

## The Prevention of Corruption (Amendment) Bill, 2013

### More Concrete Steps Needed Rather than a Piecemeal Approach

*The Prevention of Corruption Act (PCA), 1988 is the main law in India relating to the prevention of corruption and matters connected therewith. It is primarily aimed at prohibiting government agencies and public sector businesses from accepting a bribe in any form as well as to thwart any such motive. To check the supply-side (i.e. payment of bribe) and to give the law more teeth to tackle corporates indulging in corrupt practices, the amendment Bill, amongst other things, intends to bring corporations and their key managers under the ambit of PCA.*

#### The Bill at a Glance

##### Highlights

- ◆ Modification of the definitions and penalties for offences related to taking a bribe, being a habitual offender and abetting an offence.
- ◆ The Bill makes specific provisions related to giving a bribe to a public servant.
- ◆ The Bill makes specific provisions related to giving a bribe by a commercial organisation.
- ◆ Insertion of a separate Chapter i.e. Chapter IVA captioned 'Attachment and Forfeiture of Property' laying down procedure and power for the attachment and for-feiture of property of public servants.
- ◆ The Bill will introduce time bound sanctions for prosecution.

##### Lowlights

- ◆ Too many National regulators with little clarity on need and coordination
- ◆ The bill redefines criminal misconduct to only cover misappropriation of property and possession of disproportionate assets. The bill does not cover circumstances where a public official uses illegal means; abuses his position or disregards public interest and obtains a valuable thing or reward for himself or another person. Phrases like 'improper performance' 'relevant expectation' 'public function or activity' are ambiguous and likely to have different legal interpretation.
- ◆ Removal of the provision protecting a bribe giver from prosecution, for any statement made by him during a corruption trial might deter whistle blowers.
- ◆ Amendments introduced to bring the Act in line with the UN Convention against Corruption (UNCAC). However, certain provisions of the Convention have not been included in the Bill.
- ◆ Bill does not provide for compensation to those aggrieved of acts of corruption, unlike the provisions in the UN Convention against Corruption.
- ◆ Introduction of an element of intention in the disproportionate asset cases would pose additional burden upon the anti-corruption agencies to prove in the court of law.

*"Electoral compulsions for funds become the foundation of the whole super structure of corruption". National Commission to review the working of the Constitution (2002).*

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## INTRODUCTION

In order to have an effective and exhaustive framework to combat corruption, a bill was introduced in the Rajya Sabha in August 2013 to amend the existing Prevention of Corruption Act. As per the statement of object and reasons for the Bill, the ratification by India of the UNCAC, the international practice on treatment of the offence of bribery and corruption and judicial pronouncements necessitated a review of the existing provisions of the Act. The objective of the amendment is to fill in gaps in description and coverage of the offence of bribery so as to bring it in line with the current international practice and also to meet more effectively, the country's obligations under the said Convention ratified by India.

## Key Issues and Analysis

### 1. Definition of bribery expanded

A new definition of 'bribe giving' which is largely based on Section 1 of the UK Bribery Act, 2010 has been incorporated in the Bill. Offering of bribe will also be an offence under the Bill. Any person who now offers, promises or gives financial or other advantage to another person (third party/intermediaries) or public servant to induce or reward the public servant to perform improperly any public function or activity would constitute as an act of corruption. Even the offering/giving or promising financial other advantage by the bribe giver itself constitutes 'improper' performance of

relevant public function or activity'.

The Bill seeks to amend the Act to include the offence of passive bribery including solicitation and acceptance of bribe through intermediaries. It intends to prosecute the bribe givers in the offence of consensual bribery. The punishment prescribed for bribe giver is equal to the punishment prescribed for the bribe taker in corruption cases. Thus the Bill makes giving a bribe an offence with penalty equivalent to that of taking of a bribe. However, it does not distinguish between consensual, collusive and coercive bribe giving.

### 2. Time bound sanctions for prosecution

The bill makes it mandatory for the competent authority to decide on granting prosecution sanction within three months of a complaint. The period can be extended by another month after consulting the Attorney General or the Advocate General. In cases of retirement or demittance of office by public servants, prior sanction of competent authority is proposed to safeguard the public servants from the vexatious prosecution in event of bona fide omission or commission in the discharge of their official duty. However, in such cases, a limitation period of say three years should be mandatory within which cases of establishing guilty intent can be made. Lifelong exposure of public servants to the possibility of action under the Bill is not only against the principle of natural justice but also promotes procrastination at all levels.

### 3. Denied protection to persons giving bribes and then acting as whistle-blowers

The Bill proposes to abolish the immunity provided to the bribe giver for subsequent reporting during proceedings in the Court of law. Generally it has been seen that the line between coercive bribery and consensual bribery is very thin. There can be instances where a coercive bribery case may be shown as a case of consensual bribery so as to implicate the bribe giver under the new provision being introduced in the Bill.

### 4. Corporate liability in bribe giving to public servant

To prevent bribery on the supply-side (i.e. payment of bribe) and to give the law more teeth to tackle corporates indulging in corrupt practices, the amendment proposes that corporations and their key managers be brought directly under the legal ambit of PC Act. Under the proposed Bill, it will be an offence for the commercial organisation if a person associated with it bribes a public servant intending to obtain or retain business for such organisation; or to obtain or retain an advantage in the conduct of business for it. But it shall be a defence for the commercial organisation to prove that it had in place adequate procedure designed to prevent person associated with it from undertaking such conduct of bribe giving.

