



Criminalizing Demand and Supply Side of Bribery in India Under Prevention of Corruption Amendment Act, 2018: Effective Deterrent of Corruption: A Critical Analysis

Arunima Bhattacharya¹

¹West Bengal National University of Juridical Sciences, Kolkata.

*Corresponding author's E-mail: Arunima Bhattacharya

<i>Article History</i>	Abstract
Received: 06 June 2023 Revised: 05 Sept 2023 Accepted: 16 Dec 2023	<p><i>Corruption, the phenomenon, has now become a legal quagmire, as it has imbibed itself, in almost all the engaging sectors in India. The crime of corruption does not only undermine public morale, but also it corrodes the economic development of a country. From the corporate scams to the public sector corruption, the present scenario depicts proliferation of corruption, which urges for an effective anti-corruption law regime. In India, one of the main enactments which combats corruption is the Prevention of Corruption Act, 1988, which has undergone a radical change, by its Amendment Act, 2018. Some of the salient features of this Prevention of Corruption Amendment Act, 2018, are very prominent, as it now provides for punitive measures for both bribe givers and takers including commercial organizations. This paper scrutinizes the current scenario and makes a critical analysis on the points that whether the penalizing provisions enacted for the bribe-givers in the new Amendment Act, 2018, ipso facto, acts as an effective deterrent factor, against corruption and whether the rigmarole of drafting and enacting the new provisions for bribe-givers in the Amendment Act, will act as positive catalyst in revamping the abysmal situation of corruption scenario in India. This paper aims on evaluating the effect of criminalization of the demand and supply side of bribe, in the light of the new Amendment Act, 2018, by utilizing the deterrent theory of punishment. This paper puts under microscope the conditional immunity granted to bribe givers under the new Amendment, in the scenario of system corruption, where corruption is not an aberration, but has evolved as a norm. Lastly, this paper provides some suggestions to ameliorate the current scenario.</i></p>
CC License CC-BY-NC-SA 4.0	Keywords: Criminalizing, Demand, Supply

1. Introduction

Corruption, the legal conundrum, has made enormous detrimental effects in the social as well as legal scenario in almost all the countries over the world and consequentially, has fascinated the legal scholars, think tanks, social pundits and common people to find a way to route out the evil of corruption from the system. The menace of corruption damages public morale as well as hinders the development of a country in the long term. In this context, first the concept of corruption is needed to be addressed.

Barry Hindess, in his paper discussed the viewpoint of Rose-Ackerman in the context of corruption, where, as per Ackerman, corruption is nothing but a condition, where people use the special privileged positions of them for the purpose of gaining economically, here the problem arises not for the reason that people are driven towards economic gain, but for the use of their privileged positions, in such pursuit.

Corruption, now-a-days, has become rampant in public as well as private sectors, as corruption has imbibed itself in its full vigor, in the main streamline of the society. Many scholars tried to draw a line between grand corruption and petty corruption. Grand corruption happens when the high ranked public officials in respect of large public contracts make corrupt decisions, whereas, petty corruption takes place when public servants take extra small payment, often called as 'speed money', for discharging their public duties.

Every country to combat corruption has enacted its own set of anti-corruption laws, but the proper implementation of such laws in the countries are in a state of flux, for example, while conducting business in today's world in United Kingdom or in United States, one has to navigate between the tension, where in one hand, the regulatory requirements, in both these countries, prohibit influence corruption by paying or taking bribes, while in the other hand, in certain circumstances, it is a necessary norm to be followed of 'facilitating payments', to ensure the personal safety as well as the safety of goods in foreign domains.

India has its own set of anti-corruption mechanisms and one of the prime legislations dealing with the corruption conundrum, is the Prevention of Corruption Act, 1988, which has undergone a radical change by the Prevention of Corruption Amendment Act, 2018, and now there is a shift in paradigm by this new amendment, as this new Amendment Act now, prescribes for punishment of both bribe givers as well as bribe takers.

Before going into details, let the concept of bribery be discussed summarily. Bribery means offering or receiving any undue advantage, to or by any person, who holds a power or position, which is connected with administration of public duty, for influencing him or inciting him to act contrarily to the norm of honesty and integrity of public office and when the power of such person is used corruptly, for reward or promise, it seems, bribery has been committed.

This paper puts under microscope the penalizing provisions, which prescribes punishments for both the demand and supply side of bribery, under the recent Prevention of Corruption Amendment Act, 2018 and critically attempts to analyze the scenario, by utilizing the deterrence theory of punishment. This paper tries to evaluate the deterrent effect of the new penalizing provisions, in the current scenario in India.

