

**LAW ON WHITE COLLAR CRIMES**

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## **CHAPTER 1: INTRODUCTION**

The rise of white collar crimes has coincided with the progress made in the economic and industrial fields. White-collar crimes are directly or indirectly, associated with the production and distribution of wealth. The Industrial Revolution initiated changes in the economic and social structure of the society. The transformation gave birth to the large sized corporations replacing individual entrepreneur. This development led to concentration of economic wealth in a few hands. The emergence of 'mass society' and a small controlling elite necessitated adherence of people to high standard of ethical behavior for the honest functioning of the new social, political and economic processes. However the incapacity of all sections of society to appreciate this need resulted in emergence and growth of white collar and economic crimes. These are the crimes that are not committed by individual perpetrators or a few people on the basis of an independent initiative, but for which - to use preliminary and imprecise wording - organized power structures are primarily responsible. The two world wars contributed significantly towards white-collar crimes because during these wars the traditional mores and ethical restrains were vitally affected due to scarcity of things and mounting demands. The end of the Second World War almost coincided with the

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independence of the country which further worsened the situation.

Though white collar crime is as old as the depravity in the society but until recently it was not identified as crime or a social evil akin to crime. It is only a few decade ago that it attracted the attention of the students of criminology and consequently came to the attention of the public. Prof. Edwin H. Sutherland classified it as a distinct variety of crime and since that a lot has been written about this type of the crime. He defined white collar crime as crime committed by persons of respectability and high social status in the course of his occupation. Sutherland wanted to expose to the unsuspecting public a long obscured crime peoples, i.e. crimes committed by the rich and powerful. More importantly, he wanted to bring to justice the elite criminals who until then were able to avoid the reach of the law with impunity because of their lofty social status, high political office and powerful economic connections.

### **1.1 Definition of White Collar Crime**

“White Collar Crime” is a relatively new concept in the world of crime. The term itself, first coined by Edward Sutherland in 1939, was originally used to refer to crimes that were “committed by a person of respectability and high social status in the course of his occupation”. However, the exact definition of white collar crime is still debated within the field. Scholars have suggested that the classification be

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broken down into more specific subsets, namely to include crimes that the companies themselves commit. In 1977, Herbert Edelhertz, an influential figure in the field of white collar crime research, proposed a four-part categorical system to define “economic crime” – a term Edelhertz uses in place of “white collar crime”.

The first category, “crimes by persons operating on an individual, ad hoc basis,” includes crimes such as credit card fraud, tax fraud, and charity fraud. The second category, “crimes committed in the course of their occupations by those operating inside...establishments in violation of their duty...to employer or client,” consists of crimes like computer fraud, commercial bribery, embezzlement, and employee theft. The third category, “crimes incidental to, and in furtherance of, business operations, but not the central purpose of the business,” describes crimes such as fraud against the government, code violations, and other forms of misrepresentation. Finally, Edelhertz describes his fourth category as “crimes as a business or as the central activity” of the organization. This category is meant to include large frauds and schemes run by an organization.

In India, white collar crimes were first discussed by the Santhanam Committee which was appointed by the government in 1962. This committee was appointed to review the problem of corruption and to make suggestions to ensure speedy trial in cases of bribery, corruption and misconduct. In the report the committee attached

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great importance to the emergence of the concept of white collar crime.

Later on the Law Commission of India in its twenty ninth report on proposal to include certain social and economic offences in the Indian Penal Code used the term white collar crimes. The Commission did not go into the detail of the definition of white collar crime and stated that

“White collar crime may be defined approximately as a crime committed by a person of respectability and high social status in the course of his occupation.”

The emphasis is on the connection with occupation. The commission of a crime of this category is facilitated by the office, calling, profession or occupation of the person concerned.

The National Crime Record Bureau of India in its glossary defines white collar crime as including of criminal breach of trust, cheating, counterfeiting, corruption and all other organised economic crimes. This definition also enlists the offences which are white collar but does not provide a satisfactory definition.

Another attempt to define white collar crime was made by the National White Collar Crime Centre which is a non profit organisation of the United States. This centre recognised the dilemma faced over defining white collar crime and in order to formulate a working definition a workshop was conducted in the year 1996 in

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which state and local law The Law commission of India, Twenty Ninth Report on 'Proposal to include Certain Social and Economic Offences in the Indian Penal Code (1966)', enforcement agencies, state regulatory agencies and others were represented. After a long debate in which the ideas were freely exchanged the following definition was agreed upon:

“Illegal or unethical acts that violate fiduciary responsibility or public trust, committed by an individual or organization, usually during the course of legitimate occupational activity, by persons of high or respectable social status for personal or organizational gain.”

The term 'white collar crime' has been recognised in most of the Asian and the European countries. However in some other parts of the world, some other terms which are analogous to this term are used. In the Scandinavian countries, the term used is economic crime in place of white collar crime. Some scholars advocate the use of this term as it represents a broader concept but this is criticised as being vague. This term does not distinguish between economic crime caused by legitimate business and economic crime committed by illegal businesses such as smuggling. There are other alternatives also like 'commercial crime', 'business crime', 'regulatory offenses', 'fraud' and 'corruption'.

## **1.2 Generic Features of White Collar Crimes**

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Although white-collar crimes are quite varied, most have several characteristics in common. First, they involve the use of deceit and concealment, rather than the application of force or violence, for the illegitimate gain of money, property, or services. A defendant convicted of making false statements in order to obtain a government contract, for example, is considered a white-collar criminal. Next, white-collar crimes typically involve abuse of positions of trust and power. Public officials who solicit and accept bribes, or corporate officers who fix prices to drive competitors out of business, are engaging in such abuse of their positions. White-collar crime is also often more difficult to detect than other types of crime, in part because losses may not be immediately apparent to victims but also because the crimes can involve sophisticated schemes and cover-ups. Many white-collar crimes require concerted criminal activity by coconspirators. For example, a case of real-estate fraud may involve the knowing participation of an escrow officer, a buyer, an appraiser, and a bank officer, all of whom were willing to sign false documents to perpetrate a fraud for personal gain.

The features that may be attributed to white collar crime are discussed hereunder.

### *1.2.1 Occupational Crime*

White-collar crimes are occupational crimes. An occupational crime means violation of legal norms governing lawful occupational endeavours during the

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course of practicing the occupation. The reference to norms governing the occupation is meant to exclude violations of the usual criminal law such as murder and assault while on the job. The reference to lawful occupations is meant to exclude the activities of those whose entire job or profession is illegal, such as smugglers, professional forgers, thieves and organized criminals. Thus white collar crimes are committed in the course of legal occupation by violating the rules set for governing that occupation.

Occupation is used in wider sense and covers organisational or corporate crime also. White-collar crimes can be committed by individuals as well as by organisations. When they are committed by individuals or small groups in connection with their jobs and businesses, it is for personal gain and when it is committed by collective or aggregate of discrete individuals in an organisation, it is to gain advantage for the corporation and is known as corporate crime. Thus, if a corporate official violates the law in acting for the corporation it is deemed a corporate crime, but if he or she gains personal benefit in the commission of a crime against the corporation, as in the case of embezzlement of corporate funds, it is occupational crime. The lines between occupational and corporate crime therefore frequently blur.

Thus, crime can be committed in different capacities such as crimes by persons

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operating on as individuals for personal gain in business context, crimes in the course of occupations or professions which involve abuse of trust and crimes in furtherance of business operations.

### *1.2.2 Fraud*

Fraud, the most common type of white-collar crime, involves obtaining money or services by making false representations or promises. The key question in these cases is ordinarily whether the defendant intended to deceive the victims or merely failed in an honest business venture. One of the most common types of fraud involves telemarketing schemes that misrepresent the value, the terms of sale, or the use of the goods or services being sold.

In the Indian scenario, a person can be held liable for fraud under three dimensions viz. contractual, tortuous and criminal. The Indian Contract Act, 1872 governs the law relating to contract. Under the Act if a party to a contract enters into contract with fraud then the contract becomes voidable i.e. the party suffering from the fraud may terminate or continue with the contract on his option. The Act for this purpose gives the meaning of fraud. This definition is however, limited for the purposes of contract.

According to Section 17 of the *Indian Contract Act*, 1872 fraud means and

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includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract: (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it; (4) any other act fitted to deceive; (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.-Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

The criminal dimension of fraud is that as such, 'fraud' is not a criminal offence in India. If a person is defrauded and wants to initiate penal action against the accused, then he has to initiate proceeding under the *Indian Penal Code, 1860* or any other special law enacted specifically to deal with that aspect of violation. The *Indian Penal Code, 1860* does not define the word fraud anywhere and uses the word 'fraudulent' in place of fraud. A person is said to do a thing fraudulently if he does that thing with the intent to defraud. The expression 'defraud' involves two elements namely firstly deceit or an intention to deceive or in some cases mere

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secrecy and secondly injury to the person deceived.

Thus, fraud in India is not defined as such. A person is liable for fraud by failing to disclose information if he dishonestly fails to disclose to another person information which he is under a legal duty to disclose and intends, by failing to disclose the information to make a gain for himself or another, or cause loss to another or to expose another to a risk of loss. A person is liable for fraud by abuse of position if he occupies a position in which he is expected to safeguard or not to act against the financial interests of another person, dishonestly abuses that position, and intends by means of the abuse of that position to make a gain for himself or another or cause loss to another or to expose another to a risk of loss. A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

So, fraud in legal sense is any deceitful or dishonest conduct, involving acts or omissions or making of false statements knowingly, orally or in writing, with an object of obtaining money, or other benefits or gains, in illegal manner, from any person or authority, whether public or private or evading liability for personal benefit etc.

### *1.2.3 Motive*

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The motive in white collar crimes is avarice or rapaciousness. It is committed for money, profit, greed, power and general financial gain. Traditional street crimes may be committed for a variety of goals but white-collar crime is always oriented toward instrumental goal, which includes personal as well as institutional gain.

The perpetrator of white-collar crime commits a wrongful act to achieve a purpose inconsistent with law or public policy. It is a calculated risk, with the risk-taker seeking to achieve immunity from the consequences of his acts. Thus, the reasons are financial gain for self, business, or career advancement.

