitutional values.¹⁶ Framed this way, EMBs' guarantor role can be conceived to encompass much more than a management function. It also comprises of fostering democratic values and commitments.

In Nepal's context, for the ECN to be able to perform its 'guarantor' function in relation to constitutional democracy, the emphasis should not only be on electoral management but also on substantive aspects of constitutional democracy such as making proposals for law reform and the independent exercise of investigative and prosecutorial powers.¹⁷ The functions, duties, and powers of the ECN enable it to work in both these areas, as the nature of Nepal's electoral legal regime would suggest. Indeed, the ECN also recognises that elections cannot be unmoored from the wider project of democratic consolidation. As already noted earlier, in its third five-year strategic plan, the ECN articulates that its organisational goal is to 'extend to every citizen the opportunity to freely exercise their right to vote during free, fair, impartial, legitimate and efficient elections to contribute to the

12 William H Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* (Waveland Press Inc, 1988) 5.

13 *ibid.*

14 Paul Kildea, 'The Constitutional Role of Electoral Management Bodies: The Case of the Australian Electoral Commission' (2020) 48 *Federal Law Review* 469, 3-4 (citing Michael Pal).

15 Christina Murray, 'The Human Rights Commission et al: What Is the Role of South Africa's Chapter 9 Institutions?' (2009) 9 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 122, 125.

16 *ibid* 135. In comparison to the other Chapter 9s the Electoral Commission's transformative mandate is not as explicit. Its statutory provisions provide considerable scope to contribute to the transformation project. Its functions include promoting conditions conducive to free and fair elections; promoting knowledge of sound and democratic electoral processes; undertaking and promoting research into electoral matters; reviewing and making recommendations regarding electoral legislation; and promoting voter education. See 'Electoral Act 51 of 1996 (South Africa)' (1996) s 5(1).

17 See, eg, a discussion in relation to India's constitutional democracy, Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India' (2020) 14 *Law & Ethics of Human Rights* 49-95. Note, however, that Khaitan is cautious to fully endorse the creation of EMBs with rule-making and judicial powers. See Khaitan (n 4) S55.

strengthening of democracy and the enhancing of good governance.’¹⁸ Expressed in a slightly different way, the ECN’s own goal recognises that the electoral process ought to deliver a deeper and richer democracy for Nepalis. Or, to reframe this proposition: it is the pursuit of a deeper, richer democracy that ought to drive electoral governance — the end driving the means and not the other way around.

To summarize, independence (de facto and de jure) is a prerequisite for an EMB to execute its mandate of electoral administration. This electoral administration has two important components: on the technical side, organizing elections means management of human resources to run elections, choosing a method to compile the electoral register, choosing voting technologies, regular evaluations of both the staff and technologies used, managing a network of stakeholders involved in organising elections, communicating effectively with the public, and organising polling day and the count. On the substantial side, however, elections are also about educating the voters on how to choose who will represent them, shape government policy, and hold politicians accountable through civic awareness. It also involves introducing legal reform to make sure that what the Constitution envisages as an electoral system is achieved by the legal system. While organising an election as an event is a big task, achieving the objective of representative democracy is even more immense. The latter is a continual process, not tied to individual electoral cycles. It goes beyond the management of complex technology, ballot boxes, people, resources, and communication of information to the public to organize elections.

18 Nepal Election Commission (n 2) 16 (emphasis added).

3. Functions, Duties, and Powers of the Election Commission of Nepal

To see out its mandate, the ECN has one chief election commissioner and four other election commissioners. The ECN has been performing its work subject to various policies, directives, and procedures issued under the Constitution, the federal election law, and other laws. Guidance on policy formulation and performance in matters related to election management come from the commissioners as a team, with the secretariat responsible for the implementation of policy decisions. In order to honour the roles and responsibilities of the ECN effectively, there is a division of labour among the commissioners as well.

