

A Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act, 2071 (2014)

Preamble: As it is desirable to amend the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act, 2071 (2014),

Federal Parliament has made this Act.

1. **Short Name and Commencement:** (1) The name of this Act is "Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act (third amendment), 2071 (hereinafter referred as the "Main Act").

(2) This Act shall come into force immediately.

2. **Amendment to Section 2 of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act, 2071 (2014):** Section 2 of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act, 2071 (hereinafter referred to as "Main Act"), -

(1) The phrase "serious violation of human rights" in Part (g) is replaced by the phrase "violation of human rights or serious violation of human rights".

(2) In Part (h), after the word "killed", or "disappeared" is added and in various places of the same Part, the terminology "serious violations of human rights" is replaced by "violations of human rights or serious violation of human rights".

(3) The provision in Part (i) is replaced as below:

"(i) "Ministry" shall mean the Ministry of Law, Justice and Parliamentary Affairs of the Government of Nepal.

(4) The provision in Part (j) is replaced as below:

"(j) "Human rights violations" shall mean any of the following act committed during the armed conflict in a targeted or planned manner against unarmed an individual or community:

(1) Murder,

(2) Sexual violence,

(3) Physical or mental torture,

(4) Abduction and hostage taking,

(5) Illegal detention,

(6) Beating, maiming and causing physical disability,

(7) Looting, capture, destruction or arson of private and public property,

(8) Forced eviction from one's residence or displacement by any other means, or

(9) Any inhuman act that are against international human rights and humanitarian law."

(5) After Part (j), the following sub-section (j1) has been added:

"(i1) "Serious violations of human rights" shall mean any of the following act committed during the armed conflict in a targeted or planned manner against unarmed an individual or community:

- (1) Killing of somebody after cruel torture or killing of somebody in a brutal manner
- (2) Rape
- (3) Enforced Disappearances
- (4) Cruel or inhuman torture.

(6) Part (k) has been removed.

(7) After Part (l), the following Part (l1) has been added:

"(l1) "Special Court" shall mean the Special Court as provisioned under Section 29a.

3. **Amendment to Section 3 of the Main Act :** The phrase "serious violation of human rights "in sub-Section (1) of the Main Act is replaced by the phrase "violation of human rights and serious violation of human rights". Likewise, the phrase "in serious crimes concerning such incidents" in the same sub-Section is replaced by "serious violation of human rights".

4. **Amendment to Section 6 of the Main Act:** The provision in Section 6 of the Main Act are replaced by the following new provision:

"6. Tenure: (1) The tenure of the Chair and members to be appointed after the commencement of this Act shall be of a year from the date of appointment.

(2) Notwithstanding whatever is written in sub-Section (1), provided the tenure of the Commission is not over as per Section 38 (1) and if the tenure of the Commissions is extended in accordance with Section 38 (2), the Government of Nepal can extend the tenure of the Chair and the Members to a maximum of one year until the extended tenure of the commission.

(3) Notwithstanding whatever is written in sub-section (1) and (2), if the Chair or members lack performance capacity or if his/her conduct is not in line with the position that he/she holds, the Government of Nepal shall form a three member Investigation Committee headed by the former Chief Justice of Supreme Court to look into such a case.

(4) Provided the Committee as per sub-section (3) recommends, after investigation, for the removal of such a Chair and member, the Government of Nepal shall remove such a Chair and member from his/her position.

But such Chair or member must be given an opportunity for clarification before being removed from the position.

(5) Other provisions relating to the investigation as per this Section shall be as prescribed. "

5. **Amendment to Section 7 of the Main Act** : In sub-section (1) of section 7 of the Main Act:

(1) Part (b1) is replaced as below:

"(b1) If he tenure comes to an end as per sub-section (1) and (2) of Section 6.

(2) "One being on the position as per section 6 (2)" of part (c) is replaced by "in accordance with the section 6 (4)."

