

LEGAL REGIME GOVERNING TRANSNATIONAL CORRUPTION: AN INDIAN PERSPECTIVE

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INTRODUCTION

Corruption is “behaviour which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gain; or violates rules against the exercise of certain types of private-regarding influence.”¹⁵

-Joseph Nye

With the advent of globalisation, corruption has grown to be a transnational phenomenon. In case of transnational corruption, the powers granted to the public officials are misused and the responsibilities entrusted on them remain unfulfilled because the focus and actions of the corrupt officials are inclined towards their personal benefit rather than the benefit of the society. Transnational corruption comparatively has a scope narrower than the understanding of corruption in a general sense. Corruption in its general sense involves such transactions which are domestic in nature and are governed by the domestic laws. But transnational corruption on the other hand governs transactions of organisations operating across borders and dealing with different countries.

The effects of transnational corruption can be very well seen in the social, political and economic spheres. For combating the problem of transnational corruption efforts have been taken both nationally as well as internationally. At the international level, various conventions such as United Nations Convention against Corruption (UNCAC) 2005, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (aka OECD Anti-Bribery Convention) 1999, etc. have been initiated to prevent and deal with instance of corruption. At a national level, countries have enacted domestic legislations to tackle the issue of transnational corruption. The United States', Foreign Corrupt Practices Act (FCPA) 1977 can be said to have influenced the entire anti-corruption movement at an international level.

EFFECTS OF TRANSNATIONAL CORRUPTION

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¹⁵ Joseph S Nye, 'Corruption and Political Development: A Cost-Benefit Analysis' 61 American Political Science Review 417, 419 (1967).

The consequences of 'Transnational Corruption' can be understood by analyzing three different spheres i.e. Social, Economic and Political. Each of these spheres is inter-dependent and collectively lead to the inevitable consequences of transnational corruption.

The predominant view is that corruption involves a transaction where a government official abuses a position of trust for personal gain.¹⁶ Similarly in case of transnational corruption the abuse of trust for personal gain is a result of interactions between foreign officials and the transnational corporations. There is misuse of resources for private benefit by diverting them from sectors like health, education, etc. which are of vital importance which eventually leads to a rise in the price of essential public services. This deprives the underprivileged of their basic necessities of life and adversely effects the development and economic growth of the country. Hence the gap between the rich and the poor widens resulting in increased social inequalities.

“A corrupt system does not reward the producer of the best and cheapest product, but instead rewards the producer who pays the largest bribe; the rational producer, therefore, will shift resources away from quality and toward the bribe payment.”¹⁷

This would not only hamper the quality of the product but also discourage the producer of a good quality product as the valuable resources which could have been used for producing a better quality product are diverted towards the payment of bribes to corrupt officials. An economic imbalance is thus created which benefits only a group of people by surpassing the interest of the majority of the population.

The increase in socio-economic inequality then leads to a loss of confidence in public institutions. The rule of law which refers to a government based on principles of law is also affected by transnational corruption. The citizens lose trust in the government and the public authorities because their share of infrastructure is sacrificed for the personal benefits of the government officials. This hampers the rule of law and puts the citizens in the most disadvantaged position.

LAWS ON TRANSNATIONAL CORRUPTION

The need for laws related to the issue of transnational corruption was first recognized by the United States. Various scandals such as the Bananagate scandal, Lockheed bribery scandals, Watergate scandal etc. are few events which paved way for the U.S. Congress to enact the Foreign Corrupt Practices Act, 1977. This domestic law of the US

¹⁶ Nikolay A Ouzounov, Facing the Challenge: Corruption, State Capture and the Role of Multinational Business, 37 John Marshall L.R.,1181-1186, (2004).

² Philip M Nichols, The Myth of Anti-Bribery Laws as Transnational Intrusion, 33 Cornell International Law Journal 627, 631, (2000).

for combating the problem of transnational corruption inspired other countries to enact laws parallel to the FCPA to ensure a level playing field. Subsequently, an anti-corruption movement was born when various other actors such as the Transparency International, the World Bank and different human rights activists joined the struggle against global corruption.

The OECD Anti-Bribery Convention was another milestone in the global anti-corruption movement. This convention was signed on 17th December 1997 and came into force on 15 February 1999. The OECD Anti-Bribery Convention provides sanctions against bribery in the business transactions taking place at an international level with an aim of reducing corruption in developing countries.

