

Governing White-Collar Crime in South Africa: The Challenges of a State-Centric Approach

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Abstract

White-collar crime has been on the rise in South Africa, albeit, the exact scale of the problem is unknown due to under-reporting. Although, the government has a well-developed legal framework to address white collar crime, law enforcement has been fraught with challenges. Limited resources and lack of skilled investigators have been serious impediments to the criminal justice system's ability in dealing with this 'complex' crime. As such, it is important to reconsider the theoretical basis of addressing this type of crime. This article argues that the nodal approach is best placed to address white-collar crime because it does not make the normative claim that the state should monopolise policing. It urges for an empirical approach and recognises non-state actors such as regulation and compliance professionals may be important nodes in security provision. The nodal approach gives valuable insights into the governing of a policing challenge that the law enforcement and the criminal justice system are not adequately resourced to address. However, the ideological tensions between state and non-state policing actors raise serious challenges around balancing the issues of pragmatism when dealing with white-collar crime through regulatory and compliance measures, and the creation of a system of justice that treats everyone as an equal.

Introduction

The term white-collar crime is widely used, despite its definition often being elusive. Sutherland (1983) has been credited with having introduced the concept of white-collar crime committed by high status members of society, as a challenge to mainstream scholarship that traditionally focused on street crime committed by disadvantaged members of society. White-collar crime in South Africa has been on the increase, with senior management of companies implicated in engaging in

corrupt and fraudulent activities (PwC 2014). The existence of pervasive corruption in South Africa has been cited as one of the main reasons behind the rise of white-collar crime. The exact scale of white-collar crime is unknown, primarily because of under-reporting. The detrimental effects on business and investment has placed pressure on the government to tackle white-collar crime. Furthermore, the different facets of white-collar

crime incorporate money-laundering which has been linked to organised crime and the financing of terrorism.

South Africa has a well-developed legal framework to address white-collar crime. The government has created comprehensive policies and enacted a myriad of legislations to combat corruption and fraud in both the private and public sector. However, the challenge has been with law enforcement agencies and regulatory bodies struggling to identify complex white-collar crime. Furthermore, when incidences of white-collar crime are identified, securing convictions through the criminal justice system has been fraught with challenges.

These partnerships, however, can be undermined because the state and non-state actors have different mentalities and approaches to policing (Berg and Shearing 2011). A nodal perspective refers to 'mentalities' as 'the culture of the node, its way of think-ing about itself and the world around it' (Burriss 2004:342). Therefore, the police mentality to policing is centred around law enforcement and processing criminals through the criminal justice system whereas the private security industry's mentality has traditionally been around crime prevention and risk management, although this is changing (Berg and Shearing 2011). Furthermore, as opponents of the nodal approach have asserted that policing is a public good, and the state has the mandate to act in the public interest as opposed to non-state nodes that work for private interests. Closely related to the critique of non-state nodes, is the fact that they support an approach that results in white-collar crime offenders not engaging with the criminal justice system, which gives the impression that there are two parallel systems of justice and perpetuate the idea that white-collar crime is not real crime. On the other hand, the question of whether white-collar crime should necessarily be dealt with through the criminal justice system is a normative question that is outside the scope of this paper. This paper seeks to make a pragmatic contribution in the discussion around policing white-collar crime in South Africa suggesting the nodal approach as a more useful framework.

The Meaning of White-Collar Crime

White-collar crime is a difficult concept to define. Geis (1962:171) argued that white-collar crime is 'broad and indefinite as to fall into inevitable desuetude.' Criminologists have traditionally assumed that there is a clear difference between individuals who engage in criminal activity and the rest of society (Gabor 1994). Sutherland (1983:2) defined white-collar crime as 'a crime committed by a person of respectability and high social status in the course of his occupation.' Similarly, James Coleman (1987:407) defined white-collar crimes as violations of the law committed in the course of a legitimate occupation or financial pursuit by persons who hold respected positions in their communities'. Although Sutherland (1983) raised awareness on criminal activity conducted by the elite group of society, the notion of white-collar crime has been controversial. Pontell and Calavita (1993:520) pointed out that the concept of white-collar crime suggests that 'criminal behaviour on the part of white-collar offenders is qualitatively distinct from other types of crime, or at least distinct enough to merit a qualifying label.' On the other hand, Hirschi and Gottfredson (1987) maintain that white-collar crime is similar to other forms of crime and classifying it separately from other forms of crimes is not particularly beneficial. They argue that when studying juvenile delinquency, it is not useful to examine burglary or arson separately (Ibid).

