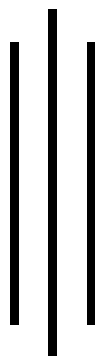


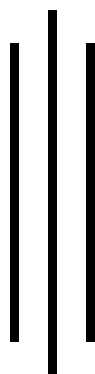
The Freedom to Economic Rights to be incorporated in the New Constitution



Recommendation of Private Sector



**Federation of Nepalese Chambers of Commerce and Industry
(FNCCI)**



(PS: This recommendation was approved by the 43rd annual general meeting of FNCCI and submitted to the Constitution Committee and various other committees of the Constitution Assembly)

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1. Background

Justice is the first virtue of a nation. The first responsibility of a modern state is to create a just society. Though experts differ on the priority of the state's various aspects and dimensions, justice has various aspects and dimension. However, when talking about the civil rights, social, economic and political justices are also considered basic fundamental rights.

Our experience has also taught us that only the political is not enough for a civic, prosperous and developed nation. Thus, a serious discussion on economic and social rights of justice, including political freedom of justice, is timely at a time when the country is gearing towards writing a new Constitution.

Economic justice is related to economic freedom and economic rights. The economic justice is considered as the fundamental right to property and labor. This right makes an individual and his/her family independent from the government and depend on one's own labor, property and products. The economic right ensures an economically free society.

Economic freedom is essential for developed state. Liberal economic policy and free market are pre requisites to economic freedom. Economic freedom ensures a right to involve in employment and economic activities without any disturbances, cheating or mistreatment. In other words, economic freedom ensures the right to selection and utilization of economic intermediaries as a justice without being discriminated or disturbed. It guarantees the right of and from investors to laborers.

Democracy without economic freedom could not be a complete democracy, thus for an overall development, the New Constitution must guarantee the economic freedom as fundamental rights. The constitutional guarantee of economic freedom could be the best way to ensure economic freedom. Such a move also shows the seriousness of state towards its economic development.

Rule of Law, Right to Property, Freedom of Agreement, free-market, economic mobilization, end to corruption and political killings are directly and indirectly related to economic freedom.

2. Economically free Society

The major objective of the economic freedom of justice is to create a free democratic society. The society, where a citizen can be freely involved in one's own choice of employment, business and economic activities, and free to invest; where the government protects and promotes its citizen's such endeavor. The government protects and promotes free movement of labor, capital and goods in an economically free society.

To create economically free society is to protect personal economic rights as well. Thus, while restructuring the state or redefining the state this issue has to be taken seriously. Those Constitutions written in various countries after the 90s, in one or the other way, have guaranteed the economic freedom and economic right. Thus, economic freedom is related to state restructuring or redefining

There may be many prerequisites for the economically free society. Some of the basic fundamentals that the Constitution has to guarantee are as follows:

- A) Rule of Law: The free society can be envisioned in the state where there is a rule of law. Without the rule of law depending upon the democracy, the economically free society cannot be dreamt of. Thus, rule of law is the prerequisite to guarantee the economically free society. The CA members should be aware of these basics.
- B) Right to Property: Right to property is inseparable part of the economic freedom. This would ensure two fundamentals: 1. Right to earn, utilize and earn profit and 2. Mobilization and handover of one's own property in a way one thinks appropriate.

According to economist Milton Friedman, right to property is fundamental right like human rights. This system will create more secure and stable environment to attract more investment. If we go by the examples, the countries, where there is a clear provision of right to property has prospered and developed in comparison to the countries where there is no guarantee of right to property. Despite huge natural resources and economic resources, Nepal has lagged behind in growth because of the lack of clear provision of economic

freedom, its policy and implementation. The key hurdles are treatment of the nation to its people who are involved in economic activities and interferences on property of the individuals. We have to realize that the welfare of the downtrodden and low-income groups is only possible when more economic activities are encouraged.

- C) Free Market: Market-oriented economy and active involvement of private sector are keys to economic progress. The state has to protect these basic fundamentals and should guarantee them constitutionally.
- D) Security of Goods, Services and Investment: The strikes and bands have been bleeding the industries white. Thus protection of movement is one of the major issues in the free market economy. The new Constitution should also take note of this very fact.
- E) Corruption free society: A free society can not be imagined in a dictatorial regime, corrupt bureaucracy and unclear policy. The more corruption means the less economic freedom and activities. Thus, the administrative corruption, government monopoly should be controlled and discouraged.
- F) Protection of economic rights: The judicial protection of person's fundamental rights to economic freedom is a prerequisite to the economically free society.

