

Legislative Brief

The Prevention of Corruption (Amendment) Bill, 2013

The Prevention of Corruption (Amendment) Bill, 2013 was introduced in the Rajya Sabha on August 19, 2013.

It was referred to the Standing Committee on Personnel, Public Grievances, Law and Justice on August 23, 2013. The Committee submitted its Report on February 6, 2014.

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Highlights of the Bill

- ◆ The Prevention of Corruption (Amendment) Bill, 2013 amends the Prevention of Corruption Act, 1988.
- ◆ The Act covers the offence of giving a bribe to a public servant under abetment. The Bill makes specific provisions related to giving a bribe to a public servant, and giving a bribe by a commercial organisation.
- ◆ The Bill redefines criminal misconduct to only cover misappropriation of property and possession of disproportionate assets.
- ◆ The Bill modifies the definitions and penalties for offences related to taking a bribe, being a habitual offender and abetting an offence.
- ◆ Powers and procedures for the attachment and forfeiture of property of public servants accused of corruption have been introduced in the Bill.
- ◆ The Act requires prior sanction to prosecute serving public officials. The Bill extends this protection to former officials.

Key Issues and Analysis

- ◆ The Bill makes giving a bribe a specific offence. There are diverging views on whether bribe giving under all circumstances must be penalised. Some have argued that a coerced bribe giver must be distinguished from a collusive bribe giver.
- ◆ The Bill has deleted the provision that protects a bribe giver from prosecution, for any statement made by him during a corruption trial. This may deter bribe givers from appearing as witnesses in court.
- ◆ The Bill has replaced the definition of criminal misconduct. It now requires that the intention to acquire assets disproportionate to income also be proved, in addition to possession of such assets. Thus, the threshold to establish the offence of possession of disproportionate assets has been increased by the Bill.
- ◆ By redefining the offence of criminal misconduct, the Bill does not cover circumstances where the public official: (i) uses illegal means, (ii) abuses his position, or (iii) disregards public interest and obtains a valuable thing or reward for himself or another person.
- ◆ Under the Act, the guilt of the person is presumed for the offences of taking a bribe, being a habitual offender or abetting an offence. The Bill amends this provision to only cover the offence of taking a bribe.

PART A: HIGHLIGHTS OF THE BILL¹

Context

Currently, offences related to corrupt practices of public officials are regulated by the Prevention of Corruption Act, 1988. The Prevention of Corruption Act, 1988 covers taking a bribe, criminal misconduct and mandates prior government sanction to prosecute a public official. In 2008, an amendment Bill was introduced which included provisions related to extending prior sanction for prosecution to former public officials, and the attachment of property of corrupt public officials. However, that Bill lapsed.²

In 1999, the Law Commission of India recommended that a separate Bill related to forfeiture of property of corrupt public officials be introduced.³ In 2007, the report of the Second Administrative Reforms Commission recommended that the Act be amended to include bribe giving as an offence, limit prior sanction for prosecution to certain cases, and provide for the attachment of property of public officials accused of corruption.⁴ In 2011, India ratified the United Nations Convention against Corruption, and agreed to bring its domestic laws in line with the Convention. The UN Convention covers giving and taking a bribe, illicit enrichment and possession of disproportionate assets by a public servant as offences, addresses bribery of foreign public officials, and bribery in the private sector.⁵

The Prevention of Corruption (Amendment) Bill, 2013 was introduced in Parliament in August 2013. The Bill amends the Prevention of Corruption Act, 1988. The Bill provides for the offence of giving a bribe by individuals and organisations, extends the requirement of prior sanction for prosecution to former public officials and covers attachment and forfeiture of property. The Standing Committee examining the Bill submitted its report in February 2014.⁶

Key Features

The Bill modifies various provisions of the Prevention of Corruption Act, 1988 and adds a few new provisions such as giving a bribe, and attachment and forfeiture of property.

