



## **ANALYSIS OF THE PREVENTION OF CORRUPTION (AMENDMENT) BILL, 2013 WITH SPECIAL REFERENCE TO INVESTIGATION AND SANCTION**

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The Prevention of Corruption Act, 1988 (hereinafter referred to as the PC Act) was enacted to make anti-corruption laws more effective. The Law Commission of India in its 166th Report submitted on 4<sup>th</sup> February, 1999 recommended for enactment of a separate law providing for forfeiture of property acquired by the public servant through corrupt means and the Committee on Civil Services Reforms (Hota Committee), submitted its report in July, 2004 which recommended to make the administration of Civil Services more transparent and accountable. Keeping in view the recommendations of the Law Commission of India and the Committee on Civil Services Reforms (Hota Committee), it was proposed to amend the said PC Act.

Therefore, The Prevention of Corruption (Amendment) Bill, 2008 was introduced in the Lok Sabha on December 19, 2008. While The Prevention of Corruption Act, 1988 covers taking a bribe, criminal misconduct and mandates prior government sanction to prosecute a public official. The Prevention of Corruption (Amendment) Bill, 2008 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.

In May, 2011 India signed the United Nations Convention against Corruption, in order to fulfill its international obligations India introduced The Prevention of Corruption (Amendment) Bill, 2013 (hereinafter referred to as the Bill) was introduced in the Rajya Sabha on 19th August 2013 to amend the PC Act, 1988.

The Statement of Objects and Reasons of the Bill states as follows:

The Prevention of Corruption Act, 1988 provides for prevention of corruption and for matters connected therewith. The ratification by India of the United Nations Convention Against Corruption, the international practice on treatment of the offence of bribery and corruption and judicial pronouncements have necessitated a review of the existing provisions of the Act and the need to amend it so as 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 aforesaid Convention. Hence, the present Bill.<sup>1</sup>

The Bill provides for the offence of giving a bribe by individuals and organizations; extends the requirement of prior sanction for prosecution to former public officials; and covers attachment and forfeiture of property.

### **Salient Features of the Proposed 2013 Bill**

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

#### **➤ Giving of a bribe**

The Bill introduces a new provision related to the offence of giving of a bribe to a public servant. Under the Bill, the requirement is that the bribe giver:

- (i) Offers any advantage to another person in return for inducing or giving a reward to a public official for improper performance of his public function,
- (ii) Offers any advantage to a public official, knowing that such acceptance would in itself qualify as improper performance of his function.

The punishment for giving of a bribe is imprisonment ranging from three to seven years and a fine.<sup>2</sup>

Under the Prevention of Corruption Act, 1988 there was no provision as such for bribe giver; they were covered under the provisions of Abetment given in Section 12<sup>3</sup> and Section 24<sup>4</sup> of the Prevention of Corruption Act, 1988.

Section 12 of the PC Act provides punishment for abetment of a bribe giver with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine but Section 24 of the PC Act gives protection to the bribe giver, that the statement made by the bribe giver against a public servant for an offence under

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<sup>1</sup>*The Prevention Of Corruption (Amendment) Bill, 2013*, (April 16,2017),<http://www.prsindia.org/administrator/uploads/general/1376983957~~PCA%20Bill%202013.pdf>

<sup>2</sup> Clause 3 of the Prevention of Corruption (Amendment) Bill, 2013

<sup>3</sup> It reads as "Punishment for abetment of offences defined in section 7 or 11.—Whoever abets any offence punishable under section 7 or section 11 whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine."

<sup>4</sup> It reads as "Statement by bribe giver not to subject him to prosecution.- Notwithstanding anything contained in any law for the time being in force, a statement made by a person in any proceeding against a public servant for an offence under sections 7 to 11 or under section 13 or section 15, that he offered or agreed to offer any gratification (other than legal remuneration) or any valuable thing to the public servant, shall not subject such person to a prosecution under section 12."

the PC Act, that the bribe giver offered or agreed to offer any gratification (other than legal remuneration) or any valuable thing to the public servant, shall not subject such person to a prosecution under section 12. Thus the bribe giver is absolved completely in such cases.

But The Prevention of Corruption (Amendment) Bill, 2013 provides 'bribe giving' under all circumstances to be criminalized. The Standing Committee examining the Bill has observed that there may be circumstances where an individual is compelled to give bribe and he needs protection in that case. So that when the Court is deciding cases with respect to the liability of the bribe giver, the Court may keep in mind the facts and circumstances of each case.<sup>5</sup>

➤ **Certain offences related to criminal misconduct not addressed:**

Under the Prevention of Corruption Act, 1988 criminal misconduct by a public servant includes:<sup>6</sup>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.

