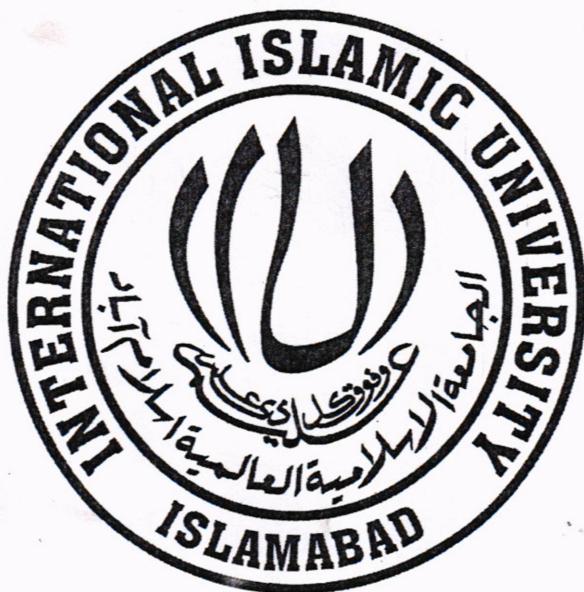


CORPORATE CRIMINAL LIABILITY:

To make the corporations more efficient, the law in Pakistan on Corporate Criminal Liability must be reformed

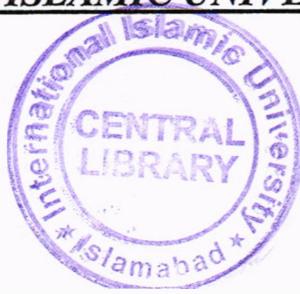


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2. Self-defence [law]
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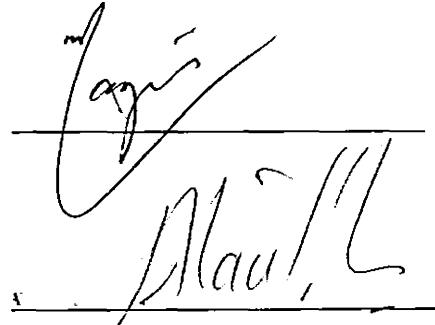
FINAL APPROVAL

It is certified that we have gone through the thesis submitted by Mr. Sheikh Saif Ullah Waleem having Registration No.160-FSL/LLMCL/F-07, and we have come to the conclusion that the research work is up to the mark and fulfill all the requirements for the grant of Master's Degree in Law by the Faculty of Shariah and Law, International Islam University Islamabad.

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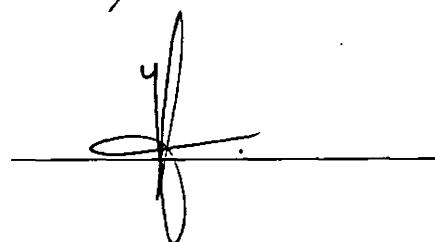
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LIST OF ABBREVIATIONS

SECP	Securities and Exchange Commission of Pakistan
PPC	Pakistan Penal Code
USA	United States of America
CCC	Criminal Code of Canada
CMA	Corporate Manslaughter Act
SCAG	Standing Committee of Attorneys-General
MCCOC	Model Criminal Code Officers Committee
TPA	Trade Practice Act
TPC	Trade Practice Commission
CDPP	Commonwealth Director of Public Prosecutions
CEO	Chief Executive Officer
FIA	Federal Investigation Agency
NAB	National Accountability Ordinance
EIA	Environment Impact Assessment
PEPA	Pakistan Environmental Protect Act
CRPC	Criminal Procedure Code
PCr.LJ	Pakistan Criminal Law Journal
CTRs	Currency Transactions Reports
SCMR	Supreme Court Monthly Review
PLJ	Pakistan Law Journal

LDC	Least Developed Countries
ASC	American Supreme Court
AIR	All India Report
USC	United States Code
UNDP	United Nations Development Program
CLD	Corporate Law Digest
CCLA	Corporate Criminal Liability Act
CDC	Corporate Data Centre
CCE	Corporate Compliance and Ethics

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5. R. V. Great West Laundry Co. (1900), 3C.C.C 514
6. Lennard's Carrying Co. Ltd V. Asiatic Petroleum Co., [1915] A.C 705, at 713 (H.L.)
7. R. v. Fane Robinson Ltd 76 C.C.C. 196 at 203 (Alta. C.A.)
8. United States v. Investment Enter Inc.,
9. Lennard's Carrying Co Ltd v. Asiatic Petroleum Co Ltd.
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27. The Rhone v The Peter A B Widener [1993] 1 SCR 497 at 526
28. ANZ Grindlays Bank Ltd & Ors v Directorate of Enforcement [2005] INSC 315
29. <http://indiankanon.org/doc/1570759/> 2003 (7) SCC 628

DEDICATION

I dedicate this piece of work first of all to the Holy Prophet Muhammad (peace be upon him) and his Companions and then to my beloved parents (may Allah rest their souls in peace) and also to my teachers and to the Faculty of Shariah & Law International Islamic University Islamabad.

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I am grateful to Almighty Allah who gave me strength, health and thoughts to enable me to achieve this work.

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ABSTRACT

The question of imposing criminal liability on a corporation for criminal offences committed by directors, managers, officers and other employees of the corporation while conducting corporate affairs has gained a lot of importance in the jurisprudence of criminal law. The very basis for the possibility of imposing criminal liability to a corporation is its independent legal personality.

The criminal responsibility of a company or corporation, as distinct from its officers or employees, fails to be determined by common law principles. Under original common law, a company could not be convicted for any criminal offence. The common criminal law also took the position that, in general, there could be no vicarious criminal responsibility; that is, a person could not be deemed to be guilty of a criminal offence committed by another.

A corporation can be held liable for the criminal acts of its employees as long as the employees are acting within the scope of their authority and their conduct benefits the corporation. To act within the scope of his or her employment, the employee must have actual or apparent authority to engage in a particular act.

The first Chapter gives a brief introduction to the topic; it will define the legal terms like corporation, crimes and explains the different types of liabilities. Thereafter, it will explain the criminal liability generally and Criminal Liability of Corporations, than will explain the doctrine of Direct liability and vicarious liability, which will open the 'window panes' for the reader.

The second Chapter defines and explains the theories regarding topic, it also talks about the new legislative approaches formulated in the whole world, it also talks about the hindrances in the way of implementing the procedure of criminal liability to the corporations and finally this chapter will end with some arguments against the implementation of criminal liability on the Corporations.

The third Chapter discusses about Corporate Crimes and their legislation in Pakistan. In this chapter we will see whether the Pakistani Law is sufficient or not? The business ethics and the Islamic considerations are being followed or not. Why we need to impose liability on the Corporations, we will touch some of the relevant provisions of the Companies Ordinance 1984,

The fourth Chapter will gives a comparative study of the Corporate Criminal Liability in different jurisdictions like Australia, UK, Canada, U.S and India.

The fifth Chapter is on conclusion and recommendation, to make the law on corporate criminal liability more efficient for smooth working of corporations in Pakistan.

CHAPTER NO.1

INTRODUCTION

1.0 Introduction:-

The responsibility of a company or corporation with regard to crime is different from that of its officers or employees, and is determined by common law principles. "According to the original common law principle, a company could not be convicted for any criminal offence because criminal guilt required intent and a corporation not having a mind could form no intent. Furthermore, a corporation had no body that could be imprisoned."¹ Another important aspect of the common criminal law principle was that, in general, "there could be no vicarious criminal responsibility; that is, one person could not be deemed to be guilty of a criminal offence committed by another."²

But with the development of law regarding corporate criminal liability, "it was held by the United States Courts of Law that, *A corporation can be held liable for the criminal acts of its managers or employees as long as the manager or employees are acting within the scope of their authority and their conduct benefits the corporation.*"³ The Court also held that, "*to act within the scope of employment means that, the employee must have actual or apparent authority to engage in a particular act. The imposition of criminal liability to a corporation for criminal offences committed by the directors, managers.*

¹ "A corporation, being merely a person in law only, and not a real one, can act only through its employees for whom it should be held responsible."

² "The general rule is that one is liable only for one's own actions and not for the actions of others. Crime is composed of both an *actus reus* and a *mens rea*. A person should only be convicted if he, she or it is directly responsible for causing both elements to occur at the same time; the practice of holding one person liable for the actions of another is the exception and not the rule in criminal law. http://en.wikipedia.org/wiki/Vicarious_liability_%28criminal%29"

³ "US v Potter 463 F 3d 9 (1st Cir, 2006)"

officers and other employees of a company while conducting corporate affairs has gained a lot of importance in the jurisprudence of criminal law. The very basis for the possibility of imposing criminal liability on a corporation is the independent legal personality of the corporation.”⁴

In present times most parts of our daily lives are affected by the activities performed by corporations. Companies produce a number of items which we use in our daily lives; these may range from the basic necessity items to the luxuries items used by the human being on routine basis. With the increased privatization, we see that most of the amenities are being provided by the companies than the Government. Moreover, the companies are generating a lot of wealth in the economy of a Country and also for their shareholders. These companies are also providing a lot of employment opportunities to the general public. Therefore, we can say that with the growing involvement of companies in a Country's economy the influence and importance of companies will increase in the near future.

As the corporations are getting more powerful, therefore, they should also be held more responsible. Law forbids a person to harm any other person or the public at large; similarly the corporations should not pollute our water, air, food, rivers and should provide a healthy and safe environment for their employees and the workforce. Moreover, the corporations should also provide the safe transport vehicles and should not endanger the lives of human beings by selling any kind of substandard goods.

⁴ ibid

Now, the question is that, what are the major crimes for which a corporation can be punished criminally, or its directors, officers or managers can be held liable? To answer this question, there are a number of crimes, for example, discharge of waste of companies—to be properly dumped to save human beings, plants and animals lives, proper disclosure by directors to share holders, proper maintaining of books of accounts, crimes against their own workforce, adulteration and contamination of food items, giving bribery to public officials etc. Therefore, a comprehensive legislation is required to be made out on this topic to avoid any further loss to the humanity.

In short, holding a corporation criminally liable is not a new concept, but the legislation is required to be done on this point, especially from the Pakistan's perspective as it's a relatively new topic in Pakistan and requires being refined through legislation to run the corporations smoothly.

1.1 MEANINGS OF CORPORATE CRIMINAL LIABILITY:

To understand the term “corporate criminal liability” it is essential to know all the three terms i.e. Corporation, Crime and Liability.

1.1.1 Corporation's Dictionary Meanings:-

- a) “An entity having authority under the law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely.”⁵
- b) Corporations relating to Business Corporation;⁶

⁵ Black's Law Dictionary.

i) A large business or company ii) A city or town council

c) According to the Companies' Ordinance 1984;

"Corporation means a corporation formed and registered under this ordinance or an existing company."⁷

1.1.2 What is "crime"?

a. "An act committed or omitted in violation of a law forbidding or commanding it and for which punishment is imposed upon conviction or a unlawful activity: statistics relating to violent crime or serious offense, especially one in violation of morality or an unjust, senseless, or disgraceful act or condition: It's a crime to squander our country's natural resources."⁸

b. According to Pakistan Penal Code, the word "Crime" means "any act or omission, punishable under the code or any other law for the time being in force."⁹

1.1.3 Liability Explained:-

To understand the topic with regard to the criminal liability of corporations the definitions of liability and its various kinds must be known.

DEFINITION:

"Liability means, the quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment"

⁶ Collins Compact Dictionary.

⁷ "Mansoor Chaudhry, a guide to Companies Ordinance 1984, (LHR; Umer Khuram Printers, 2005) 29."

⁸ "The American Heritage Dictionary of the English Language, Fourth Edition copyright 2000 by Houghton Mifflin Company. Updated in 2003. Published by Houghton Mifflin Company."

⁹ S.40 Pakistan Penal Code, 1860.

1.3.1.1 Kinds of liability:-

- a) *Joint liability*: “Liability shared by two or more parties.”¹⁰
- b) *Several liability*: “Liability that is separate and distinct from another’s liability, so that the plaintiff may bring a separate action against one defendant without joining the other liable parties.”¹¹
- c) *Contingent liability*: “A liability that will occur only if a specific event happens: a liability that depends on the occurrence of a future and uncertain event.”¹²
- d) *Enterprise liability*: This type of liability can be classified under two heads.
 - i. **Civil**: “Liability imposed on each member of an industry responsible for manufacturing harmful or defective product, allotted by each manufacturer’s market share of the industry (industry-wide liability/ market share liability/ products liability)”¹³
 - ii. **Criminal**: “Criminal liability imposed on a business for certain offenses, such as public welfare offenses or offenses for which the legislature specifically intended to impose criminal sanctions.”¹⁴
- e) *Statutory liability*: Liability that is created by a statute as opposed to common law.

¹⁰ Ibid. at 126.

¹¹ Ibid. at 127.

¹² Ibid.

¹³ Ibid. at 130

¹⁴ Ibid. at 130.

- f) *Vicarious liability*: “Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.”¹⁵
- g) *Strict Liability*: “The offense in which a defendant will be liable unless it can be established that the defendant used due diligence to avoid the commission of an offense.”

