

ARTICLES

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PARLIAMENT TIGHTENS THE NOOSE ON CORRUPTION!

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- No pardon for bribe-givers - if found guilty, liable for imprisonment and fine.
- Private entities (commercial organizations) and their directors, managers, secretaries or other officers brought within the radar of the new Bill
- Punishment for taking bribes increased to a minimum of (3) three years to a maximum of (7) seven years.
- Investigating police officers are empowered to confiscate property and money obtained through illicit means.
- Trial of offences to be held on a day to day basis and endeavor shall be made to conclude it within two years.

As India continues in its arduous path of shedding its image of corruption, both houses of Parliament finally passed the long pending Prevention of Corruption (Amendment) Bill, 2013 (“**Bill**”) last week.¹ This Bill attempts at making a conscious move towards a matured Indian anti-corruption law in consonance with the United Nation Convention Against Corruption (“**UNCAC**”)² of 2011, but fails to address several issues. The Bill awaits Presidential assent.

In an expected move, the Bill extends the scope of the Prevention of Corruption Act, 1988 (“**PCA**”) to prosecute bribe-givers, commercial organizations and its officials. These amendments are introduced with the aim to reduce corruption and keeping a tighter check not only on the public officials but also on the bribe-giver, who escaped liability till date. Despite best efforts, the Bill raises certain significant concerns which are dealt in detail below.

KEY AMENDMENTS TO THE PCA

With corruption being long recognized as a blight on the vibrancy of the Indian economy, the earlier Government rightly sought to amend the PCA and introduced the Bill in Rajya Sabha in 2013. Given the importance of the amendments, the Bill was referred to a Committee on Personnel, Public Grievances, Law and Justice (“**Standing Committee**”)³ and Law Commission of India (“**LCI**”)⁴. The Bill, as passed by both houses of Parliament will now introduce the following key changes to the PCA:

1. Giving bribe is now an offence⁵ (Section 8-Offence relating to bribing of a public servant)

- The PCA invited severe criticism due to the implied immunity granted to bribe givers inconsistent with international standards, including the UNCAC. Prior to the Bill, prosecution of bribe givers was possible only if a case of '*abetment of offences*' could be established under the PCA read with provisions of the Indian Penal Code, 1860, though instances of such prosecution has been fairly limited. The immunity granted in terms of section 24 of the PCA has now been deleted.⁶
- The Bill extends its scope to those who give or promise to give undue advantage to a person with an intent to induce or reward a public servant to perform their '*public duty*' '*improperly*'. Explicit provision on this is aimed at creating an effective deterrent to private parties (*including companies and their officers*) engaging in corrupt practices. Such offence would be punishable with the maximum imprisonment for a period of seven years and / or fine. While performance of '*public duty*' '*improperly*' has been made an offence, both expressions have not been defined and are a departure from the PCA. It is significant to note that the PCA, even in its present form makes no specific distinction between '*facilitation payments*' and other forms of bribery. Thus, any undue advantage including facilitation payments to public servants is prohibited by the PCA.
- The Bill does however grant immunity from prosecution in favour of those who are compelled to give such undue advantage provided such persons report the matter to the law enforcement authorities within seven days from the date of giving the undue advantage.⁷ The Bill seeks to distinguish between those pressured by the system to offer bribes and those intentionally seeking to engage in corrupt practices.

Comment: This amendment is to be seen in light of the newly introduced section 9 (discussed below), which prosecutes commercial organisations and individual officers for offences committed by any 'person associated with such commercial organisations', potentially exposing the commercial organization and directors of such commercial organization to criminal liability without any wrongdoing.

Supply side prosecution was imperative to bring our anti-corruption laws in consonance with international standards and act as a deterrent for private persons who bribed with impunity. However, the ambiguity on the aspect of *'improper discharge of public duty'*, could pose more concerns and abuse of the process and cause for concern leading to protracted litigation. Given that recently the Supreme Court of India ("**Supreme Court**") has expanded the scope of *'public official'*⁸, clarifications in respect of these key expressions would have provided much needed certainty. This is particularly important considering non-compliance or a violation attracts criminal prosecution. Therefore, it is imperative to have objective standards for the expression 'improperly'. The expression 'public official', although defined in the PCA required clarification in light of Supreme Court's ruling and to negate possibility of expansion of private entities which are in collaborative projects with government / state owned enterprises.

