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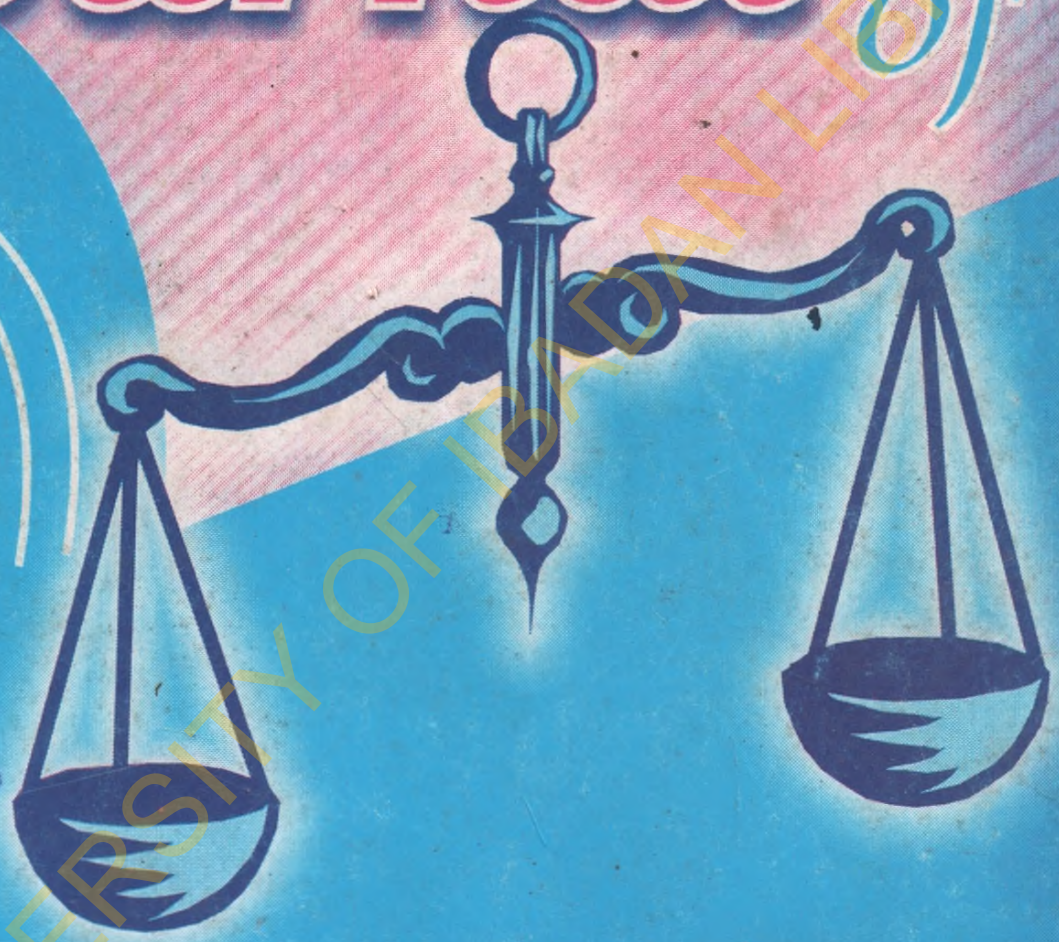

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CONTENTS

BENEFITS AND BURDENS OF INCORPORATION OF COMPANIES IN NIGERIA

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ABSTRACT

The present proposal by the Corporate Affairs Commission in Nigeria to de-register about four hundred thousand companies which have not been rendering their annual returns as stipulated by the provisions of the Companies and Allied Matters Act motivates the consideration of total attributes of corporate personality in this study. Nigeria has an estimated figure of about six hundred thousand registered companies, if about four hundred thousand Companies are de-registered; it remains two hundred thousand Companies. What could be the implication of such extinction? The essence of this study is not to discuss the merits and demerits of de-registration of Companies, but to sensitize the general public particularly the Corporate sector to the responsibilities of a registered company. It is the contention of this writer that lack of awareness of responsibility in a country dominated by high level of illiteracy could not be ruled out as one, if not the major reason, the four hundred thousand Companies failed to file their returns as at when due. In addition, research from the academics in the area of consequences of incorporation has been most of the time without a discourse on the responsibilities of a registered company. This study considers not only the procedure for registration of company but also the totality of the consequences of incorporation of companies dealing with its advantages and disadvantages at the same time. The study discusses how a company can be registered in Nigeria and the effect of such registration. On the same issue, it examines those who are competent to form a company and the choice of a valid name for the company. It argues that the consequences of the registration of Companies are not always positive but sometime negative.

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INTRODUCTION

Perhaps the current issue in the corporate sector in Nigeria is the proposal by the Corporate Affairs Commission[1] to de-register about four hundred Companies[2], which have not been rendering their returns as stipulated by the provisions of the Companies and Allied Matters Act[1]. The issue of de-registration of Companies is not a light one to be ignored with a wave of hand. Nigeria has an estimated figure of about six hundred and fifty registered companies, if about four hundred Companies are de-registered; it remains two hundred and fifty Companies.

What could be the implication of extinction of about four hundred Companies? The implication has been analysed by many[2], some are of the view that it could lead to loss of job. Each of the four hundred Companies has its own employees, if they are de-registered, their employees would be out of job, they asserted. On the other hand, others like the Registrar-General of Corporate Affairs Commission sees the positive side of proscription, he said 'the leaner the Companies register is, the more convenient and effective it is for the Corporate Affairs Commission to manage their record and offer better supervisory services'[3].

