

# The context rather than the conduct

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It is established that economic freedom engenders superior economic outcomes. Therefore, the State has been expanding the horizon of economic freedom for business. This, however, poses extraordinary challenges for the ecosystem.

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Many statutes, which restricted, or even denied economic freedom, have been repealed or liberalised in sync with shift to a market regime.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, confuse others!

## Multiple perspectives

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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 State, every conduct at 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 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, 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 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 committee of creditors (CoC), which has option to choose between resolution plan and liquidation. If CoC chooses resolution plan, it has choice among several competing resolution plans. These choices are not formulae-driven, but 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, State as well as the business need assistance of professionals with high dexterity.

## **Building expertise**

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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 26,134 clauses providing for imprisonment in case of contraventions (Recent study of the Observer Research Foundation) and where no conduct at marketplace is, *prima facie*, right or wrong.

Since economic freedom is mainly the interplay of law and economics, there is the need for developing cross-cutting expertise. Such expertise has to be used for enhancing State capacity, market capacity and professional capacity, including practice before regulator, tribunals and courts.

Since capacity building takes time, in the short run, economists may also be allowed to practise economic laws — at least before regulators and tribunals. In the long run, academics should produce economic-lawyers or legal-economists who specialise in economic law practice. Only expanding professional capabilities can reduce false negatives and protect, promote and preserve the hard-earned economic freedom.

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