The Financial Action Task Force (FATF), an intergovernmental organization which aims at combating issues such as 'money laundering' and 'terrorism financing' recognized 'corruption' and 'bribery' as an offence thus pressurizing the countries to enact anti-money laundering laws to brawl the problem of corruption. Corruption and money laundering can be linked intrinsically. Thus the FATF recommendations can be very well applied to resolve the problem of corruption, even though they were originally designed to combat problems of money laundering and terrorist financing.

Finally in the year 2003 the United Nations Convention against Corruption (UNCAC) which is one of the most subscribed conventions relating to the subject was adopted on 9th December 2003. The UNCAC also criminalises the bribery of foreign officials and encourages states to criminalize both the solicitation/acceptance and giving of bribes by foreign public officials.¹⁸ Provisions which require parties to co-operate in the recovery of assets that qualify as either proceeds or instruments of corruption and in collecting compensatory damages for harm caused by corruption are also included in the UNCAC.¹⁹

The OECD Anti-Corruption Convention, the UNCAC and most of the other conventions relating to the issue have a common objective of encouraging the member countries to enact domestic laws which are in consonance to the Foreign Corrupt Practices Act (FCPA) which prohibits bribery of foreign government officials by the people of US and prescribes practices such as accounting and record keeping. Thus it can be said that the initiation of development of laws related to transnational corruption took place for the reason that U.S. being the first and the only country to formulate legislation against the bribery of foreign government officials had put itself at a competitive disadvantage as against other countries in transacting at a global level.

¹⁸ United Nation Convention Against Corruption, chapter III art15,31 Oct 2003.

¹⁹ United Nation Convention Against Corruption, chapter V art 54-59, 31 Oct. 2003.

In the Indian context, the recent Louis Berger International Inc. case can be an apt example of the problem of transnational corruption. It involved a New Jersey-based construction management firm which was accused in the U.S. of bribing Indian officials for getting two water development projects, one in Goa and another in Guwahati.

India has the Prevention of corruption Act, 1988, which deals with the issue of corruption with its domestic territory. But the competence of this legislation in dealing with instances such as that of the Louis Berger case which involved multiple jurisdictions, is questionable.

PREVENTION OF CORRUPTION ACT 1988

The Prevention of Corruption Act, 1988 was enacted by the Parliament of India on 9 September, 1988 to deal with corruption in public sector and public sector businesses in India. The territorial jurisdiction of the Act extends to the whole of India, except Jammu and Kashmir. The Act also applies to all citizens of India outside India.

India had enacted the Prevention of Corruption Act, 1988 well before the enforcement of international conventions such as the UNCAC, 2005, OECD Anti Bribery Convention, 1999 to tackle the issue of corruption within its domestic boundaries. But the act lacked provisions to deal with the issue of corruption taking place beyond its national boundaries. To widen the scope of the act and to fulfil India's obligations under UNCAC, 2005, the Prevention of Corruption (Amendment) Bill, 2013 was introduced in the Rajya Sabha on August 19, 2013. An analysis of the Act and the Bill is necessary to ensure that a balance is made in ensuring that the country meets its international obligations as well as that the legislation is effective at the domestic level.

Under the Prevention of corruption Act, 1988, if a public servant takes gratification other than legal remuneration in respect of an official act, he can be punished under the provisions of the act.²⁰ Gratification taken by corrupt or illegal means to influence public servant²¹ and gratification taken for exercise of personal influence with public servant²² are also offences which are punishable under the Act. If a public servant acquires a valuable thing from person concerned in proceeding without consideration or if such a public servant transacts a business, he would be held liable for committing an offence under the PCA Act, 1988.²³ The punishment for the committing the offences mentioned above or for abetment of such offences is imprisonment for a period of six months which might extend up to five years along with a fine.

²⁰ Prevention of Corruption Act, 1988, Sec 7

²¹ Prevention of Corruption Act, 1988, Sec 8

²² Prevention of Corruption Act, 1988, Sec 9

²³ Prevention of Corruption Act, 1988, Sec 11

For criminal misconduct of a public servant, he would be imprisoned for a period of at least one year which may extend up to seven years along with fine.²⁴ If a public servant habitually commits offences mentioned under sections 8, 9 and 12 of the Act, he would be liable for imprisonment for a period of two years which may extend up to seven years and would also be liable to pay a fine.²⁵ These offences are discussed in Chapter III of the Prevention of Corruption Act, 1988.

PREVENTION OF CORRUPTION (AMENDMENT) BILL, 2013

The Prevention of Corruption (Amendment) Bill, 2013 has been drafted for making such changes in the existing Prevention of Corruption Act, 1988 which shall amend it to make it in accordance with the provisions of the UNCAC. Critics have pointed out certain flaws in the Bill which was introduced in the Parliament in August 2013. This calls for a comparative study between the Act and the Bill, to ensure that the most appropriate and essential provisions govern the matters of corruption in the Indian regime.

