

# ● RIGHT TO FREE AND COMPULSORY EDUCATION IN NEPAL: A STUDY WITH SPECIAL REFERENCE TO INDIA'S RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION ACT, 2009



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## Abstract

*Free and compulsory education of children of school going age is now a fundamental right in Nepal with the promulgation of Article 31 under 2015 Constitution and Right to Free and Compulsory Education Act, 2018. This right is governed by law of the land and the parliament felt its imperative to enact fair corpus of clauses laying down the duties and responsibilities of the Central government, provincial governments and their affiliates. The Act, 2018 is an instrument of guarantee in a sense that the onus to ensure free and compulsory education lies on the state. However, this burden of state has no effect on the private institutions. Nor has the Act laid down stringent measures to control the monopoly of private actors in education. This way, the Act has welcome provisions for the government schools and by the government schools. Unlike India, the Act does not slam collection of capitation fees. In India, the Act, 2009 prohibits institutions from carrying out any screening procedure of students or charging capitation fees. In doing so, the Act, 2018 falls short of adopting any measures to regulate the private school fees. So, balancing the autonomy of private institutions and public welfare functions have become a contentious issue.*

## 1.1 Introduction

Education is the most powerful weapon which you can use to change the world," is the famous saying of Nelson Mandella. Indeed, its the education which can bring change in world. An educated person has the ability to differentiate between right and wrong or good and evil or virtue and sin. Its the foremost responsibility of the state to educate its citizens in order to create a just society. An educated person does not only gain something from education but also contribute in the growth of the nation.

Its been often said that education starts from the time a person comes out from the womb of his/her mother. A child acquires major chunk of education from his/her home as s/he spends major portion of time with his/her family members, relatives or known ones. S/he learns many things from the companions s/he keeps. Afterwards, s/he goes to schools, colleges and finally starts working. Yet, acquiring education in the days we live in has become an uphill task due to heightened inflation, commercialization of education, poverty or over privatization. In order to ensure the access of education to all and reduce the disparities experienced by a section of society with low access, the competent parliament of Nepal enacted "Compulsory and Free Education Act, 2018."

The Act, 2018 is in furtherance of right to education-related fundamental rights provisions embodied under the Constitution of Nepal, which entered into force on September 20, 2015. The legislation therefore reflects the legacies of the constitutional provisions and alongside new initiatives to address the emerging needs of country and

people's aspirations. The Act, which is home to 41 sections, demands a thorough reorientation of the education system through institutional and functional reforms in an endeavour to give effect to Article 31 of the Constitution. Article 31 that begins with a marginal note of "Right to Education" incorporates welcome provisions relating to free and compulsory education to citizens living under the Constitution. In doing so, the framers of the Act have tried their best to put the state under an obligation of imparting free and compulsory education to the children of school going age.

## 1.2 Country context

The Federal Democratic Republic of Nepal is a multi-lingual and multi-ethnic country bordered to the north by the People's Republic of China and to the south, east and west by the Republic of India. With an area of 1,47,181 square Kilometers and a population of 264,945,041, Nepal is situated between the two gigantic countries India and China. Richly endowed by the nature, Nepal is known for its mountain peaks. The Himalayan republic contains eight of the 10 highest peaks in world, including Mount Everest and Kanchenjunga-the world's tallest and third highest peaks respectively. Having Kathmandu as the capital city, the nascent republic is divided into three East-West ecological belts: the Northern Range-Mountain, the Mid Range--, the Mid Range-Hill and Southern Range-Madhesh. Madhesh, the Southern plains of Nepal, is the grain house and major source of income in terms of tax, industry and other forms of national economy.

It's also known for the birthplace of Gautam Buddha and Goddess Janaki (alias Sita), who was married to Lord Ram. Despite this, Nepal's lot has been poverty and marginalization since the unification of the country 250 years ago (and unified by the first Hindu monarch the great king Prithvi Narayan Shah) down to the present through Rana's oligarchy, monarchy, and ostensible unstable democracy. Federal Democratic Republic since July 2008, Nepal was previously ruled by hereditary Hindu monarchs. Nepali currency is known by 'Nepali Rupees' (NRs) which translates to NRs 160 against India's Indian National Rupees (INR) 100.

## 1.3 A brief on Federal Constitution

On September 20, 2015, Nepal embraced the latest Constitution. It is the first Constitution promulgated by people's elected representatives as per the mandate of the Comprehensive Peace Accord signed between the Government of Nepal and the Communist Party of Nepal (Maoists) in 2006 to formally end a decade-long (1996-2006) Maoist insurgency. Abolishing the 240-year-long autocratic rule of Hindu monarchy, the Constitution institutionalized republicanism, federalism and secularism for the first time. Now, Nepal is officially known as the Federal Democratic Republic of Nepal.

A few things about 2015 Constitution are worth remembering. One, it's the first formal Constitution to affirm federal republican democracy. Two, the conscience of the Constitution has been captured under Part-III (Fundamental Rights) and Part-IV (Directive Principles). They are evidence of the splendid collection of rights, worthy of a

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<sup>1</sup>Central Bureau of Statistics, Government of Nepal, Report: Population Monograph of Nepal (National Planning Commission, Ministry of Population and environment, 2014), p.4



public welfare state and envisages for newly empowered citizenships. Thirdly, Nepal sets aside 33% of parliamentary seats for women, which is a major breakthrough. Fourth, the charter embodies plethora of progressive provisions for fundamental rights, including right to education.

