

# Legislative Brief

## The Prevention of Corruption (Amendment) Bill, 2013 and proposed 2015 amendments

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

It was referred to the Standing Committee on Personnel, Public Grievances, Law which submitted its Report on February 6, 2014.

Further amendments to the Bill were circulated by the government on November 27, 2015. The Bill was then referred to a Select Committee of Rajya Sabha on December 11, 2015.

The Committee is expected to submit its report on April 29, 2016.

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### Highlights of the Bill

- ◆ The Prevention of Corruption (Amendment) Bill, 2013 amends the Prevention of Corruption Act, 1988. Certain amendments to the Bill were circulated by the government in 2015.
- ◆ The 1988 Act defines taking a bribe by a public servant as accepting any reward other than a salary for performing one's official act. The 2015 amendments replace this to cover acts where a public servant accepts any undue advantage other than legal remuneration. Anyone who performs his public function honestly would not be penalised.
- ◆ Under the Act, a bribe giver is charged with abetment. The 2013 Bill makes giving a bribe to a public servant a direct offence. The 2015 amendments add that if a person gives a bribe to assist law enforcement authorities, he will not be punished.
- ◆ The Act defines criminal misconduct to covers six types of offences including: (i) abuse of position; (ii) use of illegal means; (iii) disregard to public interest. The 2013 Bill retains only two offences: (i) misappropriating property; and (ii) amassing disproportionate assets.
- ◆ Under the 2015 amendments, prior sanction from the Lokpal or Lokayukta must be obtained before investigating a public servant.

### Key Issues and Analysis

- ◆ A public servant will not be charged with taking a bribe if he proves that he did not 'perform his public functions dishonestly'. As this term has not been defined, the circumstances under which a public servant's actions would qualify as 'honest' is unclear.
- ◆ The 2013 Bill makes giving a bribe a direct 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 requirement of prior sanction for investigation may be considered necessary to protect a public servant from harassment. However, it could delay investigation into genuine cases of corruption. The Supreme Court had also observed that such a provision could affect the efficiency of the investigation process.
- ◆ The Lokpal, and Lokayuktas in some states, have not been constituted. This may affect the obtaining of prior sanction for investigation.

## PART A: HIGHLIGHTS OF THE BILL

### Context

The primary law that regulates corruption related offences by public servants is the Prevention of Corruption Act, 1988. The 1988 Act covers offences like that of taking a bribe, criminal misconduct (including amassing of disproportionate assets) by a public servant, and mandates prior government sanction for prosecution.

Over the years, expert bodies such as the 2<sup>nd</sup> Administrative Reforms Commission and the Law Commission of India examined the 1988 Act and suggested changes to it.<sup>1,2</sup> This included inclusion of the offence of bribe giving, limiting prior sanction for prosecution to certain cases, and the procedure for attachment of property of public servants accused of corruption. Subsequently, in 2008, a Bill to amend the 1988 Act was introduced in Parliament. The Bill sought to extend the requirement of prior sanction for prosecution to former public servants, and provide for attachment of property. However, it lapsed with the dissolution of the 14<sup>th</sup> Lok Sabha.<sup>3</sup>

In 2011, India ratified the United Nations Convention against Corruption (UNCAC), 2005 and agreed to bring its domestic laws in line with the UNCAC.<sup>4</sup> The UNCAC 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.

In August 2013, the Prevention of Corruption (Amendment) Bill, 2013 was introduced in Parliament to amend the 1988 Act. The Statement of Objects and Reasons of the Bill states that it was introduced to bring the 1988 Act in line with the UNCAC. The Standing Committee submitted its report on the Bill in February 2014.<sup>5</sup> Subsequently, in November 2014, the central government referred certain amendments to the 2013 Bill to the Law Commission of India which submitted its report in February 2015.<sup>6</sup> In November 2015, the government circulated amendments to the 2013 Bill, which were then referred to a Select Committee of Rajya Sabha.

### Key Features

The 2013 Bill amends various provisions of the Prevention of Corruption Act, 1988. The government circulated further amendments to the 2013 Bill, in November 2015. The Table compares the 1988 Act with the provisions of the 2013 Bill as modified by the 2015 amendments.