Clause 6 of 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<sup>7</sup> provided for in the Prevention of Corruption Act, 1988.

➤ **Liability of Corporation**

The Bill for the first time introduces direct offence relating to the liability of the Corporation. Clause 8 of the 2013 Bill criminalizes the commercial organization's act of bribing a public servant; the proviso to section 8 of the 2013 Bill clarifies that "when the offence under this section has been committed by a commercial organization, such commercial organizations shall be punishable with fine." Clause 9 of the Bill on the other hand, holds a commercial

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<sup>5</sup>The Prevention of Corruption (Amendment) Bill, 2013 and proposed 2015 amendments, (April 24,2017), [http://www.prsindia.org/uploads/media/Corruption/LB-%20Prevention%20of%20Corruption%20\(A\)%20Bill%202013%20-%202015%20amendments.pdf](http://www.prsindia.org/uploads/media/Corruption/LB-%20Prevention%20of%20Corruption%20(A)%20Bill%202013%20-%202015%20amendments.pdf)

<sup>6</sup> Section 13 (1) (d) of the Prevention of Corruption Act, 1988

<sup>7</sup>Section 13(1) (d) if he,—

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

organization liable for failure to prevent persons associated with it from bribing a public servant to obtain/retain business or an advantage in the conduct of business for such commercial organization. But it shall be a defense for the commercial organization if it successfully proves that it had adequate procedure to prevent person associated with it from bribe giving.

The term 'commercial organization' here includes all forms of enterprise in India as well as those incorporated outside India but engage in business in India. The Bill also provides that when a commercial organization is in contravention with the PC Act, 1988 the key personnel running the organization at that time will also be guilty of the offence - and liable to a minimum imprisonment of three years, extendable to seven years, as well as fine. The only defense for a company here is potentially to be able to show that the company has adequate measures in place to prevent such misconduct and, as such, the person bribing is a rogue employee.<sup>8</sup>

#### ➤ **Burden of Proof**

The Prevention of Corruption Act, 1988 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.<sup>9</sup>

Clause 11 of 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

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<sup>8</sup>*Prevention of Corruption Act (Amendment) Bill, 2013*, (April 23, 2017), <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-fa-pca-amendment-bill-2013-noexp.pdf>

<sup>9</sup> Section 20 of the Prevention of Corruption Act, 1988, It reads as "Presumption where public servant accepts gratification other than legal remuneration-

(1) Where, in any trial of an offence punishable under section 7 or section 11 or clause

(a) or clause (b) of sub-section (1) of section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(2) Where in any trial of an offence punishable under section 12 or under clause (b) of section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7, or as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no interference of corruption may fairly be drawn.

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.

### **Provision relating to Investigation**

The 2013 Bill was referred to the Standing Committee on Personnel, Public Grievances, Law and Justice on 23rd August 2014, and the Committee submitted its report on 6th February 2014. Subsequently, on 12th November 2014, an informal and improved version of the 2013 Bill was circulated as “2014 amendment” and approved at a Cabinet meeting, based on the recommendations of the Standing Committee.

#### **➤ Insertion of Section 17A**

The proposed Section 17A of the Prevention of Corruption Bill proposed to introduce 17 A,<sup>10</sup> introduced pursuant to the 2014 amendment, provides for investigation of offences relating to recommendations made or decision taken by a public servant in the discharge of their official duties. This section is proposed to be inserted after Section 17<sup>11</sup> of the Prevention of Corruption, 1988 and provides for “*previous approval to be taken from the Lokpal or the Lokayukta, as the case may be, where the alleged offence is relating to any recommendation made or decision taken by a public servant in the discharge of his official functions or duties.*”<sup>12</sup>

This Section talks about taking previous approval from Lokpal or the Lokayukta in order to investigate into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relating to any recommendation made or decision taken by a public servant in the discharge of his official functions or duties.

But the proviso to the section provides that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue financial or other advantage for himself or for any other person in consequence of

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<sup>10</sup> It reads as “Investigation of offences relating to recommendations made or decision taken by public servant in discharge of official functions or duties.

(1) No police officer shall conduct any investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relating to any recommendation made or decision taken by a public servant in the discharge of his official functions or duties, without the previous approval-

(a) of the Lokpal, in the case of a public servant who is employed, or as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of the Union, and is a person referred to in clauses (a) to (h) of sub-section (1) of section 14 of the Lokpal and Lokayuktas Act, 2013;

(b) of the Lokayukta of the State or such authority established by law in that State under whose jurisdiction the public servant falls, in the case of a person who is employed, as the case may be, was at the time of commission of the alleged offence employed in connected with the affairs of a State.”