3. Right to Economic freedom

Why should a state guarantee economic freedom and right to its citizen?
There are basic norms and principles for ensuring economic freedom:

- The first school of thought says that the government has to give freedom to its citizens to decide on one's own-self and family.
- Second school of thought is that government has to accept that free market itself will determine the price of labor, capital and products.
- Third, the government has to protect its citizens and their property and should help create an environment, where labor, capital and products can compete.

- Fourth, the government should accept that the state can be developed, only if it protects its citizens' investment completely.

Due to above mentioned facts, not only the national but also the international laws have guaranteed a person's economic freedom. The international declaration on socio-cultural-economy is its best example that has designated the responsibility of protecting economic rights of a citizen is the state's responsibility. The declaration has guaranteed the right to property, right to employment, basic living standard, right to labor, right to organize, trade union and open organization.

The Human Rights Declaration 1948 has also ensured socio-economic rights that includes right to social security, right to choice of profession, right to organize and trade union and right to involve in unions.

4. The pre-requisites of economic freedom

Economic right and freedom is not abstract to the modern state. These rights are ensured after meeting certain conditions, which are called key issues of the economic freedom. The following are the key issues of the economic freedom:

- Personal choice
- Voluntary exchange
- Protection of persons and property
- Freedom of fair competition
- Freedom to business, and economic activities
- Freedom to investment
- Freedom to labor
- Freedom against government monopoly and corruption
- Right to compensation

These issues are fundamental issues for an economically self-reliant society. A state can achieve economic development only if it protects

these fundamental issues. Various Constitutions in the world have guaranteed these rights in their constitutions.

Economic Freedom of the World and Index of Economic Freedom are prepared as standard indices after calculating the nations' economic freedom and its impact on life style of the people. These indices reveal that the developed countries that have achieved higher economic growth have followed economically free and market-oriented policies. The life-expectancy of the people also depends upon the income rate; higher the income rate, longer the life expectancy. Thus, the economic freedom is also related to a man's fundamental right to live a healthy life. According to report of the Economic Freedom of the World of 1998 the life expectancy of the richer countries was 20 times more than of the poorer countries. Similarly, economic freedom ensures happiness and makes people independent, according to Index of Economic Freedom. At a time when economic freedom has become a global phenomenon, Nepal also has to follow the trend with an appropriate policy. And making of the new Constitution is an opportunity for Nepal to guarantee these rights.

The form of government, its attitude towards the private sector, legal structure, education, natural resources, international trade relations, population are some of the factors that impact economic freedom. The government also has to be more responsible and sensitive on these issues.

5. Private sector and economic rights

Private sector is the key partner of economy. Without private sector's active involvement it is impossible to create economically free society. We have many examples of economic activities of private sector and Public-Private partnership.

Without private sector's involvement no economic activities can be imagined in the world. In the authoritarian society or in a state where there is closed economy that discourages the private sector also the private sector's role has been accepted principally; in one way or the other.

There has been various practices of private sector organization and structure. Though, the difference is due to system in a country, private sector has been allowed to work freely.

In the course of constitution drafting, Nepali private sector has also been suggesting its concerns that could be helpful in the drafting of the Constitution. For example the following are the major concerns of the private sector;

- Foreign Investment should be encouraged as domestic and foreign investment is necessary for the economic development.
- Private sector should be protected to make a state economically sound. So that it can implement its policies for gender equality, fight against untouchability, educational and health rights.
- Economic activities should be expedited for the socio-economic transformation and employment generation.
- Despite Nepal being member of World Trade Organization and regional trade blocks, it could not attract foreign investment. But the private sector has invested huge amount for the employment generation and economic activities. Thus it's necessary to include economic rights in the Constitution.
- Government needs to bring a balanced policy to help complete competition, liberal and market oriented economy, global economy, globalization, and free regional trade.
- Local entrepreneurs should be encouraged by bringing relevant policy to encourage national trade and commerce.
- Government should follow the policy that increases and promotes exports and trade.
- The government should accept the role of trade and industries-related organization that are involved in promoting trade and industries.
- Government should adopt the policy of involving the private sector with an active involvement of government cooperatives.
- The long-term economic and financial policy is needs. So that the policy would not change as and when the government changes.