Although, Sutherland (1983) wanted to prove that social class is irrelevant to an individual's proneness to criminal behaviour he inadvertently linked crime and social class, albeit higher social class, which created an 'imprisoning framework' (Shapiro, 1990:346). However, Sutherland's (1983) focus on businessmen of high social standing committing white-collar crime was logical when conducting the research 'relatively few Americans beyond these elite men had any opportunity for committing such illegalities' however, subsequent societal changes resulted in white-collar crime being committed by a much broader section of society (Weisburd and Schlegel, 1992:356).

Regulation of White-Collar Crime

There are two schools of thought namely, the punishment model, and the compliance school of thought, dominating the debate on the regulation of white-collar crime. The punishment model takes a punitive stance on law enforcement while the compliance school seeks to avoid prosecution in favour of a more mutual relationship between law enforcement and co-operating actors. The underlying ideological differences between the two schools of thought is based on the nature of the offender; with the compliance school assuming that corporate offenders are productive members of society and different from traditional offenders.

Gray (2006) points out that terminology perpetuates the different ideologies; for example, scholars from the punishment model regard corporate offending as 'corporate crime' while the compliance school scholars use the term 'corporate non-compliance.' However, Pearce and Tombs (1991:419) argue that compliance enforcement strategies 'that stress consultation and conciliation typically end up with agencies endorsing the industry's own evaluations of what is reasonable and usually allow companies to negotiate their way out of penalties for violating even these agreements.' However, typically, regulators enforce administrative sanctions with 'the threat of prosecution to back these up' (Croall 2004:46). On the other hand, administrative sanctions such as the withdrawal of licences 'can threaten the survival of a business, and indeed some argue that regulators have too much power and can act as judge and jury'(Ibid).

White-Collar Crime in South Africa

Notwithstanding the challenges in quantifying white-collar crime, studies show that over the past 10 years illicit financial flows in South Africa amount to R147 billion per year; with around 65 percent attributed to white-collar crimes such as tax evasion (FIC Annual Report 2014/15: 10). This figure highlights both the pervasive nature of white-collar crime and also the need for a pragmatic approach to tackling this epidemic. The next section will reveal government's response to white-collar crime.

Government Responses to White-Collar Crime

The South African Police Service (SAPS) has attempted to monopolise policing despite notions prevalent in the early 1990s, concerning the importance of democratic policing, which for example, promote partnership policing. However, a state-centric approach to policing is not necessarily desirable, particularly in a developing country such as South Africa, where the state may lack the resources and capability to provide efficient security to citizens.

South Africa has two policing policy documents: the 1996 National Crime Prevention Strategy (NCPS) and the 1998 White Paper on Safety and Security (Department of Safety and Security, 1998) which highlight the limitations of the state and advocate a collaborative, multi-agency approach to policing. The NCPS recognised that in post-apartheid South Africa, a network of security providers as opposed to just the state police would be needed to effectively tackle policing (Shaw and Shearing 1998). The White Paper on Safety and Security attempted to clarify some of the ideas from the NCPS and identified the role of various government departments from the local to national level that can collaborate in the area of crime prevention.

Furthermore, in 2012, the National Planning Commission produced a National Development Plan 2030 (NDP) in which an integrated whole of society approach to safety and security issues was advocated. The NDP (2012:357) argues that the SAPS are not 'an all-purpose agency' but a 'highly specialised resource to be deployed strategically'. The NDP (2012: 361) takes a nodal approach to policing by stating that effective security governance needs partnership between 'the criminal justice system, local government, the community, private sector and role players involved in economic and social development'. The NDP (Ibid) also advocates for a long-term sustainable 'integrated approach focused on tackling the fundamental causes of criminality'. This is consistent with the NCPS of 1996, which promotes partnerships in crime prevention.