6. **Amendment to Section 13 of the Main Act**: In Section 13 of the Main Act,

(1) After part (a) of sub-section (1), part (a1), (a2), (a3) and (a4) have been added as below:

"(a1) To analyze the pattern, nature and severity of the violations of human rights and serious violations of human rights, and the acts committed by the parties to the conflict,

(a2) To explore truths by determining the process of truth exploration on violation of human rights and serious violation of human rights,

(a3) To identify the underlying root causes of the conflict, and recommend on policy, legal and institutional reforms to ensure the non-recurrence of the violation of human rights and serious violation of human rights in future,

(a4) To recommend individuals involved in cases of serious violation of human rights for vetting,"

(2) The phrase "serious violation of human rights" existing in various places have been replaced by the phrase "violation of human rights and serious violation of human rights".

7. **Amendment to Section 18 of the Main Act**: The phrase "serious violation of human rights" in Section 18 have been replaced by the phrase "violation of human rights and serious violation of human rights".

8. **Amendment to Section 19 of the Main Act**: Sub-section (1) of Section 19 of the Main Act has been replaced as below:

"(1) The Commission must perform its functions in a transparent, victim-centric, gender-friendly and disability-friendly manner."

9. Amendment to Section 22 of the Main Act: In Section 22 of the Main Act,

(1) The provision in sub-section (1) are replaced as below:

"(1) If the perpetrator or victim submits an application to the Commission for reconciliation, the Commission may cause, on free consent of the victim, reconciliation between the victim and perpetrator of human rights violation except in the the case of serious violation of human rights.

(2) Sub-section (6) has been removed.

10. Section 22a. has been added in the Main Act: After Section 22 of the Main Act, Section 22a. has been as below:

"22a. **Right to Reparation:** (1): (1) Victims shall have the right to obtain reparation in accordance with this Act.

(2) Any of the following situation will not be deemed to have caused adverse effect on the victims' right to obtain reparation:

- (a) Non-identification of the perpetrator,
- (b) Whether or not victim and perpetrator have reconciled,
- (c) Whether or not recommendation is made to pardon the perpetrator or to prosecute him/her,

11. Amendment to Section 23 of the Main Act: In section 23 of the Main Act,

(1) The provisions under sub-section (1) are replaced as below:

the "(1) After conducting the preliminary investigation in accordance with this Act, Commission shall recommend the Government of Nepal to promptly provide psychosocial counselling, interim relief, relief and compensation, to rehabilitate or to make for any appropriate provisions to the victims."

(2) After sub-section (1), sub-section (1a) has been added as below:

" (1a). While making recommendation for interim relief as per sub-section (1), such recommendation must be made only after confirming if or not victims of rape, sexual violence and torture have received interim relief or any other support."

(3) After sub-section (2), sub-section (2a) has been added as below:

"(2a) The Commission shall recommend the Government of Nepal to launch community reparations programme as required targeting victims and their family and victims of a conflict affected areas.

(4) The phrase "in accordance with sub-section (1) or (2)" in sub-section (4) and (6) of the Act have been replaced by the phrase "in accordance with this Section".

(5) Sub-section (5) has been removed.

(6) After sub-section (6), sub-section (7) and (8) have been added as below:

"(7) While providing reparation in accordance with this Section, coordination may be done as required with the provincial government, local government, community organizations, victims' organizations including the private sector.

(8) While recommending reparations as per this section, the Commission must pay attention to the respect and dignity of the victims and their family and the gender sensitivity."

12. **Section 23a. added in the Main Act:** After section 23 in the Main Act, section (23a) has been added as below:

"23a. **Provision of a Fund:** (1) There shall be a Fund for the tasks related to the investigation of the disappeared persons, truth seeking and reconciliation as per this Act.

(2) The cash as below shall be deposited in the Fund established as per sub-section (1):

(a) Money received from the Federal, Provincial and local governments,

(b) Money received from the parties to the armed conflict,

(c) Money received from any citizen or national organizations,

(d) Money received from foreign governments or organizations or international organizations.