International Approach Against Corruption

International approaches are there, all over the world to combat the evil of corruption. The United Nations Development Programme as well as the World Bank, had examined the scenario prevailing in different countries and came to a conclusion that the social, political and also the economic conditions prevailing over the different countries, result in different causes and effects of corruption in different countries. There are numerous instruments in the international arena, which focuses on combating corruption, some of them are mentioned hereunder.

The Oecd Convention and Unga Instruments

The OECD Convention aims to combat bribery done by foreign public officials in the arena of international business, whereas, the four instruments of UNGA prescribes for adoption of an international code of conduct for the public officials, to facilitate, cooperation amongst countries to fight corruption in the international business transactions.

The United Nations Convention Against Corruption

In the year of 2003, the United Nations had adopted the United Nations Convention Against Corruption, and as many countries had signed this instrument, it has emerged as a globally legal instrument to fight corruption, this Convention mandates for the signatory countries to declare bribery, money laundering, embezzlement of public funds and obstruction to justice as criminal acts. India has signed and afterwards ratified this United Nations Convention against Corruption and accordingly, India has brought some changes in its anti-corruption legal regime, in consonance with UNCAC. In this paper, some features of UNCAC are discussed, as ratification of this Convention has compelled India to bring some changes in its anti-corruption laws, including the changes in the Prevention of Corruption Act, by the amendment of 2018.

Salient Features of The United Nations Convention Against Corruption

UNCAC has three types of obligations, those are, a) mandatory provisions, which makes the mandatory obligations to legislate, b) measures which the state endeavor to adopt, and lastly, c) optional provisions.

Chapter III, Article 15 of UNCAC, mandates the State party to adopt legislative measure so that bribe giving as well as bribe taking by national public officials be established as criminal offences. Article 16 of UNCAC, whereas mandates the State party to criminalize bribery of foreign public officials as well as officials of public international organizations.

The other provisions of the UNCAC, are not discussed here, as this paper focuses on criminalization of the acts of both bribe givers and bribe takers and the above-mentioned articles of UNCAC, prompted India to criminalize the acts of bribe givers also, by the Amendment Act of 2018.

Punishment: Deterrence Theory: An Overview

This paper, as enumerated before, aims to evaluate the utility of the deterrence theory of punishment, in the light of criminalization of both the acts of bribe givers and bribe takers under the 2018 Amendment Act. In this context, it becomes imperative, to briefly introduce the deterrence theory, before such discussion.

Punishment

Punishment is perceived as a response to a crime, and it is to be imposed by the authority of a legal system, intentionally, upon a person, as a result of breaking of a law and it involves loss, apart from this introductory concept of punishment, punishment has a general justifying aim, and one aspect of punishment is distribution of it.

If the moral justification of punishment is to be probed, it is nothing but a measure to prevent crime as well as aiming for readjustment of criminal.

Bird's Eye View of Deterrence Theory

As previously discussed, the general proponents of deterrence theory believes that the justifying aim of punishment is the deterrence, as per the deterrence theory, the prominent feature of any punishment should be its capacity to deter crime, resulting in crime reduction, punishment is justified as it results in the good consequence of reduction of crime, here, the theory revolves around the concept that people tries to avoid the threat of punishment as it is a pain, for example, David Hume argues that as all the human laws are based on rewards as well as punishments, so, these motives play a significant role to produce good and prevent evil actions.

Many proponents argue that acceptance of punishment is only for the purpose because it deters, Ted Honderich also supported this view and it may be said that deterrence theory is a consequentialist theory, which focuses on consequence.

The deterrent punishments may take different forms, one of which is general deterrence or which can be termed as macro deterrence, in this type of deterrence, the punishment is constructed in such a way, so that it deter persons in society at large from committing the crimes, in this form the punishment is justified on its efficacy to act as a general deterrence, another type of deterrence can be termed as micro deterrence or specific deterrence, in this type of deterrence, the punishment is evaluated on its capacity to deter an individual from crime, accordingly, its success is evaluated on its efficacy to act as a specific deterrent for some particular individuals.

Deterrent punishments may take the form of fear, reform or incapacitation, in case of the form of public threats or fear, public may refrain from involving in criminal acts, in fear of being punished, in case of deterrence of future criminality, reform of criminals may play a pivotal role, in case of deterrence by incapacitation, it is argued by proponents that a criminal can be deterred from criminality, if he is imprisoned, but this form overlooks the fact that in prison also, crime can take place by the said imprisoned criminal and for reduction of crime, no innocent should be imprisoned or incapacitated.