In addition to creating policy documents, the government has also enacted a plethora of legislation that address white-collar crime in South Africa. The main legislation addressing corruption in both the private and public sector is the Prevention and Combating of Corrupt Activities Act, 2004 (PACCA). Other legislation that address corruption and fraud in the private sector are the Financial Intelligence Centre Act, 2001 (FICA), the Prevention of Organised Crime Act, 1998 (POCA), the Protected Disclosures Act, 2000 (PDA) and the Companies Act, 2008. Despite the existence of forward-looking policies and legislation, enforcement remains a challenge.

The SAPS is the primary law enforcement agency in South Africa. The SAPS has several specialised economic crime units; 19 Commercial Crime Units throughout the country, an Electronic Crime Unit and a national Serious Economic Offences Unit located in the Directorate for Priority Crime Investigation (DPCI) commonly referred to as the Hawks (SAPS, 2014). The National Prosecuting Authority (NPA) and the South African Revenue Service (SARS) both have units that investigate economic crime. The *Asset Forfeiture Unit* (AFU) in the NPA focuses on the forfeiture of crime proceeds, while the Economic Crime Unit in SARS specialises in tax evasion. The AFU faces challenges of lack of skilled financial investigators and a freeze on recruitment in the AFU resulted in experienced investigators resigning without being replaced (NPA Annual Report, 2014/2015:104). In comparison to the NPA the SARS have enjoyed a reputation as one of the most efficient state institutions in South Africa. Therefore, the SARS's economic crime investigative unit is relatively well staffed. In 2015, however, the media reported on an alleged 'covert investigation unit' operating in SARS. The so-called 'rogue unit' allegedly spied on wealthy South African citizens in corporation with SAPS, intelligence and investigative agencies and other government departments (Van Wyk, 2015). Although not proven to be true, these allegations are problematic and highlight the importance of accountability in innovative approaches to investigating and regulating white-collar crime.

On the other hand, the creation of the Specialised Commercial Crimes Unit (SCCU) of the NPA in 1999, that specialises in complex commercial crime, and through which an individual offender that accrued R5 million or more from criminal activity was held accountable, has had success in the prosecution and conviction of white-collar crime. According to the NPA annual report for 2014/2015, the SCCU had a 94.3% rate of conviction (NPA Annual Report 2014/2015:8). The SCCU exemplifies the utility of a nodal approach in addressing white-collar crime. The SCCU takes an innovative approach to prosecution; the unit is prosecution-led, with cases being prosecuted in dedicated regional Specialised Commercial Crime Courts with collaborations consisting of joint planning and strategic meetings with various stakeholders in both the private and public sector, prosecutors and investigators working as part of a team and case management that monitors and evaluates progress (Altbeker, n.d.). Although, the SCCU's approach is commendable for effective prosecution of white-collar crime, its role in the eradication of white-collar crime is limited because it receives most of its cases from the SAPS Economic Crime Unit (Ibid). Indeed, during the 2014/2015 period the SCCU managed to secure 1069 convictions which is a low number in comparison to the 319 149 convictions of individuals with criminal charges (NPA Annual Report 2014/2015). Forensic expert, Powell (2010) rightly asserted that by the time law enforcement authorities and regulatory bodies are involved in a case 'major damage is usually done and measures should have been taken long before this stage.'

Regulatory Bodies in South Africa

In South Africa, several industry specific regulatory bodies regulate most white-collar crime. For purposes of this article, the most prominent are the Financial Intelligence Centre (FIC), the Financial Services Board (FSB) and the South African Reserve Bank (SARB). The Financial Intelligence Centre Amendment Act, 2008 established the FIC. The primary objective of the FIC is to provide a structure to recognise financial transactions that might be proceeds of crime.

The FIC's mandate is to prevent money-laundering and the financing of terrorism. The FIC has a monitoring and analysis department which works in co-operation with the private sector, SARS, law enforcement and intelligence agencies (FIC Annual Report 2014/2015:21). In the 2014/2015 period, the FIC was responsible for the forfeiture of assets valued at R2.3 billion (FIC Annual Report 2014/15). The Financial Services Board (FSB) is a statutory body established under the Financial Services Board Act, 1990. The FSB's mandate is to regulate the activities of financial services providers outside the banking industry and enforces its findings through administrative law, the SARB, on the other hand, regulates the banking industry.

