Principled or Unprincipled Lifting the Corporate Veil under the Legal Regime of Pakistan, the United Kingdom, and the United States of America

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Abstract

This research article provides a comparison of three jurisdictions including the United Kingdom, the United States, and Pakistan about "lifting the corporate veil" practices to pinpoint the disadvantages and benefits of loose, subjective, broad, and commendable attitudes and approaches followed by each country's courts. This article compares the legal regimes of three jurisdictions to find out a prudent approach that can be more reasonable and effective. With that aim, the article conducts qualitative research and scrutinizes all the verdicts of the courts to unearth the canons that are recognized and utilized by the courts of all aforementioned jurisdictions to resolve the veil-piercing cases. In the end, the article provides several recommendations for refining the regulatory role regarding lifting the corporate veil.

Keywords: Veil lifting, Corporate, Agency, Instrumentality theory, Limited liability, Company

1. Introduction

The *"limited liability of the company"* is a principle that is universally recognized and uniformly implemented by various countries. Under this principle, while lifting the corporate veil, the liability is imposed on the parent company for the actions of the "individual shareholders or directors" of that company even though for the actions of subsidiaries or subsidiaries the liability is imposed on the parent company. This approach of veil-piercing is known as the "principled approach." The United States (hereinafter US) follows the principled approach and regards a set of uniform theories including "agency and instrumentality theory." However, this approach is not accepted in all jurisdictions. The United Kingdom (hereinafter UK) and Pakistan follow an "unprincipled approach" rather than the principled approach for piercing the corporate veil. Under an unprincipled approach, the corporate body has a separate entity and it cannot be considered liable for the actions of shareholders or any other person.

Thereby, this article provides a comparison of the UK, the US, and Pakistan to highlight which approach is utilized by the courts while dealing with corporate veil-lifting cases. With this purpose, the article inspects the flexibility in the jurisprudence of these courts while applying the principle or unprincipled approaches. This article highlights the inconsistencies in the decisions of courts as well. To this end, this article is divided into various segments.

The second segment dissects the Pakistani court's judgments to pinpoint the evolved principles of lifting the corporate veil and the stability and effectiveness of these principles in settling the claims concerning the corporate veil-lifting issues. The article describes that the Pakistani courts decide the matters according to the conduct of the parties rather than by relying on any specific policies or principles despite the presence of clear and reasonable laws. The third segment surveys the English courts' jurisprudence that has been developed on lifting the corporate veil's subject. This segment highlights the problems that exist in the jurisprudence of English courts while not applying a principled approach and also highlights how the companies and the shareholders are facing troubles by such

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attitude of English courts. The fourth segment inspects the attitude of the US courts and highlights these courts use a principled approach while settling the corporate veil-lifting claims. Moreover, the US courts use the enlightenment of the agency and instrumentality theory that provides a strong test for lifting the corporate veil matter. Due to the application of these theories the predictability of law has been increased in this jurisdiction. However, this article highlights several cases where the courts deviate from these established principles and followed unprincipled approaches. The ensuing discussion provides findings, conclusions, and recommendations.

2. Unified Principles or Unprincipled Approach for Veil-Lifting in Pakistan

The legal system of Pakistan is influenced by common law. Pakistani courts operate under a similar regime as the UK courts do. Pakistani courts recognize the principle that a corporate body has a separate entity and the shareholders of that corporate body cannot be liable for the actions of the corporate entity. In *National Accountability Bureau v Murad Arshad (2019), the* Supreme Court of Pakistan adopted the unprincipled approach and stated that this approach was set in *Salomon v. Salomon and Co. Ltd (1897),* as this approach is based on public policy or good. Moreover, this ruling is entrenched in common law jurisdictions. In the practice of the Pakistani courts, shareholders cannot be liable for paying the debts of a company. Similarly, they are not liable for any crime committed by the corporation (Ikram, 1963).

The Companies Ordinance 1984 gave significant importance to the separate and distinct corporate identity. However, the Companies Ordinance 1984 has been repealed by the Companies Act 2017. Section 18 of the Companies Act 2017 enlists the effects of the registration of the companies. Section 18 (b) of the 2017 Act reads *"the body corporate is capable of exercising all the functions of an incorporated company, having perpetual succession and a common seal."* Reading section 98 of the 2017 Act along with its section 18 makes clearer sense. Section 98 says "in a limited company, the liability of the directors or any director may, if so provided by the memorandum, be unlimited."

