CENTRE FOR TRANSNATIONAL COMMERCIAL LAW

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JOURNAL OF ECONOMIC LAWS AND POLICY

Volume 1
2021-2022

NATIONAL LAW UNIVERSITY, DELHI

ECONOMIC FREEDOM: THE SOUL OF INDIAN BUSINESS REFORMS

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This paper presents provision of three major planks of economic freedom, namely, freedom to start business, freedom to grow business, and freedom to discontinue business, in a broad sense, through successive governments, and then briefly touches upon the outcome of such provision in the last three decades. It traces the related institutional reforms that complemented these freedoms, namely, the almost incomplete law, and the regulators, and then concludes by highlighting the need for building capacity to survive and flourish in the world with freedom. Economic Freedom

I. ECONOMIC FREEDOM

Mainstream economic thought believes that at any point of time, human wants are unlimited while the resources to satisfy them are limited. The central economic problem, therefore, is inadequacy of resources vis-à-vis ever-increasing, unlimited wants. Similarly, mainstream legal thought believes that as a person moves from social state to an economic state, it loses some degree of freedom. The central legal problem, therefore, is inadequacy of freedom to pursue economic interests meaningfully.

There is, thus, twin inadequacies: resources are limited; so also, is freedom. There are twin adequacies too: resources have alternate uses; and firms pursue self-interests. An economy thrives if it leverages the twin adequacies subject to twin inadequacies, that is, it allows optimum freedom (maximum possible freedom) to self-interested firms to move scarce resources, which can be put to alternate uses, from less efficient uses to more efficient ones, seamlessly and continuously. This ensures utilisation of resources in the best possible uses and, therefore, yields optimum economic welfare.

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The optimum economic freedom evolves with time. It is something like the social contract whereby the citizens agree to surrender some freedom in lieu of assurance of peaceful enjoyment of the other freedom. For example, one surrenders the freedom to kill another, a freedom in the natural state, in lieu of the right to live, a freedom in the social state. The ratio of freedom one surrenders to the freedom he enjoys in the society depends on contemporary thinking in the society, and there is no right or perfect ratio. These freedom relate to the life of individuals and enable them to live fully, and honourably in society. These are typically referred to as civil liberty and secured mostly through fundamental rights.

Economic freedom is about the life of firms- proprietorship firms, partnerships firms, LLPs, and companies and enables them to live meaningfully. It allows every firm to undertake any economic activity /business of its choice in the manner and of the scale it is comfortable with and thereby join the mainstream of the economy. It enables a firm to get in and get out of business with ease and thereby unleashes and realises the full potential of every firm and of every resource. This is an economy with inclusive institutions. In contrast, an economy may not allow freedom to every firm, or may use energy and creativity of a small set of firms. This is an economy with extractive institutions. Obviously, an economy with inclusive institutions develops faster as the contribution of all exceeds the contribution of some in an economy with extractive institutions.

Business creates wealth. It provides livelihood and also goods and services for sustenance of life. *It is easier to do business in a country where the firms have freedom to* do so. *Higher the free*dom *available for businesses, higher is the volume of* business in the economy *and the higher is the economic wellbeing.* It is well established - theoretically and empirically - that economic freedom and economic performance have a very high positive correlation. Economies having a high level of economic freedom generally outperform the countries with not-so-high levels of economic freedom. The Cato Institute and Fraser Institute's Annual Economic Freedom of the World Report finds that nations in the top quartile of economic freedom had an average per capita gross domestic product (GDP) of US$ 40,376 in 2016, compared to US $ 5,649 for bottom quartile nations.

It *has, therefore, been the endeavour of countries all over the world* to provide the right institutional milieu that (a) provides, promotes, and protects economic freedom, and (b) regulates such freedom only to the extent it is necessary for addressing market failure(s). This in turn enables the market to do business and create wealth. The World Bank measures the degree of freedom a business has, in terms of ease of doing business. There is a competition among countries to make it easier to do business. Even the States and Union Territories in India are working to improve business climate to attract domestic and global investors. They are competing among themselves to make it easier to do business in their jurisdiction.

