

**Indian Banks and the Prevention of Corruption Act: Freedom and  
discipline**

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## **Abstract**

*Selfless activists like Mr. Pai teach us the importance of continuously interrogating the functioning of our democracy. The NPA issue has persisted for almost a decade. It has eroded the profitability of banks, and is a problem for depositors, although sovereign guarantee mitigates concerns. Since large infrastructure loans were made to private firms, there were fears of private enrichment at the expense of the tax-payer. The institutions to curb corruption were geared to a control regime, and in the post-reform market-based system did not make the crucial distinction between crime and risk-taking. Their actions paralyzed decision-making and delayed resolution. The Prevention of Corruption Act has recently been amended, but partly because the differing requirements of a control and market-based system are not well-understood some have criticized it as being too soft on corruption while others see it as continuing to hurt decision-making. After examining the combination of discipline and freedom a market-based system requires we assess the 2018 amendment on those criteria. We also more broadly examine changes in incentives and social norms that are likely to reduce corruption as well as resolution delays.*

**Keywords: Public sector banks; Non-performing Assets; Prevention of Corruption Act**

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## **Indian Banks and the Prevention of Corruption Act: Freedom and discipline**

### **Introduction**

Selfless activists like Mr. M. R. Pai teach us the importance of continuously interrogating our democracy. Since making banks more customer-friendly was an area in which he made major contributions, it will be worthwhile, in his memory, to further analyze problems Indian banks are facing today, since these imply potential risks for their customers.

Bank depositors are safe if banks invest money deposited carefully and well. Currently public sector banks (PSBs) have the largest ratios of non-performing assets (NPAs) but the sovereign guarantee moderates risks to depositors. Some of these NPAs were a consequence of their nation building activities.

Dr. Y.V. Reddy (2018) writes that earlier the policy elite believed that whatever allocation they made was in the best interests of the nation. Unfortunately, apart from ill-informed resource allocation, such discretion can result in corruption.

Earlier loans made were at least largely to the public sector. In the 2000s post-liberalization boom, however, large infrastructure loans went to the private sector. As many of them turned non-performing there was a reaction against possible corruption and private enrichment at public expense. Greed is also a cause of corruption, and gets more scope in a market economy. But rewards to effort and risk-taking play an essential motivating role in such an economy.

There were institutions to curb corruption but they were geared to a control regime. In the post-reform market-based system they did not make the crucial distinction between crime and risk-taking. Their actions paralyzed decision-making, contributing delays in resolution and to the fall in credit growth and the industrial slowdown since 2011, even as NPAs continued to grow. This imposed a large economic cost on the economy in terms of growth and jobs lost. Market-based freedoms can contribute to prosperity for all but do need to be disciplined by appropriate laws, norms as well as better systems. The forum for free enterprise (FFE) distinguished itself in the fight for freedom from stifling controls. But the fight has to continue to achieve the right kind of discipline essential to preserve economic freedoms.

In this paper we examine systemic changes that can improve self-discipline and how India's anti-corruption apparatus can become more appropriate for a market economy. Institutions that do not adapt to a changed economic reality can even impede functioning.

After examining the combination of discipline and freedom a market-based system requires we assess the 2018 amendment of the Prevention of Corruption Act (PCA) on those criteria. Does it impose adequate discipline while protecting market freedoms? We also more broadly examine changes in incentives and social norms that are likely to reduce corruption as well as resolution delays.

### **Hysteresis**

Structure and ideas become engraved in institutions that affect outcomes—this is the SIIO paradigm (Goyal, 2015). A broad definition of an institution is repeated norms of behavior. We are more familiar with physical institutions such as the Indian Parliament. But they also ultimately influence behavior. Institutions constitute the warp and woof of a nation, and give it its distinctive character. They do change or evolve over time, but very slowly. Thus history matters and there is path dependence.

Acemoglu and Robinson (2012) argue a democracy tends to have inclusive institutions. These encourage the creative destruction and innovation that sustains wealth, and therefore create the best conditions for the success of a nation.