Prominent White-Collar Cases

Fidentia Group Case

The now disbanded Scorpions unit in the NPA, responsible for investigating serious organised crime, economic crime and corruption, began investigations into the financial management company Fidentia Asset Management (Pty) Ltd (Fidentia) after the discovery of financial discrepancies by the FSB in 2006. Fidentia was operating a *ponzi* scheme which has been labelled as one of the biggest white-collar crime cases in South Africa, and which resulted in investors losing an estimated R400 million. The Living Hands Umbrella Trust which administered monies for widows and orphans of miners killed at work, also lost monies it had invested in Fidentia (COSATU 2007)

The former director of Fidentia, Arthur Brown was charged with fraud and corruption. In 2013, a plea bargain agreement resulted in the Western Cape High Court giving him a R150 000 fine. The prosecution appealed to the Supreme Court of Appeal (SCA), which in 2014 sentenced Mr Brown to 15 years imprisonment. This sentence was widely applauded by Tony Ehrenreich of the Congress of South African Trade Unions (COSATU) stating "[t]his must serve as a clear indication to fund managers that they are going to be put in jail for corruption

and for stealing from the poor. This sentence must hopefully also serve as a deterrent to the growing levels of white-collar crime. We commend government action in appealing the case and call on all forms of corruption to see the perpetrators imprisoned" (Beamish 2014).

Barry Tannenbaum Case

Barry Tannenbaum has been dubbed South Africa's Bernie Madoff for his role in orchestrating the biggest *ponzi* scheme in South African history worth R12 billion. Mr Tannenbaum is the grandson of the founder of the prominent pharmaceutical company Adcock Ingram. He used his family's reputation to con some prominent and wealthy investors; he offered more than 200% returns for investing in the production of anti-retroviral medication. The scheme run between 2005 and 2009, later collapsed because Mr Tannenbaum was unable to pay investors.

An analysis of the Fidentia Group and Tannenbaum *ponzi* schemes shows that the law enforcement agencies and the criminal justice system in South Africa lack the capability to effectively address complex white-collar crime. Mr Tannenbaum's scheme collapsed in 2009 and 6 years later he is yet to be extradited from Australia. After 8 years of protracted and expensive legal proceedings, Mr Brown was given a 15 year sentence by the SCA. These two cases also highlight the limitations of regulatory agencies. For example, the FIC which has the mandate to supervise non-banking financial institutions failed to identify Mr Tannenbaum's high profile *ponzi* scheme, which was being operated at a time when 'the high returns for his investors did not make economic sense' (Selebalo 2009). One of the limitations of regulatory bodies such as the FIC, is that they cannot prevent the creation of *ponzi* schemes, as they are only likely to identify a scam when it is happening. The identification of a scam is highly reliant on the provision of information about 'suspicious transactions' from other financial institutions (Ibid).

It is notable that Mr Tannenbaum's investors were seasoned investors. Arguably, such investors were duped because Mr Tannenbaum was working in 'collusion with professionals that should have known better' (Selebalo, 2009).

This suggests that awareness and training on fraud is important. Indeed, PWC (2014) has identified fraud risk management programmes as an effective fraud deterrent. However, despite the usefulness of risk management in minimising white-collar crime, research has shown that ‘a significant portion of South African organisations do not carry out fraud risk assessments’ (PWC, 2014: 4). In South Africa, whistle-blowing and accidental discovery are still the most common methods of detecting fraud. Companies therefore, need to ensure they have appropriate mechanisms in place to support and provide whistle-blowing (Loxton, 2015). The private sector has the capability to employ different measures in policing white-collar crime. It is therefore, important that the private and public sector work in partnership in order to effectively address white-collar crime. The next section will give an overview of two different theoretical positions on the role of the state in public policing.

Theoretical Overview: Nodal Approach vs State-Anchored Pluralism Model

This section will be divided into two parts. The first section examines Loader and Walker’s ‘state-anchored pluralism’ model which places the state at the centre of policing governance. The second section critically assesses the nodal theory advanced by Shearing and his colleagues. The nodal theory rejects the state-centric approach to policing that argues for the state to always be at the centre of policing and advocates that we should not give conceptual priority to any node.

