GOVERNMENT SHOULD SHERIFF PRIVATE SECTOR ROBIN HOODS

Synonymous with the issue of fraud and corruption in this country is the misconceived and misplaced notion, that the issue of fraud and corruption concerns and/or pertains to only the public sector of the country. The pertinent question that arises, is as to whether this is fair and reasonable, particularly given the scenario, where the economy is being transformed to a private sector economy, with large state sector enterprises also being privatised as an ongoing exercise ?

Even the new legislation introduced in October 1994, to establish the permanent Commission to investigate allegations of bribery or corruption and the amendments introduced to the Bribery Act, also at the same time in October 1994, inter-alia, to define the offence of "corruption", pertains only to public sector institutions and/or agencies and is applicable to only public servants, defined to include cabinet ministers, members of parliament, provincial councils, local authorities and officials of the state, provincial councils, local authorities, public sector institutions and/or agencies and companies where the government owns over 50% of the shares.

The Special Presidential Commissions Act No. 7 of 1978, inter-alia, to deal with fraud and corruption, also pertains to public bodies, defined to include ministries, government departments, state corporations and companies owned mainly by the government and co-operative societies and is also applicable only to public officers, defined to include ministers, state officials and officials of public bodies so defined.

CORRUPTION IN THE PRIVATE SECTOR ?

Internal and External Commerce and Food Minister Kingsley Wickramaratne — no necessity to deal with commercial crime?

In contemporary times, where large scale public resources and the management of such large scale public resources are being transformed into the hands of the private sector, through the process of privatisation and also where large scale resources of capital from the general public are being mobilised to be invested and managed by the private sector, would not such focus on fraud and corruption, essentially only on the state or public sector, not only be patently unfair, but also grossly wrong, erroneous and misplaced ? Could it be realistically postulated and/or entertained, that fraud and corrupt practices permeate only in the public or state sector ? The answer to this would be a simple and emphatic no.

Ought not a government responsible for transforming and privatising the economy to be in the hands of the private sector, also be onerously responsible to ensure, that the private sector operates within norms of propriety, devoid of fraud and corrupt practices ? Is it not the responsibility and onus of the government to ensure, that appropriate and effective statutes and regulatory framework are in place, with competent law enforcement authorities, manned by professional and expertised personnel, to effectively function and deal with fraud and corruption, generally referred to as "white-collar crime" in the private sector, to safeguard the interests of the public, whose capital resources mobilised are at stake ? Have not other privatised and developed economies recognised the need to deal with "white-collar crime" and established requisite and effective infrastructural safeguards to deal with the same?

On the contrary, what statutes and regulatory framework are there in place in this country, to deal with fraud and corruption/white-collar crime in the private sector ? What is the corporate and commercial crime investigation capability in this country, where the economy is being aggressively privatised and large scale public resources of the country placed in the fiduciary custody of and under the management of the private sector, particularly under the fiduciary control and responsibility of Boards of Directors of companies ? The cogent matters in question are not petty thefts and misappropriations by clerical minions or by staff at lower managerial levels, but corporate commercial frauds and crimes perpetrated by the upper echelons of management of the corporate world, including by the Directors, misappropriating and/or expropriating public resources and/or shareholder funds of the investing public.

REGISTRAR OF COMPANIES & THE SEC

No doubt there are certain provisions in the Companies Act to be enforced by the Registrar of Companies. Nevertheless, what institutional investigation strength and capability is the Registrar of Companies geared with, to deal with corporate and commercial crimes by large corporate organisations and conglomerates ? The provisions in the Companies Act to protect the oppression of the minority and to deal with the mismanagement by the majority are mere civil procedure in Courts of law. It is not every shareholder, who would be willing and/or able to go through such tedious and costly legal process. On the contrary, the issue in focus is of a far more graver nature of fraud and crime by the upper echelons of corporate management, which no shareholder would be ordinarily capable of investigating, least of all, even be able to access any informations and/or documentations pertaining thereto. The Registrar of Companies is also an ex-officio member of the Securities & Exchange Commission of Sri Lanka [SEC] as per the provisions of the SEC Act.