India was unusual in starting its democracy at independence with full adult franchise. Therefore there was full political inclusion. The international press did not expect an Indian democracy where 'illiterate hordes' were invading the 'hallowed halls' of parliament to survive (Guha 2007). But it did, and resoundingly so.

The outcome, however, was inadequate economic inclusion. Provision of education, health, basic public goods, which are essential to raise productivity and incomes of the masses, was all sub-standard. Why?

Politicians do tend to deliver what voters demand. In India, unfortunately, structural aspects such as caste heterogeneity and poverty allowed these to emerge as vote winners, thus

reducing the need to deliver economic inclusion. Moreover, at independence the then dominant ideas of government planning boosted central controls inherited from a colonial system. A multiplicity of agencies arose from superimposing a centralized planning structure on a federal constitutional structure. There was a tendency to start new programs and create new bodies without a clean exit from old ones.

Controls created discretion and corruption. With multiple agencies there was no clear accountability. Harassment in permissions, licenses and certifications hindered private activity. Overlaps, conflicts and delays created poor governance, which hurt delivery of the public services necessary to empower the masses.

### **Corruption**

As corruption increased under controls, institutions were created to fight it. These were part of the checks and balances of Indian democracy. Apart from CBI, CVC was created in 1964 on the recommendations of the Committee on Prevention of Corruption to address governmental corruption. In 2003, Parliament gave it statutory status. Fear of possible investigation served as an important check on the corrupt.

With reforms and higher growth, the value of natural resources rose. Discretion in natural resource allocation and in land acquisition led to allegations of corruption and a backlash from civil society.

An atmosphere of suspicion and mistrust prevailed. The Government's auditor, CAG, estimated large losses to the tax payer in telecom resource allocation. Politicians and industrialists went to jail. Growth and job creation suffered. Ten years down the road the case was dismissed, although the judgment has been appealed. But just the existence of large profits or losses does not imply criminal activity. It turns out, the CAG's estimates of losses were only estimates, and probably did not give the true picture.

Gains or losses could be construed as criminal because a clause in the Prevention of Corruption Act (1988) defined criminal misconduct by a public servant to include obtaining a pecuniary advantage for anyone where no public interest is involved. But ensuring this is difficult in a market economy, where awarding such an advantage is commonplace.

To reduce corruption in a market economy systemic changes that affect behaviour are required. For example, as controls to go, transparent bidding should replace opaque discretionary allocation of public resources. But the control-economy based anti-corruption institutions and laws must also change, otherwise they can become not just irrelevant but also obstructive.

There is the story of someone who was stationed on a staircase after it was painted to warn people not to touch it. The paint dried but he still stood there, warning people, because the memory of why he had been put there was lost.

### **Public Sector Banks**

NPAs losses are also partly due to systemic flaws<sup>1</sup>. Development banks had been shut, but despite repeated efforts bond markets had not developed adequately. In an open economy, the government had to reduce deficits, yet in the 2000s India needed a big push in infrastructure. How to finance it? PSBs went into this as a potentially profitable nation-building exercise despite an obvious asset liability mismatch. There was some push from the then government but they also wanted to do it. Private banks, however, played safe with retail lending. Diversity in bank strategies is healthy for the economy, but this diversity must be respected, without unnecessarily running down one or the other type of bank.

PSBs needed repayment earlier but infrastructure has a longer gestation than the average deposit cycle, so many loans were non-performing from the beginning. Global slowdown and internal (government permission paralysis) shocks compounded firms' losses. Essential rollovers were regarded as 'evergreening' even though they were inadequate to keep projects viable.

There were problems such as too little owners' equity, or siphoning of money, or a Mallya who partied even as his employees were not paid. But there were also sincere entrepreneurs who failed in an impossible situation.

While crooks like Nirav Modi escaped, the regulatory over-reaction that followed hurt the honest. Instead of recognizing current efforts at recovery strictures based on past data made

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<sup>1</sup> This section draws on Goyal (2018).

recovery more difficult for PSBs. Public sector bankers who had given the loans that had created assets for the economy such as roads, power plants, and airports became liable to be charge-sheeted and imprisoned because the loans they had given were in default. Banks must take commercial risks and failure cannot be treated as criminal.