Table 1: Key changes proposed in the Bill compared with provisions of the Act:

	Prevention of Corruption Act, 1988	Prevention of Corruption (Amendment) Bill, 2013
Taking a bribe by a current or prospective public servant	<ul style="list-style-type: none"> ▪ Accepting or attempting to obtain any reward, other than a salary. This reward must be for doing or intending to do any official act. ▪ Accepting a reward for official acts that favour or disfavour any person. ▪ Accepting a reward from another person to exercise personal influence over a public servant. 	<ul style="list-style-type: none"> ▪ Accepting or attempting to obtain a reward for performing a public function in an improper manner. ▪ Inducing another public servant to perform his public function in an improper manner, in exchange for a reward. ▪ <u>Public function</u> is defined as one that is: i) of public nature, ii) in the course of employment, iii) to be performed impartially and in good faith. ▪ <u>Improper performance</u> includes: i) breach of a relevant expectation, ii) failure to perform a function that is a breach of an expectation. ▪ <u>Relevant expectation</u> is defined as i) a function performed in good faith, or ii) in a position of trust.
Taking a bribe by any person to influence a public servant	<ul style="list-style-type: none"> ▪ Accepting any reward from a person to induce a public servant, illegally, to favour or disfavor someone. ▪ Accepting a reward to exercise personal influence over a public servant to favour or disfavour someone. 	Not provided in the Bill.
Giving a bribe to a public servant	<ul style="list-style-type: none"> ▪ No specific provision. ▪ Covered under the provision of abetment. 	<ul style="list-style-type: none"> ▪ Offering or promising a reward to a person for making a public official perform his public duty improperly. ▪ Offering a reward to a public official, knowing that such acceptance would qualify as performing his public duty improperly.
Giving a bribe by a commercial organisation to a public servant	<ul style="list-style-type: none"> ▪ No specific provision. ▪ Covered under the provision of abetment. 	<ul style="list-style-type: none"> ▪ Offering a reward in return of obtaining or retaining any advantage in business. ▪ The person acting for the organisation and the head of the organisation are also made liable. ▪ The organisation and its head will not be held liable if it is proven that the organisation took adequate

		precautions, and the head had no knowledge of the act.
Abetment	<ul style="list-style-type: none"> ▪ A <u>public servant</u> abetting an offence related to influencing another public servant is covered. ▪ <u>Any person</u> abetting offences related to i) taking a bribe and ii) obtaining a valuable thing from a person engaged with in a business transaction is covered. 	<ul style="list-style-type: none"> ▪ Covers abetment by any person for all offences under the Act.
Criminal Misconduct by a public servant	<ul style="list-style-type: none"> ▪ Habitually taking a bribe or a valuable thing for free. ▪ Fraudulent misappropriation of property in his control. ▪ Obtaining a valuable thing or reward by illegal means. ▪ Abuse of position to obtain a valuable thing or monetary reward. ▪ Obtaining valuable thing or monetary reward without public interest. ▪ Possession of monetary resources or property disproportionate to known sources of income. 	<ul style="list-style-type: none"> ▪ Fraudulent misappropriation of property entrusted to a public servant. ▪ Intentional enrichment by illicit means and being in possession of property or resources disproportionate to known sources of income.
Habitual Offender	Habitually taking a reward to either influence a public servant or abet in the taking of a bribe.	The committing of any offence under the Act by a person who has previously been convicted.
Attachment and forfeiture of property	Not provided by the Act.	If an authorised investigating police officer believes that a public official has committed an offence, he may approach Special Judge for attachment of the property.
Prior sanction for prosecution	The prior sanction from the appropriate authority is required for prosecution of public officials.	Extends the requirement of prior sanction to former public officials, if the act was committed in their official capacity.
Protection to bribe giver from prosecution	Any statement made by a bribe giver, in a corruption trial of a public servant, would not subject him to prosecution for the offence of abetment.	Not provided by the Bill.
Penalties*:		
▪ Habitual offender	▪ Imprisonment of five years-10 years and a fine.	▪ Imprisonment of three years-10 years and a fine.
▪ Criminal Misconduct	▪ Imprisonment of four years-10 years and a fine.	▪ Remains unchanged in the Bill.
▪ Others (taking a bribe, abetment)	▪ Imprisonment of three years-seven years and a fine.	▪ Imprisonment of three years-seven years and a fine.

