

# A Critical Study on Incorporation of Companies under Companies Act, 2013

Bhupathi Raju Harika

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## ABSTRACT

The outstanding legal characteristic that distinguishes a corporation from other forms of business organizations is its status as a corporation. A corporation has the ability to exist indefinitely, to sue and be sued in its own name, and to own a common seal. The authors of this article evaluate the company's incorporation. Incorporation's impact and consequences will also be considered.

**Keywords:** Company, information. MOA, AOA

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## INTRODUCTION

A company, as defined by the Companies Act of 2013 (hereinafter referred to as 'Act'), is "a legal entity formed and registered under the Act. According to common law, a company is a separate legal Individual or legal entity capable of surviving beyond the lives of its members."<sup>1</sup>

"The legal process of forming a corporate entity or a company is referred to as company incorporation. An incorporated company is a legally recognized legal entity in its own right. The terms 'Inc' or 'Limited' in the names of these corporations can be recognized. It establishes itself as a separate legal entity from its owners."

In most cases, a company is formed through a procedure known as incorporation. A company becomes a separate entity from those who invest their capital and labor to run it once it has been legally incorporated.

"A company must be registered with the registrar of companies, whether it is private limited or public limited. The registrar issues a certificate of incorporation upon registration. The company is then said to have been incorporated and is said to have come into existence."

Except in the event of a one-person corporation, seven or more individuals may unite to create a company in the case of a public company, or two or more individuals subject to a maximum of 200 in the case of a private company.<sup>2</sup>

"An individual known as a 'promoter' is in charge of a company's information in most cases. The 'promotion' process, in which a Individual persuades others to contribute capital to a proposed company before it is incorporated, is usually the first step in the formation of a company. The promoter of a company is someone like this. Promoters can also sign contracts on behalf of a company before or after it receives a certificate of incorporation, as well as arrange for stock issuances in the company's name."

## PROMOTER

A promoter is "an Individual who initiates the formation of a company. He attends to all necessary preliminary work related to a company's information. In other words, he is the Individual who takes the necessary steps to ensure that the company's information is accurate. A promoter is an Individual who is in charge of all matters concerning a company's promotion."

Following the incorporation, the company's control management is handed over to the board of directors. The promoters may continue to serve as directors in the company's management. The promoters are the first people in charge of a company's affairs.

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<sup>1</sup> Legal and Regulatory Aspect of Banking Scribd, <https://www.scribd.com/document/338226472/JAIIB-MADE-SIMPLE-Paper-3-pdf> (last visited Jan 18, 2022).

<sup>2</sup> COMPANY LAW, [https://www.icsi.edu/media/webmodules/student/FUL\\_BOOK\\_EP\\_CL\\_2017\\_MARCH\\_2.pdf](https://www.icsi.edu/media/webmodules/student/FUL_BOOK_EP_CL_2017_MARCH_2.pdf) (last visited Jan 18, 2022)..

In sec. 2(69) of the Act, the term promoter is defined as an individual who-

- A) who is identified as such in the company's prospectus or annual report referred to in sec. 92; or
- B) who, as a shareholder, director, or otherwise, has direct or indirect control over the company's affairs, or
- C) the board of directors of the company is accustomed to acting on whose advice, directions, or instructions

According to sec. 2(20) of the Act, "a company is one that is formed under this Act or any previous company law."

\* Sec. 3 of the Act governs the formation of a company.

\* The incorporation of a company (procedure) is covered in Sec. 7.

\* After incorporation, the company will have a separate legal Individuality, perpetual succession, separate property, a common seal, and limited liability.

#### **Formation under the Act**

- The journey of incorporation of a company begins with an idea to form a separate legal entity (corporate form) to undertake any lawful purpose.
- The Individual in whose mind the idea comes is referred to as the promoter of the company
- The company takes birth once all procedural formalities are completed and the COR is issued.