## **Constitutional History**

### **2.1 Introduction**

The Constitution is regarded as the highest law of the land. It's a document which sets out the structure of the government of a nation. It ought to secure the natural and political rights of the national population in order to guarantee good governance and rule of law. So, far the Constitutions of Nepal are concerned, the Constitutions of 1959 and 1962 had miserably failed to show adherence to right to education. These two Constitutions lacked provisions relating to right to education.

It may be noted that Nepal has adopted and enacted seven Constitutions so far. The Government of Nepal Act, 1948 was the first Constitutional document in Nepal which conferred wide powers to the Rana Prime Ministers. This Constitutional Act was crafted to negate the existence or influence of the kings. The Rana rulers emerged as autocrats by invoking the undemocratic powers conferred under the Constitution. But, this Constitution was short-lived. In order to retain his powers, the then king Tribhuvan went on to seek help from the Indian Prime Minister Pt Jawaharlal Nehru to overthrow the Rana regime. In its effect, the days of Rana era ended and the king promulgated Interim Constitution of Nepal, 1951 which declared him as the head of the state. Afterwards, king Mahendra enacted Constitutions on two different occasions. The Constitutions of 1959 and 1962 conferred unlimited power on the royal institution and sovereignty was vested in the king. Then, king Birendra enacted 1990 Constitution which guarded democratic credentials in a healthy manner. It survived for more than a decade.

In order to depose the Hindu monarchy, Interim Constitution, 2007 was introduced by the parliament and finally the Constituent Assembly adopted and enacted the latest Constitution which is in force since September 20, 2015. The erstwhile Constitutions, save for 2007 Interim Constitution, were promulgated by the Kings while the 2015 Constitution has been crafted by the elected members in the Constituent Assembly. The 2015 Constitution makes a principled distance with the repealed Constitutions of Nepal. It institutionalized republicanism, federalism and secularism in the country.

### **2.2 Constitutional mandates for right to education in Nepal**

The right to free and compulsory education of school going children has been a fundamental right in the country ever since Nepal adopted its first Constitution in 1948. In this light, the Government of Nepal Act, 1948 under Article 4 provisioned for free and compulsory primary education throughout the country.

However, the 1951 Interim Constitution, which was promulgated by then king Tribhuvan, lacked any fundamental rights relating to education. Still, there was something called Article 11 under the head of Directive Principles which cast obligation on the government to promote with special care the educational and economic interests of the weaker sections of people. The Constitution remained reluctant to envisage any express enactment relating to free and compulsory education. Surprisingly, the formal

Constitutions of 1959 and 1962 which were enacted by then king Mahendra had not incorporated any provision relating to right to education.

In contrast, Constitution of Nepal, 1990 too lacked provisions for free and compulsory education to citizens under the chapter of fundamental rights. However, Article 18 of the Constitution sought to guarantee each community the right to operate schools up to the primary level in its own mother tongue for imparting education to its children. In addition to this, Article 26 bearing a marginal note of "State Policies" contained a fair corpus of directive principles. It obliged the state to raise the standards of living to the general public through the development of infrastructures like education, health and among others. The state was also under obligation to formulate policies and special provisions for ensuring access of education to women. The state was directed to make necessary arrangements for free education to children and safeguard their rights and interests. Also, the charter commanded the state to bring special provisions for ensuring education to economically and socially background groups.

Similarly, the 2007 Interim Constitution of Nepal brought a paradigm shift in the entire system of governance and fundamental rights. After all, it was a document designed to dismantle the regressive agendas and initiate a new political dawn in the state. In this regard, Article 17 of 2007 Constitution envisaged for the first time in constitutional history of Nepal for the citizen's right to get free education up to secondary level from the state. However, there was no provision regarding 'compulsory and free' education in the scheme of this Constitution. Despite of this, the Directive Principles of State Policy had incorporated a good deal of education related rights and obligations. The state was put under an obligation to ensure the access of education to every citizen.

Nevertheless, the 2015 charter not only brought a substantial change in political landscape but also incorporated ambitious and progressive rights under the Part-III of the Constitution dealing with fundamental rights. Interestingly, the new Constitution for the first time under Article 31 advocated for the 'free and compulsory' education. In previous Constitutions, the right to education provision was not worded with 'free and compulsory' education. To put it simply, the erstwhile Constitutions of Nepal contained provisions for right to education but lacked the legislative intent showing the commitment for 'compulsory and free' education. At this backdrop, Article 31 envisions that every citizen shall have the right to access of school education. The provision imposes an obligation on the state to ensure free education up to the secondary level and compulsory and free basic education.

The expressions-basic education and secondary education-have been defined under the definition clauses of the Act, 2018. As per the mandate of the Act, 'basic education'<sup>2</sup> means school education up to eighth standard (from class one), whereas 'secondary education'<sup>3</sup> means school education between class nine and twelve. It may be noted that 'free education'<sup>4</sup> means no student would be burdened with any kind of fee or charges (under any head). The fundamental rights clauses provision that the physically impaired

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<sup>2</sup>Section 2(d), Compulsory and Free Education Act, 2018

<sup>3</sup>Id; Section 2 (j)

<sup>4</sup>Id; Section 2(g)



and citizens who are financially poor would have the right to avail free higher education.<sup>5</sup> Likewise, the visually impaired citizens are also entitled to avail free education with the medium of brail script.<sup>6</sup> Also, the citizens have the right to acquire school education in their mother tongue and to conduct educational institutions accordingly.<sup>7</sup>

With this spirit, the competent parliament of Nepal came up with the Right to Compulsory and Free Education Act, 2018 to give effect to the constitutional provisions relating to right to education. This approach has been adopted to ensure the access of education to every citizen, including indigent persons. The researchers humbly submit that the adjudication of this right (under the current constitutional position) is challenging as this right is a positive obligation on the state which requires the state to provide necessary arrangements to make this right meaningful.

