

## Emergence of the Concept of Company Law: A Case of Pakistan

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**Abstract:** The co-operative trading undertakings were started as early as in the 13<sup>th</sup> century by way of a formal business through partnership and guilds until the 16<sup>th</sup> century when association known as “Company” did appear under the characters of incorporation by Tudor Monarchs who regulated the trade of merchant adventurers abroad and engaged in domestic enterprises. They like medieval guilds disciplined their members and provided them with monopoly in their transactions with the out-siders. The Levant Company<sup>1</sup>, the East India Company, the Hudson’s Bay Company and South Sea Company were incorporated as legal entities distinct from their members who were not liable for the debts of the corporation.<sup>2</sup> The word company has no strict legal meanings but in legal theory read with economic realities it implies: “An Association of a number of persons for some common object usually to carry on business for gain” The companies are artificial legal person invested by the law with most of the powers and responsibilities equivalent with those of natural persons. They may own property, enter into contracts, inflict or suffer wrongs, sue or be sued against and do or have done to them most other things like human beings i.e. it is capable of perpetual succession quite distinct from its members.<sup>3</sup> The corporate law has behind it a long history of centuries when in course of that period it was revised and repealed time and again by the legislature in England. Professor Gower in chapter 2 of “Principles of Modern Company Law (7<sup>th</sup> Edition)” has classified the development of Corporate Law falling into three periods:

1. Until 1720 when the Bubble Act was passed.
2. From 1720 until the Bubble Act was repealed in 1825.
3. From 1825 until the present day.<sup>4</sup>

**Keywords:** Company, Constitution, Authority, Legislation, Development, Statutory, Corporate, Court

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<sup>1</sup> The early History of Levant Company Mortimer Epstein, Rutledge & Sons Limited ( London)

<sup>2</sup> Elere v, boynton (1819) chapter 1 Page-501 (C.A)

<sup>3</sup> Salomon v. Solomon & CO. Ltd. (1897) A.C 22 at Page 28

<sup>4</sup> Gower’s Principles of Modern Company Law (Sixth Edition).

## 1. Introduction

In order to make possible for all types of investors specially the small one to contribute to the capital of enterprise with the issuance that in the events of going down to nose, they could lose no more than the amount they have contributed, concept of corporate personality and limited liability emerged. Such company is deemed to be distinct legal person, able to hold property and carry on business in its own name irrespective of the particular person who may happen to be owner of its shares from time to time<sup>5</sup>.

### HISTORY OF COMPANY LAW IN PAKISTAN

The development of Company Law in Sub Continent has also undergone formative phases since promulgation of Joint Stock Companies Act 1860 which introduced idea to set chartered Banks.

In 1866 another companies Act was enforced which was repealed by the Act of 1882. The Company Act 1882, the Companies (Amendment) Act 1875, the Companies (Memorandum of Association) Act 1875, Companies (Bank Register) Act 1900 and Companies amendment Act 1910 were repealed and to some extent consolidated by the Companies Act 1913. This Act was consolidating associations and in fact was drafted on the model of English Companies Act 1908. Idea to provide for an order of inspection into affairs of the company by local government on the instance of shareholders was first time translated into action.

Development of Company Law since 1913 is restricted to statutory law merely regulating certain rights recognized under the common law in England. So it is more or less an out-dated version of the English Law. The law enacted in 1913 was amended in 1929 and 1936 in lines with recommendations of Lord Green's report.

Since creation of Pakistan no worthwhile change was brought about in order to stream line the law. Efforts were, no doubt, made in 1959, when a Law Commission was appointed headed by late Ibrahim Ismail Chundrigar which was reconstituted in 1961, with SHARIFUDDIN

PIRZADA as its Chairman upon the demise of his predecessor. For no cogent reason the report submitted by Committee failed to get itself implemented, therefore, the Companies Act 1913, as adopted and amended, continued to remain in force until it was restructured in 1984 and introduced as Companies Ordinance, 1984.

