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## **Constitutional Provisions and Enhancing Participation of Women in Elections**

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### **(a) Introduction**

In most parts of the world and in countries of differing economic levels of development, a huge problem remains in ensuring the full participation of women in the political process. Although women are underrepresented in the political process in most countries, the situation tends to be worse in post conflict societies. In post conflict societies, while women endure the same trauma as the rest of the population, they are disproportionately harmed /affected by literacy rates, poverty, violence and gender-role stereotyping. This paper discusses the participation of women in post conflict societies from a perspective of the legislative measures that can be taken to enhance the participation of women. It also considers non legislative measures such as the role of the media. The paper first provides a background on constitutional provisions relevant to elections, next examines the participation of women in elections and the problems they face in their efforts to participate in the elections. It then considers legislative approaches that have been taken in several countries to increase women participation. It ends with a conclusion that focuses on the chances of achieving the objective of improving women participation in elections.

### **(b) The Constitution and the Electoral Process**

One of the most important measures of the validity of an electoral process is the extent to which it is accepted as legitimate by the community in which it takes place as well as by the international community. Such acceptance flows to a large extent from the transparency with which the process is pursued and the extent to which there is full participation by all citizens in the process. Mechanism for enhancing transparency includes: the provision of an appropriate legal framework, role for the media, political parties and candidates, and other elements of civil society. Participation of all citizens is enhanced by the implementation of an effective voter education program. The latter is especially important in post conflict countries with low literacy rates, low observation of human rights is low, prevalent violence and the electorate has not been exposed to regular elections.

Arrangements for a credible election process begin with, among other things, the formulation of a suitable legal framework. Foremost among the pieces of legislation that should be in place is the elections law. The electoral law not only defines the process, it will also describe the functions and responsibilities of the institutions to administer the process outlined in the law. A country's constitution, as the basis of a country's governmental structure, typically provides the foundation of the key elements of the electoral framework.<sup>1</sup> The constitutional electoral provisions contain fundamental electoral rights and the basic principles of the electoral system. These include the right to vote and be elected, the age at which citizens qualify to vote, the institutions and offices subject to democratic elections and contestation and their terms of office; and the agency to be trusted with the conduct of elections and the essential

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<sup>1</sup> Constitution of South Africa, 1996, articles 23,41; Constitution of Zambia, articles 34,63

elements of the electoral system to be used including the question of whether there will be constituencies or not. Two approaches are evident: the first approach is to provide in the constitution, whether or not there will be two houses of Parliament, the method of electing the president; whether or not the electoral system is a “first-past-the post” one or a proportional representation one; the size of the houses of parliament and how constituencies are to be determined. The second approach is for the constitution to create the political institutions for governance and provide that an act of parliament shall provide a formula for determining the number of members of parliament and number of constituencies. Under both approaches the electoral law implements the electoral provisions contained in the constitution by providing a framework for the registration of voters, the conduct of the campaign by political parties for the elections, the conduct of the elections or referenda and the observation of the elections by election observers and civil society.

In establishing a legal framework for the election process, typically an initial decision involves the selection of an election system. This involves choosing between proportional representation and majoritarian system, and also the specific variation used. Where a proportional representation system is adopted, the election law framers must also consider whether to use national or regional lists or some combination of the two, whether a threshold clause will be employed, and which formula will be used for allocating seats in the legislative bodies. Where a majoritarian system is used, the drawing of constituency boundaries may become particularly controversial. It should, however, be borne in mind that the choice of a particular electoral system affects the overall legal framework governing the conduct of the elections. The electoral system can also be a key factor in promoting the participation of women as well as political accommodation for various stakeholders whereas a poorly designed one can entrench divisions in society and exacerbate pre-existing conflict and the marginalization of women.