The essence of this study is not to discuss the merits and demerits of de-registration of Companies, but to sensitize the general public particularly the Corporate sector to the responsibilities of a registered company. It is the contention of the researcher that lack of awareness of responsibility in a country dominated by high level of illiteracy could not be ruled out as one, if not the major reason the four hundred Companies failed to file their returns as at when due.

In addition, research from the academics in the area of consequences of incorporation has been most of the time without a discourse on the responsibilities of a registered company. Therefore, this study seeks to consider not only the procedure for registration of company but also the totality of the consequences of incorporation of companies dealing with its advantages and disadvantages simultaneously.

REGISTRATION OF COMPANIES

To define a Company in legal term is a difficult task if not a mirage

to construct[6], due to the vastness of the scope of company law and its unrelenting capacity for expansion from age to age[7].

The difficulty of legal definition notwithstanding, the word company connotes 'an association' of a number[8] of people who come together to attain a specific project or projects[9]. Universally, common cause for which people come together might be many; it ranges from marital to financial and security consideration to mention but a few[10]. But when it comes to company, people come together for economic reasons with a view to making profit[11].

In that economic sphere, two groups of organisation evolved which are: partnerships and companies. A sole-proprietorship could not come into the fold because the enterprise is owned by an individual who decided not to associate with anyone[12]. Whether partnership or companies, the suffix 'company'[13] applies to both but the use of the word Company by both organisations do not make them the same, as each organisation has its own separate features with different advantages and disadvantages.

Partnership is defined as 'the relation, which subsists between persons carrying on a business in common with a view of profit[14]. It is unincorporated association which is not clothed with an attribute of legal personality; therefore it cannot sue and be sued except in the names of individual partners'[15]. The property and assets of the partnership are vested in the partners therefore the liabilities of members is unlimited for the debts of partnership[16].

All over the world, a company can be registered in one of three ways: by statute, by the grant of a charter or by registration. Even-though, in Nigeria, a company particularly government enterprises can come into existence by a statute made by the Government[17] and such a company becomes a legal entity, the usual way by which a company can be incorporated is by registration under the Companies and Allied Matters Act[18]. The body that is charged with registration of Company is the Corporate Affairs Commission which has power to regulate and supervise the "formation, incorporation, registration, management and winding up of the companies[19].

Before 1990, the Federal Ministry of Trade was in charge of the administration of the Companies Act 1968 and the registration of

companies. A Corporate Affairs Division was established by the Federal Ministry of Trade to take up that task (of registration, administration, incorporation and management of companies) but the body could not do much as it was incapacitated by shortage of personnel, inadequate of finance and bureaucracy[20] that the emergence of Corporate Affairs Commission was regarded as a great relief [21].

To register a company, certain documents are required by the Corporate Affairs Commission. Section 35 of Company and Allied Matters Act enumerates those documents[22]. If the documents submitted are found to be in order, the Corporate Affairs Commission shall register the company. There are, however, circumstances in which the commission may conclude that a company should not be registered. The circumstances for such negative conclusion are enumerated in section 36 of the Act[23].

Where the Commission refuses to register a company. The Commission shall within thirty days of the receipt of statutory declaration by a legal practitioner for the company send to the said legal practitioner a notice of its refusal giving the grounds of such refusal. If any of the promoters of the Company or any other person is aggrieved by the negative result of the application for registration. Such an aggrieved person may give notice to the commission requiring it to apply to the court for directions and the commission shall within twenty-one days of the receipt of such notice apply to the court for the directions[24].

If the ground of refusal is as to the allegation of incompetence or disqualification of any of the subscribers, the commission can authenticate the ground of such refusal by requiring the affected subscriber to submit to the commission a statutory declaration to the effect that he is qualified[7]. In the course of registration or while it is in progress, the Act prohibits the company from inviting the public to subscribe for shares or in any other manner on the basis of a prospectus[26].

EFFECT OF REGISTRATION ON COMPANIES

Once the Commission is satisfied with the documents submitted by the company, the Commission shall register the Memorandum and Article of the company. The Commission shall go further by certifying under its seal: (a) that the company is incorporated[27],(b) in the case of limited

company, that the liability of the members is limited by shares or by guarantees;[28] or (c) in the case of unlimited company, that the liability of the members is unlimited; and that the company is a private or public company, as the case may be[29].

The effect of registration is that the company becomes a legal entity[30]. The successful company shall then be issued with Certificate of Incorporation. There has been a controversy, which actuated a plethora of litigation on the effect of Certificate of Incorporation under the 1968 Act[31]. The repealed Act provided that the Certificate of Incorporation shall be a conclusive evidence of compliance to the statutory provision of the Act[32]. The consequence of that provision is that, once the certificate is issued, it may be impossible for the commission to nullify the registration on the ground that the company has failed to comply with the statutory requirements[33].

The new Act[34] has now removed the clog placed on the path of company's registry to reassess the registration of a company in the light of new emerging facts. The section provides that 'the Certificate of Incorporation shall be prima facie evidence that all the requirements of the Act in respect of registration and of matters precedent and incidental to it have been complied with and that the association is a company authorized to be registered and duly registered under the Act[35].

MINIMUM NUMBER OF SUBSCRIBERS

Section 18 of Companies and Allied Matters Act,[36] gives a right to numerical requirement of two eligible persons to form and incorporate a company after a compliance with all the requirements of the Act as to registration of a new company. It is essential that we should note that under the Act,[37] the statutory numerical requirement of those that can form a company was seven for public companies and two for private companies.

The new Act,[38] has removed the difference by making the numerical requirement uniform. Before a company can be registered, the memorandum of such a Company must be signed by at least two subscribers, in fulfilment of statutory numerical requirement. Once that has been done and other requirements are complied with, the registrar of Corporate Affairs

Commission must register the company irrespective of status of the subscribers.