We now have a corporate law which is near to foolproof and which facilitates easy reference and also gives quick adjudication in the Security and Exchange Commission of Pakistan, who is invested with the powers of the Court.

The Company Ordinance 1984 is not a final document that provides solution to all our corporate problems. Obviously no statute acquires perfection without undergoing the operational process of trial and errors, when shortcoming if any become manifest. Even in its present form the Companies Ordinance, 1984, is sufficiently broad based and a marked improvement over the repealed Act of 1913. It is quite a comprehensive piece of legislation and also embodies provisions relating to the latest and new Corporate concepts and modalities evolved in the wake of the government efforts to give our economy a sound Islamic base, and contains massive amendments repealing the Companies Act 1913, the Companies (Foreign Interest) Act, 1918, the Companies (Amendment) Act, 1930, the undesirable companies Act, 1958, the Companies (Managing Agency and Election of Directors) order, 1972, the Companies (shifting of Registered Office) Ordinance, 1972.

The Federal Government of Pakistan through section 3 of the Act XLII of 1997 has felt expedient to provide for establishment of SECP(Securities and Exchange Commission of Pakistan) for beneficial regulation of capital market, Superintendence and control of corporate entities and matters connected there with and incidental there to in place of Corporate Law Authority.

This is a step to words liberation and more involvement of the private sector absent government interference in order to maintain and to improve corporate activities with minimum procedural obstacles and less cost involved.

### TYPES OF COMPANIES

Following are the companies, set up time to time for the purpose of corporate activities.

<sup>5</sup> Foss V Harbottle (1843) 2 Ha 461

- i. Charter companies.
- ii. Statutory companies.
- iii. Registered companies<sup>6</sup>.

Lawful authority of incorporation might be by four means i.e. by the common law, by authority of parliament, by the king's charter and by prescription<sup>7</sup>.

According to sec 15 (2) of the Companies Ordinance 1984 there are following types of companies:

- i. **Unlimited Companies:** The liability of members is not limited at all.
- ii. **Companies Limited by Shares:** The liability of the members is limited to the extent of their unpaid shares.
- iii. **Companies Limited by Guarantee:** For each member undertakes to be liable to pay debts of the company up to certain amount.
- iv. **Subsidiary Companies:** A company is subsidiary of another company if that other company directly or indirect controls, beneficially owns or holds more than fifty percent of its voting security or otherwise has power to elect and appoint more than fifty percent of its directors.<sup>8</sup>
- v. **Modarba Company:** A company engaged in business of floating and managing of business in which a person participates with his money and another with his efforts or skill or both his efforts and skill and includes units trust and mutual funds by whatever name called<sup>9</sup>.

#### **PROCEDURE FOR INCORPORATION:**

Any seven or more person associated for any powerful purpose may be subscribing their names to the memorandum of association and complying with the requirements of the ordinance in respect of registration from public company and any two or more person so associated may in like manner from a private company<sup>10</sup>.

#### **NECESSARY STEPS:**

<sup>6</sup> Gower's Principle of Company Law 6<sup>th</sup> Ed. Page-5

<sup>7</sup> Sutton's Hospital (1612) 10 Co Rep 1

<sup>8</sup> Section 3 of Company Ordinance 1984

<sup>9</sup> Section 2 (23) of Company Ordinance 1984

<sup>10</sup> Section 15 (1) of Company Ordinance 1984

There are usually 5 steps which are important during the incorporation.

1. Name Clause.
2. Preparation of Memorandum and Articles of Association.
3. Submission of necessary documents.
4. Certificate of incorporation.
5. Board meeting.

Concept of incorporation of companies by registration was first legislated in the Joint Stock Companies Act 1844<sup>11</sup>.

#### **PROMOTER:**

A promoter is a person who undertakes to form a company with reference to a given object and to set it going and floats the company. It includes a person who was a party to the preparation of prospectus<sup>12</sup>.