The choice of election system, to large extent, determines the need for a law governing the delimitation of constituencies. If a majoritarian system is adopted, then such a law is essential and the process governing delimitation becomes among the most important aspects of the overall electoral process. Under a proportional representation system, the delimitation process assumes less importance, although rules are still required to allocate seats in a manner that assumes respect for the one-person one vote principle. Thus, the law might stipulate that seats be allocated on a national basis or that the number of seats assigned to a given constituency/province be based on the number of registered votes in the constituency/province or, as in some jurisdictions on the number of voters actually casting ballots in the constituency/province. An election law requires some means for identifying and registering eligible voters. In some countries the government relies on pre-existing lists developed for other purposes to prepare the voter registry. This is usually unlikely in a post conflict society where very often a civil registry does not exist and, because of war, there are complications relating to the participation in the election of refugees and internally displaced people. Other countries rely on a voter registration process, involving a census conducted by government-appointed officials. A third group of countries requires prospective voters to present themselves at a designated registration site before the elections. The legal framework for registering voters should prescribe the officials responsible for registering voters, the period in which registration occurs, the

registration venues, the precise procedures by which a citizen is registered, the role of political parties in the process, and the mechanisms for challenging the decisions of the registration officials. Finally some countries permit voters merely to present themselves at the polling site with proof of citizenship and their age. The manner of voting regulations, discussed below, set forth the precise procedures to be used for casting and counting of ballots.

Other issues addressed by elections laws include campaign laws and manner of voting. The legal provisions relating to the campaign are critical in ensuring a meaningful election where voters are adequately informed regarding issues and candidates. Typically, campaign laws establish the official campaign period and the activities permitted and proscribed during this period. Some campaign laws go further and deal with media access for political parties with a view to ensuring equal access to the media for all political parties and the prevention of abuse of government media by government-aligned parties. Campaign laws, further deal with such matters as campaign financing and contributions, code of conduct for political parties participating in the election and the accreditation and regulation of election observers. Yet another matter is providing for judicial review of the electoral process. The benefit of providing for judicial review is that it builds confidence in the validity of the process, and moreover constitutes a discipline upon the election administration which will have to be conscious that everything it does may potentially be examined by ordinary courts or by an electoral court. In post conflict elections, more than in any other election, measures must be taken which ensure that the election process is administered in an environment free from violence, intimidation and retribution. The right to vote cannot be guaranteed unless voters are free to move about freely and can vote without any fear of retribution. A difficult security situation is likely to impact more negatively on women than men and reduce the participation of women in the political process. In post conflict countries the state must take all necessary measures to improve the security situation to ensure that both men and women exercise their right to register and vote.

### **(c) Participation of Women in the Electoral Process**

The Universal Declaration of Human Rights states that everyone has the right to take part in the government of his or her country.<sup>2</sup> As was observed at the Beijing conference, the empowerment and autonomy of women and the improvement of women's social economic and political status is essential for the achievement of both transparent and accountable government and administration and sustainable development in all areas of life.<sup>3</sup> Achieving the goal of equal participation of women and men in decision-making will provide a balance that more accurately reflects the composition of society and is needed in order to strengthen democracy and promote its proper functioning. Women's equal participation in decision-making is not only a demand for simple justice or democracy but can also be seen as a necessary condition for women's interests to be taken into account. Women have different experiences that ought to be represented. Women and men have partly conflicting interests and concerns and thus men cannot act as the exclusive representatives of women. Without the active participation of women and the

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<sup>2</sup> United Nations Declaration of Human Rights, United Nations General Assembly, Dec. 10, 1948. G.A. Res. 217A, 3GAOR, Resolutions(A/810), article 21.

