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Model law on a National Commission on the Adivasi Janjatis of Nepal

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A
Model law
on the possible establishment of
a National Commission on the Adivasi Janjatis

(An Act further to amend Interim Constitution of Nepal of 2007)

An Act to provide for the establishment of an autonomous “National Commission on the Adivasi Janjatis” in Nepal for better protection and promotion of their rights and for matters connected therewith or incidental thereto.

CHAPTER I: PRELIMINARY

1. Short title, extent and commencement

- (1) This Act may be called the National Commission on the Adivasi Janjatis Act of 2007.
- (2) It extends to the whole of Nepal.
- (3) It shall be deemed to have come into force on theth day of, 2007.

2. Definitions

- (1) In this Act, unless the context otherwise requires-
 - (a) “Recommendation Committee” refers to appointing committee under Section 5 of the Act.
 - (b) “Indigenous peoples” refers to indigenous nationalities recognized by national and international laws practiced criteria.
 - (c) “Chief Commissioner” means the Chief Commissioner of the Commission;
 - (d) “Commission” means the National Commission on the Adivasi Janjatis under section 3;
 - (e) “Rights” means the rights of indigenous peoples stipulated under national and international human rights instruments;
 - (f) “Commissioner” means a Commissioner of the Commission; and
 - (g) “Notification” means a notification published in the official Gazette;

CHAPTER II: THE NATIONAL COMMISSION ON THE ADIVASI JANJATIS

3. Constitution of a National Commission on the Adivasi Janjatis

(1) The Government of Nepal shall constitute an autonomous body to be known as the National Commission on the Adivasi Janjatis to protect, promote and *defend* human rights, fundamental freedoms and other rights and interests of the indigenous peoples with due regard to their beliefs, customs, traditions and institutions and shall exercise the powers conferred upon, and perform the functions assigned to it, under this Act.

(2) The Commission shall consist of:

- (a) Chief Commissioner and
- (b) eight other Commissioners.

(3) There shall be a Secretary-General who shall be an indigenous person. He will be the Chief Executive Officer of the Commission and shall exercise such powers and discharge such functions as the Commission may delegate to him. The Secretary General need not be a government officer and should possess experiences at national and international level.

(4) The headquarters of the Commission shall be at Kathmandu and the Commission may establish offices/regional offices at other places in Nepal.

4. Criteria /Qualifications

(1) The Chief Commissioner and the Commissioners must be:

- (a) Nepalese citizens;
- (b) bonafide members of indigenous nationalities as recognized under the law;
- (c) experienced in indigenous peoples' issues and have worked for at least 7 years with an indigenous community and/or any government agency involved in indigenous peoples' issues and holds at least a bachelor degree;
- (d) have the ability, integrity and standing for selflessness to the cause of justice for the indigenous peoples.

(2) The composition of the Commissioners shall reflect the diversity of the indigenous peoples including equal representation from three different regions respectively mountain region, hill region and Terai region.-

(3) The Commission shall have at least 50% women members whose appointment shall reflect the geographical diversity;

(4) The Commission shall also have at least one retired judge of Nepal as a Commissioner who does not have to belong to an indigenous community.

5. Procedure of appointment of Chief Commissioner and Commissioners

(1) The Chief Commissioner and Commissioners shall be appointed by the Head of State on the recommendation of the “Recommendation Committee” consisting of the following members:

(a) The Prime Minister

(b) Speaker of the National Assembly

(c) Leader of the Opposition in the National Assembly

(d) Three representatives of Advisory Consultative Committee which shall for the first term be constituted by the Governing Council of the National Foundation for Development of Indigenous Nationalities (NFDIN).

The Recommendation Committee members shall appoint a Chairperson among themselves and two-third members shall form the quorum.

(2) The procedures of receiving the nomination by the Recommendation Committee shall be as under:

(a) The Secretary General of the National Commission on the Janjati Adivasis shall issue a notification inviting nominations to fill up the vacant posts of Chief Commissioner and other Commissioners, and for appointment for the first term, Director of NFDIN shall serve as the Secretary of the Recommendation Committee;

(b) Such invitation for nomination shall be pasted on the notice board of the Commission, notified through publication in all national newspapers of Nepal and other communication systems like internet;

(c) The period of filing nomination shall be at least one month from the date of the notification;

