6.1 Introduction

The society in recent time is increasingly faced with various kinds of economic crimes that were unknown earlier in any given legal system. Nowday’s courts and prosecutors are often dealing with such phenomenon holding the corporations criminally liable as most economic activities take place through them. However there has always been a hesitation of criminal law to sanction corporations for their wrongdoing and it was only after the 2nd World War that criminal law recognised corporate criminal liability. Even then the European system has not been able to incorporate the concept in its criminal legal system. Nonetheless responsible social policy mandates that we deter those who victimise society through their dangerous acts and since corporations has been the villain; it needs to be stopped even if commentators question the use of criminal law.

The primary purpose of this research is to critically analyze corporate crimes and liability and the problems of attribution attached to it with relevant case studies. The corporation is the vehicle for the crime. This may be a short-term crime, i.e., the corporation is set up as a shell to open credit trading accounts with manufacturers and wholesalers, trades for a short period of time and then disappears with the revenue and without paying for the inventory.

There are a number of corporate crimes that have come into light. One of the major havoc that is created in present times is because of mysterious disappearance of corporations. Out of the 5,651 companies listed on Bombay stock exchange, 2750 have vanished. It means that one out of two companies that come to the stock exchange to raise crores of rupees from investors, loot
and run away. Even famous company like ‘Home Trade’ came up with huge publicity stunts but after raising money, vanished some wherer. About 11 million investors have invested ₹10,000 crore in these 2750 companies. We have Securities Exchange Board of India, Reserve Bank of India and Department of Companies Affairs to monitor the stock exchange transactions but none has documented the whereabouts about these 2750 odd companies suspended from the stock exchange. Many of the promoters and merchant bankers who are responsible for these are roaming scot-free. The market regulators and stock exchanges are unable to penalize them or recover their funds.

6.1.1 **Bhopal verdict has given burial to justice**

This verdict has created a menacing precedent with unsafe consequences for people in future. It is a conspiracy to protect and shield the guilty and cheat the victims of their dues — proper medical treatment, proper compensation and rehabilitation, and most of all justice for which they have fought so long, and the assurance that such crimes will be sternly dealt with in future. Rather, by reducing the crime of deliberately gassing the people of a city with poison gas - for what else can the actions by Union Carbide be called — to nothing more than negligence in a traffic accident. In the present situation, the government has suddenly shows sympathy for the Bhopal victims, but it is at the same time pushing for the Nuclear Liability Bill, which clearly exposes its hypocrisy. For, this bill, if passed, will ensure that US suppliers of nuclear reactors, even if they are responsible for any nuclear accidents on Indian soil, will get away scot-free or with a monetary meager amount. Surely the very real dangers this entails of opening up an even more calamitous scenario centering round the hazardous production of nuclear power, cannot be overstated. In this context the words of Prime Minister, Manmohan Singh to Sathyu Sarangi of the Bhopal Group for Information and Action in 2006 that “Bhopal will happen, but the country has to progress”\(^1\) are ominous, to say the least.

The Bhopal verdict that has let the perpetrators of the offense get away scot-free has deeply shocked people, who have reacted with indignation : how is this

\(^{1}\) Outlook, 21 June, 2010
possible! This cannot be allowed to happen! Anyone with even minimum human element, irrespective of political or non-political views or allegiance is feeling indignation. It shows that all is not lost. Its deep implications have not been lost on the government either. Suddenly after 26 years, what a record the GoM (Group of Ministers) has scored! So much sympathy it has for the victims that its recommendations were ready even before the deadline of 10 days! And with those recommendations what it aimed at is to cap people’s anger, to divert people’s attention and media attention to the issue of ‘compensation’ to be disbursed from public exchequer. But what it has done in the name of compensation is adding insult to injury. Recommending now a sum of ₹10 lakhs for death, ₹ 5 lakhs for permanently disabled and 3 lakhs for temporary disabled, after 26 years of inhuman suffering - unable to work, incapacitated, lives blighted — what value does such an amount have in the prevailing conditions? Had they received that amount of compensation immediately after the disaster it could have carried some meaning for the victims. But all they got was a beggarly so-called compensation of ₹ 60, 000 for death and ₹ 25,000 for disability, all in all, and even that after many years of wait, completely destitute, unable to work. And the greatest hoax of all is that 91 per cent of the gas victims are not even eligible for the renewed compensation! For the Union Home Minister, P Chidambaram, was categorical: new claims would not be entertained. So, that leaves out, to be exact, 521,000 victims, according to Abdul Jabbar, convenor of the Bhopal Gas Peedit Mahila Udyog Sangathan, including offspring of the victims, who have inherited serious health complications from their gas-affected parents, some of whom can’t even walk. Also left out are those whose injuries have now compounded due to progressive degeneration over time, and those who experienced complications after 1996, when registration of claims was stopped. Now they get a few ‘crumbs’ of relief accompanied by sweet words of sympathy, what humiliation for the victims! It is the kind of sympathy the government has for the victims.

When the Bhopal verdict has given burial to gas victim’s demand for justice, people are indignant that the Supreme Court could dispense such supreme
injustice by blatantly obstructing the course of justice. And that the government could act so cruelly and inhuman from beginning to end!

Corporations also commit a number of crimes against their own workforce. With increasing globalization workers find themselves being pushed against the wall and shrinking revenues for redressal. The debates and rage over corporate scams talks only of the interest of shareholders. Nowhere is there a mention of the employee who suffers the most. Take the case of public sector undertakings where many irregularities can be seen in. Factories were opened in some areas where the raw material was not available and where the location was correct, imported machinery was defective. Lavishness on the part of management was one of the factors, which led to these institutions becoming sick. No doubt that the labourers suffers the most in such cases. The difficulty of Mumbai’s textile workers is even worse. Legal dues have not been paid to 2 lakhs jobless mill workers. Trade unions are fighting with the reality of worker suicides and growing unemployment and the worker’s families are struggling to get over their misery, leave alone fight for dues from faceless management.