The secretariat of the ECN is headed by a gazetted special class government secretary. It implements existing policies, directives, and programs as approved by the ECN and fulfils its election-related responsibilities. The secretariat has four divisions — administration, election management, law and political party management, and information technology — with nine branches under it. There are altogether 77 district election offices. They are led by branch officers of the gazetted third-class level. The district election office represents the ECN at the district level. They are responsible for activities like registering and updating the names of voters, preparing and distributing voter identity cards, managing polling stations, reviewing and providing updates on various election related issues to voters and stakeholders, and conducting election and voter education programs. The district election offices have been fulfilling the responsibility of necessary coordination and support in election-related work. There are 111 staff members in the secretariat and 560 in the district election offices, resulting in a total of 671 staff members.

With the restructuring of the state per the new Constitution, the ECN works with the federal government at the national level as well as at the seven provincial and 753 local government levels in the process of election management. A close coordination between these institutions is necessary, and the organizational structure of the ECN has to be changed according to this requirement. The ECN also commissioned a management study on the restructuring of the ECN based on the reality of state restructuring. Per the report's recommendations, a provincial election office led by a second class gazetted officer has been established in each of the seven provinces. In addition, the report had also proposed seventy district election offices (led by third class gazetted officers), an election officer in each constituency, and a polling officer in the polling station during the election.

The Constitution and laws made under it provide a full-fledged legal system for the operation of the ECN. In addition to conducting, supervising, directing and controlling elections, the ECN also works for the development and maintenance of the national electoral register, the registration of political parties, regulating financing of political parties, the adjudication of electoral disputes, consultation with stakeholders, and conducting electoral and civic education.¹⁹ An analysis of the legal basis for the ECN's functions, duties, and powers highlights that it has two important types of roles; these include:

¹⁹ Ayodhi Prasad Yadav, 'Nirvachan Prakriya ra Nirvachan Vyavasthapanma Sarokarbalaharuko Bhumika' [Electoral Process and the Role of Stakeholders in the Management of Elections] (2019) Election Souvenir, Election Commission Nepal 1-16.

3.1. Operational or Technical Roles

The 2015 Constitution of Nepal²⁰ sees the ECN as an independent constitutional body, responsible, subject to the Constitution and federal law, for conducting, supervising, directing, and controlling the elections of the President, Vice-President, members of the federal parliament, provincial assembly, and local levels.²¹ For these purposes, the ECN is also empowered to prepare electoral rolls that list persons who are entitled to vote for particular elections in a particular jurisdiction.²² As one of the electoral dispute settlement institutions, the ECN is also empowered to take decisions when a question arises about the qualification of a candidate for the electoral positions after nomination has been filed but before the election results have been declared.²³ The ECN also has referendum power on matters of national importance pursuant to the Constitution and federal law.²⁴ The federal, provincial, and local governments are also constitutionally required to provide employees and other assistance to the ECN, as required to perform its functions pursuant to the Constitution.²⁵ Article 246(5) holds that other functions, duties, powers, and rules of procedure of the ECN shall be as provided for in the federal law. The ECN thus enjoys significant electoral powers under the Constitution and has been exercising these powers for a long time.

3.2. Normative Role Related to Protecting and Promoting Democracy

The 2015 Constitution provisions do not explicitly designate a normative telos to guide the ECN in the way that, for example, Chapter 9 of South Africa's Constitution does for its election commission.²⁶ However, building on the preamble, Article 269, and Part 30 of the Constitution, a normative orientation to protect and promote democracy can be understood to direct its work. For example, the preamble of the Constitution, which pledges to end 'all forms of discrimination and oppression created by the feudalistic, autocratic, centralised, unitary system of governance,' clearly provides a normative orientation to functionaries under the Constitution in the following terms:

Protecting and promoting social and cultural solidarity, tolerance and harmony, and unity in diversity by recognizing the multi-ethnic, multi-lingual, multi-religious, multi-cultural and diverse regional characteristics; resolving to build an egalitarian society founded on the proportional inclusive and participatory principles in order to ensure economic equality, prosperity and social justice; by eliminating discrimination based on class, caste, region, language, religion and gender and all forms of caste-based untouchability; and, being committed to socialism based on democratic norms and values including the people's competitive multiparty democratic system of governance, civil liberties, fundamental rights, human rights, adult franchise, periodic elections, full freedom of the press, and independent, impartial and competent judiciary and concept of the rule of law, and build a prosperous nation...