A. Business Reforms

Traditionally, India followed market model for wealth creation. This enabled her to be the dominant economic power globally for more than three-fourths of known economic history. For historical reasons, however, she deviated from this model to a complete command and control regime, only to return to the roots post economic liberalisation in 1991. Since then the business reform has been removing shackles on freedom to facilitate transition to a market economy. In the early 1990s, for example, it repealed several 'control' statutes [the Capital Issues (Control) Act, 1947, the Imports and Exports (Control) Act, 1947 and the like], which restricted, or even denied freedom. It has been recasting existing statues with liberal provisions and enacting liberal statutes, to expand the freedom frontier, that is, 'who, what, when and how to do' for firms and consequently of the economy. This effected a paradigm shift from an economy with largely State provision of goods and services prior to the 1990s to a market economy, where the State's role is confined to largely regulations for provision of goods and services.

It is easy for a firm to do business if it has freedom to do so. It needs freedom broadly at three stages of a business - to start a business *(*free entry*)*, to grow the business *(*free competition*)* and to discontinue the business *(*free exit*)*. This is something like the metaphors of creation, preservation, and destruction, in Hindu mythology. The balance of the world is messed up in the absence of any of these. Economic reform, across countries, typically endeavours to provide economic freedom *at* these three *stages.* If the market has freedom, new firms emerge all the time; and they do business while they are efficient and vacate the space when they are no longer efficient. This ensures allocation of resources to the most efficient firms, efficient use of resources allocated and continuous reallocation of resources to efficient firms. This, in turn, ensures the most efficient use of resources all the time and consequently optimum economic well-being. Though structural reform since the 1990s is comprehensive, this article limits to the reforms of the marketplace in general (non-sectoral) in terms of freedom to start, grow and close businesses.

B. FREE ENTRY

Prior to independence, business was almost in the exclusive domain of the State. Consequently, the private sector did not have the capability or resources to carry on business. Immediately after independence, for various practical considerations, India continued the command and control regime, where the public sector occupied the commanding heights of the economy, and the State decided who would produce, for example, automobiles, how many firms would produce, and how many units each of them would produce in a year, and even the distribution of these automobiles. Several areas were reserved for the public sector and small scale sector and there were several entry barriers in other areas. The provisions in several statutes [the Industries (Development and Regulation) Act, 1951, the Monopolies and Restrictive Trade Practices Act, 1969 (MRTPA), the Foreign Exchange Regulation Act, 1973 and the like] did not allow many businesses to come up or grow up. A cartoon satirically attributed a statement to a Minister: "*We do not encourage big industry, as that is our policy. We also do not encourage small industries either, as they may grow big sometime in future*".

The process of liberalisation that commenced in the early 1980s and intensified in the late 1980s, attempted to iron out wrinkles at the margin only. For example, it retained industrial licensing, but exempted a few industries from licensing; it retained import licensing, but expanded the list of freely importable items; etc. Confronted with an unprecedented economic crisis, India embarked upon comprehensive structural reforms in mid-1991 that changed the system of economic management from '*every industry, except a few, requires a license*' to '*no industry, except a few, requires license*'.

The reforms in India in the 1990s focused on freedom of entry. It ushered in liberalisation, privatisation, and globalisation, famously abbreviated as LPG.

It reduced the number of industries earlier reserved for the public sector, while initiating the process of sale of public sector undertakings in the late 1990s. It reduced the number of items reserved for the small scale sector, while removing entry restrictions on big investments, setting up of new businesses and expansion of the existing ones. It dismantled the license-permit-quota Raj whereby discretionary license gave way to an entitlement of registration. Anyone who met the pre-specified eligibility requirements was entitled to registration. If registration were to be denied, it must be communicated by a reasoned order, which can be appealed against.