The SEC was established in 1987 primarily to protect the interests of the investing public. The SEC Act No. 36 of 1987 was further amended by Act No. 26 of 1991, whereby, inter-alia, the SEC was vested with power to investigate and inquire into complaints made by shareholders of listed public companies relating to the professional conduct or activities of listed public companies. The statute empowered the SEC to carry out investigations summoning officials of listed public companies and requiring the production of all relevant documentations for investigation and examination, obstruction of and/or non-compliance with which carried penal consequences. The SEC was also vested with power to institute prosecutions in criminal Courts of law, with consequences of imprisonment and/or imposition of penalties for those found guilty of offences under the SEC Act.

Here again, what is the corporate and commercial crime investigation strength and capability institutionally developed by the SEC ? How many instances of complaints by shareholders of listed public companies, pertaining to the professional conduct or activities of listed public companies have the SEC investigated, inquired into and prosecuted ? On the contrary, how many instances of complaints by shareholders of listed public companies, pertaining to the professional conduct of listed public companies, the SEC has failed and neglected to investigate and inquire into ? If so, why ? To what extent has the SEC developed institutional strength and capability to carry out investigations and inquires into complaints made by shareholders of listed public companies pertaining to corporate crime and fraud in listed public companies as has been envisaged under the SEC Act ? Were not the amendments effected by Act No. 26 of 1991 to the SEC Act, to, inter-alia, empower the SEC to investigate and deal with complaints pertaining to the professional conduct and activities of listed public companies ? If not, for what purpose were such amendments effected at all?

The SEC also essentially comprises of political appointees and public sector officials and functions under the purview of the Ministry of Finance & Planning. In this transitional era of privatisation, where listed public companies are owned in the majority by the government, could the SEC in such circumstances independently and fearlessly deal with corporate fraud and crimes perpetrated in such government owned and/or controlled companies, moreso where such government owned and/or controlled companies are also invariably managed by political appointees, with considerable political influence and clout ? In such circumstances, have the members of the SEC been able to independently, autonomously and fearlessly act, as their counterparts do in the privatised and developed economies ? On the contrary, has there not been public criticism and allegation that the SEC has been coerced by socio-political influences, preventing effective enforcement of the law, irrespective of the socio-political standing of the personalities concerned ?

COMMERCIAL CRIME INVESTIGATION

At the very same time, it must also be borne in mind, that listed public companies do not encompass the entirety of the private sector. Very large private sector operations are carried out by organisations that are not listed on the Colombo Stock Exchange and accordingly, thus would not come under the purview of the SEC and the statutory provisions of SEC Act. Crimes such as house burglary and theft are dealt with by the law enforcement authorities resulting in criminal prosecutions. Whereas, what are the institutional and infrastructural effective safeguards and arrangements to deal with corporate crime and fraud ?

Would the Criminal Investigation Department and/or the Frauds Bureau be adequately institutionally geared to deal with the complexities and the sophistication of corporate and commercial crime and fraud by large corporate organisations and conglomerates ? in instances where such white collar crime is perpetrated, invariably by the upper echelons of the corporate organisations, who would come forward to make any complaints and who would be knowledgeable to do so ? Do not privatised and developed economies have safeguards in such regard, where law enforcement authorities are permitted to entertain and even act on complaints made anonymously?

Without any further delay, ought not adequate statutory and regulatory framework be put in place and capable and competent expertised law enforcement authorities established and developed to function effectively, to deal with corporate commercial crime and fraud, particularly in the given environment of a privatised economy ? Are not such laws and regulatory frameworks in place and effectively functioning in privatised and developed economies, where multi-disciplinary expertised law enforcement authorities take action, without fear or favour, devoid of socio-political influence peddling and pressures ?

The ground realities of the upper echelons of the private corporate world, being financially powerful and these socio-politically influential, necessarily is a factor that has to be reckoned in establishing capable, competent and independent multi-disciplinary law enforcement authorities to be manned by personnel, who would not succumb and/or be subservient to socio-political influences and pressures. Thomas Fuller had once opined – "A thief passes for a gentleman when stealing has made him rich" Is this not a truism and even moreso inimical to society, where such ill-gotten riches have financed the elections of politicians into political office and power, with consequent political patronage, to influence, stymie and frustrate any endeavours by the law enforcement authorities to enforce the law to deal with such miscreant persons ?

ROLE OF AUDITORS

No doubt there are external auditors, professional firms of chartered accountants, who are required to carry out audits in the private corporate world. The auditors are prima-facie and/or for all intended purpose appointed by the shareholders to be their "watchdog". Nevertheless, the controlling shareholders of the corporate organisation invariably managing corporate organisations, the true independence of the auditors and their autonomous election has also surfaced as a contemporary issue, moreso particularly in circumstances of auditors rendering other professional services to corporate management and/or organisations for lucrative fees. Could the auditors be ever elected without the support of the controlling and managing shareholders of corporate organisations ?