#### *1.2.4 Means of Committing the Offence*

The white-collar crimes are generally considered as non-violent crimes or ones in which no actual force is used. These crimes are committed through non-violent means by placing reliance on a victim's ignorance or carelessness, and concealment of the crime through creation of a deceptive transactional facade or some similar action.

Ignorance or carelessness of the victim is crucial to the success of the white collar criminal. Thus mental deception in place of physical force is used in white collar crimes. In those areas in which regulatory agencies have a statutory mandate to protect the public; the ignorance of the public is maintained by misleading the

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agency or circumventing its disclosure requirements.

Although the means of committing crime is non-violent but the injury caused may be violent. In the modern context these offences can extend to physical injury, sickness, and even deaths. The offences where huge amount of money is involved and there is threat of detection the white collar criminal commits the brutal act of violence to silence those who threat to expose him or to prevent further disclosure. As the threat of detection increases, so does the probability of using force or violence increases.

### **1.3 Effect of White Collar Crimes**

White collar crimes are serious offences. Seriousness means the harm done to individual and public welfare or public order. White collar crime has a low visibility but has high impact factor in our society. Because of the changes in the nature of our economic organization, it is a fair assumption that white collar crime has increased at a rate which exceeds population growth. Its effects intersect with and interact with other problems of our society such as poverty and discrimination.

It is to be noted that perhaps even more damaging than the monetary costs to society of white collar crimes are the broader social consequences of crimes and illegal actions committed by individuals. When people in public trust commit white collar crime, it contributes to an erosion of public confidence in our legal

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system. This destruction of the faith of people in the legal system promotes an atmosphere of lawlessness, leading to more crime. Deceptive and fraudulent practices by some businessmen tend to force others to engage in similar practices in order to remain competitive, and thus the credibility of the commercial market is threatened. The people having social power and prestige carry heavier demands for social responsibility, and that failure of such people to obey the law represents an even more serious problem than equivalent failure by persons who are less well-situated in the social structure.

India as is well known is highly diverse in terms of its political structure, population size, culture and level of development. As the society has progressed from rural to urban and from simple to industrialize, the number and variety of white collar crimes has increased manifold. The social exclusiveness of the business world is rapidly evaporating and entry to financial markets employment is now based on entrepreneurial skills. The opportunity to commit white collar crime has expanded in response to the globalisation of commerce and financial transactions. White collar crime is pervasive in all occupations and professions of the society. In the recent past, scams have cost the exchequer and Indians loss of astronomical sums of money. White collar crime is indubitably an expanding criminal enterprise of this century.

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The criminal justice system of a country is a key factor in the analysis of effectiveness of the state in responding to crimes. The state is responsible for maintaining peace and coherence in the society. As a nation, we devote significant public resources on the development of the criminal justice system which aims at reducing crime in the society. The main building blocks of a criminal justice system are: substantive and procedural laws enacted by the legislature; the law enforcement agencies that is the police and other specialised agencies which are primarily responsible for investigation of crime; the prosecutors which are responsible for the prosecution of the crime and the courts which are responsible for conducting trial and awarding suitable punishment to the offender.

The prosecution of white collar offenders remains largely within the sphere of mainstream criminal law. White collar crimes are far more complex than most other offenses. The prosecution of these crimes is a tedious task as the events in issue usually have occurred at a far more remote time and over a far more extensive period. The 'proof' consists not merely of relatively few items of real evidence but of a large roomful of documents. The sentencing of white collar criminals has hardly addressed any problem. This is evolving an era of 'crisis of confidence' of people in the government and its agencies.

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**CHAPTER 2 : EXISTING LEGAL PROVISIONS TO DEAL WITH WHITE  
COLLAR CRIMES IN INDIA**

**2.1** White collar crimes are committed in case fraud is committed in the course of occupation. The person who is defrauded may be government or an individual or group of individuals or consumers or the society as a whole. There are different kinds of white collar crimes like corruption, insider trading, criminal breach of trust, cartel offences, tax evasion, black marketing and profiteering etc. While one species of white collar crimes such as profiteering, assumes importance at one stage, at another stage it might pale into insignificance, and other species of white collar crimes, such as tax fraud might come into prominence. White-collar crimes are pervasive in almost all the professions and occupations in our society.

As the sources of white collar crime are scattered there can be no single or omnibus law to deal with the menace. The importance attached to each species of white collar crime has varied from time to time. Accordingly, the legal frameworks developed to combat these crimes are dispersed in penal laws, economic laws, tax laws and various regulatory mechanisms. Also, the kind of proceedings that can be initiated against the wrongdoer varies from one case to another depending upon the facts of the case. There is no exhaustive list provided by the legislature enumerating the instances of white collar crime.

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In the ever growing economy newer opportunities for committing white collar crimes emerge. The legislation in order to address the problem posed by new regime pass more laws. The researcher has not come across any work which exhaustively lists white collar crime. Therefore, to enlist all the offences, figuratively speaking, is a minefield. However, an attempt has been made to enlist various statues dealing with white collar crime along with the criminal sanctions that can be imposed in case of violation.

## **2.2 Liability for White Collar Crimes**

White collar crime is not a unitary concept. One set of facts pointing to misconduct may trigger multiple proceedings. Statutes aimed at regulating white collar crime often provide multiple, alternative sanctions. The sanctions may include imposition of penalty by the adjudicating authority established under the Act or monetary fines or forfeitures, seizures of goods or prison sentences. The aim of these sanctions is same and that is to control the activities relating to white collar crime. However, the proceedings may vary depending upon the intensity of the crime.

### *2.2.1 Civil Liability*

The 'acts' designated as white collar crimes are committed in the course of occupation. In order to regulate the occupational behaviour a number of rules and

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regulations have been designed by the legislature. These regulations comprise of the manner in which the business or occupation is to be carried out.

In case of violation of these rules, civil penalties can be imposed. Civil penalties are imposed by the adjudicating authority established under the respective Acts.

The adjudicating authorities have the powers of Civil Court and are generally exempted from following technical rules of *Indian Evidence Act, 1872* while deciding the liability. The adjudicating authorities belong to the same department which has been set up for administering, regulating and monitoring the provisions of the Act. These authorities possess special skill or knowledge required for understanding the technical intricacies of the Act. Generally, the right to appeal to higher authority is also provided under the Act. Civil proceedings require a lower standard of proof, have less procedural safeguards for protecting the offender and are non-punitive in nature.

### *2.2.2 Criminal Liability*

In addition to civil liability, the statutes also provide for imposition of criminal liability. The purpose of providing for criminal sanctions is twofold. Firstly, it adds dimension to the full treatment available by giving the enforcement agencies one more weapon and secondly, white collar crime is not only a crime against the individual but a crime against the society. So it can prove effective in restraining

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the behaviour of businessmen. These provisions are not in derogation to the civil penalty imposed but are in addition to it.

Criminal prosecution is generally initiated at the complaint of the concerned department. A criminal prosecution requires a high standard of proof and is with a view to impose punitive action so that society condemnation to the alleged act is proved. The Acts which deals with a particular specie of white collar crime specifically mentions the criminal liability that can be imposed for violation of those Acts. In cases where the criminal liability is not mentioned the person is charged under the general penal provisions of *Indian Penal Code*, 1860.

### 2.2.3 Others

In addition to civil and criminal liability which is enforced by the law enforcement machinery, there are many other actions that can be initiated depending on the nature of offence and offender. For example, if the violation takes place in a company, 'internal' proceedings can be initiated against the wrongdoer. 'Internal' means within a company or an organisation without the interference of any external law enforcement agency. Internal proceedings are initiated in order to protect the internal integrity of the member operations. In India, the system of establishing internal controls in the companies is based on the principle of corporate governance, which means ethical conduct in the business. The concept is

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implemented through Clause 49 of the Listing Agreements, by Securities and Exchange Board of India. Under this, the companies or organisations frame policies on different aspects like grievance redressal, whistleblower etc. They are established with a view to keep a watch dog on the activities within the organisation to nip the evil in the bud. Therefore, whenever a criminal activity like fraud is detected in a company, the company in place of reporting it to a law enforcement agency, itself investigates and gives punishment accordingly. Internal authorities are inquisitorial in character. The punishment may vary from dismissal in service to transfer to reduction in rank etc. So whenever some suspicious activity is detected or reported the internal mechanisms swing into action.

Another kind of proceedings which can be initiated in case of some white collar crimes is 'disciplinary' proceedings. These proceedings are conducted when the misconduct is done by a civil servant. Every person in civil service is expected to follow certain norms of behaviour which is contained in *Central Civil Services (Conduct) Rules, 1964* and the *All India Services (Conduct) Rules, 1968* etc. In case a person in civil service violates these rules or is suspected of misusing his official position then, disciplinary proceedings can be initiated against him. The term 'disciplinary proceedings' is not been defined as such under any legislation or rules. It means an action initiated to find whether an employee has violated a prescribed or implicit code of ethical and professional conduct to enable the

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employer to impose penalties on the guilty. The rules regarding disciplinary proceeding and the manner in which it can be imposed is contained in the *Central Civil Services (Classification, Control and Appeal) Rules, 1965*. Under the disciplinary proceedings two kinds of penalties are imposed i.e. minor penalty and major penalty. Minor penalties consist of censure, withholding of promotion for a specified period and withholding of increment and recovery from the salary of whole or part of pecuniary loss caused by the employee. Minor penalty can be imposed after calling for and considering the explanation of the accused employee. Major penalties comprise reduction in rank through reversion to a lower scale of pay or to the parent cadre etc, compulsory retirement, removal or dismissal from service. Such penalty can be imposed only after a detailed inquiry is conducted except in cases where an inquiry is considered not practicable.

A serious fraudulent activity will thus result in a number of parallel and collateral proceedings. There may be internal action in case of companies together with external action by other agencies. Disciplinary proceedings can be initiated against a public servant together with criminal proceedings. But each proceeding has a distinctive imperative.

The arena of white collar crimes is wide. There are a number of statues which provide for criminal liability for white collar crimes. The criminal sanctions that

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can be imposed for white collar crimes are discussed hereunder.

### **2.3 Offences under the Indian Penal Code, 1860**

The *Indian Penal Code*, 1860 does not provide punishment for white collar crimes.

Neither has it criminalised 'fraud' as such which is a fundamental constituent of every white collar crime. However, there are provisions in the Code which are invoked for penalising white collar crimes. As the Code is a substantive criminal law code, the proceedings are criminal in nature. The various provisions of the Code which are invoked to deal with white collar crime are discussed hereunder.