Further, entry requires several facilitators. One can start a business if it has an idea as well as the capital to translate the idea into a business. Most often one needs external capital to start a business. Accordingly, the newly enacted securities laws allowed, subject to meeting the eligibility requirements, to access the securities markets. Such access did not require any approval from any authority, but true and complete material disclosures. It allowed the market to decide, based on such disclosures, whether to supply funds for the specific business. Thus, the market moved from merit-based regulation to disclosure-based regulation, which enabled stakeholders to make informed decisions and take responsibility for the same. Domestic issuers and investors were allowed the choice to raise resources and invest within or across the borders at market determined terms. Foreign direct investment up to a threshold was allowed under automatic route and above the threshold, on merits. Foreign technology was allowed automatic approval subject to royalties.

C. FREEDOM TO GROW

With the LPG in the first phase, new businesses emerged on the scene. Withdrawal of restrictions on size enabled organised economic activity on a higher scale. This promoted exponential growth of firms in India and firms became larger, requiring more elbow space for them at the marketplace. Barriers to international trade were largely removed to expand the size of the market for firms as well as to unleash competition from across the globe.

The basis of the MRTPA was that size was evil. It prohibited growth of business beyond a threshold, and did not allow anyone to be dominant or a monopolist. However, it was realised that monopoly could be beneficial in certain circumstances, particularly in cases of natural and network monopolies. The policy dilemma was whether to prohibit monopolies and thereby forego the benefits of such monopolies, or address the concerns associated with monopolies and thereby harness the benefits of such monopolies. It was considered that size or dominance, per se, was not bad, but its abuse was. Instead of prohibiting or controlling monopolies, it was considered prudent to address the abuse of monopoly and dominance. The reforms *repealed* the MRTPA and enacted the Competition Act, 2002 to protect freedom of firms to grow at the marketplace and address abuse of dominance.

One has freedom to do business but does not have freedom to restrain the freedom of another to do so. One restrains freedom of another if it somehow takes control of either price and or quantity of a product. For example, if a firm adopts predatory pricing, that is, sells a product below its cost, and has the financial muscle to sustain it for long, it effectively thwarts a competitors' freedom to do business who cannot sell products below the cost for long. So, the competition law proscribed predatory pricing. It became the responsibility of the State to protect firms against predatory pricing.

Further, a market requires several facilitators to promote competition. Article 19 guarantees the right to carry on any occupation, trade, or business. But it has an exception that the State is entitled to create monopolies. So, state monopoly was considered good while private monopolies were not. The competition would not be fair if law treats private firms and government firms differently. The policies and institutions should be neutral to all firms. Accordingly, the competition law applied to both state owned and private firms. Recent policies like direct benefit transfer and goods and services tax are other examples of policy neutrality.

There was considerable focus on rule of law to facilitate competition. A company cannot survive if its cost of capital is high as compared to another that manipulates the market for its securities. Similarly, a company that dutifully pays tax on its profits, cannot survive if another in the same business dodges taxes. If inefficient firms cheat on taxes, they destroy the ability of the efficient firms to kill off the inefficient ones. Institutional capacity was augmented to prevent any kind of manipulation or irregularity that benefits one at the cost of another or denies level playing field to businesses.

D. FREE EXIT

After having commenced business and grown at marketplace, a firm in a market economy may experience stress, mostly on two counts:

(a) The firm may belong to an industry where business is no longer viable for exogenous reasons such as innovation, change in policy, and change in social taste, or even black swan events like COVID-19. Most such firms have economic stress and are generally unviable. They are beyond repair; the only option available is to close the firm and release its resources for other competing uses and the entrepreneur to pursue emerging opportunities. A few of these firms may, however, have the ability and /or resources to change the business and become viable again.