The government across the world have given a free hand to corporations to exploit the natural and community resources, while depriving the common people of their right on these resources. For instance, in India, Corporations at Eloor, Kodaikanal and Gujarat have not only destroyed the water and land resources in these areas, but also impoverished communities by degrading their livelihood resources and health. All these communities suffer from disasters similar to Bhopal. Inaccessible to clean and safe drinking water was found to be a major problem in all these areas. The companies either pollute the water resources to an extent where it is no more portable or over exploit it till the water table goes down or dry up the wells. A befitting example could be of Coco Cola bottling plant Kerala where the company extract excess amount of water from the ground due to which the water level has gone very enjoy and the near by villages are suffering from scarcity of water.
Juicy has been talked about the pollution created by corporations. A train ride from Mumbai to Ahmadabad would be sufficient to realize the seriousness of pollution the companies cause in this Golden corridor. It is important to that most of the damages caused to the environment is irreversible

### 6.1.2 Indian legal system needs to be overhauled to tackle corporate crime

Criminal Procedure code is only geared to look at individuals who commit petty or violent crimes. Forced Hon’ble Manmohan Singh and A Raja play the role of coalition partners. There is no credibility left in any institution to handle such crimes.

Getting back to 2G, as a telecom entrepreneur, “This is not a scam. It’s a crime. It sensed the murkiness way back. the ₹1.76 lakh crore telecom scam..Unless Indian consumers of news train themselves to pay for truth-telling, why politicians of different political parts have not restored the power of check and balance upon office of C& AG which was constituted under the scheme of the constitution of India to provide the restraint to the expenditure disproportionate from its own discretion by the relevant ministries was brought under the ministry of Finance and thereby giving the unbridle powers to the ministers and thereby overthrowing the constitutional mandate securing the safeguard over the whimsical expenditure., the diversification of the financial powers to be utilised by the sole discretion of the bureaucrats without taking into consideration the Audit objections, which could have been made under the original constitutional scheme, was directly resulting into the notion of conferring the absolute power to the respective ministry. This was against the democratic, federal and republic set-up of our Constitution. The aforesaid concept of the parliamentarian democracy, providing the fraternity to an individual in preamble of the constitution, was an attack on its basic structure.

In a season of bewildering corruption, Niira Radia and A Raja are just symptoms of a staggering new phenomenon in India — corporate crime at an enormous scale. Crimes such as the 2G spectrum scam, two times the size of India’s health budget, and the unfolding LIC scam shed no blood but bleed millions.
The Standing Committees are a part of the whole problem. They spend extraordinary amounts of time on issues like the land use of post offices and the quality of Bharat Sanchar Nigam Limited services but not on the fundamental question of oversight of the executive. Take the review of spectrum allocation for example. There is nothing in the system at present that can oversee the working of an independent regulator like Telecom Regulatory Authority of India. The only body that can do that is Parliament. And Parliament does it through Standing Committees. But if you look at the percentage of time these committees spend in doing that job, it will be a minuscule fraction. They spend their hours on completely irrelevant issues. But the problem is when the Standing Committees meet to decide on the issues they will examine over the next 12 months, it all becomes about planning their trips, travel expenses and sightseeing euphemistically called learning experiences. This is unfortunate because Parliament is the only body that can ask questions to the regulator. As individual citizens, have no locus or authority to challenge a regulator’s policy decision. The only way we can do it is to ask questions either directly in Parliament or indirectly through Standing Committees. So this oversight of Parliament on the Executive needs closer examination because the 2G scam has proved that corporate are capturing public policy.

Economic scams of today aren’t straightforward. It’s not about one person bribing another to get a pot of gold. It’s about fixing a contract and the underlying fine print of that and the value that accrues to you from that. It’s not boxes of cash anymore. It’s about contracts and deals.

There is a need to take strong action against such criminals. The simple stand should be if companies do anything against the laws of India, they have to pay for it. The government can’t give an assurance that government protect them from being conned. Tax payers can’t be held responsible for the bad investment decisions of companies.

Protection of “investment climate” has become a tactic for dishing out favourable treatment to corporate that might be detrimental to India. Ratan Tata’s
offer to clean up the Bhopal gas tragedy site, contingent on Dow Chemicals being let off its liability for Union Carbide in India. Dow has paid for UC liabilities in the US; not in India. There was a flood of letters in government worrying that holding Dow responsible would jeopardise their promised investments. That’s just one example.

Rolling out the red carpet is fine but rolling over and playing dead is not. India is a nation with a critical mass where companies want to invest money. There should be deal with corporations from a point of strength. Still haven’t learned how to attract investment with national interest in mind.

Basically the problem is that too many businessmen are sitting around the government telling them what is good for the public. That ends up sacrificing public interest for business. Of course, business and entrepreneurship is good for India and the government should help the business community. But primarily, government policy should be about citizens’ interest. It can’t be the other way around.

If Vijay Mallya is put on a civil aviation committee, it’s wrong and distasteful. But the number of businessmen in Parliament trying to influence policy is still limited. What is really criminal and absolutely unacceptable though is influence.

There is a real need now to overhaul and create a separate legislation for white-collar crimes.

The question is just fines enough. Bernie Madoff is serving 150 years in jail. Satyam’s Ramalinga Raju was arrested. Given the sheer scale of this scam, is there a case for not just arresting Raja but all those who illegally got the spectrum.

People might instinctively want to put the crooks in jail. But the problem is we must also have some semblance of the rule of law and due process. What people don’t want to do is go witch-hunting and just arrest all those who have done wrong because of the absence of a system for proceeding against white-
collar crimes. There is a real need now to overhaul and create a separate legislation for white-collar crimes.

White-collar crime is a case of a corporate scamming another corporate or, in India’s case, scamming the tax payer and the exchequer. A large percentage of such crimes is against the tax payer and is always done with the active collusion of someone within the government. So the criminals are aided by a system that is supposed to look after the victim. Because the victims are unstructured and not immediate, it all gets very diffused and confusing. Unfortunately, as researcher said earlier, the legal statute used to prosecute such crimes is the same as what is used against pickpockets, criminals and murderers. So a sub-inspector dealing with someone carrying a weapon is also expected to deal with someone like a Raju.

