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"A Critique on the Concept of One Person Companies, and its Relevance in Indian Entrepreneurship"

Aditi Vinzanekar
Symbiosis Law School,
Pune

Abstract

In 2013, the Indian Government passed the Companies Act, 2013, due to which an individual can now constitute a company all by himself, and this concept was termed as a "One Person Company" or an "OPC". The concept of One Person Company, an effort made by the Ministry of Corporate Affairs, has given a major impetus towards corporatization of this country, and has encouraged innumerable Indian citizens to establish their own companies and businesses without having to depend on other board members or shareholders. It propagates previously hesitant young people in the country to grab opportunities, and venture into the corporate sphere of the country, by helping them get access to bank loans and even provide legal remedies if and when required.

This implementation has introduced certain changes in the Corporate Legal System of the country, as well as raised questions about the salient differences between the concept of an OPC, and a Sole Proprietorship. In this paper, the author shall carry out a detailed and critical analysis of this concept so as to address the afore mentioned questions, while also weighing in on the advantages and disadvantages of a One Person Company, from a legal as well as an economical perspective. By way of this paper, the author wishes to provide a concise yet detailed reference materials to law students within the Indian Legal Community.

Introduction

The concept of a One Person Company, (hereinafter referred to as 'OPC') , has introduced to Indian Entrepreneurs to a new era of incorporation of legitimate businesses with only one member.

The Companies Act, 2013, defines an OPC as, "a company which has only one person as a member wherein all the legal and financial liabilities are limited to to the company and not its members".[1] In the same section, it also says, "One Person Company is a company which has only one member."

This is rather revolutionary[2], since the old Companies Act of 1956, required at least two members incorporate a company.[3]

[1] Section 2, Sub-Section 62, Companies Act, 2013, Act No. 18, Acts of Parliament (India)
[2] Mayur Zanwar, *"OPC- One Person Company- The Next Big Thing"*, TAXGURU, (Apr. 27, 2014), https://taxguru.in/company-law/opc-person-company-big.html
[3] Ibid.

The principle reason for the consideration, introduction and subsequent implementation of the concept of the One Person Company concept, has been to encourage the sole proprietors of the country to freely engage themselves with an organised sector of the business sector in India, by restricting their personal liability, to the liability of only their company. This concept will be further explored and explained in the analysis of sole proprietorships v/s OPCs.

There are other reasons as well that advocate the introduction of OPCs into the Indian corporate world, for example the fact that it will encourage foreign companies to create and establish a number of subsidiaries in a very convenient fashion, thus causing a flow of wealth into the country[4]. This issue is also addressed later in the paper, in the analysis of the global position of the concept.

The first ever OPC in India was incorporated on the 28th of April, 2014 at Delhi. The company is named "VIJAY CORPORATE SOLUTIONS OPC PRIVATE LIMITED" with the CIN: U93000DL2014OPC267546. Mr. Vijay Kumar Sharma, is and remains the only Director and Shareholder of his Company.

Many argue, that the word "company" by definition involves the involvement of more than one person, and thus the concept of a "One Person Company" may seem like a contradiction within itself. Nevertheless, we now legally recognise the existence of companies where one individual can himself a member and a promoter and a director all at once.[5]

OPCs, as explained before, provide an endless array of opportunities for all those Indian citizens yearning to dive into their own business ventures, by giving them opportunities to access credit loans, bank loans and even legal protection in case required.

One Person Companies
(A) Salient Features

- <u>Single Shareholder</u>

Only one, "natural" person, who is a citizen and a resident[6] of India, may be deemed eligible to incorporate his own One Person Company.[7] This is one of the fundamental and foundational features of an OPC. The one single shareholder will possess 100% of the company's holdings.

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[4] Master Guide to Companies Act, 2013 (Along with Quick Guide to Companies Act, 2013), TAXMANN

[5] Namrata Gupta, "One Person Company - A Critical Analysis", International Journal of Legal Insight, (VOLUME I, ISSUE 3 | ISSN: 2456-3595)

[6] R. Saluja, One Person Company (2014) "The term "Resident of India means a person who has stayed in India for a period of not less than 182 days during the immediately preceding one calendar year."