The enactment of Compulsory and Free Education Act, 2018

### 3.1 Introduction

The free and compulsory education of children is a fundamental right under the Constitution of Nepal. The law ensures that all children get free and compulsory education up to class eight and free education from class nine to twelve in government schools. In order to impose a mandatory obligation on the state to provide free and compulsory school education, the competent parliament of Nepal enacted 'Right to Compulsory and Free Education Act, 2018' that entered into force recently.

The Act is designed to quicken the pulse of right to education which is a sacrosanct fundamental right embodied under 31 of the Constitution. It hosts seven parts and 41 Sections. The legislation obliges the provincial governments, local bodies and central government as well to adopt every measure to implement the provisions of the Act in letter and spirits both.

### 3.2 Preamble

The preamble of the Act, 2018 details the commitment of the state in ensuring equitable and inclusive quality education by promoting the learning opportunities to all. It endeavours to ensure free and compulsory school education in a competitive, innovative and value oriented way to create an egalitarian society and foster the bases of socialism.

At the very outset, the crafters of the Act cast an obligation on the state to take appropriate steps to contribute to socio-economic development and ensure the reach of education to every section of society. In this way, the preamble entails reorientation of the governance and management of schools to fulfil the guarantee of 'free and compulsory basic education' and 'free secondary education.' In yet another sense, the preamble clarifies that the right to education is an inalienable human rights enhancing human dignity with the help of knowledge, wisdom and understanding.

As preamble is considered as window of the Act to cull out the objective the legislation has intended to achieve, the concluding part seeks to reaffirm the status of educational

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<sup>5</sup>Article 31(3), Constitution of Nepal

<sup>6</sup>Id; Article 31(4)

<sup>7</sup>Id; Article 31(5)

right as multi-faceted, i.e., socio-economic, competitive and cultural rights because its an aid to employment. Its a competitive and cultural right that strengthens the foundation of universal culture of human rights as well as competitive environment in the society. In nutshell, the preamble expresses the legislative intent in ensuring the free and compulsory education to school going citizens.

### **3.3 Objective**

The Act intends to ensure free and compulsory basic education and free secondary education to all citizens. The law aims to secure education in mother tongue; special education to disabled or the victims of different political movements, and ensure the access of education to all.

### **3.4 Main features of the Act, 2018**

When 'free and compulsory' education was adopted and enacted as one of the fundamental rights under the constitutional scheme, it was imperative to pass Right to Education Act, 2018 to fulfil the cherished dreams of Constitution makers and rights thinking members of our society.

It took the parliament three years (after the enactment of 2015 Constitution) to pass Act, 2018 which is devoted to enforce the provisions relating right to education in Constitution. The Act is home to 41 Sections. The features of the Act can be outlined as:

- Every child in the age group of 4-13 has the right to 'free and compulsory education in a neighbourhood school, till the completion of basic education, i.e. grade eight.
- Every child has the right to 'free' education in a neighbourhood school, till the completion of secondary education, i.e., grade 12.
- The appropriate government which means central government or provincial governments and its affiliates have to provide school within two Kilo Meters walking distance for children's resident. These schools are termed as 'neighbourhood schools' as per the mandate of Section 7 of the Act.
- 10 per cent seats are reserved for scholarship candidates where the number of students stand up to 500, and 12 per cent and 15 per cent scholarship seats where the number of students is up to 800 and above 800, respectively.
- The Act puts the students from economically poor or underprivileged groups at par with the relatively privileged children. This mix up would certainly set a milestone to build an inclusive, equal and just society. Eventually, it would enable the children from poor families to avail quality and competitive education.
- No child could be expelled and denied admission. The schools are bound to provide or arrange admission in neighbourhood school.
- The Act commands that every child shall have right to acquire school education from qualified and trained teachers.
- The Act specifies the duty and responsibilities of the central government, provincial governments and local bodies in providing free and compulsory education. Financial burden will be shared between the state and central government. The local bodies are mandated to play a constructive role in ensuring the admission of children. All the three-tier governments are obliged to play a creative role in



ensuring special education to disabled children or the issues of the martyrs. The central government would arrange funds for providing text books to students.

- The Act provides for the development of curriculum in consonance with the tradition, culture and norms embodied under the Constitution. Also, the students have right to receive education in mother tongue. The medium of instruction in schools could be Nepali, English or both, or mother tongue.
- It is the duty of parents to admit their children or ward to school and ensure that they receive school education. The Act provisions that the persons who does not have received basic education would not be eligible for any government or non-government jobs after 10 years (i.e., after BS 2085, Baisakh 1).
- Local bodies may make arrangements for medical treatments and snacks/Tiffin during school hours to students belonging to economically poor families.
- The state is also obliged to provide technical education in secondary level. The tiers of governments are under obligation to provide specialized education,
- The non-compliance of the provisions could cost dearly to outliers, whosoever it may be, as the Act lays down provisions for punishment. The concerned government department is empowered to monitor schools to ensure the better implementation of the Act.

The Act, 2018 has enacted comprehensive standards to be maintained by the schools and government authorities for creating favourable environment for learning.

### 3.5 Analysis of the Act

The Right to Compulsory and Free Education Act, 2018 is home to as many as 41 Sections that are devoted to ensuring the free and compulsory school education to the citizens at the government funded educational institutions. The Act entered into force on BS 2075-06-02 after receiving the assent of the President of Nepal.

