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# A RE-ORIENTED APPROACH TOWARDS UNDERSTANDING WHITE COLLAR CRIME AND ITS IMPACT ON SOUTH AFRICA AS A DEVELOPING COUNTRY

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# A RE-ORIENTED APPROACH TOWARDS UNDERSTANDING WHITE COLLAR CRIME AND ITS IMPACT ON SOUTH AFRICA AS A DEVELOPING COUNTRY

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# **Dedication**

I dedicate this thesis to Shamilla, Ashalin, Kershan and our beloved pet, Chalky. This has been a very demanding but enjoyable task, made all the more bearable by a loving and supportive family who inspired me to pursue further studies. It has been a wonderful and exciting journey which has allowed me to see the world of law and politics through different lens. I intend to expand my studies in this field with a view to re-orienting and hopefully re-shaping our approach to white collar criminality, the modern, silent enemy in our midst.

# **Acknowledgement**

I wish to acknowledge the guidance and direction received from my supervisor, Professor Managay Reddi in tackling this topic. There does not appear to be a plethora of information in the way of written commentary or text material dealing with the problem of white collar criminality in the South African context. Hence great reliance was placed on material sourced from overseas authors, in particular the UK and USA. Professor Reddi was supportive of my choice of topic which allowed me the opportunity to express myself and to articulate my own views which hopefully will resonate with others who share my interest in the subject.

# TABLE OF CONTENTS

Title Page Declaration Dedication		i ii iii
Acknowledge	ement	iv
Contents page		V
Abstract		1
Chapter One:	Understanding White Collar Crime	
1.1	Introduction	2 - 4
1.2	The Nature of White Collar Crime	5
1.3		5 - 10
1.4	E	10–12
1.5	Conclusion	12–14
Chapter Two:	Some special attributes associated with White Co	ollar Crimes
2.1	•	15
2.2	Emphasising certain special features	15–19
2.3	Sophistry of White Collar Crime illustrated	
	through the cases	19–25
2.4	Conclusion	25–27
Chapter Three	e: Exploring White Collar Criminality in the Sout	h African context
3.1	· ·	28–29
3.2	Viewing the impact of White Collar Crime	
	through the cases	29–36
3.3	Gaining some perspective through the cases	36–40
3.4	Conclusion	41
Chapter Four:	Exploring a few theories that explain White Coll	ar criminality
4.1		42
4.2	Unravelling some theoretical explanations	42–51
4.3	A new perspective and proferring a new	
	theoretical explanation	51–53
4.4	Conclusion	53
Chapter Five:	Exploring solutions to the problem of White Col.	lar Criminality
5.1	Introduction	54
5.2	Challenges facing South Africa	54–60
5.3	What is the way forward?	60–64
5.4	Conclusion	64–66
Bibliography		67–72

#### **Abstract**

"White collar" crime is a well-known concept but one that continues to evade a generally acceptable definition. Most legal scholars are familiar with the term and understand its effects but struggle to articulate a definition that encapsulates the true import thereof, thus leading to increased debate on its applicability. This in turn impacts on the efficacy and viability of efforts to promote a greater awareness and appreciation of the concept. Whilst the debate rages on, there is increasing evidence that "white collar" crime has grown new tentacles. Simply put, it means that 'white collar' crime has morphed into a larger, more unwieldy animal, one which has transcended national boundaries and has now emerged as a scourge on the international landscape. "White collar" crime is, on any calculation, harmful to society, the fiscus and the preservation of law and order. The purpose of this paper is to focus on and to revive the core message conveyed by Sutherland in his writings about the effects of "white collar" crime and to comment on its impact on South Africa, as a developing country. There is ample evidence of growing social discord and restlessness that has taken root in several parts of the country. It is submitted that one of the root causes associated with such conditions is the widespread culture of corruption which is a core, integral ingredient of "white collar" criminality.

### **Chapter 1: Understanding White Collar Crime**

#### 1.1 Introduction

South Africa, not unlike other developing countries, is facing a serious challenge in addressing the relatively high levels of crime within her borders. It has been noted that:

"Crime in South Africa is reaching alarming, perhaps even epidemic proportions. This is the case with serious violent crimes, including murder, rape and armed robbery. In S. v Dlamini, S v Dladla & Others, S v Joubert, S v Schietekat 1999 (2) SACR 51 (CC) at 80 d – e Kriegler J acknowledged this when stating: 'It would be irresponsible to ignore the harsh reality of the society in which the Constitution is to operate. Crime is a serious national concern." <sup>2</sup>

The government of the day has responded to the situation by adopting a raft of measures including but not limited to the introduction of tougher bail legislation<sup>3</sup> and the imposition of minimum sentences for certain serious offences, for example, pre-meditated murder and rape.<sup>4</sup> The Prevention of Organised Crime Act (POCA), an innovative piece of legislation, was passed by the government with a view to dealing with organised crime which also poses a serious threat to the security and stability of many countries.<sup>5</sup> The overall purpose of POCA is to deal with the growth of organised crime, money laundering, criminal gang activities and racketeering. Such conduct presents a danger in that it threatens the rights of the citizens of the country and poses a risk to public order, safety and stability.<sup>6</sup>

Globalisation furthermore has in effect made the world a smaller place. Whilst the process of globalisation has engendered benefits for the country and its citizens, it has also created new opportunities for crime, particularly organised crime. The opening of the country's borders has resulted in people, money and goods being moved across the borders with greater ease than was previously the case.<sup>7</sup>

<sup>&</sup>lt;sup>1</sup> S S Terblanche A Guide to Sentencing in South Africa 2 ed (2007) vii (Foreword).

<sup>&</sup>lt;sup>2</sup> L Vermaak "Crime and punishment in South Africa" De Rebus April 2008 22.

<sup>&</sup>lt;sup>3</sup> Section 60 of the Criminal Procedure Act 51 of 1977.

<sup>&</sup>lt;sup>4</sup>Criminal Law Amendment Act 105 of 1997.

<sup>&</sup>lt;sup>5</sup> Prevention of Organised Crime Act No 121 of 1998.

<sup>&</sup>lt;sup>6</sup> A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* 2 ed (2013) (Foreword to 1st ed).

<sup>&</sup>lt;sup>7</sup> Ibid.

The passage of time may well reveal the success or otherwise of the government's initiatives in this regard. Suffice to state however that the crime levels in the country for now, at least, remain disturbingly high. Such a situation alone justifies calls for continuing attention and interventions by the State authorities as well as other stakeholders, including civil society. In dealing with the issue of crime however, the question that arises is whether we truly understand the concept of crime in its entirety. Do we understand crime in all its facets and is our appreciation of the nature and extent of the problem sufficient to enable us to suitably redress contentious issues? The further issue that begs a response is whether we really understand the problem of white collar crime and its impact on our society. These are some of the key questions that this study seeks to answer.

The dissertation will explore and investigate the definition of white collar crime as formulated by Sutherland and also consider the divergent views of other writers on the subject. The purpose of such investigation is to extract and subsequently combine the common themes that form part of the definition and to thereafter consider to what extent, if any, the views of the others are reconcilable with Sutherland's views.

The paper will also consider the warning about the impact of white collar crime on developing countries. Attention will also be directed to specific cases both in the private sector and the public sector involving white collar criminality where billions of rand have been siphoned off through clever, illicit manipulations and other deceptive practices. Notwithstanding widespread publicity surrounding such questionable deeds, powerful individuals and entities associated with such transactions have been able to successfully thwart off any criminal attention. The financial impact of white collar crime will also be considered to measure its impact against the cost of ordinary predatory crime.

In addition, the dissertation will explore the theories of criminal behaviour associated with white collar criminality in the South African context. The question whether differential association, social learning, strain, anomie or any other theory applies will be

<sup>&</sup>lt;sup>8</sup> Terblanche (note 1 above).

considered. Regard will also be had to the position in developing countries such as South Africa which are rendered vulnerable by changes in government and administration. Questions as to whether the new incumbents to positions of power post 1994, in seeking to position themselves by developing policies favourable to their ideologies are not rendered vulnerable and therefore viewed by white collar criminals as easy targets, will also be considered. In addition, the question of infrastructure weaknesses due to lack of suitable policies and laws will be considered.

As will be demonstrated in other parts of this paper, the country is bleeding from the losses associated with white collar criminality. A muted, lame-duck approach by the authorities will not deter white collar criminals and on the contrary will encourage such aberrant behaviour. Given the current weakened state of the economy and fiscal woes facing the country, a radical new approach is required and the time has arrived for such re-oriented initiatives.

The paper is presented in five chapters each of which seeks to explain and summarise the topic of this dissertation along particular lines in order to the allow for a succinct yet descriptive explanation of the problems especially in the South African context. Chapter One deals with the concept of white collar crime with regard to its definition with a view to gaining a clearer understanding thereof. Chapter Two outlines the problems associated with white collar criminality and the extended range of crimes. Chapter Three focuses on the impact of white collar criminality on South Africa as a developing country. Chapter Four focuses on remedial action that is considered necessary to address the problems. Chapter Five considers proposed solutions including but not limited to the establishment of an independent investigative unit, not unlike, the recently disbanded Scorpions Unit.

This dissertation is intended to be a foundation stone to champion new thoughts, policies and directions in combating white collar criminality.

#### 1.2 The nature of white collar crime

It is respectfully submitted that in the broad context our knowledge and understanding of crimes is, unfortunately, limited to the popular range of common law crimes such as murder, rape, assault, theft, robbery and fraud. This is a serious limitation as whilst such category may present one side to the face of crime, there is another dimension to crime that is often overlooked. In this regard reference is made to the concept popularly referred to as "white collar" crime which, it is submitted, may be more insidious and heinous than ordinary crimes. This category represents an intriguing and often times misunderstood phenomenon. Its effects however, as will be demonstrated, are quite devastating and criminologists have repeatedly warned of the dangers that white collar crime poses, in particular, to developing countries. Such warnings appear to be largely ignored and to this end it has also been stated that reports of white collar crime are more likely to enjoy media attention in the pages of the financial magazines than in the mainstream newspapers. The common context of the dangers of the financial magazines than in the mainstream newspapers.

Just to elaborate, white collar crime as a concept is dealt with very sparsely in the context of South African law. White collar crime does not exist as a separate, defined category of crime and whilst the topic has received some coverage in books dealing with criminology, the concept does not feature in books dealing with substantive criminal law. Our understanding of the topic in all its facets is gleaned mainly from the writings by authors from abroad, in particular the United Kingdom and the United States of America. The phenomenon of white collar criminality however, is not new. Cottino states that it has been an open secret for centuries that rulers ruled with impunity and what counted in their favour was their social standing as opposed to the their misconduct.<sup>11</sup>

#### 1.3 Defining white collar crime

The term "white collar" crime was coined by Sutherland in 1939 and was defined by him as: "a crime committed by a person of respectability and high social status in the course of his

<sup>&</sup>lt;sup>9</sup> F Adler & GOW Mueller et al *Criminology* 8 ed 331.

<sup>&</sup>lt;sup>10</sup> E H Sutherland 'White-Collar Criminality' *American Sociological Review* Volume 5 February 1940 No. 1 2.

<sup>&</sup>lt;sup>11</sup> A Cottino 'White Collar Crime' in Colin Sumner (ed) The Blackwell Companion to Criminology 344.

occupation."<sup>12</sup> Sutherland referred to popular examples of white collar crimes which ranged from misrepresentation in financial statements, bribery, corruption, misleading advertising, embezzlement to tax fraud and bankruptcies.<sup>13</sup>

Furthermore, in his article appearing in the American Sociological Review, Sutherland cautioned that: "White collar crime is real crime." Although the article was published in 1939, the key areas of concern that he alluded to, are just as relevant today, as they were then. The main thrust of his argument was to challenge the popular theory of the day that crime in general terms was caused by factors such as poverty, unemployment and poor social conditions and / or that crime was committed largely by people in the lower social strata. He adduced well documented evidence which focussed on crimes committed by businessmen as well as professional people but which was not considered as crimes by the relevant authorities. Instead violations of the law were dealt with in terms of a regulatory framework which essentially meant that such violations did not fall within the ambit of crimes. He therefore rejected the established theory that crime was attributable solely to poverty and poor social conditions.

It is now generally accepted that white collar crime affects every area of our lives and that it presently covers a wide range of harmful activities and has moved beyond traditional boundaries to other areas for example, financial regulations, the environment, occupational health and safety, consumer affairs and food regulations. In addition, this range of crime has extended beyond white collar crimes committed by individuals to those committed by business houses as well as governments.<sup>15</sup>

The term "white collar" crime has, however, since its conception in 1939 eluded a broadly successful and generally accepted definition. As far as the writer is aware there is no definition of the term white collar crime in any South African criminal law textbook. In fact two of the leading South African text books on criminal law do not even mention the term

<sup>&</sup>lt;sup>12</sup> Cottino (note11 above) 345

<sup>&</sup>lt;sup>13</sup> Sutherland (note 10 above) 2.

<sup>&</sup>lt;sup>14</sup> Sutherland (note 10 above) 5.

<sup>&</sup>lt;sup>15</sup> F Adler (note 9 above) 3.

"white collar" crime within their covers. 16 There is however a surprisingly large number of reported cases that refer to white collar crime but these are in the main almost exclusively confined to the realm of sentencing of persons convicted of offences associated with white collar criminality. It would thus appear that whilst the courts are quick to seize on the concept and to identify certain types of criminal conduct as "white collar" crime and to label the perpetrators of such crimes as "white collar" criminals, there appears to be no serious attempt to define the concept with sufficient clarity.

Before delving into the analysis of "white collar" crime it is also useful to consider the definition of the common law crime of fraud. The learned author Snyman defines fraud as "a misrepresentation that results in actual or potential prejudice to another person." As will emerge from the specific examples of white collar crimes that are dealt with later on in this article, there appears to be substantial overlapping of the elements of fraud with white collar criminality. The conduct of those involved in white collar crimes invariably entails the commission of acts which essentially comprise the elements of fraud. The difficulty that arises is that acts of white collar crimes are often not treated as such as fraud.

Our law reports are replete with references to white collar criminals and the concomitant necessity to emphasise the impact of white collar crime on society. Judge Ponnan stated the following: "White collar crime has reached alarming proportions in this country. They are serious crimes, whose corrosive impact upon society is all too obvious." <sup>18</sup>

In another case the Supreme Court of Appeal, in dealing with an appeal by the State against what was considered by the State to be a rather lenient sentence for a case involving offences relating to corruption, forgery and uttering, considered the severity of these crimes and emphasised that "white collar" crime is to be viewed seriously and punished appropriately. The Court ruled that a sentence of direct imprisonment is not to be regarded as unsuitable for white collar criminals. The Court in this instance substituted a suspended sentence of imprisonment with one of direct imprisonment. The learned Judge Marais JA at paragraphs

<sup>&</sup>lt;sup>16</sup> CR Snyman Criminal Law 5 ed (2008); J Burchell Principles of Criminal Law 3 ed (2006).

<sup>&</sup>lt;sup>17</sup> Snyman (note 16 above) 532.

<sup>&</sup>lt;sup>18</sup> De Sousa v S 2009 (1) All SA 26 (SCA) 30.

#### 11 - 12 stated that:

"So called 'white collar' crime has, I regret to have to say, often been visited in South African Courts with penalties which are advanced to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of 'white collar' crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being 'criminals' or 'prison material' by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for 'white collar' crime." <sup>19</sup>

In yet another case dealing with an appeal against a term of direct imprisonment imposed against the accused, the Court reiterated: "the need to protect the community against people like the appellant and generally the seriousness and prevalence of white collar crime in the country." <sup>20</sup> It would thus appear that whilst there is some kind of understanding about the concept of white collar crime and its impact on society, little or no attempt has been made to define the term sufficiently for the purposes of securing consensus on the constituent elements associated with the term. In the absence of any meaningful South African definition, it is useful to return to the definition as formulated by Sutherland. In this regard, there has been widespread and continuing criticism of his definition which has evoked responses ranging from mild through to extreme.