<sup>3</sup> The Beijing Declaration and Platform for Action, Fourth World Conference on Women, Beijing, China, 4-15 September 1995 (New York: United Nations, 1996).

incorporation of women's perspectives at all levels of decision-making, the goals of equality, development, peace and a better life for all cannot be achieved.<sup>4</sup>

Although legal equality is recognised in the constitutions of many states and that there has been a widespread movement towards democratisation in many countries, women are largely under-represented at most levels of government world wide, especially in ministerial and other executive bodies, and have made little progress in attaining political power in legislative bodies. Women are under-represented in the judiciary, corporate boards and state boards. The situation is to a large extent a reflection of the intensity of conflict embodying change between the aspirations of women who take their countries' constitutions seriously and resistance by men who imagine, despite legislation, that power is necessarily masculine.

This schism is reinforced by a number of well-known conditions that affect women disproportionately. For example, poverty and lack of education impact negatively on people's ability to exercise civil liberties. People whose focus must be on meeting their basic daily needs will have little time for political participation, nor will they readily see the connection between their political participation and their social status. In post-conflict countries women are sometimes afraid to engage in political activity as a result of the misuse of power by the male dominated political parties. In autocratic regimes from which most conflict countries emerge individual's rights to freedom of expression, association, and movement are severely restrained and discrimination, political assassinations and disappearances are not uncommon.

Education is very much the key to including society's traditionally non-participating groups in any successful reform. And yet, in post-conflict societies, parents are willing to invest more in a boy child than a girl child. Other numerous factors such as the heavy burden of household chores for girls, early marriages and early pregnancies conspire to reduce the number of girls who attain higher education. The constitution, by emphasizing equal citizenship for all, can be used as a tool for educating women in particular but also society in general about the right of women to participate in the political life of their countries. Knowledge must be generated and shared. If people are to be encouraged to act in other ways to organise themselves to protect or promote their interests, they must gain knowledge of ways to do this and they must have access to all relevant information. Teaching women about the constitution and its relevance in their lives will help, not only to develop a more representative democratic state, but also to set in motion changes in societal thinking about the role of women. Education may merely consist of seminars. However, in order to reach a broader base of the population, a general dissemination of written information may be useful, through a combination of media such as pamphlets and other written materials, as well as radio and television announcements. In essence knowledge is the crucial link to the effective empowerment of marginalised groups.

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4 Penelope Andrews, *The Stepchild of National Liberation: Women and Rights in the New South Africa*, in Penelope Andrews & Stephen Ellman, *The Post-Apartheid Constitutions*, 2001, at 326.

Economic factors also come into play in keeping women from fully exercising political participation rights, even if these rights are fully guaranteed by the country's constitution. The difficult economic situation in most post-conflict countries is harder on women than men. In almost all post conflict countries as elsewhere in the world, women are the poorest among the poor. For example in apartheid South Africa formal restrictions impeded the entry of black women into the workplace. Women worked predominantly in the agricultural and service areas, holding the least-skilled, lowest-paid, and most insecure jobs.<sup>5</sup> Economic necessity erodes and dilutes any formal rights, including human rights and democratic rights to vote and to seek elective office. Under such a situation, casting the vote by women is then reduced to a mere physical exercise. Specifically, women are the primary care takers for children, the disabled, the ill and the elderly. These responsibilities can impede women's political participation and keep women from realising their full citizenship rights. Moreover, the fact is that the division of labor has not changed in favor of women, but rather adds to their burden and also poses practical limitations on the possibilities for active involvement of women.

It is necessary to address these obstacles by removing them to allow for the full realisation of these rights. Possibilities for removing these obstacles include the provision of childcare facilities, the creation of safer public places and the improvement of women's access to education. Thus, education for democracy and raising awareness of human rights should go hand in hand with the economic and financial empowerment of women.