1.2 Definition of Corporate Crime:-

“Corporate crime is similar to that of white-collar crime. It is a criminal activity by persons of high social status and respectability, who use their occupational position as a means to violate the law.”¹⁶

The simplest definition of Corporate Crime is given by Braithwaite; according to him “*conduct of a corporation, or of employees acting on behalf of a corporation, which is prescribed and punishable by law.*”¹⁷

1.3 General Concept of Criminal Liability:

“The Pakistan Penal Code requires various elements to be proven before a person can be convicted of a crime. The commission of a prohibited act by the accused – for example, causing bodily harm, preparing a person to commit an offence, driving while impaired, or touching a person for a sexual purpose, must first be proven.”¹⁸

¹⁵ Geoff Lye, Francesca Muller and Rick Murray, *The Changing Landscape of Liability. A directors guide to Trend in Environmental, Social and Economic Liability*, (n.p: First edition 2004), 163.

¹⁶ “Edwin Sutherland, *White-Collar Crime* (New York: Dryden Press, 1949).”

¹⁷ “John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (London: Routledge and Kegan Paul, 1984), p.6”

¹⁸ Afzal Ahmed, *An Introduction to Criminal Law* (LHR: Mansoor Book House, 2002), 43.

“The basic rule of criminal liability revolves around the basic Latin maxim “*actus non facit reum, nisi mens sit rea*”. It means that to make one liable it must be shown that act or omission has been done which was forbidden by law and has been done with guilty mind.”¹⁹

1.4 Corporations Are also Subject to Criminal Liability:

As we know that the Corporations in Pakistan are already subject to “the Code of Criminal Procedure 1898”. According to the definition given in section 2 of CRPC, includes “*everyone, person, owner and public bodies, bodies corporate, societies, companies*”²⁰. However, it is practically very difficult in case of a Corporation as compared to an individual, to determine “whether a corporation has committed a prohibited act and whether a corporation has the requisite mental state.”

As the corporations are artificial juristic person and can only act through their authorized agents or the employees. We can take an instance of a Bank while making a loan to its customer, will solely depends upon the information of the employee or the references provided by the customer, but what will happen if the customer uses the same loan for illegal or unlawful activities? Can it makes the bank liable for the criminal acts of the customer like selling illegal products or importing drugs or swine flesh or any product of the like nature?

If we totally depend upon the actual situation that the banks made a loan which is used for criminal purpose, we will say that the bank has committed crime. But the question

¹⁹ “Actus non facit reum, nisi mens sit rea, basic Latin maxim.”

²⁰ Shahid Hussain Qadri. *Pakistan Penal Code 1860*, (LHR, Mansoor Book House, 2005), 40.

arises here is that, whether the bank knows the criminal purpose and intend of the customer before financing it?

Mostly, the President or the BODs, would be unaware of the fact that to whom the loan has been given. It is the business of a bank to lend many loans every month, and if the customer uses the loan for criminal purpose after obtaining it from the bank and the bank don't have any knowledge of the criminal intent of the customer, no offence has been committed by the bank. But on the other hand, if the authorized officer of the bank knows the criminal intent of the borrower, the issue will be framed to examine that whether the decision of authorized officer will be treated as "directing mind" or will of the corporation. This issue can be decided while taking evidence on the point that how much authority does that authorized officer had in framing the loan policies and procedures and how much benefit has been obtained by the bank. If it is proved through evidence that, the authorized officer constitute the "directing mind or will" of the bank, the bank has made a crime and the conviction can be made to the bank.

"A corporation is guilty of a crime if its *directing mind* committed the prohibited act and had the necessary state of mind. To be a *directing mind*, a person must have so much authority in the corporation that the person can be considered the *alter ego or soul* of the corporation. Determining who is a directing mind depends on the facts of each case, but generally the person must have authority to set policy rather than simply having authority to manage."²¹

²¹ "A Plain Language Guide, Bill C-45 - Amendments to The Criminal Code Affecting The Criminal Liability Of Organizations, Canada."

1.5 The Office Bearers of a Corporation (i.e. Directors, Officers & Employees) are also subject to Criminal liability:

To impose a criminal charge on directors, officers or employees of an organization may not merely depend upon the positions as director or officers in the organization. *"They can be convicted of criminal act if they are directing the corporation to commit crimes that will benefit the corporation, or are otherwise participating in criminal activities within the corporate context. In such circumstances, it is likely that the directors and Officers would be charged with the offence jointly with the corporation."*²²

1.6 Vicarious Liability—“The Basis of Punishment”:

The principle of vicarious liability is based on the relationship between employer/principal and employee/agent; it is an attribution of an act to the principal or the employer. To impose criminal liability on the principal/employer, first of all the elements of offence in the deed or act of the employee/agent should be examined. Once these elements were established in the deed or acts of the employee/agent, the same shall be shifted to the employer/principal based on the legal relationship that exists between them. This relationship, in and of itself, is a legal and perfect relationship of agency or employment.

"As per doctrine of vicarious liability it is a settled principle of legal fiction that stated, for the purpose of imposing liability, that whatever a person does through an agent, he is deemed to have done himself. In other words, we can say that, the law views the act of the agent or the employee as an act done by the principal or the employer, and the

²² Ibid.

knowledge of the agent or the employee is the knowledge of the principal or the employer.”²³

The law does not claim that the employer/principal actually acted or actually knew. Law knows that the reality is different and that these are two separate and independent entities, only one of which the agent or employer is actually involved in the actions or thoughts at stake.

The American Supreme Court while deciding a case held that:

“only one step further . . . in the interest of public policy, in order to supervise the behavior of the agent by imputing his act to his employer and imposing penalties upon the corporation for which he is acting.”²⁴

Because of the limited scope of this doctrine at the criminal level, and its frequent limitation to offenses of absolute or strict liability, it failed to offer a comprehensive solution to the issue of imposing criminal responsibility on legal bodies.²⁵

1.7 The Doctrine of Direct Liability:

Direct liability principle means, imposing of liability directly to the corporation. The purpose of development of the principle of doctrine of direct liability is to compare a corporate body with a human body. As the human beings can be punished for their illegal

²³ Due to considerations of proper legal policy in the association and the relationship of subordination between principal and agent, a fiction is devised, whereby the behavior and the thoughts of one individual, following the orders of another, appear as the behavior and the thoughts of that other. This fiction engendered the rule whereby the acts of one also bind the other.

²⁴ “New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481,494 (1909)”

²⁵ To practice vicarious liability doctrine with regard to mens rea offenses under certain circumstances, especially when dealing with the criminal responsibility of an employer of a publicly licensed business who has delegated operational authority to his employee or agent, and the latter’s infringement of the licensee regulations.

acts, so the corporations should also be punished. The people through whom the corporations do illegal acts are called as the “corporate organs”. In this way a corporation can be held liable and punished as a human being can be held liable and punished for an illegal act.

According to criminal law perspective, the embodiment of the legal body implies that, “at the time of criminal intent or behavior,” the corporate organ is also the corporation. According to sections 47 & 23 of the Chinese Companies Law and penal laws respectively.

“[T]he actions and intentions of an organ are actions and intentions of the company.”²⁶

“[I]f, keeping in view the circumstances of the case and the position of a person in the organization, responsibility and authority of a person in the management or the affairs of the corporate body—the act by which he committed the offense, his negligence or the criminal intent or are deemed to be the act, the negligence of the criminal intent of the body corporate.”²⁷

²⁶“ Chinese Companies Law, 1999, S. 47 (3d ed. 1999) (English translation) [Chinese Companies Law].”

²⁷ “Chinese Penal Law, 1977 (as amended in 1994), S. 23 (a)(2) (3d ed. 1999)(English translation).”

1.8 HISTORICAL DEVELOPMENT OF LAW RETLATING TO CORPORATE CRIMINAL LIABILITY:

The concept of corporate criminal liability is not an old one; a lot of discussion has been made at the end of 19th century on this topic. Every Country has its own laws, history, politics and economic unique to each Country, therefore the development and adoption of law in each Country is different from the other, as a result of it different “models of Corporate Criminal Liability” were introduced.

In 14th century it was contended that a corporation can do any offense in the same manner as an individual can do. All corporations can be liable both criminally and civilly, for those acts which are committed by their authorized agents. The corporations were also held liable to pay fines for such crimes.

The importance of corporations in the socio-economic life increased in the 16th and 17th centuries. There was a need to develop a law to control corporate misconduct. At that time the corporations were treated as a separate entity which can own property distinct from that of their members.

“It was observed for a long time in common law of England and Canada that the corporations were not generally be convicted of a crime. However there were certain exceptions which were based on the doctrine of respondent superior also called as vicarious liability principle. This doctrine was initially included in the law of torts in 17th century to compensate the party who were injured by a master’s servant, while the servant was carrying out the business of master.”²⁸

²⁸ Kathleen Brickey, Corporate Criminal Liability (2d ed. 1992) 64

The rationale behind above mentioned doctrine was that, *since the master is getting benefits from the works of servant, therefore, he should also carry the burdens if any.*

“After deriving the concept of vicarious liability from the law of tort, the Courts imposed vicarious criminal liability on corporations in those cases when the natural persons could be liable vicariously as well.”²⁹

The High Court of England pronounced many judgments on the issue of imposition of “direct criminal liability on corporations” and finally held “*that mens rea of certain employee of manager should be considered as that of the company itself*”.³⁰ However, it was not clear that how the mens rea element should be imputed to a corporation. This issue was settled in the year 1972 in a leading case of “*Tesco Supermarkets*”³¹ in this case the general principle of civil law termed as “alter ego” were taken to impose direct liability on the corporations, latter with the passage of time this principle was termed as “identification theory”.

In this case the Court considered that a corporation works as a human body works. For example the top level management can be considered as “brain” of the corporation, similarly the people through whom a corporation takes work can be considered as body parts of the corporation. Therefore, a corporation can be held directly liable as a human being can be held liable.

At the start of 20th century, the Courts interpreted that, normally the word “everyone” in the criminal law does include a corporation as well. Therefore, the corporations can be

²⁹ “*Regina v. Stephens*, (1866) L.R. 1 Q.B. 702 (nuisance case)”

³⁰ “*Guy Stessens, Corporate Criminal Liability: A Comparative Perspective* 43”

³¹.. *Tesco Supermarkets Ltd. v. Natrass*, [1972] A.C. 153.”

punished though fines even for those offenses in which the punishment for offense is only imprisonment.³² The Courts also specified the procedural and evidentiary rules that, how a corporation can be summed in a Court of Law and be tried.

Another hot topic of the 20th century was, that the difficulty faced by the Courts while holding corporations liable on the basis of mens rea element, as corporations have no state of mind. The law was decided on this point by deciding a case titled Lennard's Carrying Co. Ltd. by Viscount Haldane in the "House of Lords in 1915". "The issue in this case was, whether the fault of a director, who is actively participating in the affairs of a company, was in law the fault of the company." The general principle of directing mind was held in the case;

"A corporation has neither mind nor body of its own, therefore, its directing will, shall consequently be sought in the person of somebody who for some reason may be called as agent, and who in real be the directing mind or will of a corporation. In this case it was decided that the appellant was the directing mind and will of the corporation, hence his action shall be treated as the action of the company itself."³³

The theory of "directing mind" was also adopted in Canada for prosecuting the corporations. The Courts of Canada while deciding an important case titled R. v. Fane Robinson Ltd., held that;

"The two corporate officers of the company were the acting and directing will of the company, their bad intention (mens rea) and their illegal act (actus reus) were the intention and the act of the company and that conspiracy to defraud and obtaining money by false pretence are offences which a corporation is capable of committing."³⁴

³² "R. V. Great West Laundry Co. (1900), 3C.C.C 514"

³³ "Lennard's Carrying Co. Ltd V. Asiatic Petroleum Co., [1915] A.C 705, at 713 (H.L.)"

³⁴ "R. v. Fane Robinson Ltd 76 C.C.C. 196 at 203 (Alta. C.A.)"

The United States of America were following the pattern of English law in the beginning, but with the speedy growth of corporations in the US economy and society the law relating to Corporate Criminal Liability was developed more rapidly.

Initially the Courts of America were prosecuting corporations with "regulatory or public welfare offenses", in such type of offenses the proof of mensrea was not as much required. But with the start of 20th century the Courts started prosecution of corporations on the mens rea offenses as well.

In a case titled "*New York Central & Hudson River R.R v. U.S.*" the American Court held that "*the corporation shall be responsible for the acts done with the knowledge and purpose of its agents, acting within the scope of his authority.*"³⁵

The Court further held that:

*"in present times most of the business transactions were done through these corporations, moreover the interstate commerce is mostly in the hand of these legal bodies, the law cannot keep close its eyes by giving them immunity from all the punishment because of the old doctrine that a corporation cannot commit a crime, the Court while deciding the case against the corporation held that in present times the criminal liability of corporations is virtually as broad as the criminal liability of an individual; corporations can even be prosecuted and punished for manslaughter."*³⁶

³⁵ Kathleen Brickey, *Corporate Criminal Liability* (2d ed. 1992) 63

³⁶ E.M. Wise, *Criminal Liability of Corporations- US*, *Criminal Liability of Corporations* (H. de Doelder & Klaus Tiedemann eds. 1996) 384

CHAPTER NO.2

THEORIES ON CORPORATE CRIMINAL LIABILITY

2.1 Theories Developed On Corporate Criminal Liability:-

The common law played a very vital role in the development of theories relating to the criminal liability of corporations. These theories were developed with a passage of time and on case-by-case basis. The role of judiciary is very vital in the development and formation of these theories, and most importantly in the twentieth century, when Judiciary started interpreting criminal law with regard to the corporations. *"These models are the agency theory and, in a more elaborate form, identification and aggregation theories."*³⁷

2.2 Agency Theory:-

This theory was the creation of law of torts, according to which the principal shall be liable for the acts of the agent. With the development of law relating to corporate criminal liability Courts took the concept of law of torts regarding principal and agent and applied it to the corporations as well. The directors, manager or employees will be considered as agents of a corporation and can held corporations liable being the principal.

