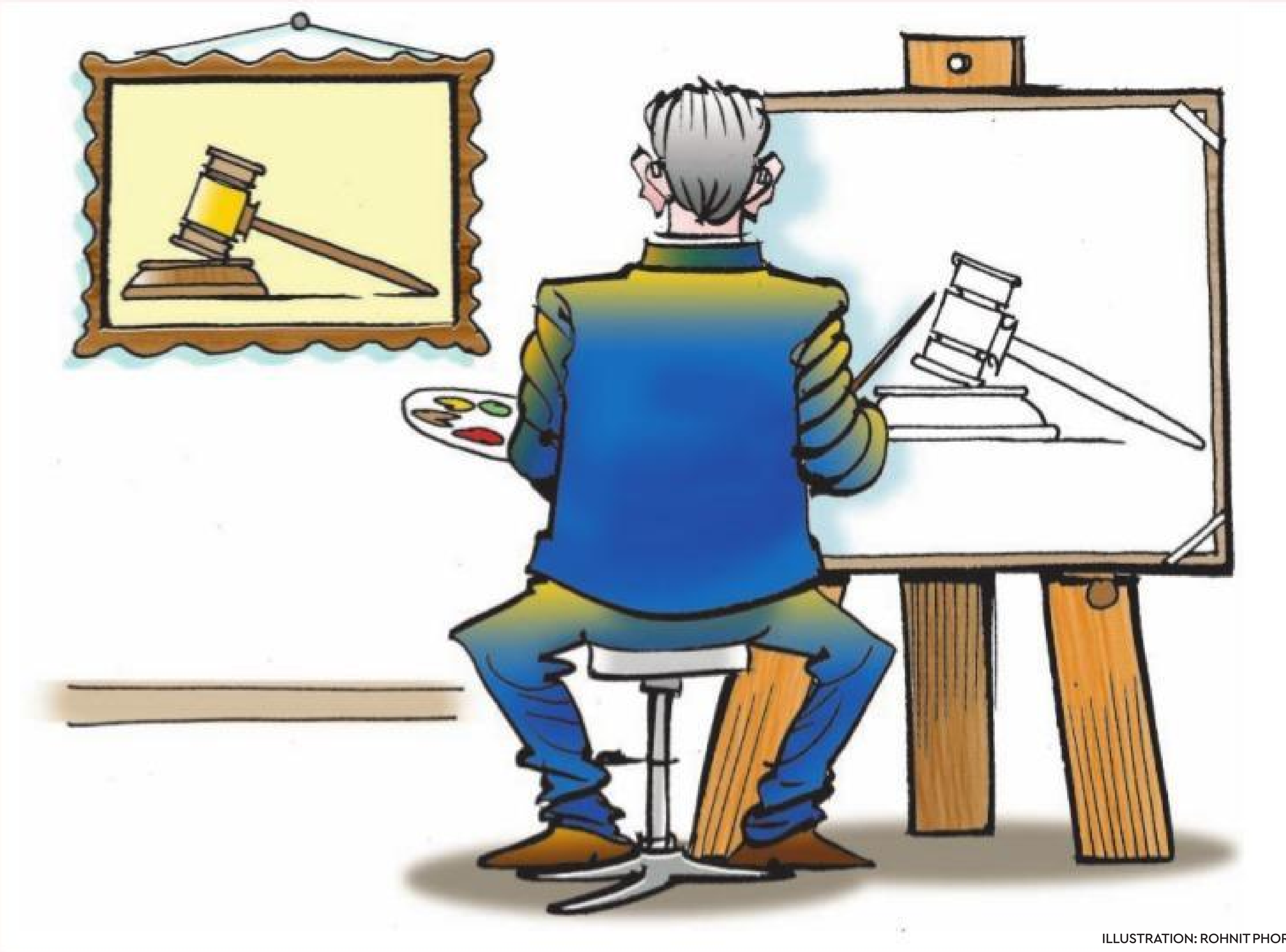

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PROCUREMENT REFORM

Jugaad legislation in India

Copycat Bills originating from self-styled 'model' 'international' legislation can pose serious dangers, especially when passed by state governments

WHILE RESEARCHING OVER 10,000 Bills that had been introduced in legislatures nationwide in the US over eight years, a recent investigation by the *USA Today*, *The Arizona Republic* and the Center for Public Integrity found that they had been almost entirely copied from versions written by special interest groups. Indeed, copycat Bills originating from self-styled 'model' 'international' legislation can pose serious dangers, as was quickly discovered by the government of India while reviewing the (draft) Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2011. Thankfully, the 2011 Bill lapsed, perhaps once it was realised by the government that the Bill would severely disadvantage Indian entities vis-à-vis foreign companies—since the latter could easily reinforce their business interests by exploiting a number of loopholes with foreign legislations such as the US's Foreign Corrupt Practices Act and the UK's Anti Bribery Act.