In many cultures women face 'gender-role stereotyping', male resistance to women's participation, more limited resources with which to participate and political structures and processes that impede women's political activity. The largest impediment to the realisation of true equality of women in a number of post conflict societies is traditional thinking and religious practices. In most communities, women have been conditioned by historical circumstances, religion and tradition to hesitate, even to be reluctant, to take high responsibilities in politics, even when they have considerable formal education. In some countries society has trained women to obey and not to debate male decisions. Most important, there is the need to instil in the very minds of the public that women's rights and democratic freedoms are not synonymous with permissiveness. Likewise, there is need to grapple with the task of concurrently raising a corresponding awareness of women's rights among men, otherwise, raising awareness of those rights only among women will cause social conflicts and have very negative repercussions. There is a need therefore to eradicate all vestiges of fear and ignorance among the public that, letting women participate fully in the democratic process and allowing them to enjoy all the fundamental human rights, will mean the destruction of the fabric of society and lead to chaos. On the contrary, the ensuing liberation and empowerment of women will enrich family values and culture and will result in the development of a peaceful and stable society. As Mills observed: 'only complete equality between all men and women in legal, political and social arrangements can create the proper conditions for human

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5 Andrien K. Wing & Eunice P. de Carvalho, *Black South African Women: Toward Equal Rights*, in *CRITICAL RACE FEMINIST*, (ed) Andrien Wing at 389.

freedom and a democratic way of life'.<sup>6</sup> The goal should be, as the Beijing Conference declared: to remove all obstacles to women's active participation in all spheres of public life through a full and equal share in economic, social, cultural and political decision making.<sup>7</sup>

**(d) Legislative Measures to increase Women's participation in the electoral processes.**

Democratic governance advances the protection of the human rights. Democracy involves three central rights: the right to take part in government, the right to vote and to be elected, and the right to equal access to the public service. The Universal Declaration of Human Rights states that the will of the people shall be the basis for the authority of government.<sup>8</sup> A number of other international instruments reflect the principal concerns underlying democratic governance, including the right of peoples freely to determine their political status, the right of all elements of society to participate in defining the political life of their country. Thus international instruments for the promotion and protection of human rights are replete with admonitions that popular political participation must be free. While the various instruments do not describe a particular methodology for ensuring such freedom, their essence is clear: to be free, participation in the political process of a country must be conducted in an atmosphere characterized by the absence of intimidation and the presence and respect of a wide range of fundamental human rights. It means that all men and women should have a voice in decision-making, whether directly or through legitimate intermediate institutions that represent their interests. While the Universal Declaration of Human Rights enunciates the basic human rights, the International Covenant on Political and Civil Rights<sup>9</sup> and the Elimination of All Forms of Discrimination Against Women<sup>10</sup> elaborate upon the rights contained in the Universal Declaration of Human Rights. The regional Conventions such as the African Charter on Human and Peoples Rights<sup>11</sup>; the European Convention on Human Rights<sup>12</sup> and the American Convention on Human Rights<sup>13</sup> further contribute to their elaboration and protection.

In examining what measures should be taken to enhance the participation of women in elections it should be stated at the outset that the problem is rarely at the

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6 J.S. Mill, *The Subjection of Women*, Cambridge M.I.T.Press(1970). For a discussion of Mills on this issue; see D. Held, *Models of Democracy*, Cambridge, Polity (1996).

7 The Beijing Declaration and Platform for Action, *supra*, note 30, p. 109.

8 *Ibid*, article 21 (3).

9 International Covenant on Civil and Political Rights, December 19, 1966. 999 U.N.T.S 171.

10 Convention on the Elimination of All Forms of Discrimination Against Women, G.A.RES.180 (XXXIV 1979), 19 I.L.M.33 (1980). Adopted by the General Assembly of the United Nations on December 18, 1979.

11 OAU Doc. CAB/LEG/67/3/Rev. 5; reprinted at 21 I.L.M. 58 (1982). Adopted by the Organization of African Unity on June 27, 1981.

12 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, E.T.S. 5 adopted at Rome on November 4, 1950.