In *Lasisi v. Registrar of Companies,*[39] where the registrar among other things refused registration of British Leyland International (Nig) Ltd on the ground that certain subscribers should have signed the memorandum of the company, the Federal high court held that the refusal was unlawful. According to Belgore J:

> *"My understanding of "each subscriber" in section 5 does not mean every subscriber within the minimum requirement of section 1 of the decree, that is seven subscribers in the case of a public company. By this I mean that once the memorandum of a private company is signed by two subscribers, the registrar cannot insist on the remaining subscribers, if any signing the memorandum before he would register it, nor can he demand signature of a particular subscriber".*

It is mandatory for any kind of association, be it partnership, or company formed for the purpose of making profit or gain to register as a company under the Act if it is more than twenty[40]. In *Akinlose v A. I. T. Company Ltd*,[41] a partnership of Ondo District Timber group had more than hundred as members. The group was held by the court to be an illegal association been a contravention of statutory provision.

The punishment for the contravention of the provision of section 19 (1) is provided for in section 19 (3)[42]. It states:

> *"If at any time the number of members of a company, association of partnership exceed 20 in contravention of this section and it carries on business for more than 14 days while the contravention continues, every person who is a member of the company, association or partnership during the time that it so carries on business after those 14 days shall be liable to a fine of #25 for every day during which the default continues".*

If however, a Co-operative Society is registered according to the provision of any law in Nigeria; such a Co-operative Society is excepted from going through another registration under the Act, even if its membership is more than 20[43]. In the same way, any partnership which is

formed for the purpose of carrying on professional practices as legal practitioners or as accountants shall be expected if each member of the partnership is a legal practitioner for the former or a qualified accountant for the latter[44].

CAPACITY OF INDIVIDUALS TO FORM A COMPANY

Section 20[45] makes a provision for capacity of an individual to form a company. A person who is under the age of 18 years shall not take part in the formation of company, unless if there are two other qualified persons[46]. A person who has been found by a court in Nigeria or elsewhere to be of unsound mind shall not join in the formation of a company[47].

Furthermore, an undischarged bankrupt or a person who is not competent to be a director of a company shall not be allowed to join in the formation of a company[48]. An alien or a foreign company may join in the formation of a company subject to compliance with the provisions of any enactment regulating the rights and capacity of aliens to undertake or participate in trade or business[49]. And finally, a corporate body in liquidation shall not join in the formation of a company under the Act[50].

Section 254 of the Act[51] disqualified certain categories of person from being a director. Those disqualified shall not be allowed to form a company . A person convicted by a high court of any offence in connection with the promotion, formation or management of a company. A person who in the course of winding up a company appears to have been guilty of any offence for which he is liable. A person who has been guilty of a breach of his position or has been guilty of fraud in relation to the company while he is an officer of the said company.

THE COMPANY'S NAME

The importance of name to a company cannot be over-emphasized. It is a symbol of identity and a mark of relationship. The Act recognises that and provides that the name of a company must be stated in its memorandum[52]. It provides further that every company shall:

(a) Paint or affix and keep painted or affixed its name and registration number on the outside of every office or place in which its business is carried on, in a conspicuous position or in letters easily legible[53].

(b) Have its name engraved in legible characters on its seals,[54]

(c) Have its name and registration number mentioned in legible characters in all business letters of the company; in all notices, advertisements, and official publications and in all or any transaction entered into by or on behalf of the companies[55].

The promoters are at liberty to choose a name of their choice but since the name of a company is a reflection of the nature of such company to the public, the Act[56] has provided for statutory guidelines on the choice of a name. In the statutory guidelines, some names are prohibited while others are restricted.

It is prohibited for a company to register with the name that is similar to that of an existing (registered) company[57]. The prohibition covers a situation where the similarity of the name can deceive the public in knowing which company to deal with[58].

In *Niger Chemists Ltd v Nigeria Chemists,*[59] the court granted an injunction in favour of the plaintiff against the defendant from using the name Nigeria Chemists or any other name closely resembling Niger Chemists since according to the court, the name is likely to cause confusion.

Similarly, in *Ogunlede v Mercury Builders (Nigeria) Ltd,*[60] a firm of engineers known as "Mercury Builders obtained an injunction restraining the defendant "Mercury builder Ltd" also an engineering company from further using its name. But if the company in existence is in the process of being wound up and its consent is obtained for the use of its name. The prohibition in that circumstance shall be of no effect[61]. Equally, important is permissible names which could only be used with the consent of the Corporate Affairs Commission.

In this category, we have names which include the word like 'Federal' 'National', 'State', 'and Government' or any other word which in the thinking of Corporate Affairs Commission suggest that the company with that name enjoys the patronage of the Government be it from the Local, State or Federal department or parastatals of government[62]. If the name contains the word like 'Municipal', 'Chartered' or any other name which in the opinion of the Corporate Affairs Commission may suggest connection with Municipality or local authority, it could only be used with

the consent of the Commission[63]. Remaining names that require commission's consent are 'Co-operative', 'Building Society', and 'Group' or 'Holding'[64].

