

WHETHER CORPORATE GOVERNANCE OR GOVERNANCE OF CORPORATE CRIME?

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Abstract

'A crime committed by a person of respectability and high social status, in the course of his occupation'
- **Edwin Sutherland, an American Sociologist**

Corporate collapses across the globe. A key aspect that is being debated in the corridors of India is whether we need major regular changes to improve corporate governance, or whether improved standards of corporate governance could be achieved through adoption of principle based standards of conduct. White Collar Crime is not only a crime but a very serious crime with wide and often gory repercussions. Its seriousness can be gauged from the fact that effect of even a few White Collar Crimes on the economic fabric of society can be far more devastating. This paper outlines that it is high time for the Indian corporate sector to draw lessons from the experience of the functioning of the legal system. Economic crimes in its wide ambit also includes white collar crimes because of the diverse nature of its component activities, is incapable of simple definition. The objectives of the present paper are to study the nature of corporate white collar crimes and criminals, role of investigating agencies, core corporate governance and its responsibility, need for enhancement of penalty/punishment for white collar crimes. The authors of this paper preferred to adopt doctrinal method of study and hence no empirical or sampling techniques are adapted.

Key Words: *Corporate Crime – Corporate Governance – Investigating Agency – Punishment – Economic Crimes.*

Introduction

Over the several years, more than a few dedicated sociologists and criminologists have devoted considerable time and effort to studying the phenomenon of white-collar crime. Throughout this period, the study of white-collar crime has taken on many different forms and touched myriad areas. The study of corporate crime can benefit from the use of virtual reality technology in many ways. Corporate crimes, however, are not nearly as visible and public as many “street” offenses. This is due to the fact that rather than attempting to hide their identities, corporate offenders use their identities to create a superficial appearance of legitimacy. The reality that corporate crimes can be technically complex (i.e., manipulation of corporate financial records, large-scale Ponzi Schemes, and price fixing conspiracies), and that these crimes are diffused over space and time, aids offenders in hiding their misdeeds. Capturing the situation and role-specific influences that affect the decision-making process is necessary to advancing our understanding of corporate crime. For example, because one’s position, autonomy, industry, and peers affect decision-making within corporations, one will rarely make a decision without input from several different channels. In the business world individuals will receive, and at times solicit, information from other parties that may influence their decision on a particular issue.

The concept of White Collar Crime is evolved in the thoughts of Criminologist and Sociologist Edwin H. Sutherland, in the year 1939, who popularised the term white collar crimes by defining such a crime as one committed by a person of respectability and high social status in the course of his occupation. Sutherland also included crimes committed by corporations and other legal entities within his definition. Sutherland’s study of white collar crime was prompted by the view that criminology had incorrectly focused on social and economic determinants of crime, such as family background and level of wealth. It is true to the common knowledge that there are certain professions which offer lucrative opportunities for criminal acts and unethical practises which is very often overlooked by the general mass of the society. There have been crooks and unethical persons in

business, various other professions, who tend to become unscrupulous because of no reason apart from the thirst of gaining more and more for themselves. These deviants have least regard for ethical and moral human values.

Corporate White Collar Crimes

The earliest documented case of white-collar crime law dates back to 15th century in England. There has been a case popularly known as the Carrier's case of 1473, where the agent was entrusted to transport wool and he attempted to steal some of it for himself. Therefore the Star Chamber and Exchequer Chamber of the English Court of Law adopted the breaking bulk doctrine as it constituted the crime of larceny.

In India, the street crime, especially snatching and motor vehicle theft, relatively down compared to 2010, the year 2011 truly belonged to the faceless white-collar criminals. The numbers of such criminals arrested by the crime branch this year saw a massive increase 108 per cent as 148 people were arrested for dabbling in white-collar crime as opposed to just 71 in 2010. In all, around 20 organised white-collar rackets were busted last year and cash and valuables, amounting to R4.5 crore, thousands of mobile phones used in the commission of criminal activity and three dozen vehicles were recovered, said a senior police officer. The list includes perpetrators of lottery fraud, fake recruitment racketeers, TM fraudsters, travel agents, property dealers, agents promising fake court affidavits and death certificates as well as both men and women operating fake friendship clubs. Meanwhile, the Economic Offences Wing (EoW) of the Delhi Police arrested more than 163 criminals in 1,358 cases ranging from those of land grabbing to fake job rackets and attached property valued at amounts estimated to be between Rs. 350 to Rs. 500 crore according to crime records.

White collar crimes are to be considered as a global phenomenon to which India is no exception. As discussed earlier, white collar crimes emerged in India with the advent of the British colonisation during the period of industrial capitalism. Prior to that, instances of men working with the District treasury embezzling with the money kept under his safe custody or bribing practiced among the officials were found.

This is unfortunate to say that the instances of white collar crimes committed in the Indian society by the lawyers, there lie the shameful illustrations of Magistrates and Judges involved in committing crimes. They in the name of interpreting the laws often act as the protective shield for the goons having or not-having any political colour and allow them to go free whereas they should have been subjected to deterrence. It is the most unfortunate situation at the same time devastating, because here the crimes are committed by those individuals who are being given by the State the responsibility to ensure justice.