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

Key Features	Prevention of Corruption Act, 1988	Prevention of Corruption (Amendment) Bill, 2013 [as modified by the 2015 amendments]
Definition of a 'bribe'	<ul style="list-style-type: none"> <li>Any reward other than a salary.</li> </ul>	<ul style="list-style-type: none"> <li>Undue advantage which is any gratification other than legal remuneration.</li> </ul>
Acts that qualify as taking a bribe by a public servant	<p>Covers any of the following acts:</p> <ul style="list-style-type: none"> <li>Accepting or attempting to obtain any reward, other than a salary.</li> <li>Accepting a reward to favour or disfavour anyone.</li> <li>Accepting a reward from another person to exercise personal influence over a public servant.</li> </ul>	<p>Covers any of the following acts:</p> <ul style="list-style-type: none"> <li>Attempting to obtain or obtaining, or accepting an undue advantage;</li> <li>Attempting to obtain or obtaining, or accepting an undue advantage, i) with the intention of, or ii) as a reward for, or iii) before or after, the improper performance of a public function.</li> </ul>
Exceptions to taking a bribe	<ul style="list-style-type: none"> <li>No provision.</li> </ul>	<ul style="list-style-type: none"> <li>If a person does not perform a public function dishonestly, it would not qualify as taking a bribe.</li> </ul>
Giving a bribe to a public servant	<ul style="list-style-type: none"> <li>No specific provision.</li> <li>Covered under the provision of abetment.</li> <li>If a bribe giver makes a statement in court that he gave a bribe it would not be used to prosecute him for the offence of abetment.</li> </ul>	<ul style="list-style-type: none"> <li>Offering or giving an undue advantage to another person, intending to: i) induce, or ii) reward, the public official to perform his public duty improperly; or</li> <li>Offering an undue advantage to a public official, knowing that such acceptance would qualify as performing his public duty improperly;</li> <li>A person would not have committed the offence of bribe giving if he did so, after informing a law enforcement authority, to assist in its investigation of a public servant.</li> </ul>
Giving a bribe by a commercial organisation to a public servant	<ul style="list-style-type: none"> <li>No specific provision.</li> <li>Covered under the provision of abetment.</li> </ul>	<ul style="list-style-type: none"> <li>Offering a reward for obtaining or retaining any advantage in business.</li> </ul>

Key Features	Prevention of Corruption Act, 1988	Prevention of Corruption (Amendment) Bill, 2013 [as modified by the 2015 amendments]
		<ul style="list-style-type: none"> <li>▪ Central government to prescribe guidelines for adequate procedures for commercial organisations to prevent bribing of public servants.</li> <li>▪ If a commercial organisation is held guilty of giving a bribe, and it is proved that it was committed with the consent of the director, manager, secretary etc., they will be punished.</li> </ul>
Abetment	<ul style="list-style-type: none"> <li>▪ Covers a public servant abetting an offence related to influencing another public servant.</li> <li>▪ Covers any person abetting offences like: i) taking a bribe and ii) obtaining a valuable thing from a person engaged with in a business transaction.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Covers abetment by any person for all offences;</li> <li>▪ Excludes the offence of attempting to misappropriate property (covered under criminal misconduct).</li> </ul>
Criminal Misconduct by a public servant	<p>Covers 6 types of offences:</p> <ul style="list-style-type: none"> <li>▪ Fraudulent misappropriation of property in the control of a public servant.</li> <li>▪ Possession of monetary resources or property disproportionate to known sources of income.</li> <li>▪ Habitually taking a bribe or valuable thing for free.</li> <li>▪ Obtaining a valuable thing or reward illegally.</li> <li>▪ Abuse of position to obtain a valuable thing or monetary reward.</li> <li>▪ Obtaining valuable thing or monetary reward without public interest.</li> </ul>	<p>Covers 2 types of offences:</p> <ul style="list-style-type: none"> <li>▪ Fraudulent misappropriation of property entrusted to a public servant.</li> <li>▪ Intentional enrichment by illicit means during the period of office. This would involve amassing resources disproportionate to one's known sources of income. [It shall be presumed that the person intentionally enriched himself.]</li> </ul>
Habitual Offender	<ul style="list-style-type: none"> <li>▪ Habitually taking a reward to either influence a public servant or abet in the taking of a bribe.</li> </ul>	<ul style="list-style-type: none"> <li>▪ The committing of any offence under the Act by a person who has previously been convicted.</li> </ul>
Presumption of guilt	<ul style="list-style-type: none"> <li>▪ The guilt of the accused would be presumed for the following 3 offences: i) taking a bribe, ii) being a habitual offender and iii) for abetting an offence.</li> </ul>	<ul style="list-style-type: none"> <li>▪ The guilt of the accused would be presumed only for the offence of taking a bribe.</li> </ul>
Trivial rewards	<ul style="list-style-type: none"> <li>▪ Such a presumption of guilt would not apply if the reward obtained is considered 'trivial' by the court.</li> </ul>	<ul style="list-style-type: none"> <li>▪ The provision related to trivial rewards has been omitted.</li> </ul>
Attachment and forfeiture of property	<ul style="list-style-type: none"> <li>▪ Not provided in the Act.</li> </ul>	<ul style="list-style-type: none"> <li>▪ The provisions of the Criminal Law Amendment Ordinance, 1944 would apply.</li> <li>▪ In place of a District Judge (as in the Ordinance), cases will be referred to a Special Judge.</li> </ul>
Prior approval for investigation	<ul style="list-style-type: none"> <li>▪ Not provided in the Act.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Before a police officer conducts any investigation into an offence alleged to have been committed by a public servant, prior approval of Lokpal/lokayukta to be taken.</li> <li>▪ Such approval would not be necessary in certain cases which involves the arrest of a person on the spot on the charge of taking a bribe, either for himself or another.</li> </ul>
Prior sanction for prosecution	<ul style="list-style-type: none"> <li>▪ The prior sanction from the appropriate authority is required for prosecution of public servants.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Extends the requirement of prior sanction to former public servants, for any act committed in office.</li> </ul>
Time period for trial of cases	<ul style="list-style-type: none"> <li>▪ No time period mentioned.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Trial by special judge to be completed within 2 years.</li> <li>▪ If not, reasons for the delay must be recorded, for every six months of extension of time obtained.</li> <li>▪ Total period for completion of trial not to exceed 4 years.</li> </ul>
Penalties*:		
▪ Habitual offender	<ul style="list-style-type: none"> <li>▪ Imprisonment of five years-10 years and a fine.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Same as the 1988 Act, for all offences.</li> </ul>
▪ Criminal Misconduct	<ul style="list-style-type: none"> <li>▪ Imprisonment of four years-10 years and a fine.</li> </ul>	
▪ Taking/giving a bribe, abetment	<ul style="list-style-type: none"> <li>▪ Imprisonment of three years-seven years and a fine.</li> </ul>	