The rotation of auditors is also a contemporary concept that is being entertained in certain circles. Audits are required to be carried out in conformity with express provisions in the law and in conformity with established accounting and auditing norms and standards. The international exposures of instances of corporate commercial crime and fraud and the developed case law pertaining to corporate fraud and crime amply demonstrate, that audits are no insurance against corporate commercial crime and fraud, whilst in several instances auditors themselves having been prosecuted in Courts of law. Audits would only be one of the precautions in the endeavour to prevent and/or detect corporate commercial crime and fraud.

Even the public sector organisations are subject to audit by the Auditor General, who in a number of instances enlists the services of private sector professional audit firms to assist in auditing public and state sector organisations. Notwithstanding such audit function to prevent and/or detect fraud and corruption in the public and state sector organisations, yet for all, there has been the enactment of the legislation referred to above, to deal with fraud and corruption in the public and state sector, through Special Presidential Commissions and the permanent Commission to investigate allegations of bribery or corruption. Under what circumstances could the private sector ever be an exception to this ? Would not such legislature underscore the paramount need and necessity to develop laws and regulatory framework and to establish law

enforcement authorities with institutional capability to deal with fraud and corrupt practices in the corporate world of the private sector, as is prevalent in privatised developed economies in the civilised world ? If not, why ?

FINANCE COMPANY FIASCO

Almost at the very time that amendments were effected in July 1991 to the SEC Act empowering the SEC to deal with complaints from shareholders of listed public companies relating to the professional conduct or activities of listed public companies, in October 1991, the Monetary Board of the Central Bank of Sri Lanka published prominent notices in the press under the caption – "Notice on Audited Statements of Accounts of Finance Companies". The press notification went on to state – "This is to inform the registered finance companies and their auditors, that the Monetary Board of the Central Bank of Sri Lanka will prosecute the auditors, who fail to comply with the provisions of the Finance Companies Act No. 78 of 1988 as amended by Act No. 23 of 1991".

Section 17 of the Finance Companies Act No. 78 of 1988 stipulated the scope and responsibilities of auditors of Finance Companies in carrying out their inspections and examinations of the accounts of Finance Companies. Section 17 went on to stipulate – "Any auditor who fails to comply with the requirements of the above Section commits an offence under Section 35 of the Finance Companies Act No. 78 of 1988 as amended by Act No. 23 of 1991."

A Deputy Governor of Central Bank is also nominated by the Governor of the Central Bank to be a member of the SEC, as statutorily provided for in the SEC Act. The SEC rules and regulations also stipulate and require that the auditors of listed public companies shall certify that the accounts of listed public companies are presented in accordance with accountancy standards laid down by the Institute of Chartered Accountants. The President of the Institute of Chartered Accountants is also an ex-officio member of the SEC as per the provisions of the SEC Act. Notwithstanding such statutory and regulatory promulgations, in how many instances has the Central Bank and/or the SEC faulted and/or prosecuted any auditor ? Why have such statutory and regulatory provisions at all ?

The above press notification published by the Monetary Board of the Central Bank of Sri Lanka was in the background of the catastrophic crash of several finance companies at that time, including some well known and leading finance companies. The public depositors of these finance companies lost their valuable savings and some are still languishing in anguish. In the cases of some of these finance companies the proprietary corporate management had to sell their private assets and repay public depositors. In the case of several other finance companies the Directors have been prosecuted in criminal Courts of law.

The Central Bank also advanced under the provisions of the Finance Companies Act No. 78 of 1988 large trenches of public funds from the Medium and Long Term Credit Fund established under the Monetary Law Act, to some of these finance companies to repay public depositors on the condition of recovering such advances from these finance companies and/or the Directors of these finance companies. Ought not the Central Bank in the public interest disclose the details of such advances made from public funds and recoveries made and as to whether, in all instances, prosecutions have been instituted in criminal Courts of law against the Directors of the

concerned finance companies, treating everyone to be equal before the law or as to whether, socio-political influences and/or any other reasons have stymied the law taking its legitimate course equally and equitably against everyone, irrespective of socio-political considerations ? If not, why ?

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