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**MASTERS OF BUSINESS LAW (LLM)**  
**COLLEGE OF LAW AND GOVERNANCE STUDIES,**  
**SCHOOL OF LAW**  
**ADDIS ABABA UNIVERSITY**

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**The Salient Features of the Commercial Registration and  
Business Licensing Proclamation No. 980/2016 vis-à-vis the  
Commercial Code and Other Relevant laws**

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**Examiners**

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**ADDIS ABABA UNIVERSITY  
COLLEGE OF LAW AND GOVERNANCE STUDIES  
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**APPROVAL SHEET**

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**October 2018**

## **DECLARATION**

**I declare that the thesis is my original work and has not been presented for a degree in any other University and that all sources of materials used in the thesis have been duly acknowledged.**

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Declared by

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# Chapter One

## Introduction

### 1.1. Background of the Study

Since 1992 G.C the Ethiopian Government has implemented a series of reform toward market economy for increasing the private sector's involvement in the economy.<sup>1</sup> Despite these, the private sector's involvement in the economy remains where it needed to be. This has been attributed to the various challenges in doing business in the country. As a result Ethiopia ranks among the worst in the world in ease of doing business.<sup>2</sup> Generally, commercial registration and business licensing system as a gateway to the formal business environment has an impact on startups. That is why growth literatures have presented the formations and regulations of business as a ground for economic development.<sup>3</sup> What and how to regulate should be seen in light of the general purpose of regulation as a tool for achieving social, political and economic ordering of societies and systems.<sup>4</sup> Regulation is a tool that is designed to monitor and discipline all the formal and informal norms and expectations of social actors about how to act in particular contexts.<sup>5</sup>

Regulation's success depends on a set of variables that varies such as different views, ideology and governing structures. It is also a contextual negotiation and renegotiation with the reflexive behavior of the regulated. Thus, regulators should consider its effect beforehand.<sup>6</sup> On this the World Bank's under the topic 'Doing Business' since 2004 suggested that poor countries tend to regulate more but, more regulation does not always coincide with higher efficiencies in the market or market failure or greater

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<sup>1</sup> Fikremarkos Merso, Derk Bienen, Yoseph Endeshaw, Mandefrot Belay, Yalew Teshome, The Cost of Business Registration in Ethiopia and Option for Reform, (2016), p.1

<sup>2</sup> See studies conducted by the World Bank since 2004, such as, Djankov S. (ed.), Klain M. (ed.), Mclish C. (ed.), Doing Business in 2004: Understanding Regulations, (World Bank, 2004), p. 17, Doing Business in Ethiopia 2014, (World Bank, 2014), Available at <http://www.doingbusiness.org/data/exploreeconomies/ethiopia> (last accessed on 26 July 2018). World Bank, Doing Business 2009, The International Bank for Reconstruction and Development / *The World Bank*, Doing Business 2017: Equal Opportunity for All; available at <http://creativecommons.org/licenses/by/3.0/igo>. Fikremarkos Merso, Derk Bienen, Yoseph Endeshaw, Mandefrot Belay, Yalew Teshome, The Cost of Business Registration in Ethiopia and Option for Reform, The World Bank Group (2016).

<sup>3</sup> Thomas Strobel, Entry and Exit Regulations: The World Bank's Doing Business Indicators, (World Bank, unpublished 2010), at 1. available at: <https://www.cesifo-group.de/DocDL/dicereport110-rr2.pdf> (last accessed on July 30, 2018)

<sup>4</sup> Glenn Morgan (ed.), Lars Engram (ed), Regulation and Organizations: International Perspective, (2002), p.2

<sup>5</sup> Id., p.3

<sup>6</sup> Id., p.5

social products.<sup>7</sup> For entry regulation reducing the number of procedures to those truly necessary i.e. statistical purpose, and tax and social security registration and using the latest technology to make the process electronic, have produced excellent results in Canada and Singapore, Latvia, Mexico, Honduras, Vietnam, Moldova, Pakistan, Australia, Denmark, Netherlands, and Sweden. This present best practices in regulation that fulfills the task of essential controls of business without imposing unnecessary burden.<sup>8</sup>