#### *2.3.1 Dishonest Misappropriation of Property*

The *Indian Penal Code*, 1860 provides criminal liability for dishonest misappropriation of property. 'Dishonest misappropriation' means using the property including money in a way different from what was bound to be done by virtue of contract or as a result of a legal relationship created through some process of law. Dishonest misappropriation of property is white collar crime as here the intention is to defraud the person.

To constitute the offence of misappropriation the following ingredients must be established:

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1. Dishonest misappropriation or conversion of property.
2. The property must be movable.
3. The movable property must belong to the complainant.

It has been held that the word 'dishonestly' and 'misappropriate' are necessary ingredients of an offence under section 403. Any dispute being about the recovery of money is purely of civil nature. Hence a criminal complaint regarding such a matter is not maintainable. **U. Dhar vs State of Jharkhand, AIR 2003 SC 974.**

The words 'converts to his own use' necessarily connote the use or dealing with the property in derogation of the rights of the owner. **Ramaswami Nadar vs State of Madras, AIR 1958 SC 56.**

A person who is liable for dishonest misappropriation of property shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

### *2.3.2 Criminal Breach of Trust*

Criminal breach of trust means that when a property which is entrusted to a person is misappropriated. This entrustment may be because of a legal contract or position

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in which the person is placed. Criminal breach of trust is the most profound type of white collar crime.

The essential ingredients of Criminal breach of trust are:

- 1) The accused must be entrusted with property or dominion over it
- 2) He must have dishonestly misappropriated the property or converted it to his own use or disposed of it in violation of such trust.

There are two distinct parts involved in the commission of the offense of criminal breach of trust. The first consists of the creation of an obligation in relation to the property over which dominion or control is acquired by the accused. The second is misappropriation or dealing with the property dishonestly and contrary to the terms of the obligation created. The principal ingredients of Criminal Breach of Trust are thus 'entrustment' and 'dishonest misappropriation'.

The definition in the section does not restrict the property to movables or immovable alone. In **R K Dalmia vs Delhi Administration**, the Supreme Court held that the word 'property' is used in the Code in a much wider sense than the expression 'moveable property'. There is no good reason to restrict the meaning of the word 'property' to moveable property only when it is used without any qualification in Section 405

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A person who is liable for dishonest misappropriation of property shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 407 of the *Indian Penal Code*, 1860 specifically talks about criminal breach of trust by carriers or wharfingers and makes them liable for a punishment with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 409 of the *Indian Penal Code*, 1860 penalizes criminal breach of trust if the property is entrusted to a person in his capacity of a public servant or in the way of his business as a banker, merchant factor, broker, attorney or agent. The person held liable shall be punished with imprisonment for life or with imprisonment of either description which may extend to ten years and shall also be liable to fine.

### *2.3.3 Cheating*

Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or

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omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”

Following are the essential ingredients of cheating:

- 1. Deception:** the word ‘deceive’ means to cause someone to believe what is false or mislead or trick him to some error by words or conduct. However, a simple misrepresentation of the quality of goods is not a false pretence i.e. untrue praise of goods meant for sale does not amount to cheating.
- 2. Dishonest or fraudulent intention:** the person so deceiving must dishonestly i.e. intention to do wrongful loss or have a wrongful gain or fraudulently i.e. intention to injure any unascertained property or person induce any person to deliver any property or to do some act or omit to do anything which the person so deceived otherwise would not have done.

The dishonest intention must accompany the dishonest act i.e. a dishonest intention cannot be drawn merely from the fact that a person was subsequently unable to fulfil his promise due to change of events. To constitute cheating it is required that the person under deception delivers the property or does or omits to do the act which is detrimental to his interest.

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**3. Causes damage or harm:** there should be causation or likelihood to cause damage or harm to the mind, body, property or reputation of the person so deceived and not to any other person. However, the damage caused should be under the influence of deceit and it should not be too remote

Section 418 of the *Indian Penal Code*, 1860 specifically punishes those in cheating cases who owe a special responsibility to protect the interest of those (either by law or by legal contract) with whom they are transacting. Misuse of trust reposed is punished under this Section. A person who is liable under this Section shall be punished with imprisonment of either description for a term which may extend to three years or with fine or both.

When due to cheating, the person deceived delivers or makes, alters or destroys the whole or any part of a property or valuable security then the person who cheats shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

#### *2.3.4 Forgery*

The essence of the offence of forgery is making of a false document. A person is said to make a false document if he dishonestly or fraudulently signs, seals or

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executes a document to make others believe that it is under the authority of a person who has not actually made or signed it. A document is a forged document if it is altered after it has already been signed or if another person is dishonestly or fraudulently induced to sign, seal, execute or alter a document knowing it well that such person does not know the contents of the document or nature of the alternation. (Sections 463 and 464 of the *Indian Penal Code*, 1860)

In order to make a person liable for forgery under the *Indian Penal Code*, 1860 the ingredients are firstly, making of a false document; secondly, the intention of making such document is (i) to cause damage or injury to (a) the public or (b) any person or (ii) to support any claim or title or (iii) to cause any person to part with property or (iv) to cause any person to enter into any express or implied contract or (v) to commit fraud. (*Sushil Suri v. CBI*, (2011) 5 SCC 708). A person who commits forgery shall be punished with imprisonment of either description which may extend to two years or with fine or with both.

Further, if the forgery is of valuable security then the person shall be punished with imprisonment for life or for imprisonment of either description which may extend to ten years and shall also be liable to fine. (Section 467) If the forgery is for the purpose of cheating then the person shall be punished with imprisonment of either description which may extend to seven years and shall also be liable to fine.

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(Section 468)

### 2.3.5 Criminal Conspiracy

Conspiracy is an “inchoate” offence i.e. it is the crime of preparing for or seeking to commit another crime without the need for actual harm to have been done. The gist of the offence lies not in doing the act or affecting the purpose for which conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties.

The ingredients of the offence of criminal conspiracy under the *Indian Penal Code*, 1860 are there should be an agreement between two or more persons who are alleged to conspire; the agreement should be to do or cause to be done illegal act or a legal act by illegal means. (Section 120A) The punishment for criminal conspiracy is more severe if the agreement is to commit a serious offence. If the offence conspired is punishable with death, life imprisonment or imprisonment for more than two years then the punishment for conspiracy is the same as if the conspirator had abetted the offence. However, if the offence conspired is punishable with less than two years of punishment, then the punishment for such an offence is imprisonment for a term not exceeding six months or with fine or both. (Section 120 B)

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## 2.4 Corruption

Corruption has prevailed in society since time immemorial. In the modern world it has become endemic to the society. The debilitating effects of corruption permeate through all aspects of public life. It not only stifles growth but also perpetuates inequalities, deepens poverty, causes human suffering, dilutes the fight against terrorism and organised crime, and tarnishes the image of the country globally.

The government works through people who are known as 'public servants'. These public servants indulge in corrupt activities and threaten the integrity of government institutions and procedures. The term 'public servant' means any person in service and pay of the government or local authority or corporation established by the government or any person designated to perform 'public duty'. It includes judges, officers of court of justice, office bearers of registered cooperative societies receiving financial grant from government; chairman, member or an employee of any service commission or board; vice chancellor, teacher or employee of any university and office-bearer or an employee of an educational, scientific, social, cultural or other institution receiving financial aid from government. (Section 21 of the *Indian Penal Code*, 1860 and Section 2 (c) of the *Prevention of Corruption Act*, 1988) It includes President of India, Vice President, Governors, Prime Minister and Ministers (*M. Karunanidhi v. Union of*

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*India*, AIR 1979 SC 898) and Members of Parliament and State Legislatures. (*P.V. Narasimha Rao v. State (CBI/ SPE)*, (1998) 4 SCC 626)

Corruption has multiple channels of expression. It may take many forms and in the Indian context it can be differentiated between petty and grand corruption. Petty corruption is either the collusive or coercive action of a public servant vis-a-vis a member of the public to subvert the system over relatively small transactions. It therefore mostly involves down the line public officials. Grand corruption is the subversion of the system by senior government officials and formations of the political executive, usually in collusion with private sector players.

A public servant who is guilty of corruption can be proceeded against departmentally or criminal sanctions can be imposed depending upon the act. Criminal liability for the offence of corruption can be imposed under various statutes which are discussed hereunder.

#### *2.4.1 Prevention of Corruption Act, 1988*

The incidence of corruption increased drastically after the First World War. Therefore in order to address it the Prevention of Corruption Act, 1947 was passed in addition to other provisions which were already there in the *Indian Penal Code*, 1860. With the passage of time the menace of corruption increased. This led to the

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passage of a more comprehensive law on the subject known as the *Prevention of Corruption Act, 1988*. This Act repealed the earlier Act of 1947. The provisions of *Indian Penal Code, 1860* which dealt with corruption were also repealed. The Act of 1988 provides for a number of offences which are discussed hereunder.

The Act prohibits public servant from taking any gratification other than legal remuneration. The word gratification is not restricted to pecuniary gratification or to gratifications in estimates of 'money' only. It is thus used in its larger sense as connoting anything which affords gratification or satisfaction or pleasure to the taste appetite or the mind. In order to make a person liable for the offence, the ingredients are that the accused must be a public servant; he must be shown to have obtained or attempted to obtain from any person any gratification other than legal remuneration; and the gratification should be as a motive or reward for doing or forbearing to do, in the exercise of his official function, favour or disfavour to any person (Section 7 of the *Prevention of Corruption Act, 1988*). The person who is held guilty shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to pay fine.