An FIR was also issued against independent directors who followed a committee based due process. The Companies Act, 2013, Schedule IV, II.1 describes the roles and functions of a part-time independent director as ‘...bringing an independent judgment to bear on the Board’s deliberations..’; duties III.6 ..ensure their concerns are addressed and if not insist they are recorded in the Board minutes, but III.8 ‘not to unfairly obstruct the functioning of an otherwise proper Board.’ Independent directors do not run the company and if they go against a commercial decision built from the bottom, following due processes and with the involvement of the relevant experts and committees, they are likely to be accused of obstruction.

The Code of Criminal Procedure, 1973, Sec. 154, which defines an FIR, clarifies that police can take action if the offence is cognizable (that is, likely to carry a punishment greater than 3 years). Action was taken, without any proof of complicity. Just agreeing to a decision cannot be a cognizable offence. Names published in the press hurt reputations built over years of hard work and contribution to society. The tarnish lasts a long time in our system because of delays in reaching a decision.

Executives and directors will not agree to the sale of an asset or restructuring with haircuts if years down the line it could be questioned as creating a loss to tax-payers. The priority for the economy should be to get assets functioning again but resolution suffers in such conditions. National assets have been deteriorating since 2010.

### **Understanding markets**

Risk can be defined as measurable uncertainty implying some probability of loss. In finance, risk arises since returns can differ from expected values. Volatility and unexpected shocks imply expected values may not be realized leading to a loss to the taxpayer, but this is not criminal.

Among common types of financial risk affecting banks are (Goyal, 2014):

*Credit risk* is the probability that a borrower defaults on payments. Country risk is included in this. Poor systems in a country raise default and counterparty risk. In particular, if governments force banks to make loans on non-commercial grounds, or government guarantees induce moral hazard from borrowers or lenders, credit is more likely to be at risk. Credit risk also arises during a slowdown or when interest rates rise in a boom that leads to borrowers being stretched.

*Market risk* includes risks like interest rate, currency, liquidity, systemic, volatility, refinancing, equity and commodity risk. Interest rate and currency risk is high when there are large arbitrary, unhedged movements in these rates. Volatility can be high in thin markets, and hedging is also limited if markets for hedging products are thin or missing. The global financial crisis gave recent demonstrations of liquidity and systemic risk as markets froze, and transactions could not be undertaken.

There are other types of risks too, such as operational, legal, and political. Some of these can be subsumed in country risk.

Both too little and too much risk-taking by banks can lower returns or create losses for tax-payers. There is a fundamental trade-off between the insurance and the incentive criterion in the allocation of risk to market participants. Rewards and therefore, incentives for innovation, rise with risk. Too little risk-taking reduces innovation and returns but too much increases the probability of loss and also reduces innovation. Who can best control risk should bear it in order to reduce risk-taking. Ex-ante diversification of risk using markets lowers expected returns, but performs a valuable insurance function.<sup>2</sup>

Banks are natural risk aggregators to whom agents can transfer risk. They should not, however, be able to retain the upside but pass on the downside through tax-payer bailouts. Passing the downside to the government or through limited liability structures encourages more risk taking, such as when loans are given without proper assessment. Reform is required since, on the criterion of who controls risk, stability improves if a bank has to bear more risk through own equity or capital at stake. Transfer should not be only to the government or tax-payer.

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<sup>2</sup> A government can more easily spread risk. Its taxing ability means it is best placed to diversify risk and to borrow at low cost since there is no bankruptcy premium. This is the reason for many types of government warranties.



Overuse of capital buffers may reduce bank lending too much, therefore, well-designed regulations such as leverage caps can be useful supplements. Other systemic improvements include credit rating and risk based lending, with better underwriting, to include risks in interest rates charged. Strategic diversification to small cap loans and retail lending can also reduce risks. Despite public sector ownership stronger liability for the bank and more independence can induce a board of directors to take responsibility for oversight of risks.

The activities of rogue traders such as Nick Leeson who brought down Barings Bank with his hidden speculative trades have become less frequent with systemic checking, enforced risk limits, and putting some liability for the downside.