One author has described white collar crime as "an unidentified object" <sup>21</sup> whilst another described Sutherland's efforts to educate the public about white collar crime as "a failure." <sup>22</sup> Sutherland's definition raised further ire and controversy when he included amongst the so-called white collar crimes, violations of laws and regulations established to control business but not falling clearly within the range of criminal law. He argued that basically the offences were identical with or similar to the traditional criminal offences. <sup>23</sup>

Cottino, in responding to the definition by Sutherland states as follows: "These social

<sup>&</sup>lt;sup>19</sup> S v Sadler 2000 (2) All SA 121 (A) 126.

<sup>&</sup>lt;sup>20</sup> Vermaak v S 2005 JOL 15404 (E) 2.

<sup>&</sup>lt;sup>21</sup> Cottino (note 12 above) 351.

<sup>&</sup>lt;sup>22</sup> Cottino (note 12 above) 347.

<sup>&</sup>lt;sup>23</sup> R S Cavan *Criminology* 3 ed (1962) 206.

attributes stress a specificity which we do not find among the so-called predatory crimes (crimes against person and property) almost exclusively carried out by subjects belonging to a lower strata."<sup>24</sup> Cottino also mentions that some scholars questioned whether the social characteristics of the individual should belong to the definition at all. He concluded however that Sutherland's choice to include this requirement in the definition was "motivated by the need to challenge the dominant notion of crime as a phenomenon typical of the working class."<sup>25</sup>

A further criticism raised by Cottino is that Sutherland's definition has created an iniquity in that the crime has been confused with the criminal, in that "the norms that have been violated have been confused with the social characteristics of the perpetrator." Another author Croall notes her objection to the definition in that: "Features of the offender such as social class or the position within the organisation should be consequential to the definition of a white collar crime rather than being a component." Cottino also refers to the criticisms raised by other scholars who state that Sutherland's theory assumes "the existence of norms on whose basis misconducts are carried out but nothing is said about how values and norms are created." 28

Another popular criticism deals with the question as to whether white collar crime is a misconduct carried out by the organisation or at the expense of the organisation. To this end some scholars have distinguished between corporate crime and occupational crime to clarify the ambiguity.<sup>29</sup> Cottino states that to equate white collar crime with high status overemphasises the latter at the expense of the former.<sup>30</sup>

Cavan records her criticism of Sutherland's definition as follows: "White collar is a colloquial term often used to symbolise the office worker who wears a white shirt to work....The term white collar is an unfortunate choice when applied to crime, since, it has no

<sup>&</sup>lt;sup>24</sup> Cottino (note 12 above) 345.

<sup>&</sup>lt;sup>25</sup> Cottino (note 12 above) 346.

<sup>&</sup>lt;sup>26</sup> Ibid.

<sup>&</sup>lt;sup>27</sup> H Croall Understanding White Collar Crime 1 ed (2001) 8.

<sup>&</sup>lt;sup>28</sup> Cottino (note 12 above) 346.

<sup>&</sup>lt;sup>29</sup> Cottino (note 12 above) 347.

<sup>&</sup>lt;sup>30</sup> Ibid.

relevance in relation to the place of the crimes so designated either in total organisation of crime or of conventional society."<sup>31</sup> The learned author advances the following definition which she contends is one that may be generally accepted: "A white collar crime is a violation of law regulating business which is committed for a firm by the firm or its agents in the conduct of its business; the law violated may be either civil or criminal provided the act is legally described as socially injurious and a legal penalty is attached."<sup>32</sup> Yet another definition is quoted as follows: "Generally, however, white collar crime is defined as a violation of the law committed by person or group of persons in the course of an otherwise respected and legitimate occupation or business enterprise.... Socio-economic developments have increasingly changed the dimensions of such crimes."<sup>33</sup>

#### 1.4 Assessment of criticisms

The question that arises is whether these criticisms are justified. It is respectfully submitted that there is merit in some, if not all, the points of criticism raised. The use of terminology such as "high social status", "person of respectability" and "course of occupation" most certainly do not contribute towards an apt description of white collar crime and have without doubt assisted the obfuscation of the proper meaning thereof.

Such criticisms apart, however, one has to carefully consider the definition to ascertain to what extent the message it sought to convey has become "lost in translation." In the writer's view, Sutherland's message highlighted a fundamental but uncomfortable truth dealing with society's treatment of certain categories of crime, which has over a period of time escalated to the modern monolithic monster it has become. To ignore the perils of white collar crime as he described it in the 1940s, was to perpetuate the dangers and effects thereof to the greater prejudice of society. One must be reminded that Sutherland set out to investigate and develop a theory to explain the cause/causes of crime. He rejected the class distinction between the so-called upper class and the lower class insofar as the application of the criminal laws was concerned. He castigated the inequality that existed in society at the time which allowed one section of the population namely those in the lower strata to be tainted

<sup>&</sup>lt;sup>31</sup> Cavan (note 23 above) 206.

<sup>&</sup>lt;sup>32</sup> Cavan (note 23 above) 207.

<sup>&</sup>lt;sup>33</sup> Adler (note 9 above) 312.

with the social label of criminals whilst another class of people, usually the business and professional people, were let off the hook for far more serious transgressions.

White collar was a term used to denote those who were in positions of management and assumed positions of authority. The term refers broadly to offences committed by people in positions of authority and of a high status and includes politicians, governments, businessman, professional people, corporations and individuals who enjoy certain levels of influence in society. As early as the 1940s Sutherland recognised that the social and political structures of the day were such that the crimes of the powerful would be hard to be exposed and dealt with under the basic definition of crime. People of affluence who occupied high positions of authority and power were in general terms hardly considered as criminals. <sup>34</sup>Their status did not match the profile of the common criminal. As a sociologist, Sutherland was swayed by the schism as it related to the prosecution of offences, the compilation of data on the crime statistics as well as the financial costs associated with the commission of white collar crime.

In considering the criticisms levelled against Sutherland's definition and which are mentioned above, it is also respectfully submitted that the criticisms fail to capture the essence of Sutherland's concerns as articulated by him in his outstanding article. Sutherland was neither creating a new species of crime nor commenting on a new phenomenon. We need to consider whether we have, in dealing with the criticisms levelled at his definition, not overlooked the core message that Sutherland was conveying and should instead focus on the content of problems highlighted by him. The criticisms failed to recognise the fundamental message propagated by Sutherland that the class divide as it existed then and continues even now is unfair, prejudicial, discriminatory and financially disastrous to society as a whole.

There is a crude but somewhat apt description which lies at the heart of white collar crime and which is stated as follows: "Some steal with a gun, others with a pen." <sup>35</sup> This statement, it is submitted, succinctly highlights the twin elements of insidiousness and deceit which are

<sup>&</sup>lt;sup>34</sup>R H Burke An Introduction to Criminological Theory 3 ed (2009) 105

<sup>&</sup>lt;sup>35</sup> Cottino (note 12 above) 344.

the underpinnings of white collar crime. A wide variety of terms have over the years been used to describe white collar crime. It has been variously referred to as corporate crime, economic crime, occupational crime and organisational crime. The diverse terms used once again highlight what the term symbolises for different scholars. Yet another statement to highlight the perceived weakness in criminal law is recorded as follows: "Law is like a cobweb; it's made for flies and the smaller kinds of insects, so to speak, but lets the big bumble bee break through" The significance of this statement is that it highlights society's apparent pre-disposition towards dealing with ordinary crimes at the expense of the bigger more pressing crimes of the type alluded to by Sutherland.

At the time that Sutherland wrote his ground-breaking article, the concept of globalisation was not in his sights and to this end the main thrust of his article concerned the prevailing environment in the United States at the time. Sutherland referred to examples of white collar criminality which were expressed:

"in the form of misrepresentation in financial statements of corporations, manipulation in the stock exchange, commercial bribery, bribery of public officials directly or indirectly in order to secure favorable contracts and legislation, misrepresentation in advertising and salesmanship, embezzlement and misapplication of funds, short weights and measures and misgrading of commodities, tax fraud, misapplication of funds in receiverships and bankruptcies." <sup>37</sup>

It is now well established that white collar crime offences include a mix of corporate and individual crimes which range from fraud, deception and corruption to pollution of the environment whilst victims of white collar crime range from the savvy investor to the unsuspecting consumer.<sup>38</sup>

#### 1.5 Conclusion

South Africa, in the context of developing countries, has been adversely affected by white

<sup>&</sup>lt;sup>36</sup> Sutherland (note 10 above) 8-9.

<sup>&</sup>lt;sup>37</sup> Ibid 2-3.

<sup>&</sup>lt;sup>38</sup> Adler (note 9 above) 312.

collar crime and stands out as yet another casualty of the effects thereof. It is argued that the country has been seriously affected by financial scandals at all levels, from the dubious activities of government departments, politicians, business houses and private individuals. Specific examples will be dealt with in detail to direct attention to the social evils and other effects of white collar crime.

The former head of the Asset Forfeiture Unit: National Prosecuting Authority warned of the dangers and the threats posed by organised crime to the security and stability of South Africa as an emerging new democracy. He alluded to the fact that the country lacked the skills, resources and sophisticated legal weapons to combat organised crime effectively and pointed out that organised crime had greater resources at its disposal and had in the past managed to corrupt much of society, law enforcement agencies as well as the State. <sup>39</sup>

White collar crime for its part is not even reflected as a separate category of crime in the crime statistics recorded for the country. The absence of such a category results in the loss of reliable information about the nature and extent of the consequences of white collar crime. This therefore impacts on the debates to be held about the nature and extent of the problem and also any discussion about serious and pragmatic solutions to addressing these problems. The cost of white collar crimes represents another strong argument for its recognition as a specific category of crime. From the figures compiled by Sutherland in his article it was evident that the cost of ordinary crime paled in comparison to the cost of white collar crime. A few examples will be referred to in this article to shed light on the financial implications thereof and the necessity to rein in this scourge.

Society, it would seem, has created an aura about white collar criminals to the extent that their criminal activities do not appear in the eyes of the ordinary public as constituting criminal conduct. In the circumstances, it is not difficult to agree with the sentiment expressed by Nelken when he asked the question: "Is there one law for the rich and another for the poor?"<sup>40</sup> Nelken also refers in his article to the popular practice of dealing with

<sup>&</sup>lt;sup>39</sup> Kruger (see note 6 above).

<sup>&</sup>lt;sup>40</sup> D Nelken 'White Collar Crime' in M Maguire,R Morgan and R Reiner (eds) *The Oxford Handbook of Criminology* 2 ed (1997) 355.

deviations by corporations and other powerful entities in terms of regulations as opposed to criminal sanctions. He furthermore states as follows: "Much regulation is geared to using prosecution as a last resort, and thus the number of prosecuted offenders says little about the likely level of crime."<sup>41</sup>

In the writer's view, perhaps the most poignant message by Sutherland concerned his subtle but ominous warnings regarding social disorganisation and distrust associated with white collar criminality. South Africa is currently in the coal face of such warnings given the extraordinarily high number of strikes and protests that have recently besieged the country. Surely it is time for the authorities to take note of Sutherland's warning that: "While ordinary crimes cause general community disturbance white collar crimes spread feelings of distrust, low public morale and produce social disorganisation."

<sup>&</sup>lt;sup>41</sup> Nelken (see note 40 above) 356.

<sup>&</sup>lt;sup>42</sup> R G Caldwell Criminology 1 ed (1956) 66.

# **Chapter 2 : Some special attributes associated with White Collar Crime**

#### 2.1 Introduction

There is something unique about white collar crime and this is more easily expressed in terms of its effects. Sutherland himself could not have contemplated the extent to which his warnings about white collar crime would impact on the international stage and on modern society. It is appropriate to consider that Sutherland's investigations into the causes of crime were directed at developing a better understanding thereof from a sociological perspective. According to him many criminologists do not properly understand crime due to the fact that "they fail to recognise that the secretive violations of public and corporate trust by those in positions of authority are just as criminal as predatory acts committed by people of lower social standing." His investigations and studies in any event were limited to the position as it presented itself in the United States at the time. Developments subsequent to Sutherland's writing about white collar crime strongly suggest that his warnings were not taken seriously enough to the extent that it has been allowed to escalate to the present levels.

#### 2.2 Emphasising certain special features

Unlike predatory crimes where the effects of harm, loss or damage are almost instantaneous and in most cases plainly visible, there is a subtle nuance about white collar crime that helps to colour or disguise its effects rather obtusely. As a result only a few are able to detect its presence and understand its effects. A proper understanding thereof is essential in order to truly appreciate the extent to which it has taken root into the fabric of society. It has been and for the most part continues to be an invisible force which is omnipresent but one that is very difficult to detect. White collar crime has succeeded in exerting its growth and influence largely due to the inherent difficulties in identifying itself for what it really and truly is.

Society functions by and large as a homogenous body because of adherence to the laws that are applicable to its members. This is in accordance with the theory of social

<sup>&</sup>lt;sup>1</sup> F Schmalleger *Criminology Today* An Integrative Introduction (2012) 305.

contract <sup>2</sup> in terms whereof, in the modern context, members of the public agree to abide by the laws of the State in return for the protection given by the State to its citizens guaranteeing certain freedoms including the provision of essential services. The threat of legal sanctions for any civil and / or criminal transgressions usually acts as sufficient deterrent to dissuade any form of unlawful conduct. Most policing systems are therefore usually structured to deal with the perceived minority element of non-conformists or transgressors. This scenario therefore promotes the notion that all forms of transgressions will be suitably dealt with by the authorities concerned. An effective judicial system is a cornerstone of a functioning democracy and the public's faith in the system is measured by the success of such systems treatment of all types of transgressions.

Sutherland bemoaned the fact that transgressions by businesses were increasingly dealt with by means of regulations as opposed to criminal sanctions.<sup>3</sup> This meant that unlawful conduct of businesses which ordinarily fell to be dealt with in accordance with criminal law (and therefore subject to criminal sanctions) were increasingly dealt with administratively by institutions other than the criminal courts. The implications of such actions are obvious as conduct which ought to be treated as criminal conduct is rendered less effective as a consequence of the treatment given to it in terms of the regulatory framework in place.

Croall states that white collar crime affects all areas of contemporary life and in relation to the loss of revenue states that "tax and public sector fraud reduces government resources for health, education and welfare." <sup>4</sup> She also refers to worldwide improvement in electronic banking which has created increased opportunities for fraud on a global scale with it being possible to move money around the world in an incredibly short space of time thereby frustrating attempts to track down the movement of money. <sup>5</sup>

<sup>&</sup>lt;sup>2</sup> Beccaria Cesare (1764) "On crimes and punishments" in Joseph E Jacoby (ed) *Classics of Criminology* 2<sup>nd</sup> Edition (1994) 278.

<sup>&</sup>lt;sup>3</sup> E H Sutherland 'White-Collar Criminality' *American Sociological Review* Volume 5 February 1940 No. 1 6.

<sup>&</sup>lt;sup>4</sup> H Croall Understanding White Collar Crime 1<sup>st</sup> ed (2001) 1.

<sup>&</sup>lt;sup>5</sup> Croall (note 4 above) 5.

Caldwell is of the view that the financial losses from white collar crime are the least important of their consequences. He states that whilst ordinary crime causes general community disturbance, white collar crime on the other hand spreads feelings of distrust, lowers public morale and produces social disorganisation.<sup>6</sup> He furthermore justifies his stance on the basis that: "Most white collar crimes involve a breach of trust which is usually accompanied and consummated by misrepresentation."

As has been recorded earlier, white collar crime has transcended national boundaries and has moved beyond the popular category of crimes alluded to by Sutherland to include offences that impact on public health as well as the environment, electronic banking, internet fraud, computer fraud, pollution, unsafe products on the market as well as human trafficking. Croall states that although the activities of corporations are subject to the criminal law and criminal justice, such activities are generally not regarded as crime in the same way as burglary, robbery or assault and for that reason it is less likely to be subjected to harsh punishment.<sup>8</sup>

It is submitted that white collar crime belongs to the category which has the effect of seriously undermining public confidence in the judicial system. It is also respectfully submitted that Sutherland's warning about social distrust and disorganisation is perhaps his most important message in relation to the harmful effects of white collar crime. <sup>9</sup> Most legal systems are able to act quickly and decisively against predatory crime but struggle with non-predatory crime.