(b) The firm may belong to an industry where other firms in the industry are doing well, but the firm in question is not doing well for endogenous reasons such as inability to compete at the marketplace and at times, malfeasance. Most such firms have only financial stress, not being able to meet financing costs and are generally viable. This firm can be rescued before it slips into economic stress. A few of these firms may, however, have significantly depleted resources and become unviable.

Thus, a firm fails mostly on account of competition and innovation. In competition, efficient firms drive out inefficient ones, while in innovation, new order drives out the old one. The higher the intensity of competition and innovation, the higher is the incidence of firm failure. Thus, failure of firms is routine and inherent in a market economy. However, competition and innovation are two main sources of growth in a market economy. Based on econometric estimates, the World Economic Forum, in its The Global Competitiveness Report 2014–2015, identifies three broad sources of growth, namely, (a) factor endowments and institutions, (b) efficiency enhancers like competition, and (c) innovation and sophistication, while classifying economies into five classes according to their stages of development. Where the reliance on competition and innovation is relatively less, say less than 40%, the economy is in the first stage of development, typically yielding a per capita

GNP of less than US$ 2000 and where the reliance on competition and innovation is significant, say more than 80%, the economy is in the fifth stage of development, typically yielding a per capita GNP of at least US$ 17000. The level of competition and innovation explains much of the distance in per capita GNP from US$ 2000 to US$ 17000. Therefore, instead of avoiding or penalising failures, it is advisable to accept failures and have a mechanism to smartly deal with them. Because, greatest success comes from having the freedom to fail, which promotes entrepreneurship.

When a firm experiences financial or economic stress, the resources at its disposal are underutilised and the firm, business or management / entrepreneur have failed, who need to exit the landscape. It should free up the labour and the capital that will be used by the more dynamic, efficient firms. The process of creative destruction should drive out failing; unviable firms continuously, put the underutilised resources to more efficient uses continuously, and free entrepreneurs from failure. It was not happening hitherto in India in the absence of an effective exit mechanism. Quite a few firms got stuck up in '*chakravyuaha*' of unsustainable business or with idle assets and no business. The Indian economy suffered the inefficiencies of several zombie entities in the system for so long. Further, this discouraged many to commence business or invest in a business, as there was no escape route in case of failure.

The reforms in the 2010s focussed on freedom to exit for firms who fail to withstand the onslaught of competition and innovation at the marketplace. The Insolvency and Bankruptcy Code, 2016 provides a market mechanism for revival of failing, but viable firms. It allows a failing, unviable firm to exit with the least disruption and cost and release idle resources in an orderly manner for fresh allocation to efficient uses. The Code liberates the entrepreneur from failure and releases resources from inefficient or defunct firms, and thereby provides the freedom to exit, the ultimate freedom.

E. SOME CAVEATS

Work-in-progress: Though the economy has made considerable headway, reform relating to freedom is far from complete. In fact, it would never be complete. There would never be a situation when there is absolutely no restriction on freedom to do business. This is because freedom needs to be restricted in certain situations to address market failures or even to protect freedom of others. Provision of freedom is always a work-in-progress.

Non-sectoral: This paper used securities, competition, and insolvency to illustrate the three types of economic freedom. These three are distinct from other reforms in the sense that these are non-sectoral, being focussed on resource allocation. For example, competition is not a problem of banking, telecom or electricity only; it is a cross cutting non sectoral problem. That is why the securities laws do not provide different dispensations for making an initial public offer for an insurance company, a banking company or a real sector company. A different dispensation would create regulatory arbitrage and promote one sector at the cost of another.

Cost of Doing Business: The suite of freedom has certainly improved ease of doing business. But one is not sure if it has reduced the costs of doing business. Many may not be willing to take the plunge and start a business as they think of the pain and the misery that one must go through in terms of compliances, red tape, suffering in the hands of unsocial elements, harassment through frivolous / motivated court cases, etc. Probably time has come to focus on reducing the cost of doing business.