<sup>11</sup> Persons Authorized to Investigate

<sup>12</sup> Section 17A(1) of the Prevention of Corruption Bill, 2013

which a relevant public function or activity shall be performed improperly either by himself or by another public servant.

This proposed section extends the requirement of “previous approval” to public servants who are or were in service at the time of the alleged offence. This is in line with the provisions of section 197 Cr.P.C<sup>13</sup> and the scheme of Section 14 of the Lokpal Act.<sup>14</sup>

**Table 1**

<b>Basis of Distinction</b>	<b>Prevention of Corruption Act, 1988</b>	<b>Prevention of Corruption (Amendment) Bill, 2013</b>
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.

This table 1 shows that under The PC Act, 1988 at present does not specifically provide for the seizure of bribe or assets purchased through proceeds from bribery. Clauses 18 A to 18 N of the Bill now empowers the investigating agencies to attach (or confiscate) such property during an ongoing trial, which can then be “forfeited” to the government if the final judgment from a court is one of conviction.

However, they are bound to create confusion given that separate procedures for attachment and forfeiture in cases of corruption of public servants are covered under the following three laws:

<sup>13</sup> It reads as “Prosecution of Judges and public servants.

(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.

<sup>14</sup> It reads as “(1) Subject to the other provisions of this Act, the Lokpal shall inquire or cause an inquiry to be conducted into any matter involved in, or arising from, or connected with, any allegation of corruption made in a complaint in respect of the following, namely:-

(a) any person who is or has been a Prime Minister:

Provided that the Lokpal shall not inquire into any matter involved in, or arising from, or connected with, any such allegation of corruption against the Prime Minister,—

(i) in so far as it relates to international relations, external and internal security, public order, atomic energy and space; (ii) unless a full bench of the Lokpal consisting of its Chairperson and all Members considers the initiation of inquiry and at least two-thirds of its Members approves of such inquiry: Provided further that any such inquiry shall be held in camera and if the Lokpal comes to the conclusion that the complaint deserves to be dismissed, the records of the inquiry shall not be published or made available to anyone.

- a. The Criminal Law (Amendment) Ordinance 1944;<sup>15</sup>
- b. Prevention of Money Laundering Act, 2002 (“hereinafter referred to as the PMLA”);
- c. The Lokpal and Lokayukta Act, 2013.

Hence, it might be better suited to replace the proposed Clauses 18A to 18N with a single provision referring to the forfeiture and attachment procedures in the PMLA or the Criminal Law Ordinance of 1944 would apply according to the facts and circumstances of each case.

However, there may be some practical difficulties in the adoption of the PMLA procedure in cases investigated and prosecuted by State Government agencies such as the State Police, State Anti-Corruption Bureaus etc. It may not be desirable to load the Enforcement Directorate, the Adjudicating Authority and the Appellate Tribunal with thousands of cases under the Prevention of Corruption Act all over the country as an exclusive forum for handling matters relating to attachment and forfeiture of property.<sup>16</sup>

Further, the reach of the 1944 Ordinance is slightly different than that of the PMLA in as much as the Ordinance enables the filing of application for attachment by the Appropriate Government merely on the belief that any person has committed a scheduled offence and the said person has procured money or other property by means of the offence, whether or not any court has taken cognizance of the offence.<sup>17</sup>

PMLA on the contrary enables provisional attachment where the Director or authorized Deputy Director believes that any person is in possession of any proceeds of crime (not necessarily the person who committed the crime) and such proceeds are likely to be concealed, transferred, etc. which may result in frustrating any proceedings for confiscation of such proceeds. PMLA requires that an order for provisional attachment cannot be passed by the Director or authorized Deputy Director unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under Section 173 of the Cr.P.C. or a complaint

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<sup>15</sup> Section 3 of the Ordinance reads as “Application for attachment of property: (1) Where the [State Government or, as the case may be, the Central Government], has reason to believe that any person has committed (whether after the commencement of this Ordinance or not) any scheduled offence, the State Government or, as the case may be, the Central Government may, whether or not any Court has taken cognizance of the offence, authorise the making of an application to the District Judge within the local limits of whose jurisdiction the said person ordinarily resides or carries on business, for the attachment, under this Ordinance of the money or other property which the [State Government or, as the case may be, the Central Government] believes the said person to have procured by means of the offence, or if such money or property cannot for any reason be attached, or other property of the said person of value as nearly as may be equivalent to that of the aforesaid money or other property.”