- Once the industrial and entrepreneurship facility is provided that should not be changed under any circumstances like by changing Act or Regulation.
- The Constitution should guarantee a person's right to start a business or exit from it.
- Government should give preference to its citizen and foreign technology be brought into the country through him/her.
- Commercial disputes should be finalized through quick and smooth legal channel.
- The government should not levy double taxes.
- Constitution should guarantee the compensation of the losses caused by band and strikes.
- The government should guarantee that a citizen's property should not be nationalized.
- The right of every citizen to earn buy and sell of one's own property under the state's legal provisions.
- The government should compensate the property if it acquires from its citizen, except in the case of public welfare.
- The limited people should not have the right to the natural resources of the country and should be equally distributed according to the natural law of justice.
- Every citizen should be free to earn property and spend one's own property. There should be no limitation to the citizens' property and spending.
- The government should adopt the policy of capitalizing the labor force according to its skill, growth and capacity that will help create investment friendly environment.
- Though the right to union could not be challenged, the politically affiliated union should be banned constitutionally.
- Private sector's role in promotion of the trade and industry should be guaranteed through industrial security's guarantee.

- The employers' right to provide employment should be guaranteed through a right to employment by protecting their rights.
- The government should adopt the policy to uplift for balanced development geographically and community-wise education, health, etc.

6. Constitutional practice and guarantee

Around 200 countries in the world have written Constitution. America is the first country to have written Constitution. The America is also the first country to guarantee the right to property in its Constitution. However in 1787 Constitution of the USA, the civil economic rights were not guaranteed. The repeated amendments in the Constitution have ensured such rights. The key features of the Constitution of USA is guarantee of rights to life, freedom and property. Here are some of the countries which have ensured the economic rights in the Constitution:

Afghanistan:

The constitution of 2004 of Afghanistan has guaranteed the Right to Property (Article 30) and Right to Employment (Article 48) as fundamental rights.

The other feature of the Afghani Constitution is that one could claim compensation if business is affected from the government's act (Article 51). The right to compensation is of very important nature in our country where the government's apathy towards maintaining law and order has caused huge losses of personal property and investment. The Article would help make government more serious towards making security arrangements to the private property or compensate them.

Albania:

The Constitution of 1998 of Albania has also guaranteed some private property as fundamental rights (Article 42). The socio-economic and cultural right under fundamental rights has also guaranteed the right to choice of employment and earn. Under this freedom, one is free to choose employment, where and how to run it, and earn profit from such business (Article 49). The Constitution has also guaranteed labor's right, their social security and right to union.

Algeria:

The Constitution of Algeria of 1996 has like Afghanistan guaranteed the right to compensation. The government should be held responsibility of miscarriage of justice (Article 49). The Constitution has guaranteed the right to private property, right to employment and union as fundamental rights.

Andorra:

The Constitution of Andorra of 1993 has guaranteed the right to business, and employees' right to defend their right to economic and social justice under fundamental rights (Article 18, 19). The right to private property (Article 27), right to employment (Article 29) and right to natural resources have also been guaranteed under the fundamental rights. The Constitution has also guaranteed the right to enterprise (Article 28) that is a key feature of this Constitution.

Cave Verdi:

The Constitution of Cave Verdi of 1992 has guaranteed right to private economic activities under the economic right as a fundamental rights (Article 65). Similarly, the right to private property and its protection (Article 66) has also been guaranteed.

Congo:

The Constitution of 1992 of Congo has guaranteed four rights under economic rights – right to private property (Article 30), right to labor and employment (Article 31), Right to choice of enterprise (Article 32) and right to economic development (article 55).

Croatia:

The Constitution of 2001 of Croatia has guaranteed the right to own as fundamental rights and accepted the right to enterprise, trade and free market economy as lifeline of the state. The Constitution has also guaranteed the equality of all the entrepreneurs, and their involvement in economy and enjoys equal rights in the market or economy (Article 149). The Constitution has stated that the state would give high priority to the right to economic development.

Chile:

The Constitution of 1980 of Chile has guaranteed right to employment as a fundamental rights, under which a person is free to chose employment and be affiliated with it. Without affecting public health, morality and social security one can be involved in any economic activities and the government will give equal treatment to them, under the economic rights.

East Timor:

The Constitution of 2002 of East Timor has guaranteed the right to employment, right to trade union, right to private property and consumers' right under labor and personal right. It has also banned padlocking of industries (Article 51) by others. The labors have the right to strike for their common rights but cannot padlock the industries.

Estonia:

Estonia is yet another state that has guaranteed the right to economic freedom as fundamental right in its Constitution of 1992. The Constitution has guaranteed the right to compensation, if anyone's property is morally or physically destroyed by other (Article 25). The Constitution has – under the right to trade – guaranteed its citizen's right to involve in trade and economic activities (article 31).

Italy:

The Constitution of 1947 of Italy has mentioned economic relations, under which it has stated the rights to freedom of labor, wage according to employment, equal wage and employment for women, and right to trade union. Right to private enterprise (Article 56) and right to cooperatives and handicrafts (Article 45) have also been stated under the Economic Zone, Enterprises and Investors' concern.