CONSEQUENCES OF INCORPORATION

Upon registration of a company under the Companies and Allied Matters Act[65] and the issuance of certificate, the company comes into being by becoming a separate legal entity with its own rights and liabilities[66]. A registration confers not only rights but liabilities on company. Our intention is to discuss those burdens (liabilities) and rights under this heading:

Firstly, as a result of registration, a company becomes a juristic person. This means the company has capacity to sue and be sued in its own name[67]. Therefore, it becomes a juristic person, once incorporated[68]. As from 1990, a company suing in its own name must end its name with its suffix[69] but failure to do that before 1990 was not fatal to the party's case. In *Bank of Baroda v. Iyalabani,*[70] *Ejiwunmi* J.S.C. remarked:

> *"Where the name of which a plaintiff sues before 1990 appears to be a corporate name but did not include the word "Limited" at the end there of, an assumption that such a plaintiff is not a corporate body would be erroneous. While it may be opened to a defendant to challenge the legal capacity of a plaintiff to sue, the plaintiff should not be deprived on the basis of a mere assumption of the opportunity of proving his or its capacity to such".*

Secondly, there is *Separate Property:* Once a company is incorporated, the property of the company is distinct from that of the member. In *Habib Nigeria Bank Ltd. v Benson Ochete,*[71] the respondent had a personal account with the appellant's wife in their business name known as Belyn Pharmacy.

On the 22nd of February, 1993, the said business name was incorporated into a Limited Liability Company. The respondent brought a cheque of N311, 215,40k made payable to him in his personal account but the bank instead of doing that mischievously paid the cheque into a

corporate account, which was heavily over drawn. The respondent suffered financial difficulties and sued the appellant to get the position rectified and also claimed damages. The high court granted his claim and awarded N150, 000,000 in his favour. On appeal, the court of appeal dismissed the appeal and affirmed the judgement of the High Court. Umoren J.C.A declared:

> *"From the moment (the company was registered) it legally assumed a separate and distinct personality from the plaintiff and his wife as well as others behind it. It puts on a corporate veil beyond which no one can penetrate except when it is lifted in a manner authorised by law. Account No. 176 was now a corporate account belonging to Belyn Pharmacy Ltd and no more to the plaintiff".*

It is easy to feel ambivalent about the effect of juristic personality to a company. It is advantageous in the sense that it gives right of locus standi to a registered company to enforce its rights by bringing an action in court in its own name but on the other hand and this time in the negative, the same company can be sued to perform her obligations which could have been avoided if it is not a juristic person.

It seems the case of *Habib Nigeria Bank Ltd v. Benson Ochete*[72] illustrates the advantage of the attribute of separate property to a company in the sense that the liability of an owner of a company has nothing to do with the fortune of a company. In addition, management becomes an easy task and the resultant accountability leads to transparency when there is a separation of property between the two (shareholders or owners of the company and company) however the attribute of separate property can also be disadvantageous to the company particularly, in some circumstances where it works like a boomerang and hits the man who was trying to use it[73].

In *Macaura v. Northern Assurance Company Ltd.*[1] Macaura the owner of an estate sold the estate to Irish Canadian Sawmills ltd in consideration of the allotment to him of 42,000 fully paid £1 per share. As a majority shareholder of the company, Macaura insured the timber in his own name but when the timber was destroyed by fire, the court held

that he had no insurable interest, that he could not insure the property of the company in his own name. Lord Sumner said: 'He owned almost all the shares in the company and the company owed him a good deal of money, but, neither as a creditor nor as a shareholder, could he insure the company's assets'.

That kind of scenario seems to be disadvantageous to the shareholders who formed the company. They loose their 'proprietary interest' in the property of the company. Whatever they do on behalf of the Company must be done in the name of the Company and not in their names. More likely than not, the Company may suffer the consequence as illustrated in that case.

Thirdly, there is *perpetual succession:* It means an incorporated company lives forever; the death of even a majority shareholder cannot cause the company to be wound up. The shares of a dead member shall be vested in his or her personal representatives. Professor Gower[75] explains in graphic metaphor the advantage of perpetual succession' when he elucidates:

> *"One of the obvious advantages of an artificial person is that it is not susceptible to "the thousand natural shocks that flesh is heir to", it cannot become incapacitated by illness, mental or physical, and it has not (or need to have) an allotted span of life. This is not that the death or capacity of its human members may not cause the company considerable embarrassment; obviously this will occur if all the directors die or are imprisoned or if there are too few surviving members to hold a valid meeting, or if the bulk of the members or directors become enemy aliens. But the vicissitudes of the flesh have no direct effect on the disembodied company. The death of a member leaves the company unmoved; members may come and go but the company can go on forever".*

Fourthly, the attribute of Separate entity may lead to dual capacities: Since Company is a different entity from the members it gives rooms for members to deal with the company in different capacities apart from their membership of the company. In *Salomon v. Salomon,*[76] the court held that Salomon could be a shareholder and a secured creditor to the company at the same time.

In *Lee v. Lee's Air farming Ltd*[77]. The court held that the appellant's late husband who formed the company and had 2,999 shares out of the 3,000 shares could be the employee of the Company at the same time and so when he was killed flying the company's plane as a chief pilot (to the company), the wife was entitled to compensation from the company. The court (Privy Council) explained:

> *"It is a logical consequence of the decision in Salomon's case that one person may function in dual capacities. There is no reason therefore, to deny the possibility of a contractual relationship being created as between the deceased and the company; ...just as the company and the deceased were separate legal entities so as to permit of contractual relations being established between them, so also were they separate legal entities so as to enable the company to give an order to the deceased...".*

The benefit to the company is obvious if shareholders can serve in different capacities with the company. There is more commitment in serving a company in which one is a shareholder than one in which nothing is at stake knowing fully well that when dividend is distributed one is going to be a beneficiary. It aids efficiency and allegiance to such companies, which could be too difficult to compromise. However, disadvantage of that attribute[78] in some circumstances could not be hidden. Unless there is adequate checks and balances, conflict of interest and abuse of power may stand as an albatross to good benefit of dual capacity.

The next attribute is that of separate business. The business of a company that is incorporated is different from the business of the members. In Gramophone & *Typewriter Ltd v. Stanley*,[79] the court held that 'the fact that one person holds all, or substantially all, of the shares in a company does not without more make the company's business that person's business'.