Similar unfortunate instances can be drawn from other professions too, like that of medical practitioners, engineers, educationalists, businessmen, politicians and the list go on. The medical practitioners are often found involved in issuance of false certificates, carrying out illegal abortions, selling out sample drugs and medicine, even in some cases adulterated drugs and medicines to the patients. Dilatory tactics are often adopted by them in providing treatment to their patients with a menswear to extract huge amount of money, no matter the person has good practice. Some of the notorious instances are like that of Nithari case, where the medical professionals put up before the society the optimum level of brutal character they can reach for the crave of making money. Misleading and fake advertisement claiming absolute cure is also one of the frequent malpractices being carried out in the medical profession. The problem lies in the fact that, they often escape punishment, since they cannot be said to have violated the letter of law, but, by violating the spirit of law, they commit crimes which are truly anti-social and creates enormous damage to the public health and safety at large.

Corporate Crimes: Role of Investigating Agencies

Economic laws in India are enforced by separate departments. The role of police is very limited. In India, keeping in view the dangerous portents of White Collar Crime, the Central Bureau of Investigation (CBI) which is the premier investigating agency for white collar crime in addition to anti-corruption crimes has through a major reorganization and restructuring aimed at achieving highest levels of specialization in economic crimes. White Collar Crime investigation formed a separate Economic offences division in 1994. In order to discharge its

functions and responsibilities effectively, the Branches/Units, Regions/Zones of the Economic Offences Division are required to maintain close liaison with the Ministries of Finance, Commerce, departments of Revenue, Banking, CEIB, SEBI and such other Central/State level economic institutions. All the economic crimes created by the special statutes are non-cognizable.

Implementation of Law

In 2003, the Supreme Court in *Assistant Commissioner, Assessment-II, Bangalore & Others. v. Velliappa Textiles Ltd & Another* took the view that since an artificial person like a company could not be physically punished to a term of imprisonment, such a section, which makes it mandatory to impose minimum term of imprisonment, cannot apply to the case of artificial person. However, Supreme Court in 2005 in *Standard Chartered Bank v. Directorate of Enforcement* in majority decision of 3:2 expressly overruled the *Velliappa Textiles* case. K.G.Balkrishnan J. in majority opinion held “We hold that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which punishment prescribed is mandatory imprisonment. We overrule by the majority in *Velliappa Textiles* on this point”.

Suggestions

- It is suggested that in the light of the experiences in cases, following reforms should be introduced in India for achieving corporate excellence and accountability.
- Enactment of laws on the pattern of the Corporate and Criminal Accountability Act, 2002 and White Collar Crime Penalty Enhancement Act, 2002 for investigation and prosecution white collar corporate crimes.
- Strengthening of the Enforcement Agencies such as CBI, DRI, and the Directorate of Enforcement is a sine qua non.
- The judiciary should play a proactive role for speedy trial of corporate frauds and award deterrent punishment to unscrupulous management found guilty of corporate offences.
- The liability of directors under the Companies Act for their non-compliance of statutory provisions and fraudulent practices should be strict as that of an ‘occupier’ under the Factories Act. The listing agreements with stock exchanges should also provide for strict penalty in case of misstatement or false information in quarterly reports.
- The institutional investors should effectively discharge their responsibility in protecting the interests of small investors by bringing in class action.
- The independent character and role of the Audit Committee under Companies Act and Listing Requirement need to be strengthened. The practice of the boards of family managed companies appointing their friends as non-executive directors should be stopped because the decision whether a director is independent or not is left to the Board of Directors.
- Warning system like ‘whistle blowing’ can be an effective anti-corruption tool. Indian Companies should encourage employees to directly inform top management about anything wrong observed by them in the company. On reported, a committee of officers and workers, including women representatives, should look into cases and grievances.
- Strengthening the independence of auditors and segregation of audit and non-audit practices. Management of a company should be prohibited from influencing auditors in discharge of their duties. At the same time, only those auditors having arm's length relationship with the board of companies should be appointed as auditors and they should be prohibited from providing non-audit and tax audit services.
- There should be greater self-discipline and emphasis on codes of ethics and social responsibilities on the part of companies. In the ultimate analysis the society has created business institution for its welfare and it has to discharge its duties and responsibilities as good corporate citizens.

Conclusion

It is high time for the Indian corporate sector to draw lessons from the experiences and to extend the nature and system of treatment that to be offered to the corporates following the provisions of all laws of the land. If



necessary, judicial reforms need to be brought into existence in order to empower judicial, quasi-judicial, constitutional bodies and investigating agencies to initiate stringent steps in discharging their functions while dealing with such corporate bodies in the cases of economic crimes. Further, In order to optimally deter corporate crime, the state cannot simply take the same approach as it does with individual criminal liability. This is especially true when corporate liability is needed to induce optimal corporate policing, prevention, and activity levels. Whereas the government can optimally deter purely individual crimes by imposing a fixed fine on wrongdoers for every crime they commit, the state cannot use strict corporate liability with a fixed fine to deter corporate crime, particularly by larger firms. Instead, the state should employ a multi- tiered duty- based on composite regime that uses a combination of criminal and civil liability to induce optimal *ex ante* and *ex post* policing.

Furthermore, in examining the requirements for optimal deterrence of corporate crime, we see the importance for law and economics of situation- specific analysis of legal rules. We see that individual criminal liability differs from optimal corporate criminal liability, and the nature of optimal corporate criminal liability depends on whether liability is directed at owner- managers of closely- held firms or larger publicly- held firms.

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