In *National Accountability Bureau through Chairman v Murad Arshad* and others (2019), the Supreme Court of Pakistan has set four circumstances in which the veil of a corporation can be lifted. These include:

"i) where a statute itself contemplates lifting the veil, or

ii) fraud or improper conduct is intended to be prevented, or

iii) a taxing statutory beneficent statute is sought to be evaded, or

iv) where associated companies are inextricably connected as to be in reality, part of one concern."

Although the Pakistani courts rely on an unprincipled approach, their attitude is a bit subjective as there are cases of arrangement for amalgamation of two companies in which courts feel and find that such amalgamation is not advantageous sometimes for the company or sometimes for the shareholders, employees, and all stakeholders but courts try not to lift the corporate veil and wait until any fraud is committed due to such amalgamation.

The Add Oil (Private) Limited (2018) case is a good example. Where the court could lift the corporate veil to ascertain the real motive behind the scheme of the arrangement but the court ignored it. In this case, the petition for sanctioning the arrangement for the amalgamation of two companies was instituted. The scheme of arrangement was approved by the court although the court felt various ambiguities in deferred cost against different entries/items. The court stated to these deferred costs need clarity and lucidness but the court sanctioned the scheme of arrangement by considering that if fraudulent or intended to be a cloak to recover the misdeeds of the directors, the court may reject the scheme in the beginning. The court could lift the corporate veil to ascertain the real motive behind the scheme but the court ignored it.

In certain cases, the rights of minority shareholders may be undermined by the majority shareholders. The majority shareholders may utilize their powers and amend the articles of association to gain benefits and to exclude the minority shareholders from matters of the company. In veil-lifting cases regarding the disputes of the shareholders, the issues are usually of control and ownership of the private

limited company. In *Messrs Nagina Films Ltd v Usman Hussain (1987)* the courts recognized the effects of incorporations and the Pakistani courts had limited the effect of incorporation by "lifting the veil where the incorporated entity was previously a partnership." Pakistani court's attitude has changed towards minority shareholders and now the courts consider the appeals of "minority shareholders in cases where the constituents of the company belong to a specific family. The corporate veil was recently lifted by the court in *Messrs U.I.G. Ltd. v Muhammad Imran Qureshi,* to solve a shareholder dispute among family members (U.I.G, 2011)."

In *Ikram Bus Service v Board of Revenue (1963),* the Supreme Court of Pakistan recognized the "rights of limited companies." The Supreme Court relied on the *Saloman Case* and followed an unprincipled approach, it conceded that the company and shareholders are two different juristic persons and the company is neither the agent nor the alias of the shareholders. However, In *Khurshid Alam v Zaig ur Rehman (2002)*, the court refused to consider that company and shareholders are separate legal personalities. The courts of Pakistan have, however, demonstrated reluctance in lifting the corporate veil, and have even refused to recognize the idea of lifting the veil in cases of default. *Sakhi Dattar v Mahood (2006)* is an example of it.

In *Premier Mercantile Service v S.M. Younus,* a plea for lifting the corporate veil was made by the members of the firm in which the partnership of the firm was altered into a limited company without notifying the party that it had formerly contracted with (Premier, 1982). In this case, the dispute was that the landlord had illegally sublet the space of the office to anyone else. The landlord had ignored the fact that he already had such a contract with another party. The court allowed the ejectment orders and Supreme Court stated that:

"We would agree with the learned counsel for the petitioners that it is necessary and appropriate in certain cases to lift the veil of incorporation with a view to find out the true state of affairs and to determine the rights and liabilities of the parties. Nonetheless, in doing so, in this case, we find that the result is not to the advantage of the petitioners. A distinct legal entity different from the firm had come into existence. It was so whether the veil of incorporation was lifted or not. Such a legal entity had altogether different rights and liabilities with respect to third parties including the landlords. Such a change could not be unilaterally brought about by the tenants so as to transform their very legal existence in a manner to affect their liability. The landlords could object. They could make it a ground for proceedings under the Rent Laws. Such a tenant as had permitted itself to be dissolved and then effaced and substituted by a different legal entity could be ejected for this ad alone, having not taken the landlord into confidence (Premier, Para 6, 1982)."