Internal freedom: The freedom discussed above is usually referred to as external freedom, as it is granted from outside, particularly by the State. On the other hand, internal freedom is generated within. It is freedom from sources internal to a firm. Therefore, at any point of time, while the external freedom is the same for all firms, the internal freedom can vary significantly from firm to firm. External freedom may allow a firm to commence a business, but a firm may not commence that business if it does not have the ability and willingness to take the plunge. The firms, therefore, need to enhance their internal freedom in sync with external freedom to harness full benefits of reform.

Irreversible reform: There have been instances where the reforms have back-tracked a step after moving ahead two steps, or side stepping for a while, but the journey has become irreversible. There is a broad consensus across the political spectrum about the inevitability and the direction of reforms that has enabled the reforms to continue, despite the party in power having changed a few times. The reform constituency, which was too small to start with, has grown over time, as the outcome of reform became visible.

F. Outcomes

The reforms thus provided the complete suite of freedom required in a market economy. The index of economic freedom, which measures the degree to which the policies and institutions of an economy are supportive of economic freedom, has substantially improved for India since the 1990s. So also, the outcome.

It is interesting to look at some anecdotal evidence. In the 1970s, when an individual joined as a Member of Parliament, he was given coupons to allocate two HMT watches to any person of his choice. In the 1990s, he was given coupons to sanction two out-of-turn gas connections. This reflects that the earlier regime was characterised by shortages, discretions, and queues. One had to wait for decades, and often indefinitely, to get a telephone connection or buy a two-wheeler. Now the economy has far better telephony, power availability, automobiles, roads, and road connectivity, etc. Many people exited poverty; lives changed measurably, though not all lives changed equally. Now, ideas have a lot more value. Examples are: the largest transport company doesn't own a single vehicle; the largest retailer doesn't own a single store; and the largest food delivery company does not own a single restaurant. The list of top 25 companies today and the list of top 25 companies prior to 1990 do not have a single name in common.

In the years preceding independence (1901-1947), when India did not have political freedom, she witnessed a growth rate under 1%, on average. With political freedom, the growth rate improved to about 3.5%, on average, during 1947-1992, which the World used to taunt as the *Hindu Rate of Growth.* The growth rate in the post reforms period since 1991 has been more than double of the pre-reforms period. Consequently, the GDP has grown tenfold and the average per capita income five fold since 1991. Today, the GDP exceeds US $ 3 trillion and is expected to hit US $ 5 trillion soon. India is one of the fastest-growing, trillion-dollar economies, the fifth largest in the world and third largest in terms of purchasing power parity.

II. INSTITUTIONAL REFORMS

Provision of freedom / shift to market economy required two major changes in governance edifice, namely, institutional environment (the form of law) and the institutional arrangement (delivery of governance).

A. INCOMPLETE LAW

There are broadly two forms of law, namely, 'almost complete' and 'almost incomplete'. A law is complete if it unambiguously stipulates for all future contingencies. An example of such a form is the Indian Penal Code enacted way back in 1860. The definition of theft, as originally enacted, holds good even today. An almost complete law endeavours to enact the law with perfection, which can deal with all the possible circumstances for a long time. Of late, the environment has become very dynamic. The change that used to take centuries earlier in business is coming in about months, or at best in years. The governance response to this has been a 'almost incomplete' form of law. This form believes that it is not possible to visualise all the possible circumstances and provide for the same in the legislation. Here, the legislation tends to be slim, but has the potential to deal with all the possible circumstances, including unforeseen emergencies.