*Note: The table reflects the amendments made to the Prevention of Corruption Act, 1988 by the Lokpal and Lokayuktas Act, 2013 in December 2013.

Sources: Prevention of Corruption Act, 1988; Lokpal and Lokayuktas Act, 2013; Prevention of Corruption (Amendment) Bill, 2013; PRS.

PART B: KEY ISSUES AND ANALYSIS

The inclusion of giving a bribe as a specific offence under the Bill

Bribe giving under all circumstances to be criminalised

Under the principal Act, a bribe giver may be penalised for abetting in the offence of taking a bribe. Under the Bill, giving a bribe, directly or through a third party, is made an offence.

Several experts have examined the issue of whether bribe giving under all circumstances should be made an offence under the principal Act. The UN Convention states that giving a bribe, either directly or indirectly, should be made a punishable offence.⁷ India has ratified this Convention.⁵

The report of the Second Administrative Reforms Commission has recommended that the Prevention of Corruption Act must distinguish between coercive and collusive bribe givers.⁴ The Standing Committee examining the Bill has observed that individuals who report the matter to the state after the payment of a bribe in normal circumstances may be distinguished from those who pay a bribe in compelling emergent situations. While in the former case no protection is necessary, in the latter situation the court may take a decision based on facts and circumstances of the case.⁶ An argument has also been made that giving immunity to a 'harassed bribe giver' would incentivise him to report the incident.⁸

Act: Clauses
12, 24

Bill: Clause
3

Protection for bribe givers appearing as witnesses removed

Act: Clause
24

Under the principal Act, during a corruption trial, if a person makes a statement that he gave a bribe it would not be used to prosecute him for the offence of abetment. The Bill omits this provision. This may deter bribe givers from appearing as witnesses in cases against public officials.

Certain offences in the Act that have been modified by the Bill

Establishing of intention for possession of disproportionate assets

Act: Clause
13 (e)

Under the principal Act, the offence of possessing disproportionate assets would require establishing the existence of disproportionate monetary resources or property in the public servant's possession.

Bill: Clause
6

The Bill modifies this provision. To establish that the public servant had disproportionate assets, two things would have to be proven: i) the possession of monetary resources or property disproportionate to his known sources of income, and ii) the intention of the public servant to enrich himself illicitly. Thus, by requiring that, in addition to the existence of disproportionate assets, the intention of the public servant to acquire disproportionate assets also be established, the Bill is raising the threshold for proving the offence.

The Standing Committee has observed that the inability of the public servant to reasonably explain the source of the disproportionate assets should be sufficient for prosecution. The Committee has recommended that the element of 'intention' be removed from the Bill.⁶

Certain offences related to criminal misconduct not addressed

Act: Clause
13 (1) (d)

Under the principal Act, criminal misconduct by a public servant includes: i) using illegal means to obtain any valuable thing or monetary reward for himself or any other person; ii) abusing his position as a public servant to obtain a valuable thing or monetary reward for himself or any other person; and iii) obtaining a valuable thing or monetary reward without public interest, for any person.

Bill: Clause
6

The Bill redefines criminal misconduct by a public servant to only include: i) fraudulent misappropriation of property under one's control, and ii) intentional illicit enrichment and possession of disproportionate assets. In doing so, the Bill no longer covers the three circumstances provided for in the principal Act.