The Act also prohibits public servant from taking any form of gifts. (Section 11 of the *Prevention of Corruption Act, 1988*). The gist of the Section is that public

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servants, if allowed, to accept 'presents' when they are prohibited from accepting bribes will easily circumvent the prohibition by accepting a bribe in the shape of a present. The ingredients of the offence are that the accused was a public servant at the time of commission of offence; he accepted or agreed to accept or attempted to obtain for himself or for someone else a valuable thing; he gave no consideration or inadequate consideration to the person giving the thing; and the person giving the thing must be a person concerned or interested in any proceeding or business transacted or about to be transacted by the public servant him or any other to whom he is subordinate. The person who is held guilty shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

Section 8 and 9 of the Act intends to deter any member of the public from offering or receiving any gratification in any form, the recipient may not be a public servant. In order to constitute an offence under these Sections the essentials are that the accused solicited, accepted or agreed to accept or attempted to accept any gratification; such gratification must not be remuneration which he is permitted by the Government or the organisation, which he serves to accept be for himself or for any other person; such gratification must have been asked for, offered, or paid as a motive or reward for inducing, by illegal; or corrupt means, a public servant; and the public servant must do an act or forbear to do an act, render or attempt to

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render any service or disservice to some person with the Central or State Government or with any public servant named or otherwise. The person who is held guilty shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine. Under Section 8 the public servant is to be influenced by corrupt or illegal means, while under the previous Section he is to be influenced by the exercise of personal influences.

In addition to above specified offence the Act provides for the offence of criminal mis-conduct. This provision intends to deal with those public servants who are habitual offenders. They live life above their income; although no specific action can be alleged against them by proving the way of accepting bribe or obtaining the money by corrupt means. The object of this Section is to detect and punish officers who have evaded detection in some way. A public servant can be held liable for criminal misconduct if he habitually accepts or obtains or attempts for himself or for any other person any illegal gratification other than legal remuneration as a motive or reward; or any valuable thing without or inadequate consideration; dishonestly or fraudulently misappropriates any property entrusted to him or under his control as a public servant or allows any other person so to do; obtains valuable thing or pecuniary advantage; or abuses his official position; or obtains any valuable thing or pecuniary advantage without any public interest; or has in his

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possession resources or property disproportionate to his known sources of income.

The clause is very wide as here the basic consideration is the possession of pecuniary resources or assets disproportionate to the known sources of a person's income and the assumption is that the situation has arisen out of his habitual acceptance of bribe or corruption.

Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine. (Section 13 of the *Prevention of Corruption Act, 1988*). Even an attempt to misappropriate the property entrusted or misuse the official position is criminalised under Section 15 and is punishable with imprisonment for a term which may extend to three years and with fine.

In order to tackle with the problem of corruption, the *Prevention of Corruption Act, 1988* makes the abetment of all the aforesaid offences also an offence. (Sections 10 and 12 of the *Prevention of Corruption Act, 1988*). The commission of offence in consequence of such abetment is not necessary to make the person liable under these Sections. (*Central Bureau of Investigation v. V. C. Shukla, 1998 SCC (Cri.) 761*). The person who is held liable for such abetment shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine. Section 14 of the Act provides

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enhanced punishment for habitual offenders. A habitual offender shall be punishable with imprisonment for a term which shall be not less than two years but which may extend to seven years and shall also be liable to fine.

## **2.5 Tax Offences**

In a welfare state like India, the Government has got the prime responsibility to fulfill the increasing developmental needs of the country and its people which require huge revenue to meet the enormous public expenditure. Various welfare schemes have to be implemented in order to protect and safeguard the interests of less privileged. The major source of the government revenue is the direct and indirect taxes. Direct taxes are levied directly on persons and corporate bodies, for example, income Tax and wealth tax. Indirect taxes are levied on commodities and taxable services, for example, customs, central excise, service tax etc.

Compliance with the tax law typically means: (i) true reporting of the tax base, (ii) correct computation of the liability, (iii) timely filing of the return, and (iv) timely payment of the amounts due. However, if a person fails to fulfill any of these liabilities then he exposes himself to civil as well as criminal liability. The civil liability is imposed by the adjudicating authorities established under the respective Acts whereas criminal liability is imposed by the criminal courts. The criminal liability imposed for evasions of taxes under various statutes are discussed

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hereunder.

### *2.5.1 Income Tax Act, 1961*

Income tax is the tax levied on the annual income of previous year of a person. A person includes an individual, hindu undivided family, company, association of persons, body of individuals, firm etc. It is the most important direct tax. In India this tax is regulated through the *Income Tax Act, 1961* which came into force in 1962. However this Act undergoes change every year with additions and deletions brought about by the Finance Act of that year. In case of violation of the provisions of the Act, a person can held criminally liable for the following as mentioned hereunder.

If a person wilfully attempts to evade the payment of any tax, penalty or interest levied under the *Income Tax Act, 1961*(Section 276C (2) of the *Income Tax Act, 1961*) or falsifies books or documents etc. to induce or abet any person to evade any tax, penalty or interest imposable under the provisions of the Act, (Section 277A of the *Income Tax Act*) then he shall be liable for punishment which shall not be less than three months but may extend to two years and fine.

If a person willfully attempts to evade any tax, penalty or interest; or willfully fails to furnish in due time a return of income (Section 276CC of the *Income Tax Act,*

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1961); or makes a statement in verification or delivery of an account or statement which is false and which the concerned person knows or believes to be false or does not believe to be true (Section 277 of the *Income Tax Act, 1961*); or abets or induces another person to make and deliver an account or statement or declaration relating to any taxable income which is false and which he either knows or believes to be false (Section 278 of the *Income Tax Act, 1961*), then such person shall be liable for criminal penalty. The liability is punishment which shall not be less than three months but may extend to two years and fine. However, if the amount which would have been evaded exceeds twenty five lakh rupees then the punishment would be not less than six months but may extend to seven years and fine.

If a person fraudulently removes, conceals, transfers or delivers any property so that recovery of tax from that property is prevented, then such person shall be liable for punishment with rigorous imprisonment for a term which may extend to two years and shall also be liable to fine (Section 276 of the *Income Tax Act, 1961*).

If a person fails to pay to the credit of the Central Government the tax deducted at source (Sections 276 B and 276-BB of the *Income Tax Act, 1961*) then he shall be liable for punishment with a term which shall not be less than three months but

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may extend to seven years and fine.

The Act provides that in case the offence is committed by the company then every person who is in charge of the affairs of the company shall be liable and punished accordingly. In case of hindu undivided family the karta is liable and in case it is proved that the offence has been committed with the consent or connivance of or is attributable to the neglect of any member then that member is liable and shall be punished accordingly (Section 278 C of the *Income Tax Act*, 1961).

#### *2.5.2 Central Excise Act, 1944*

Excise is derived from latin word which means to cut out. It is a duty levied on a manufacturer or producer in respect of the commodities produced or manufactured by him. It is a tax on manufacture of goods and not upon sales of goods. “Duty of Excise” has been renamed as ‘Central Value Added Tax’. The *Central Excise Act* came into force in 1944 and consolidated all the prior individual Acts. The term manufacture literally means to make by hand. However, in the context of today’s mechanical world, the term includes making articles by machines also. The duties are levied on the goods as specified in the schedule of the *Central Excise Tariff Act*, 1975.

A person shall be criminally liable if he contravenes any of the provisions dealing

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with restriction on possession of certain goods (Section 8 of the *Central Excise Act, 1944*), transit of goods (Section 37(2) (iii) of the *Central Excise Act, 1944*) or registration of persons (Section 37(2) (xxvii) of the *Central Excise Act, 1944*) or evades the payment of any duty; or removes any excisable goods in contravention of any of the provisions of the Act; or acquires possession of excisable goods which he knows or has reason to believe are liable for confiscation; or contravenes any of the provisions relating to credit of any duty allowed to be utilised towards payment of excise duty on final products; or fails to supply information or supplies false information; or attempts or abets the commission of any of the offences.

Such a person shall be liable for punishment with imprisonment for a term which may extend to three years or with fine or with both. However, if the duty that is to be levied on the goods exceeds fifty lakhs, then the person shall be liable for imprisonment which may extend to seven years and with fine and in no case shall be less than six months, unless there are reasons to the contrary (Section 9 of the *Central Excise Act, 1944*).

If the duty is evaded by a company then every person who at the time of commission of an offence was in charge of was responsible for the conduct of the business of the company shall be held liable and punished accordingly. (Section 9 AA of the *Central Excise Act, 1944*.)

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## 2.6 Corporate Fraud

Over the years the corporate form has emerged as the preferred mode of doing business and of mobilizing resources. Companies bring people together for economic activity and mutual gain, facilitate rising of capital, invest resources in viable activity and provide employment to millions of people. The corporate structure and its governance has evolved over a long period of time to enable the companies operate with transparency and accountability and in a manner that harnesses and makes the best use of individual talent and merit.

Companies today have spread their operations across the globe and comprise organizations, governance structures and employees carrying out their allotted tasks. Components of such corporate organizations are very unlikely to have knowledge and information about their organization beyond their immediate area of function and control. The investors and shareholders are likely to know even less. This provides a fertile ground for unscrupulous elements who misuse the corporate form for carrying out dishonest acts and transactions by misleading investors, creditors and other stakeholders. Creation of artificial bubbles of expectation and misappropriation of public funds through has sometimes been called “ugly manipulations of companies”. Such actions have often been the result of fraudulent actions on the part of those who are concerned with the conduct of

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the affairs of the company. Fraud is a complex criminal offence in itself; the complexity of which is further compounded if such fraud takes within a corporate structure, with relation to the affairs of a company.

Corporate fraud involves large volumes of money. Any case of corporate fraud has devastating consequence on confidence of investors, credibility of corporate sector, financial survival of company and its employees, losses to banks and financial institutions and set-back to the economy as a whole. This is a highly complex phenomenon and is one of the many consequences of rapidly growing economy characterised by increasing number of corporate entities with a wide range of activities.

### *2.6.1 Corporate Veil*

A company is a legal entity separate and distinct from its members. Where there is a group of companies, each company within that group is considered a separate legal entity possessed of separate legal rights and liabilities. In cases of corporate fraud, the company is the vehicle through which fraudulent activities take form and shape. In such cases individual culpability may be obscured by actions taken on the behalf of the company and the real perpetrators may take shelter behind the corporate veil. Here, the company is a mere cloak or a sham and the fraudster operates through the entity to conduct his deceitful activities. The fraud is not 'by

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the company' for which it can be indicted. Rather its structure is used to project an image based on statute and to make certain representations and projections to persons dealing with it that disguise the real intentions of the promoters. The reality behind the corporate veil is quite different.

In *Delhi Development Authority v. Skipper Construction Company (Private) Limited*, the Supreme Court noted that the concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the Court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned.