Commercial business registration and licensing is fulfilling the legal requirements for being able to call oneself a legally business person or an organization.<sup>9</sup> The purpose of registration and licensing could be answered from many perspectives and opposing thesis and theories. However, the purpose of modernization and reformation of business registration may be discerned based on simpler assumption such as, to foster the private sectors participation in the economy.<sup>10</sup> A bad experience would lead to a complicated and costly process that could contribute to business startups hindrance.<sup>11</sup> Studies from Mexico, Colombia, Portugal, Belarus, Rwanda, and Malaysia as well as a number of cross-country studies have illustrated that easier, faster, and cheaper systems tend to attract higher number of businesses to economy.<sup>12</sup> On the contrary, a rampantly bureaucratic and systemic inefficiency will pose as impediment.<sup>13</sup> In addition, this would contribute to informality, which is arguably one of the world's biggest economic and social problems.<sup>14</sup> However, no regulation is practical, in modern market, laws and regulation that could cope up with the change are necessary.<sup>15</sup> Regulations and agencies put in palace should be moderate enough to handle the market.<sup>16</sup> The consensus is, simpler business registration and licensing procedure may help startups.<sup>17</sup> Thus, a regulatory system must justify its existence and its purpose has to be scrutinized in light of the existing needs in the market and previous laws and rules.

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<sup>7</sup>Thomas Strobel, cited above at note 3, p.1

<sup>8</sup>Djankv S. (ed.), Klain M. (ed.), Mclish C. (ed.), Doing Business in 2004: Understanding Regulations, (World Bank, 2004), p.17

<sup>9</sup>Commercial Code of Ethiopia, 1960, Art117-122, Proc. No. 166/1960, Fed. Neg. Gaz., year 19, no.3

<sup>10</sup>Reforming Business Registration: A Toolkit for the Practitioners, (The World Bank Group, 2013), p1

<sup>11</sup>Smart Lessons Real experience real development; Getting down to business: Strengthening Economy Through Business Registration Reform, p.1

<sup>12</sup>Reforming Business Registration, Sited Above at Note 10, p.vii

<sup>13</sup>Valentina Saltane, Jiawen Pan, Smart Lessons Real experience real development; Getting down to business: Strengthening Economy Through Business Registration Reform, (World Bank, Smart Lessons, 2013) p.1, available at

<sup>14</sup>Reforming Business Registration: A Toolkit for the Practitioners, (The World Bank Group, 2013), p vii

<sup>15</sup>John W. Mayo, The Evolution of Regulation: 20th Century Lessons and 21st Century Opportunities, (2011), p.2

<sup>16</sup>V. Saltane, Sited Above at note 13, p.1, Fikremarkos Merso, Derk Bienen, Yoseph Endeshaw, Mandefrot Belay, Yalew Teshome, The Cost of Business Registration in Ethiopia and Option for Reform, (The World Bank Group, 2016).

<sup>17</sup> V. Saltane &J. Pan, Sited Above at note 13, p.1

On the economic side, scholars such as Peltzman, Posner and Beacke have identified that regulation on assumption of promoting the public interest only is like looking at the problem from one side. Regulation as any good in market is subjected to the standard forces of supply and demand.<sup>18</sup> Thus, it is imperative to understand the purpose and goals it intend to achieve, especially of entry. However, it is safe to say that regulations in Ethiopia are not subjected to the capture theory like that of the western world, it is also erroneous to assume that the laws are devoid of any political and ideological contents and are motivated purely of public interest alone. Whilst to regulate or deregulate the market could be seen from economists perspective based on analysis of the market and its outcomes and political theorists view. On can quietly take away the point that progressively and regressively considering the progression and regression that laws that are meant to regulate such are could reveal an enlightening experience and lesson for the future legislation.