Burke states that although the problem of white collar crime has been recognised towards the beginning of the 20<sup>th</sup> century, it has continued to be neglected and under researched by scholars. A failure to understand white collar crime results in a failure to grasp the concept of crime in all its facets which in turn contributes to inadequate or inappropriate solutions.

<sup>&</sup>lt;sup>6</sup> R G Caldwell *Criminology* 1<sup>st</sup> ed (1956) 64.

<sup>&</sup>lt;sup>7</sup> Caldwell (note 6 above) 66.

<sup>&</sup>lt;sup>8</sup> Croall (note 4 above) 1.

<sup>&</sup>lt;sup>9</sup> Sutherland (note 3 above) 11.

<sup>&</sup>lt;sup>10</sup> R H Burke *An Introduction to Criminological Theory* 3<sup>rd</sup> Ed (2009) 7.

There are no crime statistics for white collar crime as a distinct category of crime. This glaring omission in the national crime statistics is by itself a serious indictment regarding the manner in which records of crime are compiled in the first instance. No cogent, logical or persuasive explanation has been furnished to date to explain such omission. It could thus be argued that there is a general reticence to alter the status quo and if this is indeed the situation, such reticence contributes towards the weakness of the capitalist system which some argue is beholden to big business. Nelken has noted that the study of distribution and frequency of white collar crime is made problematic by the fact that white collar crimes are not included in the official statistics and that there is an increasing reliance on the use of regulation with criminal prosecution only being used as a last resort.'11

Critical criminologists question the judicial system with regard to the police and the courts in applying the law. They are of the opinion that the law is used to maintain the status quo and ensure the dominant position of one social class over another. <sup>12</sup> Critical criminologists also refer to the organisation of society with regard to the political and the economic structures and as well as the institutions of capitalism. They argue that a social system based on capitalism is unjust and exploitative because of its competitiveness. The ruling elite have an interest in the continuance of a capitalist society. Crime is therefore seen as a rational response to and is a by-product of the political and economic situation in such a system. <sup>13</sup>

In more recent studies Burke wrote that in the USA the economic losses from various white collar crimes are about ten times more than those from ordinary economic crimes. He furthermore stated that corporate crime killing and maiming are more from any violence caused by the poor. <sup>14</sup> As far as the USA is concerned very little is known about the true extent of economic criminality. This is due to the absence of a national data base for the assessment

<sup>&</sup>lt;sup>11</sup>D Nelken 'White Collar Crime' in M Maguire,R Morgan and R Reiner (eds) *The Oxford Handbook of Criminology* 2ed (1997) 355.

<sup>&</sup>lt;sup>12</sup> R Stevens 'Classification of specific types of crime' in MGT Cloete and R Stevens (eds) *Criminology* (1990) 15.

<sup>13</sup> Ibid

<sup>&</sup>lt;sup>14</sup> Burke (note 10 above) 6.

of corporate criminality.15

In the South African context, Stevens states that the cost of white collar crime is very hard to determine because research into this type of crime is made difficult for various reasons which he submits are as follows:

- 1. the code of silence amongst the top members of management in big enterprises;
- 2. employees who are caught are not charged but summarily dismissed to avoid disadvantaging business transactions;
- 3. statistics are not reliable or a true reflection of the facts.

To emphasise the difference in the values of the losses, Stevens states that in the United States, the estimated losses due to white collar crime in 1976 was approximately thirty six billion dollars. In 1980 some four years later the losses due to theft and robbery was approximately ten billion dollars. <sup>16</sup>

#### 2.3 Sophistry of white collar crime illustrated through the cases

Various authors have attempted to explain the causes of crime including white collar crime. Conklin advances the view that the economic and social system of the USA is conducive to a number of crimes and points out that inequality and inadequate job opportunities create a climate for robbery and larceny. According to him the system that generates inequality and unemployment also produces the ideal conditions for white collar crime as well as organised crime.<sup>17</sup>

There are several explanations why white collar crime remains an elusive and rather complex category of crime to deal with. There is a level of complexity and sophistication that masks what would otherwise be legitimate transactions perpetrated by people who possess high levels of business acumen and expertise. <sup>18</sup> The range of transactions and the abilities of those who facilitate such transactions fall into a highly specialised sphere of operations.

<sup>&</sup>lt;sup>15</sup> F Adler & GOW Mueller et al Criminology 8 ed 312.

<sup>&</sup>lt;sup>16</sup> Stevens (note 12 above) 159.

<sup>&</sup>lt;sup>17</sup> J E Conklin *Criminology* 181.

<sup>&</sup>lt;sup>18</sup> Schmalleger (note 1 above) 317.

The following examples may be useful to illustrate the levels of sophistication associated with such transactions. Sutherland refers to one example relating to the losses suffered through burglary and robbery in 1938 and states that the cost thereof amounted to \$130 000.00 "while the sum stolen by Krueger is estimated at \$250,000,000, or nearly two thousand times as much." He also refers to another case reported in the New York Times in 1931 involving four cases of embezzlement in the United States with a loss of more than a million dollars each and a combined loss of nine million dollars. More interestingly the learned author goes on to state that: "Although a million-dollar burglar or robber is practically unheard of, these million-dollar embezzlers are small-fry amongst white- collar criminals."

As will appear from the above, a significant but understated fact concerns the cost of white collar crime. Sutherland stated that: "The financial cost of white-collar crime is probably several times as great as the financial cost of all crimes which are customarily regarded as the 'crime problem."<sup>22</sup>

The more recent case involving the prominent United States banker Bernard Madoff also illustrates the point in issue.<sup>23</sup> He was a widely respected businessman who had built a colossal business empire largely backed by public investments. The facts of the case against him established that he was the architect of a huge "Ponzi" scheme that collapsed in 2008 in the United States and caused financial losses to his investors amounting to an estimated eighteen billion dollars (the term ponzi refers to the fraudulent tactic of paying off early investors with later investors monies to encourage more and bigger investor risks). Madoff pleaded guilty in 2009 to eleven federal offences including securities fraud, mail fraud, money laundering and perjury and was sentenced to one hundred and fifty years in federal prison. Other estimates of losses suffered by his investors are as high as sixty five billion dollars.<sup>24</sup>

<sup>&</sup>lt;sup>19</sup> Sutherland (note 3 above) 5.

<sup>&</sup>lt;sup>20</sup> Ibid.

<sup>&</sup>lt;sup>21</sup> Ibid.

<sup>&</sup>lt;sup>22</sup> Sutherland (note 3 above) 4.

<sup>&</sup>lt;sup>23</sup> Schmalleger (note 1 above) 302.

<sup>&</sup>lt;sup>24</sup> Ibid

By the time Madoff went to prison in 2009 only \$1.2 billion had been found. Madoff's scheme has been referred to as the largest investment fraud ever committed by a single person. <sup>25</sup> The aspect that demands attention in this particular example relates to the duration of time that such dubious operations were allowed to continue undetected notwithstanding stringent financial requirements relating to the rendition of accounts, financial statements, auditing statements and other such regulatory obligations.

It is very difficult to understand why notwithstanding the tough business regulations that apply to the financial markets, such deceptive transactions or behaviour were not detected any earlier. This case also illustrates the levels of sophistication and complexity associated with the manner in which the transactions were structured thereby allowing the business to operate without any hint of the illegal activities that were masked by its apparent legitimate fronting.

This case also offers support for the theory regarding the high level of acumen of the perpetrators who were able to disguise their transactions in many subtle and devious ways thus warding off any suspicions of dubious or illegal activities. Fortunately in the present case, the activities of the business were exposed resulting in the criminal conviction of Mr Madoff. Several thousand investors however were left financially stranded and had to deal with their losses which ran into several billion dollars. Given the veil of respectability behind which Mr Madoff had been allowed to operate for such a long period of time, it is perhaps understandable that not only would investors but also the broad public be sceptical of and dissuaded from dealing with similar financial institutions. One also cannot ignore the social effects of such losses incurred by the investors. In a large number of cases the savings and investments of retired people who are most often pensioners are lost to such schemes which rob such investors of their right to a financially secure retirement.

<sup>&</sup>lt;sup>25</sup> Ibid.

<sup>&</sup>lt;sup>26</sup> Schmalleger (note 1 above) 317.

It is respectfully submitted that despite Sutherland's warnings about the effects of white collar crime (which have been dealt with in the preceding chapter), it would appear that white collar crime continues to receive less attention although there is increasing evidence of its pervasiveness. Croall furthermore refers to a series of major financial scandals that occurred in the 1980s which saw the collapse of major financial institutions in the United Kingdom as well as massive fraud that was perpetrated on pension funds in the UK as well as the collapse of a major bank due to questionable financial activities.<sup>27</sup> Other international events which have a bearing on corporate responsibility for safety and falling within the range of white collar crime include the catastrophic explosion at Union Carbide in Bhopal, India on the 02<sup>nd</sup> December 1984 which resulted in the release of a deadly gas which caused nearly 6 500 fatalities and more than 20 000 injuries. <sup>28</sup> Another incident of note concerns the release of radiation across Europe following the disaster at the Chernobyl Nuclear Power Plant in the former Soviet Union which also resulted in very high fatalities and injuries.<sup>29</sup> Such catastrophic releases of toxic substances and nuclear gasses appear to be attributable to inadequate safeguards as well as human negligence which pose a hazard for the millions of the residents who reside in the vicinity of such plants.

It would seem however in the Third World at least that the problems of punishing and preventing pollution are enormous. Industries that are prepared to locate there have the power to influence governments and officials surreptitiously into passing legislation favourable to the industries. Although rules and regulations have been passed and continue to be passed to protect the public against some of the dangers referred to above, what makes it difficult to curb corporate crime is the enormous political power such corporations have in the shaping and administration of the laws that govern their conduct. This is particularly the case with regard to multi-national corporations that wish to operate in developing countries. South Africa, as a developing country, is a prime example in this regard and the extent of the impact of white collar criminality on the country will be canvassed in further detail in the next

<sup>&</sup>lt;sup>27</sup> Croall (note 4 above) 5.

<sup>&</sup>lt;sup>28</sup> Adler (note15 above) 333.

<sup>&</sup>lt;sup>29</sup> Croall (note 4 above) 5.

<sup>&</sup>lt;sup>30</sup> Burke (note 10 above) 6.

chapter.

The power of jobs and development by a corporation is a great temptation for governments of many developing countries to resist. They would rather have an abundance of employment opportunities that contribute to air and water pollution than limited employment albeit in a cleaner environment. Government officials in some third world countries can be bribed to create or maintain a legal environment favourable to the business interests of corporations even though doing so may be detrimental to the people of the host country.<sup>31</sup>

Schmalleger refers to the USA network TV series 'White Collar' which was very popular in the United States and won rave reviews. This was a fictional series involving the investigation and detection of white collar crimes. What stood out for him was the comment by reviewers of the programme that: "White Collar is packed with smart people who make things happen" <sup>32</sup> This comment supports the submission that white collar crimes operate at a level of sophistry and complexity that elevate it to another level. Another case concerned a prominent businessman Raj Rajaratnam who in 2012 was ranked amongst the world's richest men but one who was facing charges of insider trading. <sup>33</sup> Another well-known case concerned junk bond king Michael Milken who was convicted of securities fraud in the 1980s. He amassed a massive fortune through white collar law violations. He paid a six hundred million dollar fine following his conviction which amount was genuinely believed to be far less than the amount he is estimated to have reaped from illegal bond trading. <sup>34</sup>

The year 2002 in the United States also saw the collapse of WorldCom Incorporated, a huge telecommunications company. It has been reported that at least eleven billion dollars of the company's money had been lost in an accounting fraud intended to save the ailing company. The former Chief Executive Officer was found guilty of nine counts of conspiracy, securities

<sup>&</sup>lt;sup>31</sup>Adler (note15 above) 312.

<sup>&</sup>lt;sup>32</sup> Schmalleger (note 1 above) 302.

<sup>33</sup> Ibid.

<sup>&</sup>lt;sup>34</sup> Ibid.

fraud, and regulatory filing and sent to prison for twenty five years.<sup>35</sup> The collapse of key financial institutions in the savings and loan centre in the United States in the 1980s has been referred to as the biggest white collar crime in history. It is alleged that the losses were largely due to the intentional mismanagement of the institutions concerned as well as personal appropriation of depositors' funds by the executives of the institutions concerned. In one example involving the collapse of the institution, tax payers were obliged to fund the operations of the California based institution known as Lincoln Savings and Loan Institution following the losses to its depositors through white collar crime of approximately \$2.5 billion. <sup>36</sup>

Another prime example of white collar excesses concerns the former energy trading giant Enron Corporation which used complex financial transactions to hide losses to inflate revenue. <sup>37</sup> What was interesting was that Enron executives revised the financial statements for at least five years to 2001 to account for hundreds of millions of dollars in losses that were previously not disclosed. In 2001 Enron filed for bankruptcy and retrenched more than four thousand workers. The bankruptcy caused losses of at least twenty four billion dollars in retirement plans, stock accounts and mutual funds. The former chairman of the company was convicted in 2006, amongst other charges, of numerous counts of securities and wire fraud. The company's collapse however set the stage for massive reforms in the business and financial world and for federal and state investigations into the accounting practices and business dealings of all publicly traded companies in the US.<sup>38</sup>

A new area of corporate and white collar criminality defined in terms of violations of criminal law concerns crimes against the environment. Environmental crimes are violations of the criminal law by businessmen, business offices or individuals that damage some protected or other significant aspect of the natural environment.<sup>39</sup>

<sup>35</sup> Ibid.

<sup>&</sup>lt;sup>36</sup> Ibid.

<sup>&</sup>lt;sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>&</sup>lt;sup>39</sup> Schmalleger (note 1 above) 313.

Examples of such damage are as follows: 40

- 1. whaling in violation of international conventions;
- 2. pollution;
- 3. negligence, for example, the Valdez supertanker owned by Exxon Corporation which ran aground off the coast of Alaska in the 1989 spilling eleven million gallons of crude oil over one thousand seven hundred miles of pristine coast line. Exxon was ordered to pay five billion dollars in punitive damages to some fourteen thousand people who were affected by the spill as well as one hundred billion dollars in criminal fines and two hundred and eighty seven million dollars in actual damages to commercial fishermen who were affected by the oil spill.

More recent studies indicate that terrorism frequently involves some form of white collar crimes to fund the activities of the terrorists which may range from daily living expenses, weapons, travel and communications. Terrorists groups frequently send money acquired from illegal operations back to their home country or to a higher chain command. The terrorist groups' involvement in white collar crime allows the terrorist groups to maintain a low profile which may not be achieved through predatory crime. In 2001 an American telecommunications company was indicted on charges of aiding Al-Queda in preparation for the 9 / 11 attacks by handling more than five hundred thousand dollars in monthly money transfers.<sup>41</sup>

#### 2.4 Conclusion

In the cases that have been referred to above, there is usually some or other form of misconduct in the form of intention or negligence which is present together with the other elements that constitute crime. The majority of such cases are however not prosecuted. Instead breaches are treated as regulatory offences and are dealt with as such. Such offences invariably carry a fine and no other repercussions.

<sup>&</sup>lt;sup>40</sup> Ibid.

<sup>&</sup>lt;sup>41</sup> Schmalleger (note 1 above) 314.

The critical criminologists have been responsible for the dissemination of the widespread practice of white collar crime as well as society's apparent neglect thereof. Such critical criminologists are of the view that the failure to prosecute offenders of white collar crimes is perhaps a weakness in the capitalist system which is supported by the major business corporations.