"The principle of Criminal Liability is that a person is not criminally liable for his acts or conducts unless the prescribed state of mind is also present. As per criminal law there are three major elements required to be proved for offending a person. These elements are *Actus Reus*—a physical act by a person, *Mens Rea*—the state of mind or intent of the

³⁷ "Harvey L. Pitt, and Karl A Groskaufmanis., "Minimizing Corporate Civil and Criminal Liability: A second Look at Corporate Codes of Conduct" (1990) 78"

person at the time of its act and *Concurrence*—the physical act and the mental state existing at the same time.”³⁸

Basis of agency theory are that, the criminal violations normally entails the three elements at the same time i.e. *actus reus, mens rea and concurrence*. As we know that the corporations are different from natural human beings as, they could not think, act or feel anything. The corporations do not possess the ability to think and hence cannot be guilty of the three elements making up criminal violations.

*“The only way to impute intent to a corporation is to consider the state of mind of its directors, managers or employees. This theory encompasses a simple and logical method of attributing liability to a corporate offender, if corporations do not have intention, then someone within the corporations must have it and the intention of such individual as part of the corporation will be treated as the intention of the corporation itself.”*³⁹

In the 20th Century the US Courts widely accepted this theory and framed three issues to test that whether a corporation could be held liable for the acts done by its employees, managers or agents etc. or not. The first issue was *that whether the employee was acting within the scope of his or her employment, second whether the employee/agent was acting for the benefit of the corporation however, it is totally immaterial that whether the corporation got any benefit out of it or not, even the act was ever been expressly*

³⁸ “Nicolette Parisi, “Theories of Corporate Criminal Liability (or Corporations Don’t Commit Crimes. People Commit Crimes)” in Hellen Hochstetler, ed., *Corporations as Criminals - Perspectives in criminal justice 6* (New York: Sage Publications, 1984) 41- 44.”

³⁹ “United States v. One Parcel of Land—stating agent’s knowledge of illegal act may be imputed to corporation if agent was acting as authorized and motivated at least in part by an intent to benefit the corporation”

*prohibited, and lastly whether the corporation assigned that act to the employee/agent or not?*⁴⁰

2.2.1 Scope of Employment

The scope to employment in relation to an employee can be determined by checking, that whether the employee was authorized by the principal or whether the employee had the apparent or actual authority to perform the illegal act or not? If the employee was authorized to perform the act, the act was said to be done within the scope of his or her employment.⁴¹

A corporation can also be liable for the acts done by an employee within his “apparent authority.”⁴² The apparent authority is that type of authority which an outsider can assume or judge from the act, responsibilities and position of the employee within the corporation or.⁴³

“By differentiating the attribution of liability either based on the actions of agents or based on the actions of high managerial agents, the law directly distinguishes between the ability of managerial employees and lower employees to understand and prevent crime.”⁴⁴

⁴⁰ “Actual authority exists when a corporation knowingly and intentionally authorizes an employee to act on its behalf—United States v. One Parcel of Land”

⁴¹ “United States v. Investment Enter Inc., stating that a corporation is criminally liable for the unlawful acts of its agents, provided that the conduct is within the scope of the agent’s authority, whether actual or apparent.”

⁴² “The authority that has not been expressly agreed but can be understood by a third party from the context of the agent’s acts.”

⁴³ “Apparent authority is authority—which outsiders would normally assume the agent to have, judging from his position with the company and the circumstances surrounding his past conduct.”

⁴⁴ “Richard S. Gruner, Corporate Criminal Liability And Prevention (U.S. Sentencing Commission, 2004), 65.”

2.3 Identification Theory:

The theory of identification is the creation of common law principles. In the late 20th Century the Courts were facing a lot of problems while dealing cases relating to the mens rea offences with regard to corporations. This theory was developed to counter the problems faced by Courts while prosecuting the corporations under the agency theory. The identification theory was developed to impose the primary liability instead of vicarious corporate criminal liability for those offenses which are required to be proved on the basis of criminal fault.⁴⁵

*"It is a well established principle that a corporation is an abstraction, it has no mind or body of its own, as a result its directing and active will must be sought in the person of somebody, who for some purposes may be called an agent, but who is really the directing mind and will of the corporation; also called as the very ego and centre of the personality of the corporation."*⁴⁶

The similarity between the agency theory and identification theory is that both the theories points out an individual to impose criminal liability on corporations. However, the difference between the two is that the agency theory was developed through the general tort principle, whereas the identification theory is a mere creation of common law principles, moreover it relies on the personification of a corporate body.⁴⁷ According to

⁴⁵ "A model of primary corporate criminal liability for the offences which requires mens rea that would later be known as the identification theory. Explained in the light of Haldane's judgment: In Lennard's Carrying Co Ltd v. Asiatic Petroleum Co Ltd."

⁴⁶ Julia Anca Pop, criminal liability of corporations—comparative jurisprudence (Michigan State University College of Law, 2006) 197.

⁴⁷ The important principle of the identification theory is the detection of the guilty mind, the recognition of the individual who will be identified as the company itself, who will be the very ego, vital organ, or mind of the company.

the identification theory, an employee is said to be working as a corporation and not for the corporation.

“When a crime is committed by an employee of lower lever, it will be treated as an isolated occurrence, or in other words it will be treated as against the clear and well-enforced company policies, the case for vicarious corporate criminal liability is at its depths. When an act done is totally contrary to the instructions of a Company, the case for vicarious corporate criminal liability is difficult to justify.”⁴⁸

There were two approaches developed by the US Courts while deciding the issues relating to the corporate criminal liability. According to first approach “corporation may be bound criminally by the acts of subordinate, even done by unskilled employees, and even by the acts of independent contractors”.⁴⁹ Whereas other approach to vicarious corporate criminal liability focused the role of high-level, managerial involvement and give weight to the due diligence of the company to prevent the employee’s offending conduct. However, it was finally observed in the number of cases that a corporation shall be accountable for any act by employees, regardless of their station or the instructions and training provided by the company.⁵⁰

⁴⁸ “Gerald E. Lynch, The Role of Criminal Law in Policing Corporate Misconduct, 60 Law & Contemp. Probs. 23, 39 (1997) (When corporations are held liable for the acts of relatively low-level managers, even acting in violation of express corporate policy, it becomes difficult to sustain the idea that ‘the corporation’ as an entity is blameworthy in any way that is easily analogized to the intentional actions of a natural person).”

⁴⁹ “Standard Oil Co. of Tex. v. United States, 307 F.2d 120, 127 (5th Cir. 1962); see also United States v. Automated Med. Labs., Inc., 770 F.2d 399 (4th Cir. 1985)”

⁵⁰ “United States v. Am. Radiator & Standard Sanitary Corp., 433 F.2d 174 (3d Cir. 1970); Apex Oil Co. v. United States, 530 F.2d 1291 (8th Cir. 1976); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972); Cont’l Baking Co. v. United States, 281 F.2d 137 (6th Cir. 1960).

To punish a corporation criminally for an offense, due to the action of its employee, without considering the position and level of such employee or without considering the steps taken by a corporation prevent that crime, has been criticized as an extensive weapon hold by the Government.⁵¹ As a result of accusation and the lack of defense to vicarious liability, the mere threat of criminal sanctions based on the actions of an individual employee has been enough to compel corporations to settle non-meritorious claims, which has forced shareholders to bear the burden of penalties never approved by a judge or a jury. Indeed, for many corporations, a criminal indictment is identical to the death sentence and can factually put an end to its artificial life.⁵²

2.3.1 Guilty Mind

To find out the guilty mind in a corporation is a basic aim of identification theory. The principle of identification theory revolves around the detection of a person who will be treated as a company itself, or “who will be treated as very ego, vital organ or mind of the company.”

To explain the term “guilty mind” the leading case “Tesco Supermarket Vs. Nastrass” is relevant here. “Tesco Supermarket was a large chain of stores which was charged with an offence under the Trade Descriptions Act 1968⁵³ by selling goods to consumers at a price different than had been announced. An advertisement of soap powder at a reduced

⁵¹ Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 59.

⁵² Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 *The Power of the Corporate Charging Decision Over Corporate Conduct*, 116.

⁵³ Trade Descriptions Act 1968, s. 20 (1): “Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of,...any director, manager, secretary or other similar officer of the body corporate, ...he as well as the body corporate shall be guilty of that offence...”

price was made by the store, but a shop assistant mistakenly placed normally priced soap powder on the shelf. The manager of the store had failed to ensure that the powder was available at the advertised price. There was a defense of due diligence which could be pleaded by the company, unless the manager's lack of due diligence could be attributed to the company.⁵⁴ The question was whether the manager of the store could be identified with the company via the common law doctrine, or in other words, whether natural person or persons are to be treated as being the corporation itself."⁵⁵

"The House of Lords in the above case held that the manager was not a person of sufficiently important figure within the corporate structure to be identified as the company for this purpose, and since the top management has followed the principle of due diligence, the company could use the defense. The manager of the store was not considered as the mind of the store. Instead, he was regarded as a servant, the hands of the store. Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company."⁵⁶

According to Lord Denning:

"A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the directing mind and will of the company, and control what it does. The

⁵⁴ Trade Descriptions Act 1968, s. 24 (1):"In any proceedings for an offence under this Act it shall...be a defence for the person charged to prove-(a) that the commission of the offence was due to...the act or default of another person,...and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence..."

⁵⁵ 1971 2WLR 1166. [Tesco]

⁵⁶ *ibid*

state of mind of these managers is the state of mind of the company and is treated by the law as such.”⁵⁷

Similarly “*Justice Viscount Dilhorne explained that in his view a person who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company would be the directing mind and will of the company.*”

From the discussion above it is clear that dirty mind with regard to a corporation means the mind of a person who is setting the policies and procedures of a company and who actually control the operations of a company.

2.4 Aggregation Theory:-

Under the aggregation theory, “the composite knowledge of different officers shall be aggregated to impute liability; the company aggregates all the acts and mental elements of the relevant and important persons within the company to ascertain whether in too they would amount to a crime if they had all been committed by one person.”⁵⁸

“Aggregation of employees’ knowledge means that corporate culpability does not have to be contingent on one individual employee’s satisfying the relevant culpability criterion.”⁵⁹

⁵⁷ “Lord Denning in *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.*, [1957] 1 Q.B.159 at 172.”

⁵⁸ “This theory is grounded in an analogy to the law of tort in the same way as the agency and identification doctrine.”

⁵⁹ “Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed. (Oxford: Oxford University Press, 2001) at 156.”

The work and decisions of US Federal Courts for punishing a Corporation regarding criminal acts resulted in to new principles latter called as aggregation theory. A leading judgment pronounced by the US Federal Court in this regard was in the matter of "*United States v. Bank of New England*", in this case the defendant was declared guilty for not filing of mandatory "*currency transactions reports also called as CTRs*"⁶⁰ on withdrawal of cash in aggregate more than ten thousand US dollars. In this case the client made many withdrawals from the bank through different cheques; in aggregate more than ten thousand dollars, but none of the cheque was over ten thousand US dollars, all the cheques were relating to one account and in aggregate the total amount withdrawn by the customer was over 10,000 US dollars, moreover the customer presented different cheques at different times to different tellers. On the bank statement the Bank treated each transaction separately and failed to file the currency transaction reports as per law.

An important question raised and later decided by the Trial Judge was that, whether the knowledge of all the employees of defendant shall be treated as aggregate knowledge of defendant or not? While pronouncing judgment on the issue the Judge held that "the collective knowledge model" is attracted here. The knowledge of the Bank's employee during the course of their employment shall be treated as an aggregate knowledge of the bank, and therefore, declared bank guilty for not filing "currency transaction reports" as required under the law, it was further held that it is not necessary for an employee of a bank to know the acts of other employees to form aggregate knowledge.

In the same case it was explained by the Court that:

⁶⁰ "The Currency Transaction Reporting Act (31 C. F. R S.103) requires banks to file Currency Transaction Reports within fifteen days of customer currency transactions exceeding \$10,000."

“Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation’s knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation.”⁶¹

Another important case with respect to aggregation theory is “Inland Freight Lines v. United States” in this case it was argued that “The idea of aggregate knowledge is primary to the concept of *corporate fault*,⁶² it represents that intention must come from a single individual. The theories of Common law theories are bringing back to life, the principles of criminal law that have prevailed before the prevalence of the principle that only individuals commit crimes. In all of these theories, corporate fault is still traced back to an individual or a group of individual, yet they allow the imputation of criminal liability to corporations.”⁶³

Willful company offenses not requiring a culpable specific intent can be established by corporate operations that fail to properly handle existing information indicating the applicability of criminal statutes to corporate activities. Where some corporate personnel appreciate the wrongful character of a type of corporate action, but a particular employee undertaking the action does not understand or have reason to know that it is illegal, “a corporate employer can be held for a willful criminal offense”. Essence of this type of

⁶¹ This doctrine was led in a very famous case United States v Bank of New England. Basically the theory of aggregation was first presented in this case.

⁶² Corporate fault is the fault of the group and not of the corporation itself.

⁶³ “Inland Freight Lines v. United States, 191 F. 2d 313 (10th cir. 1951) at 315-316. This case involved the Commerce Act’s prohibition against maintaining false time logs for the drivers.”

liability is the reckless failure to recognize the illegitimacy of the corporate conduct involved due to defects in corporate information-handling system.