[7] As per Rule 2.1 (1) of the Draft Rules under Companies Act, 2013 only a natural person who is an Indian Citizen and resident in India shall be eligible to incorporate a One Person Company.

The rule prescribes that any other legal entity, such as a company or society, cannot incorporate a One Person Company, and neither can NRIs or foreign citizens.

- Nominee for Shareholder

The single shareholder, must compulsorily nominate any other individual, with whom responsibility of the OPC shall rest, in case of death or incapacity of the said existing single shareholder.[8] Such a nominee must be subject to the same conditions for eligibility as the single shareholder, and must give his or her clear consent while being appointed as the nominee.

At the event of the shareholder's death, or incapacity to perform the functions of the company, the nominee shall gain the title to all the shares of the original shareholder, and will also be entitled to the identical dividends/rights and liabilities that rested with the original shareholder.

After taking over, the nominee most further nominate a new nominee for himself.

- Director

Since an OPC must have a minimum of one director, the single shareholder reserves the right to be the sole director. However this does not limit the number of directors to one.

An OPC may have up to 15 directors[9]. If there is no specific mention in any of the documents, it is assumed that the sole shareholder shall also act as the sole director of the company, and this is the case in most instances of incorporation of OPCs.

- Limited Liability

This is one of the most attractive aspects of a One Person Company. It ensures that the sole director's personal property is kept safe from being included in the liabilities, regardless of the debts of the business.

This is also one of the key differences between sole proprietorships and OPCs. In an OPC, a director's liability inly extends up to his business assets.

- Freedom

Since the company consists of a sole individual, there is no need to hold meetings repeatedly, and the sole director may not be required to be answerable to any one else on day to day matters.[10] A board meeting must be held however, in case of multiple director, at least once in six months, but the gap between two such meeting should not exceed 90 days.[11]

(B) Background and Position of OPC under Companies Act, 2013

Although most of the sections of the new Companies Act came into force between September, 2013 to April, 2014, the introduction of the concept of One Person Companies had actually been

[8] Supra 1, Section 3, Sub Section 1
[9] *Intelligent Legal Risk Management Solution*, iPleaders (2014)
[10] Supra note 5
[11] Mani, One Person Company (2013).

recommended in 2005 by the J.J. Irani Committee.[12] Several countries include provisions for One Person as a separate legal entity, for example the United Kingdom, Singapore and even Australia.
As per the companies act, an OPC may be converted to a private company as well, via two methods,
(i) Voluntary Conversion; and
(ii) Compulsory Conversion[13].
Some of the largest companies worldwide such as eBay and Amazon began being a one person start-up with one tech-savvy founder. Jeff Bezos, founder and CEO of Amazon.com was a computer engineer who decided to leave Wall Street to start an online bookstore out of his garage. Amazon was now the largest online retailer in the world with revenue of $107 billion in 2015.

Issues and Questions Raised

What are the Merits and Demerits of OPCs?

1. What are the key differences between Sole Proprietorship and OPCs, and how are OPCs more beneficial to the Indian Entrepreneur?
2. What is the Impact of the implementation of OPCs on the Indian Corporate Sphere?
3. What is the global position of the concept of OPCs?

The author has researched the above given issues, and conducted a critical analysis of the same. The answers to the questions have been explored and answered in the next section of this paper.

Critical Analysis

(A) Merits and Demerits of OPCs
The benefits of a One Person Company are very simplistic, and have already been introduces earlier in the article.

- Due to the limited nature of the liability of an OPC, the personal assets of the sole shareholder are protected. This encourages entrepreneurs to fearlessly start their own ventures.