Sources: Prevention of Corruption Act, 1988; Prevention of Corruption (Amendment) Bill, 2013; Notice of Amendments, Rajya Sabha, November 27, 2015; PRS.

## PART B: KEY ISSUES AND ANALYSIS

### Taking a bribe not an offence if person performs actions honestly

Under the 1988 Act, as well as the 2013 Bill and 2015 amendments, if a public servant takes an undue advantage for performing his public function improperly, he would be punished. However, the 2015 amendments create an exception. It states that if a public servant ‘does not perform a public function or activity dishonestly’, he would not be committing an offence. This implies that if a public servant charged with taking a bribe proved that he performed his public functions honestly, he would not have committed the offence. The meaning and implications of this provision is unclear.

The 2015 amendments define terms like ‘undue advantage’ and what would constitute ‘improper performance of a public function’. However, the term ‘performance of a public function dishonestly’ has not been defined in the 1988 Act, the 2013 Bill or the 2015 amendments. In the absence of a definition of what could constitute ‘dishonest performance of a public function’, the types of actions of a public servant that would qualify as ‘honest’ would be wide and open to interpretation. This could include actions that are at variance with the purpose of the Act.

For example, let us consider a scenario where a public servant accepts five thousand rupees from a person for expediting his ration card application. However, after accepting this money, the public servant does not expedite it. Instead, he processes the application in a routine manner. The question is whether the public servant can still invoke the defence that he performed his public function ‘honestly’ as he followed the prescribed procedure and processed the application in a routine manner.

Note that this clause was not part of the official amendments that were examined by the Law Commission, in its February 2015 report.<sup>6</sup>

### Requirement of prior sanction for investigation of a public official

#### The requirement of prior sanction may not be necessary at the stage of investigation

The 2015 amendments amend the 1988 Act to provide that prior sanction will have to be obtained for the investigation of a public servant. The provision states that before a police officer can begin any investigation into an offence under the Act, prior approval of the Lokpal or Lokayukta must be taken. Such approval would not be necessary in cases of arrest of a person on the spot for taking a bribe.