The Indian government was equally nifty when dealing with mounting international pressure for the 'quick' passage of the (draft) Public Procurement (PP) Bill, which was also later allowed to lapse. Multiple versions of the draft PP Bills in 2011-12 had been drafted by the (then) Planning Commission of India, virtually copy-pasting the UNCITRAL Model Public Procurement Law of 1996, not even the already released 2011 version; and the first draft required foreign bidders to be treated at par with domestic bidders, staring in the face of many legal and non-tariff barriers to participation by Indian bidders in external public procurement markets such as those in the US, Europe and China.

Of course, it is easier for the government of India to overcome external agency pressure, given its size and high standing in international politics, but state governments in the country have not been as lucky, especially when faced with strong market-opening measures pursued by international loaning agencies as 'public finance management' reforms—indebted as the states are because of running negative fiscal and budgetary deficits for years altogether.

Procurement reform experiences

Almost 10 years ago, Rajasthan was the first state to enact UNCITRAL-styled public procurement legislation in India—the Rajasthan Transparency in Public Procurement (RTPP) Act 2012—resulting in perhaps the fattest but a rather unnecessary 'reform' measure of this variety. Copy-pasting in Rajasthan went on to the extent of permitting 'competitive negotiations' under state law, when there is virtually no one in the state who understands either its meaning or its complexity, and therefore, unsurprisingly, not one single contract has been processed in Rajasthan during the last eight years under this method after enactment of the RTPP Act. Assam followed next in Rajasthan's footsteps in 2017, copy-pasting all the confusion and inefficiencies with the Rajasthan Act in the Assam version as well; although they managed to remove some of these defects while finalising their draft rules. And now, Punjab, as recently as in September 2019, seems to have fallen prey to using the legislative route to procurement reform, as if efficient project execution can be achieved without proper allocation of risk, and without first ensuring simplified procurement procedures and standardised bidding documents.

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In some ways, however, the Punjab Act makes for comparatively more interesting reading, given its rather unique provisions on debarment (sections 7 and 56) and blacklisting (section 26), without defining either of these phrases, and even though these two concepts, as a matter of legal practice, are virtually the same! Punjab's debarment provisions have been copy-pasted from the Rajasthan/Assam texts, while its blacklisting provisions seem to have been copied from some of its earlier executive instructions. The net result of this '*jugaad*' legislation in Punjab is that while a contractor debarred under section 56 of the Punjab Act by an executive engineer posted in PWD Patiala can participate in contracts awarded by his counterpart officer in PWD Amritsar, but, on the other hand, a bidder debarred by an executive engineer in PWD Jaipur (in Rajasthan) or by his/her counterpart in PWD Timbuktu (in Mali, if under a loan agreement by an international organisation) would have to be necessarily excluded from participation under section 26 of the Punjab Act. In addition, contractor ineligibility arising out of a debarment decision in Timbuktu by an 'international organisation' such as the Bill & Melinda Gates Foundation or Oxfam may have to be necessarily respected forthwith by the Patiala chap by excluding such a bidder in his/her own PWD contracts, while allowing a contractor debarred by neighbouring PWD Amritsar to participate. All this confusion seems to have happened in Punjab only because of copycat legislation without attempting to appreciate procurement complexities in a bottoms-up manner, particularly when contractor ineligibility as a matter of international best practice, and even under the government of India's 1971 framework for banning and suspension of business dealings, has always been narrowly interpreted and applied to contracts awarded only by the debarring agency/department.

Conclusion

It would, of course, be premature and naïve to state that the only defects with the Punjab, Assam, Rajasthan texts are in relation to their provisions on debarment, blacklisting, competitive negotiations. There appear to be many other instances of similar confusion and impracticality in each of these states—confusion that is unlikely to die down soon enough. For instance, in Rajasthan, it has been difficult to amend many of the RTPP Act provisions, given the political optics of a state government tinkering with any piece of legislation that claims to infuse transparency in the award of public contracts, however silly or impractical any of its provisions may be.

But Punjab seems to have some major advantages vis-à-vis Rajasthan and Assam. First, the two-year period ending September 2021 allowed by its section 62 (the removal of difficulties—ROD—provision) allows the state to amend large parts of the text so long as its ROD orders are consistent with the principal Act. Second, Punjab is yet to formulate and publish its draft rules and can thus potentially avoid copy-pasting problems that will necessarily arise when it is expected by external lending agencies to simply reproduce Rajasthan/Assam's rules. And last but not the least, Punjab's bureaucracy has always had a much more sensible approach to auto-correcting government policies and rules—one that is generally acknowledged to be bolder and more pragmatic than many other states in India—and it would therefore perhaps be safe for its procuring officers to expect that the last word on public procurement legislation may not be out in Punjab as yet, hopefully speaking.