The problems associated with the investigation of white collar crime are best summed up in the following statement: "White Collar Crimes are as difficult to detect as they are easy to commit." Cavan advances the following further reasons relating to the difficulties of investigating such crimes: 43

- 1. abuses grow out of the operations of legitimate businesses that form the economic backbone of the country;
- 2. public opinion is not easily stirred against white collar crime. It is very hard for a member of the public to prove that he has been cheated;
- 3. examination of corporate books is not easy and in any event the books are not available to anyone;
- 4. crimes of the perpetrators are only noticed by the corporation themselves;
- 5. members of the public who hold shares in big business and seek out generous dividend payments are inclined to turn a blind eye to the activities of the corporation;
- 6. the majority of the entities operate behind a façade of legitimacy. Deviant acts, if any, only become known long after the event has occurred and usually through the exposure of such acts through the actions of whistle blowers or media coverage;
- 7. the incriminatory information is within the knowledge and control of the perpetrators to the extent that such incriminatory evidence can in most instances be concealed or withheld thus frustrating efforts to uncover the true facts.

<sup>&</sup>lt;sup>42</sup> Adler (note15 above) 314.

<sup>&</sup>lt;sup>43</sup> R S Cavan *Criminology* 3 ed (1962) 208.

Sutherland also noted that white collar criminals are far less likely to be investigated, arrested or prosecuted than other types of offenders and that when they are, on rare occasions convicted, such criminals are far less likely to receive prison terms than ordinary criminals. If they are sent to prison the amount of time they are ordered to serve is far less than is to be expected notwithstanding the damage their crimes inflicted on society. This kind of treatment shown to white collar criminals is primarily due to their social standing. They are well respected in their communities and take part in national affairs.<sup>44</sup> Newburn in analysing the impact of white collar crime distinguishes it from other forms of criminal activity on the following bases; <sup>45</sup>

- 1. white collar crime generally takes place in private;
- 2. offenders are usually quite legitimately at the scene where the offences take place;
- 3. it tends to involve an abuse of trust inherent in the occupational role;
- 4. it involves some form of insider knowledge;
- 5. often there is no complaint and even when it is made, this takes place long after the event;
- 6. generally it involves no immediate physical threat and as such it is less a source of fear or anxiety than other forms of crime;
- 7. determining responsibility may be extremely problematic;
- 8. it tends to have an ambiguous legal and criminal status.

Having regard to current developments regarding white collar criminality, it is thus not difficult to disagree with Burdis and Tombs<sup>46</sup> who conclude that:

"Something is rotten in the body of criminology. At a time when evidence of corporate harm, white collar criminality and corruption abound, our discipline finds itself in a state of paralysis; a state in which we seem unable to offer credible explanations for developing forms of crime and criminality precisely when such explanations are urgently required."

<sup>&</sup>lt;sup>44</sup> Schmalleger (note 1 above) 307.

<sup>&</sup>lt;sup>45</sup> T Newburn Criminology (2007) 377.

<sup>&</sup>lt;sup>46</sup> K Burdis and S Tombs "After the Crisis: New directions in theorising corporate and white collar crime" in S Hall and S Winslow (eds) *New Directions in Criminological Theory* 1<sup>st</sup> ed (2012) 276.

#### **Chapter 3: Exploring White Collar criminality in the South African context**

#### 3.1 Introduction

South Africa, as a fledgling democracy, has achieved a level of notoriety that impacts on the gains it made from its transition to a constitutional state. Sadly it would appear that the country has succumbed to the social ills and dangers associated with white collar criminality and stands accused of having ignored an important but ominous warning repeatedly sounded out by criminologists. This refers to the rather iniquitous and vulnerable position that developing states find themselves in when transacting with developed countries and powerful business entities. Relevant aspects in this regard have already been canvassed in the previous chapters.

White collar crime does not exist on its own auspices but forms part of the broader mass of conduct generally referred to as crime. Given South Africa's chequered and painful apartheid history, she has been lauded the world over for the peaceful nature of her transition to democracy. Crime however, is a pressing problem and is a crisis which demands realistic and urgent solutions. Shaw states that reducing lawlessness and reforming the country's agencies of policing are among the key challenges facing the new democracy. Given the poor track record of the country in successfully combating all forms of crime, Shaw points out that many questions have already been raised about the current government's ability to deal with the twin problems of development and governance. It is a fact that crime is a harmful phenomenon that harms the State directly and indirectly and costs the taxpayer millions of rand per annum. In addition an incalculable number of man hours are devoted to tracing suspects and eventually prosecuting offenders.

Criminal enterprises in South Africa as well as other parts of the continent have developed quickly since the 1980s mainly due to advances in communications, technology and the globalization of the world's economies.<sup>4</sup> Easier international travel, expanded world trade and transnational financial dealings have made it possible for such enterprises to target international victims and to develop criminal networks within prosperous countries and

<sup>&</sup>lt;sup>1</sup> M Shaw Crime and Policing in Post-Apartheid South Africa Transforming under Fire (2002) xi (Foreword)

<sup>&</sup>lt;sup>2</sup> Ibid.

<sup>&</sup>lt;sup>3</sup> PJ van der Walt, G Cronje and BF Smit Criminology – An introduction (1982) 153.

<sup>&</sup>lt;sup>4</sup> F Schmalleger *Criminology Today* An Integrative Introduction (2012) 327.

regions.<sup>5</sup> The political, social and economic conditions in South Africa as well as other African countries have helped some enterprises to expand globally. Profitable activities include drug trafficking, money laundering, bank fraud, credit fraud and identity fraud. It is also widely acknowledged that the internet and email have made such crimes more profitable and prevalent.

# 3.2 Viewing the impact of white collar crime through the cases

It is useful to take a tour of specific cases that have made their impact in the twenty one year history of the country's democracy. The examples cited are classic cases of white collar criminality involving the wealthy and powerfully connected class of people in society. The main objective of this exercise is to draw parallels with the cases referred to by Sutherland and other criminologists in order to demonstrate how quickly South Africa has slipped into the sea of white collar criminality and the extent to which the country has been impacted thereby. In the majority of the cases referred to, there have been no criminal repercussions thus far and it does seem unlikely that there will be any in the future. The cases are important in that they demonstrate prima facie evidence of fraud, corruption and other forms of criminal conduct but despite the existence thereof, continue to be treated in a manner very different to ordinary predatory crime. The "favourable" treatment of white collar criminals not only jeopardises the administration of justice but significantly undermines the public confidence in the criminal justice system. The cases referred to are cited purely to assist our understanding of the causes of crime from a criminological perspective and are not intended to debase, offend or undermine the interest or status of the parties or entities concerned.

The first matter cited is of particular interest as it has not reached any conclusion and it is still under scrutiny. The country had barely taken its first few breadths as a fledgling democracy when it was catapulted into a major international scandal in what has since been termed the "arms deal". The haunting spectre involving the controversial deal has not been resolved notwithstanding the lapse of some sixteen years since the issue surfaced. The Arms Procurement Commission that was appointed in 2011 to probe the issue of the arms deal has yet to conclude its investigation to determine the burning question as to whether or not bribes were paid to solicit the deal involving the acquisition by the South African government of

<sup>&</sup>lt;sup>5</sup> Ibid.

<sup>&</sup>lt;sup>6</sup> Announcement of the Arms Procurement Commission by Jeff Radebe, MP, Cape Town 27 October 2011, available at <a href="http://www.armscomm.org.za">http://www.armscomm.org.za</a> accessed on 11 June 2014

arms and ammunition at what appeared to be very exorbitant prices paid to various suppliers.<sup>7</sup> The investigations are also intended to probe the payment of "commissions" that were allegedly advanced to a number of persons in the procurement line up which is believed to include high ranking government officials including senior members of the cabinet which is reported to have authorised the purchase transaction.

The Honourable Minister of Justice and Constitutional Development, Jeff Radebe, MP, in appointing the Commission on the 27 October 2011 stated: "It is my honour and privilege to announce the terms of reference and the Regulations for the Commission of Inquiry into allegations of fraud, corruption, impropriety or irregularity in the Strategic Defence Procurement Packages (SDPP), commonly referred to as the Arms Deal."8

The present position is that although the Commission commenced its hearings in 2013, it has lurched from one crisis to another with the as yet unexplained resignations of key personnel from the Commission including its commissioner, research staff, investigative staff and senior commission evidence leaders. In addition the Commission has faced and continues to face a major backlash from key witnesses who have questioned the credibility of the Commission and have publicly declined to testify, notwithstanding threats of prosecution from the Commission. On the Commission.

The arms deal is alleged to have involved officials representing the government of the day transacting with foreign based companies to purchase arms and ammunition at a substantial cost to the South African government in circumstances where the country could barely afford such expenditure. One of the key features of the deal was the incentive involving offsets which would entail secondary benefits accruing to the country in the form of skills training, support for local manufacturers and the employment of local people. These were intended to address the skills shortage, training, unemployment and the development of the local industries in the country. It would appear none of the offset benefits have materialised. The majority of the assets purchased in the form of military planes, army tanks, submarines, naval ships, army helicopters and other sophisticated equipment have been grounded alternatively

<sup>&</sup>lt;sup>7</sup> Ibid.

<sup>&</sup>lt;sup>8</sup> Ibid.

<sup>&</sup>lt;sup>9</sup> SAPA "Organisations call for Seriti committee to be dissolved" *Mail and Guardian Online* 29 September 2014 available at <a href="http://mg.co.za/article/2014-09-29">http://mg.co.za/article/2014-09-29</a> accessed 30 September 2014.

<sup>&</sup>lt;sup>10</sup> Glynnis Underhill "Quitting Seriti Commission: Arms deal 'Letter bomb'" available at http://mg.co.za/article/2014-08-07-arms-deal-letter-bomb accessed 11 August 2014

have not been put to use further alternatively are in a state of disrepair. Several of the officials who acted on behalf of the government have passed on while others have retired, resigned or left office. Notwithstanding that the arms deal has raised ire regarding some or other form of impropriety, the word "crime" has, so far, barely entered the equation. Although much has been written about the controversial arms deal and criticism heaped upon those who have been involved in the questionable transactions, it is submitted that the entire matter seems to focus more on the issue of the abuse of public funding as opposed to any real investigation into criminal conduct.

Whatever the outcome and the findings of the Commission, it is relevant to contextualise the matter from a criminological perspective. The "arms deal" evoked and continues to evoke mixed feelings of anger, resentment, despair, disappointment and distrust from ordinary citizens of the republic.<sup>11</sup> The entire handling of the purchase of arms and ammunition from the foreign based arms dealers was mired in controversy at the outset for the very reason that the government had committed itself to a financial transaction amounting to some seventy billion rand. The widely held belief was that substantial kickbacks were paid by the suppliers of arms and ammunition to the government officials connected to the deal. The further concern was that the government had barely installed itself in the seat of power and yet had committed itself to a major financial burden. Many questioned the rationality of the decision on the basis that an arms deal had been concluded at a time when the country was at peace with its neighbours and had no identifiable enemies.

More importantly for the citizenry, the common sense reasoning was that the country had yet to commence with its urgently needed social programmes to improve housing, health, education and crippling levels of unemployment. Although proof of any financial impropriety has yet to be conclusively determined on the part of the role players involved, the entire arms deal was shrouded in secrecy thereby leading to increasing suspicion as to the nature and extent of the corruption involved. The arms deal has resulted in some casualties which have led to criminal prosecution of smaller role players on arms deal related charges. It is still not

<sup>&</sup>lt;sup>11</sup> See note 9 above.

<sup>&</sup>lt;sup>12</sup> Athandiwe Saba and Charl Du Plessis "Arms deal's top secret graveyard" available at http://news24.com/Archives/City Press/Arms-deals-top-secret-graveyard-20130811 accessed 11 June 2014.

<sup>&</sup>lt;sup>13</sup> Yengeni v S 2005 JOL 16068 (T) and S v Shaik and Others 2007 (1) SACR 142 (D).

known however why no action has been taken to date against the key arms suppliers who allegedly paid bribes to other politicians and lobbyists. <sup>14</sup>What is significant however is that the sheer pressure that was brought to bear on the government to address the unanswered issues around the arms deal resulted in a commission of enquiry notwithstanding the lapse of some fourteen years after the deal was concluded. <sup>15</sup>

The saga of the arms deal is a fitting but chilling reminder of the lessons for developing nations which find themselves in a somewhat vulnerable situation when transacting with developed nations. As mentioned in an earlier chapter, the power of job creation and development by a corporation is too great a temptation for governments of many developing countries to resist. The warning by Sutherland of social distrust is thus very apt in this context.<sup>16</sup>

In dealing with white collar crime in the private sector and in order to emphasise the power of the big business, the following case deserves mention. It concerns yet another scandal this time involving collusion amongst the major players in the construction industry and which recently came into the spotlight. The reported facts are that several construction industry companies had colluded amongst themselves to fix the prices relating to the construction of stadia and other facilities which had to be built in preparation for the 2010 World Cup which had been awarded to South Africa by FIFA.<sup>17</sup> Recent investigations have revealed that the government was literally held to ransom by being forced to pay substantially higher prices to the role players in the construction industry in order to ensure that the project was successfully and timeously executed. Further investigations have revealed that the government was fleeced of billions of rand through price fixing. The involvement of the Competition Commission has seen the imposition of fines running into millions of rand being levied against several of the construction companies concerned. The last word has not been spoken on the subject as some of the construction companies are contesting the claims of the Competition Commission and these matters are still subject to investigation.

<sup>&</sup>lt;sup>14</sup> See note12 above.

<sup>&</sup>lt;sup>15</sup> See note 6 above.

<sup>&</sup>lt;sup>16</sup> E H Sutherland "White-Collar Criminality" American Sociological Review Volume 5 February 1940 No.1 11.

<sup>&</sup>lt;sup>17</sup> Loni Prinsloo "Calls to charge construction bosses" available at http://bdlive.co.za/2013/08/11/calls-to-charge-construction-bosses accessed 11 June 2014.

Some companies have admitted their involvement in price fixing and have co-operated with the Competition Commission and this has resulted in a few of the matters being finalised against those companies who have accepted responsibility for their actions. A local newspaper reported that the Competition Commission had linked twenty one construction companies to price fixing, inflating profit margins and cover-bidding on three hundred infrastructure projects. Damages in the form of losses to the government were estimated to be around fifty billion rand between the period 2006 to 2010. Subsequent to the report and pursuant to its own investigations, the Competition Commission issued a statement to the effect that it had reached settlement with fifteen construction companies who admitted to collusive tendering and the cumulative penalties imposed on the fifteen companies amounted to R1.46bn.

The significant part of the statement and which highlights the corrupt practices of the businesses reads as follows: <sup>20</sup>

"Firms colluded to create the illusion of competition by submitting sham tenders ("cover pricing") to enable a fellow conspirator to win a tender. In other instances, firms agreed that whoever won a tender would pay the losing bidders a "loser's fee" to cover their cost of bidding. Subcontracting was also used to compensate losing bidders."

It is noteworthy, that notwithstanding the fines levied in terms of the Competition Act, how conduct which falls squarely within the definition of fraud and as a consequence ought to have criminal consequences is dealt with in terms of the regulatory mechanisms of the Act. The levying of the fines brings the matter to a close as far as the errant companies are concerned, with no consequences for the companies or their directors. This begs the question as to why a case involving a private individual engaging in seemingly fraudulent conduct is dealt with in the criminal courts thereby exposing such individual to the risk of a criminal conviction of fraud or any other competent verdict. In any event, the criminal conviction does not eradicate the individual's liability to the aggrieved party as far as our civil law is concerned. Moreover what about the implications for the convicted person whose conviction forms part of the national statistics but our statistics say nothing about the fifteen construction

<sup>18</sup> Ibid.

<sup>&</sup>lt;sup>19</sup> Competition Commission "Press release 24 June 2013" available at http://compcom.co.za. accessed 7 June 2014.

<sup>&</sup>lt;sup>20</sup> Ibid.

companies who have been fined for their corrupt practices, for conduct which is nothing other than fraud?