Company after its incorporation is not bound by those contracts which were made before its incorporation by the promoters.

#### **NAME CLAUSE:**

Since the company is an artificial person, it can be identified only by its name which is thus of considerable importance<sup>13</sup>. As well as the British and Indian's law on the name clause of the company, the Companies ordinance of Pakistan also lays great emphasis on this subject where.

No Company shall be registered by a name:

- i. Which is inappropriate deceptive or is designed to exploit or offend the religious susceptibilities of the people.
- ii. The name must not resemble too closely the name of any other company.
- iii. The words expressing patronage of any Pakistani or foreign head of state cannot be used except with the prior approval of SECP<sup>14</sup>.

This concept was in fact originated by Lord Jenkins<sup>15</sup>.

<sup>11</sup> Mayson's Company Law 13<sup>th</sup> Edition Chap-1

<sup>12</sup> Section 59 (6)(a) of Company Ordinance 1984

<sup>13</sup> Mayson's Company Law 13<sup>th</sup> Ed. Chap. 49

<sup>14</sup> Section 37 of the Company Ordinance 1984

<sup>15</sup> Para 456 of Jenkins Reports

There are following considerations to be born in mind when choosing a name for a company, likely.

- (a) If a company limited by shares is to be a private company, the last word of its name must be Private limited and if it is public company, the name must end with “public limited”. But this does not invalidate contracts made in the course of such a trade or business.

**Case:**

The Registrar has no authority to refuse to register a company with a name which the registrar considers to be misleading.

The Registrar could refuse registration of the company’s name contain scandalous or obscene words<sup>16</sup>.

- (b) Using a name for one’s business, the name of another business so that actual damage has been or is likely to be, caused to the proprietor of that other business is a form of the tort of passing off which may be restrained by injunction.

**Case:**

The plaintiff who carried on business under the trade name of the “Buttercup diary company was held entitled to restrain a newly registered company from carrying on business under the name of the Buttercup margarine company Ltd”, on the ground that the registered company was connected with his business<sup>17</sup>

- (c) A company may conduct its business under a name which is not its corporate name i.e. the name under which it is register at companies house and appears on its certificate of incorporation Carrying on a business under a name which is not the true name of the person who is carrying on business is controlled by the Business Names Act 1985 which has two main objects.

- (i) To enable people, who wish to take legal proceedings against persons carrying on a business to discover that person’s true name?

- (ii) To control the use of undesirable name<sup>18</sup>.

**PUBLICATION OF NAME**

After approval of the name, the company is required to paint or affix the same on the outside of its business office and engraved it in legible character or its seal, so that all the business letters of the company notices official publications and negotiable instruments carry its name.<sup>19</sup>

In another case, a bill was drawn on a limited company and it was accepted by the secretary who wrote across it ‘accepted’. It was held:

“When the bill was not honored, the secretary was held personally liable as the company’s correct name was not mentioned in the bill.”<sup>20</sup>

**CHANGE OF THE NAME OF COMPANY**

A company at any time during the course of its business may change its name by the complying the following formalities:

- i. Through passing of special resolution.<sup>21</sup>
- ii. By obtaining approval in writing of the registrar who enters the new name on the register and issues certificate of incorporation in the change name.<sup>22</sup>
- iii. Where a company has inadvertently registered a name similar to that of an existing company it can be changed simply with the sanction of the Registrar.<sup>23</sup>
- iv. The company changing its name shall for a period of one year from the issue of certification of incorporation by the Registrar continues to mention its former name along with its new name on the outside of every office or place in which its business is carried on and on every documents.<sup>24</sup>

**Case:**

<sup>18</sup> Mayson Company Law (13<sup>th</sup> Edition) Page 52

<sup>19</sup> Charles worth & Cain’s Company Law (11<sup>th</sup> Edition)Page 67

<sup>20</sup> Penrose V Martyr (1856) 120 ER 595.