Kenya:

The Kenya's Constitution of 2005 could be an example to the Nepal's private sector that lacks social security and are hit by the government's apathy. Right to security (Article 56) and right to fair administration (Article 65) could be best examples for Nepal while writing new Constitution.

Lithuania:

The Constitution of 1992 of Lithuania has stated that state's economy, private ownership and economic activities depends on the person's right to freedom and the Article 23 and 46 have guaranteed right to property and ownership as fundamental rights.

Malawi:

Malawi is yet another state that has accepted economic rights as fundamental rights. The Constitution of 1994 has guaranteed right to earn property (Article 28), right to employment and getting involved in economic activities (Article 30).

Mali:

Mali is yet another state that has guaranteed right to enterprises as fundamental rights. The Constitution of 1992 has guaranteed right to enterprise under the law.

Oceania:

The guarantee of rights to economic activities of private sector is a major feature of Oceania's Constitution. Unlike the global trend and practice, the Constitution of Oceania of 1994 has given high regard to the private entity in comparison to the other state mechanism. The Constitution believes that the private entities can work better than the government agencies. "We believe that private Entities would so a better job than the Government agencies. Oceanians have the Right to use unlicensed professionals as they see fit," –the Constitution says.

The right to property under Economic Rights has been highlighted in the Constitution. The Constitution has guaranteed the right to property where it clearly spell out that no one can seize or attack anyone's property by force or fraud. The Constitution has defined a person's body and his labor as assets, under which an Oceanian can sell or rent his/her body.

Some more examples from the Oceanian Constitutions:

"An Oceanian has the right to own property and to not have his property taken from him by force or fraud. A person's body and the fruits of his labor are his property. No one may claim another's work as his own by

taxation, civil forfeiture, eminent domain, or other forms of theft. An Oceanian may sell or rent parts of his body. This includes becoming a surrogate of mother, prostitute, or subject of medical experiments. In the absence of an explicit will, it will be assumed that the deceased does not wish to sell or give his body parts.”

An Oceanian has right to run a business, for profit or not for profit, and for any purpose. The Government may not grant or take away Licenses for the right to Own and Operate a Business. A Business may hire and fire employees without explanation. It may permanently fire an entire union. It may refuse to rehire former union employees.”

“An Oceanian has the right to import and export without Government interference. This means that it is illegal for the Government to put tariffs, quotas, or taxes on imported goods. If another country puts such tariffs, quotas, taxes or other restrictions on Oceanian’s exports, the Government of Oceania may not retaliate in any way. Oceania will set an example for the rest of the world by showing what “free trade” really means.”

Paraguay:

The Constitution of 1992 of Paraguay has also guaranteed the right to property. The right is called the public welfare institution (Article 59). The right to competition (Article 106) has also given priority under the right to economic freedom. The Constitution has banned all the activities that promotes carteling, monopoly and unnatural price hike that hits competitive market.

The Constitution has also guaranteed the free distribution of imported goods and domestic products both. The Constitution has stated that the state has to promote cooperative enterprises.

Surinam:

The Constitution of Surinam of 1987 has guaranteed the right to employer as fundamental rights. It has included the right of a employer to defend and promote his/her organization.

7. **Nepal's Constitutional Development and Economic Rights:**

Nepal Legislative Law 2004 BS: The law promulgated by Shree 3 Padma Shumshere on 13 Magh 2004 is the first written Constitution of Nepal. The Constitution that had six chapters, 68 Articles and 1 schedule was said to be implemented from 1 Baisakh 2005. However, according to the situation, if it could not be implemented at once, it would be implemented as and when it was possible, Article 2 of the Constitution has stated. The Chapter 2 of the Constitution has guaranteed some fundamental rights like – right to freedom of speech, freedom to publication, freedom to open organization, right to practice of religion, right to equality, right to access to justice, right to free primary education.

Under the economic right Article 4, it has stated right to property without violating the morality and against the society.

Nepal's interim Constitution of 2007 BS: King Tribhuwan promulgated the Nepal's Interim Constitution 2007 BS as a temporary measure to run the state until the Constituent Assembly writes the new Constitution. It is the second written Constitution of Nepal. In its seven Chapters and 47 Articles, the Constitution has guaranteed Civil and fundamental rights as state's governing policy and principles. Freedom of Speech, freedom of organization and rally, freedom to open organization and freedom to movement and habitation were some of the features under civil and fundamental rights.