6.1.3 Empirical Fact about our growth

The excitement about the growth story in India is misplaced. There been talking about 9 percent growth. But the three main components of this are mining, real estate and construction which are growing at higher than average. Agriculture is 1 percent. Manufacturing is 3 percent. So the average is high only because of these three sections. There is not a man in India who believes that these sectors are not heavily politicised. And it’s these sectors that have thrown up the most number of billionaires. So the government is asking us to celebrate an economic model whose inside story is about robber barons and crony capitalism. If you are endorsing this percent growth rate, then you are basically endorsing crony capitalism.

It’s really heartening to have someone from the corporate community talking of this. The people of India all want growth but it should be define the kind of growth people want. Bureaucrats don’t give a damn they will say 9 percent growth and hype it all up. But the truth is this growth is distorting our wealth creation and creating a small club of billionaires while 480 million of our people still live in sub-Saharan conditions. If you only enjoy spreadsheets and numbers, you can keep plotting graphs and marvel at how it’s going up. But the graphs
hide a lot of things. That’s what Rajan says. If you allow this kind of wealth creation, you are, in effect, putting democracy at risk. It’s going to be a democracy not of the people, by the people, but of, for and by money. One of the most damaging symptoms in Indian media today is its unquestioning relationship with corporate power. Political misconduct is often brought to book, corporate crime almost never. There are crippling structural reasons for this. Indians are willing to pay ₹ 50 for a packet of chips or a coffee but they pull back at paying that for a magazine or newspaper. Unless consumers of news train themselves to pay for truth-telling, they will always be hostage to advertisers and vested corporate interests. In television, the entrapments get even more complex. Set aside the launch and running costs of a television channel, just the cable distribution cost every year runs upwards of ₹ 50 crore. This is absolute profiteering but the government has done nothing to curb it. Given all this, the moment a television channel is launched, the economics militate against it doing the really hard-hitting, rock-boat stories. For media companies that are publicly listed, the corporate skulduggery is even more complex. Miffed corporations have been known to invest in media shares and drive the stocks up or down depending on their compliance.

Individual loss of vision and moral sight is only a minor part of the problem. The greater challenges are the design faults. Suitcase story Harshad Mehta releasing proof of his claim of bribing politician to halt the 1991 probe into the stock market scam.

The security scams and financial scandals discussed harshad Mehta and Ketan Parekh involved the manipulation of huge amounts of money. The purpose of the so called “traders” or “investors” was not genuine. The perpetrators had such a comprehensive knowledge of how the system worked that they manipulated it. It is clearly evident that the occurrence and reoccurrence of such security scams and financial scandals as some point in time be attributed to a failure of corporate governance in finance and that of financial regulation. Corporate Governance vs Financial Regulation is more a personal thing which involves the adherence to rules regulations and ethics by officials management.
Fraud is a deception. Whatever industry the fraud is situated in, or whatever kind of fraud you visualize, “deception is always the core of fraud”. Fraud is “a million dollar business and it is increasing every year.” Applied to the 2011 Gross World Product, as per ACFE Survey, this figure translates to a potential projected annual fraud loss of more than $3.5 trillion. Both internal and external fraud present a substantial cost to our economy worldwide. It is widely accepted that corporate entities of all sizes across the world are susceptible to accounting scandals and frauds. From Enron and WorldCom in 2001 to Madoff and Satyam in 2009, accounting fraud has been a dominate news item in the past decade. Despite intense efforts to stamp out corruption, misappropriation of assets, and fraudulent financial reporting, it appears that fraud in its various forms is a problem that is increasing, both in frequency and rigorousness. Financial statement fraud was a contributing factor to the recent financial crisis and threatens the efficiency, liquidity, and safety of both debt and capital markets. Furthermore, frauds and scandals have significantly increased uncertainty and volatility in the financial markets, thereby shaking investor confidence worldwide. It also reduced the creditability of financial information that investors use in investment decisions. However, there has been ample evidence that rising number of frauds have undermined the integrity of financial reports, contributed to substantial economic losses, and eroded investors’ confidence means the faith of investors wear out eventually in the usefulness and reliability of financial statements. Given the current state of the economy and recent corporate scandals, fraud is still a top concern for corporate executives. Hence, major financial reporting frauds need to be studied for lessons learned and strategies to be followed so as to avoid the incidence of such frauds in the coming future. Recent corporate frauds and the outcry for transparency and honesty in reporting have given rise to two outcomes. First, forensic accounting skills have become very crucial in untangling the complicated accounting maneuvers that have obfuscated financial statements. Second, public

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2 Association of certified Fraud Examiner
demand for change and subsequent regulatory action has transformed Corporate Governance scenario across the globe. In fact, both these trends have the common goal of addressing the investors’ concerns about the transparent financial reporting system. The failure of the corporate communication structure, therefore, has made the financial community realize that “there is a great need for skilled professionals that can identify, expose, and prevent structural weaknesses in three key areas: poor corporate governance, flawed internal controls, and fraudulent financial statements.” Undoubtedly, forensic accounting skills are becoming increasingly relied upon within a corporate reporting system that emphasizes its accountability and responsibility to stakeholders. In addition, the Corporate Governance framework needs to be first of all strengthened and then implemented in “letter as well as in right spirit.” The increasing rate of white-collar crimes, without doubt, demands stiff penalties and punishments.

6.1.4 The Satyam scandal highlights the importance of securities laws and Corporate Governance in emerging markets.

There is a broad compromise that emerging market countries must struggle to create a regulatory environment in their securities markets that fosters effective CG. India has managed its transition into a global economy well, and although it suffers from CG issues, it is not alone as both developed countries and emerging countries experience accounting and CG scandals. The Satyam scandal brought to light, once again, the importance of ethics and its relevance to corporate culture. The fraud committed by the founders of Satyam is a testament to the fact that “the science of conduct is swayed in large by human greed, ambition, and hunger for power, money, fame and glory.” All kind of scandals/frauds have proven that there is a need for good conduct based on strong ethics. The Indian government, in Satyam case, took very quick actions to protect the interest of the investors, safeguard the credibility of India, and the nation’s image across the world. Moreover, Satyam fraud has forced the government to re write CG rules and tightened the norms for auditors and accountants.
6.2 The Corporate Punishment – Indian criminal justice system - Whether only fine is Possible or not.