This Act is brought into existence in order to give effect to Article 31 of the Constitution that is devoted to ensuring the right to education to every citizen of school-going age (up to secondary<sup>8</sup> level). In this light, Part-2 details the provisions relating to right to avail education and the responsibility of the state. The framers of the Act cast an obligation on the state to ensure equitable and qualitative school education to every citizen without any distinction.

There is also an obligation on the state to provide necessary requirements for ensuring school education in mother tongue, i.e., the language given by the mother. The expression "mother tongue" is defined under the Section 2 (k) which envisages that mother tongue could be one among any language spoken in Nepali community and mother tongue-based education could be multi-lingual education also. This provision serves two goals in particular. One, the Act directs the state to provide a favourable atmosphere for the school going children to acquire education in their mother tongue. Two, the crafters allow the imparting of education in multi language which may provide

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<sup>8</sup>Supra note 2; Secondary education means school education from grade nine to 12 as provisioned under Section 2 (j)

an opportunity for students to learn more than one local language. This approach may cement the cause of linguistic diversity in the country.

Along with this, every student has been conferred with the right as per the prevailing laws to seek admission, study, acquire knowledge, participate in exam or avail academic certificates. In doing so, the citizens would have the right to acquire higher education as per his/her interest and capability.<sup>9</sup>

In contrast, the Act places a duty on the state to provide special education to differently-abled citizens or economically poor or the issues of martyrs. The citizens belonging to the category of disabled, economically poor, Dalit or the issues of martyrs, persons with enforced disappearance or the victims of different political movements happened so far in the country have an inherent right to acquire "special education"<sup>10</sup> to be provided compulsorily and freely by the state. This provision is in furtherance with the mandates provisioned under Article 24(2)(b)<sup>11</sup> of Convention on the Rights of Persons with Disabilities, 2006.

In order to fulfil these obligations, the Act directs all the three-tier governments to enforce the provisions of the Act and achieve the goals the legislation has intended to achieve. In saying so, the architects of the Act intend to give a message that rights and duties are jural correlatives. With this spirit, Section 5 lays down a fundamental duty on every citizen and their parents to enrol their issues in schools from the early age, so that their sons and daughters could avail education.

### 3.5.1 Compulsory and Free Education

Furthermore, Part-3 of the Act bearing a head note of "Compulsory and Free Education" contains welcome provisions that are dedicated to activate the objectives of the Act. The legislation binds the state to ensure necessary arrangements for early child development; free and compulsory basic<sup>12</sup> level education (to every child of four to thirteen years of age); free secondary<sup>13</sup> level education; and higher education.

In India, the Right of Children to Free and Compulsory Education Act, 2009 commands the state to provide free and compulsory elementary (i.e., class one to eight) education to every child (of age six to fourteen years).<sup>14</sup>

The state through the agency of local bodies would ensure basic level education to every child in the age group of four to thirteen. The schools should also provide one year "early child development education"<sup>15</sup> to every child of four years age. Moreover, the local

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<sup>9</sup>Id; Section 3(6)

<sup>10</sup>Id; Section 2(n), Special Education means imparting education through a particular medium and in separate groups to citizens who are blind, deaf, visually challenged, physically impaired or disabled, or the likes

<sup>11</sup>Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.

<sup>12</sup>Supra note 2; Section 2(d): School education from grade one to eight.

<sup>13</sup>Id; Section 2(j): School education from grade nine to 12.

<sup>14</sup>Right of Children to Free and Compulsory Education Act, 2009; Section 8,

<sup>15</sup>Supra note 2; Section 2(l), provides the definition of "Early child development education" which means an year of elementary education to children of 4 before they join class one.



bodies would ensure basic level education to the persons who are the victim of natural calamities, accidents or the other forms of the act of god.

Like the domestic laws, the international conventions of United Nations (UN) too host plethora of progressive provisions for ensuring right to education to all without any distinction. In this light, Article 26 of Universal Declaration of Human Rights (UDHR) provisions that everyone has the right to education and obliges the states to ensure elementary education free of cost. The instrument lacks any express provision directing the state parties to provide 'free and compulsory' education to the children of school going age.

Similarly, International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 places an obligation on the states to ensure right to education to all. Article 13 envisions that the primary education shall be compulsory and available free to all. As the Convention is observed as directory, not mandatory, in nature, it seeks to ensure free education up to secondary level by "progressive means"<sup>16</sup>. The Convention on Rights of Children (CRC), 1989 under Article 28 (1) (a) places an obligation on the signatory states to make primary education compulsory and available free to all.

Having gone through these international commitments, one could draw a conclusion that the national laws of Nepal stand (comparatively) progressive than the international obligations. The competent parliament of Nepal has enacted healthy legislative frameworks which further advances the international mandates in a further progressive ways.

Nevertheless, the accessible schools for the purpose would be those educational institutions established within the periphery of two kilometres. It means the state is duty bound to establish government school in every two kilometres in residential areas. The parents are strictly instructed to enrol their issues in schools. If they fail to admit their issues in schools or deprive their issues from acquiring basic level education, they would be deprived from the facilities provided by the local bodies. The local bodies are mandated to hold dialogues with the reluctant parents who are not willing to enrol their issues in schools and convince them to ensure the access of education to their children.

