

**Why, for a Class of Bribes, the Act of *Giving* a Bribe should
be Treated as Legal**

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Foreword

In the rush to produce urgent policy documents and briefing notes that any government has to do, it is easy to let matters that may not be quite as urgent to go unattended. However, the not-so-urgent often includes matters of great importance for the long-run well-being of the nation and its citizenry. Research papers on topics of strategic economic policy fall in this category. The Economic Division in the Department of Economic Affairs, Ministry of Finance, has initiated this Working Paper series to make available to the Indian policymaker, as well as the academic and research community interested in the Indian economy, papers that are based on research done in the Ministry of Finance and address matters that may or may not be of immediate concern but address topics of importance for India's sustained and inclusive development. It is hoped that this series will serve as a forum that gives shape to new ideas and provides space to discuss, debate and disseminate them.

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Disclaimer and Acknowledgements

I briefly spoke about the main idea behind this paper in my inaugural remarks at a conference organized by NIPFP in New Delhi on 15 March. It generated a lot of discussion and I am grateful for comments and criticisms I received from Supriyo De, Sean Dougherty, Arun Duggal, K. P. Krishnan, H. A. C. Prasad, Ajay Shah, Shekhar Shah and T. C. A. Srinivasa-Raghavan. I am also grateful to Sayali Phatak and Jyoti Sagar for drawing my attention to some of the relevant legal literature.

The ideas presented in this paper are personal and do not reflect the views of the Ministry of Finance, Government of India. Since I have been talking about these ideas informally for a while and the main argument is fairly nuanced, I decided it is worth putting this out as a fully spelled out paper to minimize the risk of misinterpretation.

Abstract

The paper puts forward a small but novel idea of how we can cut down the incidence of bribery. There are different kinds of bribes and what this paper is concerned with are bribes that people often have to give to get what they are legally entitled to. I shall call these “harassment bribes.” Suppose an income tax refund is held back from a taxpayer till he pays some cash to the officer. Suppose government allots subsidized land to a person but when the person goes to get her paperwork done and receive documents for this land, she is asked to pay a hefty bribe. These are all illustrations of harassment bribes. Harassment bribery is widespread in India and it plays a large role in breeding inefficiency and has a corrosive effect on civil society. The central message of this paper is that we should declare the act of giving a bribe in all such cases as legitimate activity. In other words the giver of a harassment bribe should have full immunity from any punitive action by the state.

It is argued that this will cause a sharp decline in the incidence of bribery. The reasoning is that once the law is altered in this manner, after the act of bribery is committed, the interests of the bribe giver and the bribe taker will be at divergence. The bribe giver will be willing to cooperate in getting the bribe taker caught. Knowing that this will happen, the bribe taker will be deterred from taking a bribe.

It should be emphasized that what is being argued in this paper is not a retrospective pardon for bribe-giving. Retrospective pardons are like amnesties. They encourage rather than discourage corrupt behavior by rewarding the corrupt. And, in the process, they corrode society’s morals.

1. The Thesis and the Proof

This paper puts forward a new idea about the control of one kind of corruption, namely, bribery. Bribery is rampant in India. It is a scourge that deserves to be banished. Tackling this is a problem that has to be a joint effort of all wings of the government and also of all political parties and even civil society. While it is not possible for a single person or even a single ministry to cure this malaise, one can think of small steps which, taken together, can add up to something substantial. It is in this spirit that this paper is being written.

What the paper puts forward is a small but fairly radical idea of how we can take one step towards cutting down the incidence of bribery. There are different kinds of bribes and what I am concerned with in this paper are bribes that people often have to give to get what they are legally entitled to. I shall call these “harassment bribes.” Suppose an income tax refund is held back from a taxpayer till he pays some cash to the officer. Consider a case where to buy a regular train ticket you are told that you have to pay some money under the table. Suppose government allots subsidized land to a person but when the person goes to get her paperwork done and receive documents for this land, she is asked to pay a hefty bribe. Consider the case of an exporter who has fulfilled all formalities is asked to make an illegal payment before getting a customs clearance. These are all illustrations of harassment bribes. Harassment bribery is widespread in India and it plays a large role in breeding inefficiency and has a corrosive effect on civil society¹.

