Need or Greed? An Analysis of White Collar Crime in the Sri Lankan Context

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Abstract— *White Collar Crimes are a significant type of criminal behaviour which renders the traditional notions of criminal justice inadequate to define the causes of this crime. This paper seeks to analyse the areas in which the crime causation theories have failed to provide with an adequate explanation to address the root causes of white collar crimes. The main objectives of the criminal justice system are not limited to traditional notions of victim-offender justice.*

The contemporary development of criminal justice has refocused on repairing the harm done to the society at large. Hence in order to meet the laudable objectives of the criminal justice system it is essential to develop a theory of crime causation which enables development of legal and social policies to supplement the system.

White collar crimes are a distinctive type of crimes that do not involve any physical harm or injury to an individual, the victim suffers an economic loss which would sometimes be more adverse in the impact. At the same time these types of offences damage the economic fabric of the society and might hamper the development process. Hence in a country like Sri Lanka which has economic development at the forefront of its agenda, the impact of these crimes is destructive and destabilising.

This paper seeks to analyse the judicial attitude of the Sri Lankan courts in terms of white collar crimes and how the judiciary has interpreted the crime causation in respect of white collar crimes, or the inadequacy thereof any attempt by the judiciary to develop a body of jurisprudence in this regard. Since judiciary is one of the main actors which is involved integrally with the criminal justice system.

The research methodology intended to be adopted is one based on secondary data collection, involving an analysis of the theories of crime causation as propounded by various authors in criminology. In order to analyse the Sri Lankan system statues and judicial decisions would be referred to, especially in respect of assessing the jurisprudence developed by the judicial decisions or the lack thereof.

Keywords: white collar crimes, crime causation theories, criminal justice, judicial decisions, penal code

I. INTRODUCTION

Reduction of crime rate and apprehending offenders are undoubtedly the main purposes of any criminal justice system. (Sanders & Young, 2000)

Criminal law recognizes different types of crimes. Amongst those crimes more attention is paid to the traditional crimes such as offences against the body and offences against the state. The tendency to consider white collar crimes as not warranting a harsh punishment or a rigorous mode of crime alleviation is mainly due to the fact that criminal justice system views these types of crimes as remediable offences as opposed to the irremediable harms caused by murder etc. What remains forgotten is the fact that the hidden cost of white collar crimes could be murder or even suicide itself of the victim and harm to the family of the victim.

According to the crime statistics of Sri Lanka the Grave Crime index reveals that the most recurrent white collar crimes are mischief, cheating, and criminal misappropriation of property and criminal breach of trust. While there are a number of statutes governing various forms of white collar crimes unfortunately there are only a very limited number of cases available under those statutes and they haven't been subject to interpretation by any superior court. Since the focal point of this research is to analyse the judicial attitude of the superior courts towards white collar crimes the

research will focus on case law under the penal code provisions relating to abovementioned offences.

The subsequent sections will deal with the nature of white collar crimes and the criminological theories that sought to explain them. Furthermore the paper would attempt to outline the judicial decisions in terms of combating white collar crimes. The core argument of the paper is that what plagues Sri Lanka in terms of white collar crimes is not an inadequacy of laws rather a non-use of the laws mechanisms and the permissive attitude of the criminal justice system. In the recent years post-recession attitude of many countries seems to consider white collar crimes as a serious phenomenon with an irreplaceable social cost.

II. WHAT ARE WHITE COLLAR CRIMES?

White collar crime is starkly different to the traditional crimes in terms of the nature of the perpetrator, the nature of the *actus reus*of the offence and the victim-which results in the difficulty to formulate a all-encompassing definition to identify the white collar crimes, and at times to not regard those as crimes at all.