COMPARISON BETWEEN PC ACT 1988 AND PC BILL 2013

The principal Act under Chapter III deals with the Offences and Penalties. Section 12 of the Act states that “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”²⁶.

However, according to the Bill, giving bribe, directly or through a third party, is made an offence.²⁷ The question here is, whether under the Act giving of bribe under all circumstances should be made an offence or not. The report of the Second Administrative Reforms Commission has recommended that the Prevention of Corruption Act must distinguish between coercive and collusive bribe givers.²⁸ The Bill has made ‘giving a bribe’ a ‘specific offence’. The moot point here is, whether giving of bribe under all circumstances should be penalized or not. In certain situation bribe would have been given by the bribe giver under coercion which makes him a ‘Coercive bribe giver’. Such a bribe giver should be differentiated from a ‘Collusive bribe giver’ who does not enjoy any kind of protection because the bribe is given by him under normal circumstances and not under coercion. In case of a coerced bribe giver the judge can look into the facts of the case and circumstances under which the bribe was given. This would incentivise the bribe giver to report the matter because of the immunity enjoyed by him.

²⁴ Prevention of Corruption Act, 1988, Sec 13

²⁵ Prevention of Corruption Act, 1988, Sec 14

²⁶ Prevention of Corruption Act, 1988, Sec 12,24.

²⁷ Prevention of Corruption (Amendment) Bill, 2013, Clause 3.

²⁸ ‘Ethics in Governance’, Fourth Report, Second Administrative Reforms Commission, and January (2007)

The bill has removed the provision which safeguards the interest of the bribe giver by protecting him from prosecution in case of any statement made by him during a 'corruption trial'. Under the Act if a person makes a statement during a corruption trial against a public official, such a statement cannot be used to prosecute him for the offence of abetment.²⁹ The omission of this provision in the bill would restrain or discourage the bribe givers to appear as witnesses in trial against a public official. This would encourage corruption by the public officials.

The Bill, in case of possession of disproportionate asset by a public servant, makes 'intention' an essential element to prove the offence.³⁰ Clause 6 of the Bill provides for certain conditions which need to be proved for establishing the offence of criminal misconduct of a public servant. Whereas in the Act, Sec 13(d) which provides for establishing the criminal misconduct by a public servant, does not require 'Intention' to be present for proving the same.³¹

According to the provisions of the Act the burden of proof is transferred on the accused in case of offences such as: - taking a bribe, abetting an offence, being a habitual offender. Under the provisions of the Act if it is proved that there is an acceptance or solicitation of any reward, it shall be presumed that the reward given or accepted was a bribe. The Act penalizes giving of bribe under the offence of abetment.³² But according to the provisions of the Bill, only for the offence of taking a bribe, the burden of proof is transferred onto the accused person and he will have to prove that the reward obtained by him was not a bribe. In case of offences such as: abetting an offence, giving bribe and being a habitual offender, a presumption will not be made as to the commission of an offence, but the burden would lie on the prosecution to establish the same.³³

The Bill has deleted certain provisions of the Act. First being the provision of 'trivial reward'. According to the Act, if in case the court considers the reward obtained by a public servant as trivial, then it shall not make a presumption of an 'act of corruption'.³⁴ Secondly, according to the provisions of the Act, in case a public servant accepts a valuable thing from a person whom he knows officially or with whom he is engaged in business transactions, for a little or no cost, then he shall be penalized.³⁵ This provision has also been deleted by the Bill. The deletion of these two provisions has made the situation open for interpretation by the court. This in turn can have both positive as well as negative implications in imparting justice in cases related to corruption.

²⁹ Prevention of Corruption Act, 1988, Sec 24.

³⁰ Prevention of Corruption (Amendment) Bill, 2013, Clause 6.

³¹ Prevention of Corruption Act, 1988, Sec 13(d).

³² Prevention of Corruption Act, 1988, Sec 20 (1).

³³ Prevention of Corruption (Amendment) Bill, 2013, Clause 11.

³⁴ Prevention of Corruption Act, 1988, Sec 20(2).

³⁵ Prevention of Corruption Act, 1988, Sec 11.

As discussed earlier, the Prevention of Corruption Bill aims at harmonising the existing Prevention of Corruption Act, 1988 with the provisions of the UNCAC, 2005. Thus there is a need for a comparison between the Prevention of Corruption Bill, 2013 and UNCAC, 2005.