What is furthermore disconcerting is the comment by the spokesperson of the Competition Commission in response to the action taken against the construction companies which appears to cement the attitude of the Commission in dealing with future violations of this nature. He stated he was pleased with the participation of the companies involved in the fast track settlement "which broke up existing cartels and created awareness of collusive practices in the industry".<sup>21</sup> This statement appears to ignore the criminal ramifications of the contemptuous practices engaged in by the construction companies involved and does nothing to promote the call for criminal conduct to be treated as such by the authorities.

This latter example also fits in smugly, hand in glove, with the scenario outlined by Sutherland, when he lamented the increasing use of regulatory provisions to deal with what, at face value, constitute criminal transgressions. According to him, this practice favours the crimes of the powerful at the expense of the powerless.<sup>22</sup>

Yet another case of collusion and price fixing involving a major food manufacturer was reported in 2012.<sup>23</sup> The Competition Commission investigated a complaint regarding collusion among the major millers in the country which revealed that the cartel members had agreed to fix the price of both wheat and white maize products and to create uniform price lists for wholesale, retail and trade customers. The members concerned undertook to reciprocate and to enforce the application of the terms agreed to in addition to agreeing to implementation dates for price increases. The Commission determined that through such price fixing agreements the cartel members concerned prevented and/or limited competition amongst themselves in relation to the pricing of milled wheat and white maize products. It was reported that the Commission reached a settlement with Foodcorp, one of the cartel members, which admitted to pricing collusion and also agreed to pay an administrative penalty of R88 500 000 (eighty eight and a half million rand) which equates to about ten per cent of its 2010 turnover.<sup>24</sup>

<sup>&</sup>lt;sup>21</sup> Ibid.

<sup>&</sup>lt;sup>22</sup> See note15 above.

<sup>&</sup>lt;sup>23</sup> Competition Commission "Press release 13 December 2012" available at http://compcom.co.za. accessed 7 June 2014

The following cases which have been reported emphasise the elements of political power and the wall of secrecy built around the factual foundations thereof. The role players are extremely powerful and it is only through intensive investigative reporting, reports from whistle blowers and the courts intervention that details of dodgy dealings and suspicious transactions have come to light.

In 2005, a local newspaper conducted an investigation into covert political party funding which revealed that R11million of public money was diverted to a political party ahead of the 2004 elections. This was reputed to be the biggest political funding scandal since 1994. The investigation established that South Africa's state oil company, PetroSA, irregularly paid R15million to Imvume Management, a company closely tied to the ruling political party at a time when the party was hard pressed for funds to fight elections. The effect of the entire transaction was that PetroSA, and ultimately the taxpayer, subsidised the ruling party's election campaign which was, on any calculation, a blatant abuse of public resources. Election campaign which was, on any calculation, a blatant abuse of public resources.

Currently the country is seized with another case, dubbed "Nkandlagate", which has major political repercussions for the ruling party and its leader.<sup>27</sup>This case is indicative of the extent of distrust that has been sown amongst the general public following the revelations of the blatant abuse of the public purse. It also highlights how political machinations threaten the institutions and people who are seized with the task of investigating alleged wrongdoing on the part of highly placed individuals. The brief facts are that what was proposed originally as necessary security upgrades to the personal residence of the leader of the ruling party and which was originally estimated to cost around R27 million escalated into an expenditure amounting to R246 million. This resulted in a probe by the Public Protector who released a damning report highlighting the abuse of authority and wasteful extravagant expenditure and recommended that action be taken against errant State officials and that the political leader repay the State a portion of the capital amount spent on upgrades.<sup>28</sup>

A well-known author and journalist in describing the Nkandla scandal stated: "Nkandlagate is about personal greed and moral shamelessness. It is about looting public money so that one

<sup>&</sup>lt;sup>25</sup> Stefaans Brummer, Sam Sole, Wisani wa ka Ngobeni "The ANC's Oilgate" available at <a href="http://mg.co.za/article/2005-05-03-the anc's-oilgate">http://mg.co.za/article/2005-05-03-the anc's-oilgate</a> accessed 11 June 2014.

<sup>&</sup>lt;sup>26</sup> Ibid.

<sup>&</sup>lt;sup>27</sup> Report of the Public Protector available at http://news. howsit.msn.com, accessed 20 March 2014.

<sup>&</sup>lt;sup>28</sup> Ibid.

man and his family can live in extravagant opulence for the rest of their lives — amid some of his people's most abject poverty."<sup>29</sup> He furthermore went on to state: "That is how the costs of a project initially estimated at R27m swelled to R246m. That is a tenfold, or 1,000%, overrun. Madonsela has described it as 'unconscionable'. Yet no one directly involved in the project asked any questions. Madonsela has excoriated them, including some ministers and whole organs of state, saying they 'failed dismally' and finds some guilty of unlawful and improper conduct and maladministration."<sup>30</sup>

### 3.3 Gaining some perpective through the cases

In analysing the above matters briefly, the common thread that runs through all of the examples that have been referred to above illustrate the following:

- 1. the absence of transparency;
- 2. collusion of some sort to ensure a particular result, usually financial;
- 3. prejudice, also usually financial, in the sense that in all of the examples quoted the taxpayers are ultimately burdened with the task of making good the actual loss;
- 4. a form of misrepresentation. Each of these transactions was disguised with facts and circumstances which suggest something other than that which actually took place;
- 5. the actors concerned were major players and were highly connected thereby allowing themselves the benefit of utilising their influence, albeit, for the wrong reasons.

As will also be evident from these examples, there is a level of complexity and sophistication that masks what would otherwise appear to be legitimate transactions perpetrated by people who possess a high level of business acumen and expertise. It is worth repeating the comment by Stevens to the effect that white collar crime is very hard to determine because research into this type of crime is made difficult for various reasons one of which is the code of silence amongst the top members of management in big enterprises coupled with the fact that employees who are caught are not charged but summarily dismissed to avoid disadvantaging

<sup>&</sup>lt;sup>29</sup> Allister Sparks "At home and abroad: Watergate, Muldergate pale in comparison to Nkandla" available at http://www.bdlive.co.za/opinion/columnists/2014/03/26/at-home-and-abroad-watergate-muldergate-pale-in-comparison-to-nkandla accessed 11 June 2014
<sup>30</sup> Ibid.

business transactions.31

When Sutherland warned of social disorganisation and distrust, he could not have envisaged the extent to which it would leave its mark on developing countries. South Africa is straddled currently in the midst of a very strange social phenomenon, that of "service delivery protests." Whilst protest actions were fairly common during the country's struggle to eradicate apartheid policies of the previous government, the reasons for the new wave of protest action are less easy to understand. South Africa is a constitutional state which subscribes to the principles of democracy and has a government which has been elected by the populace and enjoys majority support. Yet the actions of the protestors and the sheer number of such protest actions would seem to imply that the country is teetering on the brink of major chaos. The following news reports will afford some indication of the nature of the matters being referred to: "Gauteng councillors to tackle service delivery protests" "Brits town residents call for better sanitation" "N-West village protests disrupt schooling" "4" "Service delivery under the microscope" "5" "Mthethwa cautions against violence during protests." "36"

It would be easy to dismiss such actions on the basis that sections of the community are dissatisfied with the levels of service delivery in the light of the repeated promises by the government to provide housing, water, electricity and other basic services. After all, some would argue that the government has not quite addressed the basic needs of the previously disadvantaged members of the community at a pace that is justified taking into account the lapse of some twenty one years since the present government came into power. Others may take the view that the protesters are simply opponents of the government who are using the protest action as a form of posturing to garner political mileage for their cause. The government has, within certain limitations and financial challenges, been striving to address the basic needs of its citizenry. There has been a marked improvement in the lives of several

<sup>&</sup>lt;sup>31</sup> R Stevens 'Classification of specific types of crime' in MGT Cloete and R Stevens (eds) Criminology (1990) 15.

<sup>&</sup>lt;sup>32</sup> SABC News available at http://sabc.co.za/news Sunday 20140831 accessed 21 November 2014.

<sup>&</sup>lt;sup>33</sup> SABC News available at http://sabc.co.za/news Friday 20140530 accessed 21 November 2014.

<sup>&</sup>lt;sup>34</sup> SABC News available at http://sabc.co.za/news Tuesday 20140605 accessed 21 November 2014.

<sup>&</sup>lt;sup>35</sup> SABC News available at http://sabc.co.za/news Friday 20141104 accessed 21 November 2014.

<sup>&</sup>lt;sup>36</sup> SABC News available at http://sabc.co.za/news Sunday 20140209 accessed 21 November 2014.

millions of the previously disadvantaged sections of the population. Whatever the argument, the reality of the matter is that the actual number of protest actions over the past two to three years can no longer be considered in the light of the above views only. It has been reported according to one organization which monitors the occurrence of major service delivery protests across South Africa, that there have been more major protests in 2014 than any previous year since service delivery protests started in 2004.<sup>37</sup>

The report also states that: "The somewhat uncertain response by both government and analysts has done little to allay the public's fears. In truth, the reasons behind protests are generally poorly understood and this has fuelled speculation on why protests occur and indeed whether these protests are even about service delivery." The authors of the report also comment on the fact that a lack of access to information often leads to the rumours of favouritism, corruption, and mismanagement which at times are actually true.

It is respectfully submitted that the widespread incidence of white collar crime across all sectors including the private and public sectors has started to undermine public confidence in matters affecting administration especially on the part of the government. It is for this reason that there is an underlying suspicion and lack of trust as far as promises relating to basic services are concerned. This view is fortified by the message that social disorganisation and distrust is a consequence of white collar criminality. There appears to be a disturbing pattern of profligate and unjustified spending mainly on the part of the government authorities which for various reasons cannot be justified on any rational basis.

The recent report of the Auditor-General<sup>40</sup> concerning unauthorised and wasteful expenditure on the part of government departments makes for very disturbing reading. There is nothing to indicate that the authorities are serious about eradicating the problems of irregular spending. It is not inconceivable that the masses are frustrated at what is perceived to be a government that is dedicated to enriching a few powerfully connected individuals whilst paying lip service to service delivery. More importantly, the current era of protest actions appear to resonate with the warnings of social disorganisation and distrust.

<sup>&</sup>lt;sup>37</sup> Kevin Allan and Karen Heese "Understanding why service delivery protests take place and who is to blame" Municipal IQ's Hotspots Monitor available at <a href="http://www.municipalig.co.za">http://www.municipalig.co.za</a>, accessed 11 November 2014.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>&</sup>lt;sup>40</sup> Auditor-General South Africa Media Release available at http://www.agsa.co.za, accessed 11 November 2014.

It is important to remember, however, that the South African crime problems are not unique. Given the huge and disparate social inequalities that existed prior to 1994 coupled with the ravages of apartheid that continue to fester within the broader society, it is understandable that the crime problem after 1994 was never going to be an easy one to deal with or that it would ever be possible for such a problem to simply vanish from its midst. It is a fact that crime is an established social phenomenon that prevails in all societies and that realistically it is rather the extent of the problem and attempts to combat it that present the real challenges. It is absurd to contemplate the notion of a crime free environment in any society.

The new South African society, it would appear, to a certain extent continues to be a fractured society which is still trying to pick itself up from its wounded past and to come to terms with the demands of a different reality. The structural inequalities in relation to education, employment, provision of housing, ownership of land, poverty and skills shortage continue to haunt the new society to the extent that unless several of the social and economic issues referred to above are addressed, the transformation of the nation towards a safer and progressive democracy will be delayed. It is also submitted that, given the country's history, it is useful to consider the vision commonly held by the majority of the South African population post-1994 which spoke to an improved social, economic and political environment. Promises were made by the politicians of the day to foster the building of a new society which would incorporate amongst others a new improved set of values, ideals and goals as enshrined in the constitution. It was hoped that the quality of life of each and every South African would be vastly improved by the implementation of new and far-reaching social policies by the government and whilst there appears to be some notable improvements in a few areas, for example, the promotion of human rights, social welfare, health, housing and education, other areas in particular safety and security appear to have been compromised.

Perhaps in the South African situation the position is best summed up by looking at the points raised in the article by Sutherland which after all these years still has relevance to the situation: <sup>41</sup>

<sup>&</sup>lt;sup>41</sup> See Note 16 above.

- 1. he identified a serious gap in the application of the criminal laws against businessmen and professionals which could not be justified;
- 2. he identified serious shortcomings in the way in which crime statistics are prepared. Even though his observations were noted in 1940 this situation still prevails some 73 years later. White collar crime for its part is not even reflected as a separate category of crime in the crime statistics recorded for the country. The absence of such a category impacts on the availability of reliable information about the nature and extent of the problem and results in the effects of white collar crime being so to speak "lost in the wash" with the other statistics. This therefore impedes serious discussions and debates to be held about the issue and consequently inhibits the formulation of pragmatic solutions thereto. Even a cursory perusal of the 2014 crime statistics will demonstrate the absence of any category relating to white collar crimes;
- 3. the lack of information also impacts on the inability to collect reliable data and hampers proper research into the subject. In order to secure any data, one is obliged to scour the pages of newspaper reports, articles by investigative journalists, financial magazines, police records, court records and such available information to obtain a glimpse into the nature and extent of the problem;
- 4. the cost of white collar crime continues to be a huge financial loss to the fiscus. The financial losses that were identified in the forties speak volumes to the seriousness of the problem. South Africa in 2014 is in the same boat having to deal with billions of rand being lost through white collar criminality;
- 5. the so-called common law crimes which expose the violent vulgarities and mayhem are easier to deal with than instances of white collar criminality. The public is more concerned about such category of crime and the war on such crime represents a dimension that is easier to deal with and more palatable towards addressing public concern;
- 6. he sends out a clarion call for white collar crime to be treated and recognised as "real crime." The failure to do so will result in governments and administration having to deal with a more subtle threat in terms of criminality and financial loss which is not justifiable.

### 3.4 Conclusion

As a developing democracy, South Africa would do well to revisit its policies in tackling all forms of crime including white collar crime. There is no justification for the continuation of two parallel systems of justice, as Nelken previously commented on.<sup>42</sup>As no separate statistics are maintained for white collar crime, there are no accurate or reliable records available to indicate are what the actual annual losses to the fiscus. It is a relatively safe bet to assume that white collar crimes far exceed the cost of predatory crimes. One can hardly disagree with the following statement by Sparks of the dangers that may befall the country if deep rooted corruption is not addressed:<sup>43</sup>

"Nkandla is not going to go away, just as the arms deal scandal has not. Nor will the Guptagate affair. Zuma is tainted beyond redemption and if the ANC leadership decides to rally around him come hell or high water, all its ministers and other senior officials will have to keep obfuscating, lying and deceiving the public for the next five years, by which time they will themselves all be morally corrupted. Which would mean the disintegration of the party. And let me say this. Critical though I have been of the ANC under the Zuma administration these past few years, it is obviously still the party of the majority of our black people, so its precipitous disintegration would be disastrous for South Africa."

<sup>&</sup>lt;sup>42</sup> D Nelken 'White Collar Crime' in M Maguire,R Morgan and R Reiner (eds) *The Oxford Handbook of Criminology* 2 ed (1997) 355.

<sup>&</sup>lt;sup>43</sup> See note 29 above.

### **Chapter 4: Exploring a few theories that explain White Collar criminality**

#### 4.1 Introduction

Burdis and Tombs lament the fact we have been unable to respond to the contemporary events such as the current global economic crisis as well as the plethora of international financial frauds which have occurred over the past twenty five years. They furthermore state that: "It appears that we have failed to theorise the context in which these events have occurred and also virtually given up on alternative forms of social and economic organisation which may reduce their incidence."

Against this background, it has therefore deemed necessary to comment on the criminological theory or theories that form the underpinnings of white collar crime. This may assist us to form a better understanding of white collar criminality in order to redress some of the concerns raised by Burdis and Tombs.