(d) After the expiry of the date of filing nominations, the Secretary General shall issue a public notice inviting comments from the indigenous peoples (individuals and organizations) on candidature of all the nominees and the details of the nominees including names, address, educational qualifications, work experience

etc. before placing the nominations for consideration of the Recommendation Committee and the information pertaining to all the nominees shall be made public;

6. Procedure for filling up vacancies of Chief Commissioner /Commissioners

(1) In case of resignation or removal according to Clause 7 provided under the Act, the procedure for filling up the vacancy must be completed within three months after resignation or removal of the Chief Commissioner or any Commissioner;

(2) In case of retirement or completion of the terms of office of the Chief Commissioner/any other Commissioners, the procedure for filling up the vacancy be completed prior to the retirement or completion of the term of the concerned Chief Commissioner/Commissioners;

7. Resignation and removal of the Chief Commissioner or other Commissioners

(1) The Chief Commissioner or any Commissioner may, by notice in writing under his/her hand addressed to the Head of State, resign his/her office.

(2) Subject to the provisions of sub-section (3), the Chief Commissioner or any other Commissioners shall only be removed from his/her office by the initiative of the Recommendation Committee or upon recommendation by any indigenous community on the ground of proven misbehaviour or incapacity after the Supreme Court, on reference being made to it by the Recommendation Committee, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chief Commissioner or such other Commissioner, as the case may be, ought on any such ground to be removed.

(3) Notwithstanding anything in sub-section (1), the Head of State on the advice of the Recommendation Committee may by order remove from office the Chief Commissioner or any other Commissioner if the Chief Commissioner or such other Commissioners, as the case may be;

(a) is adjudged an insolvent; or

(b) engages during his/her term of office in any paid employment outside the duties of his/her office; or

(c) is unfit to continue in office by reason of infirmity of mind or body; or

(d) is of unsound mind and stands so declared by a competent court; or

(e) is convicted and sentenced to imprisonment for an offence involves moral turpitude.

8. Term of office of Commissioners

(1) A person appointed as Chief Commissioner shall hold office for a term of five years from the date on which he/she enters upon his/her office.

(2) A person appointed as a Commissioner shall hold office for a term of five years from the date on which he/she enters upon his/her office and shall be eligible for re-appointment for another term of five years.

9. Commissioner to act as Chief Commissioner or to discharge his/her functions in certain circumstances

(1) In the event of the occurrence of any vacancy in the office of the Chief Commissioner by reason of his/her death, resignation or otherwise, the Commissioners can authorize one of the Commissioners to act as the Chief Commissioner until the appointment of a new Chief Commissioner to fill such vacancy.

(2) When the Chief Commissioner is unable to discharge his/her functions owing to absence on leave or otherwise, such one of the Commissioners may be authorized to discharge the functions of the Chief Commissioner until the date on which the Chief Commissioner resumes his/her duties.

10. Terms and conditions of service of Commissioners

The salaries and allowances payable to, and other terms and conditions of service of the Commissioners shall be such as may be prescribed by the government of Nepal. Provided that neither the salary and allowances nor the other terms and conditions of service of a Commissioner shall be varied to his/her disadvantage after his/her appointment.

11. Vacancies, etc., not to invalidate the proceedings of the Commission

No act or proceedings of the Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Commission.

12. Procedure to be regulated by the Commission

(1) The Commission shall meet at such time and place as the Chief Commissioner may think fit.

(2) The Commission shall regulate its own procedure.

(3) All orders and decisions of the Commission shall be audited by the Secretary-General or any other officer of the Commission duly authorized by the Chief Commissioner.

13. Officers and other staff of the Commission

(1) The Government of Nepal shall make available to the Commission:

(a) an officer who shall be an indigenous person and serve as the Secretary-General of the Commission and hold the rank of the Secretary to the Government of Nepal

(b) such investigative staff and officers as may be necessary for the efficient performance of the functions of the Commission.

(2) Subject to such rules as may be made by the Government of Nepal in this behalf, the Commission may appoint such other administrative, technical and scientific staff as it may consider necessary.

(3) The salaries, allowances and conditions of service of the officers and other staff appointed under sub-section (2) shall be such as may be prescribed.

(4) Subject to such rules as adopted by the Commission, it may hire consultants/staff who are independent of the staff provided by the government of Nepal.