[12] Section 6, Dr. Jamshed J. Irani, *Report on Company Law,* (May 31st 2005) ".. To facilitate this, the Committee recommends that the law should recognize the formation of a single person economic entity in the form of 'One Person Company'"
[13] Nikunj Keyal, *"Research Article on One Person Company"*, LEGAL INDIA, https://www.legalindia.com/reserch-article-one-person-company/ "Voluntary Conversion:
An OPC cannot be converted into a private limited company for a period of not less than two(2) years from its date of incorporation and if the time has elapsed and the period of two years is over, it can apply for converting itself into a Private Limited Company or Public Limited Company.
The aforesaid conversion should be done in accordance with the rules and regulations laid down under section 18 and Rule 7(4) . Compulsory Conversion:
When an OPC has a paid-up capital equal to or more than Rs.50 Lakhs or its Annual turnover for the relevant financial year exceeds Rs.2 Crore, then in such a situation the OPC has to be converted itself into Private Limited Company or Public Limited Company as per Rule 7(4)"

- Individuals are provided several benefits, such as easy access to credit and bank loans, while also enjoying legal protection under the Companies Act, 2013.
- OPCs reduce a citizen's dependence other people by providing the opportunity to constitute a single person company[14], for smaller scale traders and businessmen who now enjoy a separate legal entity status.
- The cultures of OPCs tend to be more free, since the sole shareholder isn not required to comply with anyone else.
- After being incorporated as an OPC, the company includes the feature of perpetual succession, so as to effectively build a large capital for the business.
- There is greater credibility in the case of OPCs, since they are required to have their books audited annually.

Despite these several benefits, the concept and culture of OPCs has its own disadvantages[15] and setbacks.

- There is a singular limit on the number of members. Only one person can constitute an OPC.
- A minor cannot be a sole shareholder even become a nominee in an OPC.
- The facility of incorporating an OPC is not available to non Indian residents,
- OPCs are only suitable in cases of small businesses.[16]
- OPCs cannot participate in any non banking investments, for example vesting in the securities of another corporate body.
- Where taxation is concerned, OPCs stand at a greater disadvantage as compared to Sole Proprietorships. Under the Income Tax Act of 1961, sole proprietorships may pay taxes at a rate based on their income slabs. However, since OPCs are not recognized properly under the Income Tax Act, they are subject to the same tax bracket as any other private company, ie 30%. This decreases the lucrative value of starting an OPC.
- Unlike proprietorships, OPCs are required to be registered at the Registrar of Companies, and this increases the tedious process as well as the expenditure.
- The OPC, requires just as much paper for and completion of formalities as a sole proprietorship. A person cannot escape that factor even in an OPC.
- Since the line between the sole owner and the sole director is blurred in the concept of an OPC, it may give rise to a certain degree of unethical practices.
- Several people in the country are still not aware of the concept.

[14] Company Secretary Module (2014), One Person Company (OPC), The Institute of Company Secretaries of India, https://www.icsi.edu/Docs/Webmodules/Publications/1.%20Company%20Law-Executive.pdf

[15] Divesh Goyal, "Advatages and Disadvantages of One Person Company", TAXGURU, (May 15th, 2015) https://taxguru.in/company-law/advantages-disadvantages-person-company.html

[16] Supra note 4, "OPC can have maximum paid up share capital of Rs. 50 lakhs or turnover of Rs. 2 crores. Otherwise OPC need to be converted into Private Ltd Company"

OPC v/s SOLE PROPRIETORSHIP

OPC	Sole proprietorship
Separate legal entity	Owner & entity is same personality
Limited Liability	Unlimited Liability
Debt- not the sole responsibility of the owner	Debt - sole responsibility of the owner
Finance- credit record of the company	Finance- credit history of the owner
Legal requirements- will need to register itself as such	Legal requirements- will not have to draw up paper declaring its status
Separate tax	Tax paid by the owner

- Sole proprietors may raise funds from personal contacts like friends and famly, however an OPC, due to its private limited nature cannot acquire or raise such funds.

Since the concept of an OPC, seems to provide a lot more benefits than disadvantages, the author has made some suggestions on how to curb some of the above given issues.
Firstly, and most importantly, reforms should be made in the Income Tax Act, 1961 so that it may recognize OPCs, and consequently customise tax impositions.
Secondly, NRIs should also be allowed to venture into the world of OPCs, and should receive the same rights as any other Indian citizen.
Thirdly, awareness should be increased, and the concept of OPC should be introduced to students in schools and colleges, and banks should also educate loan seekers about the possibility of starting an OPC.
Fourthly, the tediousness of the registration process should be drastically decreased, and should be made a lot more flexible to the day to day Indian individual, so as to not discourage interested parties.