2. Commercial organizations now liable for prosecution⁹, (Section 9- Offences relating to bribing a public servant by commercial organization)

- The Bill grants authorities the power to prosecute commercial organizations *'if any person associated with such commercial organizations gives or promises to give any undue advantage to a public servant...'*
- 'Commercial Organizations' have been defined to include bodies, partnerships or any other association of persons incorporated within and outside India which carry on at least a part of their business in India.
- If any director, manager, secretary or other officer of the concerned commercial organization is proven to have consented and / or connived to commit the said offence, such officer would be punishable with imprisonment for a term not less than three years and extendable to seven years and also liable to fine.
- Any person would be said to be associated with the commercial organization if, independent of ingredients of offence in Section 9(1) of the Bill, such person performs services for or on behalf of the commercial organization.

- As per the Bill, it shall be a valid defense for the commercial organization if it is able to prove that it had '*adequate procedures*' in place.

Comment: The impact of these provisions would be far reaching considering that Directors and officers of the company can be sued for acts of the commercial organisations leading to consequential confiscation of property. India, unlike other jurisdictions has faced severe criticisms for abuse of the process despite laws being in place, therefore such provisions could lead to harassment for individuals within companies even if not responsible/involved in the illegal act. It also potentially defeats the principle of 'corporate veil' and hence requires safeguards to be put in place before implementation of these provisions to avoid harassment of professionals. While the provision contemplates prosecution of an individual if the offence under the Bill is '*proved in the court to have been committed with the consent or connivance*' of any director, as a matter of practice, investigating authorities ordinarily do not prosecute companies without making a director a party as well. Consequently, innocent directors / officers could be prosecuted and subject to investigation.

While the Bill does enable the Central Government to prescribe guidelines to be put in place for compliance by such an organization, absence of guidelines at present could lead to considerable uncertainty to determine what would be seen as '*adequate procedures*' and considerable subjectivity in the enforcement of the statute. This could also lead to Directors and officers of commercial organizations extremely vulnerable to prosecution under the Bill and face consequences at the hands of law.

The companies need to introduce compliance programmes, manuals and guidance notes to ensure that employees and consultants are adequately educated about obligations under the Bill, as done in other developed jurisdictions. Failure to do so might exacerbate liabilities under the Bill.

The UK Bribery Act's Six Principles provide an outline for an anti-corruption compliance system that establishes '*adequate procedures*' to prevent a person from bribing on the company's behalf including: *proportionality, tone at the top, risk assessment, due diligence, communication, monitoring and review*, used as a valid defence. India needs to follow the

path without any further delay and publish guidelines to determine the adequacy of 'procedures'.

3. Prior permission to be sought before initiating investigation and prosecution of serving and retired public officials¹⁰ and scope of criminal misconduct restricted. (Section 17A- Introducing new provision on enquiry or inquiry or investigation of offences related to recommendations made or decisions taken by public servant in discharge of duties)

- Considering the sensitive nature of a public servant's role, the Bill makes it mandatory for police officers to seek prior approval before conducting an enquiry into any offence committed by incumbent and retired public servants. The approval would have to be sought from the relevant union or state government in whose employment the accused "*public servant*" committed the offence in discharge of his official functions and duties. The introduction of such provisions are in accordance with other jurisdictions which require prior sanction for all offences and for all persons.
- While the Bill binds such approving authority to pass its decision within three months, further extendable by a month, this may dilute the power of investigating authorities from effectively prosecuting guilty officials.
- However, such prior sanction would not be required in the cases of arrest of officials caught 'red-handed' accepting or attempting to accept any undue advantage for himself or for any other person.
- With a view to protect honest public servants, the Bill has sought to restrict the scope of offences proposed to be covered under the PCA by identifying 'criminal misconduct'.¹¹ This restricted definition no longer takes into account, previously covered grounds such as disregarding public interest, abusing his / her position, using illegal means, etc.¹² The element of criminal intent is added to lend more objectivity to enforcement.

Comment: Requirement of prior sanction for retired public officials and change of scope of 'criminal misconduct' would encourage retiring bureaucrats to take faster decisions and the checks and balances introduced in the amendment should protect such public officials.

4. Attachment of tainted property (Section 18A – Provisions of Criminal Law Ordinance, 1944 to apply)

The Bill seeks to add a new chapter - Chapter IV A to the PCA, which grants the power to attach property, confiscate money or property and administrate property tainted by corrupt activities as defined under the Bill. The provisions of the Criminal Law Amendment Ordinance, 1944 is now applicable to such attachment proceedings. Earlier, tainted property could be attached through measures under anti-money laundering laws.