In Ethiopia, mainly Proclamation 67/97 as amended by latter proclamations and proclamation 686/2010 as amended have been introduced for the purpose of regulating business entry since the Commercial Code in 1960.<sup>19</sup> They were introduced to improve the commercial registration and licensing regime. The issue with registration system in Ethiopia could not be fully blamed on to the outdated laws, rather the newly introduced laws have to share the blame based on their contribution to the system.<sup>20</sup> Studies have shown that, the cost of complying with the Ethiopian registration and licensing procedure is among the worst in the world.<sup>21</sup> For instance, Ethiopia's rank in the World Bank's Doing Business indicator declined from 124 in 2013 to 125 in 2014<sup>22</sup> and in 2018 to 161 out of 190 countries in the world.<sup>23</sup> With regard to starting a business in the country, Ethiopia's rank dropped from 162 in 2013 to 166 out of 189 in 2014.<sup>24</sup> These findings asserts the question that stricter regulation is not associated with superior social outcome. Thus, when choosing regulatory laws and policies, they should be scrutinized in light of their contribution. Unless otherwise entry regulation not based on the right reason and ideology will not produce the desired social outcome.<sup>25</sup>

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<sup>18</sup>John Mayo, Sited Above at note 15, p.11

<sup>19</sup>Fikremarkos Merso and more, cited above at note 1, p.52

<sup>20</sup>Id., p. 24

<sup>21</sup>Fikremarkos Merso and more, cited above at note 1, p.3-4

<sup>22</sup>Doing Business in Ethiopia, (World Bank, 2014), (Available at <http://www.doingbusiness.org/data/exploreeconomies/Ethiopia>) (last accessed on 22 July 2018).

<sup>23</sup>Ibid.

<sup>24</sup>Ibid.

<sup>25</sup>Djankv S. (ed.) and more, Sited Above at Note 8, p.44

Having stated this about the overall commercial registration and licensing system, in the Ethiopian context, Proclamation 980/2016 was enacted by replacing Proclamation 686/2010 as amended. Naturally the progress or not of the Proclamation has to be scrutinized in relation with past laws. Content wise the proclamation introduced or reintroduced holding company, franchisor and franchisee agreement, border trade, permanent registration, domestic and foreign chamber of commerce, non-requirement of minimum capital requirement for certain businesses and so on. However, could also be condemned for taking step regressively on issues such as the renewal of license, and etc. Overall the new proclamation is thought to take the country in right direction but the problem is, it does not clearly specify what direction it is supposed to go. Based on this, the study will identify the prominent features of the proclamation and contrast them with the past relevant laws.

## 1.2. Literature Review

To understand business registration and licensing laws, the generic term within which these laws fall must be acquainted with. Business registration and licensing is by definition an entry regulation and entry regulation is a regulation. Thus, it would be imperative to understand regulation to understand entry regulation. Regulation could be termed as any rules, laws and action of the state that are designed to influence business or social behavior of an individual or group.<sup>26</sup> The relationship between regulation and free market should be seen together also to get the full meaning. Free market is where individuals and groups are left free to fulfill their welfare goals without many restrictions. Thus, the role of government as a regulator is marginalized if not used at all.<sup>27</sup> Contrarily in a collectivist system, the state directs the behavior of the individuals and groups based on the assumption that market has deficiencies and needs intervention.<sup>28</sup> Generally, laws that facilitate the market and laws that are designed to regulate the market should also be understood in both contexts. The character such as designed for controlling individual and group behavior and sanctioning those dissenting by controlling authority must be tell sign for regulation. This shows it is the state's duty to enforce regulations and usually through centralized system. Contrary to this, laws in market economy government plays a facilitative role in the relationship between individuals who are striving to maximize their own welfare.<sup>29</sup>

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<sup>26</sup>Robert Baldwin, Martin Cave, Martin Lodge, Understanding Regulation Theory, Strategy, and Practice, (2nd ed. 2012), p.3

<sup>27</sup>Anthony Ogus, Regulation Legal Form and Economic Theory, (Oxford Press, 1994,2004), p.1

<sup>28</sup>Id. P.2

<sup>29</sup>Id. p.2

In general the notion of regulation presupposes the assumption that market will not always going function properly. And thus will not fulfill the public interests all in all because market is driven by profit. But, some of the public need cannot be provided by such market. Thus, government regulates the market for collective interest of the society. This is why such aspirations are stated in the preamble of laws that are put in place for such purpose. This indicates that the states intervention in the economy is a pragmatic response to a societal problem that not answered by market force.<sup>30</sup> Even though trade is an essential instrument, with which society collectively work to satisfy their needs, the issue of how such relationship is governed and enforced should be answered by the state.<sup>31</sup>