The central message of this paper is that we should declare the act of giving a bribe in all such cases as legitimate activity. In other words the giver of a harassment bribe should have full immunity from any punitive action by the state.

It should be clarified that the act of bribery is still being considered illegal, and the total punishment meted out for bribery may still be the same. That is, if under the old system, the bribe giver and the bribe taker are fined Rs. x each, what I am suggesting is that we fine the bribe taker $2x$ and the bribe giver 0. In other

¹ For surveys of bribery and corruption, especially in the context of developing countries and in particular India, see Bardhan (1997) and Dasgupta (2009).

words, what is being argued is that this entire punishment should be heaped on the bribe taker and the bribe giver should not be penalized at all, at least not for the act of offering or giving the bribe. We may in fact go further and say that, in the event of a case of bribery being established in the court of law, the bribe taker is required to give the bribe, to the extent that its size can be uncovered, back to the giver. Let us, for now, go with this assumption.

The main argument of this paper is that such a change in the law will cause a dramatic drop in the incidence of bribery. The reasoning is simple. Under the current law, discussed in some detail in the next section, once a bribe is given, the bribe giver and the bribe taker become partners in crime. It is in their joint interest to keep this fact hidden from the authorities and to be fugitives from the law, because, if caught, both expect to be punished. Under the kind of revised law that I am proposing here, once a bribe is given and the bribe giver collects whatever she is trying to acquire by giving the money, the interests of the bribe taker and bribe giver become completely orthogonal to each other. If caught, the bribe giver will go scot free and will be able to collect his bribe money back. The bribe taker, on the other hand, loses the booty of bribe and faces a hefty punishment.

Hence, in the post-bribe situation it is in the interest of the bribe giver to have the bribe taker caught. Since the bribe giver will cooperate with the law, the chances are much higher of the bribe taker getting caught. In fact, it will be in the interest of the bribe giver to have the taker get caught, since that way the bribe giver can get back the money she gave as bribe. Since the bribe taker knows this, he will be much less inclined to take the bribe in the first place. This establishes that there will be a drop in the incidence of bribery.

Indeed, under the new law, when a person gives a bribe, she will try to keep evidence of the act of bribery—a secret photo or jotting of the numbers on the currency notes handed over and so on—so that immediately after the bribery she can turn informer and get the bribe taker caught. The upshot of this is not that the bribe taker will get caught but he will not take the bribe in the first place².

² This use of rationality calculus *a la* Becker (1968) may be questioned by some. I myself believe that trying to understand crime by assuming relentless self-interested behavior on the part of all individuals is inappropriate. There are moral individuals and their existence makes a large difference to how behavior in society at large plays out (see

Since the argument is being made here for harassment bribes, it can reasonably be expected that, if a change in the legislation is made in the manner suggested in this paper, there will be a sharp drop in the incidence of harassment bribery.

2. Institutional Details

In India, the main law concerning bribery is a 1988 legislation called the Prevention of Corruption Act, 1988. According to this law, bribe taking by a public servant and bribe giving are equally wrong and, in the event of conviction, both are punishable by anywhere between 6 months and 5 years imprisonment and they shall also be liable to fine. For the most part, the act of giving and taking a bribe are treated on par under this law. As section 12 states, “Whoever abets any offence [pertaining to bribery], whether or not that offence is committed in consequence of the abetment, shall be punishable with imprisonment for a term which shall be not less than 6 months but which may extend up to five years and shall also be liable to fine.” It may be added here that the giving of a bribe is treated by lawyers as abetment to the crime of bribery, and so bribe giving is covered under this section.

There is, however, an exception to the bribe giving or abetment law in the form of section 24 of the Prevention of Corruption Act 1988. I reproduce this section in full here:

“Notwithstanding anything contained in any law for the time being in force, a statement made by a person in any proceeding against a public servant for an offence under sections 7 to 11 or under section 13 or section 15, that he offered or agreed to offer any gratification (other than legal remuneration) or any valuable thing to the public servant, shall not subject such person to a prosecution under section 12”.