The main criterion of a white collar crime is that is occurs as a part of or as a *deviation from the violator's occupational role*. (Newman, 1958) Hence most of the white collar crimes cannot be considered as a part of the traditional criminal codes and many writers (Newman, 1958) take the view that most of white collar crimes are committed by persons in the higher strata of the social order which is included in the definition given by Sutherland that white collar crime is " a crime committed by a person of respectability and high social status in the course of his occupation and he has also observed that there could be wealthy organised crime figured who did not enjoy "respectability and high standards" (Newman,1958)

One of the main problems in the definition of Sutherland is relating to the requirement that the perpetrator be respectable or of high social status (Braithwaite, 1985). There has been a long strand of academic writings on the criminality of white collar crimes.

This ambiguity in determining the scope of the crime and the sociological parameters of the crime itself contributes to the minimal application of white collar crime legislations and regulations.

It has also been argued by some writers that the answer to controlling white collar crimes lie in administrative procedures rather than the criminal process.(Newman, 1958). However this paper argues that given the serious nature of the crime and the adverse impact that it has on the society it is undeniable that white collar crimes warrant attention of criminal justice institutions of a country, and as seen in the proceeding sections Sri Lanka has taken salutary steps in terms of having a proper legislative framework in place.

The question lies however in the efficacy of the legislative measures in terms reduction of the white collar crime rate and bringing the perpetrator to justice which is the main objective of the criminal justice system in a country.

In a legal culture where any civil political issue is hailed as the important regimes, where murder and treason are considered as the worst possible affront to the society it is inevitable that the legal community cultivates lax attitude towards white collar crimes. In terms of the origin of white collar crimes, most of those are created by legislation, therefore gaining the character of *mala prohibita* rather than *mala in se* which is considered as an expression of "natural crimes".

As the white collar crimes are punished infrequently due to a number of factors, including the high social status of many violators; lack of clarity and consensus about the criminal nature of their behaviour, (Newman 1958; 739) the tendency is to settle the issues rather than impose a punishment in view of the retributive penal theory. Moreover the objective of these laws is to restore the economic loss caused, rather than seeking an "eye-for-eye". Moreover the traditional theories in criminal law that determines the culpability in criminal law are difficult to apply in white collar crimes; especially given the ambiguous nature of the perpetrator when it's a corporate body and when the victim is the public at large and due to the difficulty in establishing the criminal intent.

It should also be noted that due to the difference of attitude towards white collar crimes there is no constant demand by the public or interested groups for a "zero tolerance policy" for this type of

crimes. (Croall, 2001)There is also a number of sociologists who argue that white collar activities should not be consider as crimes at all since even though they might be "legally criminal" they are not "sociologically" criminal(Newman, 1958). However it is now accepted as per Sutherland that

> "White-collar crime is real crime. It is not ordinarily called crime, and calling it by this name does not make it worse, just as refraining from calling it crime does not make it better than it otherwise would be. It is called crime here in order to bring it within the scope of criminology, which is justified because it is in violation of the criminal law. The crucial question in this analysis is the criterion of violation of the criminal law. Conviction in the criminal court, which is sometimes suggested as the criterion, is not adequate because a large proportion of those who commit crimes are not convicted in criminal courts." (1940)

As a result of the contest created by Sutherland's definition of white collar crimes academic literature has formed under three main orientations. (Barnett, 2000)

In an attempt to identify the numerous forms of white collar crimes they can be categorised under three broad themes, namely*; occupational crimes committed by high class individuals, economic offence*(ex: fraud and embezzlement) and *corporate crimes*.(Agnew, Piquero and Cullen, 2005)

Today white collar crime encompasses a wide array of offences ranging from moral ethical violations to violations of regulatory and civil corporate laws, occupational crimes and violation of trust. Hence in the modern complex commercialized

world the legal system can only identify forms of white collar crime that could occur. Another aspect which calls for attention is the fact that these types of crimes are not limited to the private sector; government officials are also prone to commit violations that cause a pure economic harm.

A. Forms of White Collar Crimes In Sri Lanka

The main types of white collar crime in Sri Lanka as legally recognized are: mischief, criminal breach of trust, criminal misappropriation of property, fraud, and possession and use of counterfeit payment devices, forgery and computer crime. It should be noted that white collar crime also occurs in the form of blackmail, cellular phone fraud, computer fraud, credit card fraud (which are covered by the Payment Devices Frauds Act No. 30 of 2006), corporate and securities frauds, embezzlement, currency schemes, extortion, fake employment placement, fraudulent foreign employment schemes, insider dealing, money laundering, tax evasion and money laundering are the main few to be mentioned.