However, the decisions of Pakistani courts are based on the conduct of parties and the courts usually do not rely on specific principles or policies. Like in *Manek Mobed v Shah Behram (1974),* the court's verdict was not based on any doctrine of lifting the veil of corporate but was based on the conduct of the parties. This brief survey indicates that the "unprincipled approach" is regarded by the Pakistani courts and they usually rely on the verdicts of the UK Courts.

3. Unprincipled Approach for Lifting the Corporate Veil in the UK

The courts of the United Kingdom lift the corporate veil by "unprincipled assessment of facts and the circumstances of each case. However, the UK courts follow the rules set in the landmark judgments (Re FG (Films) Ltd (1953), Lee v. Lee's Air Farming Ltd, Lee v. Lee's Air Farming Ltd, AC 12 (1961) Creasey v. Breachwood Motors Ltd (1992), Ord v. Belhaven Pubs Ltd (1998), and Chandler v. Cape (2012)." The cases now are resolved usually by relying on these cases. However, in some cases, the courts deviate from the old set of rules and follow their discretion to resolve veil-lifting cases. It is, however, understandable that these judgments are not exhaustive enough to cover the situations arising in the modern context and sometimes old rules do not sit well with modern cases.

The liability on the shareholders of the company was imposed by the UK Courts under section 213 of the Insolvency Act 1986. Section 213 reads:

"(1) If in the course of the winding-up of a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has an effect;

(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper."

Moreover, "Trading with the Enemy Act 1914" debars trading with an enemy. In Daimler Co. Ltd v. Continental Tyre and Rubber Co., the corporate veil was lifted to distinguish and identify the German shareholders of the company in war times (Daimler, 1916). Additionally, the UK courts lifted the veil when serious fraud had been committed in the company or a fake company had been set up to defraud. Gilford Motor Co. Ltd v. Horne can be cited in this regard where the veil was lifted when the prior employee avoided approving the "non-solicitation clause in his employment contract by operating through the company's vehicle (Gilford, 1933)." Some other examples include "Jones v. Lipman and Re Darby, ex parte Brougham (1962)". In these cases, the UK Courts had not utilized a principled approach. However, the courts in these cases reviewed the facts and circumstances of the case and gave verdicts and justifications. The justifications of the courts were based on an analysis of the nature of the company's vehicle.

Daimler's case was considered an enemy-trading case which provided the necessary justification for veil lifting. The acts of the organs of the company including the "directors, managers and secretary of the company" are the company's acts because such organs of the corporation were performing their function under the authority of the company. Furthermore, the justification in Gilford Lord's case was "to enable [Mr. Gilford], under what [was] a cloak or sham, to engage in business which, on consideration of the agreement (…) was a business in respect of which he had a fear that the plaintiffs might intervene and object." The decisions of the UK courts in these cases didn't establish unified rules. Hence, the court applied the unprincipled approach in *Daimler and Gilford* cases.

In certain cases, the UK courts seem doubtful about whether or not the group of companies could be called a single business hub or unit. Many examples can be regarded including "*Adams v Cape Industries* (1990) and *Prest v Petrodel Resources* (2013)." However, the UK courts consider the parent company liable for the subsidiaries' negligence. *Chandler v Cape (2011)* is a case in point. Moreover, in *His Royal Highness Okpabi v. Royal Dutch Shell (2018)*, when the claimant remained unsuccessful in explaining that the duty of care was on the parent company in case of leakage of the oil tanks, the court gave a verdict against the claimant. These inconsistencies in the decisions of the UK courts are confusing the well-established and full-fledged unprincipled approach.