In *Tunstall v. Steigman,*[80] the then Landlord and Tenant Act 1954 allowed the landlord to refuse a renewal of a tenancy if the landlord intends to occupy the premises for the purposes his or her business. Mrs. Steigman formed a company where she held all but two shares. She refused to renew the tenancy of the tenant on the ground that she intends to carry on business on the premises through her company. The court held that she could not

do so, the business of the company was not her business, and the tenant was successful. The court said:

> *"The landlord and her company are entirely separate entities. This is no matter of form; it is a matter of substance and reality. Each can sue and be sued in its own right; indeed there is nothing to prevent one from suing the other. Even the holder of 100percent of the shares in a company does not by such holdings become so identified with the company that he or she can be said to carry on the business of the company".*

If the business of company is treated as the business of shareholders. It might be difficult to punish the shareholders who abuse their office as directors. The corollary is this: If the business is mine I can run it the way I like and the proceed is mine. In *Gorgewill v Ekine*,[81] Uwaifo, J.C.A laments the misuse of company's funds by shareholder/director and proffered intervention of the government as a panacea; *"From the manner the company's fund were dealt with as personal money, it is obvious that she did not exercise her power as a director honestly in the interest of the company. She built a number of houses from the money taken (or stolen) from the company's coffers. Eventually, the company is now said to be non-existent even though it has not in law been liquidated. I should have thought this was a matter to which the attention of both the Attorney-General of the Federation and Corporate Affairs Commission should be drawn for necessary action".*

On the whole,[82] the attribute of separate business can be advantageous when it is used to check the abuse of power but could be disastrous if shareholders become unconcern about the business of the company on flimsy excuse that the business of the company is not theirs.

Another consequence of incorporation is limited liability. If a company is registered as limited company, the liability of members is limited to the amount they still have unpaid on their shares.[3] In the case of a company limited by guarantee, the member is liable to contribute the specified amount which he has already guaranteed. Only when a company is registered as unlimited that the liability of members is not limited at all[84].

The advantage of limited liability is that it protects the shareholders from suffering from serious risks to which companies can be subjected to. In fact, it is possible for a shareholder not only to limit his risks 'to the money which he put into the enterprise' but could even safeguard substantial part of that money by "subscribing for debentures rather than shares. The disadvantage of this attribute could be seen when we consider the fate of the public who deal with the company at their own peril. Lord Macnaghten[85] in *Salomon v Salomon explained the fate of the public when he observes:*

> *"The unsecured creditors of a Salomon and Co Ltd. may be entitled to sympathy, but they have only themselves to blame for their misfortunes. They trusted the company. I suppose, because they had long dealt with Mr. Salomon and he had always paid his way; but they had full notice that they were no longer dealing with an individual; and they must be taken to have been cognisant of the memorandum of the articles of association".*

Furthermore, an incorporated company enjoys greater opportunity to obtain fund by borrowing money from financial houses and Banks. A company is in the best position to do this best by creating a floating charge on all the whole assets (existing and future assets) of the company[86]. In addition, the attribute of legal entity of an incorporated company makes it easier for members to transfer their interests in the company to others without much ado[87], without incorporation, opportunities to transfer would be greatly curtailed.

Be that as it may, absence of secrecy and formalities are discouraging features of an incorporated company. Everyone whether natural or artificial person desires privacy[89]. Privacy has something to do with confidentiality and confidentiality is essential in some circumstances for progress of a company. A sole trader or partners in partnership business enjoy high level of confidentiality and privacy but like public figures, incorporation leads to loss of privacy.[1] When a company is registered; such a company is partially if not wholly stripped of secrecy, particularly, if it is a public company. There must be registration of certain resolution passed at the meeting. There must be publicity and fillings of the accounts and returns of the company and so on.

A loss of privacy could not be on the positive side of any entity except if we consider the purpose for which the loss is occasioned. In this case, the desire to protect the public against risks coming from the companies calls for a sacrifice of privacy on the altar of transparency. As if loss of privacy is not enough, a company to be registered must undergo certain kind of formality and after registration the formalities still continue. Most of these formalities shall be discussed in the next section.

Suffice to say, at this juncture that no condition is permanent in life. Advantages of incorporation are not perpetual without a let-up. One of the greatest disadvantages of incorporation is that a company can loose the benefit of corporate personality when the veil is lifted. In some circumstances, the court can lift the veil of corporate personality while the Act itself provides other circumstances in which the veil can be lifted[90].

RESPONSIBILITY AS BURDEN OF INCORPORATION

There is no benefit without its alloy of responsibility. That responsibility can be regarded as a burden to be discharged by the companies. We have examined the legal consequences of incorporation in this study, our finding is baffling to us, in the sense that each of the so-called consequences can be of benefit and detriment or advantageous or disadvantageous to the company depending on the circumstances at a particular time. There is no panoply benefit without its alloy of detriment.

The issue of responsibility or burden of a registered company came to the fore in the case of Marina Nominees Ltd. F.B.I.R[91] he contention of the appellant counsel Chief F.R.A Williams could have been upheld by the court if incorporation of company is all about advantages and non about disadvantages or all about benefit and non of responsibility.

In that case, Chief Williams contended that since the appellant's company had no staff of its own and made no profits, it could not be required to file any assessment returns or pay any corporate tax on the fees paid to and collected by the appellant's company on behalf of a parent company. Court disagrees with him and held that if the appellant's company could enjoy the benefit of a legal entity it must also be ready to perform the responsibility of a corporate company.