<sup>21</sup> Section 39 of Company Ordinance 1984

<sup>22</sup> Section 40 (1) of Companies Ordinance 1984

<sup>23</sup> Section 38 by Company Ordinance 19884

<sup>24</sup> Section 40(2) Company Ordinance 1984

<sup>16</sup> R V Registrar of Companies (1914)n3 KB 1161

<sup>17</sup> Ewing V Buttercup Margarine Co Ltd. (1917)2 Ch 1 CA

A change in the name of the plaintiff company during the pendency of suit does not affect the right of the company, if there for a decree is passed in the old name of the company it can be executed by the company in its new name.<sup>25</sup>

- v. Where the company is entitled to retain its old name until the new certificate is issued.<sup>26</sup>

## **1. PREPARATION OF MEMORANDUM & ARTICLES OF ASSOCIATION**

### ***(I) MEMORANDUM OF ASSOCIATION:***

Memorandum of Association is very important document in relation to the proposed company.<sup>27</sup> It contains the fundamental provisions of the company and defines as well as confines the power of the company. The memorandum of Association defines its relationship with the outside world and the scope of its activities. The memorandum of association thus the constitution of the company and is the very foundation on which the whole edifice of the company is built.<sup>28</sup> The statement of the objects in the memorandum serves a double purpose.

- a. It protects the subscribers.
- b. It protects persons dealing with the company.<sup>29</sup> Any activity in transgression of the objects is attachable under the doctrine of ultra vires.

### **CLAUSES IN THE MEMORANDUM**

There are six clauses in the memorandum of association which are:

- i. Name Clause.
- ii. Registered Office Clause.
- iii. Object Clause.
- iv. Liability Clause
- v. Capital Clause

<sup>25</sup> AIR 1955 All 192 (DB)

<sup>26</sup> Shackle Flip, Ford & Co Ltd. V Merger filed (1868) LR3 407

<sup>27</sup> Palmer's Company Law 1987 P-26

<sup>28</sup> Ashbury Railway Carriage & Iron Co V Riche (1875) LR & HL 653

<sup>29</sup> Cotman V Brougham (1918) AC 514

- vi. Subscription clause.

Memorandum of association serves an important role in the management of the company. It explains every corner of administration and given clauses is of vital importance, which has its own rules.

### ***(ii) ARTICLES OF ASSOCIATION***

The articles are made by the company for the internal management of its affairs and for carrying on objectives of the company. This document contains rules regulations and bye-laws for the general administration of the company.

### **DIFFERENCE BETWEEN MEMORANDUM AND ARTICLES**

- a. The memorandum is the area beyond which the company cannot go whilst the articles are the bye-laws for the government of the shareholders.
- b. Memorandum is altered regarding provision of the Companies ordinance whilst articles can be altered to any extent.<sup>30</sup>
- c. Articles are subordinate to the memorandum of association and cannot control over it but in case of ambiguity, both can be read together.<sup>31</sup>

### **BINDING EFFECT OF MEMORANDUM AND ARTICLES**

- I. Subject to the provisions given in the Act, the Memorandum and Articles shall when registered bind the company and its members thereof to the extent that if they have been signed by company and by each member and contain covenant on it and his heirs and legal representatives to observe and be bound by their provisions and the money payable by any member to the company under them treated as a debt due from him to the company.<sup>32</sup>
- II. An article of association constitutes a contract between the members and the company and the company can

<sup>30</sup> Section 21 of the Company Ordinance, 1984

<sup>31</sup> Shyam Chand V Calcutta Exchange Association AIR 1949( Cal) 337

<sup>32</sup> Section 31 of the Company Ordinance 1984

- sue its members for the enforcement of its articles as well as for restraining their breach.<sup>33</sup>
- III. The Article does not create any express agreement between the members of the company inter se. However, impliedly each member of the company is bound to other for breach of the articles.<sup>34</sup>
- IV. Neither the Memorandum nor the Articles give any right to the outsiders against the Company their names may have been mentioned in these documents. Hence, neither the company nor the members are bound to outsiders.<sup>35</sup>
- V. The company is not bound to its members. Hence, a member cannot enforce any article against it.<sup>36</sup>