Typically, a criminal investigation includes verification of facts and circumstances and collection of evidence, to decide whether there is a case for prosecuting the accused.<sup>7</sup> In the absence of such preliminary information being made available to the Lokpal, the basis on which it would take a decision to grant sanction for investigation is unclear.

The rationale for requiring prior sanction is to protect public servants from harassment. However, it could result in delays in investigation and prosecution of genuine cases of corruption. Under the 1988 Act, prior sanction must be obtained at the stage of prosecution of the public servant. Requiring prior sanction for investigation too, raises the question whether this protection is necessary at two stages, i.e. investigation and prosecution.

Note that the 2nd Administrative Reforms Commission recommended that the use of prior sanction be limited, even at the stage of prosecution. It stated that it may not be necessary for cases (i) where a public servant has been trapped red-handed; or (ii) of possession of assets disproportionate to known sources of income.<sup>1</sup>

#### Supreme Court had observed that prior sanction for investigation could affect its efficiency

The requirement of prior sanction in the 2015 amendments could also be at variance with the observations of the Supreme Court on prior sanction for investigation.<sup>8</sup> The only law that contained a similar provision of prior sanction for investigation was the Delhi Special Police Establishment Act, 1946. The 1946 Act required the CBI to obtain prior approval from the central government for investigation against a public official of the rank of Joint Secretary and above. (This provision was struck down by the Court on the grounds that differentiating between two classes of public servants violates Article 14 of the Constitution.) The Court also observed that such a provision would impede an unhampered, unbiased, efficient and fearless investigation.<sup>8</sup>

Act: Section 7  
2015  
amendments:  
Clause 3

2015  
Amendments:  
Clause 8B

## Lokpal and some Lokayuktas have not been constituted

2015  
amendments:  
Clause 8 B

The 2015 amendments state that the Lokpal or the Lokayukta will be the appropriate authority for granting of prior sanction for investigation. However, the Lokpal, and Lokayuktas, in some states such as West Bengal and Tamil Nadu, have not been constituted. This may affect the obtaining of sanction for investigation in relation to a complaint against a public servant.

## The inclusion of giving a bribe as a specific offence

### Bribe giving under all circumstances to be criminalised

Act: Section 12  
Bill: Clause 3

Under the 1988 Act, a bribe giver may be penalised for abetting the offence of taking a bribe. Under the 2013 Bill and 2015 amendments, giving a bribe, directly or through a third party, is made an offence. Further, illustrations in the 2015 amendments clarify that a bribe given to process a routine entitlement (like a ration card) or to obtain an unfair advantage (securing a license over other bidders) will both be treated as offences under this provision. The punishment for giving a bribe under all circumstances is the same as that of taking a bribe, which is three to seven years' imprisonment, and a fine.

2015  
amendments:  
Clause 3

Several experts have examined the issue of whether bribe giving under all circumstances should be made an offence under the 1988 Act. The United Nations Convention against Corruption (UNCAC) states that giving a bribe, either directly or indirectly, should be made a punishable offence.<sup>9</sup> India has ratified the UNCAC.<sup>4</sup>

However, some experts have stressed the need to distinguish between bribe givers based on the circumstances under which they give a bribe. In 2007, the report of the Second Administrative Reforms Commission recommended that the 1988 Act must distinguish between coercive and collusive bribe givers. This implies that individuals who are coerced into giving a bribe for obtaining an entitlement (a ration card) may be treated differently from those who act in collusion with the bribe taker to obtain an undue advantage (securing a license over other bidders).<sup>1</sup> The Standing Committee that examined the 2013 Bill had expressed a similar view.<sup>5</sup>

### Protection to bribe giver under certain circumstances

Act: Section 24  
2015  
amendments:  
Clause 3

Under the 1988 Act, if a bribe giver makes a statement in court that he gave a bribe it would not be used to prosecute him for the offence of abetment. The 2015 amendments replace this provision. It states that if someone gives a bribe after informing law enforcement authorities, in order to assist them in their investigation against the bribe taker, he will not be charged with bribe giving. This may not address situations where a person is forced to pay a bribe for an entitlement, and subsequently reports the matter to the authorities.

The Standing Committee that examined the 2013 Bill noted that individuals who report the matter 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 (from punishment) is necessary, in the latter situation the court may take a decision based on facts and circumstances of the case.<sup>5</sup> Further, the then Chief Economic Adviser made an argument that giving immunity to a "harassed bribe giver" would incentivise him to report the incident.<sup>10</sup>

## Certain offences under criminal misconduct modified

Act: Section  
13 (1) (d)

Under the 1988 Act, criminal misconduct by a public servant covers six types of offences, including: 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 2013 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 2013 Bill no longer covers the three circumstances in the 1988 Act under the offence of criminal misconduct. It is unclear why these elements have been omitted in the Bill.