### 4.2 <u>Unravelling some theoretical explanations</u>

Newburn summarises the essential differences between white collar crime and other forms of criminality as follows: <sup>3</sup>

- 1. white collar crime generally takes place in private;
- 2. offenders are usually quite legitimately present at the scene;
- 3. it tends to involve the abuse of trust inherent in the occupational role;
- 4. it involves some form of insider knowledge;
- 5. often there is no complaint and when there is one, it is made long after the event;
- 6. there is generally no immediate physical threat and as such it is less a source of fear or anxiety than other forms of crime;
- 7. determining responsibility may be extremely problematic;
- 8. it tends to have an ambiguous legal and criminal status.

Burke states that Sutherland is remembered for his attempts to apply the differential

<sup>&</sup>lt;sup>1</sup> K Burdis and S Tombs "After the Crisis: New Directions in theorising Corporate and White Collar Crime" in S Hall and S Winslow (eds) *New Directions in Criminological Theory* (2012) 16.

<sup>&</sup>lt;sup>2</sup> Ibid.

<sup>&</sup>lt;sup>3</sup> T Newburn Criminology (2007) 377.

association theory to white collar crime.<sup>4</sup> He also noted Sutherland's observation that the majority of the criminological data had been compiled in relation to offenders from the lower classes although it was accepted that businessmen also committed a wide range of criminal offences which was invariably difficult to detect.<sup>5</sup> It is interesting to note that Sutherland provided the first scholarly insight into the wrongdoings of corporations. Subsequent scholars have distinguished white collar crimes committed by individuals from corporate crime committed by business organisations.<sup>6</sup>

Conklin states that due to the low risk of apprehension, the small likelihood of being found guilty and the limited prospects of any criminal sanction, corporate executives knowingly violate the law as the gains are great and the risks are small.<sup>7</sup> According to Schmalleger, white collar crimes are difficult to investigate and prosecute for a number of reasons: <sup>8</sup>

- 1. white collar criminals are better educated than most other offenders and are better able to conceal their actions;
- 2. cases against white collar offenders for a continuing series of offences are often built on the evidence only understandable to financial or legal experts. As such it is often difficult to examine and understand the evidence;
- 3. financially business executives earn high salaries and bonuses as well as the resources of the corporation at their disposal. They can hire excellent defence attorneys and can tie up the courts with motions and appeals not readily available to defendants with lesser resources.

Burdis and Tombs comment on the fact that one of the common features of the behaviour patterns of white collar crimes is that by their very nature, they remain inaccessible to public, political and academic scrutiny. As a consequence the social position of the perpetrators often provide opportunities for the successful concealment of the offences or for

<sup>&</sup>lt;sup>4</sup> R H Burke *An Introduction to Criminological Theory* 3<sup>rd</sup> Edition (2009) 105.

<sup>5</sup> Ibid

<sup>&</sup>lt;sup>6</sup> F Adler & GOW Mueller et al *Criminology* 8th Edition 338.

<sup>&</sup>lt;sup>7</sup>J E Conklin *Criminology* 185.

<sup>&</sup>lt;sup>8</sup> F Schmalleger *Criminology Today* An Integrative Introduction (2012) 317.

<sup>&</sup>lt;sup>9</sup> See note 1 above 279.

the avoidance of prosecution either by having access to expensive lawyers or by being above the law.<sup>10</sup> They point out that an important task of criminology has been to explore some of these forms of criminality and gain some sense of the extent and nature of this elusive phenomenon but that despite the numerous examples of corporate and white collar criminality which serve to demonstrate the pervasiveness of the problem, the "dark figure" of white collar crime remains even more unquantifiable than that pertaining to "street crime."<sup>11</sup>

According to Sutherland, businessmen do not associate with criminals in order to learn criminal behaviour but they come into contact with criminal attitudes in their work environment. This enables them to learn the same attitude largely because many white collar offenders do not see their actions as criminal. 12 The learning of behaviour also includes the adapting of criminal techniques that work when a certain business uses a successful white collar technique, which technique can be adapted by other businesses to enlarge their own profits. 13 It is however noted that differential association cannot explain all forms of white collar crime. Personal factors can also play an important role in the causation of white collar crime, for example, emotional uncertainty, feelings of personal incompetence, the importance of money as a status symbol and a person's feeling of inferiority about his personal abilities. 14

Differential association has also been referred to as 'bad company' theory. Sutherland's student, Cressey, objected strongly to the use of this terminology as it amounted to an oversimplification and stated that in addition to association, frequency, duration, priority, intensity, motives and drives there were many other factors that influenced the quality and effect of the association.<sup>15</sup> In his view, the theory was better described as a cultural transmission theory. Fox in his commentary on differential association theory as formulated by Sutherland, states that this was the first major sociological theory to explain the causes of crime on the part of individuals as it refers to patterns of behaviour to which individuals are exposed.<sup>16</sup>

<sup>10</sup> Ibid.

<sup>&</sup>lt;sup>11</sup> Ibid.

<sup>&</sup>lt;sup>12</sup> R Stevens 'Classification of Specific Types of Crime' in MGT Cloete and R Stevens (eds) Criminology (1990) 160.

<sup>13</sup> Ibid.

<sup>&</sup>lt;sup>14</sup> Ibic

<sup>&</sup>lt;sup>15</sup> V Fox *Introduction to Criminology* 2nd Edition (1985) 95.

<sup>&</sup>lt;sup>16</sup> See note 15 above 92.

According to him, crime is best understood as learned behaviour that is imparted by other persons with whom one associates. He summarised Sutherland's final theory of differential association on the following bases: <sup>17</sup>

- 1. criminal behaviour is learned;
- 2. criminal behaviour is learned in interaction with other persons in the process of communication;
- 3. the principal part of learning of criminal behaviour occurs within intimate personal groups;
- 4. when criminal behaviour is learned, the learning technique includes:
  - 4.1 techniques of committing the crime, which are sometimes very complicated, sometimes very simple;
  - 4.2 the specific direction of motives, drives, rationalisations and attitudes.
- 5. the specific direction of motives and drives is learned from definitions of the legal codes as favourable or unfavourable;
- 6. a person becomes delinquent because of an excess of definitions favourable to violation of the law over definitions unfavourable to violation of the law;
- 7. differential associations may vary in frequency, duration, priority and intensity;
- 8. the process of learning criminal behaviour by association with criminal and anticriminal patterns involves all of the mechanisms that are involved in any other learning;
- 9. while criminal behaviour is an expression of general needs and values, it is not explained by those general needs and values since non-criminal behaviour is an expression of the same needs and values.

Fox highlights the fact that one of the problems with the theory of differential association is that not everyone who has contact with criminality adopts or follows the criminal pattern. <sup>18</sup>There have been a barrage of other criticisms of the theory. Caldwell has however pointed out that inasmuch as the theory has serious weaknesses, it also has much merit with particular reference to the importance of social factors. <sup>19</sup>The key criticisms of the theory were

<sup>&</sup>lt;sup>17</sup> See note 15 above 94.

<sup>&</sup>lt;sup>18</sup> See note 15 above 95.

<sup>&</sup>lt;sup>19</sup> See note 15 above 96.

summarised by Reed Adams and are set out as follows: 20

- 1. it is difficult to reduce differential association to empirical research for validation purposes;
- there are some misinterpretations on the part of some writers with regard to differential association. For example, he points out that Sutherland was focussing on an overabundance of criminal associations and not simply criminal associations. In addition, Sutherland was focussing on patterns of behaviour as opposed to simply criminal behaviour;
- 3. the theory does not explain why the associations exist;
- 4. the theory fails to account for all types of crime;
- 5. the theory fails to consider personality and differences in people in receptivity;
- 6. the theory does not address the ratio of behaviour patterns that determine criminality with sufficient clarity and precision.

Another view that has been expressed is that Sutherland had three purposes for inventing the concept of white collar crime and they are set out as follows: <sup>21</sup>

- 1. he wanted to bring the crimes of the rich and powerful within the scope of criminology in order to show that upper world offenders were no better than customary offenders;
- 2. he wanted to debunk theories that pathological offenders by focussing on individual traits associated with the poor;
- 3. he wanted to use the opportunity to develop his own approach to the study of crime and to formulate theories to explain all forms of crime. When people enter the business world, they come into contact with other white collar workers who school them in the techniques associated with illegal schemes.

Sutherland also identified at least four reasons why it is difficult to fight white collar crime: <sup>22</sup>

1. due to their respectability and high social status, the public do not think of businessmen and professionals as criminals;

<sup>&</sup>lt;sup>20</sup> See note 15 above 99.

<sup>&</sup>lt;sup>21</sup> J Robert Lilly et al *Criminological Theory* Context and Consequences 5<sup>th</sup> edition (2011) 274.

<sup>&</sup>lt;sup>22</sup> See note 21 above 276.

- 2. the capitalist ideology discourages state intervention in business practices;
- 3. business uses its influence to disrupt attempts to control it. The association between business officials and the political elite impacts on the state officials attempts to stop unlawful conduct;
- 4. the potential victims of white collar crime are weak, for example, consumers and investors. By contrast, white collar crime is organised crime.

As Fox points out, whilst the theory of differential association has in some instances been attacked, at other times been supported and yet other times criticised for its limitations, it has attracted more attention and generated more comment, research and writing than any other criminal theory. <sup>23</sup>

Other criminologists consider the rational choice theory as the logical explanation to explain white collar crime.<sup>24</sup>They emphasise that the principal goal of business involves the making of profits. This entails the engaging of activities in which financial rewards outweigh the costs. Rationality results in wealth whilst recklessness or negligence results in bankruptcy. White collar criminality in business flourishes due to the fact that potential profits are high. Due to weaknesses in law enforcement and secrecy in organisations, the risk costs are low. A business executive will weigh the potential formal, informal and self-imposed costs. He will also consider the costs of complying with the law and the benefits of not complying.<sup>25</sup>It has also been pointed out that corporate crime is more likely to occur when the following factors are present:

- 1. managers of business perceive that formal and informal sanctions will be weak;
- 2. managers do not experience a loss of self- respect;
- 3. managers lack strong morality and believe their actions are justified;
- 4. rules are viewed as being unfair;
- 5. laws have been broken in the past.

Adler states that the rational choice perspective is based on two approaches: <sup>26</sup>

<sup>&</sup>lt;sup>23</sup> See note 15 above 102.

<sup>&</sup>lt;sup>24</sup> See note 21 above 288.

<sup>&</sup>lt;sup>25</sup> Ibid.

<sup>&</sup>lt;sup>26</sup> See note 6 above 208.

- utilitarianism people make decisions with the objective to maximise pleasure and minimise pain;
- 2. economic choice theory people evaluate their options and choose what they believe will satisfy their needs. A person decides to commit a crime after concluding that the benefits outweigh the risks and the effort.

The rational choice theory assumes that people make their decisions with a goal in mind and they are made intelligently and with their own free will. Individuals believe that the chances of getting caught are low and the possibility of good pay-offs are high.

The argument of the leftists, however, is that the profit imperative of capitalism is its weakness in that such imperative has affected or eroded meaningful regulation within the business and financial sectors which in turn has opened up gaps for criminal activity to flourish.<sup>27</sup> They furthermore argue that it is by appeal to the rational actor that this area of theory is able to shed some light on the motivational aspect of white collar offending. The rewards for criminality can be potentially very lucrative whilst the likelihood of detection is low and the consequence of detection relatively minor.<sup>28</sup>

The further theories associated with white collar criminality are discussed briefly. The normalisation of deviance theory involves the neutralisation of perceptions of danger. The risks are known to the role players but are down played to the extent that the risks are accepted.<sup>29</sup> The example cited is that of the Space Shuttle "Challenger" which in 1986 burst into flames on take-off resulting in the death of seven crew members.<sup>30</sup> An investigation revealed that the catastrophe was caused by the failure of an "O" ring in a rubber seal. It was also established that the manufacturer was aware of the "O" ring danger but underplayed the risk due to time as well as funding constraints. The theory is that the normalisation of risk allows dangerous products to be marketed or not recalled promptly.

The strain theory is used to explain situations where expectations for goal achievement in the

<sup>&</sup>lt;sup>27</sup> See note 2 above 281.

<sup>&</sup>lt;sup>28</sup> Ibid.

<sup>&</sup>lt;sup>29</sup> See note 21 above 282.

<sup>&</sup>lt;sup>30</sup> Ibid.

corporate world are intensified.<sup>31</sup> Individuals are under performance pressures to meet goals or be denied mobility within the company. Failures to achieve may result in relative deprivation compared to others who are more successful. Executives whose bonuses depend on stockholder returns can exert inordinate pressure on underlings to increase profits. The emphasis on economic success can not only generate strain but also anomie. Another theory, the criminogenic opportunity theory, simply expressed, means that when there is an attractive target and no guardianship, a criminal opportunity exists.<sup>32</sup>This theory involves two elements:

- 1. there must be an attractive target, for example, an opportunity to steal someone else's savings;
- 2. the absence of a capable guardian, for example, the absence of an accountant to supervise the funds.

Williams states that it is widely accepted that the complexity of white collar crime makes it expensive to investigate and to prosecute both in terms of labour and finance.<sup>33</sup> In the UK, for example, offences such as fraud require a dedicated and highly qualified staff to deal with it. Even where there are specialist units attached, the success rate in terms of convictions in cases brought to trial are low.<sup>34</sup> The cost of bringing matters to trial are very expensive and the element of complexity can lead to trials running for durations of three to eighteen months. In cases where a jury is involved, the information may be too complex for the jurors to comprehend.<sup>35</sup>

Sutherland identified another four important features of white collar criminality which add to the complexity of investigating and prosecuting thereof: <sup>36</sup>

- 1. companies develop support and transmit to new employees a criminal culture;
- 2. companies conspire internally and with other companies to plan and carry illegal acts, for example, false advertising and fixing of prices;

<sup>&</sup>lt;sup>31</sup> See note 21 above 283.

<sup>&</sup>lt;sup>32</sup> See note 21 above 284.

<sup>&</sup>lt;sup>33</sup> KS Williams *Textbook on Criminology* 7<sup>th</sup> Edition (2012) 67.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>&</sup>lt;sup>36</sup> See note 21 above 276.

- 3. the corporate veil of companies allow perpetrators of white collar crime to remain anonymous. Assigning criminal responsibility to a particular person is difficult if not impossible;
- 4. the rational nature of companies is to make a profit and this encourages them to engage in amoral practices which is done in secret.

Lilly comments on the distinctive features of white collar offenders which impact on the task of investigating and prosecuting the offenders as follows: <sup>37</sup>

- 1. the offender has legitimate access to the location in which the crime is committed;
- 2. the offender is spatially separated from the victim;
- 3. the offenders actions have a superficial appearance of legitimacy, for example, price fixing which is negotiated in boardrooms amongst different business executives. Consumers pay inflated prices for items whose prices are rigged. The executives never see the victims and the entire scheme is undertaken behind a respectable business enterprise.

Lilly also explains how the effects of white collar crime are at times barely visible.<sup>38</sup>In a complex society members are forced to accept that their monies are not being swindled, safety regulations are being followed, there is no false advertising and that they are being billed for services actually rendered. White collar criminals have many ways to deceive the public. Behind closed doors, they conspire to fix prices, manipulate financial statements and set up Ponzi schemes. Most importantly, he comments on the fact that the very nature of our capitalist system not only creates new industries, provides new employment opportunities, wealth and social improvement but also offers a well of criminal opportunities.<sup>39</sup> Such opportunity to commit a crime may make a person a criminal.

Reference was made in the previous chapter to the Seriti Commission of Inquiry which is currently seized with the task of investigating allegations of corruption in the multi-billion rand 1999 arms deal. Apart from the practical difficulties of securing evidence which dates back to some two decades, there have been recent reports on the costs associated with the

<sup>&</sup>lt;sup>37</sup> See note 21 above 284.

<sup>&</sup>lt;sup>38</sup> See note 21 above 285.

<sup>&</sup>lt;sup>39</sup> Ibid.