A specific intent to violate a legal standard can be found based on collective knowledge where at least one corporate employee appreciates that a legal requirement obligates a corporation to act in a particular fashion, but other corporate employees evidence plain indifference to compliance with that requirement. To establish this type of collective liability, there must be proof of an appreciation by a corporate employee of the applicability of a legal requirement to corporate operations and a failure by another corporate employee to take steps to evaluate his or her compliance with the legal requirement in the course of violating that requirement.

2.4.1 Corporate Knowledge based on Group Knowledge:-

The knowledge of an actor is material in a variety of criminal liability assessments. For example, some offenses require knowing violations of criminal standards. Other offenses, such as those involving fraud, turn on misleading conduct which can be proven from circumstantial evidence that an actor knew that matters were not as the actor represented them. In still other contexts, the knowledge of an actor about risks associated with certain conduct may bear on determinations about the actor's recklessness in undertaking the conduct.

The collective knowledge that a corporation is deemed to hold is the aggregate knowledge acquired "*by its employees in the scope of their employment*". An

appreciation that acquired knowledge relates to actions elsewhere in the corporate organization is not necessary. It was held that

*A corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then would have comprehended its full import. Rather, the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.*⁶⁴

The corporation's responsibility for "the collective knowledge of its employees" is a matter of strict accountability, and not a question of due care in information gathering. Corporations are accountable for all the knowledge of their employees.

2.5 Obstacles to enforce Corporate Criminal Liability:-

There are two main obstacles in the way of enforcing criminal liability on corporations these are;

- a) That the corporations are artificial person and do not have a mind to constitute guilty mind or mens rea to commit an offense.
- b) Similarly Corporations do not have any body to be put behind the bars and therefore cannot be pronounced punishment for imprisonment.

Moreover, there are some other obstacles faced by the Courts while punishing corporations, for example, the Court requires accused to be brought in the court room for prosecution.⁶⁵ The doctrine of "ultra vires" is also relevant here according to this doctrine a corporation could not be punished for an act which is not provided in the charter of the corporation.

⁶⁴ "United States V. T.I.M.E Inc, 381"

⁶⁵ "Richard S. Gruner, at 329."

A company charter is the constitution of a company; it tells about all the aims and objectives of the Company, therefore, if any act is done was not provide in the charter of the company, it cannot be punished easily. "Any act done out of the scope of charter is void and the company is not liable and accountable to it."

CHAPTER NO.3

LEGISLATION IN PAKISTAN

3.1 Corporate Crimes and Legislation in Pakistan:-

There are series of corporate crimes all over the world and therefore, the whole world is busy in legislation process to counter the criminal activities of corporations. However, from the Pakistan perspective, we usually find it easy to adopt the ideas of others, therefore, the legislation in Pakistan regarding corporate criminal liability is very weak or in a pre-initial stage. This chapter will discuss the areas on which the legislation has been done in Pakistan to counter this big issue, and what our future challenges are.

3.2 Law related to Corporate Criminal Liability in Pakistan:-

The process of legislation in US was properly adopted after the down fall of Enron, Xerox, Adelphia and Rite Aid in the shape of Sarbanes-Oxley Act to enforce standards of accountability and transparency. "Pakistan's legislature, on the other hand, delegated the task of issuing a corporate governance code to the Securities and Exchange Commission of Pakistan (SECP), which enacted Pakistan's Code of Corporate Governance (the Code) in 2002."⁶⁶ Both of these laws are aimed on the principle of "lifting of Corporate Veil"—to punish the real culprit.

After its promulgation, the Code is facing very heavy criticisms however, in spite of criticisms, the process of development in the Code is continuous and growing with the help of explanations given by the court on its provisions, moreover, SECP itself have made substantial revisions to the Code. Most parts of the Code have not been

⁶⁶ Sec. & Exch. Comm'n Pak., Code Of Corporate Governance (2002)

significantly criticized by the Courts of Pakistan in the past 3 years.⁶⁷ “However, the courts have shown an unprecedented concern for the welfare of minority shareholders and have been willing to annul the decisions of majority shareholders in certain cases.”⁶⁸

3.2.1 CRIMINAL LIABILITY AND COMPANIES ORDINANCE 1984:-

The “Companies Ordinance 1984” penalizes the guilty directors and other responsible persons but it does not penalize the company itself. There are certain provisions relating to the criminal liability in Companies Ordinance, 1984 which are discussed as under.

“According to section 60 of the Companies Ordinance, 1984”

*“Where a prospectus includes any untrue statement, every person who signed or authorized the issue of the prospectus shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to ten thousand rupees, or with both”*⁶⁹

Section 194 of the Companies Ordinance says

*“Save as provided in this section, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any director, chief executive or officer of the company or any person, whether an officer of the company or not, employed by the company as auditor, from, or indemnifying him against, any liability which by virtue of any law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company, shall be void”*⁷⁰

Section 270 of “the Companies Ordinance says”

“If, from any report made under section 269, it appears to the Commission that any person has, in relation to the company or in relation to any other body corporate, whose affairs have been investigated by

⁶⁷ “One exception is when the Sindh High Court accepted a company’s right to continue with its external auditor, as opposed to the Code, which requires a change of auditors every five years.”

⁶⁸ “These matters tend to arise out of minority shareholders’ objections to swap-rationing determined in schemes of arrangement for proposed mergers. 2003 CLD 1209; Kohinoor Raiwind Mills Limited v. Kohinoor Gujjar Khan Mills Limited.”

⁶⁹ “Section 60 of the Companies Ordinance, 1984”

⁷⁰ Ibid

*virtue of section 267, been guilty of any offense for which he is criminally liable, the Commission may, after taking such legal advice as it thinks fit, prosecute such person for the offence, and it shall be the duty of all officers and other employees and agents of the company or body corporate, as the case may be, other than the accused in the proceedings, to give the Commission or any person nominated by it in this behalf all assistance in connection with the prosecution which they are reasonably able to give.*⁷¹

According to "section 418 of the Companies Ordinance, 1984"

*"If it appears to the Court or liquidator in the course of winding up by, or subject to the supervision of, the Court that any past or present director, or other officer, or any member, of the company has been guilty of any offence in relation to the company for which he is criminally liable, the Court may, either on the application of any person interested in the winding up or of its own motion, direct the liquidator either himself to prosecute the offender or to refer the matter to the registrar."*⁷²

Section 475 of the Companies Ordinance, 1984 says.

*"Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898), every offence against this Ordinance shall, for the purposes of the said Code, be deemed to be non-cognizable."*⁷³

We can notice that there are a number of crimes in which the corporations are involved now a day. One of the basic confusion we are facing in present times is the mysterious disappearance of corporations. We can notice that a number of companies listed with the Stock Exchanges in Pakistan vanished after some time. This means that many of such companies offer their shares to the general public, raise a lot of money from the investors loots them and run away. Similarly we can see the big names came in to the market, "with huge publicity stunts but after raising money, disappeared into the thin air."

After going through the relevant sections of Companies Ordinance, 1984 it is obvious that the Ordinance punish only guilty culprit & not the company itself, it deals with the

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid

principle of lifting of corporate veil. However, there is a need of amendment in the Companies ordinance, 1984 so that some punishment in shape of fine or otherwise shall be imposed on the corporations as well to stop the continuous violation of laws.

3.2.2 PAKISTAN PENAL CODE AND CORPORATE CRIMINAL LIABILITY:-

A Corporate has “no soul to damn, and no body to kick.”

“The corporation is invisible, incorporeal, and immortal; it cannot be assaulted, beaten, or imprisoned; it cannot commit treason”

Every Country has its criminal law which is used as a vehicle for deterrence. The numbers of Corporations are increasing day by day, they have a very important role in the economy of every country.

According to the “Pakistan Penal Code, 1860 the word ‘Person’ includes any Company or Association or body of persons, whether incorporated or not.”⁷⁴

Since the application of this Code in Pakistan, we do not have even a single example where an FIR has been lodged against a body Corporate. The code only punishes the guilty accused who has committed the offence and not the corporate body. In other words the code is based on the principles of lifting of corporate veil.

“The word person as defined in section 11 and as appearing in sections describing offences where imprisonment is mandatory does not include corporate body. Corporate body of company is not indictable for offences which can be committed only by human individuals or for offences punishable with imprisonment. The Officer or Agent authorized to act on behalf of corporate body is individually liable for criminal action.”⁷⁵

According to the Pakistan Penal Code there are two core problems which came forward, during the growth of the “doctrine of Corporate Criminal Liability” were:

⁷⁴ Section 11 of Pakistan Penal Code 1860.

⁷⁵ 1977 P Cr. L J 537

1. "First is the failure to identify or prove corporate intent." As we know that, the criminal law is based on the intentional violation of any law for the time being in force. It is very difficult to identify the intention of a corporation (intangible and fictional entities) so that they should be punished under the law as well.
2. Second core issue is the imprisonment of corporate entities. As these are artificial fictitious entities, do have anybody to be brought before the court or to be imprisoned. Therefore, it was argued by the jurists that, the criminal law is not a good tool for controlling the behavior of corporations.

3.2.2.1 Model Penal Code provisions:

According to the provisions of Model Penal Code of Canada, if an act is done by the agent, which was prohibited under any law for the time being in force, during the course of his employment, and for which he was fully authorized by the BODs or high level management to perform, shall make a corporation liable for such illegal act irrespective of the fact that, whether or not the corporation has got any benefit out of it or not.

There is a wide range of crimes for which a Corporation can be punished, some of these crimes are as under:⁷⁶

1. Contempt of Court—where a corporation disobeys the decrees or orders of the Court, directed to it.
2. "Conspiracy."
3. "Bribery or a conspiracy to bribe public officials."
4. "The practice of medicine in illegal manner."
5. "Committing public nuisance."
6. "Licensing and regulatory statutes violations."
7. "Consumer protection laws violations."
8. "Violations of Antitrust law."
9. "Violations regarding Liquor law."

⁷⁶ http://www.legalserviceindia.com/articles/cor_dr.htm

10. "Larceny, if corporate officers authorized or acquiesced in criminal act."
11. "Extortion, by assuming that it was authorized, requested or commanded by a managerial agent having supervisory responsibility."
12. "Obtaining money by false pretenses."
13. "Selling or exhibiting obscene matter."
14. "Occupational Safety and Health Act violations."

It has been noticed in a number of cases that most of the crimes are performed to benefit the corporation and to raise profits. In some cases the corporations do not get any direct benefit, but may receive some indirect benefit, for example where a corporation does not observe safety measures for the workers—to reduce the safety cost. In all such cases the corporation must be punished criminally.

3.2.2.2 Punishments:

Fines are the best method to punish corporations. As we know that a corporation is an artificial person so do not have any soul or body to be imprisoned. The punishments which can be awarded to a corporation are through fines, penalties, seizure of its property and initiation of winding up proceedings leading to corporate death. Where in a statute the punishment given is of imprisonment or fine or both, than it will be in the discretion of Court to punish a corporation with fine.

3.2.3 CORPORATE CRIMINAL LIABILITY AND "PAKISTAN ENVIRONMENTAL PROTECTION ACT 1997"

The purpose of act is "to provide for the protection, conservation, rehabilitation and improvement of the environment, for the prevention and control of pollution, and promotion of sustainable development."⁷⁷

⁷⁷ "Preamble Pakistan Environmental Protection Act 1997"

3.2.3.1 CRIMINAL LIABILITY ON CORPORATIONS:

The criminal liability on corporations with regard to "Pakistan Environmental Protection act 1997" is the use and safely disposal of hazardous materials. All the precautionary measures should be adopted by the corporation while using and disposing of hazardous materials. Where a corporation does not follow the prescribed procedure, it shall be guilty of a criminal offense and shall be punished accordingly.

3.2.3.2 Whether "Pakistan Environmental Protection Act, 1997 is sufficient or not?"

According to section 133 of the CRPC, Pakistan Environmental Protection Act, 1997 is a complete code with regard to "prevention and elimination of any pollution amounting to public nuisance" PEPA being special statute would override the provisions of general statute i.e. The Code of Criminal Procedure, 1898 in respect of matters covered by it and provisions of Section 133 CRPC by implication would stand repealed.⁷⁸

- "Pakistan Environmental Protection Act, 1997(PEPA)" is a complete code to deal with all the matters concerning the pollution, with certain exceptions. Before the implementation of this Act some other laws e.g. Factories Act, the Mines Act, West Pakistan Regulation and Amplifier Control Ordinance 1965 etc.
- These all laws deal with the control of pollution but these laws dealt with some special issues, such as Factories Act deals with the environment of

⁷⁸ 2001 CLC 1139

Factories, but unlike these laws, PEPA not only deals with all the issues such as Noise Pollution, Hazardous Waste, Hospital Waste, Agriculture Waste, Biodiversity but also deals with a large number of things which cause pollution.

- Furthermore this Act provides another important thing and that is sustainable development fund, controlled by the Sustainable development fund Board. It was established to invest money in such projects which may eliminate the pollution.
- The punishment awarded under this Act is based on deterrent theory of punishment so that the violators may not cause harm to the environment.
- Under this Act not only the Corporate bodies but Government corporations are liable for environment degradation.