20 See Bipin Adhikari, Salient Features of the Constitution of Nepal 2015 (Nepal Consulting Lawyers Inc. 2016) 126-202 (providing also the overview of significant constitutional consolidation and reforms); and Bipin Adhikari (ed), A Treatise on the Constitution of Nepal 2015 (Kathmandu University School of Law 2020) (providing critical papers on the Constitution of Nepal presented in a 2018 international conference organised in Nepal).

21 Constitution of Nepal 2015, Art 246 details on the functions, duties, and powers of the ECN.

22 Ibid, Art. 246(1).

23 Ibid, Art 246(3).

24 Ibid, Art 246(2).

25 Ibid, Art 247.

26 The Part confines itself to listing the elections and referenda over which the ECN will have supervisory control, its responsibility to prepare electoral rolls, and its jurisdiction to decide on candidate eligibility. Ibid, Art. 246.

Furthermore, Article 269 of the Constitution has given the ECN powers to govern political parties. Per the Article, political parties must be registered with the ECN. Clause (4) of the Article provides the ECN immense power to carry out this responsibility. It enables the ECN to check that:

- (a) political parties' constitutions and rules are democratic;
- (b) political parties' constitutions provide for election of each of the office bearers of the party at the federal and provincial levels at least once in every five years;²⁷ and
- (c) there must be a provision of such inclusive representation in its executive committees at various levels as reflecting the diversity of Nepal.

Article 269(5) also enables the ECN to reject the application for registration of political parties in cases where the name, objective, insignia or flag of a political party is of such a nature as to jeopardize the religious and communal unity of the country or to fragment the country. Apart from this, a political party that is registered with the ECN under the above provisions that also wants to contest in the elections must register again to secure recognition from the ECN for the purpose of elections and in fulfilment of the procedures set forth in the federal law. The political party must also submit a yearly audit report in addition to the matters set forth in Article 269 (3) along with an application to be made for the above purpose. It also has to fulfil the terms set forth in clause (4) of the aforementioned article.²⁸

The preamble of the Constitution read alongside Article 246 and provisions in Part 30 (emergency power) of the Constitution thus provide a normative orientation to the ECN in the performance of its functions, duties, and powers. The enacted federal electoral legislation also supports this normative orientation in significant ways. Under the laws, the ECN can impose a ceiling on election expenses of political parties,²⁹ conduct voter education programmes,³⁰ and exercise the power to remove any employee of the Government of Nepal or recommend for their suspension.³¹ Additional powers have been given to the ECN under the Political Parties Act 2017 as well. In addition, the ECN's operational/technical role also provide space for ECN's broader normative role. For example, implementing the code of conduct seems to be an operational task, but the content of the code and how the ECN chooses to implement it have normative connotations.

27 Provided that nothing shall bar the making of provision by the constitution of a political party to hold such election within six months in the event of failure to hold election of its office-bearers within five years because of a special circumstance

28 Constitution of Nepal 2015, Art. 269.

29 Election Commission Act 2017, Section 24, available at <https://www.lawcommission.gov.np/en/wp-content/uploads/2021/01/Election-Commission-Act-2073-2017.pdf>.

30 Ibid, Section 33.

31 Ibid, Section 43.

4. Areas for Policy Reform and Policy Implementation

The necessity of independent EMBs for democratic consolidation has been established through the argument in Chapter Two. The argument further makes the case that EMBs should not be limited to performing mere technical roles, but that they should also participate in substantive aspects of democratic consolidation. The analysis has explored the ECN's case and how the Constitution and the electoral legislative framework provide normative orientation for the Commission to work in the broader arena of democracy protection and promotion.