The burden of proof on accused person only for taking a bribe

Act: Clause 20
(1)

The principal Act contains a provision that transfers the burden of proof on the person facing trial for offences related to: i) taking a bribe, ii) being a habitual offender and iii) for abetting an offence. It states that if it is proved that the person has accepted or given any reward, it shall be presumed that such reward was a bribe. Under the principal Act, giving a bribe is penalised under the offence of abetment.

Bill: Clause
11

The Bill amends this provision. Under the Bill, the burden of proof is transferred to the accused person only for the offence of taking a bribe. In this case, he would have to establish that the reward that he obtained was not a bribe. But for offences related to: i) being a habitual offender, ii) abetment, and iii) giving a bribe, it will not be presumed that he committed the offences, but would require the prosecution to establish the same.

Trivial rewards not exempt

Act: Clause
20 (2)

Under the principal Act, if the reward obtained by the public servant is considered as 'trivial' by the court, then it shall not be presumed as an act of corruption. The Bill deletes the provision related to a 'trivial' reward.

Obtaining a valuable thing from a person related to business dealings not covered

Act: Clause
11

The principal Act penalises a public servant who accepts or obtains a valuable thing for little or no cost, from a person whom he is engaged in business transaction with or knows officially. The Bill has deleted this provision.

Recommendations of the Standing Committee

The Standing Committee examining the Bill has made some recommendations:⁶

- The provision that includes the requirement of proving intention of public servant, in a disproportionate assets case against him must be removed. The inability of the public servant to explain the source of his disproportionate assets should be sufficient for prosecution.

- The minimum punishment for habitual offenders must be enhanced from three to five years extendable to 10 years. This would ensure parity with the Lokpal and Lokayuktas Act, 2013. The time line for trial of corruption cases should be prescribed as provided for in Lokpal and Lokayuktas referred cases.
- There is a differentiation in punishment to commercial entities (fine only) and persons associated with the entities (three to seven years imprisonment, extendable to 10 years). The punishment prescribed for commercial organisations should be in addition to that prescribed to individuals in charge of the organisation.
- The definitions of ‘corruption’ and ‘corrupt practices’ must be included in the Bill. Further, 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.
- The government must formulate rules and regulations to ensure that chances of coercive bribery are reduced. Laws like the Right of Citizens for Time bound Delivery of Goods and Services Bill, 2011 and The Whistle Blowers Protection Bill, 2011 should be enacted. This would address concerns of persons forced to give bribes to access services from the state, and encourage them to report acts of corruption respectively. [The Whistleblowers Protection Bill, 2011 has been enacted.]

Recommendations of the 2nd Administrative Reforms Commission

In 2007, the 2nd Administrative Reforms Commission (ARC) made certain recommendations related to the Prevention of Corruption Act, 1988, which have not been incorporated in the Bill.⁴

Table 2: Recommendations of the 2nd ARC not included in the Bill

Issue	4 th Report of the 2 nd ARC
Offences related to corruption	The following offences must be included in the Act: <ul style="list-style-type: none"> ▪ Gross perversion of the Constitution amounting to willful violation of oath of office; ▪ Abuse of authority by unduly favouring someone; ▪ Obstruction of justice; ▪ Squandering public money.
Bribery	The Act must provide for a special offence called ‘collusive bribery’, by the public servant and the beneficiary of the decision. The punishment should be double than that of other cases of bribery.*
Prior sanction for prosecution	<ul style="list-style-type: none"> ▪ 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.
Private sector institutions/NGOs	<ul style="list-style-type: none"> ▪ Private sector providers of public utility services should be included in the Act. ▪ NGOs who receive substantial funding from the government should also be covered.

*Note: The Bill makes giving a bribe an offence with penalty equivalent to that of taking of a bribe. However, it does not distinguish between ‘collusive’ and ‘coercive’ bribe giving.

Sources: ‘Ethics in Governance’, Fourth Report, 2nd Administrative Reforms Commission, 2007; The Prevention of Corruption (Amendment) Bill, 2013; PRS.