(B) Differences between Sole Proprietorship and OPCs

As explained earlier, there are numerous differences between a proprietorship and an OPC. The most blaring difference is the nature of the liability of the shareholder. The liability of the owner only extends up to his business assets in the case of OPCs, however in the case of a proprietorship, even the personal property of the proprietor may be sued for.
Even under the Income Tax Act, 1961, the tax bracket for sole proprietorships is a lot more feasible than OPCs.

(C) Impact of OPCs in the Indian Corporate Sphere

Although the concept of OPCs, is still relatively new in the Indian Entrepreneurship sector, and hence deemed as extremely progressive, it will require time for such a concept to be consolidated with full efficiency. However as time flies by, and the the corporate sphere of India develops day by day, OPCs will no doubt have a promising future with great scope. The reason behind its projected success, is the comparative ease of incorporation with fewer compliances. The foreign investor wont have to deal with a multitude of people, thus avoiding disparity and disagreement, by keeping it simplistic with one single investee. OPCs encourage foreign investors to also establish their own businesses in India, by merging with OPCs effectively and easily.

Thus, as mentioned earlier, OPCs encourage a flow of foreign funds into the country.

(D) Global Comparison of the Concept of OPCs

The concept of OPC has grown in India over the last few years, and can be called relatively new as far as legislations go. However, this concept has already pre existed in several other countries such as China, France, United States, United Kingdom, Singapore.[17]
The first country to introduce this concept was the UK, due to the celebrated case[18] of Salomon & Salomon Co. Ltd. in 1925. (1897 AC22)

After that, several nations gradually began adopting the concept and integrating it into their own corporate laws. Although the fundamental idea of the One Person Company is the same from country to country, the structure, intricacies and the prerequisites for the incorporation of the same is different depending on the country.

For example countries like the U.K. and the U.S.A. require the capital of their OPCs to “meet the expected strains of a venture of its nature and size” while other countries like India, France and China expressly mention a minimum requirement of capital for their OPCs.

Even with regard to eligibility of people to start an OPC, most countries do not put a restriction on legal/natural persons from starting or incorporating an OPC, however India requires that inly a natural person[19] may incorporate an OPC.

Each country has the same motivating factor for introducing the concept into their laws - to encourage and give impetus to businesses, entrepreneurship and hence boost their nation’s economic development.

[17] Supra note 5
[18] Salomon v Salomon 1897 AC22
[19] Companies Act, 2013, *Incorporation of Companies and Matters Incidental Thereto*, The Institute of Company Secretaries Of India (Dec, 24th 2014) https://www.icsi.edu/portals/0/INCORPORATION%20OF%20COMPANIES.pdf

Conclusion

The introduction of the concept of a One Person Company is severally advantageous, for the government, the nation, as well as the market players.

Earlier, before this concept existed, an entire sector of businesses remained disorganised, due to the fact that they could not be registered as companies.

Now, the introduction of OPCs, in the Companies Act, 2013 has succeeded in unifying and organizing an entire sector of the corporate sphere in the nation, thus making the regulation of these businesses very convenient and efficient.

Furthermore, the status of OPCs, as private limited companies encourage more business ventures due to the fact that the single shareholder will not be unlimitedly liable, and hence enjoys the security that his personal assets will not fall under peril due to his business.

Although we have established that it is easier for entrepreneurs to access bank and credit loans due to this concept, we have also criticised that fact because of the extensive requirement of paperwork, formalities and also the heavy tax burden.
Apart from the heavy tax burden and procedural troubles, the author would like to add that the rules framed so far for the Indian OPCs, are simplistic, yet sensible, and will go a long way in encouraging and accelerating economic growth in the country.

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[4] R. Saluja, One Person Company

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[10] Divesh Goyal, "Advatages and Disadvantages of One Person Company", TAXGURU, (May 15th, 2015) https://taxguru.in/company-law/advantages-disadvantages-person-company.html

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