13 American Convention on Human Rights, O.A.S. Official Records OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 January 7, 1970 P I.L.M. 101 (1970).

constitutional level. There are no legislative barriers to women participating in the election process. Typically most post conflict constitutions guarantee the right to vote and the right to be elected to all citizens regardless of gender. Almost all constitutional and election law frameworks guarantee the right of all citizens to participate in elections. The problem is that, at the implementation level, such guarantees do not result in outcomes that produce significant women participation in the election process. Women find that they run into major obstacles when they try to exercise their constitutional rights to vote and be elected. At the government levels the problems include the lack of resources and a lack of gender awareness or political will among the implementation staff. Other major problems are to be found at a social level, where the new discourses of gender equality may run counter to existing social norms regarding gender roles. In some cases, local authorities and male members of society may discourage or prohibit women from participating in political activities.

Two approaches have been adopted in a number of jurisdictions to enhance the participation of women. These are (a) setting aside a number of reserved seats for women (in this situation identified constituencies are restricted to women candidates) and (b) establishing quota for women. The introduction of quota system represents a change in public policy, from “equal opportunities” to “equality in results.” Although highly controversial, electoral gender quotas are now being introduced at an amazing speed all over the world.<sup>14</sup> In Kosovo, an election provision provided that 30 per cent of each political party’s top fifteen candidates on the party lists must be women. Quotas are now in place in countries as diverse as Morocco, Rwanda and Indonesia. A country or political party can introduce quotas in a number of ways. Quotas could be introduced at the level of political parties, without national legislation, or at the national level through legislation. A further distinction must be made between quotas for (a) the pool of potential candidates, (b) the actual nominees and (c) the elected. An electoral gender quota regulation may, for example, require that at least 40% of the candidates on the electoral list are women. Other quota systems are constructed as gender- neutral. They establish a maximum for both sexes. In still other jurisdictions a “double quota” is implemented, in which case legislation requires that a certain percentage of women comprise the electoral list, and also prevents women candidates from merely being placed at the bottom of the list with little chance of being elected.

Quotas work differently under different electoral systems. They are more easily introduced in proportional representation systems. This is because while in first past the post systems candidates fight for elections based on constituencies, in proportional representation system the seats are allocated after the vote. But even in a proportional representation system, because of the few candidates elected, small parties in small constituents have difficulties implementing quotas without controversial central interference in the usual prerogatives of the local party organization to select their own candidates.

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14 Quotas have been recommended by the United Nations (UN) the Inter-Parliamentary Union (IPU), the European Union (EU) and the Organization for Security and Co-operation in Europe (OSCE).

In the reserved seats approach, a certain number of seats are reserved for women.<sup>15</sup> Only women can stand as candidates against other women in such seats. For example in the recently passed Afghanistan constitution in article 83 would reserve at least one seat per province for women in both the upper and lower house. It can also be done at the level of political parties. Eritrea, Kenya, Namibia, Sudan Tanzania and Uganda all have legislation reserving seats for women in Parliament or in local government. In contrast, East Timor defeated a proposal to establish a 30 per cent quota for women candidates to be included on party lists for election to the constituent assembly. The East Timorese women were more successful in persuading the Special Representative of the United Nations Secretary-General to deny airtime to political parties registering for elections unless they could demonstrate their commitment to gender equality in the positioning of candidates. This seems to have had some impact.

While quotas have achieved good levels of women representation in many countries they are not without their critics. Introducing quotas is seen by some as discrimination and as a violation of the principle of fairness, competence, and individualism whereas others consider quotas as compensation for the structural barriers that prevent fair competition and try to right the wrongs in outcomes created by a patriarchal dominated society. Notably, quotas are not without their own dangers for women. The danger to women participation is that the quotas might be regarded as a ceiling- thereby actually limiting women's participation in the electoral process. Women occupying those seats might be regarded as special and as second-class citizens. Thus while legislative measures, as discussed above, might bring about increased women representation in the political process, such measures, when they do not rest on previous mobilization and empowerment and integration of women into all parts of society are not likely to be successful in bringing about effective women's participation in the political process.