The legal and normative space for the ECN to perform its technical and normative role vis-à-vis electoral administration is a prerequisite but not a sufficient condition for the Commission to effectively execute its mandate of electoral administration and support Nepal's democratic consolidation. This is because having legal and normative space does not imply that the space is utilized effectively. This might be due to the Commission's own inefficiency or constraints put on the Commission by other stakeholders (e.g., government and political parties). Through the elections held in 2017 and 2018 under the new Constitution, the ECN experienced the new Constitution and electoral legislations under it. The ECN reviewed these elections in consultation with various stakeholders in 18 thematic areas.³² The objective of the review was to document the lessons learnt from the recent elections and to gather recommendations for improving electoral processes in the future. The review focused on elections, but not on the larger democratization perspective. Upon review of the foregone elections and the ECN's experience, the ECN needs to consider the following aspects to better exercise its legal and normative space, and support the consolidation of democracy in Nepal:

4.1. Creating a National Election Policy

Nepal does not have a national election policy. Without this, a holistic approach to elections and election management is not possible. With the 2015 Constitution and the provision of the three-tier federal system and electoral interrelations, such a national election policy will be a major instrument to realise constitutional democracy. This will enable the ECN to focus on elections during the election year and, according to national policy, spend the rest of the time on democratic consolidation. This includes focus on issues such as the protection of electoral integrity, continuous evaluation of electoral standards, working with interest group organizations — non-governmental organizations, media, law enforcement agencies — for strengthening electoral democracy, working with relevant public or private institutions for propagation of values that help improve the socio-economic equality,

32 These were election laws, voter registration, polling centre review, political party registration, election code of conduct, voter education, electoral trainings, election management, election counting and results, election observation and monitoring, gender and social inclusion, electoral disputes resolution, election information sources, election security, election materials management, ballot paper management, staff mobilisation and financial management. See The Election Commission, *Nirvachan Samiksha* [Elections Review] (Election Commission Nepal, 2018).

developing a sense of tolerance and respect for each other, creating a sense of accountability, and actively participating in political affairs.

4.2. Streamlining Existing Laws and Procedures

Even with the lack of a national election policy, Nepal has many laws, policies, and regulations relating to the ECN, and the framework can be confusing at times. There is a need to streamline existing laws and procedures by working on comprehensive laws to regulate its overall functioning. To its credit, the ECN is assisting the government on three comprehensive bills which shall cover all its activities. Among the three acts, the first will be related to election, second to political parties, and third to the ECN itself. While commendable, this process needs to be expedited.

4.3. Reforming the Political Parties Act 2017

One act of particular importance to the ECN is The Political Parties Act 2017, which contains detailed provisions on issues of the organization of political parties and its operationalization, membership and organizational structure, the functions, duties and powers of political parties, activities that political parties should never do, provision of parliamentary parties, quitting membership in political parties and defection, funding provisions, financial audit, and handling of disputes related to recognition of political parties. The ECN is authorized to ensure the implementation of these provisions but many of these provisions await effective implementation. Section 14(2), for example, has a strict provision that bars party membership to people convicted on charges of corruption, rape, human trafficking, export and import of drugs and their sale or distribution, money laundering, and other criminal offences that show moral turpitude. There has never been an effort to see if all, or at least the major parties of Nepal, have implemented this provision. This section also bars professors, teachers, and staff of autonomous institutions created by any level of the three-tier federal system from holding party membership. Currently, unless the members of these groups choose to contest elections, they are not investigated or side-lined. Similarly, the Act prohibits political parties from engaging in vandalism of public property³³ and using children in their activities.³⁴ However, such instances are common, and parties have not been forced take responsibility. This has affected the quality of Nepal's democracy.