The Act commands the state authorities to establish schools within three years or ensure other alternatives where there is no school in the distance of two kilometres. The schools under no circumstances are entitled to say no to admission. But, this legislative intent is not exhaustive. The schools may refuse to enrol the admission if determined number of students is full, if he does not possess minimum qualification and physical infrastructure of school does not allow for more students. With the same spirit, the Supreme Court of Nepal in a landmark ruling of Sagar KC v. Ministry of Education, Government of Nepal (2071) observed that it would an uphill task for the schools to maintain quality education if they enrol students beyond its infrastructural strength.<sup>17</sup>

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<sup>16</sup>ICESCR 1966; Article 13 (2)(b), Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

<sup>17</sup>[http://nkp.gov.np/full\\_detail/8299/?keywords=%20%E0%A4%B6%E0%A4%BF%E0%A4%95%E0%A5%8D%E0%A4%B7%E0%A4%BE%E0%A4%95%E0%A5%8B%20%E0%A4%B9%E0%A4%95](http://nkp.gov.np/full_detail/8299/?keywords=%20%E0%A4%B6%E0%A4%BF%E0%A4%95%E0%A5%8D%E0%A4%B7%E0%A4%BE%E0%A4%95%E0%A5%8B%20%E0%A4%B9%E0%A4%95) (Retrieved on December 26, 2018)

Notwithstanding anything contained in the Act, the schools shall ensure admission of disabled persons or economically poor children. Still, the head teacher would make arrangement of admission in accessible school if he could not ensure admission to those children in his school.

Apart from this, any students taking basic level education cannot be expelled from the school. If students are seen engaged in undisciplined activities, they would not be deprived from acquiring education or appearing in examinations. Rather, the school would provide them psychological consultation. On the other hand, there is a provision of readmission for the children who are dropped out from school without completing basic level education. Again if the children of the age group of five to 12 have not got admission in school due to various reasons, there is a provision of admission for such children. These arrangements have been floated to limit the school dropout rates. The available data shows that "About 86 per cent of children who enrol in grade 1 reach grade 5 and only 74.6 % survive to grade 8."<sup>18</sup>

On the contrary, at the instance of collapse or merger of any schools, the local bodies are shouldered with the responsibility to arrange admission or transfer of basic level students in accessible school. However, the local bodies have to give due consideration to the consent of parents while giving effect to this legal mandate. Similarly, if the students or parents want to get admission in another school due to various reasons, the head teacher will provide transfer certificate. The Act, 2018 of Nepal and ICESCR under Article 13(3) stand on the same plane in envisaging that the parents and legal guardians are at liberty to enrol their children in any school or institution.<sup>19</sup> Moreover, Article 13 also directs the state parties to ensure the full development of the human personality and the sense of its dignity, and strengthen the respect for human rights and fundamental freedoms.

### **3.5.2 Distance education and schools for the promotion of traditional values**

Under the current legal framework, the children who are not able to achieve formal education through regular mode would have the facility to get secondary level education through non-formal or open schooling. If students do not get school in their access or they fail to take admission under regular mode, then such students would have the right to acquire option education under distance or open learning mode.<sup>20</sup> Further, the citizens who have completed basic level of education would have the right to avail secondary education or technical education equivalent to that.

In order to provide secondary level education, government of Nepal is directed to establish as well as conduct non-formal or open school education as per the necessity. Likewise, the children would have been given education about the traditional norms,

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<sup>18</sup>School Sector Development Program 2016/17-2022/23, Ministry of Education (2016), Kathmandu: Ministry of Education, p.9

<sup>19</sup>The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

<sup>20</sup>Supra note 2; Section 14



values, culture or etiquettes through Gurukul, Gumba or Madrasa.<sup>21</sup> Such institutions must be registered under local bodies and it has to follow the rules and regulations set by the local laws. This provision does not only supplement but also supplant the entry number 8<sup>22</sup> entry number 22<sup>23</sup> of Schedule-8 which details the powers and jurisdiction of Local Level.

The provincial governments are also empowered to enact laws or bring policies for the "Protection and use of language, culture, script, fine arts and religion."<sup>24</sup> Besides this, such institutions should also include curriculum set by the government of Nepal. This arrangement is in the line with the Article 13(3)<sup>25</sup> of ICESCR, 1966 and Article 18 (4) of International Covenant on Civil and Political Rights, 1966 which envisages that the state should impart religious and moral education in conformity with one's conviction.

Interestingly, this provision (i.e., Section 16) is in consonance with the fundamental rights provisions embodied under the Articles 32(2)<sup>26</sup>, and 32(3)<sup>27</sup>. The provision seeks to ensure the robust development of Article 32 bearing marginal note of "Right to language and culture." Arguably, Section 16, which allows a person to acquire education about traditional norms or culture, further provides life to Article 26 of our Constitution that provides every person to profess, practice and preserve his religion.

### 3.5.3 Education to child whose parents are not traced

The Act does not only provide fair corpus of provisions in the interest of 'free and compulsory education' but it also provides welcomes legal arrangements for the education of children whose parents are not known. The Act under Section 18 commands the Local Bodies to ensure school education up to basic level to every child whose paternity and maternity is not known.

In this way, Nepali laws don't only seek to ensure school education to children found in Nepal whereabouts of whose paternity and maternity is not traced, it also intend to provide citizenship to them under Article 11(4)<sup>28</sup>.