Not considering the "unified principles approach" in lifting the corporate veil may also lead to various problems including the absence of lucid laws. The absence of significant utility of law causes difficulty for the companies and their shareholders, creditors, and directors of the company. However, the advantages of the unprincipled approach are much more than the principled approach as it permits and encourages the courts to consider the probable magnitudes and consequences of each distinct verdict for future cases. In an "unprincipled approach," courts also consider the impact of their verdict on the economy of the country. This approach is flexible enough to enable the courts to achieve justice even by evading the rigid common law principles and following the equity laws. Following rigid principles in such cases might lead to unfair consequences not only for the parties but also for the country. The unprincipled approach is followed where complex laws specifically in the cases where there is the involvement of the *"liability of a parent company for actions of its subsidiaries."*

4. Stringent Theories and Strict Principled Approach for Veil-Piercing in the US

The Courts of the US follow the "principled approach" while dealing with the lifting the veil cases. The US courts rely on two theories in the cases of veil piercing. These are "agency theory" and "the theory of instrumentality." The instrumentality theory is also called the "alter ego theory." Both of these theories comprise a strong test that contains various terms and conditions. The test works as a guidance that ensures

standardized verdicts by the courts of the United States in veil-lifting cases. Such an attitude results in expressive and meaningful increases in the predictability and certainty of the law.

The instrumentality theory says that the veil of a company is to be lifted when the factual situations and circumstances evince that a company is just an "instrumentality or it is an alter ego" of any person. This theory is held in several cases like *US v. Elgin Joliet (1936), US v. South Buffalo Ry (1948), and US v. Milwaukee (1905).*

In *Zaist v Olson (1967),* the court categorizes several conditions that are necessary to be fulfilled for piercing corporate veils. These conditions include: 1) The company and the shareholders have a unity of interest. 2) Company has taken unfair, unlawful, or inequitable action. 3) Due to the company, harm is faced by the party who is willing to lift the veil of the company. These conditions were also set in *Wholesale v Santa Fe* (1993).

In *Great Am. Duck Races v Intellectual Solutions (2013),* the court stated that the first condition would be satisfied when the separate owners and corporate personalities ceased to exist. Still, however, the owners and corporate personalities should have common interests. This principle was also upheld in *Dietel v Day (1972), and Gatecliff v Great Republic Life Ins (1991).* In *Automotriz del Golfo v Resnick (1957),* the court found that the second condition is satisfied when "upholding the corporate entity and allowing for the shareholders to dodge personal liability for its debts would sanction a fraud or promote an injustice."

Such conditions and theories provide strong support to the US courts while dealing with veil-lifting cases. In this way, the decisions of these courts have standardized reasoning. Due to the applicability of the test, the courts recognize the circumstances, facts, and situations of each case and then apply the essentials of the tests. In the US, the courts do not usually follow the principles of equity while dealing with the cases of the corporate veil and the whole approach remains deficient in one way or the other.

There are certain drawbacks to the applicability of instrumentality theory and it has remained unsuccessful in ensuring fair consequences. This purpose is somehow fulfilled by reliance on the theory of agency. In *Berkey v. Third Avenue Railway*, the theory of agency was established as the court suggested that the veil of a corporation should be lifted in the cases where "the dominion may be so complete, interference so obtrusive that by the general rules of agency the parent will be a principal and the subsidiary an agent (Berkey, 1926)." This theory seems to be more distinctive but the US courts had a conflict in the application of agency theory in the cases "where the control is less obtrusive, instead of encouraging the application of the tests on honesty and justice (Berkey, 1926)."

The US courts follow the principled approach and follow the specific theories; they satisfy the conditions of the test while dealing with veil-lifting cases but in some circumstances, they used remained flexible and deviated from the set principles. The courts give a justification that to ensure justice and fairness they have deviated from laws and principles. *Kinney Shoe Corp. v Polan* (1991) is a better example. In this case, the company owner was sued on the ground that money taken by the company on subleases was outstanding and had not been paid. As per the theory, the veil of a company protects the company owner from the company's debts. But the court pierced the veil neither because the company had convened any corporate meeting nor had it appointed or selected any designated officers. Moreover, the court held that the company was made to protect the actions of the owner and that can be seen when *"standard corporate formalities were not preserved."* The court conceded that the company's distinct legal personality has to be overlooked and disregarded when the consideration of it causes injustice, unfair and inequitable results.

The decision of the court in the Kinney Shoe case rests well with the reasoning and justifications of UK courts in the Gilford case. The same approach is demonstrated by the UK courts while dealing with cases where the companies have been used to fraud the people. The court in the *Kinney Shoe case* did not follow the agency or instrumentality theory and adopted a flexible approach. This approach does not rest well, however, with the universal approach of the US courts but the court had ignored the established principle and followed a flexible approach for lifting the corporate veil.