14. Offices and departments of the Commission

The Commission, among others, shall have the following offices which shall be headed by indigenous persons and be responsible for the implementation of the policies hereinafter provided:

a) **Policy, Planning and Research and Advocacy office** will be responsible for formulation of appropriate policies and programs for indigenous peoples such as, but not limited to, the development of a Five-Year Master Plan for the indigenous peoples. The Commission shall endeavor to assess the plans and make necessary rectifications in accordance with the changing situations. The Office shall also undertake the documentation of customary law and shall establish and maintain a Research Center that would serve as a depository of ethnographic information for monitoring, evaluation and policy formulation. It shall assist the legislative branch of the government in the formulation of appropriate legislation on indigenous peoples;

b) **Education and Culture Office** will ensure effective implementation of the education, cultural and health rights of the indigenous peoples. It shall assist, promote and support community schools, both formal and non-formal, for the benefit of the indigenous communities, especially in areas where existing educational facilities are not accessible to members of the indigenous groups. It shall administer all scholarship programs and other

educational rights intended for indigenous people's beneficiaries in coordination with the Ministry of Education, Culture and Sports and other related agencies. It shall also undertake special programs to preserve and promote the languages and traditional knowledge of the indigenous peoples.

c) **Office on Socio-Economic Services and Special Concerns** will coordinate with pertinent government agencies specially charged with the implementation of various basic socio-economic services, policies, plans and programs affecting the indigenous peoples to ensure that the same are properly and directly enjoyed by the indigenous peoples. It shall also be responsible for such other functions as the Commission may deem appropriate and necessary;

d) **Women Rights Cell** which, among others, shall design and implement the programmes of the Commission pertaining to indigenous women.

e) **Youth and Child Rights Cell** which, among others, shall design and implement the programmes of the Commission pertaining to indigenous youths and children.

f) **Office of Empowerment and Human Rights** will ensure the enjoyment of the human rights and fundamental freedoms by the indigenous peoples. It shall, among others, undertake capacity building programmes, participation of indigenous peoples at all levels of decision-making and intervene against violations of the rights of indigenous peoples.

g) **Administrative Office**, among others, shall provide the Commission with economic, efficient and effective services pertaining to personnel, finance, records, equipment, security, supplies and related services.

h) **Legal Affairs Office** shall, among others, advice the Commission on all legal matters concerning indigenous peoples and providing legal assistance to indigenous peoples in litigations.

i) **Other Offices** - The Commission shall have the power to create additional offices or regional offices in all development regions or wherever it may deem necessary.

15. Consultative Advisory Committee of the Commission

(1) It shall be the duty of the National Commission on the Adivasi Janjatis to inform and consult the Consultative Advisory Committee which shall have the mandate to:

(i) advise the Commission on matters relating to the problems, aspirations and interests of the indigenous peoples; and

(ii) nominate indigenous representative to the "Recommendation Committee" for nomination of the Commissioners.

(2) The Consultative Advisory Committee shall consist of one representative of each indigenous community and the diversity of indigenous peoples including representation of women shall be ensured.

(3) The Consultative Advisory Committee shall meet twice a year or on an urgent basis as required;

(4) For the first term, the Governing Council of the National Foundation for Development of Indigenous Nationalities shall serve as the Consultative Advisory Committee for a period of two years;

(5) The Commission shall serve as the Secretariat for nomination of the Consultative Advisory Consultative Committee as per the procedure laid down for nomination of the members of the Governing Council of the National Foundation for Development of Indigenous Nationalities.

CHAPTER III: FUNCTIONS AND POWERS OF THE COMMISSION

16. Functions and powers of the Commission

(1) It shall be the duty of the Government of Nepal to inform and consult the Commission on all major policy matters affecting indigenous peoples.

(2) It shall be the duty of the Commission—

(a) To serve as the primary government agency through which indigenous peoples can seek government assistance and as the medium, through which such assistance may be extended;

(b) To monitor, review, and assess the conditions of indigenous peoples including existing laws and policies pertinent thereto and to propose relevant laws and policies to ensure their role in national development;

(c) To coordinate, formulate and implement policies, plans, programs and projects of the government of Nepal for the economic, social and cultural development of the indigenous peoples and monitoring the implementation thereof;

(d) To request and engage the services and support of experts from other agencies of government or employ private experts and consultants as may be required in the pursuit of its objectives;

(e) To inquire into specific complaints, on receipt of complaints or suo motu, with respect to the violations of the rights and safeguards of the indigenous peoples;