### **Market compatibility and vigilance institutions**

Vigilance institutions can be compatible with markets if they rely more on data to find evidence of wrong doing. In the age of big data, technology can be leveraged to find unusual patterns in data, suspicious transaction reports can be generated, and random checks can induce compliance. Data can be collected without naming and hurting reputations, as data is now a by-product of activity.

Those guilty of corruption must be punished. But to minimize collateral damage accusatory lists must be short, well-researched and based on robust evidence of a cognizable offence. A commercial loss should not be assumed to be a criminal offence unless there is evidence of kickbacks, violation of procedures, or misuse. Moreover, the system that sets them up to fail needs to be reformed rather than blaming individuals or seeking scapegoats.

### **Systemic change**

Systemic change is taking place. The controversial 1988 clause in the PCA was finally changed with the Prevention of Corruption (Amendment) Act, 26th July 2018. Surprisingly, however, the change generated opposite reactions. Some feared it had become even more stringent and would hurt business, while others thought it had made the investigative agencies toothless, giving a free reign to corruption. Therefore it is worthwhile to carefully assess the changes introduced. The first set worry about ‘intentionally enriching’ being taken as

indicative of criminal misconduct since, intention is a broad term that could be misused<sup>3</sup>. The second set fears forcing investigative agencies to get permission to act is a retrograde step that will slow them down.

A valuable feature of the amendment is the imposition of deadlines on an Indian justice system currently subject to agonizing delays. A trial is to be concluded within a period of two years. Extensions can be applied for 6 months at a time, with reasons given, but a trial is not to exceed an aggregate of four years (Section 3).

Despite an academic literature arguing those who are forced to give bribe to get what they are anyway entitled to from the government should not be punished—they would then be able to turn informers more easily (Basu 2011), the amendment punishes bribe givers severely with imprisonment that can extend upto 7 years or with a fine or with both (Section 8). The reason is probably to discourage corporate attempts to corner resources and to encourage positive values in society. While the punishment for a commercial organization can be a fine with their recorded compliance procedures allowed as a defense; any officer of the organization found responsible can face imprisonment (Section 9).

There are, however, useful escape clauses that allow a bribe-giver to escape punishment and turn approver. For example, the punishment will not apply if the briber is compelled and reports the bribe within 7 days, or if she is assisting law enforcement authority.

Getting an ‘undue advantage’ is made a cognizable offence (with punishment of minimum 3 extendable to 7 years). But intentional enrichment is presumed only if assets are disproportionate to income (Section 7 substituting for the PCA Section 13)—since tangible proof is required, it should allay fears that ‘intention’ can be broadly interpreted. The requirement of tangible proof of enrichment is a major improvement over just giving a commercial advantage as in the old PCA.

Moreover, there is further protection for those who have to make risky commercial decisions. If an action is in the line of duty, police cannot act against a public servant (retired also)

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<sup>3</sup> See, for example, <https://www.businesstoday.in/sectors/banks/parliament-clears-prevention-of-corruption-act-honest-bankers-bureaucrats-can-breathe-easy/story/280670.html>

without permission of the relevant Govt. or superior (Section 12). The latter are likely to have a more nuanced understanding of commercial risks compared to the police.

But there are clauses to prevent misuse of the above feature to protect the corrupt. For example, the protection will not hold if an individual is caught red-handed; prosecution can take place based on a court order also, after giving the individual an opportunity to be heard.

The protective authority also has to give her reasons in writing within 3 + 1 months. This should be made accessible to RTI queries. Then transparency and possible questioning could mitigate unwarranted protection. The required sanction for prosecution also has to be given within 4 months. This reduces the possibility of protective delays.

So there is balance—some, but not excessive protection, and moderation through escape clauses. Measures to reduce the delays, and therefore the prolonged trauma currently inflicted, are important. Moreover, a major reason for delays is that investigations are begun without adequate evidence. This amendment should push the investigative agencies to use sharper data, and build tighter cases, so that permission to prosecute cannot be denied and the case comes to a conclusion within the deadlines imposed. Interpretation of the amendment in action will be important, as will be the role of activists and civil society in ensuring clauses are not misused.