From the brief discussion of deterrent theory, it is clear deterrence aims to negatively incentivize the citizens, in its structure, to reduce crime.

Penalizing The Demand And Supply Side of Bribery Under Prevention of Corruption Amendment Act, 2018: Effective Deterrent of Corruption

In this part, the salient penalizing provisions of demand and supply side of bribery under the new Amendment Act of 2018, are discussed and analyzed first. Thereafter, the rationale behind criminalization of both the act of bribe giving and bribe taking are discussed in the light of different rival contentions and lastly, by utilizing the deterrence theory, this part endeavors to evaluate the deterrent effect of this new Amendment Act, 2018, in reduction of corruption cases in India in the current scenario.

Penalizing Provisions Under The Prevention of Corruption Amendment Act, 2018

One of the main enactments, which played a pivotal role in fighting corruption in India is the Prevention of Corruption Act, 1988 , which came into force after repealing the 1947 PCA. This Act provided for punishment for bribe takers, but the 1988 Act also provided immunity to the bribe givers in cases, as they are treated as victims of the crime. After signing and ratifying the United Nations Convention Against Corruption, India in consonance of the said convention, mandated for criminalization of acts of bribe givers and bribe takers in the Prevention of Corruption Amendment Act, 2018 and this new Amendment Act brought some changes in the penalizing provisions of the Prevention of Corruption Act, 1988, which are discussed and analyzed hereunder.

In section 2 of 1988 Act, by the new Amendment Act, 2018, the word 'undue advantage' included gratification, other than the legal remuneration and the word 'gratification' now broadened its ambit and included other benefits also, and not limited to the pecuniary benefits, in its purview. So, by the amendment, the impact of the Act has become extensive, as, now, the act includes any kind of improper act by public official, in lieu of any benefit or favour.

By section 4 of the new Amendment Act, the previous S. 7,8,9,10 of the 1988 Act had been substituted and new provisions had been added, after the amendment, S. 7 of the Act has broadened and now, the bribe taker public official's act has become punishable as soon as the undue benefit has been obtained or accepted or attempt had been done in such regard, regardless to the fact that whether corrupt performance has been taken place or not, further, after the amendment, the punishment for the bribe takers had been enhanced, and now the punishment is not less than three years and which may be extended up to the term of seven years, along with fine, under section 7A, now there is punishment provision for the person, who though, not being a public servant, lures a public servant to act corruptly. As previously stated, this Act, 2018 has provided punitive measures for bribe takers, now, let the punitive measures provided by this 2018 Act, against the bribe givers be discussed. When supply side of the bribery chain, i.e., bribe givers lure the demand side of bribery chain i.e, bribe takers, corrupt acts take place. So, unequivocally, it can be deduced that bribe givers play a crucial role, in the events of bribery.

S.8 as provided by the Amendment Act, 2018, now provides punishment for bribe givers, who induce the public servant to act corruptly, it prescribes imprisonment for a term, which may extend up to seven years or with fine or with both, this section does not provide for any mandatory minimum punishment for bribe givers, but innocent bribe givers, who pay bribe under compulsion are protected, if they report the incident, to the proper legal authority, within seven days from the incident of compulsive bribery.

The amended Act, now has penal provisions for commercial organizations also, if any person, who is associated with the commercial organizations, gives or has made a promise to give undue benefit, to any public servant, for the purpose of the retention of business of such commercial organization or to get an advantage towards the said purpose, but in these cases, the commercial organization may get defended, if it can prove that it had proper procedures, in compliance of the prescribed guidelines, to prevent such type of corrupt conduct.

The new substituted provision by 2018 Act, provides for enhanced punishment for subsequent offenders, for a term of imprisonment not less than five years, but which may extend up to ten years along with fine.

There are other salient features of speedy disposal, criminal misconduct, attachment and confiscation of property, sanction etc. which are there in the new Act, to facilitate the fight of this new Amendment Act 2018, against corruption, but in this paper, those are not discussed in details, as this paper focuses on the deterrent effect of the penalizing provisions of this Amendment Act, in the current scenario.

Rationale For Penalizing Supply Side of Bribery Chain

Before evaluating the deterrent effect of the penal provisions of the amendment, the rationale behind punishing supply side of bribery chain, be discussed, because there is no controversy in punishing demand side of bribery chain.