State-Anchored Pluralism in Security Governance

A brief outline of the Hobbesian world-view is useful to set the context for an understanding of the state-centric approach to policing that is rejected by the nodal theorists. The framework for the state-centric approach to policing is based on the Hobbesian world-view which advocates for state authority over civil society to facilitate peace: ‘during the time men live without a common power to keep them all in awe, they are in that condition which is called war, and such a war as is of every man against every man’ (Hobbes, 2012: 2).

Therefore, sovereignty is viewed as state authority to use force in exercising its mandate to protect the citizenry. The state-centric approach to policing has been a defining feature of the Westphalian model of governance which states that the sovereign state has ‘exclusive authority within its own geographic boundaries’ (Krasner, 2001:24). State sovereignty is a complex political concept but the wider meaning for the purposes of this article is that the state has the capacity to control a territory against threats from both internal and external forces, as well as to protect its citizens from crime and ‘criminal depredations’ (Garland, 1996:448). The Hobbesian concept that the state has legitimate monopoly over security governance in a given jurisdiction is based on this understanding of sovereignty.

The anchored pluralism approach attempts to place the state at the centre of security governance because security is viewed to be a public good. Loader (1999:387) builds on the work of Manning (1997) to argue that at least in the UK, the public police hold a “sacred” symbolic role of ‘law, order and nation’. The symbolic power held by the police is explained by Bourdieu’s (1991) thesis. Bourdieu (1991) argues that symbolic power is the tacit power exercised obliviously by a person in a position of authority to make people willingly conform to a particular world-view without putting up resistance. Loader and Walker (2007) argue that security is a ‘thick’ public good. Security as a ‘thick’ public good consists of two dimensions: the first dimension entails freedom from fear, although this freedom is subjective as it is based on one’s perception and experience of a particular social environment and the adequacy of its safety mechanisms (Loader and Walker 2007). Secondly, security as a public good presupposes a recognisable public that possesses collective interests (Ibid). Loader and Walker (2007) argue that security and particularly the pursuit of security is the glue that holds political communities together.

Loader and Walker (2006) assert that security as a public good has an instrumental role in the ‘very making and sustenance of the collective project of

common 'publicness.' Therefore, the commodification of security services is problematic because it has undermined 'peoples' capacity to enact inclusive, negotiated solutions to the problem of order, such as those promised by community mediation' (Loader 1999). This destroys the 'thickness' of social bonds in society and makes it more difficult to link policing issues to democratic values such as equality and justice (Ibid). Furthermore, commodification of security services effectively means that the consumers of these services have 'turned their backs on democratic politics as a means of providing policing and security, and have opted instead to exercise what control they can by market means which excludes poor communities who cannot afford this option'(Ibid). Marks and Goldsmith (2006) agree with this point and argue that the state-centric approach to policing can address the issue of unequal policing provision, which places poor communities in South Africa at a disadvantage. They argue that for poor communities, while the state may be distant, the alternatives too often are unaffordable and/or unpalatable (Ibid). Similarly, Marks and Wood (2010) asserted that non-state policing actors can be susceptible to becoming heavy handed and undermine democratic principles that value individual human rights. However, this position presupposes that the state is not susceptible to undemocratic policing. Indeed, Loader and Walker (2006:195) have acknowledged the importance of curbing the arbitrary power of state policing.

Nodal Security Governance

Kempa et al. (2004: 562) have rightly noted that we now live in a 'post- Westphalian' era with multiple sites of governance and 'policing is a central function of governance.' Despite the wide usage of the term 'governance', there lacks consensus on the definition of the term. Burriss et al., (2008 cited Sand 2004) asserted that the literature on governance is "numerous, diverse and fragmented, and has not formed any consistent tradition." Burriss et al (2008:7) have highlighted that the popularity of governance as a topic risks the danger of 'becoming a point of

false rhetorical convergence, a term that means all things to all people.' Despite these challenges, Kempa et al (2004:2) have defined governance as the 'organized efforts to manage the course of events in a social system.' Security governance is therefore, complex, with a plurality of actors (Ibid). This complexity effectively undermines the state-centric approach to policing because the state lacks capability to be solely responsible for security governance in a dynamic environment.