5. Conclusions and Policy Recommendations for a Prudent Approach

Lifting the veil of a corporation is a protective or defensive doctrine against the misuse of distinct legal personalities. It can also be viewed as a remedy against the potential abuse of limited liability. After comparing various jurisdictions including the UK, the US, and Pakistan, it can be concluded that Pakistan and the UK follow an unprincipled approach to veil-lifting. However, some inconsistencies in their decisions have also been observed. The UK approach is better as in the UK, the courts take the responsibility to meet the ends of justice, and follow the equity laws. The UK courts put the liability on one who is actually liable for it. The UK courts ascertain the status of a corporation as a separate legal personality and upheld that corporation cannot be considered liable for the act of shareholders etc. Pakistani courts tend to follow the rules set by the UK courts. But Pakistani Courts need to be more consistent with an unprincipled approach while deciding veil-lifting cases. The decisions of veil-lifting cases by Pakistani courts on the ground of the conduct of parties which is inconsistent with the unprincipled approach are the main defect that is needed to be rectified from the attitude of the courts. The courts in the US follow the principled approach and rely on theories of agency and instrumentality and apply various tests to satisfy themselves before lifting the corporate veil. The principled approach increases the predictability of the law but remains unsuccessful in satisfying the equity laws. These modern theories may fail to provide just solutions in suits of limited liability as happened in the Kinney case. Considering a corporation liable for the misconduct of its shareholders is a passive assumption of a principled approach hence, led to injustice.

Lifting the corporate veil has achieved significant attention because this subject lacks clear principles to provide a remedy to the aggrieved parties in a dispute. “Piercing the corporate veil is an equitable remedy” that requires the discretion of courts to decide the cases after perusal of the records, facts, and circumstances of each case. However, the deficiency of clear principles and rules on the subject creates an impediment to the commercial legal justice system.

The uniform test and principled approach is an invention of old principles, which increases the predictability and certainty of the law. The predictability of the law is reasonably a requirement to ensure a steady and thriving commercial atmosphere within the state. The doctrine established for lifting the corporate veil by the US courts is less effective and cannot be applied in the UK or Pakistan because this principled doctrine lacks efficacy and cannot operate the law smoothly. It cannot, even, fulfill the needs of the court. That is why in the Kinney case the court by neglecting such established doctrines departed from them to satisfy justice. After all, these set principles are against public policy and the public good. It is hard to believe to burden someone who has not committed fraud. The principled approach is not just and fair because it always considers the corporate body liable and accountable for the wrongdoings or irresponsible acts or frauds of its shareholders etc although the corporation has no Mens rea to commit such frauds or faults. So it is necessary to lift the veil of the corporation to uphold equity, justice, and good conscience. Consequently, the principled approach is useful for the capitalist that seeks protection from the corporate veil.

On the contrary to it, The UK courts have developed a reasonable approach that not only set the fundamental standards for the proper functioning of the corporation but also protects the rights and obligations of the corporation. The unprincipled approach followed by the UK courts is more effective because firstly of all such approach sits well with the law of equity. Secondly, the courts by the perusal of facts and circumstances give reasonable judgments.

The UK courts by following the unprincipled approach have established the well-defined concept in the veil-lifting of a corporation that a company has a separate legal personality that is independent of the shareholder’s identity (Murray, 1968) to generate a concept that the obligations, rights, or liabilities of a corporate body are discrete from its shareholders whereas the shareholders are only liable to the extent of their capital contributions (Ireland, 1984). The developed corporate fiction by the UK courts has been devised to permit the corporation to execute contracts on its own, raise debt, own property; make several investments, independent of its members (John, 2012; Farrar v Farrar, 1888). Additionally, the corporate body can sue or be sued in its name as well as a corporation can expedite the legal course as well (Metropolitan, 1859). For

Pakistan, there is a need to consistently follow the unprincipled approach to maintaining a commercial business environment. The Pakistani can take guidance and learn a lesson from the so-called well-established doctrine and legal regime set by the English courts to maintain reasonable environments for the promotion of commercial businesses and to attract investors to invest in Pakistan.

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