Aniagolu J.S.C. explains the principle in graphic metaphor as follows:

> *"It is admitted in all side that Marina Nominees Ltd. is a registered company, limited by shares, under the companies Act 1968. It follows that as such a registered company under that Act it is subject to all the incidents, under the Act, of a company so registered. It enjoys all the benefits accruing there from as well as suffering or enduring all liabilities which such registration entails, including the liability to discharge all the duties imposed by the Act upon all the copies registered under the Act".*

Similarly, in *Alalade v. North line Industry and Agric serv. Ltd*[2] the court of Appeal agreed with the Federal High Court that the responsibility of filling forms CO2 (a return of allotment) and form CO7 (particulars of Directors and Secretary) is that of the company and not that of the shareholder. It is contended that the incorporation of a company gives room to responsibility, failure to perform that responsibility leads to penalty or sanction.

It can therefore be seen that the incorporation of a company gives rooms to responsibility and failure to perform that responsibility leads to penalty or sanction. In that respect, some statutory duties are actually imposed on the company but since the company, though a corporate entity can not operate by itself,[93] the statutory duties devolve on the directors,[94] such as the requirements to file annual returns,[95] disclose loans in favour of directors, to prepare annual accounts,[96] and to keep accounting records ofn its transaction[97] among others.

Some statutory duties are also imposed directly on directors themselves, such as the prohibition of insider dealing and other restrictions on directors taking financial advantage of their position[98]. Common law also imposes some kind of duties on all the activities of every director[99]. The essence is to hold somebody responsible for the management of a corporate entity[100]. That does not mean that a company is immuned from sanction because it is a corporate entity with no mechanism of its own to function except through directors, officers and members at the general meetings".

A company can be sued for civil actions and can be liable. It can also be prosecuted for criminal offences and can be guilty. In *Kite v. OLL Ltd*[101] the Managing Director of the company that organised a trip which led to the deaths of four teenagers in a canoeing disaster was imprisoned for manslaughter and the company was fined a total of 60,000[102].

CONCLUDING REMARKS

We should begin from our introduction, four hundred companies to be de-registered in Nigeria for their failure to render their annual returns[103]. In Nigeria a company must within 42 days after any annual general meeting complete and forthwith send to the commission a copy of the annual return signed by both a director and secretary to the company[104].

A failure to comply with the requirements as to annual return is a crime punishable with N100 fine in the case of a private company. Almost all the companies proposed to be deregistered are private companies. There is no doubt that the fine of N 100 which is less than one dollar is an inadequate sanction but the proposed deregistration for what should attract a fine of N 100 (less than one dollar) is not only absurd but unfair[105].

The problem is that of awareness. The directors of private companies are ignorant of the rules and regulations imposed by the Companies and Allied Matters Act[106]. Promoters are interested in rules relating to registration of companies and once the companies are registered they go to sleep. It is suggested that the Corporate Affairs Commission should embark on a strategy to sensitize the subscribers and promoters of company to the duties and responsibilities imposed on the companies at the pre-registration stage.

This is because we must consider both side of the views, the issue of registration and formation of company is one path, that of management of the company is another. Both paths should be considered to arrive at a consensus. The formation and registration of a company is not the end of the game, to manage the company successfully, obligations and responsibilities of the company must be discharged.

That is the crux of the matter. That is the essence of this study. There is benefit in incorporation but there is also a burden, in fact the so called

benefit if critically examined as it is done in this study is intertwined with alloy of burden. It takes awareness of the law by the promoters and the directors not to go asleep after incorporation less they and the companies incure the wrath of the law.

In conclusion, it is observed that life itself is ambivalent, it contains the negative and the positive, benefit and the burdens all at the same time. Consequences of incorporation are not immuned from this vicissitude. Alertness of one's obligations particularly on the path of those who manage the company and prompt execution of same are the antidote to a precarious situation in which the four hundred companies proposed to be delisted find themselves.

NOTES

[1]The Corporate Affairs Commission (CAC) was established in 1990 to administer the then new Nigerian Company legislation which replaced the Companies Act 1968 known as Companies And Allied Matters Act (CAMA). It has the power to administer the new Company Law (CAMA) and to register and manage the affairs of all registered companies from incorporation to winding up.

[2]See 'CAC and De-registration of 400,000 Companies'. This Day (Nig.), 27 March, 2007. p. 52 see also 'No pleasure in de-listing companies'. The Punch 19 January 2007 p. 31. 'we will soon deregister 400,000 companies' Nigerian Tribune 27 January 2009, *http://www.tribune.com.ng* (accessed on 27 January 2009), the Registrar General of the Corporate Affairs Commission Mr. Ahmed Al Mustapha said "Everyday we register companies and everyday, the number of registered companies keeps changing. But I can tell you that approximately over 600,000 companies are registered, out of which about 400,000 which are defaulting are going to be struck off".

[3]See section 370-373 Companies and Allied Matters Act (CAMA), Chapt4er C20, Volume 3 of the Laws of the Federation of Nigeria 2004.

[4]See "CAC and De-registration of 400 companies" supra note 2.

[5]**Ibid**

[6]**Ibid**.

[7]**Davies, P. L.** Gower's Principles of Modern Company Law, 6th ed., London, Sweet & Maxwell (1997)pp 3-8. See also per Buckley J. in Re Stanley (1906) Ch. 131 at 134: 'the word company has no strictly legal meaning'

[8]**Pace James L.J**. in *Smith* v *Anderson* (1880) 15 ch D, 247 at 273: 'The word association in the sense in which it is now commonly used, is etymologically inaccurate, for 'association' does not properly describe the thing formed, but properly and etymologically describes the act of association together, from which act of associating there is formed a company or partnership.

[9]**Companies And Allied Matters Act** (CAMA) , section 18 makes it mandatory for a minimum of two to form a company.