#### **Incorporation of the company: authority under the act,**

- CENTRAL REGISTRATION CENTRE (CRC)
- REGISTRAR OF COMPANIES (ROC)

#### **CENTRAL REGISTRATION CENTRE(CRC):**

"The Central Registration Centre (CRC) is a Ministry of Corporate Affairs (MCA) Government Process Re-engineering (GPR) initiative with the specific goal of providing fast incorporation-related services in accordance with global best practices."<sup>3</sup>

#### **REGISTRAR OF COMPANIES(ROC):**

"Registrars of Companies (ROCs) appointed under Sec. 609 of the Act are in charge of registering companies and limited liability partnerships (LLPs) formed in their respective states and Union Territories, as well as ensuring that they comply with the Act's statutory requirements." These offices act as a repository for records pertaining to companies that have registered with them, which are available for public inspection for a fee. The Regional Directors serve as conduits for the Central Government to exert administrative control over these offices.

#### **TYPES OF COMPANIES:**

As per the Act we can incorporate three types/classes of companies:

- Public company
- Private company
- One Person company

These companies may be incorporated in the following categories:

- Companies limited by shares
- Companies limited by guarantee
- Unlimited company

#### **PUBLIC COMPANY:** sec. 2(71) of Act.

"A public company is defined as one that is neither private nor public. A public company can be formed by 7 or more individuals for any lawful purpose. The board of directors of a public company must have at least three members. The words "Limited" must appear at the end of the name of a public company."

The core of a public business, as opposed to private corporations, is that its shares and debentures may be easily transferable to the public. A stock exchange can only trade publicly traded firm shares. A private firm that is a branch of a public company is described as a public company.<sup>4</sup>

<sup>3</sup> COMPANY LAW, [https://www.icsi.edu/media/webmodules/student/FUL\\_BOOK\\_EP\\_CL\\_2017\\_MARCH\\_2.pdf](https://www.icsi.edu/media/webmodules/student/FUL_BOOK_EP_CL_2017_MARCH_2.pdf) (last visited Jan 18, 2022).

<sup>4</sup> COMPANY LAW, [https://www.icsi.edu/media/webmodules/student/FUL\\_BOOK\\_EP\\_CL\\_2017\\_MARCH\\_2.pdf](https://www.icsi.edu/media/webmodules/student/FUL_BOOK_EP_CL_2017_MARCH_2.pdf)

**PRIVATE COMPANY:** sec. 2(68) of Act.

For any lawful purpose, two or more people can form a private company. “A private company's board of directors must have at least two directors. A private company's name must include the words Private Ltd at the end. A number of benefits and exemptions are available to private companies under the Act.”

A private company is one whose articles limit the number of members to 200 and restrict the right to transfer shares. (With the exception of OPC).<sup>5</sup>

**NOTE:**

\* Individuals who are currently employed by the company, as well as those who were previously employed by the company and were members of the company while employed by the company and remained members after their employment ended, are not eligible.

\* When two or more people own one or more shares in a company, they are treated as if they were one individual.

It is illegal to invite the public to subscribe to any of the company's securities.

**ONE PERSON COMPANY:** sec. 2(62) of Act.

A one-person company is defined as a company with only one member. For any lawful purpose, a single individual may form an OPC (as a private company). At least one director is required on the Board of an OPC, and the OPC's sole member can also be a director.

The Act introduced several new concepts that were not present in the Companies Act of 1956, completely revolutionizing corporate law in India. The introduction of the OPC concept was one of them.

As a result, a new avenue for starting businesses has emerged, providing the flexibility that only a company can provide while also providing limited liability that sole proprietorships and partnerships do not.

**COMPANY LIMITED BY GUARANTEE:**

The liability of its members is “limited by the memorandum to the amount that each member agrees to contribute to the company's assets in the event of its liquidation. [Sec. 2(21)] [Sec. 2(21)] [Sec. 2(21) [Sec. 2(21)] [Sec. 2(21)] [Sec. 2(21) [Sec. 2(21)(a)(b)(c)(d) (Members' contributions are deferred until the winding up event.”

**COMPANY LIMITED BY SHARES:**

[Sec. 2(22)] means a corporation whose members' liability is limited by the memorandum to the amount, if any, unpaid on the shares they own. A contribution from members is a current requirement at the time of incorporation or call. Members who have paid in full for their shares are exempt from liability.

**REGISTRATION/INCORPORATION OF A COMPANY:**

- A) 7 or more individuals if the company is to be a public company;
- B) 2 or more individuals, if the company is to be a private company; or
- C) 1 or more Individuals if the company is to be a public company.

by signing a memorandum in their or his name and complying with the act's registration requirements.