(3) Prior to receiving the money as under part (d) of sub-section (2), permission from the Ministry of Finance of the Government of Nepal must be obtained.

(4) The money from the Fund as under sub-section (1) shall be used for the activities of the Commission such as investigation, relief, reparation and other activities necessary to meet the objective of this Act.

(5) The money required for the Commission to undertake activities as under sub-section (4), the Ministry shall imburse from the Fund on the basis of demand from the Commission.

(6) The other provision regarding the operation of the Fund as under sub-section (1) shall be as prescribed.

(7) The Secretariat of the Fund as under sub-section (1) shall be at the Ministry.

13. **Amendment to the Section 25 of the Main Act:** In Section 25 of the Main Act,

- (1) The phrase "serious violation of human rights" in sub-section (1) has been replaced by "violation of human rights".
- (2) Sub-section (3) has been removed.
- (3) The phrase "serious violation of human rights" in sub-section (4) has been replaced by "violation of human rights".
14. **Addition of Section 25a. to the Main Act:** After Section 25 of the Main Act, Section 25a. has been added as below:
- "25a. **Can make policy recommendations:** The Commission can make recommendations to the Government of Nepal to make policy provisions on the following matters:
- (a) To provide necessary relief and support in respect and honour of the contributions made by the security personnel or members of their family who were killed, injured or disabled in any incident during the armed conflict.
- (b) To provide necessary relief and support to any individual and members of his/her family who was killed, injured and disabled in any incident during the armed conflict.
- (c) To provide necessary relief and support to the persons and members of their family who were killed, injured or disabled because of the explosion of the land mines and any other explosive substances laid out during the time of armed conflict."
15. **Amendment to Section 26 of the Main Act:**
- (1) The phrase "Notwithstanding whatsoever is written in Section 25" from sub-section (1) of Section 26 has been removed.
- (2) Existing sub-section (2) has been replaced with the following:
- "(2) Notwithstanding whatever is written in sub-section (1), the Commission shall not make a recommendation to grant amnesty for the person involved in the serious violation of human rights."
- (3) The phrase "serious violation of human rights" in sub-section (4) part (a) has been replaced by "violation of human rights".
- (4) Provision of the sub-section (5) has been replaced by the following:
- "(5) If an application is received for amnesty in accordance with sub-section (3), the Commission shall make necessary investigation on the matter."
- (5) After sub-section 5, sub-section (5a) has been added as below:
- "(5a) The Commission, while investigating in accordance with sub-section (5), shall make recommendation for amnesty on victim's free consent and also considering the

harm suffered by the victim as well as the the statement made by the perpetrator in the Commission

(6) The phrase "serious violation of human rights" in sub-section (6) has been replaced by "violation of human rights".

(7) After sub-section (7), a new sub-section (7a) has been added as below:

"(7a) Notwithstanding whatever is written in sub-section (7), if it is seen that a perpetrator is not able to provide compensation to the victim due to his/her economic backwardness, the Commission shall recommend to the Government of Nepal to provide the compensation amount to be received by the victim. The Government of Nepal must provide such compensation within three months from the date such a recommendation is received from the Commission."

(8) Sub-section (9) has been removed.

16. **Amendment to Section 27 of the Main Act**: After part (e) of sub-section (1) of Section 27 of the Main Act, part (e1) has been added as below:

"(e1) Details of the recommendation to file case in accordance with section 29.

17. **Amendment to Section 28 of the Main Act**: Part (b) of the sub-section (2) of Section 28 has been removed.

16. **Amendment to Section 29 of the Main Act**: Section 29 of the Main Act has been replaced as below:

"29. Provisions relating to filing of cases : (1) While filing a case against a person involved in the act of serious violation of human rights, the Commission must make a recommendation to the Attorney General along with a note on the circumstance while the incident took place, its reason, investigation report and the evidences.