The common undetected forms of white collar crimes in Sri Lanka include false invoicing, non-payment of customs, different forms of bribery and corruption, manipulation of stock valuations, misuse of business funds, and various other corporate law related crimes.

B. Social Cost of White Collar Crimes

It has been noted that one of the main stimulants of the recent economic crisis in worldwide is due to white collar crimes that is rarely apprehended by the criminal justice systems across the world. (Koller, Patterson & Scalf, 2014). Costs of white collar crime can be varied and the injury or harm could be in a number of forms.

The paper identifies these harms mainly under the broad themes. Namely: economic loss- both to the victim and the society, ancillary societal economic loss such as failure of enterprises and recovery costs.

Direct physical harm to the victim and the society; emotional consequences affecting the victim and the society; los of trust and faith that damages the good will of the society; stress- to the victims; the warning light syndrome crime which is that an occurrence of a white collar crime can send a message to the stakeholders of the society that something is wrong in the system.

The social cost of the corporate frauds and mishaps is more far-reaching than any other crime in the statue book, as witnessed by Sri Lanka in the recent years through the Golden Key debacle, the Sakwithi saga and the Touchwood scam that caused many people to commit suicide in the face of dire economic poverty when the people lost their life savings due to the greed of these institutions.

This is a clear indication that white collar crimes have a direct impact on the victim and the society.

III. LEGAL FRAMEWORK OF WHITE COLLAR CRIMES IN SRI LANKA

The main source of white collar crimes in Sri Lanka is the Penal Code. Apart from this there are a number of other statutes which incriminates a variety of activities as white collar crimes. The subsequent section will include a survey of the various offences identified under these statutes.

A. Penal Code

Penal Code sets out a number of offences including mischief, cheating, criminal breach of trust, dishonest misappropriation of property, forgery and using as genuine forged documents.

B. Other Statutes

The other main statutes that seek to criminalise various white collar crime practices are Prevention of Money Laundering Act No. 5 of 2005 which seeks to prohibit money laundering in Sri Lanka and to provide for measures to combat and prevent money laundering and to provide for matters connected (preamble of the Act); payment devices fraud act no. 30 of 2006 which seeks to prevent the possession and use of unauthorised or counterfeit payment devices ; to create offences connected with the possession or use of unauthorised payment devices ;to protect persons lawfully issuing and using such payment devices ; to make provision for the investigation, prosecution and punishment of offenders,(preamble) which was mainly brought into combat credit card and bank teller machine fraud; Computer Crimes Act No. 24 of 2007 which provide for the identification of computer crime and to provide the procedure for the investigation and prevention of such crimes (preamble).

Apart from these laws the Companies Act of No. 07 of 2007 Sri Lanka also recognised a variety of offences in order to regulate the conduct of the Directors in a company including disclosure about a transaction that the Director might be interested in

(non-compliance with section 192 of the Act), section 374 of the Act also provides for a number of situations in which a Director can be made criminally liable after the company is wound up. Hence section 189, 191- 200, 219 and 229 are intended to ensure that the Directors do not commit fraudulent acts that might adversely affect the company and the stakeholders of the company.

Furthermore there is also the Convention on the Suppression of Terrorist Financing Act No. 25 of 2005 was introduced not merely as a reaction to the LTTE terrorism, it is a part of the “global reaction to curb money laundering from international drug trafficking and international terrorism” (Weerasooriya, 2011).

The Banking (Amendment) Act No 2 or 2005 and Financial Transactions Reporting Act No. 06 of 2006 which strengthens the Monetary Board and prohibits pyramid schemes that seemed to be spreading through the country at that time (Weerasooriya, 2011).

This brief survey of laws clearly indicates that the legislative provisions are well set in place with extensive measures for various types of offences. The question remains how much of this legislation is implemented by the criminal justice agencies.