Under the right to economic freedom, citizens' were allowed to earn, own, buy and sell property as fundamental rights (Article 16-Cha). The Constitution has also guaranteed the right to employment, establish and run industry and trade. After the amendment of the Interim Constitution these rights were under Article 17 (cha) and (chha).

Kingdom of Nepal's Constitution of 2015 BS: This third written Constitution promulgated in 2015 BS was more liberal in comparison to the earlier two Constitutions. The preamble of the Constitution reads –

“We are convinced that the independent and sovereign Kingdom of Nepal needed a Constitution. Thus following the tradition of our great and

honorary forefathers to rule this country we have in our capacity as a King of this kingdom promulgated this Constitution.”

The Constitution had guaranteed nine fundamental rights like right to freedom, right to equality, right to religion and practice of religion, right to political freedom, right to public welfare and right to constitutional remedy.

The Constitutions had also guaranteed economic rights under which – the government could not confiscate and seize anyone’s property except under the law, right to earn and own property, right to sell and buy property (Article 6).

Nepal’ Constitution 2019 BS: Due to political instability, the Constitution of 2015 BS could not get longer life. The Constitution promulgated to establish party-less Panchayat system in 2019 BS replaced the Constitution of 2015 BS. The Constitution of 2019 BS is the longest surviving constitution in the history of Nepal. The Constitution was promulgated by King Mahendra as his vision of party-less Panchayat system with decentralization that only can save and help develop Nepal and Nepalese people. The Constitution has the People’s rights and responsibilities.

Though, it had guaranteed right to equality, freedom, right against exile, right against exploitation, right to religion, property, and legal solution, its Article 17 was against the fundamental rights as it said that for the larger benefit all the other rights could be banned.

However, Constitution had guaranteed the right to property except under law (Article 15). No one can confiscate property without court order, it has stated.

The Constitution of the Kingdom of Nepal 2047 BS: The Constitution promulgated in 2047 BS as the result of success of people’s movement was the fifth written Constitution of Nepal. The Constitution has guaranteed the fundamental rights like rule of law, adult franchise, free judiciary, multiparty democracy. This was the first Constitution that has clearly spelled out that the sovereignty of the country remains with the people. The Constitution had 23 Chapters, 133 Articles and 3 Schedule

The right to equality, freedom of speech, right to freedom of printing and publication, right to criminal justice, education, religion, and legal solution were guaranteed as fundamental rights of the people.

Under the economic right, the Constitution has guaranteed the right to employment, profession, Industry and trading (Article 12 (2)-Nga). The Constitution has also guaranteed the citizens' right to earn and own, sell and buy property and other transactions (Article 17).

The Constitution has guaranteed that except for the public welfare, the government could not confiscate, seize or claim individual's property. In case of Public welfare also, proper compensation was guaranteed under the rule of law.

Interim Constitution of Nepal 2063 BS: The success of second Jana-Andolan in 2062/63 BS has resulted in a new Interim Constitution of 2063 BS to manage the transition period. This Constitution approved by then House and passed by the Interim Legislative Parliament is the sixth written Constitution of Nepal.

The Constitution that is against the Constitutionalism and practices in many basic features, it has guaranteed the freedom of employment, profession, to run industry and trading (article 12-f). The Constitution has also guaranteed the right to employment as according to Constitution (Article-18.1), social security to women, labor, adults, physically challenged, and food-sovereignty to the people.

The Constitution has guaranteed every citizen's right -- under the law of the state -- earn, own, buy and sell and transaction of the property (Article 19).

8. Conclusion

The above examples and Constitutional practices have clearly identified the economic rights of privates sector and individual. The Constitutional guarantee of these economic rights is the need of the hour:

- Right to own and secure protection of the private property
- Right to economic activities

- Right to enterprises
- Right to compensation if any physical damage is caused to any person by any unauthorized act of any individual or government
- Right to impartial administrative services
- Right to operate and earn profit from the business and close it
- Right to free and fair competition
- Right to freedom of agreement
- Right against the monopoly of the government
- Right to free movement of goods and service
- Right to investment and occupational security
- Right to fight against the double taxation
- Right of workers to receive fair wages and other benefits
- Constitutional guarantee of healthy industrial relation between investor / entrepreneur / employer and labor / employee

Thus, for an economically independent society the new Constitution should guarantee right to enterprises, security and freedom of investment, right to property, its security, right to competition, economic activities, right to compensation if government or any individual destroyed or damaged property, close and earn profit from one's own economic activities, right to freedom against government monopoly, free movement of goods and services, right to security of investment and its security, right to fight against the double taxation, right to justifiable wages and benefits of labors and Constitutional guarantee of healthy industrial relation between investor, entrepreneur, employer and labor and employee.