However, this section has a lot of ambiguity. In a case three years ago, *Bhupinder Singh Patel v. CBI*, 2008 (3) CCR 247 at p. 261 (Del): 2008 Cri LJ 4396, it was ruled that this exemption would apply only if the bribe giver could establish that the bribe was given unwillingly and in order to get the public servant

Guha and Guha, 2010). However, once one is analyzing the behavior of those who have chosen to be engaged in an act of corruption or bribery, it seems reasonable to analyze the outcome by utilizing standard rationality calculus.

trapped. But the word “unwillingly” is itself so ambiguous that the use of this judgment as precedence is not easy either.

As a consequence, section 24 is increasingly becoming a clause meant for those wanting to carry out a sting operation to trap a public servant in the act of bribe taking and seeking protection from the law. This was clear from a ruling of the Delhi High Court in the *Bharadwaj Media Private Limited v. State*, 2008 146 DLT 108 (Del): 2008 (1) CCR 11: 2008 (2) Crimes 244.

What this paper argues for is a much clearer statement concerning the legality of the bribe giver’s action in the context of harassment bribes. In other words, this would amount to a revocation of section 12 in the case of harassment bribes. In addition the law should say that once the fact of bribery is established in court, the amount of the bribe has to be returned to the person who gave the bribe.

One problem with the new law is the following. Once it is completely clear that a bribe giver has immunity from our bribery law, it is true that many more people will be willing to give bribes. However, since, every time a person gives a bribe, after that it will be in the interest of the bribe giver to expose this act of corruption (since by that not only will she not be punished but she will be getting back the money that she gave as a bribe) the bribe taker will not want to take the bribe. Since the crime of bribery cannot occur without both sides, the giver and the taker agreeing to undertake this act, the fact of greater desire on the part of the bribe giver to give a bribe under the new law will be of little consequence. This paper predicts that the end result will be a sharp decline in the incidence of bribery.

For the sake of clarity, let me emphasize what to the careful reader will be obvious anyway. It is not being argued here that the (harassment) bribe giver be pardoned in retrospect. A retrospective pardon is like an amnesty; and barring rare exceptions, amnesties are not worth it. They encourage corrupt behavior by raising hopes of future pardon and corrodes a society’s morals.

What is being argued is that the law should be changed, so that, at the time of committing harassment bribery, both parties know that the giver has immunity and that the taker not only has a heftier penalty but also has to return the bribe. If we simply grant clemency to the bribe giver *after* the crime has been committed, none of the benefits being talked about here will be achieved.

One can today get a snapshot view of harassment bribery across the nation thanks to the innovative work by the not-for-profit organization, Janaagraha, and its remarkable website, ipaidabribe.com. It illustrates well how citizens are often compelled to give a bribe; and by bringing such practices out of the closet, the idea is not to take away the guilt from such actions but the reverse, to discourage the very act of bribery. The legal change that this paper suggests will simply strengthen this kind of action, by strengthening the voice of the harassed bribe giver and increasing the penalty on the bribe taker.

3. Non-Harassment Bribes

I have confined the above analysis to harassment bribes³. The question that naturally arises is about other kinds of bribe, for instance, the kinds of bribery that are believed to occur when government gives out big development contracts. Should the bribe giver be given full immunity in such cases? The simple answer to this is a ‘No’.

But what should be the optimal policy be in such cases? We need to give this much greater thought and subject it to formal law and economic analysis before we have an answer. The main problem arises from the fact that in such cases the bribe giver is likely to have got something by giving a bribe that she does not deserve to get. Hence, in the event of bribery being established in a law court, the issue remains about the bribe giver being in possession of an object that is not supposed to be in her possession.

A full answer to how the law should treat such cases will have to await further analysis. But I am inclined to believe that even in such bribery cases there ought to be an asymmetric treatment of the bribe taker and the giver. In particular, the punishment meted out to the bribe taker should be substantially greater than on the giver. This will mean that the collusive bond between the bribe taker and the

³ Also, we ignore here the fact that in a society with widespread corruption there is the problem of ‘bribe hierarchy’, that is, the possibility that even after one gets caught taking a bribe one may be able to escape by bribing the very person or agency that caught you taking a bribe. This immediately opens up another layer of the same problem. What these ‘towers of bribery’ do to a society is discussed in Basu, Bhattacharya and Mishra (1992). In a fuller analysis of policy change it is critical to pay attention to these towers of bribery and how we can strategize to break them down.

giver will be weakened and the bribe giver will be more likely to cooperate with the judiciary in exposing the crime than under the current circumstances.