(2) The following situations, if applicable, must also be clearly specified with regard to the person against whom a case is to filed as per sub-section (1):

- (a) Whether or not the person has revealed the truths and facts that he/she knows,
- (b) Whether or not the person has cooperated in the course of investigation by expressing the truths and facts with regard to the allegations against him/her,
- (c) Whether or not the person has repented for having been part of such act,
- (d) Whether or not the person has provided reparation to the victim,
- (e) Whether or not the person has apologized with the victim,
- (f) Whether or not the person has promised not to do such act in the future.

(3) If a recommendation as per sub-section (1) is received, the Attorney General or the public attorney authorized by him shall decide, based on the evidences received,

whether or not to file the case within six months from the date of having received such recommendation.

(4) If a decision to file a case is made pursuant to sub-section (3), the Attorney General or the public attorney authorized by him/her must file such a case at the Special Court,

(5) While filing case pursuant to this section, the Attorney General or the public attorney authorized by him/her, can put a claim for a reduced sentencing in place of the sentence as provided for in the prevailing laws taking into consideration of the situation as per sub-section (2), the circumstance and reason of the incident, and the principles of transitional justice.

(6) If a case is filed, pursuant to this section, against a person occupying a public position, he/she shall be automatically deemed to have been suspended the position until such a case is decided."

19. **Addition of section 29a., 29b., 29c. and 29d. in the Main Act:** After section 29 of the Main Act, following section 29a., 29b., 29c. and 29d. have been added:

"29a. **Formation of Special Court:** (1) For the purpose of adjudication and settlement of the cases related to the serious violations of human right committed during the conflict, the Government of Nepal shall form a three member Special Court in consultation with the Judicial Council by publishing a notice in the National Gazette.

(2) In consultation with the Judicial Council, the Government of Nepal shall appoint a Chair and members of the Special Court formed pursuant to sub-section (1) from among the judges of the High Court.

(3) The headquarter of the Special Court formed pursuant to sub-section (1) shall be in Kathmandu.

(4) The Special Court shall exercise the power of the Court of first instance as provided for in the prevailing laws in cases have been transferred from the District Courts pursuant to Section 29a. and shall exercise the power of the Court of Appeal as provided for in the prevailing laws if the cases have been transferred from the High Court.

(5) Notwithstanding whatever is written in the prevailing laws, the decision of the Special Court made pursuant to this Act shall be final.

(6) Other provisions relating to the use of jurisdiction of the Special and its procedure shall be as per Special Court Act, 2059 (2002).

- 29b. **Transfer of cases:** (1) The Attorney General shall write to the concerned Court to transfer the case files, appeals, applications and reports of cases related to the violation of human rights and serious violation of human rights committed during the armed conflict sub-judice at District or High Courts at the time of the commencement of this Section.

(2) If a written application pursuant to sub-section (1) is received, the concerned Court must send all the original case files, appeal, application and reports to the Special Court within twenty one days.

(3) The Special Court must send within fifteen days of having received the original case files as per sub-section (2) to the Commission asking it to submit a report along with its opinion after conducting an investigation on whether or not the case is related to human rights violation or serious human rights violation committed during the course of the armed conflict.

(4) If an original case file is received pursuant to sub-section (3), the Commission must investigate the case to ascertain whether or not it is related to the violation of human rights or serious violation of human rights and must send as promptly as possible the original file and the report of of investigation together with the Commission's opinion to the Special Court.

(5) If victims and perpetrators agree for a reconciliation in accordance with this Act or if the victims consent to give pardon in the course of investigation pursuant to sub-section (5), the Commission must write the matter in its report and submit to the Special Court along with the original case file.

(6) Based on the report obtained pursuant to sub-section (5), the Special Court may, for the purpose of executing the recommendation of reconciliation and amnesty in the case pursuant to this Act, strike off the case from its list and send the original case files to the Commission.