Commission's hearing to date. A local newspaper reported that according to the country's Justice Minister, Michael Masutha, the Commission, as at November 2014, has cost the taxpayer R83 million and its work is not yet complete.<sup>40</sup> The issue of the cost has become a bone of contention at parliamentary level with at least one opposition Member of Parliament claiming that the Commission's costs are likely to cost around R100 million rand with "no prospect of exposing the truth about corruption in the arms deal." <sup>41</sup>

The issue of the costs associated with investigation and prosecution of white collar crime is fundamental to any decision that is made, especially by developing countries to combat such crimes. The example quoted above best illustrates how funds which would otherwise have been diverted by a developing country such as South Africa, to other more pressing social programmes (unemployment, housing, health, education) are utilised for non-essential purposes.

## 4.3 A new perspective and proferring a new theoretical explanation

Having regard to the theories that have been referred to thus far to explain the causes of white collar crimes, it is respectfully contended that it is no longer possible to limit the theories to those that have been described. The sheer passage of time since Sutherland's first identification of white collar crime together with the changing face thereof, demand new approaches towards understanding the causes of white collar crime. In addition, it is arguable that more than one theory applies to a particular crime. The theory of differential association whilst enjoying widespread support in the 1940s to explain white collar crimes falls to be reconsidered in light of the technological revolution that has occurred since the 1980s. Computer fraud, cyber-crime, software piracy and hacking have added new dimensions to explanations for white collar crime. The rational choice theory still appears to be popular as it emphasises the freedom to make choices relating to the risks of detection weighed against the pay-off of criminal conduct. The remaining theories are not as popular as differential association and rational choice but nonetheless sufficiently explain the causes in the context in which the crimes sometimes occur.

<sup>&</sup>lt;sup>40</sup> Wyndham Hartley "Lawyers and officials at arms deal inquiry have earned millions" *Business Day* 26 November 2014 at 3.

<sup>&</sup>lt;sup>41</sup> Ibid.

It is submitted that the most logical explanation of white collar crime that has emerged especially over the past twenty to thirty years is that of the "easy profit" theory. The view expressed is neither new nor a revelation of sorts. It is the simple explanation for the unyielding growth of white collar crime throughout the world. The lure of profits is the central pillar of white collar crime. The profit motive in turn is inextricably linked to the fundamental goals of capitalism. For capitalism to flourish, the pay-offs must be sufficiently attractive to those who have access to the means. The capitalist system currently provides the most material benefits to those who invest in the system. The trappings of wealth, popularity, success and cult-like status are usually only available to those who pursue such pursuits. The capitalist system unashamedly glorifies the acquisition of material wealth as the primary indicator of "success" to the extent that it has become the *raison d'etre* of the system.

The warning sounded out to developing countries<sup>42</sup> to guard against their vulnerabilities has particular resonance to South Africa. The transition from a minority led apartheid government to a constitutional democracy has conjured up its share of challenges, most notably the transfer of power from one set of rulers to another. It is argued that this changing of the guard invariably entailed the appointments of those closely allied to the political ideologies and dictates of the ruling class. White collar offenders are often able to exploit gaps in new administrations by taking advantage of loopholes in existing legislation as well as rallying to the new rulers with a view primarily of ingratiating themselves with the ruling elite. It goes without saying that the prospects of securing lucrative government tenders and extending their influence are the main drivers of such initiatives.

The uniqueness of white collar offending has to be the levels of sophistry and complexity that transcend other forms of offending. Developing countries are rendered further vulnerable by the usually reduced levels of expertise on the part of the new administration. White collar offenders possess unique skills and acumen which are difficult to unravel save for those with specialist knowledge and training. It is also interesting to observe how at times, white collar offenders are able to exploit system weaknesses to their advantage. This is best illustrated in the long running case of J Arthur Brown which encapsulates all the vices associated with white collar crime and was reported on in the media as follows: <sup>43</sup>

<sup>&</sup>lt;sup>42</sup> F Adler & GOW Mueller et al *Criminology* 8 ed 331.

<sup>&</sup>lt;sup>43</sup> Rebecca Davis "The disgraced Fidentia boss and his unlikely friends" available at http://www.dailymaverick.co.za/article/2013-05-21-the-disgraced-fidentia-boss-and-his-unlikely-friends/#.Va010Pmqqko

"J Arthur Brown has been one of the most unpopular men in South Africa for a long time now. As the former CEO of Fidentia, he was at the wheel while R1,4 billion went missing from funds administered by the firm, including a fund meant to support widows and orphans of mine workers. It remains one of the biggest corporate scandals in South Africa's history. Last week, to the shock and disgust of many, the Western Cape High Court ended six years of legal proceedings by handing Brown only a R150,000 fine and a suspended jail sentence. But Brown is receiving loyal support from an unexpected quarter: some of the very people whose money disappeared under his watch, and who most need it back."

The State was severely criticised for its handling of this case, mainly due to the prosecution's inability to build a strong case against him.<sup>44</sup> Brown initially faced 192 counts of fraud, theft, money-laundering and corruption, but these charges were reduced to nine. After numerous postponements, the court case eventually commenced in November 2012 and in April 2013, he was convicted of just two counts of fraud. It is equally interesting to note that by contrast, two men in subordinate positions to Brown, the business financial director and broker received seven-year jail terms at their trials which were heard separately from that of Arthur Brown.<sup>45</sup> The subsequent developments in this case are however interesting in that the State pursued the matter on appeal to the SCA and the sentence was overturned and the accused received a lengthy prison term of fifteen years.<sup>46</sup>

### 4.4 Conclusion

The J Arthur Brown case however highlights the iniquitous situation which prevails as far as the administration of justice is concerned in the treatment of white collar offenders from those who commit so-called ordinary crimes. Such a situation cannot be supported, justified or sustained and it is very arguable that such disparity in treatment offends the equality provisions as enshrined in the South African Constitution.<sup>47</sup>

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>&</sup>lt;sup>46</sup> Rebecca Davis "J Arthur Brown: Fraudster reaches 'cell-by' date" available at http://www.dailymaverick.co.za/article/2014-12-02-j.-arthur-brown-fraudster-reaches-cell-by-date/#.Va02ZPmqqko.

<sup>&</sup>lt;sup>47</sup> Sec 9 of Act 108 / 1996.

### Chapter 5: Exploring solutions to the problem of white collar criminality

#### 5.1 Introduction

African criminal enterprises have developed quickly since the 1980s mainly due to advances in communications technology and the globalisation of the worlds' economies.¹ Easier international travel, expanded world trade and transnational financial transactions have enabled these groups to target international victims and to develop criminal networks within prosperous countries and regions. The social, political and economic conditions in African countries including South Africa have helped such enterprises to expand globally.² Profitable activities include drug trafficking, money laundering, bank fraud, credit card fraud as well as identity fraud. The internet and e-mail have made such crimes more profitable and prevalent.

Transnational organised crime is yet another unlawful activity undertaken and supported by organised criminal groups operating across national boundaries and involving international criminal enterprises. This category of crime is fast emerging as one of the pressing challenges of this century. The globalisation of crime has necessitated enhanced co-ordination of law enforcement efforts in different parts of the world.

### 5.2 Challenges facing South Africa

South Africa as a developing country is confronted with on-going challenges in containing crime, including white collar crime, both inside and outside her borders. Shaw states that crime is a pressing issue in South Africa and reducing lawlessness and reforming the country's agencies of policing are among the key challenges facing the country as a new democracy.<sup>5</sup> He furthermore stated the following in relation to the obligations facing the new incoming administration(with reference to the new government that was installed in 1994):<sup>6</sup>

"Ensuring civil order and personal safety is the key to a successful governance in the post-transition order and a credible, competent and

<sup>&</sup>lt;sup>1</sup> F Schmalleger *Criminology Today* An Integrative Introduction (2012) 327.

<sup>&</sup>lt;sup>2</sup> Ibid.

<sup>&</sup>lt;sup>3</sup> Ibid.

<sup>&</sup>lt;sup>4</sup> See note 1 above 328.

<sup>&</sup>lt;sup>5</sup> M Shaw Crime and Policing in Post-Apartheid South Africa Transforming under Fire (2002) xi.

<sup>&</sup>lt;sup>6</sup> See note 5 above xii.

accountable police service enjoying broad public legitimacy is a pre-requisite for a durable democracy. Criminal violence is identified as a dominant feature of the post-apartheid landscape. Violent crime is now clearly associated with South Africa. Few in 1994 both inside and outside the country expected that crime would so dominate the nature of the democratic order. Inevitably the news headlines, police reports and the experience of citizens have brought the issue of crime onto the public agenda. Crime sullies the perception of South Africa elsewhere in the world."

In mid-2000 a moratorium was placed on the release of crime statistics by the police. The explanation was that it related to the alleged inconsistencies in the data but also indicated how sensitive the authorities are to crime information which portrays the government in a negative light. Confidence in the new order is seriously undermined by crime. South Africa faces a daunting challenge in containing, investigating, prosecuting and eradicating all forms of crime, in particular white collar crime. The government's message that it is winning the war against crime has not found favour with the public. Surveys show that the levels of fear are up and that crime ranks as a pressing concern of the country. Altbeker states that government insistence that statistics are improving has fuelled scepticism about its honesty and argues that government lacks the means to provide solutions to the crime problems as it has repeatedly failed to act decisively due to lack of ideas.

Dixon and van der Spuy are of the view that the challenges facing South Africa are of the order facing other similarly placed countries. They state their belief that poverty must be reduced and opportunities widened as a *sine qua non* in what remains a highly unequal society which is affected by rapid urbanisation and industrialisation. <sup>10</sup> Bezuidenhout states in addition to the current problems, corruption, collusion and nepotism by politicians are crippling the South African economy to the extent that the public are urged to ask what has

<sup>&</sup>lt;sup>7</sup> See note 5 above 83.

<sup>&</sup>lt;sup>8</sup> A Altbeker A Country at War with Itself (2007) 12.

<sup>&</sup>lt;sup>9</sup> See note 8 above 13.

<sup>&</sup>lt;sup>10</sup> B Dixon and E van der Spuy Justice Gained? Crime and Crime control in South Africa's Transition (2004) 218.

happened to the social or unwritten contract between the voter and the government in which the elected government undertakes to ensure fairness (everyone would be treated the same and their human rights protected), public safety, housing and equal opportunities for everyone.<sup>11</sup> The author further opines that the government is losing its sovereign power to govern the populace and also to maintain law and order.<sup>12</sup>

According to one researcher, Camerer, South Africa received a score line of 5.62 out of 10 in the Transparency International's 1995 Corruption index. <sup>13</sup>The findings are based on a scale of 0 to 10 with 0 denoting wholesale corruption and 10 denoting the total absence of corruption. Such a result as 5.62 is indicative that white collar crime is endemic in the country. There is however sufficient proof that the government has, for some time already, acknowledged the existence of white collar crimes and corruption through the following developments: <sup>14</sup>

- 1. numerous conferences and workshops on commercial crimes facilitated by business and the South African Police Services;
- 2. the declaration of serious economic offences as priority crimes;
- 3. the appointment of a commission to investigate corruption and irregularities relating to taxes, customs and excise duties.

The author also points out that although there are no accurate or reliable data to support the claim, it is accepted that the financial cost of white-collar crime exceeds the value received from street crimes.<sup>15</sup> In addition official statistics are fraught with shortcomings and are recognised as providing an under estimate of crime and that in order to obtain a clearer picture of the unreported crime, it is necessary to have regard to victim surveys as an alternative to official police statistics to gather information on the true nature and extent of crimes.<sup>16</sup> The author also refers to the theory of neutralisation to explain why white collar offenders violate certain standards by stating that: <sup>17</sup>

<sup>&</sup>lt;sup>11</sup> C Bezuidenhout A South African Perspective on Fundamental Criminology (2011) viii.

<sup>12</sup> Ibid

<sup>&</sup>lt;sup>13</sup>L Camerer "White-collar Crime in South Africa: A Comparative Perspective" in African Security Review Vol 5 No 2, 1996 1.

<sup>&</sup>lt;sup>14</sup> Ibid.

<sup>&</sup>lt;sup>15</sup> See note 13 above 2.

<sup>&</sup>lt;sup>16</sup> See note 13 above 4.

<sup>&</sup>lt;sup>17</sup> See note 13 above 6.

"Fraud is known to thrive in a social and business environment where low ethical standards prevail and moral flexibility reigns. In South Africa one can argue that motive, opportunity, and the neutralisation of ethical concerns regarding white-collar crime, have been exacerbated by historical circumstance. In particular, the 'techniques of neutralisation' prevail which enable individuals to violate important normative and ethical standards, but neutralise any definition of themselves as deviant or criminal. For instance, on an individual level, neutralisation of ethical restraints may justify theft as 'borrowing' and on an organisational level, criminal activities are defined in such a way as to make them appear routine, unproblematic and necessary."

During 2010 it was reported that South Africa was losing between R86 billion and R120 billion linked to white collar crime and that during a downturn in the economy there is increased pressure to commit fraud. 18 The underlying explanation for this conduct was due to the pressure on employees to maintain their lifestyle and likewise for executives to secure their bonuses by manipulating the business books to reflect that they were performing well. The report also referred to a survey that had been carried out over a period of three to five years which revealed that white collar crime was on the increase in the country. <sup>19</sup> Proof of the increase in white collar crime was made available in 2011 following the release of crime statistics by the then National Police Commissioner who confirmed that white collar crime had soared compared to the previous year and appealed for a partnering with international counterparts to combat certain categories of white collar crime, for example, cyber-crimes.<sup>20</sup> Mention was also made of the fact that the public's focus remained on the issue of violent crime but remained indifferent to white collar crime.<sup>21</sup> Yet another researcher commented on the difficulty of dealing with white collar crime as a result of the companies electing to deal with such matters internally when it occurs in order to avoid negative reporting on the company's image if the matter is made public.<sup>22</sup>

<sup>18</sup> Dave Loxton "White collar crime surges in South Africa – expert" available at http://www.bdlive.co.za/articles/2010/12/06/white-collar-crime-surges-in-south-africa-- expert; jsessionid=BDF1EF27CCFAA3C00589FCB322A967AB.present2.bdfm accessed 21 November 2014

<sup>&</sup>lt;sup>20</sup> Mogomotsi Magome "White collar crime soars-police stats" available at http://www.iol.co.za/news/crime-courts/white-collar-crime-soars-police-stats-1.1134196#.Va03Ifmqqko accessed 21 November 2014.

<sup>&</sup>lt;sup>21</sup> Ibid.

<sup>&</sup>lt;sup>22</sup> Ibid.

Apart from the monetary losses, it has been well established that the unquantified cost of crime relates to the impact on employee morale, motivation and loss of customers. In addition crime impacts on the decision by investors to bring their money into the country although this may have much to do with other factors, for example, labour market flexibility.<sup>23</sup>

Crime has almost certainly prevented the growth of the tourist trade to its fullest potential given the country's reputation for violence.<sup>24</sup> Shaw warns that the failure to control rampant spread of crime not only contributes to the weakening of the new democracy but also contributes to the failure to build a non-racial society as it promotes distrust.<sup>25</sup> He also warns that failure to do so will lead to higher levels of crime as the public will be increasingly alienated from the police which in turn leads to a divided society.

Currently there are grounds to support the argument that the country is promoting two parallel systems of justice, one for the rich and one for the poor. The examples cited in the previous chapters bear testimony to this argument. Sutherland and other writers have repeatedly warned of the disorganisation and social distrust which are left in the wake of white collar crime. It is submitted that the extent of the distrust may manifest itself in very many forms, one of which is widespread service delivery protests which have become an everyday occurrence in the lives of ordinary South Africans. The frequency, intensity and the often destructive nature of the protest actions coupled with the deep—seated anger of the protesters appear to convey a message of a society in distress. As stated previously, such agitation is difficult to comprehend, given that the government enjoys legitimacy as one duly elected by the majority of the citizens of the country. It is also submitted that the distress may well be symptomatic of a deeper malaise which is epitomised by a battle between the "haves" and the "have-nots." The widening chasm between the affluent and the working class may well have as its cause society's treatment of white collar offenders.