### 3.5.4 Basic education essential for any government, non-govt. jobs

More so, the legislation clarifies that the persons who have not acquired basic level education would not be entitled to hold any posts in governmental offices, non-governmental institutions or others after BS 2085 Baisakh 1 (Section 19). Similarly, such

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<sup>21</sup>Id; Section 16

<sup>22</sup>Basic and secondary education

<sup>23</sup>Preservation and development of language, culture and fine arts

<sup>24</sup>Supra note 5; Schedule-6, Entry no. 18

<sup>25</sup>The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

<sup>26</sup>Every person and community shall have the right to participate in the cultural life of its community.

<sup>27</sup>Each community living in Nepal shall have the right to preserve and promote its language, script, culture, cultural civilization and heritage.

<sup>28</sup>Every child found in Nepal whereabouts of whose paternity and maternity is not known shall, until the mother or father is traced, be deemed a citizen of Nepal by descent.

persons would be debarred from holding membership in any company, firm or cooperatives or acquire shares in companies.

Still, there is an exception to this mandatory clause. The disabled, or physically impaired persons, who could not avail school education, are exempted and this law does not create any hurdle or barrier to them from seeking jobs in any private or government offices or any other. The motive behind this provision is to create an atmosphere of achieving basic level education compulsorily. In addition to this, the legislation also intends to ensure the access of secondary education to every citizen without any distinction.

### 3.5.5 Budget allocation

As provisions could not be implemented in letter and spirits without allocation of budget, the Act in part-5 floats provisions regarding the budget. Section 30 envisages that the government of Nepal would allocate budget to local bodies every year on the basis of number of students and the achievements of students. The provincial government, the central government and the local bodies are shouldered with the responsibility to allocate certain amount of budget as donation for the schools. To put it simply, the Central government and state governments have concurrent responsibility for providing funds for carrying out the provisions of the Act, 2018. The similar arrangement has been provisioned in India under Section 7(1) of Right to Education Act, 2009.

The schools are allowed to receive donations from any institution or trust with the prior permission of local bodies. Similarly, the schools are required to seek prior permission from Ministry from Finance, Government of Nepal while receiving donations from foreign institutions.<sup>29</sup>

In this light, the Act commands the state to provide books or provide certain budget three months before the new session starts. The provision intends to provide text books to students for free of cost. Besides this, local units can provide copy, pen or other necessary materials to poor students of basic level. The local units would make arrangements for necessary equipments like computer, laboratory, extra-curricular activities or materials regarding game and sports. The local bodies may make arrangements regarding health treatment or health services in schools in coordination with health institutions.

Apart from this, the law casts an obligation on the government of Nepal to make arrangements for snacks for the students belonging to marginalized community or poor family or disabled sections of society through local units. This facility would make students regular in class. Also, the students belonging to marginalized community or poor family are entitled to avail scholarship.

Much like Nepali laws, the 1966 ICESCR also provisions that the states would establish "fellowship"<sup>30</sup> for the better development of the school education. These provisions in one way or some other supplements the objectives of the Act.

<sup>29</sup>Supra note 2; Section 31

<sup>30</sup>ICESCR, 1966; Article 13 (2) (e) 'The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved'



### 3.5.6 Medium of instruction

So far the medium of instruction is concerned, Nepali, English or the mother tongues could be the language of instruction in schools. While there were many constitutional changes in the country, the sections that immediately address language policy and education remained unchanged from those in the Constitution of 1990,<sup>31</sup> writes Miranda Weinberg, a research scholar of University of Pennsylvania. She argued that Nepali is dominant in school education as well. However, her observation may prove wrong with the implementation of this Act as the crafters have endorsed fair corpus of provisions for ensuring school education in mother tongue, and English or Nepali, or both.

Further, the Constitution, under Article 287, provisions for the establishment of 'Language Commission.' The functions of the Language Commission has been enlisted under Clause 6 which says that the Constitutional body would have to determine the basis for a language to acquire status of official language and forward a recommendation to the Government of Nepal; to forward a recommendation to the government of Nepal regarding the measures to be adopted for the protection, promotion and development of languages; to measure the standards for development of mother language, and to forward a recommendation to the Government of Nepal regarding its potentials for use in education and to carry out research, monitoring and studies of languages. Adopting a progressive measure, the Constitutional document places responsibility on the Center to take initiative for establishing branch offices of Language Commission at provincial level.

However, any foreign student would not be bound to study compulsory Nepali as a subject. Rather, s/he can opt for any other language subject as per his/her convenience.

### 3.5.7 Mandates for private schools

Interestingly, this Act is not only concerned with the government schools. It has incorporated provisions for the private owned boarding schools. The legislation says that the private boarding schools ought to be service oriented while conducting early child development or basic level education. The private schools up to grade twelve should provide scholarship to certain percentage of students as determined by the law of the land. For example, 10 per cent students should be given scholarship where the number of students is up to 500; 12 per cent scholarship where the number of students lies between above 500 and up to 800 and minimum 15 per cent students should be given scholarships where the number of students is above 800.<sup>32</sup> The scholarships will be awarded based on competition. This provision in one way or some other will enhance competitive environment in schools and promote philanthropy acts, i.e., corporate social responsibility, of the private institutions.

Still, the Act does not incorporate any provision relating to capping of fees or reasonable fees to be charged by the private schools. This leaves the private schools scot-free to charge or hikes the fees at their pleasure.

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<sup>31</sup>Miranda Weinberg (2013). Revisiting History in Language Policy: The Case of Medium of Instruction in Nepal. Working Papers in Educational Linguistics: A Journal of University of Pennsylvania, Volume 28(1), p. 67.