Comparison with the UN Convention and laws of different countries

The UN Convention against Corruption

According to the Statement of Objects and Reasons of the Bill, the amendments to the Act were introduced to bring it in line with the UN Convention against Corruption.⁹ However, certain provisions of the Convention have not been included in the Bill.

Table 3: Provisions of the UN Convention that are not covered in the Bill

	UN Convention	The PCA Bill, 2013
Bribery of foreign public officials	Criminalises giving a bribe to a foreign public servant to obtain or retain business.	Not covered in this Bill. Proposed in The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill, 2011, which lapsed with the dissolution of the 15 th Lok Sabha.
Bribery in the private sector	Includes giving and taking a bribe by the private sector entity.	The Bill does not cover taking a bribe by private sector entities.
Compensation for damage	Those who have suffered damage as a result of an act of corruption have a right to obtain compensation against those responsible for that damage.	The Bill does not provide for compensation to those aggrieved of acts of corruption.

Sources: UN Convention against Corruption, 2003; The Prevention of Corruption (Amendment) Bill, 2013; PRS.

Anti corruption laws in different countries

Different countries address corruption related offences either through their criminal laws or through separate laws at the national level. Broadly, they include provisions related to giving and taking a bribe. Table 4 presents the position of law across different jurisdictions.

Table 4: International comparison of anti corruption laws

	UK	USA	Germany	Canada	France
Entities covered	Applies to individuals in public service and other individuals.	Applies to public officials.*	Applies to public officials and other individuals engaged in commercial practice.	Applies to public servants only.	Applies to public officials and other persons in the course of employment.
Giving a bribe	Covers giving of a bribe by a person to any other person.	Covers giving of a bribe to public officials.	Covers giving of a bribe to a public official, and in commercial practice.	Covers giving of a bribe to public officials.	Covered under the offence of 'active corruption'.
Taking a bribe	Covers taking of a bribe by a person to any other person.	Covers taking of a bribe by public officials.	Covers taking of a bribe by a public official, and in commercial practice.	Covers taking of a bribe by public officials.	Covered under the offence of 'passive corruption'.
Disproportionate assets	No specific provision.	Covers embezzlement of property or thing above a certain value.	Hiding unlawfully obtained financial benefits is covered.	No specific provision.	No specific provision.
Prior sanction for prosecution	Consent to prosecution to be taken for all persons, and for all offences.	No specific provision.	In commercial practice cases, request for prosecution to be made, unless prosecuting officer considers it necessary.	Consent of Attorney General for initiating proceedings against a Judicial officer.	No specific provision.

Note: * Private commercial bribery in the US is generally addressed at the state level.

Sources: **UK**: Bribery Act, 2010; **USA**: US Code, Section 201, 666; **Germany**: German Criminal Code, 1998; **Canada**: Criminal Code, 1985; **France**: French Penal Code; PRS.

Notes

1. This Brief has been written on the basis of the Prevention of Corruption (Amendment) Bill, 2013 which was introduced in the Rajya Sabha on August 19, 2013. The Bill was referred to the Standing Committee on Personnel, Public Grievances, Law and Justice, which submitted its report on February 6, 2014.
2. The Prevention of Corruption (Amendment) Bill, 2008.
3. The Corrupt Public Servants (Forfeiture of Property) Bill, 166th Report, Law Commission of India, February 1999.
4. 'Ethics in Governance', Fourth Report, Second Administrative Reforms Commission, January 2007.
5. United Nations Convention Against Corruption, United Nations Office on Drugs and Crime, United Nations, 2004.
6. Prevention of Corruption (Amendment) Bill, 2013, 69th Report, Standing Committee, Rajya Sabha.
7. Article 15, Bribery of National Public official, United Nations Convention Against Corruption.
8. 'Why for a class of bribes, the act of giving a bribe should be treated as legal', Kaushik Basu, Chief Economic Adviser, Ministry of Finance, 2011.
9. Statement of Objects and Reasons, Prevention of Corruption (Amendment) Bill, 2013.

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