2015  
amendments:  
Clause 3,  
Explanation 2

Note that the 2015 amendment list includes two of the three offences (except 'obtaining a valuable thing or monetary reward without public interest') under the 1988 Act that were deleted in the 2013 Bill. However, these elements have been included under the offence of taking a bribe, and not criminal misconduct. The punishment for the offence of taking a bribe, which is three to seven years' imprisonment, is lower than that for criminal misconduct, which is four to 10 years' imprisonment.

## Offences for which the guilt of the accused is presumed

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

Act: Clause 20  
(1)  
Bill: Clause 11

Under the 1988 Act, for certain offences like taking a bribe, habitual offender and abetment, the burden of proof is on the accused. The 2013 Bill amends this provision to transfer the burden of proof onto the accused only in the case of taking a bribe. The Bill seeks to treat the taking and giving of a bribe in a similar manner, in relation to punishment for both offences. Therefore, it is unclear why the burden of proof is on the accused person only for the offence of taking a bribe. The Table below captures the shift in relation to burden of proof from the 1988 Act to the 2013 Bill.

**Table 2: Burden of proof for certain offences under the 1988 Act and 2013 Bill**

Offence	1988 Act	2013 Bill
Taking a bribe	On the accused.	On the accused.
Giving a bribe	Not a direct offence (covered under abetment).	On the prosecution.
Abetment	On the accused.	On the prosecution.
Habitual offender	On the accused.	On the prosecution.

Sources: The Prevention of Corruption Act, 1988; Prevention of Corruption Bill, 2013; PRS.

### Trivial rewards not exempt

Act: Clause  
20 (2)

Under the 1988 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. This provision has been omitted in the Bill and 2015 amendments.

## Establishing of intention for possession of disproportionate assets

Act: Clause 13  
(e)

Under the 1988 Act, the offence of possessing disproportionate assets requires the existence of disproportionate monetary resources or property in the public servant’s possession. The 2013 Bill modifies this provision. To establish that the public servant had disproportionate assets, it has to be proven that: i) he possesses monetary resources or property disproportionate to his known sources of income, and ii) his *intention* to enrich himself illicitly. Thus, by requiring that the intention of the public servant to acquire disproportionate assets be established, in addition to the existence of assets itself, the Bill is raising the threshold for proving the offence. The Standing Committee had observed that the inability of the public servant to explain the source of the disproportionate assets is sufficient for prosecution, and recommended removing ‘*intention*’ from the provision.<sup>5</sup>

Bill: Clause 6

2015  
amendments:  
Clause 6,  
Explanation 1

Note that this issue has been addressed by the 2015 amendments, as it removes the requirement of intention.

## Comparison with the UN Convention against Corruption (UNCAC), 2005

According to the Statement of Objects and Reasons of the 2013 Bill, the amendments to the Act were introduced to bring it in line with the UNCAC, 2005. However, certain provisions of the UNCAC have not been included in the 2013 Bill or the proposed 2015 amendments. These include: i) giving a bribe to a foreign public servant; ii) taking a bribe by a private sector entity; and (iii) compensation for those aggrieved by acts of corruption.<sup>4</sup>

1. ‘Ethics in Governance’, Fourth Report, Second Administrative Reforms Commission, January 2007.
2. The Corrupt Public Servants (Forfeiture of Property) Bill, 166th Report, Law Commission of India, February 1999.
3. The Prevention of Corruption (Amendment) Bill, 2008.
4. United Nations Convention Against Corruption, United Nations Office on Drugs and Crime, United Nations, 2005.
5. ‘Prevention of Corruption (Amendment) Bill, 2013’, 69<sup>th</sup> Report, Standing Committee on Law and Justice, February 2014.
6. ‘Prevention of Corruption (Amendment) Bill, 2013’, Report No. 254, Law Commission of India, February, 2015.
7. H.N. Rishbud and Inder Singh vs. The State of Delhi, AIR 1955 SC 196; Central Bureau of Investigation Manual, 2005.
8. Subramaniam Swamy vs. Director, CBI, (2014) 8 SCC 682, (paragraph 59).
9. Article 15, Bribery of National Public official, United Nations Convention Against Corruption, 2005.
10. “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.

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