<sup>32</sup>Supra note 2; Section 27

### 3.5.8 Education in mother tongue

In part-4 of the Act, the drafters have incorporated provisions for education in mother tongues. Every citizen would have the right to get education up to basic or secondary level in mother tongue. A community is allowed to establish educational institutions accordingly. However, the local units or the provincial government should play an instrumental role in additional arrangement regarding the imparting of education in mother tongue. This provision seeks to foster the cause of fundamental rights, i.e., Article 32: Right to language and culture. If the students acquire education in mother tongue, his right to use his language or participate in cultural life would be secured. In nutshell, this provision supplements the cause of Article 32. This provision is in pursuance of Article 29(1)(c) of Convention on Rights of Children which places obligation on signatory states to provide education to children in his or her own cultural identity, language and values. In this regard, the government has developed and published text books in 24 mother tongues that include: Maithili, Bhojpuri, Awadhi, Tamang and Limbu.<sup>33</sup>

### 3.5.9 Penalties

The Act incorporates the provisions relating to penalties under part-6. If a child is expelled or deprived from appearing in any examination or not provided certificates, his/her parents are entitled to bring an action before judicial committee of local bodies with fifteen days. The Act clarifies that the Judicial Committee is an entity constituted under Article 217<sup>34</sup> of the Constitution. The Judicial Committee may impose fine up to five thousand on head teacher in case where he is found not proving certificates, debarring students from appearing in exam, or depriving students from acquiring school education. Likewise, the fine of three thousands could be imposed at the instance when the head teacher is found not issuing certificate, or transfer certificate, or violating laws or depriving students from acquiring education or appearing in exams. Similarly, if the private institutions fail to provide scholarships to as provisioned under Section 27, the Council may order the principal to refund the fees so collected or impose fine of Rs 25000, or the amount claimed or whichever sum is higher. Yet, the penalty provisions are not so stricter enough that could succeed to curb the commercialization or over privatization of education.

### 3.5.10 Special arrangements and role of local bodies, NGOs and Ministry

On a positive note, part-7 is devoted for the provisions of special arrangements. In this context, Section 33 provides that the visually challenged, deaf or blind students would have the right to acquire free school education. The students having eye-sight problem should be taught through Braille.

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<sup>33</sup>Central Bureau of Statistics, Education in Figures, 2017. Kathmandu: Ministry of Education, Science and Technology, p.6

<sup>34</sup>Judicial Committee: (1) There shall be a Judicial Committee under the Convenorship of the Deputy Head of the Village Executive in every Village Council and under the Convenorship of the Deputy Mayor of the Municipality in every Municipality to exercise power to hear cases, as entrusted to the Village Council or Municipality pursuant to Federal and Provincial laws. (2) The Judicial Committee, pursuant to Clause (1), shall have two members designated by the Head of Village Executive in case of Village Council and two members designated by the Mayor of the Municipal executive in case of a Municipality.



Similarly, the students having problem in hearing would be taught through sign language. The central, provincial or local government may establish specialized schools, model schools or mobile schools to realize this purpose. This legal arrangement echoes the provisions of Article 24(3) of Convention on the Rights of Persons with Disabilities, 2006 which seeks to facilitate the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring for the persons with disabilities.

The crafters have also enacted provisions for the monitoring. In this regard, Section 35 provides that the Ministry of Education shall formulate monitoring index for the better implementation of right to education. The index is to be made public by the Ministry. Apart from this, the legislation places an obligation on the village council or municipalities to submit the report containing the details of number of schools, number of students enrolled in each school in basic level and secondary level, number of private boarding schools and the students therein and among other details before the village council board or municipality board.<sup>35</sup> This provision empowers the local bodies to place a check on the schools in order to give effect to the provision of this Act. Along with this, the local bodies shall maintain an updated record of students belonging to vulnerable groups.<sup>36</sup> Also, the local units have to maintain the record of the number of students acquiring education in mother tongue. The available data projects a grim face of reality and requires state governments' interventions to improve the situations. The literacy rate (of five years and above) in province-1, Province-2, Province-3, Province-4, Province-5, Province-6, and Province-7 stands at 71, 50, 75, 75, 66, 63, 63 and 65, respectively.<sup>37</sup> The drafters of the Act provide ample powers to local bodies as well as provincial governments which may help the instrumentalities of the state to translate the provisions in action at grassroots level. After all, "the legislation intends to secure quality education in schools in order to prepare human resource for national development and to maintain good conduct, decency and morality of the people," held the apex Court of Nepal in the case of Kamala Wagle Bhattarai v. Office of Prime Minister, Government of Nepal<sup>38</sup> (BS 2071).

In addition to this, the schools are empowered to adjust coordination and cooperation with non-government organizations (NGOs) and local bodies for ensuring quality education in schools. This provision empowers the NGOs or the public spirited institutions to voluntarily engage in philanthropic activities and help the state in implementing this Act in letter and spirit both. Conversely, the government of Nepal is empowered to formulate necessary rules to implement the provisions of this Act.<sup>39</sup> The concluding provision (i.e., Section 41) of the Act obliges the Ministry of Education to formulate necessary policies as per the mandates of rules framed by the government of

<sup>35</sup>Supra note 2; Section 36

<sup>36</sup>Id; Section 37

<sup>37</sup>CBS, 2011, Education in Figures, 2017, p.4

<sup>38</sup>[http://nkp.gov.np/full\\_detail/8277/?keywords=%20E0%A4%B6%E0%A4%BF%E0%A4%95%E0%A5%8D%E0%A4%B7%E0%A4%BE%E0%A4%95%E0%A5%8B%20%E0%A4%B9%E0%A4%95](http://nkp.gov.np/full_detail/8277/?keywords=%20E0%A4%B6%E0%A4%BF%E0%A4%95%E0%A5%8D%E0%A4%B7%E0%A4%BE%E0%A4%95%E0%A5%8B%20%E0%A4%B9%E0%A4%95) (Retrieved on December 26, 2018).