In India, certain statutes like the Indian Penal Code talk about kinds of punishments that can be imposed upon the convict and as per Sec. 53 include death, life imprisonment, rigorous and simple imprisonment, forfeiture of property and fine. In certain cases the sections speak only of imprisonment as a punishment like in case of Sec.420 thereby the problem arises as to how to apply those sections upon the companies since a criminal statute needs to be strictly interpreted wherein there is no scope for corporations to be imprisoned. Going with the above viewpoint and with the growing trend of corporate criminality, the Courts in India have finally recognized that a corporation can have a guilty mind components of a crime and that generally must be coupled with mens rea to establish criminal liability; a forbidden act.

In The Assistant Commissioner, Assessment- II, Bangalore and Ors. v. Velliappa Textiles Ltd. and Ors. B.N. Srikrishna J. said that corporate criminal liability cannot be imposed without making corresponding legislative changes. For example, the imposition of fine in lieu of imprisonment is required to be introduced in many sections of the penal statutes. The Court was of the view that the company could be prosecuted for an offence involving rupees one lakh or less and be punished as the option is given to the court to impose a sentence of imprisonment or fine, whereas in the case of an offence involving an amount or value exceeding rupees one lakh, the court is not given a discretion to impose imprisonment or fine and therefore, the company cannot be prosecuted as the custodial sentence cannot be imposed on it.

The legal difficulty arising out of the above situation was noticed by the Law Commission and in its 41st Report, the Law Commission suggested amendment to Section 62 of the Indian Penal Code by adding the following lines:

3AIR2004SC86
“In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only.”

As per the jurisprudence evolved till then, under the present Indian law it is difficult to impose fine in lieu of imprisonment though the definition of ‘person’ in the Indian Penal Code includes ‘company’. It is also worthwhile to mention that our Parliament has also understood this problem and proposed to amend the IPC in this regard by including fine as an alternate to imprisonment where corporations are involved in 1972.

The proposed Indian Penal Code (Amendment) Bill, 1972, Clause 72(a) reads as hereunder:

Clause 72(a)(1) - In every case in which the offence is punishable with imprisonment and fine, and the offender is a company, it shall be competent for the Court to sentence such offender to fine only. (2) - In every case in which the offence is punishable with imprisonment and any other punishment not being fine, and the offender is a company, it shall be competent for the Court to sentence such offender to fine only. Explanation: - For the purpose of this section, ‘company’ means any body corporate and includes a firm or other association of individuals.”

However, the Apex Court later overruled this decision in Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors on account of providing complete justice to the aggrieved which could not be prejudiced in the garb of corporate personality. In this case, the Court did not go by the literal and strict interpretation rule required to be done for the penal statutes and went on to provide complete justice thereby imposing fine on the corporate.

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4The proposed Indian Penal Code (Amendment) Bill, 1972, Clause 72(a) reads as hereunder:“Clause 72(a)(1) - In every case in which the offence is punishable with imprisonment and fine, and the offender is a company, it shall be competent for the Court to sentence such offender to fine only. (2) - In every case in which the offence is punishable with imprisonment and any other punishment not being fine, and the offender is a company, it shall be competent for the Court to sentence such offender to fine only. Explanation: - For the purpose of this section, ‘company’ means any body corporate and includes a firm or other association of individuals.”

5AIR2005SC2622
The Court looked into the interpretation rule that all penal statutes are to be strictly construed in the sense that the Court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that the thing is so clearly within the mischief that it must have been intended to be included and would have included if thought of. Simultaneously, it also considered the legislative intent and held that all penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment. It was of the view that here, the legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted. It is sheer violence to commonsense that the legislature intended to punish the corporate bodies for minor and silly offences and extended immunity of prosecution to major and grave economic crimes.

If an enactment requires what is legally impossible it will be presumed that Parliament intended it to be modified so as to remove the impossibility element. These Courts have applied the doctrine of impossibility of performance [Lex non cogit ad impossibilia] in numerous cases including the aforementioned.

Finally, the Court decided that as the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such discretion is to be read into the Section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company.

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This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment.

The maxim ‘judicis est just dicere, non dare’ best expounds the role of the court. It is to interpret the law, not to make it. This read with the Doctrine of Separation of Powers has bound the Court’s hands in imposing various kinds of punishments and all that it is left with is to impose fines. In order to avoid compelling the Courts to go out of the statute and interpret and therefore define the law which is essentially the task of the legislature\(^8\), it is advised that the legislature amends the various penal statutes in a way so as to bring in various forms of punishments for the corporations as well, thereby maintaining the separation of powers regime and hence the rule of law.

6.2.1 Corporate Punishment

Till now, the Courts have been able to impose only fine as a form of punishment because of statutory inadequacy and lack of new forms of punishments which could be imposed upon corporate.

6.2.2 The Feasibility of Fine

Fine is the most common punishment in every part of the world and it is a punishment the advantages of which are so great and obvious that we propose to authorize the courts to inflict it in every case… Imprisonment, transportation, banishment, solitude, compelled labour are not equally disagreeable to all men. With fine the case is different. In imposing a fine it is necessary to have regard to the pecuniary circumstances of the offender, as to the character and magnitude of the offence. The mullet which is ruinous to the labourer is easily borne by a tradesman and is absolutely unfelt by a rich zamindar.

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\(^8\) Asif Hameed and others v. State of Jammu& Kashmir, AIR1989SC1899
The imposition of fines may be made in four different ways as provided in the IPC. It is the sole punishment for certain offences and the limit of maximum fine has been laid down; in certain cases it is an alternative punishment but the amount is limited; in certain offences it is imperative to impose fine in addition to some other punishment and in some it is obligatory to impose fine but no pecuniary limit is laid down.