As this chasm spreads, one is able to observe the attack on capitalism which is punted as the systemic cause for the differential treatment of white collar offenders. Chambliss refers to a class division that develops between the class that rules (the owners of the means of

<sup>&</sup>lt;sup>23</sup> See note 5 above 155.

<sup>&</sup>lt;sup>24</sup> Ibid.

<sup>&</sup>lt;sup>25</sup> Ibid.

production) and the class that is ruled (those who work for the ruling class) and argues that capitalist societies are responsible for creation of substantial amounts of crime.<sup>26</sup> He also points out that the class division leads to conflict between the two classes which manifests itself in rebellions and riots amongst the "proletariat" whilst the ruling class applies State sanctioned force in order to protect the "bourgeoisie."<sup>27</sup> More importantly Chambliss advances his own theory of criminal behaviour by contending the following points of view: <sup>28</sup>

- 1. criminal law is not a reflection of custom but is a creation by the State in the interests of the ruling class;
- 2. criminal behaviour results from conflicts due to the divergent class structures;
- 3. criminal behaviour stems from the exploitative nature of the economic relations which results in the alienation of the working class from the established social structures;
- 4. criminal behaviour is a product of the economic and political system which serves to perpetuate the capitalist system

Whilst not necessarily agreeing with Chambliss's views, it is submitted that there is room for argument that as the extent of the inequality between the so-called classes expands, those who are affected by such inequalities (the poor, marginalised and the unemployed) may be attracted to the extremist views of the critical criminologists. Chambliss explains the Marxian paradigm of crime and criminal law which appears to unequivocally support the explanations for the existence as well as the widespread prevalence of white collar crime, as follows: <sup>29</sup>

- 1. acts are defined as criminal as it is in the interests of the ruling class to do so;
- 2. members of the ruling class are able to violate laws with impunity while members of the working class will be punished;
- 3. crime diverts the attention of the lower class from the exploitation they experience;
- 4. crime is a reaction to a person's life condition;
- 5. socialist societies experience lower crime rates because there is less of a class struggle in such societies.

Chambliss, whilst on the one hand, agreeing with Sutherland that the argument that violations of criminal laws are more often committed by members of the lower class is not tenable, on

<sup>&</sup>lt;sup>26</sup> WJ Chambliss 'Towards a Political Economy of Crime' (1974) 150.

<sup>&</sup>lt;sup>27</sup> See note 26 above 151.

<sup>&</sup>lt;sup>28</sup> Ibid.

<sup>&</sup>lt;sup>29</sup> See note 26 above 154.

the other hand rejects the latter's explanation relating to the cause of white collar crime. <sup>30</sup> He furthermore argues that crime is committed by all social classes in capitalist societies, the rich, the rulers, the poor and the working class but that it is in the enforcement of the law that the lower classes are subjected to "the effects of ruling class domination over the legal system, and which results in the appearance of a concentration of criminal acts among the lower classes in the official records."<sup>31</sup> Chambliss concludes by repeating his assertion that the Marxist paradigm offers a proper explanation for crime from a criminological and sociological perspective.<sup>32</sup>

An almost identical stance is adopted by Quinney who unreservedly promotes the creation of a new society based on socialist principles as a panacea to the crime problem.<sup>33</sup> He describes the situation in the USA and concludes that criminal law is used by the government and the ruling class to secure the survival of the capitalist system. He states in particular that: "Criminal law continues to secure the colonial status of the oppressed in the social and economic order of the USA."<sup>34</sup>

Given the current impasse as far as innovative thinking around corporate and white collar crimes are concerned, Burdis and Tombs decry the absence of truly transformative political ideals in criminology which they contend is indicative of the current poverty of the discipline.<sup>35</sup> They lament the fact that recent criminological thinking has focussed on the particular criminals rather than the persistent forms of criminality which cause social harm.<sup>36</sup>

### 5.3 What is the way forward?

First, it is strongly recommended that the authorities recognise white collar crime for what it well and truly is, namely, that it is rather insidious in nature, is divisive in that it creates class conflict, is the cause of major social distrust and disorganisation, is a huge financial

<sup>&</sup>lt;sup>30</sup> See note 26 above 166.

<sup>31</sup> Ibid.

<sup>&</sup>lt;sup>32</sup> See note 26 above 168.

<sup>&</sup>lt;sup>33</sup> R Quinney 'Crime Control in Capitalist Society: A Critical Philosophy of Legal Order 199.

<sup>&</sup>lt;sup>34</sup> Ibid

<sup>&</sup>lt;sup>35</sup> K Burdis and S Tombs "After the Crisis: New Directions in theorising Corporate and White Collar Crime" in S Hall and S Winslow (eds) *New Directions in Criminological Theory* (2012) 16.
<sup>36</sup> Ibid.

drain on the economy and most importantly, to use Sutherland's words that it is "real crime." White collar crimes must be seen and treated as a category of crime in its own right and incorporated into the teaching of criminal law with a view to enhancing its status as a specialist area of expertise combined with aspects of commercial law. It is abundantly clear that the white collar criminals, no doubt aided and abetted by professionals such as accountants, auditors, financial advisers, lawyers and tax advisors, have escalated the levels of sophistication and expertise involved in white collar crimes to levels that demands equivalent, if not superior, skills to counter such criminality. A more focused drive is necessary to develop further, relevant and rational theories to explain the causes of white collar crime.

Secondly, in the South African context, it is proposed that the collation of evidence, investigation and prosecution of all white collar crimes fall under the strict purview of an independent, autonomous body, preferably headed by an expert jurist, for example, a suitably experienced judge. Such a body will be established in terms of the constitutional imperatives applicable to Chapter 9 institutions and will be expected to operate without fear, favour or prejudice and will not be subject to political or other controlling influence by any ruling party. In short what is proposed will be akin to the former Scorpions Unit which operated with very great success, until it was recently disbanded by political decree.<sup>38</sup>

The country's leaders have repeatedly warned of the triple challenges of poverty, inequality and unemployment that have bedevilled the country and which have not been ameliorated over the past few years. The danger that this situation presents is that crime becomes an acceptable alternative for purposes of survival. The scenario described above coupled with the plethora of fringe parties that have entered the political stage in the country, boasting radical agendas and untested theories relating to economic and social transformation, provide a fertile breeding ground for the promotion of unpopular and extremist views, some of which will no doubt focus on the country's perceived soft treatment of white collar offenders.

Nkandlagate is but one example which in the fullness of time, may help to explain the shift in

<sup>&</sup>lt;sup>37</sup> E H Sutherland 'White-Collar Criminality' *American Sociological Review* Volume 5 February 1940 No. 1 5.

<sup>&</sup>lt;sup>38</sup> Angela Quintal 'Scorpions fate in the balance' Natal Mercury 14 February 2005 at 1.

public opinion about the State's current handling of white collar crime.<sup>39</sup> The point that is being made is that public trust in government may be seriously undermined if white collar crimes continue to be treated in the present fashion. South Africa may unfortunately find itself facing a new crisis.

Thirdly, individuals, organisations, civil society formations, religious bodies, lawyers associations, accountants and auditors associations, political parties and other non-governmental organisations are strongly urged to seize the cudgels and to boost the drive to eliminate all forms of corruption whenever and wherever it appears. Reports relating to corruption, nepotism, cronyism and lack of transparency should ideally be referred to an independent institution, not unlike the Office of the Ombudsman. The purpose thereof would be to ascertain whether from a legal and factual perspective, there is a prima facie case to be made out against the perpetrator/perpetrators concerned. Matters which are of a serious nature could be diverted to the independent prosecuting authority referred to in point two above. Matters of a less serious nature could be dealt with in terms of rulings given by the Ombudsman.

It is perhaps appropriate to be reminded again that corruption is not unlike cancer in that it can lead to devastating consequences. The fact that the subject of corruption has found itself as one of the central themes in the State of the Nation address delivered by the President of the Republic of South Africa on the 13 February 2014, lends credence to the argument that corruption is and remains a festering sore which is contributing to the economic ills of the country. To use the President's words: <sup>40</sup>

"South Africans are united in wanting a corruption free society. Fighting corruption within the public service is yielding results. Since the launch of the National Anti-Corruption Hotline by the Public Service Commission, over 13000 cases of corruption and maladministration have been referred to government departments for further handling and investigation. Government has recovered more than R320 million from perpetrators through the National Anti-Corruption Hotline."

<sup>&</sup>lt;sup>39</sup> Allister Sparks "At home and abroad: Watergate, Muldergate pale in comparison to Nkandla" Business Day 26 March 2014 available at http://www.bdlive.co.za/opinion/columnists/2014/03/26 accessed 11 June 2014.

<sup>&</sup>lt;sup>40</sup> State of the Nation address delivered on 13 February 2014 by his Excellency Jacob G Zuma, President of the Republic of South Africa available at <a href="http://www.gov.za">http://www.gov.za</a>. accessed 11 June 2014.

The problem however is that so much of the white collar criminality and corruption that needs investigation and prosecution is inextricably woven into the fabric of government's methods of transacting business (hence the call for the establishment of independent entities to be entrusted with the task of investigating and prosecuting such transgressions).

An independent, non-profit institute, Corruption Watch was launched in 2012 to assist in combating crime and has received the support of both government and the Congress of South African Trade Unions (Cosatu). 41 The statements of some of the key note speakers at the launch adequately summarises the issues and challenges facing the country. The Public Protector, Ms Thuli Madonsela, referred to "tenderpreneurs" as those who participate in public procurement self-enrichment schemes and "treat government funds as orphaned money" and strongly urged that such persons be named and shamed because they collude with government officials and office bearers thereby depriving the public of much needed resources as well as service delivery.<sup>42</sup> She also referred to a 2011crime survey by Statistics South Africa which revealed that bribery was the most common form of corruption in organs of the State such as traffic departments, the police, social services, housing and home affairs and concluded that corruption posed a threat to the guarantees in the Constitution and this impacted most significantly on the poor sections of the community.<sup>43</sup> Another speaker, the General Secretary of Cosatu, Mr Zwelinzima Vavi, was quoted as having stated the following: 44 "Corruption was growing like a wild fire in the veld, threatening to engulf and destroy the future of a country that has so much potential" and lauded the objectives of Corruption Watch as corruption was "daylight theft from the poor." 44

Fourthly, we need to heed Sutherland's warning relating to the increasing reliance on the use of regulations to deal with what appears to be prima facie criminal conduct. The examples cited in the previous chapters of the imposition of fines by the Competition Commission for alleged serious transgressions relating to price fixing, collusion and over-reaching give impetus to the arguments raised by the critical criminologists that the system of capitalism is designed to protect the ruling class, the bourgeoisie, at the expense of the working class, the

<sup>&</sup>lt;sup>41</sup> Nomfundo Manyathi "New anti-corruption watchdog launched" De Rebus March 2012 at 6.

<sup>&</sup>lt;sup>42</sup> Ibid.

<sup>&</sup>lt;sup>43</sup> Ibid.

<sup>44</sup> Ibid.

proletariat. All forms of criminal conduct must be treated as such without fear, favour or prejudice.

Fifthly, it is now time for South African society to break free from its hiatus and the adulations following its liberation from apartheid to democracy and take its rightful place amongst the world community of nations by focussing on achieving excellence in all spheres, from quality education programmes, upgrading of skills, greater and more efficient use of all resources, greater investment in human capital, technology, agriculture, conservation, science and communication. The phenomenon of globalisation has brought in its wake a realisation that in order for the country to survive well, South Africans of all races and creeds have to embrace the dynamics of a changing world order. Held and McGrew summarise the situation by stating that discussion regarding globalisation has intensified following the collapse of state socialism and the consolidation of capitalism worldwide and in particular that the "world was fast becoming a shared social and economic space – at least for its inhabitants." They adduce proof of such status by referring to the existence of the World Wide Web, round the clock trading in global financial markets and the speed of social interaction.

### 5.4 Conclusion

Perhaps the most poignant moment has arrived for South Africa and the rest of the world to truly understand just how widespread and destructive white collar crime well and truly is. The high level probe by the USA Federal Bureau of Investigation and the subsequent arrests during May 2015 of several high ranking FIFA officials on corruption charges is likely to mark a significant turning point in how the international community views white collar criminality.<sup>47</sup> The FIFA saga, currently the most explosive event on the world stage, encapsulates just about all of the elements which have been extolled in these preceding chapters regarding the nature and effects of white collar crime, the role of the rich and powerful, the pervasiveness of corruption and the involvement of governments in alleged

<sup>&</sup>lt;sup>45</sup> D Held and A McGrew 'The Great Globalisation Debate: An introduction' in D Held and A McGrew (eds) 'The Global Transformations Reader' (2000) 1.

<sup>&</sup>lt;sup>46</sup> See note 45 above 3.

<sup>&</sup>lt;sup>47</sup> Mark Gleeson, Graeme Hosken and Shaun Smillie "World Cup of fraud" The Times 28 May 2015 at 1.

clandestine activities. The initial media reports point to an organisation allegedly steeped in deep-rooted corrupt practices which impacted on the choice of host nations selected to stage the world's most loved sport, namely, football. South Africa, as the 2010 host, has also been named by the investigators as a possible corrupt conspirator.<sup>48</sup> It is understandable that it will be some time before the cases are finalised and the perpetrators dealt with in terms of the applicable legal processes.

What is important however is the acknowledgment that white collar crimes continue to fester unabated and to sow the seeds of distrust and social disorganisation on sections of the community. Currently South Africa continues to quietly haemorrhage as a result of the unchecked and largely ignorant approach towards effectively dealing with and tackling white collar crimes. The relevant authorities appear to skirt around the real issues by addressing at times symptomatic issues but avoid the fundamental causal issues.

Looking at the developments and occurrences in the South African context over the past two decades (as outlined in the earlier chapters), the overall picture that emerges is of a country languishing in an ever-escalating quagmire of chaos with no realistic solutions in the offing. This factor alone underscores the need for a re-vitalised approach towards the problem of white collar criminality. By way of example, the unanswered questions, absence of accountability and legal consequences are just some of the debacles surrounding the "arms deal" as well as "Nkandlagate." The lack of transparency surrounding these matters have effectively obfuscated the true facts to the extent that the various commissions and committees appointed to deal with the matters may well struggle to unravel the real facts behind the transactions. This in turn leads to endless speculation and fuels other myths and theories about the role of the key players involved as well as the issue of unlawful, illegal financial benefits, if any.

Public morale is seriously affected when truth becomes a casualty and it is useful to remind those that rule that the continued undermining of public trust has the potential to destabilise countries and to topple those in power. History is replete with examples of populist

<sup>&</sup>lt;sup>48</sup> Ibid.

movements which helped to remove sitting governments and to secure the arrests of leaders and officials who were perceived to be tainted and corrupt. Given South Africa's tortured past, the country can barely afford such a revolution. Corruption bites deep into the realm of public trust and confidence and the powers that be would do well to heed this warning and to avoid any betrayal thereof. In a recent article concerning corruption in the country, Lewis warned that the public will only take so much (referring to corruption) before it turns on government.<sup>49</sup>

As stated earlier, Sutherland identified distrust and social disorganisation as some of the key dangers associated with white collar crime. The current climate of almost daily and often violent service delivery protests, is a matter of grave concern to the country. This is a strange and appears at face value at least, to be an inexplicable phenomenon. A new political dispensation from 1994 has provided a powerful and effective mechanism for all and sundry to legally articulate concerns affecting political, social and economic matters. Why then the intolerance, impatience and anger displayed by such protesters? Part of the answer may be found in the perceptions, real or contrived of the rampant increase in corruption affecting all critical areas whether in business, law, politics, education and employment which have contributed to the erosion of public trust.

It is abundantly clear that if we are to succeed in our quest to create a fair, just and equal South African society and in accordance with the spirit and values enshrined in our beloved constitution, we would do well to heed all of Sutherland warnings relating to white collar criminality, the silent, invisible enemy in our midst.

<sup>&</sup>lt;sup>49</sup>David Lewis "Graft should send a shiver down SA's spine" The Times 31 January 2016 at 16.

<sup>&</sup>lt;sup>50</sup> See note 37 above 5.

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