<sup>39</sup>Supra note 2; Section 40

Nepal by invoking Section 40. In this way, this Act is not an exhaustive law. The Act empowers the government to adopt all necessary measures for giving effect to the provisions contained there under.

### 3.6 Areas of Improvement

Unlike India, the Act does not slam collection of capitation fees. In India, the Act, 2009 prohibits institutions from carrying out any screening procedure of students or charging capitation fees.<sup>40</sup> In this way, the Act, 2018 falls short of adopting any measures to regulate the private school fees. So, balancing the autonomy of private institutions and public welfare functions have become a contentious issue.

The Supreme Court of Nepal has rightly observed that the instrumentalities of the state have so far failed to put a cap on the monopoly of private institutions to hike or charge fees. The topmost Court further observed that the private sectors are contributing in commercialization of education. The government should intervene to curb this commercialization process.<sup>41</sup> In the similar breath, the Supreme Court of India in the case of *Modern School v. Union of India*<sup>42</sup> recommended accounting standards for private schools. The Court ordered the government authorities to do regular inspection and watch over audits. "While the private educational institutions in the matter of setting up a reasonable fee structure may not resort to profiteering but they may take into consideration the need to generate funds to be utilized for the betterment and growth of the educational institution, the betterment of education in that institution and to provide facilities necessary for the benefit of the students. The fixing of a rigid fee structure would be an unacceptable restriction. The essence of a private educational institution is the autonomy that the institution must have in its management and administration," further held the Court.

The drafters of the Act, 2018 have measurably failed to take cognizance of the ruling of the Supreme Court. Likewise, Article 51(h)(2) obliges the state to increase the investment of the State in the educational sector, and "regulating and managing" the investment of the private sector in it to make education service oriented. However, the Act, 2018 fails to give effect to this obligation as it lacks legal arrangements to regulate and manage the private sectors.

Similarly, the Act does not suggest the schools to prepare 'school development plans' and seek the budgets accordingly from the government. Unlike India, the Act is also silent about maintaining teacher-pupil ratio in schools.

Moreover, the Act, 2018 does not prohibit a government school teacher to engage himself/herself in private teaching activities. In India, the Act, 2009 (under Section 27) disallows the government school teachers to engage in private tuition or teaching activities.

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<sup>40</sup>Supra note 14; Section 13 (1)

<sup>41</sup>[http://nkp.gov.np/full\\_detail/462/?keywords=%20%E0%A4%B6%E0%A4%BF%E0%A4%95%E0%A5%8D%E0%A4%B7%E0%A4%BE%E0%A4%95%E0%A5%8B%20%E0%A4%B9%E0%A4%95](http://nkp.gov.np/full_detail/462/?keywords=%20%E0%A4%B6%E0%A4%BF%E0%A4%95%E0%A5%8D%E0%A4%B7%E0%A4%BE%E0%A4%95%E0%A5%8B%20%E0%A4%B9%E0%A4%95) (Retrieved on December 26, 2018).

<sup>42</sup>AIR 2004 SC 2236 Also available at: <https://indiankanon.org/doc/1421376/> (Retrieved on December 26, 2018)



## 4.1 Conclusion

The long-stayed legal maxim--*Salus Populi Suprema Lex*-- intends to impart a message that law exists to serve the common cause and the welfare of people should be the supreme function of law. The makers of the Constitution and the Act, 2018 had realized that in a developing country like Nepal, political democracy would be of little value without consolidation of economic democracy. Accordingly, they have enacted plethora of clauses that oblige the state to impart free and compulsory school education to children. After all, "democracy without education is hypocrisy without limitation," says Ram Jethmalani, senior advocate of Supreme Court of India.

The Act, 2018 incorporates healthy provisions for free and compulsory school education to children. Unlike international instruments or India's free and compulsory education only up to grade eight, our laws seek to guarantee free school education up to grade twelve in state owned institutions. Similarly, the state has been directed to provide education in mother tongue and special education to the disabled persons or the victims of different political movements. The children's right to learn about the traditional norms or culture has been duly secured by the law. The students who could not complete formal education in regular mode could avail school education through distance learning. Still, the Act lacks any strict measures to control the over privatization or commercialization of education. The legislation also fails to provide teacher-pupil ratio in a state owned school. Over and above this, the Act is home to progressive provisions. The challenge lies in implementation.

Having gone through the provisions of the Act, 2018, the researcher humbly submits the following recommendations:

- The drafters could have introduced the provisions to adjust a balance between autonomy of private institutions and public welfare functions
- There could be a mandatory provision for the presentation of school development plan to get budget
- Like India, there could be legal arrangement regarding pupil-teacher ratio in schools
- Like India, the government school teachers could have been barred from giving private tuition or engage in other private teaching jobs

This way, the state is a step ahead in right direction by adopting and enacting free and compulsory education law. Over and above it all, the 'free and compulsory education' up to grade eight, 'free education' up to grade 12 and the 'state liability' things need to be guarded by the educational bureaucracy. Mere enactment of appealing laws is not going to serve the purpose.

Its high time to acknowledge the words of Nelson Mandella who rightly said, "Education is the most powerful weapon which you can use to change the world." We can bring a change in the country if we succeed to enforce the right to education related laws in our part of the world in true and material sense.