IV. CRIMINOGICAL EXPLANATION OF WHITE COLLAR CRIME AND ITS RELEVANCE TO SRI LANKA

The preceding sections have analysed in detail criminological theories and the definitions of white collar crime. The complexity involved in identifying white collar crimes can be viewed as one of the reasons why statutory offences are constituted of complex technicalities.

V. CASE LAW ANALYSIS

One of the main objectives of this paper is to analyse the judicial response towards white collar crimes. According to the Grave Crime Index of the police department (Annexure 1) the main white collar offences that are looked into are mischief, dishonest misappropriation of propertycriminal breach of trust and. Hence the case analysis would be limited to the aforementioned penal code offences.

In terms of the other statutes dealt with in the paper it should be mentioned that the criminal apprehensions are carried out in a majority of instances are in relation to the offences under the penal code. The limitation of the type of offences is also due to the fact that with the few number of cases available under the other statutes the judicial attitude is difficult to be established.

A. Sri Lankan Judicial Response To White Collar Crimes

1) case law under mischief

Under Sri Lankan law section 408 of the Penal code states that "Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously, commits " mischief ".

Many of the cases have dealt with the constituent elements of establishing the offence *Smith vs. Jayasuriya* (1899 Koch's Report 42), *Kadirama Tamby vs. Venasitamby* (1908 3 Bal. Rep. 278), *King v. Lavena Maricar* (10 NLR 369) and many other cases involves clarifying the legal terminology in terms of the meaning of the elements of the offence *King v. Van Cuylenberg*(11 NLR 240), *King v. Chandrasekera* (23 NLR 286), *King v. Seneviratne* (27 NLR 100), *Ellawala v. IP* (45 NLR 60), *Fernando v. King* (46 NLR 321), *Christinahamy et.al v. Conderlag*(47 NLR 382).

One of the main issues that seem to have plagued the prosecution throughout the case law in these cases is the fact that evidence in these type of cases solely dependent on documentary evidence and the trail of those documents. Hence most of the cases fall apart due to discrepancies in such documentary evidence *Zahira v. Cooray* (42 NLR 263),*Manickam v. IP* (64 NLR 286*), Jayamanne v. Sivasubramaniam* (73 NLR 118), *AG v. Jinak Sri Uluwaduge and another* (1990 1 SLR 157).

An analysis of these cases revealed the difficulty in establishing a case in relation to cheating and the difficulty encountered by the prosecution.

2) *case law under dishonest misappropriation of property*

The legal definition of dishonest misappropriation of property is in section 386 which states "Whoever dishonestly misappropriates or converts to his own use any movable property shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both".

In terms of clarifying the elements of the offence there is a line of case law that interpret the main elements of the offence in great detail. *Stickney vs. Sinnatamby*, (1886, 5 CL Rev. 112), Fernando v. Charles (4 NLR 215) define the *mens rea* element in the offence in terms of fraudulent or dishonest intention, *Jayeman v. Palaniandy*(1887 8 S.C.C 83) involved the interpretation of the second explanation of the offence. Further elements of the offence were discussed in the cases of*Barber v. Abdulla* (1920 7 CWR 144), *AG v. Menthis*(61 NLR 561).

In *Ranasinghe vs. Wijendra* (74 NLR 38) in a remarkable judgment that comparatively analyses the situation in Indian and English law held that "upon a review of all the authorities that in the case of a charge of criminal misappropriation where the property is taken from the possession of another, such initial taking must be innocent, for this is the feature which marks out this offence of theft and other offences which may be committed" (per Weeramantry J.).

The brief survey of the milestone judgments in terms of this offence indicates that the judicial interpretation was paramount in setting out and clarifying the elements of the offence.

3) case law under criminal breach of trust

As per section 388 of Penal Code "whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits " criminal breach of trust".

The statute recognizes few variants of this offence through section 389-392(B) which include the offences of CBT by a carrier, clerk or servant and CBT by a public servant, banker, merchant or agent.