(7) If the report pursuant to sub-section (4) shows that the case is not related to the serious violation of human rights or violation of human rights, the Special Court must send the original case file to the concerned Court within fifteen days.

29c. **May file application:** (1) Before the Special Court decides on the case, the defendant may file an application requesting to support the justice process by revealing truths and facts of the case in which he/she is alleged, to repent for his/her involvement in the human rights violation, and to make a promise to not repeat such an act in the future or to provide and opportunity to seek an apology from the victim.

(2) If an application pursuant to sub-section (1) is received, the Special Court must give due opportunity for such an applicant.

29d. **Provisions relating to Sentence:** (1) Notwithstanding whatever is written in the prevailing laws, the Special Court must determine the sentence to a person involved in serious violation of human rights with reduction in the sentence as provided for in the prevailing laws by paying due attention to the circumstances under which the incident happened, its reason and the principles of transitional justice.

(2) While determining the reduced sentence pursuant to sub-section (1), the following must also be looked into:

- (a) Demands made pursuant to Section 29 sub-section (5) while filing the case,
 - (b) The details of the full account before the Court or the Commission about the truths and facts of the incidents by revealing the truths to the extent one is knowledgeable of,
 - (c) Whether or not the accused has confessed to having been involved in such a case and expressed truths and facts and supported the judicial process,
 - (d) Repentance for being involved in such acts,
 - (e) Apology sought with the victim,
 - (f) Money as determined by the Court or the Commission provided to the victim as reparation by the accused or has agreed to pay such money,
 - (g) Promise made not to commit such acts in future.
- (3) Notwithstanding whatever is written elsewhere in this Section, if there has already been a sentence to an individual in a case related to armed conflict that is filed in any Court formed in accordance with the prevailing laws of Nepal, no case shall be filed and no sentence imposed against such an individual on the same issue."

(20). **Amendment to Section 38 of the Main Act**: The provisions under Section 38 of the Main Act have been replaced as below:

"38. **Tenure of the Commission**: (1) The tenure of the Commission shall be until 15 July 2024 (BS 2081 Asar Masanta).

(2) Notwithstanding whatever is written in sub-section (1), if there are unfinished tasks to be accomplished by the Commission pursuant to this Act, the Government of Nepal may extend the tenure of the Commission by a year."

21. **Addition of Section 40a. in the Main Act**: After Section 40 in the Main Act, Section 40a. has been added as below:

"**40a. Transfer of Property**: (1) Notwithstanding whatever is written in the prevailing laws, with regard to the property that is in the name of or the property that is entitled to the person listed as disappeared in the record of the Commission of the Investigation of Enforced Disappeared Persons whose whereabouts is not ascertained as of the date of the commencement of this Section, the concerned entitled person may submit application to the concerned office or agency to accomplish the deeds of partition the property amongst the persons who are entitled to it or to transfer the property in the name of the rightful entitled person pursuant to the prevailing laws.

(2) If an application is received pursuant to sub-section (2), the concerned office or agency shall conduct necessary investigation to ascertain whether or not the applicant is the entitled person to the disappeared person.

(3) While carrying out investigation pursuant to sub-section (2) if it is found that the applicant alone is the entitled person, the share of the property in the name of the disappeared person must be kept aside transferring the remaining property in the name of the applicant, and if there are other entitled persons in addition to the applicant, the property must be divided between the disappeared person, the applicant and other entitled persons, and then transferred to their respective names and dismiss the file on record.

(4) If there is money deposited in a Bank account in the name of a disappeared person pursuant to sub-section (1), the concerned Bank must pay out the money person to the person put in the will paper, and if there is no such will, to the entitled person of the disappeared person.

(5) If the disappeared person pursuant to sub-section (1) has not yet accessed the facilities and benefits including pension and gratuity for his/her service at a government agency, institution or organization, such facilities and benefits must be provided to the entitled person of the disappeared.

22. **Change:** The phrase "legislative-parliament" found in different places has been changed to "federal parliament" except in the law making formulation.