- (f) To receive complaints and/or take *suo motu* action and inquire into non-implementation of the services provided by the government and compel action from appropriate agency.
- (g) To participate and advise on the planning process of socio-economic development of the indigenous peoples and to evaluate the progress of their development;
- (h) To study and make recommendations for sustainable development of indigenous peoples;
- (i) To discharge such other functions in relation to the protection, welfare and development and advancement of the indigenous peoples;
- (j) To discharge such other functions in relation to the protection, welfare and development and advancement of the indigenous peoples as the case may be, subject to the provisions of any law made by Parliament;
- (k) To convene periodic conventions or assemblies of indigenous peoples to review, assess as well as propose policies or plans;
- (l) To update the scheduled list of indigenous peoples through identification and recognition of the unidentified and unrecognized ones;
- (m) To recognize, promote and protect traditional wisdom and knowledge of the indigenous peoples and prevent transfer of such knowledge and wisdom to non-indigenous peoples/areas without benefit sharing and ensuring full respect for the right to free, prior and informed consent;
- (n) To act as the regulating agency for implementation of programmes or projects by non-governmental organizations and the private sector; and
- (o) To promulgate the necessary rules and regulations for the implementation of this Act;

17. Powers relating to inquiries

- (1) The Commission shall, while inquiring into any complaint under Section 15 have all the powers of a civil or criminal court whichever applicable in respect of the following matters, namely:-
 - (a) summoning and enforcing the attendance of any person from any part of Nepal and examining him on oath;
 - (b) requiring the discovery and production of any documents;
 - (c) receiving evidence on affidavits;

- (d) requisitioning any public record or copy thereof from any court or office;
 - (e) issuing commissions for the examination of witnesses and documents; and
 - (f) any other matter which may be prescribed by the parliament;
- (2) The Commission shall have power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the Commission, may be useful for, or relevant to, the subject matter of the inquiry and any person so required shall be deemed to be legally bound to furnish such information as legally provided.
- (3) The Commission or any other officer, not below the rank of a Gazetted Officer, specially authorised in this behalf by the Commission may enter any building or place where the Commission has reason to believe that any document relating to the subject matter of the inquiry may be found, and may seize any such document or take extracts or copies there from subject as provided under law.
- (5) Every proceeding before the Commission shall be deemed to be a judicial proceeding and the decisions of the Commission shall be appealable only before the Supreme Court of Nepal.

CHAPTER IV: PROCEDURES

18. Inquiry into complaints

(1) The Commission while investigating into non-implementation of safeguards available to the indigenous peoples under the Constitution of Nepal or any law for the being in force or inquiring into the complaints of violations of the rights of indigenous peoples may

- (i) call for information or report from the Government of Nepal or any other authority or agency or organisation of the Government within such time as may be specified by it;

Provided that-

- (a) if the information or report is not received within the time stipulated by the Commission, it may proceed to inquire into the complaint on its own;
- (b) if, on receipt of information or report, the Commission is satisfied either that no further investigation or inquiry is required or that the required action has been initiated or taken by the concerned Government or authority, it may not proceed with the complaint and inform the complainant accordingly;

(ii) without prejudice to anything contained in sub-section (i), if it considers necessary, having regard to the nature of the complaint, initiate an inquiry by its own investigation or any other agency of the government of Nepal as the Commission deems fit.

(2) The officer or agency whose services are utilised under subsection (1)(ii) shall investigate into any matter pertaining to the inquiry and submit a report thereon to the Commission within such period as may be specified by the Commission in this behalf.

(5) The Commission shall satisfy itself about the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it and for this purpose the Commission may make such inquiry (including the examination of the person or persons who conducted or assisted in the investigation) as it thinks fit.

19. Statement made by persons to the Commission

No statement made by a person in the course of giving evidence before the Commission shall subject him/her to, or be used against him/her in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement:

Provided that the statement:-

- (a) is made in reply to the question which he is required by the Commission to answer; or
- (b) is relevant to the subject matter of the inquiry.

20. Persons likely to be prejudicially affected to be heard

If, at any stage of the inquiry, the Commission:-

- (a) considers it necessary to inquire into the conduct of any person or persons; or
- (b) is of the opinion that the reputation of any persons is likely to be prejudicially affected by the inquiry; it shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his/her defence:

Provided that nothing in this section shall apply where the credit of a witness is being impeached.