The case law in terms of this offence has the similar elements of the aforementioned offenses where the judges have diligently reasoned towards establishing and clarifying the subtle nuances between theses offences.

In the case of *Buchanan v. Conrad* (1982 2 CLR 135) a clerk was charged in respect of deficiency in accounts, *Queen v. Costa* (1893 2 CLR 205) dealt

with CBT of a public servant in terms of a duty imposed by an implied contract. *Koch vs. Nicholas Pulle* (3NLR 198) was a case of CBT by a servant and dealt with the evidence that needed to be provided in such cases. *King vs. Suppaiya* (5 NLR 119) held that in term of CBT by a servant would occur if the servant denies the receipt of money received. In *King vs. Ragal*(5 NLR 314) it was also in relation to CBT by a post-master. Cases such as *the King vs. Walter Don*(3 Browne 16), *King vs. Pulle*(12 NLR 63), *the King vs. Arwandy Kangan*,(7 Tamb (C.L.Rev) 134) was a case where bona fide of the accused operated against establishing the element of dihoenst intention, *the King vs. Kabeer*((1920) 22 NLR 105), *Laxana vs. Muhandirama*(24 NLR 251), *the King vs. Kabeer*(22 NLR 105), *Muttucumaru vs. Amrithalingam* (9 Law Recorder 35) held that dishonesty is a necessary component in establishing guilt under this offence, King vs. Caspersz, 47 NLR 165 dealt with the element of dishonesty in the offence,*King vs. Foenander*(48 NLR 327) dealt with the issue of evidence needed to prove the offence.

Cases such as *Ariyaratnam vs. S.I Police*(62 NLR 451),*Kanapathipillai vs. Fernando*(73 NLR - 524),*Cyril Alferd Rodrigo vs. Mohamed Nulair* (1982 (2) SLR 217), *Basnayake vs. Inspector of Police* (66 NLR 379) were important in setting out the jurisprudence relating to the essential components of the offence.

Attorney General vs. Dewapriya Walgamage And Another, (1990) 2 SLR 212, the court of appeal case is pertinent in terms of the fact that it is one of the recent judgments that clearly set out the governing criteria needed to be established by the prosecution in CBT. It also deals extensively on the matter of *mens rea* pre and post the commission of the offence and held that "There are no words in Section 386 which require that the mens rea of dishonesty should be preceded by an innocent state of mind. Dishonest intention is the element of mens rea of the offence of criminal misappropriation as defined in Section 386 of the Penal Code". In the subsequent appeal that followed the supreme court in *Walgamage vs. The Attorney General* ((2000)3 SLR 1), the main issue was in relation to the component of entrustment in terms of the fact that offender should be in possession of the property and misappropriates is guilty of the offence, the court held that "entrustment does not imply the technicalities found in law of trust, it is mere delivery of property to another to be dealt with in accordance with an arrangement made with then or previously". Hence this case has now clarified the component of "entrustment" that has baffled and beleaguered the legal community.

4) Case law under cheating

The definition set out in section 398 is that "whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government, is said to " cheat".

As in the case of abovementioned offences in relation to cheating too there are a number of cases that were key in setting out the elements of the offence. Hence the cases such as *Gunijee v. Silva* (2 NLR 85) which related to a false representation, *Smith vs. Jayasuriya* ((1899) Koch's Report 42) held that if the "representation was false and the complaint was so deceived by it, that is not enough. It must be proved that the accused deceived the complainant fraudulently or dishonestly", *Kadirama Tamby vs. Venasitamby* ((1908) 3 Bal. Rep. 278) was a matter relating to a mortgage in terms of a fiduciary relationship, *The king vs. Wijerama* ((1937) 17 CL Rec. 160), *King v. Lavena Maricar* (10 NLR 369) was also a matter relating to obtaining money on a mortgage property which was under seizure of the said property.