In addition, political party-related laws and regulations also need further consolidation before the upcoming elections. Political parties in Nepal have been growing and expanding without adequate internal regulations. The Political Parties Act should contain clear provisions regulating political parties' internal affairs. It should be made compulsory for political parties to maintain a register of their members. There should be an internal mechanism to ensure party compliance with inclusion provisions and effective guarantee that decision-making bodies of the party have proportional representation. The issue here is not only enabling the provisions, but also the empowerment of the ECN in taking effective action when such provisions are violated.

Since mid-July 2021, the ECN has been working on two software applications — one to register and archive political parties, and another to regulate and evaluate political parties according to applicable laws. Given that the applications will force parties to be more transparent and accountable, the political parties have shown little interest in using them. For example, the ECN conducted a brief study and found that although political parties had to compulsorily submit an audit report to the ECN, 88 parties had failed to do so. The ECN has advised these political parties about the potential effect of failing to submit these reports. However, the political parties' response to the ECN has been poor. There is hope that once the ECN's finalizes the software, working with political parties throughout

33 Political Parties Act 2017, Section 21(n).

34 Ibid, Section 21(p).

the country will be easier. These reforms will also help the effort to establish new mechanisms to investigate political parties' code of conduct. However, a legal sanction should also be set to ensure that parties abide by code of conduct.

4.4. Ensuring Constant Coordination between the ECN and Political Parties

The above-mentioned political party-related legislation would build on the 2015 Constitution itself, which gives the ECN power to regulate political parties. To carry out this mandate, there is a need for constant and continuous coordination with political parties. At present, there are 74 political parties registered with the ECN. There is a political parties management section in the ECN with five staff members to support the ECN in carrying out its mandate concerning political parties.³⁵ Despite this, aside from the periods directly around elections, regular coordination between the ECN and the political parties is missing, which should be remedied. Coordination is essential to ensure compliance with constitutional requirements and the provisions mentioned in the election laws.

At the behest of the ECN, PRI is also currently conducting research on this issue.

4.5. Implementing Standard Electoral Dispute Resolution Procedures

Effective and continuous coordination with political parties is essential in resolving electoral disputes, which have the potential to undermine the integrity of the electoral process and lead to conflict of various kinds. The Election (Offence and Procedure) Act 2007 confers jurisdiction on the supreme court's constitutional bench, high courts, and appointed courts to hear legal complaints in this regard. In the current framework, the ECN also has a role in resolving disputes that arise before the appointed date of election. Both the courts and the ECN have come under criticism for failing to handle electoral disputes effectively and in a timely manner. To this end, the legal system for dispute resolution needs overhauling to ensure correction of any mistakes or unlawful electoral action. It should be able to protect the values of legality, impartiality, authenticity, clarity, and justice in electoral actions and procedures. In addition, delays in the resolution of disputes should also be addressed.

To its credit, the ECN has developed a procedure for electoral dispute resolution³⁶ as well as related training manuals.³⁷ It has experience in conducting capacity-building training for representatives from political parties, the district administration office, the armed police force, Nepal police, journalists, observers, and civil society. But these procedures remain ad hoc. Thus, for the ECN and the court of law to effectively resolve disputes arising during elections, a detailed standard operation procedure should be established and implemented to clarify responsibilities between professionals (e.g., the returning officer and the chief returning officer) during conflict resolution.

4.6. Regulating and Monitoring Campaign Finance

Campaign finance is another critical issue that relates to the regulation of political parties by the ECN. Nepal has seen the increasing influence of money in elections. A recent election study confirmed this, showing financiers' increased influence in elections, unequal access of funds among candidates, and accountability issues during the election cycle.³⁸ This is due to poorly enforced campaign finance laws. Various political parties have demanded that the existing campaign finance laws be amended in a

35 See the ECN organogram at https://www.election.gov.np/uploads/Pages/1629801350_np.pdf

36 Electoral Disputes (Hearing and Resolution) Procedures 2076 (2019).

37 See Nepal Election Commission and National Judicial Academy, 'Resource Book on Electoral Justice, 2076' (2019) <<https://aceproject.org/ero-en/regions/asia/NP/resource-book-on-electoral-justice-ecn-and-nja/view>>.