Credit, corona and climate

ANIL KISHORA

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Banks need to wake up to climate risk in a more concerted, comprehensive way

WE ARE AWARE of the devastating impact the demon called 'credit risk' exercises on banks' balance sheets and bottom lines. Many a growth stories and ambitions have come a cropper, singed by sharp spikes in exposures to a set of borrowers, groups and sectors. This movie has played out again and again globally, with variations in underlying specific reasons, but fuelled by the same urge to post earnings and top-line growth quarter-on-quarter. Developments necessitating efforts to rescue a private sector player drive the same lesson back home. Not surprisingly, some might even question the efficacy of all the Basel measures in making banks safe. It might also be argued that the fundamental issue goes beyond the mechanics and models of Basel and its ilk. Can or, rather, should a bank keep pressing on the gas regardless of the pace of the economy? Is it feasible for players to deliver a secular upward trend in credit growth all the time?

It is heartening to note that the SGX, the stock exchange in Singapore, recently made quarterly reporting optional for companies meeting certain criteria. It demonstrates a realisation that quarterly numbers are important, but regulatory mandates to report every quarter can potentially lead to blind pursuit of 'outcomes' that may not support long-term sustainable corporate growth. This author had long back (on Feb 12, 2014) argued in an op-ed piece in the *Business Times*, in favour of quarterly reporting being made optional.

While these questions need to be asked, it is time banks started focusing on their portfolio credit risk. Credit risk is considered a relatively well-understood and mature domain in banking, but historical outcomes hardly endorse such a conclusion. Globalisation and interconnectedness have added to systemic susceptibilities. Coronavirus threatens to derail economies. It has brought out how fragile the broader ecosystem can be; banks might be better off returning to the basics of lending and portfolio risk management—never put all your eggs in one basket. Another lesson is that banks can't continue to lend, banking on 'a good tide' to lift their 'boats'. As such, notwithstanding what ratings, CDS spreads, stress tests and risk-adjusted return measures tell us, it is time we used blunt tools such as hard limits on risk appetite in terms of ticket sizes, counterparty risk and sector exposures. The adage 'cut your coat according to your cloth' holds true in risk management, too. Just read 'capital' and 'capacity' in place of 'cloth'.

Many industries are set to potentially suffer due to the corona effect. Supply chain disruptions and fear-led emptying of shops leading to demand destruction may impact entertainment, travel, tourism, textiles, IT, ports and power sectors. Given the enormity of the potential public health consequences, social distancing and lockdowns are a necessary response to contain corona, and there's no way we can prevent the collateral damage to the economy and the concomitant second-order issues. The good part is public memory is short, and life would be back to normal sooner than later. A vaccine or a cure would surely speed up normalcy.

Is 'corona' a black swan? If so, probably black swans are turning out to be too common. Is it time for Nassim Nicholas Taleb to hunt for other birds—possibly 'blue swans'? While the debate around what may bring in or escalate uncertainties would stay open-ended, another risk looms. Banks need to wake up to climate risk in a more concerted and comprehensive way. Global warming, changing climatic conditions, distorted rainfall patterns, large-scale 'reclamations' from the seas (though it's probably a case of 'claiming' or usurping land from the oceans that the oceanic waters might 'reclaim' in a jiffy!), rising sea levels and mass migrations to expanding mega cities create delicate systems that can break in no time. It is time to revisit our policies. Negative interest rates have made the 'time value of money' somewhat suspect; climate risk build-up can make the concept turn on its head. Credit is known to influence investment decisions. Developing and adopting the right climate risk framework to shape lending is the way to go for banks. Real economy must 'reclaim' its suzerainty over the 'financial economy' to keep risk under control.

CHINA V AMERICA

Expelling journalists is no way to fight a pandemic

In a crisis, reporting is more valuable than ever

THE FLOW OF information is essential to curbing a pandemic. Yet on March 17 China took a dramatic step towards throttling it. Xi Jinping's government ordered American journalists for the *New York Times*, the *Washington Post* and the *Wall Street Journal* to leave the country, in the biggest expulsion of Western correspondents from China since the Communist takeover in 1949. The world sorely needs objective reporting on the place with the longest experience of fighting Covid-19. China, too, lacks objective reporting about the virus or any other sensitive topic. At times like this people need masks, not muzzles.