This enables the law to evolve continuously in tandem with the environment to meet the emerging deficiencies, accommodate new services and market designs, deal with innovative transactions, and improve the efficiency of operations in the market by overcoming the legislative lags. An example is the definition of 'securities' in the Securities Contracts (Regulation) Act, 1956. It is an inclusive definition; it includes a, b, c, d and '*such other instruments as may be declared by the Central Government'*. Using this power, the Central Government has recently declared 'electronic gold receipts' and 'zero coupon zero principal instrument' to be securities. Similarly, the SEBI Act, 1992 empowers the Securities and Exchange Board of India (SEBI) to register and regulate a, b, c, d and '*any other intermediary associated with the securities market as the Board may by notification in this behalf specify'*. This enables the SEBI to regulate, by specification in a notification, an intermediary, which is not required to be regulated today, but may have to be regulated tomorrow and an intermediary which may emerge in future. Such declaration or notification can be done quickly to facilitate market development, without an amendment to the statute.

Another dimension of incomplete law is subordinate legislation. For example, the SEBI Act, 1992 confers on SEBI substantial powers of delegated legislation (quasi-legislative) to make subordinate legislation (regulations) to fill the gaps in laws and to deal with the matters of detail, which rapidly change with time. This enables it to strike the moving targets at the right time and at the same time, keep the laws relevant to times. This is something like repairing an aircraft while flying, as one does not have luxury to bring it to ground for repair. For example, the regulator notices a pernicious practice which impinges upon the integrity of the market. SEBI may cover it within the definition of fraudulent and unfair trade practices by an amendment to the regulations. Thereafter, it may penalise the miscreant for contravention of regulations, if it continues the same practice. This form of law is eminently suitable for markets which evolve fast, and the authority needs to respond faster with preventive and remedial measures.

B. REGULATORS

In the earlier regime, the Government used to play a dual role. It was, through its instrumentalities, doing business (it was a player through the BSNL and MTNL in telecom; it had the GIC companies and the LIC in insurance), while making rules to govern the business. This created a perception that since the Government had an interest in making sure that the government companies performed well, any rules that it made would have an institutional bias in favour of those companies. A firm would not trust a regime where a competitor is also the rule maker. It was this persuading logic, which created the regulators outside governmental apparatus.

The emergence of the regulators to share governance with the Government is a hard reality. They resemble the State in terms of powers and responsibilities. They provide public goods in public interest. They have responsibilities - consumer protection, development and regulation - and powers - legislative, executive and judicial - similar to those of the Government. They carry out governance on behalf of the Government in accordance with a statutory contract.

There are significant advantages of governance through a regulator. It generally does not share the 'social' obligations of government; nor is it subject to the pressures of 'interest' groups. It provides the same level playing field to all kinds of participants without fear or favour. It builds the expertise matching the complexities of the task and evolves processes to enforce authority, rapidly and proactively. There are significant concerns too. When regulators fail to perform, the Government, as the principal, is often called upon to explain and carry out rescue operations.

It has not been easy for the executive to accept the shift of governance to regulators/ decisions made outside Government. They initially found it strange as they were answerable to Parliament for decisions made by regulators. Gradually, the rationale sank in and the executive started accepting regulators as partners in governance. Now the executive prefers decisions by regulators in the interest of stability of the regime and to insulate them from adverse decisions having a bearing on electoral outcomes.

Even the regulated took time to accept governance by regulators. Whenever the regulated failed to persuade the regulator to reverse a decision or action, they ran to the Government for a direction to the regulator. In one such instance, a former SEBI Chairperson quipped that the road from *Dalal Street* (where brokers are located) to *Mittal Court* (where SEBI was located) is not via *North Block* (where the Finance Ministry is located). The regulated used to resort to different gimmicks to influence the regulators. Realising the futility of such gimmicks over time, they have started engaging with the regulators in design of regulatory policy, while the regulators have created formal mechanisms to involve the regulated in making regulations. The law enables the regulated to seek relief from an appellate forum if they are aggrieved by quasi-judicial decisions of the regulator.