38 Election Observation Committee Nepal, 'Study on the Election Campaign Finance of Local, Provincial and Federal Elections in Nepal, 2017' (The Asia Foundation, 2018). Available at <https://asiafoundation.org/wp-content/uploads/2018/10/Study-on-Election-Campaign-Finance-Election-Observation-Committee-Nepal.pdf>

manner that would oblige the state to fund political parties in proportion to the votes they received in the (previously) contested elections. This has not been addressed. If campaign finance is not effectively regulated and monitored, it will continue to undermine the integrity of political processes and institutions and jeopardize the quality of democracy.

To start with, the existing laws should be properly enforced. This will require additional monitoring mechanisms to be put into place. In addition, as per parties' suggestions, the state should finance parties to support their election expenses in kind (for example, through providing petrol, paper, telephones, etc.). This will decrease political party reliance on financiers. The ECN is taking this issue seriously. One of three studies commissioned by the ECN and being undertaken by the Policy Research Institute (PRI) concerns the electoral system and how the costs of the election process can be minimized.

4.7. Providing Regular Civic Education beyond Technical Voter Education

As previously mentioned in this note, the ECN needs a civic engagement policy for engagement with citizens during the non-election period. The (moderate) focus of the ECN on voter education so far has touched on issues like how to register to vote, how to complete ballot papers (as filling out ballots incorrectly can mean an individual's vote is misrepresented in the final count or be invalid) and informing them on the electoral system. This way the ECN has principally conceptualised voter education in a technical way. Factors that have been overlooked include regularly educating people on: (1) the Constitution of Nepal as the supreme law of the land; (2) the broader concepts such as the respective roles and responsibilities of citizens, government, political and special interest organizations, mass media, private businesses, and the non-profit sector—underpinning a democratic society under the Constitution and the relevant laws; and (3) the significance of periodic and competitive elections. The Commission should remedy and work on these three components.

In addition, the ECN has recently also introduced policies related to the use of social media during elections, to how the election process should be observed, and how training should be conducted. The Commission should include these as part of regular civic education. It can accomplish these tasks much more effectively in collaboration with civil society organizations (CSOs) and local informal citizens' forums. In doing so, it should also see voter information and education as part of a larger civic education, and emphasize not only citizen awareness, but also citizen participation in all aspects of democratic society.

4.8. Fostering Inclusion and Participation in Electoral Systems and Processes

Citizen participation in democratic society must also incorporate inclusive participation in the electoral process. The Constitution of Nepal has a great commitment to inclusion, protection of identity, and participation — a commitment reflected in Nepal's electoral system and processes. The electoral systems at the federal, provincial, and local levels all include mechanisms to support inclusive electoral outcomes. At the local level, the electoral system has specific provision for women, Dalit, and other minorities. Both the provincial and national legislative assemblies are elected via a mixed method of first-past-the-post (FPTP) and proportional representation (PR).³⁹ Candidates on the closed PR lists must identify as one of seven the inclusion groups identified in the Constitution;⁴⁰ this is in addition to fulfilling 50 percent women and 2 percent persons-with-disabilities criteria per party.⁴¹ The ECN is responsible to ensure these and other similar constitutional commitments towards an inclusive electoral system.

³⁹ Sixty percent of parliamentarians were directly elected to represent 165 national and 330 provincial constituencies, while 40 percent of the members of provincial and federal parliaments were elected by PR from closed party lists.

⁴⁰ Constitution of Nepal 2015, Arts 84(2), 84(3), 84(8), 176(6), 176(7), 176(9).

⁴¹ Election to the House of Representatives Act 2017, Section 28 (3).