Further, it may well be argued that the public servant who takes the bribe is the gate keeper who violates his responsibility and sells off the property that he is supposed to protect. Since bribery is not a case of theft but of collaboration between two agents, the primary moral responsibility for the same rests on the shoulder of the bribe taker. Of course, if the bribe giver uses threats to induce the public servant to take a bribe that becomes a criminal act in itself.

4. Caveats

It is worth being clear that giving immunity to the bribe giver, even when this is restricted to harassment bribes, will not cause bribery to vanish altogether. This is because of the interests of the serial bribe giver, that is, a person who regularly meets with government officials and is asked or offers to pay a bribe or the agent who acts as go between in crimes of bribery. For such a bribe giver, reputation is a matter of great importance, as game theory emphasizes and people with common sense know. In other words, a serial bribe giver, planning to aid the judiciary in trapping a bribe taker, will have to weigh the cost of his loss of credibility among the officials with whom he interacts repeatedly and gives bribes to against the gain of getting her bribe money back.

What is being argued here is that the legal amendments being suggested in this paper will not remove all incentives to bribery. But to the extent that it does create mistrust between the bribe giver and the taker in the post bribery situation, it means that the comfort zone within which bribery occurs in today's world will cease to exist and the upshot will be a decline in the incidence of bribery. However, the fact that the changes in the law suggested in this paper will diminish the incidence of bribery should not lull us into the fact that there are many other actions needed to tackle this ubiquitous phenomenon. Among these is the effort to use e-technology to make procedures rule-based and to minimize the interface

between ordinary citizens and the public servant. Fortunately, important steps along these lines have been initiated in recent times.

If we want to put a virtual end to bribery and corruption, what we really have to rely on are individual values and character traits. As I had argued in a paper many years ago (Basu, 1983), human ingenuity is so great that no matter how many plugs we put in to stop corruption, people will almost invariably find a way around it⁴. One of the most acute observations on this go back by two millennia—Kautilya’s **Arthashastra**, where we find this wonderful but cynical observation (p. 281): “Just as it is impossible to know when a fish moving in water is drinking it, so it is impossible to find out when government servants in charge of undertakings misappropriate money”.

In the scheme I am suggesting one problem that will open up is that public servants may be vulnerable to blackmail and false charges of bribe-taking. We could try to plug this loophole by increasing the punishment for blackmail and false accusation. What all this underlines is the fact that there is nothing fool-proof in economic policy design.

If we want to really get at corruption, what we need to build up are values of honesty and integrity in society. In the language of the **Arthashastra**, we have to wean fish off water. This has received so little attention and even to make such an argument sounds like moral claptrap because mainstream economics has taught us that human beings are endlessly self-seeking. In truth, they are not. Honesty, pro-social preferences and a sense of right and wrong constitute a part of the human psyche (Hauser, 2006), even though we can create societies where such traits are barely visible.

It is possible to go further and argue that we cannot have an efficient market economy unless human beings are endowed with a minimal amount of integrity and pro-sociality (Basu, 2011). Because of the propensity of economics to ignore these traits, these are under-researched areas. But if we want to substantially cut down the incidence of corruption, such as bribery, and want an efficient and

⁴ It may be pointed out here that the game theorist’s ingenuity is also so remarkable that we can technically create models whereby we can create complex models of good compliant behavior which do not rely on individual moral commitments. For a very skillful model of this see Myerson (2004). Importantly, Myerson manages to illustrate the powerful role of institutions in these kinds of situations. It shows, that trying to understand human behavior without recognizing the important role of institutions and collective beliefs, can easily lead us to erroneous conclusions.

vibrant economy, alongside getting our laws and economic policies right, we need to work on building up appropriate social and cultural traits, which provide the foundations for such an economy.

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