As such, in response to the plural actors and dynamics of security governance, Shearing and his colleagues have advocated for a nodal approach to policing. A node is 'not a virtual entity' but has 'some institutional form' with the necessary 'stability and structure to enable the mobilization of resources, mentalities and technologies over time' (Kempa et al. 2004:12). Although the nodal position acknowledges that some nodes such as the state are bigger than others, the nodal approach does not give conceptual priority to the state. Therefore, Shearing (2006) rejects the Hobbesian view of the state and asserts that the state police are one node 'among many' policing providers.

Bayley and Shearing (1996) argue that the drastic changes in policing governance have resulted in the state losing its perceived monopoly, if there ever was a monopoly on policing. They claim that 'modern democratic countries have reached a watershed in the evolution of their systems of crime control...and future generations will look back on our era as a time when one system of policing ended and another took its place' (Bayley and Shearing, 1996:585). This is particularly evident with the rise of private security which operates in all spheres of private and public life. However, Crawford (1999) and Jones and Newburn (2002) have questioned the assumption by Bayley and Shearing (1996), that the current policing practices are 'watershed' moments that differ from past practices. This is because an examination of the historical processes shows that 'policing provision has become less rather than more fragmented (Bayley and Shearing 1996). While there have been far reaching changes, there has also been as identified by Boutellier and Van Steden (2011), 'consistencies and continuities

that still exist in the authorization and provision of policing'. Jones and Newburn (2002) assert that the decline of 'secondary social control' agents for example, the caretakers who performed the surveillance function, created a security vacuum that has been filled by private security. Therefore, the rise of private security is merely an increase 'in a general trend towards the formalisation of social control' (Ibid:139). Although Jones and Newburn (2002) make an important observation, the relevant point for the purposes of my argument remains undisputed; in fact, Bayley (1996), Shearing (1996), Jones and Newburn (2002) are in agreement that policing has never been adequately provided by the state alone. The exception of this is the so-called 'Golden Age' of policing in the 1950s in which the United Kingdom metropolitan police was viewed to have successfully fulfilled their duties (Reiner, 1992:761). On the other hand, scholars such as Reiner have questioned the reliability of the statistics collected during this period; for example, challenges of under-reporting of crime were and are still widespread (Ibid:768).

This section has outlined the different theoretical paradigms on policing with the aim of arguing that the nodal approach is a more pragmatic approach to policing in a developing country such as South Africa, where law enforcement agencies have limited resources at their disposal. For example, the information economy has opened new spaces such as cyber space which has created new opportunities for criminal actors and made the policing of white-collar crime such as banking fraud extremely difficult for under-resourced state law enforcement. However, Loader and Walker (2006) make a compelling argument about the importance of democratic policing, in which the state plays a leading role in regulating non-state policing actors. As such, implementation of the nodal approach to policing white-collar crime needs to acknowledge and be conscious of implementing a fair and equal system of justice in order to gain legitimacy.

Conclusions

State institutions such as law enforcement agencies and the criminal justice system in South Africa lack the capability to address white-collar crime. Therefore, it is expedient for the government to adopt an approach that leverages and compliments the invaluable experience, skills and resources of the private sector. The nodal approach gives all nodes equal conceptual priority in policing and recognise that some forms of criminality such as anti-money laundering, require non-state actors to potentially have a bigger role than the state in policing white-collar crime. This is because regulatory and compliance actors such as banks are in a better position to adequately address this type of crime.

In South Africa, the policy-makers have identified that a cooperative partnership approach among the various actors involved in policing white-collar is essential. However, the different policing 'mentalities' of the state and the private sector require a circumspect approach to adopting private sector practices in addressing white-collar crime; the private sector's emphasis on regulatory measures and risk management is in sharp contrast to the state's criminal justice system focus. This potentially creates an unequal justice system; dual approaches for different offenders. Similarly, as Loader and Walker (2006) have identified, the regulation of the different non-state actors is important; what form such regulation should take if the state is working with non-state actors is unclear. Therefore, regulatory bodies should not only be strengthened and have an increase in capacity and resources, but the regulatory sanctions need to be backed by the threat of criminal sanctions. Although law enforcement institutions tend to enter the scene when most of the harm has already occurred, nevertheless, they have a symbolic role of showing that the state will treat everyone who breaks the law equally.

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