

**THE PREVENTION OF CORRUPTION (AMENDMENT) ACT, 2018–
A SHIELD FOR THE CORRUPT IN PUBLIC OFFICE?**

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The Prevention of Corruption Act, 1988 was enacted by the Parliament with the intent to fight the corruption prevailing in public offices in the territory of India. India is a country where corruption scams are frequently reported in the media and more often are unreported due to the ignorance of the government. India has witnessed varied scams ranging from the widely reported 2G scam which effected the cellular market, the Coalgate which caused trust deficit for investors, Adarsh Housing Scam which shook the faith of the public and many such high profile scams which have led to investor trust deficit. More recent news of the Rafale scam has once again placed the government in the docket. In light of these scams, comes into light the recent amendment to *The Prevention of Corruption Act, 1988* (popularly known as the POCA) came into effect on September 9, 2018 and extends to the whole of India except the State of Kashmir. It is important to mention that it is also applicable on Indians, not in India.

The Prevention of Corruption Bill has been passed with a view to enhance transparency and accountability of the government and to make the anti-graft provisions under the Prevention of Corruption Act more stringent. The Bill was introduced in Rajya Sabha in the year 2013 which was found lacking in certain provisions, due to which, the recommendations of the Law Commission (headed by Justice Shah) were sought that proposed certain changes, which were incorporated to have a wider impact. The Amendment was introduced in the parliament to make it in conformity with the provisions of the *United Nations Convention against Corruption* (also known as UNCAC), which are the minimum standards to be incorporated in a legislation to fight corruption for members signatory to the convention. The main purpose of the Act is to let the officials work ethically and as per the code of conduct of their office. The Bill received the assent of the President on 26th July, 2018 and thereby became an Act.

The Prevention of Corruption (Amendment) Act, 2018 is an attempt to punish the persons who take bribe as well as the bribe giver. Further, public servants are protected under the provision of prior government sanction clause i.e. if one is trying take an action against a public servant, prior permission of the appropriate authority is required for prosecution including an investigation, being the most criticized provision of the present amendment. A distinction between collusive and coerced bribe givers is drawn by way of this amendment. Collusive bribe giver is the one, who in

an attempt to do an illegal activity gives a bribe, wherein there is a mutual understanding in the bribe giver and the government official covered under the ambit of this Act. On the other hand, a coerced bribe giver is one who is forced to give the bribe due to a threat or even helplessness. A person who has given bribe due to a coerced action may inform the government authorities within a period of seven days from day of giving that bribe to protect itself from penalties under the new law. The key features of the amendment are discussed in detail below.

➤ **Key Features of the Amendment Act**

1. Penalties for the Bribe Givers

Persons who offer bribes to an official without any coercion are now under danger and can now be sentenced upto a term of seven years. Specific provision with respect to bribes given by commercial organization are also now incorporated. According to Section 9(3)(a), a “commercial organization” means

- (i) *a body which is incorporated in India and which carries on a business, whether in India or outside India; Offence relating to bribing a public servant by a commercial organisation. Taking undue advantage to influence public servant by corrupt or illegal means or by exercise of personal influence. Offence relating to bribing of a public servant.*
- (ii) *any other body which is incorporated outside India and which carries on a business, or part of a business, in any part of India;*
- (iii) *a partnership firm or any association of persons formed in India and which carries on a business whether in India or outside India; or*
- (iv) *any other partnership or association of persons which is formed outside India and which carries on a business, or part of a business, in any part of India¹*

Commercial organizations under the new law shall be punished to pay fine, however, may take the defence of having a suitable mechanism in place to comply with the provisions of the Act. A person employed with a commercial organization who tries to induce an undue advantage on a public officer is assumed to be acting on behalf of the commercial organization unless the contrary is proven by them. It is pertinent to mention that as per the explanation to Section 10 of the Act, if a person is proved to have induced undue advantage over a Government servant in connivance with the director, manager, secretary or other

¹ Section 9(3)(a) of the Prevention of Corruption Act, 1988

officer, such director, manager or other officer shall be sentenced for a term of not less than 3 years and maximum of 7 years.

The Act further introduced the power of Special Court to attach property obtained through corruption by persons in office.

2. The new definition of Criminal misconduct

If a public servant is found to be illicitly enriching himself or even intending to do so during its time in office or the assets of such public servant are not in proportion with its income are now in trouble under the new legislation. It is pertinent to mention that known sources of income are only the income gained lawfully by the persons in office for the purposes of this Act.

3. Trial to be conducted within 2 years

The new legislation makes it mandatory for the trial to be concluded within a period of 2 years. Any further extension in the trial for an offence under Prevention of Corruption Act may be extended by 6 months with reasonable grounds and the upper time limit for concluding the trial is a maximum period 4 years and shall not go beyond that.

4. Government Approval for Investigation and Sanction for Prosecution

The most criticized provision in the new legislation is Section 17A of the Act which protects all public servants and provides for requisite of prior approval before the conduct of inquiry against the corrupt officers. This provision of prior approval has raised questions of achieving the intent of the Act due to this provision. It is pertinent to mention that persons arrested on the spot for a charge punishable under the Act are an exception under this provision. It means a police officer cannot start investigation against a government servant without the prior approval of an appropriate authority. A defence under this Section has recently been availed by Rakesh Asthana, Special Director of Central Bureau of Investigation questioning the validity of First Information Report filed against him before the Hon'ble Delhi High Court and later on in the Hon'ble Supreme Court of India.

The new legislation makes provision for requirement of government sanction for prosecution of former officers. The previous Act dealt only with sanction for prosecution of serving officers, the new Act has intended to cover both under its ambit. The government shall make guidelines for obtaining sanctions under the said provision and the sanction

shall be given within a period of 3 months which may be extendable to a period of 1 month, in totality, 4 months.

The intent of the new legislation is to enhance transparency and accountability, however, with a new protection of prior approval for investigation now being extended to all public servants is rather a shield to protect the government servants wrongfully gaining while in office. Thus, the new Act rather than enhancing its purpose has raised concerns on the intent of the introduction of the Act *per se*. It is yet to be seen whether this amendment brings any good to the ethics of the persons in office or continue to help them have an undue advantage and bank illicitly.

About the Author:

Aarti Manchanda is an Amity Law School alumni having completed her law in 2017 and has been enrolled with the Bar ever since. She has had the opportunity to appear before almost all Tribunals and Courts in New Delhi and has her special interest in Intellectual Property Laws. Aarti Manchanda is currently working with Legal Tempo, Advocates & Consultants, Pitam Pura, New Delhi.

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