C. Regulatory Tribunals

The SEBI Act, 1992, as originally enacted, provided for suspension or cancellation of registration of an intermediary for contraventions of law. For various reasons, this was not suitable in many circumstances. It was because the contravention might not warrant such a serious penalty, the business of the intermediary (market infrastructure institution and the like) is such that its registration cannot be cancelled easily, or the culprit was not a registered intermediary whose registration could be cancelled. A proposal was mooted to empower SEBI to impose monetary penalties also. There was considerable hesitation to allow an agency outside the Government to impose such penalties. After years of deliberations, it was agreed subject to the conditions that: (a) the Act listed various contraventions and the associated monetary penalties; (b) the penalties were imposed by an adjudication order; and (c) there was an appellate forum for appeals against such orders. Thus came the Securities Appellate Tribunal (SAT) in 1995 to dispose of appeals against adjudication orders. In course of time, SAT became the appellate authority in respect of all orders of SEBI. This solution was replicated in several other regulatory legislation.

D. CAPACITY FOR ECONOMIC FREEDOM

Economic freedom is in a fluid state: it is enhanced or curtailed relatively easily depending on the contemporary economic thought and philosophy, and sometimes even regardless. Right to property was a fundamental right some time ago: but no more. Many statutes, which restricted, or even denied economic freedom, have been repealed or liberalised in sync with shift to a market regime. Further, economic freedom is not absolute. It has many shades of grey, probably because it is encapsulated in economic laws, a domain served by both economists and lawyers, who by their multifarious, and often conflicting capabilities, complicate jurisprudence. The determination of an issue relating to economic freedom in each context requires that all possible legal perspectives are considered from all possible economic angles.

Consider this anecdote. Three persons have received notices from the competition authority. They are comparing their notes. The first one says he charges a price higher than anyone else; he is accused of monopoly pricing. The second one says he charges a price lower than anyone else; he is accused of predatory pricing. The last one says he charges the same price as anyone else; he is accused of cartelisation. Thus, different conducts - high price, low price and same price - could be misconduct, and the same conduct could be bad or good, depending on the ‘context’. There are contexts, where an apparent misconduct (negative price) may even be rewarded for promoting competition. So more than conduct, the context matters.

From the perspective of the State, every conduct at the marketplace could be presumed to be misconduct unless proved otherwise, considering the context. Depending on the skill and expertise of personnel, the kind and extent of information available, and quality of tools and technology used, the same facts and circumstances may not present a clear context, or present a false context. If the context presented is false, one may end up with either a false negative or false positive. Punishing a false negative, that is, penalising a business for its impeccable conduct is the most damaging to an economy. This calls for commensurate institutional capacity among the new agencies of the State - the regulators and regulatory tribunals, who have duty to secure freedom.

From the perspective of business, the market is all about freedom of choice. In case of stress, for example, a creditor has several options for recovery as well as resolution. Its choice is, however, subject to the rights of others. If another creditor or the debtor triggers corporate insolvency resolution process (CIRP), it has no option but to participate in the CIRP even if it preferred recovery. Therefore, it needs to use its freedom strategically. If it chooses resolution, it may evaluate CIRP as an option. If it chooses CIRP, it joins the committee of creditors (CoC), which has the option to choose between resolution plan and liquidation. If CoC wishes to choose a resolution plan, it has a choice among several competing resolution plans. These choices are not formulae-driven, but guided by commercial wisdom. The creditor does not acquire commercial wisdom from legislation, which merely confers rights. It needs to develop commercial wisdom to survive and flourish in a world with choices.

Professional expertise required for economic freedom are quite distinct as compared to civil liberty. In case of murder (civil liberty), medical science answers whether the death is unnatural, with reasonable precision. Thereafter, one sifts through evidence to establish if X intentionally caused the death, beyond all reasonable doubts. This is relatively easier to settle as compared to abuse of dominant position (economic freedom). Abuse means imposing an unfair price. What is unfair for one may not be so for another. What is unfair in the morning may not be so in the afternoon. A conduct otherwise unfair is not unfair if it is adopted to meet competition. Thus, one has to struggle to determine whether a particular conduct is unfair and, therefore, abuse in a given context.