COMPARISON BETWEEN THE PROVISIONS OF UNCAC AND PC BILL, 2013

The Prevention of Corruption Act 1988 was enacted even before the UNCAC came into existence. India became a signatory to the UNCAC in the year 2005 and ratified the same in May 2011. Even though the purpose of the domestic legislation is similar to that of the convention; it has a narrow scope when dealing with the issue of corruption unlike the UNCAC. Hence to fill in the gaps in the PCA Act 1988 and to meet India's obligations under the UNCAC more effectively, amendments to the PCA Act 1988 were proposed by the Prevention of Corruption (Amendment) Bill 2013.

Bribery is a central concept to both the UNCAC as well as the Prevention of Corruption Act 1988. But when it comes to the bribery of a foreign public official, there is a huge difference between the two. On one hand, the UNCAC has specific articles which deal with the bribery of foreign public official and on the other hand the Prevention of Corruption (Amendment) Bill 2013 has no provisions to deal with the issue.

Article 16 of the UNCAC is called "Bribery of foreign public officials and officials of public international organizations". According to this article both giving bribe to a foreign public official or an official of a public international organization as well as acceptance of bribe by a foreign public official or an official of a public international organization in order to obtain or retain business or for any other undue advantage shall be a criminal offence.³⁶

The Prevention of Corruption (Amendment) Bill 2013 remains silent on the issue of bribery of a foreign public official. However efforts were made to rectify this by way of proposition of the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill, 2011 which lapsed with the dissolution of the 15th Lok Sabha. This Bill provided a mechanism to criminalize bribery among foreign public officials (FPO) and officials of public international organizations (OPIO). The Bill was considered to be necessary for the ratification of the UNCAC.

The Prevention of Corruption (Amendment) Bill 2013 also ignores the issue of 'Bribery in the private sector'. On the other hand the UNCAC has specific provisions under Article 21 to deal with the problem of bribery in the private sector. According to this article, the giving of a bribe to an individual working in the capacity of private

³⁶ United Nation Convention Against Corruption, art 16, 31 Oct 2003.

sector entity as well as the acceptance of a bribe by such an individual is established as a criminal offence.³⁷ Apart from this, Article 12 of the convention enlists certain ways to tackle corruption in the private sector. It emphasise on the “the maintenance of books and records, financial statement disclosures and accounting and auditing standards”. It also prohibits acts like “the establishment of off-the-books accounts; the making of off-the-books or inadequately identified transactions; the recording of non-existent expenditure; the entry of liabilities with incorrect identification of their objects; the use of false documents; and the intentional destruction of bookkeeping documents earlier than foreseen by the law.”³⁸

With regard to the compensation of damage, the UNCAC includes Article 35 which states that “Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation”.³⁹ The Bill has no such provision which would ensure compensation to the person who is aggrieved by the act of corruption.

CONCLUSION

There have been immense efforts made in the past decade for reforming the anti-corruption legal framework of India and various bills have been introduced in the Indian Parliament for the same. This implies that issue of corruption, despite of being covered by the Prevention of Corruption Act, 1988, needs to be dealt with more efficiently in India. The Prevention of Corruption (Amendment) Bill, 2013 if enacted will make the domestic legislation more effective in tackling the instances involving corruption across borders. But merely enacting legislations to fill in the gaps in the existing law would not be sufficient.

It is very essential to ensure that the law is suitably executed and enforced. Apart from this lack of political will in the effective implementation of the act is something which hinders the anti-corruption regime in the country. This calls for efforts to be made in the direction of effective implementation of the act as well as ensuring existence of political will rather than just bringing in new legislations. However vital amendments which would improve the existing legislation are essential to be made.

Effective public awareness relating to the provisions of the act would further strengthen the anti-corruption regime of the country. Protection of the whistleblowers is also pre-requisite for ensuring a participative democracy and a transparent as well as accountable government. This in turn would lead to a drop in the corruption levels. The

³⁷ United Nation Convention Against Corruption, art 21, 31 Oct 2003.

³⁸ United Nation Convention Against Corruption, art 16(3), 31 Oct 2003.

³⁹ United Nation Convention Against Corruption, art 35, 31 Oct 2003.

multinational companies would also become more alert before indulging in any sort of corrupt activity if they are aware of the fact that they are under enhanced public scrutiny and could be subjected to queries by media and whistleblowers. This are some recommendations which might prove to be fruitful in dealing with the issue of transnational corruption.



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