<sup>16</sup> The Prevention of Corruption (Amendment) Bill, 2013, (April 23,2017),  
[http://lawcommissionofindia.nic.in/reports/report\\_no.254\\_prevention\\_of\\_corruption.pdf](http://lawcommissionofindia.nic.in/reports/report_no.254_prevention_of_corruption.pdf)

<sup>17</sup> *ibid*

has been filed by a person authorized to investigate the offence before a Magistrate or court for taking cognizance of the scheduled offence.<sup>18</sup>

Recommendations by the Rajya Sabha Committee on Forfeiture and Attachment:

- Offering of equivalent security in lieu of attachment of ill-gotten property by the accused<sup>19</sup> may force the accused to under value the attached property.
- Providing certain sum/interest from the attached property to the alleged public servant for the maintenance of his/her family or meet litigation expenses as proposed under Section 18 H (1) will go against the spirit of the law.
- Investigating Officer (IO) of anti corruption agencies like CBI, Anti Corruption Bureau (ACB) may be given power from the head of that investigating agency to attach the property of the alleged accused public servant as has been given to officers of the Enforcement Directorate under the Prevention of Money Laundering Act.

**Table 2**

<b>Basis of Distinction</b>	<b>Prevention of Corruption Act, 1988</b>	<b>Prevention of Corruption (Amendment) Bill, 2013</b>
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.
Time Limit for completion of Sanction	No such provision	The Appropriate Government or the competent authority, as the case may be, shall within a period of three months, which may, for reasons to be recorded in writing by the appropriate Government or the competent authority, that the consultation with the Attorney General or the Advocate General, as the case may be, is required, be extended by a further period of one month.

<sup>18</sup> *ibid*

<sup>19</sup> Clause 18G of the Prevention of Corruption (Amendment) Bill, 2013

Under the Prevention of Corruption Act, 1988 public officials in office may not be prosecuted without prior sanction from the State or Central government. The Bill extends such protection to retired public officials if they were in office at the time of the alleged offence.<sup>20</sup>

It was suggested by the Standing Committee on Personnel, Public Grievances, Law and Justice (Chairperson: Mr Shantaram Naik), that 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'.<sup>21</sup> In the Bill the safeguard related to sanction is to be extended to the ex-public servants who committed any offence while they were employed as public servants as compared to the existing provision which includes the currently employed public servants only.

### **Provisions relating to Sanction**

Section 19 of the Prevention of Corruption Act, 1988<sup>22</sup> provides for sanction required before initiation of the prosecution against any public servant. It is one of the most debatable Section of the Act as it is misused to delay the proceedings against public servants. The safeguard of prior sanction for prosecution provided under Section 19 of the Act to protect public servant against malicious and vexatious prosecution for any bonafide omission or commission in the discharge of official duty. The affording of such protection need to be based on careful appraisal of the facts and the process of decision making involved. Now the same protection is being given to the public servant after they cease to hold public office through Clause 10 of the Bill. It must be remembered that protection of sanction must not be taken as a shield by the corrupt officials and the Competent Authority must try to grant sanction or not grant sanction as expeditiously as possible.

### **Time limit:**

The bill provides for time limit within which the aforementioned sanction is to be accorded by the appropriate authority. A period of three months shall be given to the appropriate

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<sup>20</sup> Clause 10 (2) of the Prevention of Corruption (Amendment) Bill, 2013

<sup>21</sup> *Standing Committee Report Summary*, (April 18, 2017),

<http://www.prsindia.org/uploads/media/Corruption/SCR%20Summary-%20PCA,%202013.pdf>

<sup>22</sup> It reads as "Previous sanction necessary for prosecution-

(1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,-

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

authority to decide whether to give sanction or not and this period can be further extended to one month provided reasons are recorded in writing by the appropriate authority after consultation with the Attorney General or the Advocate General as the case may be.<sup>23</sup>

This prescription of time limit has been done to comply with the judicial pronouncements so that undue delay in prosecution can be avoided.<sup>24</sup> But the Bill does not provide for action/punishment against sanctioning authority failing to meet time line prescribed under Clause 10 of the Bill.

**Thus** it could be seen that the bill takes stringent measures for the purpose tackling corruption. It makes bribe giving a specific offence. But however there are different views on whether giving bribe in all circumstances must be penalized. The Bill has expanded the ambit of inducement of public servant from individuals to commercial entities also. It also proposes to provide for time limit for the procedure of sanction which would help in disposal of cases at a faster rate. The Bill with certain amendments would be able to tackle corruption more efficiently.

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<sup>23</sup> Clause 10 of the Prevention of Corruption (Amendment) Bill,2013, it reads as “Provided also that the appropriate Government or the competent authority, as the case may be, shall convey its decision under this sub-section within a period of three months, which may, for reasons to be recorded in writing by the appropriate Government or the competent authority, that the consultation with the Attorney General or the Advocate General, as the case may be, is required, be extended by a further period of one month.”