21. Steps after inquiry

The Commission may take any of the following steps upon the completion of an inquiry held under this Act namely:

(1) where the inquiry discloses the commission of violation of rights of the indigenous peoples or negligence in the prevention of violation of the rights by a public servant, it may recommend to the Government of Nepal or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons;

(2) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;

(3) recommend to the Government of Nepal or authority for the grant of such immediate interim relief to the victim or the members of his/her family as the Commission may consider necessary;

(4) subject to the provisions of clause (5), provide a copy of the inquiry report to the petitioner or his/her representative;

(5) the Commission shall send a copy of its inquiry report together with its recommendations to the Government of Nepal or authority and the Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission; and

(6) the Commission shall publish its inquiry report together with the comments of the Government or authority, if any, and the action taken or proposed to be taken by the Government or authority on the recommendations of the Commission.

22. Annual and special reports of the Commission

(1) The Commission shall submit an annual report to the Parliament of Nepal and may at any time submit special reports on any matter which, in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report.

(2) The Government of Nepal shall submit a memorandum of action taken or proposed to be taken on the recommendations of the Commission and the reasons for non-acceptance of the recommendations, if any.

CHAPTER V: Provincial Commissions

23. Constitution of Provincial Commission on the Adivasi Janjatis

(1) The National Commission on the Adivasi Janjatis may constitute a Provincial Commission to be known as the (name of the Province) Commission on Adivasi Janjatis to exercise the powers conferred upon, and to perform the functions assigned to by the National Commission.

(2) The National Commission in consultation with the Provincial government and the Consultative Advisory Committee may by notification specify appoint

(a) a Chief Commissioner

(b) four other commissioners who shall represent diversity of indigenous peoples including equal representation of women;

(3) There shall be a Secretary who shall be the Chief Executive Officer of the Provincial Commission and shall exercise such powers and discharge such functions of the State Commission as it may delegate to him.

(4) The headquarters of the Provincial Commission shall be at such place as the National Commission may notify in consultation with the Provincial Government.

CHAPTER VI: FINANCE, ACCOUNTS AND AUDIT

24. Grants by the Government of Nepal

(1) The Government of Nepal shall after due appropriation made by Parliament by law in this behalf, pay to the Commission by way of grants such sums of money as the Commission may present in a budget to the Government annually.

(2) It shall be the duty of the Provincial government to provide financial resources for proper functioning of the Provincial Commission as the Provincial Commission may present in a budget to the Government annually.

(3) The Commission may spend such sums as it thinks fit for performing the functions under this Act, and such sums shall be treated as expenditure payable out of the grants referred to in sub-section (1).

(4) The Commission can directly receive additional funds from foreign sources as donation, assistance, grants etc.

25. Accounts and Audit

(1) The Commission shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Government of Nepal in consultation with the Comptroller and Auditor-General of Nepal.

(2) The Accounts of the Commission shall be audited by the Comptroller and Auditor-General at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Commission to the Comptroller and Auditor-General.

(3) The Comptroller and Auditor-General or any person appointed by him in connection with the audit of the accounts of the Commission under this Act shall have the same rights and privileges and the authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Commission.

(4) The accounts of the Commission as certified by the Comptroller and Auditor-General or any other person appointed by him in this behalf, together with the audit report thereon shall be forwarded only to the Government of Nepal by the Commission and the Government of Nepal shall cause the audit report to be laid as soon as may be after it is received before each House of Parliament.

CHAPTER VII: MISCELLANEOUS

26. Matters not subject to jurisdiction of the Commission

(1) The Commission shall not inquire into any matter which is pending before a court or any other Commission duly constituted under any law for the time being in force.

(2) The Commission shall not inquire into any matter after the expiry of five years from the date on which the act constituting violation of human rights is alleged to have been committed.

27. Constitution of Expert Sub-Committees

Notwithstanding anything contained in any other law for the time being in force, where the Commission considers it necessary so to do, it may constitute one or more Sub-Committees for purposes research, investigation, review and monitoring of social, economic, cultural and civil and political rights of the indigenous peoples.

28. Protection of action taken in good faith

No suit or other legal proceeding shall lie against the Government of Nepal, the Commission or any Commissioner thereof or any person acting under the direction either of the Government of Nepal or Commission in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or any order made thereunder or in respect of the publication by or under the authority of the Government of Nepal or Commission of any report paper or proceedings.

29. Commissioners and officers to be public servants

Every Commissioner and every officer appointed or authorised by the Commission to exercise functions under this Act shall be deemed to be a public servant.

30. Repeal and Savings

(1) The National Foundation for Development of Indigenous Nationalities hereby becomes a part of the Commission.

(2) Notwithstanding such repeal, anything done or any action taken under the said Act shall be deemed to have been done or taken under the corresponding provisions of this Act.