Fines can be an effective punishment in cases of traffic offences or offences against property. But where the offence is grave, in the sense of murder or rape or kidnapping for death etc., it is questionable whether fine can achieve the object of punishment. Another shortcoming of this form of punishment is that it pins the poor and eases the rich. The rich can easily get away by paying a huge fine while the poor may have to toil hard even to get a hundred rupees. Nevertheless, its efficacy in specific crimes has made it a necessary mode of sanction. This shows that biggest drawback in restricting fine as the sole form of punishment to corporate since with their massive bank accounts, it is easy for them to get away with the criminal liability and it also does not solve the purpose of punishment since neither the corporate would be deterred nor would they be reattributed for the crimes like corporate killings that they have committed for instance: using poor quality of material in building dams which would soon collapse thereby dislocating and even killing inhabitants around the area or the labourers themselves.

Looking into the above drawbacks, there is a need to evolve new forms of punishments which could effectively deter the corporate from engaging into any criminal activity.

6.3 Problems of Corporate Governance in Finance

In particular, we examine three interrelated characteristics of financial intermediaries and how these traits affect corporate governance. First, banks and other intermediaries are more opaque, which fundamentally intensifies the agency problem. Due to greater information asymmetries between insiders and outside investors in banking, it is (i) more difficult for equity and debt holders to monitor
managers and use incentive contracts, (ii) easier for managers and large investors
to exploit the private benefits of control, rather than maximize value, (iii) unlikely
that potential outside bidders with poor information will generate a sufficiently
effective takeover threat to improve governance substantially, and (iv) likely that
a more monopolistic sector will ensue and will generate less corporate
governance through product market competition, compared with an industry with
less informational asymmetries. Second, banks, like most intermediaries, are
heavily regulated and this frequently impedes natural corporate governance
mechanisms. For instance,

I) deposit insurance reduces monitoring by insured depositors, reduces the
desirability of banks to raise capital from large, uninsured creditors with
incentives to monitor, and increases incentives for shifting bank assets
to more risky investments,

II) regulatory restrictions on the concentration of ownership interfere with
one of the main mechanisms for exerting corporate governance around
the world: concentrated ownership,

III) regulatory restrictions on entry, takeovers, and bank activities reduce
competition, which reduce market pressures on managers to maximize
profits, and

IV) bank regulators and supervisors frequently have their own incentives in
influencing bank managers that do not coincide with value maximization.
Finally, government ownership of banks fundamentally alters the corporate
governance equation. Since state ownership of banks remains large in
many countries, this makes corporate governance of the banking industry
very different from other industries.

6.4 Findings

From the above analysis, it is proved that the criminal law jurisprudence
relating to imposition of criminal liability on corporations is settled on the point
that the corporations can commit crimes and hence be made criminally liable.
However, the statutes in India are not in pace with these developments and the
above analysis shows that they do not make corporations criminally liable and even if they do so, the statutes and judicial interpretations impose no other punishments except for fines. It is therefore recommended that amendments should be carried out by the legislature as soon as possible so as to avoid judiciary from defining the law and make the statutes fit for strict interpretation by providing for infliction of criminal liability on the corporations as also providing for various kinds of sanctions apart from only fines.

6.5 Suggestions:

On the basis of research work done by researcher, humble suggestions for the notion of corporate crimes nature and corporate criminal liabilities.

6.5.1 The Consumer Protection Motive

One frequently used argument for securities regulation and supervision is that the consumers need protection. Generally, an efficient way to protect consumers in the securities markets is to ensure,

a) that the price formation process is as efficient as possible, and

b) that there is sufficient competition between the traders, brokers and other market participants.

Thus, if a large number of professional traders compete in assembling and interpreting new information, securities market prices will reflect that information and unsophisticated traders do not need any additional information and analysis. In this case, the observed prices are sufficient. Given that rules and regulations are needed for some other reason, effective ways to protect uniformed traders are therefore to enact measures to reduce transaction costs, to guarantee efficient trading mechanisms, to introduce antitrust policies, to lower barriers to entry and to improve competition. If the markets are efficient, all trades will be performed at correct prices and the need to protect consumers will in principle vanish. Thus, consumers are better protected in an efficient market than in a less efficient market. Thus, an effective way of protecting the consumers is to ensure an efficient market. However, securities markets cannot
always be perfectly efficient in an informational sense. One of the reasons is that there is asymmetric information means due to lack of proportion information consumers some time misguided. The consumer protection argument for regulation is typically based on the existence of asymmetric information. Price sensitive information is not immediately spread to all traders. Some investors, especially small investors, normally have less access to information than other traders. As a consequence, securities regulations are often aimed at either reducing the asymmetric information between different agents, or limiting the perceived damage of asymmetric information. However, reducing the asymmetric information may also have significant adverse effects. If the regulation prohibits agents from taking advantage of superior information, this information will not be incorporated into the securities prices. It is exactly the search for information, not yet reflected in the prices, which makes prices informationally efficient. This search, which is costly, has to be profitable otherwise prices will not be as informative. Therefore, accepting a certain limited level of asymmetric information may be the price we have to pay to get informative prices on a well-functioning market. There are also other problems. The main reason for investor protection is based on a free-riding problem, combined with a principal agent conflict and incomplete contracts. Principal agent relationships are common in securities markets. Retail investors typically invest in different funds and other financial services firms. Here the former are principals and the latter agents. These investment funds, trusts and financial services firms invest in stocks, bond etc and then act as principals towards the management of the issuing companies (agents). Given that complete contracts are not feasible or enforceable, that all contingencies cannot be foreseen, and that it is not obvious that contracts that align the incentives are always available, there is a potential economic problem. Under these circumstances, the free market may yield a socially sub-optimal solution, and thus there may be scope for regulations based on the consumer protection motive. socially sub-optimal solution, and thus there may be scope for regulations based on the consumer protection motive. consumer protection argument for the regulation of investment services is based,
(a) on the principal agent problem between the retail investor and the investment service provider,

(b) on the difficulty of the retail investor to monitor the performance of the service provider, even ex post,

(c) on the long term aspect of many investment services, and

(d) all under the assumption that the public sector has a responsibility for some minimum living standards.