The problem of corporate fraud is addressed through various statutes like the *Indian Penal Code, 1860*, the *Securities and Exchange Board of India Act, 1992* and the *Companies Act, 2013*. The provisions of the *Indian Penal Code, 1860* and the *Securities and Exchange Board of India Act, 1992* have already been discussed in earlier part of the chapter. The provisions of the *Companies Act, 2013* which are invoked in case of fraud are enumerated hereunder.

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### 2.6.2 Companies Act, 2013

The *Companies Act, 2013* provides the statutory code for the structure of a company, its governance and regulation. The Act came into force on 29<sup>th</sup> August, 2013, but all the Sections have not been notified. At present companies are regulated by the present Act together with its predecessor that is the *Companies Act, 1956*. The new Act was passed in the backdrop of Satyam scam which is the biggest corporate scam in India so far. The Act of 2013 for the first time has recognized 'fraud' as an offence in itself and has provided punishment for it (Section 447). Together with it the Act also recognizes certain situations which may arise as a result of fraud and seeks to address them in a manner that is supportive to the main object of the Act.

A company is a conglomerate of persons. Fraud can be committed by persons like directors, promoters, key managerial persons, or any other officer of the company. The word 'fraud' has been given a wide meaning under the Act. It includes any act, omission, concealment of fact or abuse of position to deceive, gain undue advantage from, or injures the interests of the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss and includes corrupt practices, deceit, conflict of interest and bribery. Any person who is found guilty of fraud shall be punishable with

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imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved. The Act specifically provides that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years (Section 447A), person shall be held guilty for fraud in the circumstances enumerated herein.

A company shall be liable for fraud if it gives any false or misleading information on incorporation. When a company is formed the information and documents relating to company has to be filed with the registrar so that it can be entered into the register of companies and a certificate for incorporation can be issued. If any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company then he shall be liable for fraud. Further if at any time after the incorporation of a company, it is proved that the company has been got incorporated by furnishing false or incorrect information or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company, or by any fraudulent action then the promoters, the persons named as the first directors of the company and the persons making declaration that all the requirements under the Act have been fulfilled shall be liable for fraud. (Section 7 (6))

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A person shall be liable for fraud for mis-statements in prospectus. Prospectus is a notice, circular, advertisement or any document through which the public is invited for subscription or purchase of any securities of a body corporate. It includes a red herring as well as shelf prospectus (Section 2(70)). It gives all necessary information about the company so that the prospective shareholders may fully understand the objectives and the plans of the company. When a prospectus contains any statement which is untrue or misleading in form or context or contains any omission which is likely to mislead, then every person who authorises the issue of such prospectus shall be liable for fraud. (Section 34)

If any person either knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading, or deliberately conceals any material facts, to induce another person to enter into an agreement for acquiring, disposing or underwriting securities; or an agreement the purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities; or an agreement to obtain credit facilities from any bank or financial institution, then such person shall be liable for fraud. (Section 36)

The companies can receive deposits. Deposit means receipt of money by way of deposit or loan or in any other form by a company (Section 2(31)). A company has

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to repay the deposits according to the provisions of the Act. Where a company fails to repay the deposit or part thereof or any interest thereon and it is proved that the deposits had been accepted with intent to defraud the depositors or for any fraudulent purpose, then every officer of the company who was responsible for the acceptance of such deposit shall become liable for fraud (Section 75).

A company is formed for lawful purpose. Whenever it is found that the business of the company is being carried on for a fraudulent or unlawful purpose then every officer of the company who is in default shall be liable for fraud. (Sections 206, 213, 339 and proviso to Section 8 (11) of the *Companies Act, 2013*)

If any person in a return, report, certificate, financial statement, prospectus or any other document required under the Act makes a false statement in material particulars knowing it to be false or omits to make statement as to material fact, knowing it to be material then such person shall be liable for fraud. (Section 448)

Where a person who is required to make a statement during the course of inspection, inquiry or investigation, destroys, mutilates, conceals, tampers or in an unauthorised manner removes documents relating to the property, assets or affairs of the company or the body corporate or provides an explanation which is false or which he knows to be false then such person shall be liable for fraud. (Section 229)

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Share certificate specify the share held by a person and is a prima facie evidence of the title of the person to such share. If a duplicate share certificate is issued with the intent to defraud, then every officer of the company who is in default shall be liable for fraud.

One of the objectives of passing the *Companies Act, 2013* was to safeguard the interest of creditors. In order to protect them against fraud, the criminal liability has been provided for in following cases. Firstly, where there is reduction of share capital. A company limited by shares or limited by guarantee and having a share capital can reduce its share capital by a special resolution which is subjected to confirmation by the Tribunal. It is the duty of the Tribunal to see that the interests of the creditors are secured before giving confirmation. If the officer of the company knowingly conceals the name of any creditor or knowingly misrepresents the nature or amount of the debt then such officer shall be liable for fraud. If the officer abets or is privy to any such concealment or misrepresentation then such officer shall also be liable for fraud (Section 66 (10)). Secondly, a company may after extinguishing all its liabilities, may file an application before the registrar for removal of its name from the Register of Companies (Section 248). However, if the application is made with the object of evading the liabilities of the company or with the intention to deceive the creditors or to defraud any other person then the

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person in charge of the management of the company shall be liable for fraud (Section 251).

An auditor is considered as a watchdog of the affairs of the company. He is a man from accounting profession and holds himself out to the public as an accountant qualified to perform such assignments. It is mandatory for every company to appoint an auditor Section 139. When the auditor acts in a fraudulent manner or abets or colludes in any fraud in relation to the company or its directors or officer, then such auditor shall be liable for fraud (Section 140(5)).

## **2.7 Money Laundering**

With the growing financial strength of the country, India is becoming vulnerable to money laundering activities. Money laundering is the process by which illegally obtained cash is moved into legitimate financial channels. Money laundering helps criminals disguise the true nature of their ill-gotten gains, and allows them to use these gains without risk of detection and seizure. Money may be laundered in a number of ways, such as reinvestment in other criminal activities, purchase of goods for personal use, or investment in real estate or legitimate businesses. Money laundering poses a serious threat not only to the financial system of the country, but also to its integrity and sovereignty. In view of the need to have comprehensive law dealing with prevention of money laundering and connected

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activities, the *Prevention of Money Laundering Act* was passed by the Legislature in 2002.

### *2.7.1 Prevention of Money Laundering Act, 2002*

The *Prevention of Money Laundering Act, 2002* was enacted in 2003 and was brought into force on 1<sup>st</sup> July 2005 in order to prevent money laundering and to provide for attachment, seizure and confiscation of property obtained or derived, directly or indirectly, from or involved in money laundering. Money-laundering means the projection of tainted money (proceeds of the crime) as untainted either directly or indirectly or assisting in such act. However, it is not an independent crime and depends upon another crime (predicate offence), the proceeds of which is the subject matter of the crime in money laundering.

Under the *Prevention of Money Laundering Act, 2002* a person is liable for money laundering if he directly or indirectly attempts to indulge or assists or is actually involved in any process or activity which is connected with the proceeds of crime and projects it as untainted property. Such a person shall be guilty of offence of money-laundering (Section 3 of the *Prevention of Money Laundering Act 2002*).

Whoever commits the offence of money-laundering shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine which may extend to five lakh

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rupees (Section 4 of the *Prevention of Money Laundering Act, 2002*). Under Section 70 of the Act the companies are also made liable for the offence.

In the present age the volume of external trade has increased manifold. Therefore in order to manage foreign exchange and promote external trade the *Foreign Exchange Management Act, 2002* was passed. The Act deals with cases relating to contraventions in foreign exchange transactions, generally by persons resident in India. Unauthorized holding of funds outside India by any person resident in India, is a contravention under the Act for which penalty can be imposed by the adjudicating authority once such a charge is established (Sections 4 and 13 of the *Foreign Exchange Management Act*). However, the *Foreign Exchange Management Act, 2002* is a civil law and hence no criminal prosecution can be launched for its violation.

## **2.8 Securities Fraud**

Securities fraud is a white collar crime which has developed with the growth of the Indian economy and the infusion of private capital into the market. The number of players associated with the market has also increased manifold. The investors invest on the basis of information received by them through different sources. Therefore, in securities market fraud is perpetrated when a person or a company, such as a stockbroker, brokerage firm, and corporation or investment bank

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misrepresents information or use internal information for trading in securities.

However, in order to promote growth in the economy it is necessary to instil the confidence of the investors in the market. Thus laws have been framed to regulate the market. The laws which prohibit fraud in securities market are discussed hereunder.

### *2.8.1 Securities and Exchange Board of India Act, 1992*

*Securities and Exchange Board of India Act, 1992* is the main law regulating the securities market. This law was developed pursuant to changes in policy framework - i.e. recognition of the importance of developing the Indian securities market and transaction from control based regime to disclosure based regime. A person who violates the provisions of the Act exposes himself to civil liability as well as criminal liability.

The *Securities and Exchange Board of India Act, 1992* aims to protect the interest of investors by prohibiting certain activities. Chapter VA of the Act specifically prohibits any fraudulent and manipulative activity, insider trading and substantial acquisition of shares and takeovers of companies listed. This chapter was inserted in 2002. Prior to this insertion these provisions were mentioned in the functions of the board and were regulated by the respective regulations framed by the board

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under Section 11(2)(e), 11(2)(g) and 11(2)(h) read with Section 30 of the Act. The Act prohibits manipulative, fraudulent and unfair trade practices. Dealing is fraudulent or manipulative or unfair trade practice if it involves fraud. 'Fraud' includes any act, expression, omission or concealment committed whether in a deceitful manner or not by a person or by any other person with his connivance or by his agent while dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any wrongful gain or avoidance of any loss and also includes a knowing misrepresentation, active concealment, reckless and careless representation etc. The words "whether in deceitful manner or not" indicate that intention to deceive is not an essential ingredient of fraud. Thus the liability exists on the principle of strict liability (*Pyramid Saimira Theatre Ltd. v. SEBI*, [2010] 100 SCL 224 (SAT)). Regulation 3 of the *SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003* prohibits certain dealings in securities and Regulation 4 gives a list of activities which shall be deemed to be fraudulent or unfair trade practise if it involves fraud. The commonly used fraudulent practises are synchronised trades including circular trades, reverse trades and cross deals; self trade; front running / back running; tailgating; scalping; puffing advertisements or rumour fraud; ponzi schemes; punting; parking, order book manipulations etc.