### 5. Higher standard of proof

Presently, as per the provisions of PC Act, the guilt of the person is presumed for the offences of

## Recommendations of the Second Administrative Reforms Commission which do not find place in Prevention of Corruption (Amendment) Bill, 2013

The Second Administrative Reforms Commission (2<sup>nd</sup>ARC) made certain recommendations related to the Prevention of Corruption Act, 1988. Majority of such recommendations do not find place in the Bill. Such recommendations include:

- a. Incorporation of a special offence called 'collusive bribery', by the public servant and the beneficiary of the decision. It further recommended double punishment in cases of collusive bribery in comparison with other cases of bribery.
- b. Prior sanction should not be necessary for prosecuting a public servant who has been caught red handed, or in cases of possession of disproportionate assets.
- c. Private sector providers of public utility services and NGOs who receive substantial funding from the government should also be included in the Act.
- d. In addition to the penalty in criminal cases the law should provide that public servants who cause loss to the state or citizens by their corrupt acts should be made liable to make good the loss caused and, in addition, be liable for damages.
- e. Offences related to corruption viz., gross perversion of the constitution amounting to wilful violation of oath of office; abuse of authority by unduly favouring someone; obstruction of justice and squandering public money must be included in the act.

*Source: Ethics in Governance, Fourth Report, 2<sup>nd</sup> Administrative Reforms Commission, 2007*

taking a bribe, being a habitual offender or abetting an offence. The Bill seeks to amend this to cover only the offence of taking a bribe. This will lead to a higher standard of proof and thus difficult for agencies to prove the case. Currently under Section 13 of the PC Act, possession of assets disproportionate to known lawful source of income of the public servant is a criminal misconduct. Intention of the public servant is not required in disproportionate assets cases. The proposed amendment to that section has introduced the phrase 'intentionally enriching the public servant illicitly during the period of his/her office'. Such an amendment tends to introduce an element of intention in the disproportionate asset cases, thereby increasing the burden upon the anti-corruption agencies to prove in the court of law. Further, the Bill seeks to

delete the entire clause (d) of sub-section (1) of section 13. This section penalises criminal misconduct through abuse of office and other corrupt or illegal means leading to pecuniary benefit either to the public servant or any other person.

The Bill should make it mandatory to record statements at the time of trap or search before a Magistrate to eliminate the possibility of witnesses reversing their stand due to fear or temptation.

### **6. Enhanced punishment**

In the Bill, the enhanced punishment proposed for bribe taking is a minimum of three years extendable to seven years of imprisonment and a fine in addition to confiscation of proceeds of bribe from the disproportionate assets. However, there is a differentiation in punishment to commercial entities (fine only)

and persons associated with the entities (three to seven years imprisonment extendable to ten years). The Standing Committee on Law & Personnel in its report opined that the punishment prescribed for commercial entities should be in addition to that prescribed to individual associated with it and in-charge of the entity.

### **7. Confiscation of proceeds of corruption**

The Prevention of Corruption Act, at present, does not specifically provide for the seizure of bribe or assets purchased through proceeds from bribery. The Bill has provision for the attachment of property purchased through proceeds from bribery. The Bill empowers the investigating agencies to attach or confiscate such property during an on-going trial, which can later on be "forfeited" to the government if the offence is proved.

Many corrupt practices involve acquiring property in the name of others. The onus of proving that such property is not “benami” has to be on the ones in whose name it is.

Provision of UNCAC that are not covered in the bill:

- The Bill is not compliant to Article 32 & 33 of the UNCAC seeking protection of witnesses, experts & victims and of reporting persons.
- The Bill is not compliant to Article 16 of the UNCAC on bribery of foreign public officials, Article 21 – Bribery in private sector and Article 35 – Compensation for damage.

## Conclusion

The Prevention of Corruption (Amendment) Bill, 2013 amends the Prevention of Corruption Act, 1988, the rationale being that “the ratification by India of the United Nations Convention against Corruption.” Overall, the bill is proactive in its approach towards corruption and inclusion of corporates and bribe givers and thus a step in the right direction. On the other hand by introducing higher standard of proof, the proposed changes are going to dilute the effectiveness of the criminal justice response to corruption. Even after the amendment, the

anti-corruption legislation will not be comprehensive and might suffer from a few practical difficulties. The prosecution requires prior governmental sanction, which is seldom granted and there are procedural barriers and red-tapism. This has resulted in abysmally low prosecution rates in the past. The Jan Lokpal Bill can tackle these shortcomings by acting as a back-stopper to the impediments in implementation of the PCA. A comprehensive legislative reform in form of Anti-Corruption watchdog is needed to check the high levels of corruption in India.

## Action Points

- In the case of retirement or demittance of office by public servants, a limitation period of say three years should be mandatory within which cases of establishing guilty intent can be made.
- Comprehensive law dealing with all aspects of corruption aimed at fast disposal and stricter punishments should be put in place.
- Proper definitions of terms ‘corruption’ or ‘corrupt practices’ need to be given.
- Coercive bribery needs to be covered as a special case and bribe givers in such cases need not be punished.
- Taking a bribe by private sector entities should also be included in the Bill.
- Provision for compensation to those aggrieved of acts of corruption need to be there which will be in line with the provisions in the UN Convention against Corruption.
- The definition of public servant should include retired officials, in line with a provision that extends protection of sanction for prosecution to retired public servants.

## References

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