[10]**See Davies, supra note 7**, Companies and Allied Matters Act defines company in term of process leading to its creation; 'a company formed and registered in Nigeria before and in existence on the commencement of this Act', See supra note 3.

[11]**Ibid** p.3.

[12]Some Companies like Companies limited by guarantee are not formed to make profit see section 26 0f CAMA supra note 3.

[13] For advantages of sole-proprietorship see M.O. Sofowora, Modern Nigeria Company Law 2nd ed. Lagos, Soft Associates (2002) p.5.

[14] A sole partnership or partnership enterprise can be registered in Nigeria under part B of Companies and Allied Matters Act (CAMA) supra note 3. Usually it bears such titles as Esther and Associates, Jacob and Company and so forth. The word 'limited' is not part of the name of a sole proprietorship or partnership enterprise. Consequentially the owner of the business could not sue in the name of the company. See Emeka Chianu. 'Legal Consequences of Incorporation' *MPJFIL* Vol. 6. No. 1-2 pp. 111 - 112. He wrote: 'if a contract is executed under the business name and the proprietor chooses to sue, the writ should be headed 'Kenneth Chima (trading under the name and style of Kechi and Associates) if he sues as Kechi and Associates, the action will fail because Kechi and Associates is not a person in the eye of the law.'

[15]Section 1 (1) Partnership Act of 1890. See also *Thadani & Hotchand* v *Maja* 1966 (1) ALR Comm, 105 at p. 100 Supreme Court of Nigeria declared that the partnership Act, 1890 applies to Nigeria.

[16]*Automobile Association of Nigeria* v *Registrar of Business* 1968 (2) ALR Comm 342 (H. Ct. of Lagos State) See C.D. Thomas, Company Law for Accountants 3rd ed. London, Butterworths (1992), p. 344 and p.15, he enumerated 16 differences between limited companies and partnership.

[17]See *At your service Ltd.* v. *Fine Agencies* 1974 NCLR, 504.

[18] For example, Nigerian National Petroleum Corporation was established by Decree No. 33 of 1997 as a Corporation.

[19] Before 1990, companies were registered under the 1968 Act. But now they must be registered under the Companies Allied Matters Act, supra note 3.

[20] Ibid section 7.

[21] See C.O. Okonkwo "The Corporate Affairs Commission in Essays in Company Law" edited by E.O Akanki. (ed) Univerrsity of Lagos Press p. 14.

[22] Those documents as enumerated by the Act are: (a) The notice of the address of the registered office of the company and the head office, if different from the registered office of the company. The Act provides that a postal box address or a private bag address is inadequate and the essence of the prohibition is for easy monitoring of the affairs of the company by the Corporate Affairs Commission; (b)A statement in the prescribed form containing the list and particulars together with the consent of the persons who are to be the first directors of the company; (c) A statement of the authorized share capital, signed by at least one director; and (e) Any other document required by the Commission to satisfy the requirements of any law relating to formation of a Company; (d) A statutory declaration in the prescribed form by a legal practitioner that those requirements of the Act for the registration of a company have been complied with shall be produced to the Commission, and that the Corporate Affairs Commission may accept such a declaration as sufficient evidence of compliance.

[23] They are: (a) If the Corporate Affairs Commission thinks that the Company does not comply with the provisions of the Act; or (b) If the business which the Company is to carry on, or the objects for which it is formed, or any of them, are illegal, or (c) If any of the subscribers to the memorandum is incompetent or disqualified in accordance with section 20 of the Act, or (d) If there is non-compliance with the requirements of any other law as to registration and incorporation of Company; or (e) If the proposed name conflicts with or is likely to conflict with an existing trademarks or business name registered in Nigeria.

[24] Section 35[3] of CAMA
[25] Section 36[2] of CAMA
[26] Section 36(4) of CAMA
[27] Section 36(5) of CAMA
[28] Section 36(5) of CAMA
[29] Section 36(5) of CAMA
[30] Section 36(5) of CAMA
[31]The Company Act 1968; that was the law in existence before the Companies and Allied Matters Act of 1990.
[32] See section 17(1) of Companies Act.
[33] See Kiser Barnes; "Terminating the incorporation of offensive companies" (1988) 1 *GRB PL.* No 1 pg 79-85
[34] Section 36 (6) of CAMA
[35]Supra note 3
[36] CAMA supra note 3
[37] The Company Act 1968
[38] CAMA supra note 3
[39] 1974 (3) A.L.R. Comm. 85.
[40] Section 19 (1) of CAMA
[41] (1961) W. N. L. R. 213.
[42] Section 19 (2) of CAMA
[43] Section 19 (2) (a) of CAMA
[44] Section 19 (2) (b) of CAMA
[45] CAMA supra note 3
[46] Section 20 (2) of CAMA
[47] Section 20 (b) of CAMA
[48] Section 20 (c) and (d) See also Section 254 of CAMA
[49] Section 20 (4) of CAMA
[50] CAMA of supra note 3
[51] CAMA of supra note 3
[52] Section 27 of CAMA
[53] Section 27 of CAMA
[54] Section 27 of CAMA
[55] Section 27 of CAMA
[56] Section 30 of CAMA

[57] Section 30 (1) (a) of CAMA

[58] This type of section was also prevented by a common law of passing off which says that a person or company should not carry on his or its business in such a manner as to deceive or mislead the public that the business belongs to someone else. The essence of prohibition is to avoid a situation in which the public will be deceived to deal with a wrong company which they do not intend to deal with.