The Act also prohibits insider trading. An 'Insider' is a person who, is or was

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connected with the company or is deemed to have been connected with the company, and who is reasonably expected to have access or has received or has had access to unpublished price sensitive information in respect of securities of company (Section 2(e) of *SEBI Prohibition of (Insider Trading) Regulations, 1992*). The definition of insider trading has not been provided in the Act and the same is dealt under *SEBI (Prohibition of Insider Trading) Regulation, 1992* which says that 'insider trading' means the use of sensitive or privileged information that is yet to be released to the public in order to take advantage of the market. This may include the misuse of information to avoid a loss as well as to make a profit. However, the scope of the Regulations is not only limited to prohibition of insider trading but also prohibits communication, solicitation and counselling of unpublished price sensitive information. A person shall be liable for insider dealing if he deals in securities of a body corporate listed on any stock exchange on the basis of any unpublished price sensitive information that is in his possession; or communicates or discloses any unpublished price sensitive information to any person, with or without his request for such information except as required in the ordinary course of business or under any law; or counsels, or procures or encourages any other person to deal in any securities of a body corporate on the basis of unpublished price-sensitive information.

In addition to it the *Companies Act, 2013* also prohibits Director or any key  
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managerial personnel of a company to enter into insider trading. A person who indulges in it shall be punishable with imprisonment for a term which may extend to five years or with fine which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher, or with both (Section 195 of the *Companies Act, 2013*).

In order to protect the interest of investors the provisions related to collective investment schemes were inserted in the *Securities and Exchange Board of India Act, 1992* in 2000 (Section 11AA of the *Securities and Exchange Board of India Act, 1992*). Collective Investment Schemes are popularly known as ‘ponzi schemes’. In ponzi schemes funds are collected through fraudulent investment schemes with promise of huge returns. These schemes erode the confidence of investors. The Board has been empowered to issue any directions in the interest of investor. In order to further tighten the noose on these schemes, amendments have been proposed in the Section. It is proposed that pooling of any funds under any scheme or arrangement which involves a corpus amount of one hundred crore rupees or more should be deemed to be a ‘Collective Investment Scheme’ so that the Board can look into it.

In addition to above mentioned provisions, if any person indulges in any act which

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is prohibited by the Act or the Rules or Regulations framed there under then, he shall expose himself to civil penalty imposed by the adjudicating officer under the Act. In addition to it, he can also be criminally prosecuted if he contravenes any provisions of the Act, Rules or Regulations or does not pay the penalty imposed by the adjudicating officer. The punishment for such violation is imprisonment for a term which shall not be less than one month but which may extend to ten years or with fine, which may extend to twenty-five crore rupees or with both.

## **2.9 Cyber Crime and Software Piracy**

Cybercrime is fast becoming a popular way of defrauding both individuals and entities. New communication systems and digital technology has made dramatic changes in the way people transact business. Businesses are increasingly using computers to create, transmit and store information in the electronic form instead of traditional paper documents. Trade through the medium of e-commerce has also growing rapidly in the past few years. The business or individual with an online presence are prone to cybercrime.

The growing incidence of cybercrime has led the legislature to criminalise several acts which can be termed as cybercrime. In cybercrimes computer or a computer network is used either as a tool or as a target of the crime. Typical cybercrimes committed in the arena of white collar crimes are getting unauthorised access to

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computer, stealing sensitive information, disrupting vital operations and critical functions. The crimes committed under cyber fraud are dealt under the *Indian Penal Code*, 1860 and the *Information Technology Act*, 2000.

### 2.9.1 *Information Technology Act, 2000*

The Act provides legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication and also prescribe punishment for cyber related crime. However, some of the offence in the cyber arena is punished under the provisions of the *Indian Penal Code*, 1860 where electronic records have been legally recognised as documents.

With the development in e-commerce many type of documents are maintained in computers in place of hard copies. The *Information Technology Act*, 2000 prohibits tampering with computer source code. A computer source code is the text of computer software written in a high level programming language. It is a set of commands written in a particular programming language and if such language is known the program can be easily modified. The tampering may consist of concealing, destruction or alteration of the source code used for a computer, computer system, computer programme or computer network when the computer source is required to be maintained by law. Often source code includes comments regarding the design and purpose of the programme. If a person knowingly or

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intentionally tampers with computer source code then he shall be liable for imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both (Section 65 of the *Information Technology Act, 2000*).

One of the most frequented ways of committing cyber crime is trespassing into other's computer. Section 66 of the Act is very wide and provides punishment for unauthorised access. In cyberspace when a person gets unauthorised access to data contained in computer, computer system or computer networks the consequences can be diverse and devastating. The most obvious risks are that an individual or organisation will become a victim of identity and data theft and will suffer ruinous loss to credit and reputation. In order to ensure data and database protection the *Information Technology Act, 2000* makes a person criminally liable if the act is unauthorised, that is, done without actual, implied or apparent authority and is done fraudulently or dishonestly. The prohibited acts are unauthorised access, data diddling, introducing virus or computer contaminant in computer systems, denial of service attacks etc (Section 43 of the *Information Technology Act, 2000*). In such cases the person shall be held liable and punished with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both (Section 66 of the *Information Technology Act, 2000*).

If any person has secured access to any electronic record, book, register,

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correspondence, information, document or any other material without the consent of the person concerned and discloses the same to any other person without consent, then such person shall be liable for breach of confidentiality and privacy. The punishment for such breach is imprisonment which may extend to two years or fine which may extend to one lakh rupees or both (Section 72 of the *Information Technology Act, 2000*).

If any person whether it is a government entity or not discloses any personal information which is has obtained while providing services under a lawful contract, with the intention to cause or knowing that he is likely to cause wrongful gain or wrongful loss, then such person shall become liable for unauthorised disclosure. Such person is liable for punishment with imprisonment up to three years or with fine which may extend to five lakh rupees or both (Section 72A of the *Information Technology Act, 2000*).

Another kind of computer crime is identity theft. Identity theft means stealing someone else's identity. It is the recognition of the growing concept of online personality and the damage which can be caused by an imposter. If any person dishonestly or fraudulently makes use of electronic signature, password or any other unique identification feature of another person, then he shall be liable for identity theft and shall be punishable with imprisonment for a term which may

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extend to three years and shall also be liable to fine which may extend to rupees one lakh (Section 66 C of the *Information Technology Act, 2000*).

Cheating by personation is commonly known as 'phishing'. In this, the phishers attempt to fraudulently acquire the sensitive information like passwords, financial details of bank accounts and credit cards etc. by masquerading as a trustworthy entity in an electronic communication. They then use this sensitive information for financial gains. Phishing is one of the most dangerous frauds that cause tremendous loss to the online commerce. A person becomes liable for cheating by personation if he by means of a computer device or computer resource cheats another by personation and can be made liable for punishment with imprisonment which may extend to three years and fine which may extend to one lakh rupees (Section 66 D of the *Information Technology Act, 2000*).

The *Information Technology Act, 2000* gives legal recognition to electronic signature by providing that where law provides that the information, matter or document shall be signed by the person then such requirement shall be deemed to be satisfied if the information or matter is authenticated by means of electronic signature (Section 5 of the *Information Technology Act, 2000*). If a person knowingly creates, publishes or otherwise makes available an electronic signature for any fraudulent or unlawful purpose, then such person shall be liable for

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punishment with a term of imprisonment which may extend to two years or with fine which may extend to one lakh rupees or both (Section 74 of the *Information Technology Act, 2000*).

Where the above mentioned offences under the *Information Technology Act, 2000* are committed by a company, then every person who was at the time the contravention was made was in charge of or was responsible for the conduct of the company shall be liable and punished accordingly. However, if the person proves that contravention took place without his knowledge or even after exercising due diligence, then he shall not be liable (Section 85 (1) of the *Information Technology Act, 2000*). Where the offence has taken place with the connivance or consent of a director, manager, secretary or any other officer of the company, then such person shall also be liable and shall be punished accordingly (Section 85 (2) of the *Information Technology Act, 2000*).

**CHAPTER 3: INVESTIGATION AND PROSECUTION PROCEDURES**  
**AND AGENCIES**

**3.1 Introduction**

The criminal justice system of the country provides for criminality in white collar crimes. The mere existence of such laws has a symbolic impact on the society. Though criminal sanctions have been imposed for violation of white collar crimes but the strategy has not worked as a deterrent or a tool for achieving compliance. Both the substance and the image of law enforcement will be lost if criminal and antisocial activity is not recognized, prevented, and prosecuted. If the society is protected from traditional crimes then people get freedom to heighten their level of social and economic interaction thus enhancing their quality of life and if the society is free from white collar crimes then it adds reliability to this quality.

The main step involved in effective enforcement of white collar crime is investigation and prosecution. The investigation of white collar crimes is far more complex than most other traditional offenses. The events in issue usually have occurred at a far more remote time and over a far more extensive period. The crime is not only dynamic but is also multifaceted. A number of events are interwoven and needs to be proved in the court. An investigator has to go through volumes to find the one nugget he needs to prove his case.

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After the investigation is completed by the concerned investigating agency the next important step is the prosecution. Prosecution is the backbone of a successful criminal justice system. It plays a balancing act between the apprehension of criminals by the investigation agencies and the finding of guilt as well as award of punishment by the judiciary. The investigation of a case may be good but it will be rendered fruitless if the prosecution machinery of the state does not work efficiently.

The researcher in this chapter has studied the various agencies that are responsible for the investigation and prosecution of white collar crimes and the procedure of investigation and prosecution.

### **3.2 Investigation and Prosecution of Offences committed under Indian Penal Code, 1860**

The main agency which is responsible for investigation of offences in India is Police. The *Code of Criminal Procedure*, 1973 which is the bedrock of the Indian criminal justice system envisages police as the investigation agency. Under the Code, Police has the jurisdiction to investigate all offences. The Code provides for the procedure and steps involved in the investigation of crimes. However, if under any special statute there are provisions pertaining to the procedure then the provisions of special law will have overriding effect over the provisions of the

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Code.