3.2.3.3 Some Instances Of Environmental Degradation

- An estimated two thousand tons of dead fish was found floating in the marine beach at Karachi possibly due to toxic chemicals of industry effluent
- The burning of oil wells in Kuwait during the gulf crises caused atmospheric and marine pollution and the oil slick killed several species of birds due to deprivation of fish food and threatened the safety of consumers of water from desalination plant in Saudi Arabia.
- More than five hundred people fell sick after sulphur dioxide gas leaked from an acid plant in Bihar and standing crops in the vicinity of the plant were damaged in the previous decade.⁷⁹

⁷⁹ "Public Health and Community Medicine by Iliyas"

3.2.3.4 Enforcement of Criminal Liability against the Corporations:

“According to section 18 of the Pakistan Environmental Protection Act 1997”:

“Offences by bodies corporate.— Where any contravention of this Act has been committed by a body corporate, and it is proved that such offence has been committed with the consent or connivance of, or is attributed to any negligence on the part of, any director, partner, manager, secretary or other Officer of the body corporate, such director, partner, manager, secretary or other officer of the body corporate, shall be deemed guilty of such contravention along with the body corporate and shall be punished accordingly”

“Provided that in the case of a company as defined under the Companies Ordinance, 1984 (XLVII of 1984), only the Chief Executive as defined in the said Ordinance shall be liable under this section.”⁸⁰

This section of the Pakistan Environmental Protection act 1997 directly imposes criminal liability directly “not only to the body corporate but also to each director, partner, manager, secretary or other officer of the body corporate involved in the violations of the provisions of this Act.”

3.2.3.5 Problems Regarding Enforcing Criminal Liability on Corporations:

The “Pakistan Environmental Protection Act 1997” punishes Corporations being involved in environmental degradation, but there is a problem in enforcing liability to the Corporations due to the following reasons.

Section 12 of the “Environmental Protection Act 1997” says;

“No proponent of a project shall commence construction or operation unless he has filed with the Government Agency designated by Federal Environmental Protection Agency or

⁸⁰ “Section 18 of Pakistan Environmental Protection Act, 1997.”

Provincial Environmental Protection Agencies, as the case may be, or, where the project is likely to cause an adverse environmental effects an environmental impact assessment, and has obtained from the Government Agency approval in respect thereof...⁸¹

The “*Environment Impact Assessment (EIA)*” reports are of immense importance in imposing criminal liability to corporations. The unbiased independent reports are the base line while enforcing the Criminal Liability.

“The preparation of high quality EIA reports or Environmental Impact Statements (EISs) is one component of an effective translation of EIA policy into practice. However, just having EIA policy is not the only pre-requisite for producing good quality EIA reports. The literature on EIA suggests that many authors have been pondering upon the key issues related to achieving better quality of EIA reports.”⁸²

“The various issues which need to be addressed to achieve quality in EIA includes, a) enhancing the quality of information provided to decision makers, b) opportunities for public involvement, c) cost effectiveness, d) methods of impact analysis, e) Commitment to EIA, f) availability of EIA guidelines and legislation, g) resources allocated to EIA, h) nature and experience of various participants in EIA process, i) interaction between parties involved in EIA, j) type and size of project”⁸³

Corporations can escape in Pakistan from EIA due to political pressure and high level of corruption. In presence of these two elements the preparation of fair and quality reports are impossible. “The methodology adopted for this purpose includes diagnostics of

⁸¹ “Section 12 of Pakistan Environmental Protection Act 1997”

⁸² “J. Glasson, R. Therivel, and A. Chadwick, Introduction to environmental impact assessment, 2nd ed., London: UCL Press, 1999.”

⁸³ “Fuller, K., ‘Quality and quality control in environmental impact assessment,’ in Handbook of environmental impact assessment, vol. 2, Petts, J., Ed. Oxford: Blackwell, 1999.”

randomly selected EIA reports prepared for industrial development projects in Pakistan and interviews of those who prepare and review EIA reports.”⁸⁴

There are certain issued related to the Quality of EIA Reports which includes “a) insufficient allocation of funds and time for conducting EIA, b) non availability of baseline data, c) lack of experience of EIA consultants, d) insufficient involvement of affectees and regulators during scoping, e) no use of quantitative impact assessment methods, f) no formal consideration of project alternatives, g) no sound basis of proposed mitigation measures, h) no incorporation of public concerns raised during EIA review, i) subjective and quantitative nature of EIA review criteria, j) no independent EIA review body”⁸⁵

It is therefore, necessary that a proper EIA report in accordance with set criteria should be made before the start of any industrial undertaking, so that the corporate bodies can be punished for wrong doings and for causing contamination in the environment and destroying public health.

3.2.4 CORPORATE CRIMINAL LIABILITY AND “NATIONAL ACCOUNTABILITY ORDINANCE 1999”:

“National Accountability Ordinance, 1999 was introduced to provide for effective measures for the detection, investigation, prosecution and speedy disposal of cases involving corruption, corrupt practices, misuse/abuse of power, misappropriation of

⁸⁴“ O. Nadeem, and R. Hameed, ‘Good Environmental Governance Through EIA: The Case of Public Sector Development Projects in Pakistan,’ in Proc. 12 Annual International Sustainable Development Research Conf. Hong Kong, April 6-8, 2006a.”

⁸⁵“S. Momtaz, Environmental assessment in Bangladesh: A critical review, Environmental Impact Assessment Review, vol. 22, pp. 163- 179, 2002.”

property, kickbacks, commissions and for matters connected and ancillary or incidental thereto in Pakistan.”⁸⁶

“Section 9 of the Ordinance defines offense of corruption and corrupt practices, which definition includes the following”

“[A] holder of public office, or any other person, is said to commit or to have committed the offense of corruption and corruption practices:

[...]

if he dishonestly or fraudulently misappropriates or otherwise converts for his own use, or for the use of any other person, any property entrusted to him, or under his control, or willfully allows any other person so to do.”⁸⁷

The term “person” has been defined in the ordinance as

“[I]n the case of a company or a body corporate, the sponsors, Chairman, Chief Executive, Managing Director, elected Directors by whatever name called, and guarantors of the company or body corporate or any one exercising direction or control of the affairs of such company or a body corporate and in the case of any firm, partnership or sole proprietorship, the partners, proprietor or any person having any interest in the said firm, partnership or proprietorship concern or direction or control thereof.”⁸⁸

From the above sections it is clear that, every responsible officer of a company who is indulge in the corruption, misappropriation and corporate fraud shall be brought forward for prosecution before the Court, and “upon the successful prosecution for the offense of corruption and corrupt practices, the delinquent corporate management may face rigorous imprisonment which may extend to fourteen years in addition to the payment of a fine and the confiscation of the property misappropriated or obtained through corruption and corrupt practices.”⁸⁹ It is further “provides that the imposition of fine as a punishment

⁸⁶ “The Preamble of the National Accountability Ordinance, 1999”

⁸⁷ “Section 9(a)(iii) of the National Accountability Ordinance, 1999”

⁸⁸ “Section 5(o) of the National Accountability Ordinance, 1999”

⁸⁹ “Section 10 of the National Accountability Ordinance, 1999”

shall in no case be less than the gain derived by the accused by the commission of the offence.”⁹⁰

This is the first law in Pakistan which ever prosecute a person holding of a public office for an offense punishable under the law. “The Supreme Court of Pakistan has already considered an office of the public company to be a public office and, therefore, entertained constitutional petitions for the issuance of the writ of *quo-warranto*.⁹¹

Quid-e-Azam once said

“One of the biggest curse from which we are suffering, I do not say that other countries are free from it, but, I think our condition is much worse, is bribery and corruption. That really is a poison; we must put it down with iron hands.”⁹²

3.2.5 PREVENTION OF ELECTRONIC CRIMES ORDINANCE, 2009 AND CORPORATE CRIMINAL LIABILITY:

“Prevention of Electronic Crimes Ordinance, 2009 was promulgated to prevent any action directed against the confidentiality, integrity and availability of electronic system, networks and data as well as the misuse of such system, networks and data by providing for the punishment of such actions and to provide mechanism for investigation, prosecution and trial of offences and for matters connected therewith or ancillary thereto.”⁹³

⁹⁰ “Section 11 of the National Accountability Ordinance, 1999”

⁹¹ “*Salahuddin vs. Frontier Sugar Mills & Distillery Limited* PLD 1975 Supreme Court p. 244”

⁹² “Address of Quid to the first Indian legislative assembly on 11.8.1947”

⁹³ “Preamble of Prevention of Electronic Crimes Ordinance, 2009”

3.2.5.1 What is a “CYBER CRIME”?

The present world is facing a lot of problem due to “Cyber Crimes”. “Cyber crime may be said to be those species, of which, genus is the conventional crime⁹⁴, and where either the computer is an object or subject of the conduct constituting crime”⁹⁵. “Any criminal activity that uses a computer either as an instrumentality, target or a means for perpetuating further crimes comes within the ambit of cyber crime”.

There is another very simple definition according to which, “cyber crime may be unlawful acts wherein the computer is either a tool or target or both”.

1.2.5.2 Formation of law regarding E-crimes in Pakistan and its application over Corporations:

The “Prevention of Electronic Crimes Ordinance” was first promulgated in the year 2002, by the then President of Pakistan but in that Ordinance, the Corporations were not directly liable for their criminal conducts as defined in that Ordinance, but in the year 2007 a bill was passed by the National Assembly, in which all types of cyber crimes and their punishments were defined. Moreover, in that bill the Corporations were held liable for the first time in Pakistan for the crimes relating to electronic transactions.

On 9th July 2009, President of Pakistan was pleased to promulgate another Ordinance called Prevention of Cyber Crimes Ordinance, 2009. Section 21 of the said Ordinance says that, if a crime is conducted by a body corporate it shall be punished with fine and any director, Manager or person responsible for such action shall also be punished accordingly.

⁹⁴ “a legal wrong that can be followed by criminal proceedings which may result into punishment.”

⁹⁵ “Author Of CYBER CRIME By Parthasarathi Pati (Naavi.Org)”

Section 21 of the Prevention of Cyber Crimes Ordinance:

Offences by corporate body:

"A corporate body shall be held liable for an offence under this Ordinance if the offence is committed on its instructions or for its benefit. The corporate body shall be punished with fine not less than one hundred thousand rupees or the amount involved in the offence whichever is the higher. Provided that such punishment shall not absolve the criminal liability of the natural person who has committed the offence."

*Explanation.- For the purposes of this section corporate body, includes a body of persons incorporated under any law such as trust, Waqf, an association, a statutory body or a company.*⁹⁶

3.3 Reasons for the Imposition of Liability on Corporations:

It is very much necessary for all the corporations to follow law and procedures as provided. "The question is how to best ensure that companies comply with this legislation. Can compliance be secured by placing liability on the corporation alone or it is necessary to also impose liability on the directors and managers of those corporations? If so, what type of liability should be imposed on those managers?"⁹⁷

For these reasons SECP has proposed three tiers of liabilities;

3.3.1 First Tier - Criminal liability—lifting of corporate veil

According to first tier system to determine corporate liability, first there is a need to determine the nature of an act done by the corporation. To punish corporation there is a need to examine that, whether the act done by the corporation was really a criminal act or

⁹⁶ "Section 21, Prevention of Electronic Crime Ordinance, 2009."

⁹⁷ "Securities & Exchange Commission of Pakistan, Manual Of Corporate Governance (2004) 3.1 At 15."

not? And if it is proved that the act was criminal in nature than the manager or directors who are responsible for the same shall be punished accordingly.

3.3.2 "Second Tier - Civil Liability"

SECP proposed that the civil liability should also be imposed along with criminal liability. According to A second tier of liability should be introduced. "It is submitted that a duty should be imposed on directors and managers to ensure that the corporations that they control do not commit an offence under the relevant Act. Therefore, the manager should ensure that all the things done by the company should be done through due diligence."⁹⁸

3.3.3 Third Tier - Lesser penalties, education and persuasion:

As per SECP proposal there must be a system for imposing liability regarding offenses of minor nature. Where a company involves in a minor breach of law, all of its officer who are directing mind of the corporation should be personally liable for the act of the corporation. "It could involve the manager being warned, minor pecuniary penalties being imposed or orders being made that the managers undertake a relevant education program or implement a relevant compliance program."⁹⁹

3.4 Avoiding Criminal Liability under Sarbanes-Oxley Act

The Sarbanes-Oxley Act was introduced to cater with the corporate fraud and emphases on true and fair reporting. The financial statements should show the true picture of the

⁹⁸ "Any director or other person who is concerned, or takes part, in the management of the corporation is under a duty to prevent the corporation contravening the relevant legislation: where a corporation contravenes the relevant legislation any director or other person who is concerned, or takes part, in the management of the corporation has breached his or her duty and is liable to a civil penalty order unless the person proves otherwise."

⁹⁹ "Securities & Exchange Commission of Pakistan, Manual Of Corporate Governance (2004) 20."

company and it is the duty of the top level management and chief financial officer to implement a fair and fool proof compliance program as per law. Sec 302¹⁰⁰ of the Act is very much relevant here; according to it the financial statements should not mislead anyone regarding the financial position of the company. Similarly section 406¹⁰¹ of the act imposes responsibility upon the CFO & CEO to adopt the code of ethics for themselves as well as for the others and to comply with the government rules and regulations.

¹⁰⁰ “Section 302 targets a favored defense for individual officers being threatened during an investigation of corporate fraud.”

¹⁰¹ “S. 406 of the Sarbanes-Oxley Act 2002.”

CHAPTER NO.4

COMPARATIVE STUDY

4.1 Comparative Study of Corporate Criminal Liability in different Jurisdictions

Every Country has its own policies and procedures regarding the enforcement of Criminal Liability on Corporations. The countries that do impose criminal liability of some kind on corporations adopt varying approaches to the form and scope of this liability.