[59] (1961) ALL NLR 171

[60] (1961) ALL NLR 171

[61] (1970) NCLR 38

[62] Section 30 (1) (a) of CAMA

[63] Section 30 (2) (a) of CAMA

[64]Section 30 (2) (b) of CAMA

[65] Section 30 (2) (b) (c) and (d) of CAMA

[66] Section 37 of CAMA

[67] *Adesanya* v *President of Nigeria* (1981) 2 NCLR 356; "once one is not a juristic person it automatically results to loss of locus standi.

[68] *Lyke Medical Merchandise* v *Pfizer Inc. & Anor.* (2001) 10. NWLR & part 722) 540: "As a general rule, only juristic persons have the inherent right and/ or power to sue and be sued in their names. Non legal persons or entities may neither sue nor be sued except where such right to sue or be sued is created and/ or vested by or under our statute.

[69] Section 631 of CAMA

[70] (2002) 11 NSQR 498.

[71](2001) 3 NWLR (pt 690).

[72]Ibid

[73]O. Kahn-Freund, "Some Reflection on Company Law Reform" (1944) 7 *M.L.R* 54 at p. 56.

[74] (1925) A.C 615

[75]Gower's Principles of Modern Company Law pp. 85 - 86

[76] (1879) A.C 22

[77] (1960) 3 ALL, E.R. 420

[78] Section 280 (1) and (6) of CAMA. The personal interest of a director must not be in conflict with any of his duties as a director.

[79] (1908) 2 KB 89; 24 T.L.R. 480 C.A.

[80] (1962) 2 Q B. 593 (1962) 2 WLR 1045

[81] (1998) 8 N.W.L.R 454 pg. 464

[82]See Section 63 (1) of CAMA " A company shall act through its members in general meeting" so shareholders must be proactive to make advantage of this section.

[83] Section 26 (7) of CAMA

[84] Section 27 (1) (f) of CAMA

[85] See *Solomon* v *Solomon* supra note 76.

[86] Section 166 of CAMA a company has a statutory power to borrow money see also *Intercontractors Nigeria Ltd.* v *UAC of Nigeria Ltd.* (1988) 2 NWLR (pt 76) 303: the court explained that a floating charge is "ambulatory and float over the property until the event indicated in the debenture deed happens".

S 151 and 115 n9 this can be by ways of sale or as a gift

[87] Gower's Principles of Modern Company Law pp 85 - 86

[88] Gower's Principles of Modern Company Law pp 85 - 86

[89]*FDB Financial Service Ltd. & Ors.* v *Adesola (2000) 8 NWLR* (part 668) 170; "The consequences of recognising the separate personality of a company is to draw a veil of incorporation over the company. One is therefore not entitled to go behind or lift this veil. However, since statute will not be allowed to be used as an excuse to justify illegality or fraud, it is in quest to avoid the normal consequences of the statute which may result in grave injustice that the court as occasion demands pierce the corporate veil".Court can lift the veil on the ground of illegality, fraud public policy agency trust and taxation. It can also be lifted under the statute when the number of members falls below two etc.

[90] Osuntogun Abiodun "Gossip Journalism and the Law" 11 December 1990 *Tribune Newspaper.*

[91]Osuntogun Abiodun "Gossip Journalism and the Law" 11 December 1990 *Tribune Newspaper*

[92] (1986) 2 NWLR 48.

[93] "A company is an entity distinct from its shareholders and its directors. Some of its powers may according to its articles, be exercised by

directors, certain other powers may be reserved for shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these power." Greer L.J in *John Shaw & Sons (Salford) Ltd.* v *Shaw* [1935] All E.R. Rep 836

[94]Section 370 of CAMA

[95]Section 340 of CAMA

[96] Section 334 of CAMA

[97]Section 331 of CAMA

[98] Section 275 of CAMA (disclosure of directors shareholding) section 276 (general duty to give notice of some personal matters) section 287 (prohibition of secret payments, gifts or bribes to directors) sections 288-290 are aimed at ensuring more probity in the conduct of those company directors who hid under the protective cover of limited liability to mismanage their companies or take undue advantage of corporate personality to dupe unwary members of the public.

[99] The common law duties have been codified in the Act; for example, the duty of utmost good faith is contained in section 279(1) of CAMA; the duty to act in the best interest of the company as a whole is contained in section 279(3); the duty to exercise power for proper purpose and not for a collateral purpose is contained in section 279(51; duty not to fetter discretion, section 279(6); duty to avoid conflict of interest, section 260 and duty of care and skill could be found in sect. 282 etc.

[100] The directors and officers of the company can be held responsible and punished for their acts on behalf of the company.

[101] [1994] 2 All ER 400

[102]The Act (CAMA) prescribes penalty against the company in form of fines for breach of its regulations, see for example sections 321 and 322.

[103] Annual return is a return made by the company to the corporate affairs commission on vital information concerning the registered office of the company, registers of members and of debenture holders, share and debentures, indebtedness, past and present members and directors and secretary, a summary, distinguishing between shares issued for cash and shares issued as fully or partly paid or otherwise than in cash.

[104] Section 374 of CAMA

[105] That does not mean that the Registrar of Corporate Affairs Commission lacks statutory power to de-register a company after its registration. The registration is just a prima facie evidence that all the requirements of the Act in respect of registration and of matters precedent and incidental to it have been complied with (section 36 (6) of CAMA). Before 1990 when the company law was amended, the then section 17 (1) of Companies Act 1968 provides that a certificate of incorporation shall be conclusive evidence that all the requirements of the Act have been complied with. There was controversy as to the power of the registrar to terminate the incorporation of offensive companies since the effect of incorporation was a conclusive evidence of compliance to the Act. The new Act amends the word conclusive and changes it to prima facie so as to cloth the registrar with unfettered power.

[106] Section 324 of CAMA..