### *3.2.1 Police*

Police in India primarily belong to the state list of the Constitution and therefore matter related to it falls into the jurisdiction of the respective state governments. The police force has been organised not at the national level but at the state level. Each state has a *Police Act*. The police forces of that state is organised and governed by the rules and regulations in accordance with the provisions of the concerned *Police Act*. These rules and regulations are outlined in the *Police Manuals* of the state police forces. Despite the diversity of police forces, there is a good deal that is common amongst them. This is because the structure and working of the state police forces are governed by the *Police Act* of 1861 which is still the basic instrument governing the functioning of the Indian police. The State Police Acts are modelled mostly on the 1861 legislation. Secondly major criminal laws like the *Indian Penal Code*, 1860 the *Code of Criminal Procedure*, 1973 and the *Indian Evidence Act*, 1872 are uniformly applicable to almost all parts of the country.

The state police force is headed by the Director General of Police, who is responsible for the overall police administration of that state. He is at the top of the pyramidal hierarchy consisting of the Deputy Inspector General, the Assistant

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Inspector General and Superintendents of police. States are divided territorially into administrative units known as districts. An officer of the rank of Superintendent of Police heads the district police force. A group of districts form a range, which is looked after by an officer of the rank of Deputy Inspector General of Police. Some states have zones comprising two or more ranges, under the charge of an officer of the rank of an Inspector General of Police. Every district is divided into sub-divisions. A sub-division is under the charge of an officer of the rank of Assistant Superintendent of Police/Deputy Superintendent of Police. Every sub-division is further divided into a number of police stations, depending on its area, population and volume of crime. The police station is the basic unit of police administration in a district. The officer in charge of a police station is an Inspector of Police. Under the *Criminal Procedure Code*, 1973 all crime has to be recorded at the police station.

### *3.2.2 Economic Offences Wing*

The Economic Offences Wing was established in 1993 in the wake of serious frauds and Economic Offences taking place in the city. The Economic Offences Wing is headed by an officer of the rank of DCP and is supervised by Additional Commissioner, Crime Branch and Joint Commissioner, Crime Branch of Mumbai Police Commissionerate; Three ACPs assist DCP Economic Offences Wing

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(EOW), in the discharge of supervision and conduct of investigations. In all five units carry out task of investigations in EOW of Crime Branch, Mumbai Police.

These units are as follows:

i) Unit -1 : Banking, Education & Medical

ii) Unit – 2: Housing.

iii) Unit -3 : General

iv) Unit - 4: Job Racketeering.

v) Unit - 5: Shares.

Following is the brief description of cases handled by each unit of the Economic Offences Wing:

i) Unit - I Banking, Educational and Medical

This unit handles cases of fraud in the field of Banking, Education and Medical Practices. These cases involve fraud by bank directors, employees, cheating of the bank by borrowers, cheating by educational institutions, fraud in University Examinations and Results and cases against doctors practicing on bogus or fake certificates etc.

ii) Unit-II Housing.

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This unit deals with cases of housing frauds. These cases involve bogus housing societies, planning TDR (Transferable Development Rights) or FSI (Flooring Space Index) Scams and other such frauds.

iii) Unit - III General Cases

This unit deals with all crimes of general nature. These involve cases of cheating, fraud and Criminal Breach of Trust not specifically covered by other units. This unit also investigates cases under Maharashtra Protection of Investors and Depositors Act 1999.

iv) Unit - IV Job Racketeering.

This unit deals with crimes involving recruitment agencies cheating unemployed or job seeking persons.

v) Unit-V Shares.

This unit investigates crimes related to securities, bogus shares, shares stolen in transit and other crimes committed by Share Brokers.

A Senior Police Inspector heads each of these units and each unit consists of officers and staff in ranks of Inspector, API, PSI, ASI, HC, NPC and PC. Officers of rank of PSI and above carry out investigations in Economic Offences Wing.

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*3.2.2.1 Functioning of Economic Offences Wing. Crime Branch, Mumbai Police.*

As per the directions of the Commissioner of Police, cases involving fraud, cheating, criminal breach of trust of Rs. 6 Crores and above are taken up for investigation in this specialized wing of the Mumbai Police.

After a complaint is initially received in the Economic Offences Wing and prima-facie it is seen that the amount involved is more than Rs. 6 Crores, the concerned officer to whom the complaint is marked, puts up an application to the superiors to obtain orders for conducting preliminary enquiry (PE). The Jt. C.P. (Crime) orders for registration of P. E. Further when the P.E. is completed and if at all an offense of criminal nature is disclosed, again the enquiry officer puts up the file to obtain permission for registration of a case. The Joint Commissioner of Police (Crime) grants permission for registration of a case. Once the case is registered, efforts are made to trace the accused. All important decisions such as Arrest and Charge-sheeting of the accused are taken with the approval of Jt. C.P. (Crime).

A Separate Station Diary is maintained in the Economic Offences Wing, which is in the custody of Duty Head Constable. All important events or developments are recorded therein by concerned officers. The Addl. C.P. (Crime) monitors pending investigation cases on a weekly basis.

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Procedures with respect to Rewards, Punishments and ACR writing in Economic Offences Wing, Crime Branch are on the lines of procedures followed in Zonal Police in Mumbai.

Although the Police Officers working in the Economic Offences Wing are summoned for Law and Order duties, their working hours are less demanding and distractions from investigations are much less as compared to Zonal Police. Supervision of Investigating Officers' work is more exacting in Economic Offences Wing.

This wing is entrusted with the responsibility of investigation of serious economic offences and offences having inter-state ramifications. The wing also interacts, assists and guides district police in cases of financial crimes. In order to investigate various forms of white collar crime the economic offences wing typically consist of different sections like Anti-Fraud and Cheating section to deal with frauds relating to banking sector, financial institutions and companies; Anti Forgery section to deal with frauds relating to forgery of documents; Anti Criminal Breach of Trust section for dealing with multi-level marketing frauds, share trade frauds, corporate frauds, criminal breach of trust cases; Anti Cyber Crime section to deal with cybercrimes etc. There are other departments also like Criminal Investigation Department and the Special Branch. These departments investigate important and

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difficult cases and provide supervision over the crime control efforts.

### 3.2.3 Central Bureau of Investigation

Another agency which plays prominent role in investigation of white collar crimes is the Central Bureau of Investigation (CBI). CBI is a central investigative agency established by the central government. The agency was initially set up through an executive order in 1941 in order to curb the corrupt practices which had sprung up as a result of World War II. But the need of a central agency led to the passage of *Delhi Special Police Establishment Act, 1946* through which the present agency derives its powers and functions. This Special Police Establishment which was initially set up to investigate corruption offences only but later on many offences under *Indian Penal Code, 1860* was brought in its purview.

The CBI can investigate all those offences or classes of offences which are notified by the Central Government under Section 3 of the *Delhi Special Police Establishment Act, 1946*. A list of such offences is issued by the Directorate of Prosecution division of CBI. As on date, offences under existing 74 Central Acts, 19 State Acts and 243 offences under the *Indian Penal Code, 1860* have been notified by the central government. The CBI can investigate these offences in union territories only. However, the central government has the power to extend the jurisdiction to other areas as well as states, subject to the consent of state

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government. In addition to it, the Supreme Court as well as the high courts by virtue of powers vested in them under Article 32 and 226 of the *Constitution of India*, 1950 can order CBI to conduct investigation in a case. However these powers of courts are extraordinary powers and are to be exercised sparingly, cautiously and in exceptional situations where it becomes necessary for doing complete justice.

The powers of CBI are concurrent and coextensive with the powers of state police. In order to avoid duplication and keeping in view the limited resources of the agency an administrative arrangement has been arrived at by CBI with the state police forces. In corruption cases, if substantially and essentially the employees of central government are involved then the case is to be investigated by CBI, otherwise by state anti-corruption bureau. In addition to it CBI investigate cases relating to the breaches of central laws with the enforcement of which the government of India is mainly concerned and the cases which have interstate ramifications; big cases of fraud, cheating, embezzlement and the like, relating to public joint stock companies in which large funds are involved; cases having interstate and international ramifications and being investigated by several agencies and where it is considered necessary that a single investigating agency should be in charge of the investigation and cases in which the interests of the central government or of any statutory corporation or body set up and financed by government of India are

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involved particularly those in which public servants are concerned or very large amounts are involved. Although, a general agreement exists, but there is discretion and the matters notified under section 3 can be investigated by CBI or police.

The CBI is headed by a Director who is of the rank of Inspector General of Police. He is responsible for the overall administration of the organisation. The superintendence of CBI vests with the Central Government except in investigations of offences under the *Prevention of Corruption Act, 1988* in which the superintendence vests with the Central Vigilance Commission (CVC). The agency is divided into divisions and each division takes care of a particular work. The cases of corruption and fraud committed by public servants of central government are investigated by Anti-Corruption division of CBI. Large scale economic crimes like bank frauds, financial frauds, import export and foreign exchange violations, smuggling of contraband items are investigated by the Economic Offences Division of the agency. The anti-corruption division is organised into zones, regions and branches. The major field work is done by branches which are headed by Superintendents of Police. The Economic Offences Division is organised into four zones namely EOW-I, EOW-II, EOW-III and EOW-IV. Each zone is headed by a joint director under the overall superintendence of director, CBI. Over the years the CBI has evolved from an anti-corruption agency to a multifaceted, multi-disciplinary central police law enforcement agency with the legal mandate to

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investigate and prosecute offences anywhere in India.

### *3.2.3 Procedure of Investigation*

The procedure of investigation together with the powers available with the police during investigation is enumerated under the *Code of Criminal Procedure, 1973*. The investigation of a cognizable offence is initiated by the registration of a case under Section 154 of the Code. However, in cases of non-cognizable offences, complaint is filed with the magistrate. If the magistrate is of the opinion that investigation is necessary, then he can order investigation and then the procedure is same in both cases.

Investigation is the art of unearthing the truth for the purpose of successful detection and prosecution. The main object is collection of evidence. This is done through recording the statement of witnesses and accused by the investigating officer. Any person acquainted with the facts and circumstances of the case can be summoned by the investigating officer and examined orally. However, such statements do not have much evidentiary value as they cannot be used as such by the prosecution to prove the case. The accused can use such statements but the prosecution can use it only with the permission of the court and that only for the purpose of contradicting the witness in accordance with Section 145 of the *Indian Evidence Act, 1872*. In other words such statement cannot be used as a previous

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statement for the purpose of corroborating the maker.