Another question is then how these problems can be solved. Other Motives Occasionally other motives for separate securities regulations are presented, such as competitiveness and money laundering. Historically, a number of other politically motivated arguments have been made, including the need to channel funds to politically favored sectors of the economy, or to help financing public deficits. However after the deregulation of securities markets, the latter argument have more or less disappeared.

6.5.2 Money Laundering

With the exploding volume of international financial transactions and the lifted regulation on these transactions, it has become easier also for drug traders and organized crime to use the financial system to hide criminal revenue and transform them into legitimate financial positions. Therefore a number of countries have imposed reporting requirements for major currency transactions. As long as it is only a question of requirements to report, the costs are likely to be small and not to influence legitimate transactions in any major way. However, if additional restrictions are imposed, even for ‘good’ causes such as in the combat against terrorism, It may severely affect the efficiency of international securities markets. Money mobilized in security markets by monopoly brokers used for their own personal benefit is also considered as money laundering.
6.5.3 The notion of corporate culture as a foundation for corporate criminal liability

Generally, it can be said that corporate culture refers to a “pattern of common beliefs and values that give the members of an institution meaning and provide them with the rules for behavior”. This rather broad notion can be used for many purposes, and is helpful in analyzing a corporation’s personality in many respects. For the purposes of attributing criminal liability, corporate culture refers primarily to the chain of command, the decision-making structure and the general atmosphere concerning obedience to the law. There are some indicators are often singled out as pointing to facets of corporate culture that are relevant in the context of criminal liability.

The development within the corporation of clearly defined responsibilities concerning the creation, evaluation and application of standards and procedures designed to ensure compliance with the law by employees would be a significant indicator of a corporate culture that is thoughtful of compliance with the law. If, for example, the corporate structure is so organized as to deprive senior managers of the information they need to exercise such powers, this would indicate a corporate culture that is designed to elude law enforcement. Generally, deficient structures for the dissemination of information within the firm would also be suspect. Indeed, providing that a deficient corporate culture can be the basis for a charge of intentionally committing a crime transforms into an intention what in researcher opinion is simply negligence but it must be proved that the corporate culture instigated, encouraged or led to the commission of the offence or that the failure to maintain a law-abiding atmosphere was deliberate.

6.5.4 Holding Corporations responsible for their criminal act

In India and internationally, laws to hold corporations accountable are systematically being dismantled, even as corporations and other agents of globalization dictate policies of nations. The corporate sector enjoys far more rights than the common people. With the onset of the new trade regime, national
laws are being changed to empower corporations with the right to hire and fire at will, to get the first right over natural and community resources.

Many of our lives and daily routines are affected by corporate activities. To extent, companies provide the food we eat, the water we drink, the luxuries of everyday living. Increasingly, particularly with privatisation, it is not the State that provides these amenities but such companies generate wealth for the economy and their shareholders and provide employment for much of the population. Short of a revolutionary restructuring of the economy and the political institutions of the country, it is certain that the power and influence of companies will grow and not diminish in the foreseeable future.

Now it’s high time to put a control over these crimes. There has been a debate as to whether a Corporation can be held criminally liable. There are two theories regarding this- ‘Nominalist’ and ‘Realistic’. Nominalist theory of corporate personality view corporations “as nothing more than collectives of individuals. In this an individual first commits the offence; the responsibility of that individual is then imputed to the corporation. According to Realist approach corporations have an existence, which is to some extent independent of the existence of its members. Here, the responsibility of corporation is primarily. The ‘Realist’ theory looks more convincing and practically applicable.

The argument in favour of corporate being criminally liable is that in many cases it is the corporation itself, through its policies or practices, that has done wrong and prosecution and punishment should be directed at the real wrongdoer. In many cases there is no individual who, alone, has committed a crime. It is the conjunction of the practices of several individuals, all acting in compliance with a company’s sloppy or non-existent procedures, that has caused the harm. Alternatively, in many cases companies have complex structures with responsibility buried at many different layers within the corporate hierarchy making it difficult, if not impossible, to determine where the true fault lies.

The common law jurisdictions have adopted the approach and recognize that corporations may be held criminally liable. However, they do highlight the
conceptual difficulty in applying a theory of criminal liability based on a view of fault centered on the psychological processes of humans to what is simply a fictional person. There is an apparent need, now, to adapt the notion of fault to the structure and particular modus operandi of corporations. The existing mechanisms used to attribute criminal liability to corporations are but a partial solution, and should be improved.

In so far as negligence as a fault element is concerned, it might be necessary to provide that criminal negligence refers to a significant departure from the standard of conduct of a prudent and diligent corporation. Corporate negligence is established by proof of negligence of its employees, agents or officers or, if no one individually is negligent, that the body corporate’s conduct, viewed as a whole, is negligent. This collective negligence may be established by proof that the prohibited conduct was substantially attributable to inadequate management control or supervision, or failure to provide adequate systems for conveying information within the body corporate.

6.5.5 The Indian Criminal Procedure Code (CrPc) is only geared to look at individuals who commit petty or violent crimes. Need to introduce legislation.

In today’s world, the much bigger crimes are those that are sophisticated and have silent victims. Tax payers never feel there has been a real crime against tax payer.— these are victimless crimes in that sense. Victims of white-collar crimes need a special dispensation. Our criminal code and public prosecution system is inadequate to prosecute this. The proof is Raju and how he is running around despite being charged under the Criminal Procedure Code.

The second urgent need is to introduce legislation that will reform the business chambers and lobbies. They are operating in an area where there are absolutely no laws.
6.5.6 Heightened transparency where tax-payers’ money is involved

There has to be a deterrent against robber barons and oligarchic capitalism. Policymaking has to become more transparent. If you read the manifesto of the Tories in the UK, they have promised unprecedented transparency. We also have to push for heightened transparency where tax-payers’ money is involved. ‘Rolling out the red carpet is fine but rolling over and playing dead is not. Government have to deal with corporations from a point of strength but not at the cost of human lifes.