In terms of the elements of the offence *King v. Van Cuylenberg* (11 NLR 240), *King vs. Fernando* (15 NLR 106), which clarified the elements relating to dishonesty and wrongful loss. In addition, *King vs. Chandrasekera* (23 NLR 286) dealt with the nature of deception that would amount to cheating and inducement. The difficult nature of proving an offence of this nature was clealy set out in the case of *King v. Silva* (24 NLR 493) where it was held that:

> " It is most difficult, if not impossible, to form any satisfactory and exhaustive definition which would lay down for all cases when preparation to commit an

> offence ends, and when an attempt to commit that offence begins. In short, the question whether any given act or series of acts amounts merely to preparation, or to an attempt which is punishable under section 490, appears to be one of fact in each case,"

Eliyatamby v. Kathiravel (37 NLR 16) was a case in relation to making a false statement to with regard to a pawned article. In this case it was held that the accused had committed the offence of cheating under section 398. "Theft is the taking dishonestly of movable property out of the possession of any person without that person's consent and the fact that that consent is obtained by means of a deception does not render it any the less a consent within the meaning of that definition."

In terms of the nature of representation it was held in the case of *Ellawalla v. Inspector of Police* (45 NLR 60). The case was in relation to a continuing false representation and it was a matter of circumstances that proved the continuing nature.

Another form in which cheating can occur is through personation. The case in point is *Christinahamy et al v. Conderlag* (47 NLR 382). *Abeyewardene v. Muttunayagam* (47 NLR 12) was in relation an attempt to cheat.

Salih Bin Ahmed vs. Howth (1951) 45 CLW 62 was a case in relation to cheques issued without sufficient money in the account. *P. Kanagaratnam vs. W.A Bartholomeusz, Inspector of Police, Fort* (50 CLW 112), *A.R Karoliya vs. T.R Noiya* (53 CLW 13), *Manickam vs. Inspector of Police*, 64 NLR 286 were also important in terms of defining the term "property " in the relevant section.

A. The Journey So Far

An analysis of the case in law in terms of the mostly contested offences in the superior courts reveals that prosecution and conviction of these types of offences have proven to be a herculean task due to the fact that provisions in relations to white collar crime in the Penal Code are extremely technical and difficult to prove. Therefore the court seemed to be trapped in the legal technicalities that occur due to the complex nature of the provisions.

Hence case law reveal that at court in terms of the law the judges are at a difficulty in terms of the technical definitions of the offences even though the harm has already been done.

VI. CONCLUSIVE REMARKS AND RECOMMENDATION

This paper was an attempt to identify the white collar crimes under the Penal Code and analyse the case law in this regard. Furthermore the paper has analysed the most investigated offences under Penal Code mainly due to the fact that comparative analysis is supported by the cases that have been decided by the superior courts, which is not available in terms of the other statutory offences.

Criminologists have observed that white collar crimes are committed by individuals for personal benefits and whether individual or organizational white collar crimes encompass a wide array of offences.

The cases have established that in Sri Lanka the Penal Code provisions are wallowing with the complexity of the white collar crimes and this could be alleviated if the criminal justice system pay more heed to the statutes that are available other than the Penal Code which are more recent and inclusive of the complex offences that occur due to the advancement of technology and expansion of business. Hence the paper suggests that the criminal justice system should change attitude towards white collar crimes.

The criminal justice system needs to invest on training and educating the actors such as the investigators, lawyers and judges.

In addition a stronger stance needs to be taken with a more severe form of punishment which could minimise such crimes.Unlike the other offences combating white collar crimes would seem impracticable hence the laws and regulations in place ought to be effectively used in court to alleviate these type of crimes.

ANNEXURE 1

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http://www.police.lk/images/others/crime_trends/2011/grave-crime-abstract-for-the-year-2011.pdf

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ACKNOWLEDGMENT

The author acknowledges that this research was was inspired by the work done during the 'Project for Strengthening and capacity building for prosecutors in the Attorney General's Department, conducted by the UNDP Access to Justice Project in collaboration with the Attorney General's Department. Moreover the author gratefully acknowledges the support of guidance of DSG Mr. Yasantha Kodagoda in conducting the research on case law. Furthermore support and ncouragement of the Faculty of Law of the General Sir John Kotelawala Defence University in completing the research is appreciatively acknowledged.

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