### **Behavioural change**

The amendment is just part of larger structural changes that are changing behaviour and social norms. The support that demonetization got from the aam aadmi, despite the considerable costs it imposed on him suggests there is a change in social norms. Corruption and tax avoidance are no longer acceptable behaviour. People are willing to sacrifice to get a corruption free society. Data from GST and demonetization have increased the registered base of tax payers, reducing the set that unfairly escape taxes. There is also support from a global push, which includes data sharing and action against tax havens. This makes money laundering and profit shifting more difficult.

Game theorists study tipping outcomes. At a critical mass of compliant behaviour, it pays for the marginal individual also to be compliant. So, as it crosses the threshold, society switches suddenly from an outcome where few are compliant to where most are compliant. If everyone

is paying taxes I will also be willing to pay. As the provision of public goods improves so will my willingness to contribute taxes towards their provision. The greater use of e-governance, web-based provision and direct benefit transfers is making public services more efficient while reducing discretion and therefore local corruption in providing entitlements.

The success of Indian democracy has been the regular holding of elections and transparent change in governments. But horizontal social networks are complementing this vertical democracy in a valuable steady deepening of democracy. Today there are many NGOs and activists, where Mr. Pai was an early and far-seeing pioneer. These encourage citizen participation and awareness and make sure our democratic institutions cannot be subverted.

The potential asset loss under the Indian Bankruptcy Code (IBC) is increasing repayment by promoters. They can no longer just pocket the profits and leave the losses to tax-payers to fund. The deadlines IBC imposes are reducing delays and encouraging decisiveness. Over-reaction has to be avoided, however, such as lumping all of a heterogeneous set of NPAs on an untested IBC. PSBs are changing from loan decisions taken by governing elites to diversified risk-based lending on commercial grounds so that going forward losses to tax payers should be reduced.

As corruption decreases, so can suspicion and mistrust. The investigative agencies can shift to investigation that is more focused and data-based, instead of being suspicion and allegation based. Then valid commercial activity will not be harmed and market freedoms can flourish and deliver prosperity for more.

There is a story of a farmer taking a basket of crabs to sell. Someone pointed out there was no lid so they would escape. He responded they were Indian crabs who would pull each other down. This is a mentality born of scarcity. Today there is the possibility of shared prosperity provided the crabs begin to trust and let each other finally get to economic inclusion.

## **References**

Acemoglu, D. and Robinson, J.A. 2012. *Why nations fail: The origins of power, prosperity and poverty*. Crown: New York.

Basu K. 2011. 'Why, for a class of bribes, the act of giving a bribe should be treated as legal'. *Ministry of Finance Government of India Working Paper No. 1/2011-DEA*. (March).

Goyal, A. 2018. 'The economy suffers from a trust deficit', *The Hindu Business Line*, May 6. Available at <https://www.thehindubusinessline.com/opinion/columns/ashima-goyal/the-economy-suffers-from-a-trust-deficit/article23794621.ece>

Goyal, A. 2014. 'Banks, policy, and risks: How emerging markets differ'. *International Journal of Public Policy*, 10 (1, 2 & 3): 4–26.

Goyal, A. 2015. 'Sustaining Indian growth: Interests versus institutions', *India Review*, 14(3): 330-351, July-September.

Government of India. 2018. Prevention of Corruption (Amendment) Bill 2018. Ministry of Law and Justice. Available at <http://www.egazette.nic.in/WriteReadData/2018/187644.pdf>

Government of India. 2013. The Companies Act, 2013. Ministry of Corporate Affairs. Available at <http://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf>

Government of India. 1988. Prevention of Corruption Act, 1988. Available at [http://cbi.gov.in/rt\\_infoact/pcact.pdf](http://cbi.gov.in/rt_infoact/pcact.pdf)

Guha, R. 2007. *India after Gandhi: The history of the world's largest democracy*, London: Macmillan.

Reddy, Y. V. 2017. 'Future of public sector banking', Chapter 1 in A. Arya (ed.) *Anvesak*, 47 (1 & 2): 1- 16. Ahmedabad: Sardar Patel Institute of Economic and Social Research.