Further, who killed, who was killed, where he was killed, what was the effect of killing, etc. are far less relevant to the case of murder. On the contrary, who abused is material. It is an offence only if it is by a dominant player. One struggles to figure out the *relevant market* (geographical and product) first, and then determine whether the player is dominant in that market. Thus, the laws relating to civil liberty prohibit murder, whether it is by or of X or Y, while economic laws prohibit abuse by a dominant player only. While no one, not even the State, can encroach upon civil liberty, in certain contexts, the State as well the business may encroach upon economic freedom and yet not violate the law. The economic laws, therefore, allow greater latitude to businesses, but for ascertaining the latitude and using it appropriately, the State as well as the business need assistance from professionals with high dexterity.

To harness full benefits of the freedom to take the economy to greater heights, the ecosystem - professionals, firms, and State - needs to build commensurate capability. This assumes further significance, when business laws in the country have thousands of clauses providing for imprisonment in case of contraventions and where no conduct at marketplace is, prima facie, right or wrong. Building professional capabilities can reduce false negatives and protect, promote and preserve the hard-earned economic freedom.

E. REGULATORY CAPACITY

Reforms created statutory regulators to make regulations. They safeguard freedom, prevent abuse of freedom and protect the interests of consumers, so that the markets develop and operate in an efficient and fair manner. They specify the conduct at the marketplace and manner of carrying out business transactions such as raising resources from the market, acquisition of one firm by another, resolution of stress of a firm, and so on. They occupy a centre stage in the institutional edifice of a market economy.

Some useful insights have been gained from experience of regulations. Some regulators have come to believe that new regulations are required every time the market fails or the even State (extant regulations) fails, regardless of whether it resulted from misdemeanour of a firm, or there was inadequate supervision. The typical regulatory response is addition of a set of new regulations. Such regulations may not have been necessary in the first place.

Further, if the new regulations are not designed properly, firms may find another way of getting around it, leading to even more regulations. Ill-designed and unnecessary regulations have thus a tendency to proliferate.

Further, regulations try to address ‘polycentric’ issues in business. Such issues involve many interested parties interacting with one another in a fluid situation. A small trigger in one variable creates tensions all around, with an incalculable series of interdependent changes, making the task of regulation difficult. With increasing sophistication and globalisation of markets, regulations have become more complex and nuanced. A regulator is expected to design and modify such regulations, preferably proactively, or at least swiftly, in response to market dynamics, without unduly restricting freedom of firms.

Regulation involves the entire chain of activities from the process of making regulations to its content, manner of monitoring and enforcement, and its review. These put an increasing pressure on the regulatory apparatus, way beyond the existing capacity. Regulations are designed and executed by human beings and not by robots; although technology, in some limited cases, can and does reduce the burden. These human beings must be trained professionals. While some increase in the regulatory staff is called for, more important is to improve the quality of the staff available to regulators and firms, through institutional arrangements.

Regulators need human resources of the right quantity and quality who can calibrate freedom, through regulations, on an on-going basis such that firms find it easy to do business. Similarly, firms need human resources who can translate freedom to business opportunities and undertake business in accordance with regulations, without instigating further regulations. With the right human resources, both regulators and firms would have access to professionals trained in regulations, appreciate each other’s perspective better and be partners in regulations, minimising cost of regulations.

Three decades of experience with regulations indicate a void in terms of human resources needed to make the market paradigm work. While reforms focussed on freedom, the task of building human resources for calibrating and implementing the requisite regulations has remained largely unattended, limiting the gains from reforms. To fill the void and build regulatory capacity for a market economy, the National Law University, Delhi has set up a Centre for Regulatory Studies. The Centre has the mandate to develop regulations as a multi-disciplinary field of study that intertwines the disciplines of law, economics, management, accountancy and other behavioural sciences.