4.2 Overview of “Approaches to Corporate Criminal Liability in different jurisdictions”:

Every Country is following different approach for prosecuting a corporation guilty of corporate offenses. There are different theories/models with regard to corporate criminal liability (discussed in chapter 3 of this thesis), each Country chose to adopt different model which suits it the most. For example in US the agency theory is adopted—which based on the vicarious liability principle, according to this model a company can be indirectly liable due to the act of its employee done within the course of his or her employment. Similarly UK and Canada is following the “Identification Model” approach, according to this approach the state of mind of the senior officer/manager or director will be treated as the state of mind of the corporation itself, which renders corporations directly liable for the acts of their employees. In the same way some Countries adopts the aggregation model for the imposition of criminal liability upon the corporations.

According to this model a corporation can be punished due to aggregate knowledge of its employees.

4.3 Comparison of Criminal Liability of Corporations among different jurisdictions.

4.3.1 Australia:

The constitution of Australia gives some common wealth legislative powers to the Federation and rest of the powers to the States. The powers which comes under the domain of Federal system are related to defense, matters relating to drugs, fraud in tax matters, people trafficking, immigration offences, fisheries offenses, postal , trade, commerce with other countries, and telephone services, whereas rest of the matters are the responsibility of States.

Any other crime occurring within the boundaries of States are the responsibility of States, e.g. street crimes, theft and fraud offenses, murder cases, assault cases, traffic offences and hurt offenses. The States and commonwealth have their separate and independent agencies for prosecution, which are responsible for the prosecution of offenses occurring within their respective jurisdictions.

Therefore, under the federal system of Australia the commonwealth, under the Constitution, only has legislative power in respect of certain specified matters. These matters do not include general criminal law. Accordingly, most criminal law in Australia is State law, and federal criminal offences are confined to those enacted in relation to "matters in respect of which the Commonwealth does have legislative power." State criminal law varies across the jurisdictions: some Australian States have comprehensive criminal codes and others rely upon a combination of statute and the common law.

In Australia initially Courts relied on principles of vicarious liability, but thereafter followed the identification approach after its development in United Kingdom in 1970s.¹⁰² “The most significant aspect of Australia's corporate criminal liability regime is the statutory provisions providing for organizational liability in relation to federal offences, including on the basis of 'corporate culture'. These provisions are 'arguably the most sophisticated model of corporate criminal liability in the world'. There are also various provisions in individual statutes setting out models of corporate liability applying to particular offences.”¹⁰³

4.3.1.1 Responsibilities of Corporations at Common Law:

The general principles of common law that a corporation can be held liable for the criminal acts and omissions have been accepted by Australia. According to this principle senior officer or director will be treated as directing mind and will of the corporation, therefore, an act done by such person shall be treated as the act done by the corporation itself. The only difficulty faced by the courts was to determine that, which act comes

¹⁰² “*Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719 (relying on the UK decision in *Tesco Supermarkets Pvt Ltd v Nattrass* [1972] AC 151)”

¹⁰³ “Section 84 of the *Trade Practices Act 1974* (Cth) (TPA):”

1. “Where, in a proceeding under this Part in respect of conduct engaged in by a body corporate, being conduct in relation to which section 46 or 46A or Part IVA, IVB, V, VB or VC applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, being a director, servant or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind.”
2. “Any conduct engaged in on behalf of a body corporate:
 - a. “by a director, servant or agent of the body corporate within the scope of the person's actual or apparent authority; or”
 - b. “by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent;”

“Shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.”

under the purview of directing mind and will of the corporation? The question was finally resolved by the High Court of Australia in a case titled "*Hamilton v. Whitehead*"¹⁰⁴ by following the decision of "*Tesco Super Market v. Natrass*"¹⁰⁵

The Australian High Court which deciding the issue held that "In this case a company not qualified to offer 'prescribed interests' to the public was convicted as a principle for doing so. The offers were made by its managing director. The managing director's conduct was attributed to the company. The High Court also held that the managing director could be convicted as a secondary participant despite being instrument through which the company committed the offence."

4.3.1.2 Development of Criminal Law with regard to Corporations in Australia

The development in the Corporate Criminal structure of Australia was started in the year 1987, which resulted in the amendment of Criminal Code Act in 1995. The main purpose of the development was to maintain a uniform structure of law, policies and equity "in the operation of commonwealth criminal law throughout the Country." In the year 1987 a committee was formed by the Attorney General of that time which was chaired by the Chief Justice of High Court of Australia. This committee was formed to overview the commonwealth criminal law and to give its findings thereon. Thereafter in the year 1990 the committee presented its report which was known as "*Principles of Criminal Responsibility and Other Matters*"¹⁰⁶

On the basis of this report a draft uniform Criminal Code was presented "by the Standing Committee of Attorneys-General (SCAG)." This committee was further known as

¹⁰⁴ (1988) 166 CLR 121

¹⁰⁵ [1972] A.C. 153

¹⁰⁶ Review of Commonwealth Criminal Law. Interim Report. Principles of Criminal Responsibility and Other Matters. July 1990.

“Model Criminal Code Officers Committee (MCCOC)”. In the year 1995 the Criminal Code Act was passed by the commonwealth.

4.3.1.3 Insertion of New Provisions in the “Criminal Code Act of Australia”:

New differentiating provisions in the Criminal Code of Act were envisaged in Section 12 which depicts the true picture with regard to the Corporate Criminal Liability in Australia.

“Where an employee, agent or officer of a body corporate, acting within the actual or apparent scope of their employment; or within their actual or apparent authority, commits the physical element of an offence, the physical element of the offence must be attributed also to the body corporate.”(s.12.2)

“If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to the body corporate if that body corporate expressly, tacitly or impliedly authorized or permitted the commission of the offence” (s12.3).

“Authorization or permission for the commission of an offence may be established on, *inter alia*, the four bases set out in” s12.3(2):

- i. “the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence”;
- ii. “a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence”;
- iii. “a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance”; or
- iv. “the body corporate failed to create and maintain a corporate culture that required compliance”¹⁰⁷

“Corporate culture was defined as an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place”.¹⁰⁸

¹⁰⁷ “Section 12 of the Criminal Code Act of Australia 1995”

¹⁰⁸ Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (2002) p.144.

4.3.2 UNITED KINGDOM:

The identification model was followed by the UK since 1940, which was based on the principle of civil case titled “*Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*,”¹⁰⁹ decided by Viscount Haldane, in which it was held that

“[A] Corporation is an abstraction ... its active mind and directing will must consequently be sought in the person ... who is really ... the very ego and centre of the personality of the corporation.”

In 1940s, a series of cases were decided in which it was held that a corporation is directly liable for the offenses committed by its employees. In the year 1971, a very famous case titled “*Tesco Supermarket v Nattrass*” was decided by the House of Lords in which it was clarified “*that the corporations would be directly liable for wrongdoing committed by persons sufficiently senior to constitute the corporation's 'directing mind and will', on the basis that the actions and culpable mindset of such individuals were the actions and mindset of the company itself.*”¹¹⁰

After the decision of Tesco, the question arise that which persons are considered “sufficient senior to constitute corporation's directing mind or will” to impose liability on the corporation. A case titled *Meridian Global Funds Management Asia Ltd v Security Commission*,¹¹¹ was decided by the High Court, in which it was held that “in the case of statutory offences, the language of the provisions, their content and policy, served to indicate the persons whose state of mind would constitute the state of mind of the corporation. Accordingly, in order to identify these persons, it is necessary to engage in a

¹⁰⁹ [1915] AC 705.

¹¹⁰ [1972] AC 153.

¹¹¹ [1995] 2 AC 500.

rather circular inquiry into whether they have 'the status or authority in law to make their acts the acts of the company.'"¹¹²

In UK the doctrine of identification remains was adopted for a number of years for imposing criminal liability over corporations, but in the year 2007 they passed "*Corporate Manslaughter and Corporate Homicide Act called as (Corporate Manslaughter Act)*" which provides for a form of organizational liability in relation to the offence of manslaughter.

4.3.2.1 Corporate Criminal Law Development in United Kingdom:

The major development in the Corporate Criminal law of the UK started in the year 1999, after the incident of Southall train disaster in which seven people died due to defective Automatic Warning System. The allegation was that, if the Automatic Warning System equipment on the High Speed passenger train had been working, the chance of the accident would have been substantially reduced. In this case Mr. Justice Scott-Baker ruled that:

"Since the end of the 19th century the 'Corporation' has penetrated private lives to an unprecedented level. This means they have social duties to the public which can be interpreted as the 'directing mind'. If it can be established the extent to which this 'directing mind' is responsible for the an event which results in a death then Unlawful Killing or Corporate Manslaughter will stand"¹¹³

The main question decided in this case was, "whether a non-human defendant could be convicted of manslaughter by gross negligence in the absence of evidence establishing

¹¹² "Amanda Pinto and Martin Evans, Corporate Criminal Liability (2003), 66"

¹¹³ "http://danger-ahead.railfan.net/reports/rep99/southall_99_02a.html"

the guilt of a known individual? The Court of Appeal held that the 'identification' model in *Tesco v Nattrass* still served as the basis for corporate criminal liability.”¹¹⁴

In May 2000 Law commission recommended government that liability should be based on “failures in the management or organization of a corporation's activities.” These recommendations were accepted by the government. The law started developed during these years and “in 2007 the Corporate Manslaughter Act and Corporate Homicide Act was passed.” In this act the definition of offence was inserted with some new interpretations and therefore, the corporate bodies were liable for punishment for the offenses relating to the death of a human being committed by their employees in course of employment.

According to this act a corporations shall be liable for the offense of “corporate manslaughter” where the offense committed shall come under the domain of section 1 of the act. The relevant provisions of section 1 are reproduced hereunder:

4.3.2.2 “The offence”

1. “An organization to which this section applies is guilty of an offence if the way in which its activities are managed or organized”—
 - a. “Causes a person's death, and”
 - b. “Amounts to a gross breach of a relevant duty of care owed by the organization to the deceased.”
2. “The organizations to which this section applies are”—
 - a. “A corporation;”
 - b. “A department or other body listed in Schedule 1;”
 - c. “A police force;”
 - d. “A partnership, or a trade union or employers' association that is an employer.”
3. “An organization is guilty of an offence under this section only if the way in which its activities are managed or organized by its senior management is a substantial element in the breach referred to in subsection (1).”¹¹⁵

¹¹⁴ “Attorney-General's Reference (No 2 of 1999) [2000] 3 All ER 182.”

¹¹⁵ “Section 1 of the Corporate Manslaughter Act and Corporate Homicide Act 2007”

Similarly “Section 8 of the act provides that, where it is established that an organization owed a relevant duty of care to a person, and it falls to a jury to decide whether there was a gross breach of that duty, the jury must first consider whether the evidence establishes that there was a failure to comply with any Organizational Health and Safely legislation related to the alleged breach and, if so, its nature of seriousness if it is not complied, and how much of a risk of death it posed. The jury may also consider, among any other matters it considers relevant, any health and safety guidance that relates to the alleged breach and ‘corporate culture’ factors.”¹¹⁶

Section 10 of the act provides that where a corporation is convicted of corporate manslaughter, the court may upon the application of the prosecution pass a “remedial order” by directing the corporation guilty of the offense to remedy the breach of the relevant duty of care, deficiencies and other related matters. The prosecution will also consult with the enforcement authorities for formulation of the proposed order. The facts regarding conviction of the organization shall also publicize by the Court in a specific manner so that others should seek lesson, and will not do any act in violation of the act.

¹¹⁶“ Section 8 of the Corporate Manslaughter Act and Corporate Homicide Act 2007”

4.3.3 UNITED STATES OF AMERICA

US have similarity with Australia in the sense that it has criminal law at both federal and state level. Most of the prosecutions are conducted under the State Criminal Laws. The Corporations are held liable under the federal criminal law on the bases of doctrine of *respondeat superior* or vicarious liability.

The law adopted by the States is more complex as compared to the Federal law, due to the reasons that some States have adopted more complicated statutory provisions regarding Corporate Liability in the model penal code.¹¹⁷

As the Corporate Criminal law is simple at Federal level, therefore, US has advanced much further than Australia, the UK or Canada in developing sentencing regimes that are adapted to corporate defendants. According to the US *Federal Sentencing Guidelines Manual*, 'corporate culture' considerations are relevant in assessment of the proper fine and other orders to be imposed on corporate defendants.

4.3.3.1 Bases of Federal Law Principle:

The principle of *respondeat superior* has been followed at US Federal law system. According to this system a corporation can only be held liable for the criminal acts of its employees or agents, if it is proved that

- “The actions done by the individuals were within the scope of their employment and duties; and
- Such actions done by the individual was to benefit the corporation.”

As far as the first requirement for establishing offense is concerned, “*it is not necessary that the action done by the individual should be illegal, but it is sufficient that the*

¹¹⁷ “James Gobert and Maurice Punch, *Rethinking Corporate Crime* (2003) 59”

individual commits an offence in the course of achieving such objectives or undertaking the task which are required or authorized by virtue of his position."