#### **ALTERATION OF ARTICLES**<sup>37</sup>

- i. It may be changed by passing special resolution
- ii. It can not contain any thing which is against the provisions of the ordinance or go beyond the powers given in the memorandum.
- iii. Three fourth majorities are necessary during the alteration where the alteration affects the rights and liabilities of the members.
- iv. Alteration should not constitute fraud and is to be made bonafide for the benefit of the company.

#### **SUBMISSION OF DOCUMENT**

The following documents are submitted to the registrar of the companies along with prescribed fee.

- a. Memorandum and article of association.
- b. Letter of authority signed by the subscribers authorizing a representative to make

<sup>33</sup> Steam way Tramway Co V Laung Bombay LR 184

<sup>34</sup> Baillie V Orient Telephone Co. (1915) Ch-503

<sup>35</sup> Gulab Sing V Punjab Zamindari Bank Ltd. AIR 1924 Lahore- 28

<sup>36</sup> Manic Lal V Surya Pur Mills Co Ltd

<sup>37</sup> Section 28 Company Ordinance 1984

- amendments and alterations in the memorandum and articles.
- c. Particulars of the appointments of first Director in from 32 in duplicates.
- d. Consent to act as a Director, given by each Director where necessary undertaking regarding to trace up and pay for qualification shares.<sup>38</sup>
- e. Notice regarding registered office in from 18 within 28 days of incorporation.<sup>39</sup>

#### **CHANGE OF REGISTERED OFFICE**

The company may change or shift its registered office or place of business from one city to another or province by fulfilling the following requirements:

- i. Passing a Special Resolution.
- ii. Confirmation of the change from the Authority/SECP.
- iii. Filling the certificate issued by the Authority/SECP in the office of the Registrar.
- iv. Notice of new location
- v. Amendments in the memorandum and articles of association
- vi. Letter from the Registrar in original as regards availability of name.

#### **2. CERTIFICATE OF INCORPORATION.**

The certificate of incorporation is the conclusion evidence that all the requirements of the companies in respect of registration of the company and of matters precedents and incidental to the registration have been complied with and that the company is duly registered under the Companies ordinance.<sup>40</sup>

#### **EXCEPTIONS**

- (a) If the objects of the company are illegal they cannot be rendered legal

<sup>38</sup> Section 184 (1) Companies Ordinance 1984

<sup>39</sup> Section 142 of the Company Ordinance 1984

<sup>40</sup> Section 142 of the Companies Ordinance

by the issuance of certificate of incorporation.<sup>41</sup>

- (b) The certificate is the conclusive proof for the purpose of corporation and registration and it is not prove of fact that the object is legal which in fact are illegal.<sup>42</sup>

The date given in the certificate is the date of incorporation.

### 3. **BOARD MEETING**

The first board meeting will consider the following items inter alia.

1. Appointments of auditor's bankers and legal advisors.
2. Adoptions of common seal.
3. Opening of banks accounts.
4. Matters relating to share certificates.

### CONCLUSION

A company may be incorporated either by Royal Charter commonly known as Charter Company, by act of Parliament commonly known as Statutory Company, by registration commonly known as registered company. Registered Company is the most common type of company. A company has no contractual capacity prior to registration; therefore, after incorporation it became a separate legal entity, see Solomon V Solomon & Co Ltd and Lee V Lee's Air Farming Ltd. The main documents required for incorporation of a company are Article of Association and Memorandum of Association.

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<sup>41</sup> Mehboob Ali Malik V West Pakistan PLD 1963 Lahore- 575

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