6.5.7 Televised standing committee

The standing committee keep the watch and have control on the independent regulatory like TRAI. Parliament of India create such committee. The meeting place and functions as an effective arm of Parliament is to ensure that the transcripts of committee meetings are available to the public both video and text. Researcher has gone to the extent of saying these meetings should be open to the public. In the UK, for example, when the Chairman of the Reserve Bank deposes to Parliament, people can sit in the gallery and listen. In the US too, depositions like in the Texas Oil Spill are public.

6.5.8 Bringing corporations under the ambit of Right To Information (RTI) part of that process

wherever there is a contract or memorandum between corporate and the government, which involves a private-public partnership, a use of national resources or tax-payers’ money, it should be under the purview of RTI and the CAG should be able to audit it. The problem is that with two million such transactions every year, even the CAG led by a good member team cannot possibly audit all that. So we need to push for mandatory legal disclosures.

With the Right To Information, people need to ask a question to get an answer. But they should be disclosing without being asked. More disclosures from government, a better legal framework for prosecuting white-collar crime and heavy penalties will hopefully be a good deterrent.
6.5.9 Business does play an important role but it shouldn’t be laissez faire

Big business is always pushing for less government. You cannot expect people who are in the business of wealth creation to regulate themselves. The government cannot abrogate its responsibility to make and enforce rules. Business does play an important role but it shouldn’t be laissez faire. The way to make corporate more honest is not to plead with them to be honest. It is really for society to lay down rules and define what is acceptable corporate behaviour. The vision to have morally responsible corporate has to be driven by society articulating it to them. It is need to tell corporate that irresponsible, greedy behaviour is unacceptable.

6.5.10 Towards New Forms

“Law should not sit limply, while those who defy it go free and those who seek its protection lose hope”

Presently, all the sections include only fine as a form of punishment that can be imposed on a company. So is the case with judicial pronouncements on the aspect of sentencing. In addition to this, the Law Commission in its 41st Report also speaks of introducing only fine as an additional punishment to be imposed upon corporations in lieu of fines. This restrictive thinking, according to Courts is based on the maxim lex non cogit ad impossibilia, which tells us that law does not contemplate something which cannot be done. This reasoning in itself shows that the law lacks in a non holistic viewpoint in the concept of corporate criminal liability.

The Courts have no doubt been efficient in evolving the concept of criminal liability of corporate and have imposed the same on the convicts but the only way of imposition that has been thought of is by way of fines. It is now for the legislature to evolve new forms of punishments and incorporate

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9 Jennison v. Baker (1972) 1 All ER 997.

(219)
them in the criminal justice system of the land. The legislature may take the following suggestions.

These other forms (including fine), can be classified into the following major heads:

6.5.10.A Economic Sanctions

Economic Sanctions: these sanctions would include various kinds of monetary and other forms which would cause huge losses to the company as a whole. Apart from fine, they can include the following:

6.5.10.A(I) Corporate Death or order for winding up

only in cases of continuous criminal behaviour in the given field. For instance, exit order of the corporate from the division in which its criminal behaviour has been found continuously. For instance, the food department of a corporate can be directed to be shut if despite several warnings, poisonous or objectionable substances are adulterated. Such a sanction could have been imposed in the famous oil adulteration scam that came up around 7 years back causing loss of many lives. It may also ordered at the first instance itself without giving any warning when due to the intentional activities of the corporate, people might lose their lives like manufacture of low quality engines for airplanes which would lead to their crashing thereby causing huge loss of lives.

6.5.10.A(II) Temporary closure of the company

For a given period depending upon the gravity of the act till the time compliance with norms can be ensured. This can be an alternative to the above course when the act is not that harmful to the society. For instance, a corporate being closed for causing pollution till the time it does not arrange for a pollution free technology.

6.5.10.A(III) Rehabilitation of victims of crime.

In such a form of punishment, the corporate would be ordered to rehabilitate the victims in a manner such as to erase any traces of the effect
of the crime. For instance, cleansing of the riverbanks that have been polluted as a result of toxic disposal. Though it would take some time but this would also assure that the crime has been undone.

Such schemes are already operational in Germany. Compulsory welfare or reinstatement activities are to be undertaken in the affected areas over there. Its corporations are subject to administrative sanctions for public welfare or administrative offences.

6.5.10.A(IV) Payments of high sum as compensation to the victims of crime as were paid in the Bhopal gas tragedy.

Compensation to a victim may be made in three different ways. The State may be made responsible for the payment of compensation, or the offender can be sentenced to pay a fine by way of punishment for the offence and, out of that fine, compensation can be awarded to the victim or the court trying the offender can, in addition, to punishing him according to law, direct him to pay compensation to the victim of the crime, or otherwise make amends by repairing the damage done by the offence.11 Section 357, Criminal Procedure Code, empowers a Court imposing a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, in its discretion, inter alia, to order payment of compensation, out of the fine recovered, to a person for any loss or injury caused to him by the offence.12

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11 Ahmed Siddiqui, Criminology, page 139.
12 Sub-section (1) of the section reads: When a Court imposes a sentence or fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgement, order the whole or any part of the fine recovered to be applied-

a. in defraying the expenses properly incurred in the prosecution;

b. in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

c. when any person is convicted of any offence for having caused death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death; when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating or of having dishonestly assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensation any bonafide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.
Sub-section (1) of the section reads: When a Court imposes a sentence or fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgement, order the whole or any part of the fine recovered to be applied-

The Supreme Court of India while discussing the scope and object of Section 357 Cr.P.C. in Hari Krishnan and State of Haryana v. Sukhbir Singh\(^\text{13}\) observed that it is an important provision but the courts have seldom invoked it, perhaps due to the ignorance of the object of it. It empowered the courts to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of the accused. It may be noted that this power of the Court to award compensation is not ancillary to other sentences but is in addition thereto. This power was intended to do something to reassure the victim that he/she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is indeed a step forward in our criminal justice system."