The challenge now is to see how the constitutional commitment for inclusion in electoral system and processes has materialised. To this end, the ECN was able to review legal complications in the elections,⁴² but it did not get involved in issues of inclusion and participation. The ECN is aware that the inclusion arrangement under the FPTP electoral system needs to be facilitated by legal regulations, but it has not been able to recommend clear measures. In addition, the political parties need to be encouraged to become more accountable and responsible towards the constitutional commitment of an inclusive electoral system. Civic society and other stakeholders' active participation is also necessary in this process.

In addition to ensuring that previous inclusion related provisions are met, electoral laws regarding inclusion should be revised based on the experience and lessons of the previous three-tier elections. For example, Articles 215(4) and 216(4) contain provisions for inclusion of two individuals (for rural municipalities) and three (for urban municipalities) representing a Dalit or minority group in the local government. When the Constitution is being considered for amendment, representation of the specific interests of Dalit and other minority groups should be ensured. Similarly, based on the experience of the preceding elections, electoral laws should be revised to ensure that the constitutional commitment for inclusive representation of women, Dalit, indigenous people, Madhesi, Tharu and other minority groups has been achieved.

Inclusion should not be limited to inclusion only in the representative tickets, but it should be translated in other aspects. To this end, the ECN should accommodate all gender and social inclusion issues pertinent to elections and ensure that elections are in compliance with constitutional systems, all existing legal system related to elections,⁴³ various instruments including the Muluki Civil Code, the Fifteenth Plan of Government of Nepal, provisions of gender equality included in government schemes, women empowerment and inclusion policies, international obligations created by law, sustainable development goals, learnings and achievements of all levels of elections held in 2017, the Five Year Strategic Plan of the ECN, and the ECN's Gender and Inclusion Policy 2013.

The Gender and Inclusion Policy 2013 was particularly ambitious, and it could have affected many inclusive practices had the provisions within been fully implemented. To incorporate an inclusive approach to all electoral processes, the policy stated the gender issues within the inclusion policy be incorporated in laws, rules, and guidelines relating to elections. Special programs for those with different needs from an inclusion perspective were to be formulated and implemented while collecting electoral rolls and in the voting process. Disaggregated records of women, Dalit, oppressed castes and indigenous peoples, backward classes, people from backward regions, Madhesi, and other minority voters were also to be prepared from an inclusion perspective. The policy also stated that shortcomings will be corrected by analysing voters through an inclusion perspective at the time of electoral roll preparation. Principles of inclusion were to be enforced when the political parties nominate candidates under the FPTP system for election and when they prepared list of candidates under the PR system. Women, Dalit, oppressed castes and indigenous peoples, people from backward regions, Madhesi and other minority citizens were to be encouraged to participate in election through electoral education. The policy also emphasised that efforts to maintain a balance regarding gender and inclusion while appointing or nominating office bearers and staffers in the ECN. A separate mechanism to focus on issues pertaining to gender and inclusion was to be formed by bringing in organizational and structural changes to the secretariat. Emphasis was to be placed on continuous improvement by analysing annual and periodic programs of the ECN from a gender and

42 See The Election Commission (n 32).

43 Section 42 of the Election Commission Act 2017 states that the ECN shall adopt the principles of gender friendliness and inclusiveness while preparing election related policies, conducting programs, deputing employees, supervising, and monitoring or causing to be supervised and monitored, in accordance with this Act.

social inclusion perspective. To make necessary arrangements for the effective implementation of provisions stipulated in the policy, a gender and inclusion coordination committee was to be formed under the leadership of an election commissioner. The committee so formed would then have to review the implementation status of the policy on an annual basis and issue necessary directives to the secretariat and the gender unit and submit the report to the ECN. The provisions within the policy have not been realized till date. It is high time for an exhaustive audit of the gender and inclusion issues in the context of election and electoral administration.