A case titled US v Potter¹¹⁸ is relevant here, to determine the test regarding commission of an offense by an agent in course of his employment. In this case a general manager paid bribe to the speaker of the House of Representatives of Rhodes Island, even though the President of the company has considered the proposed course of action and ordered him not to proceed. The Court of Appeals observed:

"For obvious practical reasons, the scope of employment test does not require specific directives from the board or president for every corporate action; it is enough that the type of conduct (making contracts, driving the delivery truck) is authorized ... The principal is held liable for acts done on his account by a general agent which are incidental to or customarily a part of a transaction which the agent has been authorized to perform. And this is the case, even though it is established fact that the act was forbidden by the principal. ... despite the instructions [the individual in question] remained the high-ranking official centrally responsible for lobbying efforts and his misdeeds in that effort made the corporation liable even if he overstepped those instructions"¹¹⁹

For the second requirement i.e. actions of individual to benefit the corporation, the test has been discussed in the case titled "*US v Sun-Diamond Growers of California.*" The vice-president for corporate affairs, who was responsible for promoting the company's interest, was also a friend of Secretary Agriculture. The Secretary Agriculture requested his friend to assist in retiring the Secretary's brother's debts accrued in running for the Senate. Due to this understanding the vice-president for corporate affairs transferred 5000 US dollars of the company to satisfy his debt, by presenting it as a payment to a third party communications agency. The Court of Appeals held that:

¹¹⁸ "US v Potter 463 F 3d 9 (1st Cir, 2006)"

¹¹⁹ "US v Potter 463 F 3d 9 (1st Cir, 2006) 42-43."

*"Although the acts could be interpreted as acts of friendship for the Secretary, they could also have been intended to benefit the company by consolidating its relationship with the Secretary of Agriculture, despite the fact that the illegal acts effectively defrauded the company."*¹²⁰

4.3.3.2 Basis of State's Law Principle:

At State level the principle for imputing liability is almost similar as that of Federal system. The State follows the provisions based on the Model Penal Code, which also allows *"a corporation to be punished for an offence if the offence was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or a high managerial agent acting on behalf of the corporation within the scope of his office or employment"*¹²¹.

4.3.3.3 Corporate Culture of a Corporation—Basis for sentencing:

In 1991 after several years of research and debate on best approach to sentencing corporate bodies¹²² Chapter 8 of the Federal Sentencing Guidelines Manual was first introduced. This chapter provides a very detailed guideline to punish an organization convicted of Federal offenses and wrongdoings and, insofar as it provides for implementation of *'Compliance and ethics programs'*.¹²³ "The chapter is designed in such manner so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for

¹²⁰ "US v Sun-Diamond Growers of California 138 F 3d 961 (DC Cir, 1998)"

¹²¹ "American Law Institute, Model Penal Code (1981 revision) S.2.(1)(c)."

¹²² "Diana E Murphy, 'The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics' (2002) 87 *Iowa Law Review* 697, 701-2"

¹²³ "Compliance and ethics program means a program designed to prevent and detect criminal conduct."

organizations to maintain internal mechanisms for detecting, preventing, and reporting criminal behavior.”¹²⁴

4.3.3.4 Effective compliance and ethics program

According to US Federal Sentencing Guidelines:

- A. “For the purpose of effective compliance and ethics program, an organization shall;
 - a. Detect and prevent criminal conduct by exercising due diligence; and
 - b. To promote an organizational culture that provides ethical conduct and a commitment to compliance with the law.”¹²⁵

For obtaining above mentioned objectives it is necessary that, a corporate body should maintain procedures and standards to avoid and identify crimes. An effective compliance program should exists to check that whether the organization if following the standards and procedures or not? Top level management is usually responsible for the compliance of standards and procedures as per guideline provided by the US sentencing commission.

4.3.3.5 Determining Fine for Criminal Liability under Federal Sentencing Guidelines:

Imposing fines over organizations on the basis of “Corporate culture” considerations are mostly important in two aspects of Chapter 8 of the guidelines, namely the “assessment of appropriate fines”, and as an aspect of corporate “probation”.

¹²⁴ “Organization in this context means a person other than an individual, and includes corporations, associations, partnerships, unions, joint-stock companies, pension funds, trusts, unincorporated organizations, non-profit organizations and governments and political subdivisions.”

¹²⁵ “United States Sentencing Commission, Federal Sentencing Guidelines Manual (2006) S.8B2.1(a) (Sentencing Guidelines) available at <http://www.ussc.gov>”

Chapter 8 of the guidelines provides that the US Courts should determine the “culpability score” on the basis of certain **mitigating and aggravating factors** to calculate proper fine range. One *aggravating factor* is “involvement or tolerance of criminal activity”, said to arise:

- A. “Where there are 5000 or more employees in an organization or the unit of the organization wherein the offense was committed and;”
 - i. “A high-level individual personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or
 - ii. Where the tolerance of the offense by substantial authority personnel was persistent throughout the organization.”¹²⁶

Another *aggravating factor* is the absence of an “effective compliance and ethics program”. Such an absence of compliance program was an aggravating factor in the determination of a 'culpability score' in 100% of sentences under Chapter 8 in 2006..

Mitigating factors include the existence of an “effective compliance and ethics program” although this does not apply;

- “When the organization unreasonably delayed in reporting the offence to the concerned authorities;”¹²⁷ or
- “If a high-level personnel of the organization, or a person within high level of the unit of the organization within which the offence was committed, or an individual with either overall responsibility or day-to-day operational responsibility for the compliance and ethics program itself, participated in, condoned, or was willfully ignorant of the offence.”¹²⁸

Federal Sentencing Guidelines Manual, also empowered the Courts to order for a term of 'probation' for corporations (for a period not exceeding five years¹²⁹) where this is necessary, this will help the organizations to reduce the possibility of any future criminal activity.

¹²⁶ S.8C2.5 of the Federal Sentencing Guidelines Manual

¹²⁷ Sentencing Guidelines, above n 136, S.8C2.5(f)(2)

¹²⁸ Ibid S.8C2.5(b)(3)(A)

¹²⁹ Ibid S.8D1.2

The terms of Probation include requirements to develop and “submit to the Court an effective compliance and ethics program, make periodic reports as to compliance with the program,” and submit to audits and interviews of employees, conducted at the corporation's expense by the probation officer or court appointed experts.¹³⁰

As per US Sentencing Commission report in the year 2006, 217 cases were decided, a period of probation was ordered in 197 cases and in 41 cases the defendant was ordered by the Court to develop a compliance and ethics program.

¹³⁰ Ibid, S.8D1.4(c)

4.3.4 CANADA:

Like Australia, Canada is based on the federal system, but unlike Australia and the US, the criminal law is exclusively a federal responsibility. However, the provinces have the provincial legislative powers to enact penal provisions in order to enforce provincial legislation.

Under the Canadian Criminal Code, the Corporations are included within the definition of 'persons' who may commit offences, but the actual attribution of liability to corporations occurs on the basis of the identification doctrine also followed in UK.¹³¹

There are different offenses described under the Canadian Criminal law for which a corporation could be punished criminally, these offenses are;

- a. mens rea offences¹³²
- b. strict liability offences¹³³ and
- c. absolute liability offences¹³⁴

Doctrine of Identification applies in the offenses related to the mens rea as adopted in the UK for the same purpose. But in the case of Canada, the Courts decisions may admit a wider class of individuals "as the directing mind and will of the corporation."¹³⁵ Canadian law puts more importance on the office held by the individual than the question of whether the individual is the directing mind and will in their particular area of responsibility.¹³⁶ In a case titled The Rhone v The Peter the Canadian Supreme Court held that;

¹³¹ "Canadian Dredge and Dock Co v The Queen [1985] 1 SCR 662"

¹³² "requiring a culpable state of mind"

¹³³ "Strict liability offence is the offense in which a defendant will be liable unless it can be established that the defendant used due diligence to avoid the commission of the offence"

¹³⁴ "for which a defendant will be liable regardless of their state of mind"

¹³⁵ "The Rhone v The Peter A B Widener [1993] 1 SCR 497"

¹³⁶ "Canadian Dredge and Dock Co v The Queen [1985] 1 SCR 662 at 676."

“[The] key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy.”¹³⁷

However, on the other hand no question arises as to corporation’s state of mind “in the case of offences relating to the strict and absolute liability”. Regardless of having judicial statements that corporate criminal liability under the identification approach is direct, rather than vicarious, it seems that the physical element of these offences can be determined on the basis of standard vicarious liability principles, such that commission of the physical element of the offences by a corporation’s employee or agent will engage corporate criminal liability.¹³⁸

4.3.4.1 Development of Corporate Criminal law in Canada:

In Canada till 2003, the issue regarding Corporate Criminal Liability was examined in a number of law reform projects and reviews of legislation, but none of them could draft legislation on the matter.

The major development in the Canadian Corporate Criminal Law was started in the year 1992 with the incident of “Westray Mine” in which 26 miners were died due to explosion, which focused new interest in corporate criminal liability. The public inquiry report was released in 1997, in this report the committee concluded that the incident was occurred due to the mismanagement which had *‘created unsafe working conditions in the mine that directly contributed to the tragedy’*, and therefore, recommended that the Canadian Government may examine the accountability of corporate executives for wrongful and negligent acts of corporations. It was also recommended that some

¹³⁷ “The Rhone v The Peter A B Widener [1993] 1 SCR 497 at 526.”

¹³⁸ Gerry Ferguson, “Criminal Responsibility of Legal and Collective Entities (1999) P.165-7.”

amendments in the law should be brought so that the executives could be held liable for the safety of their workplace.

In the report a number of “Corporate Culture” factors were discussed to assess the cause of incident, moreover different recommendations were given for the development and legislation of law relating to the criminal acts done by a corporation. Mr. Justice K Peter Richard (Commissioner) recommended the following in the report.

“... management did not install a safety mentality in its workforce. The policy laid out there was never implemented as per given in the employees handbooks. But in fact, , management ignored a series of illegal or hazardous practices, including having the miners work 12-hour shifts, improperly storing fuel and refueling vehicles underground, and using non-flameproof equipment underground in ways that violated conditions set by the Department of Labor —to mention only a few.”¹³⁹

“...the management of the Westray was failed to provide safe work environment to its workforce, in fact, the examples of illegal and hazardous practices were encouraged and condoned by the Westray management. The management totally avoided any safety measure and apparently did so out of concern for the production imperatives. The management was full aware of unsafe use of torches underground. The management has not only condoned the practices but also reprimanded those who condemned it. The unsafe mentality of the Management was, in effect, filtering down to the Westray workforce.”¹⁴⁰

In the report along with other recommendations a very important recommendation was given, known as 73rd recommendation which results in the legislation of Corporate Criminal law in Canada. The 73rd recommendation provided that:

“The Government of Canada, through the Department of Justice, should institute a study of the accountability of corporate executives and directors for the wrongful or negligent acts of the corporation and should introduce in the Parliament of Canada such amendments to legislation as are

¹³⁹ “Justice K Peter Richard (Commissioner), The Westray Story: A Predictable Path to Disaster: Report of the Westray Mine Public Inquiry (1997), Executive Summary (Westray Inquiry Report) available at <http://www.gov.ns.ca>”

¹⁴⁰ Ibid

necessary to ensure that corporate executives and directors are held properly accountable for workplace safety.”¹⁴¹

The federal Minister of Justice in response to this Recommendation agreed to examine the issue of corporate criminal liability.

A Bill known as *Bill C-284* was drafted by proposing new provisions on corporate criminal liability.

In the bill it was proposed that:

“where an act or omission is done on behalf of a corporation, directly or indirectly by the act or in accordance with the order of any one or more of the officers, employees or independent contractors, and”

- “Such act or omission was tolerated, condoned or encouraged by the practices or policies established or permitted to subsist by the management of the corporation, or the management of the corporation could and should have been aware of but was willfully ignorant to the act or omission, and
- The management of the Corporation had developed a culture of common attitude between its employees and officer which encouraged them to believe that, the act or omission would be tolerated, condoned or ignored by the corporation.”

A hot discussion was started on the point of Criminal Liability of the Corporations; the department of justice prepared a paper for discussion and referred it “to the Standing Committee on Justice and Human Rights for public consultation.” The Committee presented its fifteenth report to the House of Commons on June 10, 2002, by recommending therein that;

“The Government should table in the House legislation to deal with the criminal liability of corporations, directors, and officers.”¹⁴²

In light of this report the Canadian Government concluded while discussing the case of Westray that “*regulations, no matter how effective on the paper, are worthless when they*

¹⁴¹ Ibid

¹⁴² Standing Committee on Justice and Human Rights, House of Commons, Parliament of Canada, Fifteenth Report (2002).

are ignored by the management".¹⁴³ It was further observed by the Government "that, there is a need to study on the accountability of corporate executives and directors for the negligent and wrongful acts of the corporation." The criminal law must be treated as an instrument of last resort and in most of the cases to be used as secondary to regulatory legislation. The Government response also observed that public consultation by the standing committee gives a mixed response; it little supports the vicarious liability principle as characterized in the US law, and also supports the creating of specific offences for the corporations, as adopted in the UK such as corporate manslaughter. Moreover, the Government noted that along with the determination of fact the "Corporate Culture" will also help to simplify the investigation of alleged corporate crime. However, the government did not focused so much on the "corporate culture" for the determination of criminal liability and therefore, finally concluded that:

"Corporate culture is at this moment an untested basis for criminal liability. The Government is conscious of the need for clarity in the law and considers that 'corporate culture' is too vague to constitute the necessary corporate *mens rea*."¹⁴⁴

After a detailed discussion the government retained the original "identification" model for imputing liability on the corporations. However, the government also recognized the fact that, the corporations in present time with modern structure necessary imputes responsibility on the managers below the board level for implementing policies, the Government wanted to "expand the class of persons who could constitute the directing mind and will of the corporation" for the purposes of imputing fault.

¹⁴³..Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights (November 2002) (Government Response), Background, available at <<http://www.justice.gc.ca>>"

¹⁴⁴ Ibid

4.3.4.2 Effect of new provisions in the Criminal Code of Canada:

The new provisions were inserted in the Canadian Criminal Code with effect from 31st March, 2004. The new provision codified the bases of liability of corporations for the offences with fault element (not strict or absolute liability offences). The following sections were added in the code for the purpose of imputing criminal liability over corporations.