However, since Section 357 (1) is subject to some limitations, it should be categorized as a separate form of punishment itself which is not dependent on the quantum of fine or constitutional provisions.\(^\text{14}\)

6.5.10. B Social Sanctions.

Social Sanctions: Goodwill, for any body corporate is its heart and soul. Once, that is lost, the entire strength comes to a standstill. The term ‘reputation’ carries with it more than one meaning. For individuals, reputation loss connotes

\(^{13}\) AIR 1988 SC 2127

\(^{14}\) The right to compensation has also been recognized as an integral part of right to life and liberty under Art. 21 of the Indian Constitution. As early as in 1983, the Supreme Court recognized the petitioner’s right to claim compensation for illegal detention and awarded a total sum of Rs. 35000 by way of compensation. In delivering the judgment, Chandrachud C.J. observed: “Art 21 which guarantees the right to life and liberty will be denuded of its significance content if the power of this Court were limited to passing orders of relief from illegal detention.
both the individual’s sense of shame and others’ increased reluctance to do
business in the future with the individual or corporations, however, reputation
loss refers only to the reluctance of others, such as customers and workers,
to deal with the corporation in the future. Of course, the managers of the
corporation may feel shame about their corporation’s conviction. As applied to
corporations, reputation refers, for example, to the supra competitive price that
a firm with a good reputation can charge customers for its products or the lower
wages that a ‘good’ employer can pay while still attracting workers.15

Once this is harmed, it would create a deep stigmatizing effect on the
corporation since its business would come to a standstill with no customers.
This can be done by asking the corporate to publish this crime widely
compulsorily and fund the publication as well. This will act as a strong deterrence
for not to commit crimes and the shareholders also would come in an active
role in stopping the active organizational structure from authorizing committal
of such crimes. However, in certain situations reputation sanctions are not
effective against corporations. Because activities that harm third parties, such
as environmental pollution, do not directly affect a firm’s customers, the firm
will be unlikely to suffer a reputation loss for engaging in those activities. Also,
firms that lack reputations, such as ‘fly-by-night’ firms, cannot really suffer a
reputation loss. This would also make the share value less attractive to be invested
in thereby leading to huge financial losses also.

Such sanctions should also be incorporated in Sec. 52 for the corporates
apart from the traditional forms of punishment that are already there in the
section. The other statutes like Essential Commodities Act, Food Adulteration
Act, Companies Act, etc., also require such sanctions to be imposed so as to
adopt a just approach of punishment which is required for deterrence as fine
cannot deter all corporate in all cases. The gravity of each of these punishments
should vary with the gravity of the act committed, a reference to which would give
us the following model of sentencing:

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These sanctions are all designed keeping in view that deterrence is the ultimate objective of penal law making companies liable since other accepted theories like reformation cannot be introduced where a juristic mind is concerned.

### 6.5.11 General Suggestion for victims of corporate crimes

I) Compensation to victims can be awarded only when substantive sentence is imposed and not in cases of acquittal.

II) Quantum of compensation is limited to the fine levied and not in addition to it or exceed the fine imposed.

III) Compensation can be ordered only out of fine realized and if no fine is realized, compensation to victim cannot be directed to be realized.

IV) In very rare cases under IPC, the maximum amount of fine is imposed. Moreover the maximum fine as prescribed in IPC amount 150 years back is now inadequate in terms of real losses to victims.

V) Compensation to victim under this section can be allowed by the court if it is of the opinion that the compensation is recoverable by such person in a Civil Court.

The Corporate Sentencing Model. This model of sentencing provides with an illustration as to how the existing penal law of India should be amended so that it would serve the purpose of sentencing corporate bodies in a just manner and simultaneously also keeping pace with the theory of proportionality of crime and punishment.

### 6.5.12 Lessons Learned from some Accounting scandals

Scandal in India highlighted the immoral potential of an improperly governed corporate leader. As the fallout continues, and the effects were felt throughout the global economy, the prevailing hope is that some good can come from the scandal in terms of lessons learned. Here are some lessons learned from the accounting Scandals:
6.5.12(I) Investigate All Inaccuracies:

The fraud scheme at Satyam started very small, eventually growing into $276 million white-elephant in the room. Indeed, a lot of fraud schemes initially start out small, with the perpetrator thinking that small changes here and there would not make a big difference, and is less likely to be detected. This sends a message to a lot of companies: if your accounts are not balancing, or if something seems inaccurate (even just a tiny bit), it is worth investigating. Dividing responsibilities across a team of people makes it easier to detect irregularities or misappropriated funds.

6.5.12(II) Ruined reputations:

Fraud does not just look bad on a company; it looks bad on the whole industry and a country. “India’s biggest corporate scandal in memory threatens future foreign investment flows into Asia’s third-largest economy and casts a cloud over growth in its once-booming outsourcing sector. The news sent Indian equity markets into a tail-spin, with Bombay’s main benchmark index tumbling 7.3% and the Indian rupee fell” (IMF, 2010). Now, because of the Satyam scandal, Indian rivals will come under greater scrutiny by the regulators, investors and customers.

6.5.12(III) Corporate Governance needs to be stronger:

The Satyam case is just another example supporting the need for stronger CG. All public-companies must be careful when selecting executives and top-level managers. These are the people who set the tone for the company: if there is corruption at the top, it is bound to trickle-down. Also, separate the role of CEO and Chairman of the Board. Splitting up the roles, thus, helps avoid situations like the one at Satyam.

Scandals brought to light the importance of ethics and its relevance to corporate culture. The fraud committed by the founders of Satyam is a testament to the fact that “the science of conduct” is influenced in large by human greed, ambition, and hunger for power, money, fame and glory. Scandals from Enron
to the recent financial crisis have time and time again proven that there is a need for good conduct based on strong ethics. Not surprising, such frauds can happen, at any time, all over the world. Satyam fraud spurred the government of India to tighten CG norms to prevent recurrence of similar frauds in the near future. The government took prompt actions to protect the interest of the investors and safeguard the credibility of India and the nation’s image across the world.