One of the measures that must be taken in post conflict elections is the establishment of well-organized civic education programs targeting women. The programs should not only emphasize the technical aspects of voting, but also emphasize to women the importance of their vote. This is especially important as in most post conflict elections the majority of the women are illiterate and live in a world which is overwhelmingly patriarchal and which is shaped by centuries of cultures and religious beliefs that discourage women from participating in politics. This implies providing adequate resources and support to NGOs that are engaged in this kind of work. In many post conflict countries the discrimination of women is rampant and the rights of women are not adequately protected. Women are often subjected to gender-based violence. Although often a legal framework exists to provide protection against violence in the electoral process to women, the legal framework and, more often than not, its implementation mechanisms remain largely unresponsive to the experiences of women.

There is need to pay significant attention to improving compliance with such a legal framework. Steps must be taken to ensure that the requirements of human rights

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15 Drude Dahlerup, Comparative Studies of Electoral Gender Quotas, Department of Political Science, Stockholm University, Sweden. (2001)

laws are widely known and applied. It is important to ensure that national legal systems provide accessible and gender sensitive redress for women and that the national institutions respond to the needs, concerns and experiences of women. There is need to disseminate information about the procedures for redress to the public as widely as possible and to educate women and create social awareness among women of their rights and inform them of their rights and the proper channels that they could report violations of their rights through programs that target women.

Yet another matter that is often ignored in electoral processes is the role the media plays in discouraging the participation of women in the electoral process.<sup>16</sup> The portrayal of women in the media, which perpetuates gender stereotypes, has a negative impact on the participation of women in politics. The media is a product of society and thus it reflects the values, ideas, attitudes, culture and practices of any given society. Simultaneously, the media influences and shapes society. Typically women are portrayed as subjects and objects needing input in the form of welfare, or in need of protection from abuse, or as objects to be consumed in the form of goods or sales. Very few are presented as able, and efficient decision makers or leaders. As Mintintso has observed: when women are reported as poor, helpless victims, as physical objects or useless leaders the recipients of this information take this as true because: (a) their own experiences of poverty and hunger tell them that this is the lot for women; (b) their own world which is a microcosm of the patriarchal world, has never shown them as women playing an effective leadership or decision making role.<sup>17</sup> Civic education should include programs to sensitize the media to issues that undermine gender equality and help plays a critical role in the transformation of gender relations in post conflict societies.

#### **(d) Conclusion**

The improvement of the participation of women in post conflict elections will depend on taking measure that ensure that constitutional and legislative provisions that guarantee women equal participation and citizenship in the electoral process are implemented fully. This will involve supporting NGOs and other institutions that ensure accountability and monitor the protection of human rights and the provision of government agencies charged with the specific responsibility of promoting women's rights. This effort cannot succeed unless countries are committed to providing resources and expertise to ensure that NGOs and government agencies and institutions charged with the responsibility of promoting women's rights are adequately resourced and are function effectively. This will require working to change deeply ingrained attitudes. It requires targeting political parties to force them to become internally democratic and sensitive to women's needs. The political parties need to include, accept and welcome women in meaningful positions and in meaningful numbers. It is important to realize that in almost all political systems, no matter what the electoral regime, it is the political parties, not the voters, which are the real gatekeepers in regard to elected offices. For example In the case of South Africa the decision of the Africa National Congress (ANC) to use quotas

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16 Colleen Lowe-Morna (ed) *Whose News ? Whose Views ? Southern Africa: Gender in Media Handbook*, a Publication of Gender Links, Johannesburg, South Africa.

17 Ibid, Thenjiwe Mtintso, p.1.

has had a substantial effect on the overall representation of women in the South African political system where women representation now compares favorably to that of the Scandinavian countries.<sup>18</sup> It is important, therefore, that political parties are made more representative and include women at all levels of leadership.

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<sup>18</sup> Drude Dahlerup, *Ibid.*