The expulsion is part of an on-going feud between America and China. For a moment in January it seemed as if tempers were cooling, when both sides wisely agreed to suspend their trade war. In recent weeks the temperature has reached boiling-point. In a stunning failure of diplomacy, American and Chinese officials have been trading insinuations, all but blaming each other for Covid-19. A few Chinese diplomats and American lawmakers have shared preposterous conspiracy theories about the virus having been cooked up in biowarfare labs. Enough, already.

The two powers are behaving more and more like Cold-War rivals, tussling in every domain. President Donald Trump's administration made CGTN America, a state-owned broadcaster, register last year as a "foreign agent" and in February designated it and four other state-media outlets as foreign missions, a declaration that their staff are propagandists, not journalists. This is a foolish battleground for a democracy to pick. It cannot outcensor an authoritarian regime. Inevitably, a tit-for-tat cycle has ensued. Last month China expelled three correspondents of the *WSJ*, citing a single offensive headline. Trump then booted out 60 staff from Chinese state-owned media. Now China has shut out many of the finest reporters on its territory.

One alarming implication concerns Hong Kong. The expelled Americans have been told they cannot work there either. This upends a convention that has largely prevailed under Chinese rule that foreign correspondents are free to work in the territory even if barred from the mainland. China has, in effect, scrapped an important feature of its "one country, two systems" policy.

But the most alarming consequences are global. There was a time, more than a decade ago, when some Americans talked optimistically about a possible "G2" partnership. They believed that America and China, for all their differences, could tackle the world's challenges together. That now seems laughable.

Americans have cause to be irked by China's behaviour. Western media there are suffering ever tighter restrictions. Chinese officials have become blunter in their warnings: carry on reporting like that on Xinjiang's gulag for Muslims, or on the finances of powerful families, and your visa may not be renewed. But when America expels Chinese media workers, it does not make things better. On the contrary, it gives China a pretext to treat American reporters as if they represent America—which they do not.

THE ECONOMIST

(Block)chaining coronavirus

As the coronavirus pandemic threatens to mutate, the world will require inspired leadership and innovative measures

BHARAT R JOSHI

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THE CHINESE YEAR of the Rat 2020 has already witnessed instability—military action in Iran, bushfires in Australia, earthquakes in South America, and floods in Indonesia, before the Covid-19 pandemic purged the above from public discourse. Many countries have shut down, Wall Street's 11-year bull-run has ended, and cloud hangs over Tokyo Olympics. Worryingly, some quarters are using the crisis as a lightning rod to fuel clamour for anti-globalisation, which ironically might lead to slowbalisation.

Three main lessons from it are:

Dependence on China: While the impact of supplies from tier-1 suppliers can quickly be assessed, the impact from tier-2 and tier-3 vendors remains cripplingly invisible. Your supplier might not depend on sourcing from China, but their suppliers might, and their supplier's supplier almost certainly does. According to Dun and Bradstreet, almost 5 million firms have tier-2 or tier-3 suppliers, dependent on the Wuhan region—and 51,000 (including 938 of Fortune 1000) companies source directly from that region. The effects of current disruptions could have been mitigated with active risk management across global value chains.

Blockchain: Unlike Fukushima or Australian bushfires, Covid-19 will not remain geographically confined. Technology must be used to ensure business continuity—remote working is a prime example. But more can be done, including blockchain—a distributed, time-stamped ledger. Alipay has launched a blockchain platform with the Zhejiang Provincial Health Commission and the Economy and Information Technology Department, to combat the spate of counterfeit facial masks (30 million masks have been seized) and medical supplies in China. Blockchain enables users to verify proof-of-provenance and track supply chains of medical supplies, including masks, gloves and protective gear. There are reports from Indian auto majors, of workers refusing to touch consignments from China. Here, blockchain could provide the immutable evidence to assure workers that said consignments were handled with due care to eliminate probability of contagion. The above Chinese model could be adopted to demonstrate proof-of-provenance.

Regulation: EU members are suspending mortgage payments, so residents don't feel compelled to keep establishments open. 'Ghost flights', or empty planes (operated by airlines, for fear of losing flying slots), have prompted aviation regulators to ease onerous rules. To facilitate trade, remote processing of consignments could be an answer. RMS (Risk Management System) enables Indian Customs to process cargo and documents remotely, while subsequent financial flows (duties, drawbacks) are executed electronically. Secure video-conferencing could be adopted to virtually 'inspect' cargo, where required. Regulation can provide the nudge to encourage adoption of technology and best practices to prevent loss of livelihoods and economic disruption.

As the coronavirus pandemic threatens to mutate—from a humanitarian into a socio-economic crisis—it will require inspired leadership and innovative measures from governments and private firms to emerge unscathed.