“The promoters must gather at least seven people in the case of a public company and two people in the case of a private company in order to subscribe to the memorandum of association.”

**PROCEDURE FOR REGISTRATION INCORPORATION OF A COMPANY:**

“For the registration of a company, an application in the prescribed form INC-22/INC-29 must be filed, along with the required fee as determined by the registrar of companies in the state where the company's registered office will be located, and the following documents (sec. 7).”<sup>6</sup>

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<sup>5</sup> COMPANY AND ITS FORMATION, <https://www.egyankosh.ac.in/bitstream/123456789/67936/1/Block-1.pdf> (last visited Jan 19, 2022)..

<sup>6</sup> COMPANY AND ITS FORMATION, <https://www.egyankosh.ac.in/bitstream/123456789/67936/1/Block-1.pdf> (last visited Jan 19, 2022).

## RESERVATION OF NAME:

The promoters will apply to the Central Registration Centre registrar for approval of the proposed name, which can now be submitted online.

“An Individual may apply to the registrar, central registration Centre, in such form and manner as may be prescribed, and with such fee as may be prescribed, for the reservation of a name set out in the application as – Sec. 4 of the Act, read with the Companies' Incorporation Rules, 2014, states that a Individual may apply to the registrar, central registration Centre, in such form and manner as may be prescribed, and with such fee as may be prescribed, for the reservation of a name set.”

A) the proposed company's name; or

B) The name to which the company intends to change:

- i. The registrar central registration Centre may reserve a name for a period of sixty days from the date of the application, depending on the information document provided with the application, after receiving an application under sub-sec. (4).
- ii. if it is discovered after reservation of name under clause(i), that the name was applied by furnishing false or incorrect information, then –
  - A. The reserved name will be deleted if the business is not formed, and the individual will face a penalty of up to 1 lakh rupees.
  - B. If the business has been incorporated, the registrar has the authority to:
    - i. order the corporation to change its name within 3 months after an ordinary resolution being passed;
    - ii. take action to strike off the company's name from the register after giving the company an opportunity to be heard;

## PREPARATION OF MEMORANDUM AND ARTICLES OF ASSOCIATION:

“The promoters must take the necessary steps to prepare important documents such as a memorandum of association and articles of association before filing an application for registration with the registrar of companies. The promoters may seek the assistance of a legal expert, such as a solicitor, in this regard. These documents should be printed properly. The memorandum and articles must be stamped according to the state stamp laws in effect.”<sup>7</sup>

A company's memorandum must be in the appropriate form as specified in Tables A, B, C, D, and E in Schedule 1 for that company. Tables F, G, H, I, and J in Schedule 1 to the Act contain model articles relating to various types of businesses.

Sec. 7 and rule 13 of the company's incorporation rules 2014 state that “each subscriber to the memorandum must sign it and add his name, address, description, and occupation, if any, in the presence of at least one witness who must attest the signature and sign and add his name, description, and occupation if any. The witness's identification must also be verified. The promoters' signatures on the memorandum and articles, however, are not required.”

## POWER OF ATTORNEY:

In order to complete numerous procedures necessary for the establishment of a business, the promoters may obtain a power of attorney in favor of one of them, an advocate, or another professional such as a chartered accountant, company secretary, cost and works accountant, or an advocate. A non-judicial stamp of the value authorized by the stamp statute of the relevant state shall be used to create the power of attorney.

## CERTIFICATE OF INCORPORATION:

The certificate of incorporation is indisputable proof that the company has met all of the criteria of the Act, and all registration requirements, and that it is a lawfully established entity. The legitimacy of a certificate of incorporation issued by the registrar cannot be called into dispute after it has been issued.

“Such subscribers to the memorandum and all other Individuals who may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company under this act and having perpetual succession with power to acquire, hold, and dispose of property, both movable and immovable, tangible and intangible, from the date of incorporation mentioned in the certificate at incorporation.”<sup>8</sup>

<sup>7</sup> COMPANY AND ITS FORMATION, <https://www.egyankosh.ac.in/bitstream/123456789/67936/1/Block-1.pdf> (last visited Jan 19, 2022).