- “Section 21 of Criminal Code of Canada defined “party to an offence” to include persons actually committing the offence, persons abetting the offence, and persons doing or omitting to do anything for the purpose of aiding any person to commit the offence.”
- “Section 22.1, states that a corporation will be treated as a party with a fault element of negligence to the offense if the “representatives or two or more representatives, acting within the scope of their duty are parties to the offence, and the senior officer “departs Markedly” the standards of care that could reasonable have been expected to prevent a representative of the corporation from being a party to the offence.”
- “will be a party to an offence with a fault element of negligence if either a “representative” (an employee, agent or contractor), or two or more representatives, acting within the scope of their employment, are parties to the offence, and the 'senior officer' liable for the relevant aspect of the corporation's activities 'departs markedly' from the standard of care that could reasonably have been.”

The amendments to the Criminal Code of Canada made in the year 2004, also brought the concept of probation orders. Like USA the probation orders can be issued against the corporate defendants. The Court may order a corporation to establish procedures and policies to minimize the chances of the corporation committing subsequent offence. The Court may also order to communicate such procedures and policies within the corporation, and to report the Court on their implementation.

4.3.5 Corporate Criminal Liability in India:

Like Pakistan there is no proper legislation has been made out on the point of Criminal liability of corporation in India. Indian Courts have inherited the identification model from England for the purpose of penalizing Corporations guilty of offense.

According to section 11 of the Indian Penal Code 1860 and section 3(42) of the General Clauses act, a person shall include “any company or Association of persons, whether incorporated or not”. Similarly “section 2 of the Indian Penal Code 1860 provides that every person shall be liable to punishment under the code.” Therefore, all the Corporate Bodies can be prosecuted and punished in the Indian Courts. However, there is no special and detailed legislation available on the point of Criminal Liability of Corporations.

Prior to 2005 the Indian Courts were of the opinion “that where the punishment required imprisonment the corporation cannot be punished.” As the corporation is an artificial juristic person having no body and soul, so where the act provides the punishment of an offense as imprisonment, the punishment could not be awarded to the corporations.

In 2005 the Supreme Court of India decided a very famous case titled *ANZ Grindlays Bank Ltd & Ors Vs Directorate of Enforcement*¹⁴⁵ in which the Supreme Court of India reversed this position, by holding therein that, where a statue mandated imprisonment and a fine, a court could impose a fine alone instead.

The main issue involved in the above mentioned judgment was that "Whether a company, being a juristic person, can be prosecuted for an offence for which mandatory punishment prescribed is imprisonment and fine?

¹⁴⁵ ANZ Grindlays Bank Ltd & Ors v Directorate of Enforcement [2005] 1NSC 315

From the appellant side it was argued that the appellant is a company and cannot be subject to any criminal action because the section only prescribes a minimum sentence of imprisonment and fine and the corporation cannot be imprisoned. Another point of argument from the appellant side was that the statutes creating criminal liability shall have to be strictly construed. When a statute prescribes punishment of imprisonment and fine, the court cannot be allowed to award punishment of fine alone. A corporation being a juristic person cannot be awarded the punishment of imprisonment. The appellant further contended that when a provision cannot be complied with as per its strict language, as a result there should be no prosecution. There is no logic in prosecuting anybody when the punishment cannot be awarded as per the mandate of the statute.

While pronouncing the judgment *Mr. Justice Arun Kumar* held that a statute does not make any distinction between a natural person and an artificial juristic person while laying down the criminal liability. The Indian Criminal Code does not provide any exemption for the corporations from prosecution if there is any difficulty in prosecuting them as per statute. So the corporations cannot be allowed to escape liability on this specious plea. Mr. Justice Arun Kumar referred a Latin maxim which means that "law does not compel a man to do which he cannot possibly perform"

The learned Judge referred the principle held in the case titled *Bulram Kumawat vs. Union of India.*¹⁴⁶ In this case a Bench of three Judges held that a judgment of conviction

¹⁴⁶ <http://indiankanoon.org/doc/1570759/> 2003 (7) SCC 628

can be passed against a corporation, but having regard to the fact that it is a juristic person, therefore, no punishment of mandatory imprisonment can be imposed. Furthermore, it was held that “while interpreting a penal statute any narrow and pedantic, literal and lexical construction may not always be given effect to. The law should always be interpreted having regard to the subject matter of the offence and the object of the law it seeks to achieve. The main aim of law is not to provide any offender to sneak out of the meshes of law—the criminal jurisprudence does not say so.”

Finally, it was held that the mandatory sentence of imprisonment and fine shall be imposed where it can be imposed, but where it cannot be imposed, namely on the company, fine will only be the punishment. Therefore, the appeal of the appellant was dismissed.

CHAPTER NO.5

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

After going through the whole discussion, it is now clear that the corporations are not merely fictions. They exist, work and occupy a predominant position in the society, and are able to cause harm to anybody in the same way as the human beings are able to cause harm. Therefore, we can apply the principle of equality before the law to treat them like human beings and hold them liable for the offenses they commit in the ordinary course of business. These Corporations play a vital role in Pakistan's economy and social life of people therefore, are required to respect the fundamental values of the society as defined by the criminal law. The approach regarding Corporate Criminal Liability of Corporations has changed over the years. In the beginning there was no concept that the Corporations can commit crime, but with the passage of time different theories were developed and adopted in different Countries. Many Countries have done legislation to combat the problem but in Pakistan even no debate till now has been done on the issue, which means that there is no proper codified law in Pakistan to control the crimes committed by a corporation.

The Corporate Criminal Liability is similar to that of individual liability. The law in Pakistan impose liability on the individual, whereas, globally both corporate and

individual prosecutions are available to the regulatory authorities. The whole world is trying to achieve greater control, monitoring and accountability of corporate activity in a globalised economy. The Crime regarding Corporations is similar to that of white collar crimes. There are cases where the prosecution of individual only is not an adequate remedy for example, where the basic purpose of a corporation can be achieved only through criminal activities, the dismissal of few individual is not an adequate remedy or where the individual liability is difficult to determine the prosecution of corporations is an attractive alternative. There are many other situations where the prosecution of corporate body is the only way to punish the white collar crimes. The prosecution of corporations should be done to achieve the effective regulations of corporate activities, as well as the general objective of sentencing.

We see a number of cases happened around us whereby a crime has been committed by a corporate body but no prosecution has been made against them, we have a case of Doctor's Hospital Lahore, whereby, a doctor during the course of his employment acted negligently to inject a girl of four years old with a wrong medicine to take her death, but no prosecution has been made against the hospital. We have the examples of municipal authorities, where main holes on the road were kept opened to take the life of innocent people, we have example of Railways, where accident occurred due to negligence of its officer in the performance of his official duties, we have example of electricity companies, where a number of people died from electric shocks due to improper wiring, we have cases whereby corporations appears in the stock exchange, offer their shares, loots the general public and then disappears in to the thin air, there are hundreds and

thousands of other examples in Pakistan where a crime has been committed by a Corporation but no prosecution has been made out against them. It is only because of the absence of Law regarding Corporate Criminal Liability, which is a very need of time to prevent any future loss to the society.

The Companies Ordinance, 1984 has given and conferred a special status to the Companies, which is not available to the other forms of business. The basic aim of the Ordinance is the effective development of corporations for the growth and progress of nation. The Ordinance required the Companies to perform their Social Responsibilities, so that the people of Pakistan can enjoy a quality of life. In the present time the Companies play a very vital role in the development and growth of a nation, therefore, they should be encouraged and motivated to contribute more. This purpose can only be achieved by providing additional benefits, privileges and concessions to the Corporations. Therefore, any law made on the Criminal Liability of Corporations should not be made so complicated by forcing them to comply with unnecessary and technical formalities. But the same should be made more liberal and simplified so that the *Corporate Governance* can become a real and effective governing force.

5.2 RECOMMENDATIONS:

After going through the whole discussion I would like to recommend following.

5.2.1 Amendments in Pakistan Penal Code:

According to section 11 Pakistan Penal Code, 1860 person includes body corporate, Association of persons whether incorporated or not, but till now we do not have any instance where punishment has been awarded to such persons by any Pakistani Court of Law. Reason being that, the law does not provide the punishment for a body corporate, for example where an offence has been committed by a corporate body the punishment provided for such offense in the law is only the imprisonment or the imprisonment and fine, than the system would fail to punish such a body corporate. It is therefore, recommended that the Pakistan Penal Code, 1860 should be amended to the effect that, the code should speak itself about the punishments where the offense is done by any unnatural person or a corporate body. New provisions regarding corporate criminal liability should be incorporated to make clear that the corporations shall be liable for conduct committed by those with authority over its actions, whether or not there is an individual who could be held personally liable for the conduct. The words “guilty mind” and “intention” may also be required to be elaborated more to include corporation in the purview of its definitions.

5.2.2 Infliction of Punishment to a Corporation:

As we know that a Corporation has no soul to damn, and nobody to punish. But there are certain other ways through which a corporation can be punished

criminally for its wrong and illegal acts. The legal system of a Country gives rights and liabilities all individuals and corporations. Though it is clear that the corporations plays vital role in the development of any Country's economy, but we cannot exempt corporation from the infliction of punishment only due to this fact, there must be strict control over this area effectively to counteract abuses. However, there are only two examples where the corporate criminal liability cannot be imposed: When the crime cannot be punished with fines—since fines are the principal means for punishing a Corporation, and where the crime, by its nature cannot be committed by a corporation (for example rape, hurt, sodomy etc.) In all other cases it is recommended that the Corporation should be punished as follows.

- a) Where an offence is punishable with imprisonment only or where the offence committed is punishable with imprisonment and fine. In such cases the only punishment of fine shall be imposed on the corporate body.
- b) Similarly, where the offences committed by a corporate body is punishable with imprisonment and any other punishment not being fine, it shall be competent to the Court to sentence the Corporation with fine.
- c) In addition to the punishment of fines, a corporation can also be punished with restitution¹⁴⁷, community services¹⁴⁸, remedial order¹⁴⁹, public notice and apologies¹⁵⁰, disgorgement¹⁵¹, probation¹⁵² and death penalty¹⁵³.

¹⁴⁷ Restitution order can be passed by the Court for the full amount of the victim's loss—the corporate body will pay compensation or refund the amount to the victim. This is an order requiring a convicted person to restore property to its rightful owner, compensate for a loss, or repair damage caused.

¹⁴⁸ The Court can order for community services for the performance of unpaid work to repay the community for an offense committed. A punishment imposed by a judge as a condition of probation, community service requires the offender to work a certain number of hours to recompense the community.

¹⁴⁹ The order of a Court to remedy the loss caused to the other party, it means the Court can order the corporation to do or not to do certain acts or omissions.

¹⁵⁰ The Court may order to the corporate body to publish public notices and apologies at its own expense to publicize the fact and nature of the conviction, punishment, and remedial steps to avoid future recurrence of misconduct.

¹⁵¹ According to Black's Law Dictionary disgorgement is the forced giving up of profits obtained by law <http://en.wikipedia.org/wiki/Law> or acts <http://en.wikipedia.org/wiki/Ethics>. The Court may

5.2.3 Amendment in Companies Ordinance, 1984

The Companies Ordinance, 1984 is basically working on the principle of lifting of Corporate Veil principle—to punish the real culprit/individual. There is a need to amend the Ordinance, so the punishment can also be awarded to the corporations, when the individuals are acting within the scope of their employment to benefit the corporation. For good performance of Companies in the economy of Pakistan, it is recommended that the Companies should be punished along with the director/officer/employee or any person working within the scope of his or her employment to benefit the Corporation. When a corporation will be punished, it will create an example for the other corporations and individual not to indulge in any criminal or illegal activities.

5.2.4 Issuance of Effective compliance and ethics program by SECP:

The SECP should issue an ethical code of conduct and sentencing guide lines for the employees and the corporations, any corporation or employee working outside the domain of such code shall be punished accordingly. In other words, we can say that there is a need to develop a “Corporate Culture” within the organization.

This will decrease the crime ratio on grass root level.

order wrongdoers (corporate body) to pay back illegal profits, with interest, to prevent http://en.wikipedia.org/wiki/Unjust_enrichment

¹⁵² Probation is a particular type of sentence for criminal offenders. The Court can issue a probation order, which allows a convicted defendant corporation to go free with a suspended sentence for a specified duration during good behavior. Probationers are placed under the supervision of a probation officer and must fulfill certain conditions. If the probationer violates a condition of probation, the court may place additional restrictions on the probationer or order the probationer to serve another additional punishment.

¹⁵³ The Court can impose punishment for a corporate death penalty by imposing fines large enough to deprive a corporation of all of its net assets; however, this punishment shall only be inflicted where the corporation is found to exist only for “criminal purpose” and not when the shareholders may be innocently unaware of corporate criminal conduct.

5.2.5 Drafting Altogether a New Law on Corporate Criminal Liability of Organizations:

Further in my opinion there is a need to develop altogether a new law to curb the issue of corporate criminal liability. The components of this law should be based on the need for both criminal and civil remedies in combating criminal liability of corporations. The law shall define all the important definitions involved with the issue, the nature of offense which a corporation can do, the quantum of punishment for such an offense, and the way of investigation for the crime. This law can mainly focus on the punishments of fine and seizer of property, and all other punishments mentioned in the recommendation No.2 given above. The corporations are growing day by day and the elements of frauds with the general public are increasing, therefore, there is an immediate need to draft such a law to avoid any future hazard.

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