K. Basu has suggested that the bribe givers should get complete immunity, from punishment in India, Abbink and others investigated Basu's proposal by surveys in India and found that indeed asymmetric punishment against bribe givers can reduce the incidents of corruption, the foundation of this theory is based on the concept that if for reporting of crimes, the system is dependent upon bribe givers, then converting to the asymmetric punishment from symmetric punishment for bribe givers, can give much needed incentive to the bribe givers to report the incidents of corruption.

But some proponents suggest that in case of harassment bribes, the immunity for innocent bribers or the asymmetric punishment in some cases, may well pay off, but in case of collusive bribers, there is requirement for symmetric punishment, because collusive bribers might regard that mild sanction is an affordable cost, for reporting against a bribe taker, who has let them down, so, if asymmetry is followed in cases of these collusive bribe givers, then they may be armed with credible technology, by threat of which, they may enforce a corrupt deal with a bribe taker.

So, here, it is found that in case of innocent bribers, there should be immunity, as deterrence theory proponents except few, never supported punishment of innocent, but that is not so in case of collusive bribers.

Deterrent Effect Of The Prevention of Corruption Amendment Act, 2018

Now, let the deterrent effect of the Prevention of Corruption Amendment Act, 2018, be discussed and analyzed in the light of deterrence theory, with the aid of data in Table 1, which comprises of NCRB data for the year of 2018 to 2020 for corruption cases.

Table 1: NCRB Data on Corruption Cases Reported in the year of 2018-2020²⁶

Year	2018	2019	2020
PC Act and related IPC Sections Case Reported in India	4129	4244	3100

LocalCircles in collaboration with the Transparency International held a survey, and it is found before this 2018 Act 56% citizens paid bribe, but after this 2018 Act came into force, it is found that 51% of the citizens had paid bribes in 2019.

From the above NCRB data and 2019 survey report data by LocalCircles, it is found that there is reduction in the incidents of bribery after the Amendment Act, 2018 came into force, but whether the reduction is aftereffect of the criminalization of both the bribery demand and supply side by the Amendment Act, has to be evaluated. The deterrent factor of this Amendment Act is also needed to be analyzed.

If we utilize the deterrence theory of punishment, then the proponents of deterrence theory, might argue that enhancement in punishment for the bribe takers and subsequent offenders and penalization of bribe givers had conjointly played as deterrent factors in reduction of corruption crime rates, as can be seen from the NCRB data and survey report, 2019.

Deterrence proponents may further point out that, the corruption crime rate has been reduced, as the enhancement in punishment and penalization of bribers had made the crime unattractive for the criminals, in regard to the immunity provided to the innocent bribe givers, it can be found that major figures like Fichte, Bentham had rejected the idea of punishment of innocent, Beccaria being the exception, the underlying idea being that the state issue threats, if citizens perform crime, so, where no crime of bribery has been done by innocent bribe givers, state need not to execute threats by punishing any innocent bribe giver.

From the above discussion, it can be deduced that 2018 Amendment Act has brought some deterrent factors, in reducing corruption rate, but whether it has complete deterrent effect or not is needed to be evaluated.

From the survey report, 2019, it can be found that 51% citizens had given bribes, but from the NCRB data for the year of 2019, it can be found that very few cases, in comparison to 51% citizens bribe giving incidents, had been reported in the National Crime Record Bureau, which clearly indicates that there is lack in reporting of corruption incidents. So, why the deterrent factor of the 2018 Act has failed to make complete deterrent effect, let it be analyzed.

Deterrence theory presupposes the knowledge of the crimes and their sanction, but in India, where till date illiteracy and lack of transparency is there, a handful of citizens know about the new penal provisions against bribe takers and bribe givers, in the light of the new Amendment Act, so, if a citizen does not possess the clear idea of punishment and crimes of corruption, no question of applying deterrent factors upon them arises at all, further the chance of being caught is also to be enhanced and known to the public in crime of corruption, then only there can be much more reporting of corruption cases in India, which can ultimately serve as an effective deterrent.

Further, there should be some minimum punishment prescribed against the collusive bribers, which at least can bring some symmetry between the punishment of both demand and supply chain of bribery under this new Act and consequentially deter the collusive bribers, who sometimes disregard the mild sanction and tries to enforce a corrupt deal.

From the above discussion, it is found that the new Amendment Act, 2018, has substantial deterrent effect upon crime of corruption as can be seen from the above data, but some measures can be taken to make it as a more effective deterrent, in fight against corruption.