<sup>8</sup> COMPANY LAW, [https://www.icsi.edu/media/webmodules/student/FUL\\_BOOK\\_EP\\_CL\\_2017\\_MARCH\\_2.pdf](https://www.icsi.edu/media/webmodules/student/FUL_BOOK_EP_CL_2017_MARCH_2.pdf)

## CONSEQUENCES OF INCORPORATION:

The advantages and disadvantages of incorporation can be used to explain the effects or consequences of incorporation. From the day of formation, the company becomes a legal entity with indefinite perpetuity and a common seal.

## ADVANTAGES OF INCORPORATION:

1. Legal Individuality.
2. Perpetual succession.
3. Can sue and be sued,
4. Limited liability.
5. Transfer of shares (sec.44)
6. Separate property.

- 1) Legal Individuality: A business becomes a legal Individual apart from its members following formation. It stands out from the rest of the group (shareholders). Salmon vs. salmon & Co., a landmark decision from 1897, established the legal Individuality of a corporation.<sup>9</sup>
- 2) Perpetual succession: the existence of the company continues forever. Death or insolvency or insanity of its individual member does not affect its existence.
- 3) Can sue and be sued: a company after incorporation becomes competent to sue others and be sued by others. Its officials act on behalf of the company in this regard.  
A company can sue others if:  
i. the act complained of is capable of being committed against the company; and ii. it has a negative impact on the company's business or reputation.
- 4) Limited liability: The members' liability is limited to the amount of the shares' face value. Unless there is an agreement to the contrary, their Individualal assets are not affected.
- 5) Transfer of shares: the members can freely transfer their shares in an open market without the consent of anybody.
- 6) Separate property: Because it is a legal entity, a corporation can possess, acquire, and transfer of property in its own name. The property of the corporation is separate from that of its stockholders.<sup>10</sup>

## DISADVANTAGES OF INCORPORATION:

1. Misuse of the corporate veil.
  2. Expensive and troublesome.
  3. Members ignored by management.
- 1) Misuse of the corporate veil: incorporation confers corporate veil on the company. It distinguishes the company from its members. It gives room for mismanagement, fraud, and other irregularities under the shelter of the corporate veil.
  - 2) Expensive and troublesome: incorporation of a company involves a lot of formalities and is also expensive. Hence, the promoters engaged in the task of incorporation will face many troubles.<sup>11</sup>
  - 3) Members ignored from management: even though the members are the real owners, they are ignored by the management. The company is managed by a few individuals called directors.

Among the advantages of the incorporation of a company, corporate Individuality is of great importance. However, it is subject to misuse by the directors of the company. The misuse of corporate Individuality can be removed/prevented by lifting the corporate veil.

## CONCLUSION

A company, whether public or private limited, becomes a juristic Individual as soon as it is incorporated. It has its own identity, as well as its own property. It is a separate legal entity from the individuals who make up the corporation. The directors are the people who run a company. The directors are also known as the company's ears, eyes, and hands. A

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<sup>10</sup> Legal and Regulatory Aspect of Banking Scribd, <https://www.scribd.com/document/338226472/JAIIB-MADE-SIMPLE-Paper-3-pdf> (last visited Jan 18, 2022).

<sup>11</sup> COMPANY AND ITS FORMATION, <https://www.egyankosh.ac.in/bitstream/123456789/67936/1/Block-1.pdf> (last visited Jan 19, 2022).

company's directors have a fiduciary responsibility. On the one hand, they are the company's owner (Policymaker), and on the other, they are merely the company's servants who are paid. They have the authority to perform any work on behalf of the company that a company can perform in the normal course of business. There are some things that the Board isn't allowed to do. The company handles such matters in general meetings. In the ordinary course of business, any action taken by the directors is treated as if it were taken by the Company. However, any wrongdoing by the Directors (criminal action) is the responsibility of the Directors, not the Company.

The process of forming a company is known as incorporation. For the purpose of incorporation, it includes a variety of factors and legal documents. There are two documents that are extremely important at the time of establishment. The Memorandum of Association (MoA) and Articles of Association are those documents.

As a result, in Company Law, the formation of a company entails a number of major stages that must be completed in order to complete the incorporation process. The company cannot be formed or run without these stages.

As a conclusion, starting a firm has both advantages and disadvantages. Incorporation is heavily reliant on the firm's needs; if the members feel the company is sustainable, the high fees of incorporation are totally justified.

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