The investigating officer is also given the power to arrest an accused. Arrest means apprehension of a person by legal authority resulting in deprivation of his liberty. It gives the investigation agency an opportunity to examine the accused. Arrest can be made with or without warrant depending on whether the case is cognizable or non-cognizable. Arrest denies a person of his liberty and therefore this power should be exercised only in those cases where there is credible information and suspicion as to the involvement of the accused in the crime. The legislature as well as the courts have provided for a number of rights to the arrested person. It has been specifically laid down that the arrest should be made strictly in accordance with the legislative provisions. After the person is arrested he may be kept in custody for investigation for 24 hours. However, if it appears that the investigation cannot be completed in 24 hours, then the person has to be produced before the magistrate and further detention is possible only on the order of magistrate. The magistrate is empowered to send the person either in police custody or in judicial custody. In police custody further investigation is carried out by the police where as in judicial custody, the person is detained with the prison authorities and he cannot be interrogated by police without the permission of the magistrate. However, a person who has been arrested has a right to bail in bailable offences. In non- bailable offences the judge has the discretion to grant him bail or not.

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If any particular document or thing is necessary or desirable for the purpose of investigation then the investigating officer may issue a written order to the person in whose possession or power such document or thing is believed to be for its production. A court can also issue summons for production of such document or thing. If the person who is issued an order for the production of documents and other material objects which are relevant for the investigation or trial does not cooperate or the thing is in the possession of unknown person, then the police have the power to conduct search. Search may be conducted with warrant or without warrant. A search involves invasion into the sanctity and privacy of a citizen's home (*Kalinga Tubes Ltd. v. D. Suri*, AIR 1953 Ori 153). Therefore, the legislature has prescribed some conditions and formalities which are to be observed while conducting search (Sections 47 and 100 of the *Code of Criminal Procedure*, 1973). In addition to it, instructions are issued by various departments from time to time and although these instructions do not have the force of law but they are intended to guide the officers and to see that a fair procedure is adopted in investigation (*Khet Singh v. Union of India*, (2002) 4 SCC 480).<sup>[1]</sup> The non-compliance with the formalities of search procedure do not vitiate the trial but does give the defence a strong argument against the credibility of search evidence (*Emperor v. Mehmood Ali Khan*, 34 Cri LJ 641). Whenever a police officer lawfully makes search and recovers incriminating things then, he has the power to seize all those things. The

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police also have the power to seize any property which may create suspicion of commission of any offence. Thus, the pre- requisites are that it must be 'property' and secondly, in respect of the said property there must have suspicion of commission of an 'offence'. The bank accounts are also properties within the meaning of this section and can be seized (*State of Maharashtra v. Tapas Neogy*, 1999 Cri LJ 4305).

Every investigation must be completed as soon as possible. Once that is completed, the investigating officer has to form his opinion as to commission of offence and has to submit a charger sheet to the court for further action by the court (Section 173 of the *Code of Criminal Procedure*, 1973).

With the development in science and technology the crime has become global from local. In cases where the accused persons have escaped from the country after committing the crime or part of the crime has been committed abroad or the witnesses and other material evidence are available in a foreign country, it may be necessary to conduct investigation abroad. International white collar crime creates specific problems that are not encountered domestically in that legal, linguistic and cultural barriers all combine to present potential barriers to effective investigation. Co-operation between the agencies from different countries is absolutely vital and this can be effective whether it is formal or informal. The provisions for carrying

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out investigation in the country or place outside India, and also to provide similar assistance to the court or authority outside India for carrying out investigation in India were introduced in the *Code of Criminal Procedure, 1973* through an amendment in the year 1990 (Sections 166-A and 166- B of the *Code of Criminal Procedure, 1973*). The sections provide for issuance of letters rogatory for obtaining or extending similar assistance to the other countries. There are two ways for conducting investigation abroad. One is the informal method where information/material may be collected through Interpol and diplomatic channels. The evidence collected through this means cannot be used as evidence in court of law. The second is the formal method. Here the evidence can be collected or the material objects/ documents may be gathered through formal 'Letter of Request' (*Letters Rogatory*) sent through a competent court under provisions of 166-A of the *Criminal Procedure Code, 1973*. All the letters of request are sent through the Interpol wing of CBI.

It is to be noted that there is no time period for completion of investigation. Moreover, the statements that have been recorded by the investigating officer during the course of examination are not taken as evidence by the court for corroborating the witness. This has led to the problem of witnesses turning hostile.

The investigations in white collar crime are slow as the crime is not evident on the face of it and is concealed in the fabric of a complex commercial transaction which

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appears a normal business transaction unless revealed.

### *3.2.4 Agency for Prosecution*

In the entire criminal justice system, as framed under the Code and other ancillary enactments, the Public Prosecutor is assigned a pivotal role. In a way, it can be said that he is conferred the status of the master of the prosecution. Efficient working of prosecutors is necessary for the success of criminal justice system.

Public Prosecutor means any person appointed under Section 24 of the *Code of Criminal Procedure*, 1973 and includes any person acting under the direction of a public prosecutor (Section 2(u) of the *Code of Criminal Procedure*, 1973). Every case which has been instituted on the police report, the prosecution is carried by the public prosecutor appointed by the state. Generally, in complaint cases the complainant fights the case himself or by his duly authorised counsel. In cases where the trial is conducted before the court of sessions, the case is to be presented by public prosecutor only (Section 225 of the *Code of Criminal Procedure*, 1973). Public Prosecutor is not a part of the investigating agency but is an independent statutory authority (*Hitendra Vishnu Thakur v. State of Maharashtra*, AIR 1994 SC 2623). His duty is to assist the court in reaching a proper conclusion in regard to the case which is brought before it for trial. The *Code of Criminal Procedure*, 1973 provides the basic framework for the hierarchy of public prosecutors in India.

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In order to effectively carry out prosecution, every state has a Directorate of Prosecution (Section 25 A of the *Code of Criminal Procedure*, 1973). The Directorate is headed by the Director of Prosecution. The director functions under the administrative control of head of the Home Department of State. In addition to the Director, Deputy Directors are also appointed in every Directorate. These Deputy Directors are subordinate to the Director of Prosecution (Section 25 A (4) of the *Code of Criminal Procedure*, 1973). The Director of Prosecution is the Director of Prosecutors rather than a Director of Prosecutions as he is the administrative head of all the prosecutors appointed in the state by the state government in order to conduct prosecution.

The prosecution in high courts is conducted by public prosecutors and additional public prosecutors who are appointed by the central government as well as state government. In order to carry out prosecution in district courts, public prosecutors and additional public prosecutors are appointed by the state government. In the magistrate's court, the prosecution is carried by the assistant public prosecutor who is appointed by the state government (Section 25 of the *Code of Criminal Procedure*, 1973). They are all subordinate to the Director of Prosecution. The public prosecutor or the assistant public prosecutor can appear and plead without any written authority before any court (Section 301(1) of the *Code of Criminal Procedure*, 1973). If any private person instructs any pleader to prosecute any

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person, then such pleader shall act under the directions of the public prosecutor or assistant public prosecutor and may with the permission of court submit written arguments (Section 301(2) of the *Code of Criminal Procedure, 1973*). If the prosecution is conducted by a private counsel or by the complainant himself then he is not under the direction of public prosecutor.

However, even in the cases instituted on a private complaint the public prosecutor and assistant public prosecutor can intervene and assume charge of the case. In such cases the pleader appearing on the behalf of the prosecution shall have to act under the directions of public prosecutor.

There are instances where a case or class of cases are of such a nature that the prosecution cannot be conducted by the public prosecutors already appointed and there is need of more expertise and special handling by a special person. In such cases, the Code envisages the appointment of 'Special Public Prosecutor' by the central or the state government. The Code does not specify any conditions or circumstances for the appointment of the Special Public Prosecutor. Thus, guidelines for appointing Special Public Prosecutor have to be gathered from court decisions. The court in the case of *P.G. Narayana Kutty v. State of Kerala* held that a Special Public Prosecutor should be appointed where need is there in the public interest and not otherwise.

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Most of the white collar crimes are regulatory in nature. The prosecution is instituted on the basis of complaint. In such cases the complainant of the concerned regulatory authority is appointed to look after the prosecution of regulatory offences in criminal courts on behalf of their respective departments. E.g. in case of income tax violations, the Income Tax Officer who has conducted surveys, received complaints and investigated legal violations conducts the case like a Public Prosecutor. They can be termed as “assigned prosecutors”. These officers are neither under the control of Directorate of Prosecution nor accountable to them. These officers generally neither hold a degree in law nor do they have any knowledge of principles of admissibility of evidence. They are not acquainted with the technicalities involved in the process of courts and lack knowledge of the principles of the *Code of Criminal Procedure, 1973*.

It is to be noted that the public prosecutors are appointed for conducting prosecution in a court without any reference to the nature of case except where special public prosecutors are appointed. The white collar offenders get the best of talent in the profession to assist them whereas the public prosecutors do not match their skill and expertise. Thus, there is a total mismatch. The Supreme Court of India in *K.I. Pavunny v. Asst. Collector (HQ), Central Excise Collectorate, (1997)* 3 SCC 721 expressed their deep concern and anguish over the inability of prosecuting lawyers said that sensitive cases which have far reaching effect on the

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economy should be assigned only to those counsel who have experience and ability in that branch of law to defend their cases so that justice might not suffer and the economy of the country is not put in jeopardy.

In case of investigation by CBI, the prosecution is conducted by the Directorate of Prosecution of CBI. This separate directorate was set up in CBI in 2001 on the basis of recommendations of a report submitted by independent review committee in the case of *Vineet Narain v. Union of India*. The main function of the Directorate is to give legal advice and to conduct prosecution of CBI cases in courts. The Directorate is headed by a Director who is selected and appointed by the Government of India. He is the chief functionary of the prosecution wing of the CBI and is vested with the powers of direction and control over the prosecuting officers. The Director is assisted by Additional Legal Advisors, Deputy Legal Advisors, Senior Public Prosecutors, Public Prosecutor and Assistant Public Prosecutors posted in the Head Office/High Courts and Zones/Regions and Branches/Units. The monitoring of work is done through Deputy Legal Advisors and Senior Public Prosecutors at the zonal level. The cases are conducted in the courts by the CBI prosecutors. In order to conduct cases in High Courts competent lawyers are engaged as Retainer Counsels with the approval of Directorate of Personnel and Training.

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**DISCLAIMER:**

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