2. Conclusion

From the above discussion, it is clear that the Prevention of Corruption Amendment Act, 2018, has a substantial deterrent effect, which consequentially reduced the corruption crime rates, but by implementing some measures, this deterrent effect, can further be increased.

This paper suggests that provision for some minimum limit of punishment for bribe givers, can help deter the collusive bribers.

The immunity to the innocent bribe givers under the new Act is provided, if only they report the incident, within seven days, from it, but in many cases, due to retaliation from the bribe takers, an innocent bribe giver may have further delay in reporting the incident, so, time limit may be increased to support the cases of genuine innocent bribe givers.

There should be awareness in public that what is the crime of corruption under the new Act, what is the prescribed sanction for it, and what is the chance of them being caught, because it is a settled proposition, that the chance of being caught has much more deterrent effect upon the criminals, as expressed by John Stuart Mill that one person is deterred, not by the punishment of other fellow being, but by the expectation, that he may be punished.

There should be proper accurate data survey, to know, what is the extent of corruption in India, only then it can be curbed and effective corruption control can be done.

In conclusion, it can be said that apart from this new Amendment Act, 2018, there should be more checks and balances in every sector and there should be effective enforcement of the Prevention of Corruption Act, along with other anti-corruption mechanisms in India, only then we can fight with the legal quagmire of corruption. Thus, this paper has supplemented the deterrent theory, by fitting it into the current scenario of corruption in India and provided a coherent account in this regard.

References:

1. Barry Hindess, "Good Government and Corruption" in Peter Larmour and Nick Wolanin (eds.), *Corruption and Anti-Corruption*, 2-10 (Anu Press, 2006)
2. Zoe Pearson, "An International Human Rights Approach to Corruption" in Peter Larmour and Nick Wolanin (eds.), *Corruption and Anti-Corruption*, 30-61 (Anu Press, 2006)
3. Beverley Earle and Anita Cava, "When Is a Bribe Not a Bribe: A Re-Examination of the FCPA in Light of Business Reality", 23 *Indiana International and Comparative Law Review*. 111 (2013)
4. William Oldnall; et al. Russell. *Treatise on Crimes and Misdemeanors*, 153, (Gale, 2010)
5. Varun Chablani, "Understanding The Organization For Economic Cooperation And Development: Anti-Bribery Convention For India", 6(1) *NUJS Law Review* 83 (2013)
6. Akeem Olajide Bello, "United Nations and African Union Conventions on Corruption and anti-corruption legislation in Nigeria: A Comparative Analysis", 22(2) *African Journal of International and Comparative Law* 309 (2014)
7. Pradeep Kumar Singh, "Tackling of Corruption in India by Recently Enacted Penal Laws", 7 *Athens Journal of Law* 298 (2021).
8. K. Basu, and T. Cordella. "Asymmetric Punishment as an Instrument of Corruption Control" (World Bank Policy Research Working Paper No. 6933, 2014).
9. K. Abbink, U. Dasgupta et. al., "Letting the Briber Go Free: An Experiment on Mitigating Harassment Bribes." 111 *Journal of Public Economics* 17-28 (2014)
10. Christoph Engel, Sebastian J. Goerg et. al., "Symmetric vs. Asymmetric Punishment Regimes for Collusive Bribery". 18 *American Law and Economics Review* 507 (2016).
11. Sanja Kutnjak Ivkovic, "To Serve and Collect: Measuring Police Corruption", 93 *Journal of Criminal Law and Criminology* 593 (2003).
12. Thom Brooks, *Punishment*, 2-6 (Routledge, Oxon, 1st edn., 2012)
13. H.L.A Hart, *Punishment and Responsibility*, 159, (Oxford University Press, Oxford, 2nd edn., 2008)
14. The United Nations Convention Against Corruption, 2003
15. The Prevention of Corruption Act, 1988, (Act 49 of 1988)
16. The Prevention of Corruption (Amendment) Act, 2018, (Act 16 of 2018)
17. Crime in India, Statistics, Volume II, available at <https://ncrb.gov.in> (2018, 2019, 2020)
18. Local Circles, India Corruption Survey 2019 Report, available at <https://www.localcircles.com/a/press/page/india-corruption-survey-2019#.ZA8x8uxX4pd>

List Of Abbreviations

eds. – Editors

edn.- Edition

OECD- Organization for Economic Cooperation and Development

UNGA- United Nations General Assembly

NCRB- National Crime Records Bureau

PCA- Prevention of Corruption Act

S. - section