4.9. Providing Voting Rights to Non-resident Nepalis

An inclusive electoral system must also consider the importance of out-of-country citizens voting, a relatively new issue in the discussions about elections. The Supreme Court had directed the government in 2018 to ensure voting rights for Nepali citizens living in foreign countries.⁴⁴ The new draft version of the ECN Bill, previously mentioned in section 4.2, includes provisions to allow Nepali citizens to vote from abroad in the elections. If passed, this would ensure greater public participation in the election process and strengthen democratic practice.

4.10. Incorporating a NOTA Option

Similarly, the new draft version of the ECN Bill has also proposed the inclusion of a 'None of the Above' (NOTA) option in the ballot paper. If passed, this will increase choices and option for democratic expression. This provision has also been suggested by the Supreme Court in response to a public interest litigation case in 2014. The Supreme Court had directed the government in *Bikas Khadka et al v. Government of Nepal et al* (2014) to create a provision giving the voters the 'right to reject' all candidates in elections henceforth by formulating appropriate laws. Such a rule allows a voter the option to reject all the candidates mentioned on ballot papers. The ECN, following the court order, has also proposed the NOTA option in the draft Bill related to management of local elections.⁴⁵

4.11. Other Areas for Reform

There are some other issues, which, if addressed, will support the ECN to lead public discourse in consolidating Nepali democracy. One such important issue is making voting compulsory, for this will support increasing civic consciousness. Similarly, amendments to existing electoral laws, regulations, and guidelines can be brought to allow for votes to be counted right at the polling stations as taking them elsewhere for counting has its own dangers. The existing provisions for validity and invalidity of ballots can be made clearer and more efficient. The current provision that mandates the need for an all-party meeting to decide on ballot validity and invalidity does not help.

In line with international best practices, the law should be amended to provide the ECN with the power to announce election dates. In addition, there should be a law setting election calendar and dates for elections. This will end partisan attempts in finalizing election dates. Additionally, laws requiring minimum academic qualifications for candidates (at the local, provincial, and federal levels) can also support the consolidation of Nepali democracy by increasing the quality of elected representatives. Lastly, the ECN should prepare a list of temporary voters comprising of employees who are mobilised in the election to ensure their right to vote for PR seats at national elections (there was a similar provision in the earlier Constituent Assembly elections). To its credit, the ECN has realized this need.

44 The Kathmandu Post, 'Grant Voter Rights to Non-Resident Nepalis, SC Tells Govt' (22 March 2018), available at <https://kathmandupost.com/national/2018/03/22/grant-voter-rights-to-non-resident-nepalis-sc-tells-govt>.

45 Neel Kantha Uprety, 'Right to Reject' My Republica (3 January 2017) <<http://myrepublica.nagariknetwork.com/news/12320/>> accessed 19 January 2022.

5. Afterword

Nepal undergoes periodic elections every five years. Ordinarily, the maximum period within which the ECN is able to hold elections is 120 days, i.e., about four months. The Commission further needs a review period of at least two months immediately after the election has been held. The problem is that the government and other stakeholders forget about the ECN in the remaining four years and six months. The non-election period is also a good time for the Commission to work on its normative role. If the Commission is inactive in this period, it will affect its ability to perform its technical role during the election period. This, therefore, is not a sustainable practice.

If the government and other stakeholders take reform initiatives during the non-election period, there will be less to worry about democracy during the election period. The protection and consolidation of democracy in Nepal will require more than what the ECN has been doing since its establishment. Apart from attending to the technical management (during the election period) of elections according to the prevailing Constitution, the ECN should also fulfil its normative role and support electoral system and accountable government. This will create space for the ECN to directly and indirectly work on the issues of better representation of public interest, fairer and more equitable policies, and increased accountability of the government — matters that deeply affect citizens' commitment to democracy and contribute to Nepal's democratic consolidation.



Dugar Marg, Naxal, Kathmandu, Nepal
+977-1-4523430 • info@nitifoundation.org

www.nitifoundation.org