Comment: It was important to streamline proceedings and avoid multiple enforcement mechanisms. Based on suggestions and recommendations from LCI on adopting attachment mechanism under the Prevention of Money Laundering Act, 2002 ('PMLA'), or the Lokpal and Lokayukta Act, 2013 or the Criminal Law Ordinance, the Bill has introduced the new chapter to help authorities recover proceeds of crime expeditiously. It may also be possible that victims of such crimes can seek restorative justice.

5. Time limit for trial (Section 4 (4))¹³

The Bill now requires trial of offences to be held on a day to day basis and endeavor to conclude it within two years.

Comment: A time bound trial would certainly help expedite the process of effective prosecution and would act as a powerful deterrent for habitual offenders.

ANALYSIS: MISSING THE BUS!

While this Bill certainly marks an epoch in India's fight against corruption, the reality of corruption in the country seems to be far more complicated and deep rooted than what this Bill hopes to cure. The Bill will raise significant concerns to be addressed in the absence of any clarity on the newly introduced provisions. With its catalytic statute being the UNCAC, the Bill is the result of a series of amendments and revisions to the original text of the Bill as introduced in the Lok Sabha in 2013. After a series of recommendations, further amendments to the Amendment Bill were circulated in Parliament in November, 2015. However, the Bill fails to reflect certain key provisions of the UNCAC:

- The Bill does not provide for prosecution of corrupt practices amongst private entities such as payments made beyond a contract, or payments made to fraudulently secure contracts in the private sector which could have far reaching impact on public interest. The UNCAC and most matured jurisdictions have legislated for prosecution of private parties for illegal gratification such as making or accepting payments beyond a contract or fraudulent payments made to secure contracts, as well.
- Further, contrary to more matured jurisdictions like US and UK dealing with bribery of foreign public officials, the Bill does not recognize illegal gratification paid to foreign government officials or official of a public international organization. This has been an obvious departure from the UNCAC which specifically prohibits giving undue advantage to any foreign public official or official of a public international organization.
- The Bill fails to clarify an important expression - 'public duty' and does not define 'improperly' leading to ambiguity and scope for misuse. The clarification was particularly required in the context of private enterprises being engaged in large infrastructure and public-private-partnership projects. The absence of a certainty with respect to 'improperly' could expose public servants and employees and directors of private companies to investigation and prosecution under the Bill.
- India's corruption laws fail to include preventive anti-corruption policies and practices. Although the new Bill provides for '*adequate procedures designed to prevent persons associated with it from undertaking such conduct*' as being a valid defense, compliance guidelines setting precedent for what may constitute as 'adequate procedures' to escape prosecution for bribery is absent in the Bill and the Statement of Objects and Reasons as to what would constitute 'adequate procedure'.
- The Lokpal and Lokayukta Act ("**Lokpal Act**") enacted in 2013 with a view to kick start India's fight against corruption. Based on news articles, we note that till date the anti-corruption ombudsman has not been appointed. Pending appointment of the Lokpal and Lokayukta, practical and effective implementation of the Bill may be stunted.

- It may also be worth revisiting the practical effectiveness of granting leniency to those compelled to give undue advantage. Those so 'compelled' are unlikely to be in a position to take the risk of coming forward to report such corrupt government officials. In the absence of safety being accorded or a viable protection mechanism in place, it would be not be hard to imagine a situation where the distinction between those compelled and those truly corrupt is blurred beyond recognition and causing severe abuse of the process.
- In contrast to the UNCAC¹⁴ the Bill does not include any provisions dealing with the right of an aggrieved party to seek compensation / damages for loss caused due to corrupt practices. Government would do well to have a mechanism to ensure that no claims under bilateral investment treaties are made against India.
- It remains to be seen whether the objectivity in relation to enforcement against public servants and protection of retired public servants encourages bureaucrats to bold decisions and expedite the decision-making process. It will be interesting to see these provisions being applied as it comes in the backdrop of the CBI filing a charge-sheet against current and former bureaucrats in relation to foreign investments approved nearly a decade back. With its stringent provisions on prosecution of private persons, corporate organizations and attachment of tainted property and money, the Bill could act as an effective deterrent for habitual offenders and enablers of corruption, if implemented and used in the right manner.

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