Though there are instances of market failures, and government intervention are necessary, the hand of a government could do more harm than it corrects to the economy.<sup>32</sup> If not done properly studies suggest that regulations could be bad. It is due to this misfortune that it costs more than three times per capita income to start a business in Burkina Faso and Nicaragua, four times in Ethiopia and Niger, and more than five times in Cambodia.<sup>33</sup> This shows that regulation could have adverse effect on the business startup and can lead to the incumbent's monopoly or serve as barrier to entry. Furthermore, studies suggest that for better coordination and improvement of business registration and licensing procedure modernization is necessary. The use of modern technology, coordination and streamlining of procedures is necessary.<sup>34</sup> Which in turn leads to access to information and standardized forms. In this regard the simplest improvement that could be made on a business registration and licensing system are making the information regarding the number and sequence of procedures and time and cost it could entail present for prospective business entrants available in advance.<sup>35</sup> Regulation coupled with the weak enforcement mechanism it could lead to its demise regardless of its purpose is.<sup>36</sup> The regulatory instrument could be hijacked if not designed and set up in a way that is compatible with the interest and optimal acceptance of the regulated.

On theoretical aspect, generally some explain why governments intervene in market. The public interest theory suggests that unregulated market is prone to failures and a government must for the sake of

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<sup>30</sup>Id. p7

<sup>31</sup>Id. p. 16

<sup>32</sup>Mark A. Eisner, Market in the Shadow of the State: An Appraisal of Deregulation and Implications for Future Research, p.1

<sup>33</sup>Djankov S.(ed) and more, cited above at note 8, p.39

<sup>34</sup>Fikremarkos Merso and more, cited above at note 1, p.18

<sup>35</sup>Djankov S. (ed.) and more, cited above at note 8, p.46

<sup>36</sup>Id., p.87

protecting its public or social efficiency intervene through regulation.<sup>37</sup> For entry regulation, this theory suggest that a government must screen out new entrants so that the best quality services and goods are available in the market.<sup>38</sup> The contracting theory suggests that the interest could be addressed through contract that could be enforced by court of law.<sup>39</sup> Nevertheless, it require an efficient court system that could enforce the property rights and contracts. The capture theory suggests that there is no benevolent regulator.<sup>40</sup> Even though the intention of regulation were to promote social welfare, the government may lack the capacity to enforce and do so. This could lead to the regulations being captured by the politician or incumbents.<sup>41</sup> Meaning bureaucratic entry could lead to more corruption and cost for the entrant. On the other hand, regulation is also dependent on enforcing machineries. For regulation to bear fruit, it has to be enforced effectively. On this, enforcement theory indicates that regulation is best for countries, which have sufficient enforcement capacity and are democratic. On the contrary, in countries with limited enforcement capacity and are undemocratic regulation could have adverse effect and inferior social outcome.<sup>42</sup>

Accordingly, the problem in Ethiopian registration and licensing system is not the fees that are paid to get registered or licensed. But, rather the documentation procedures that the entrants must comply with. On these studies suggests that, they are time consuming and costly.<sup>43</sup> It is estimated that in 2014 the compliance cost of starting a business, i.e. the cost of procedures and documentation compliance is ten times the application fees that is legally required of the startup.<sup>44</sup> These studies suggest that the commercial registration and business licensing regime in Ethiopia is in desperate need of reform. Furthermore, the system needs to be streamlined and simplified in order to attract business formation and increase the private sectors role in the economy.<sup>45</sup> Additionally the studies suggest that, effective regulation should have the tendency of helping the market improve. Because, good regulations encourage formation of new businesses and transitioning of businesses from the informal to legal one,<sup>46</sup> overall

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<sup>37</sup>Arthur Pigou, The Economics of Welfare, (4th ed., 1938), p.126

<sup>38</sup>Ibid.

<sup>39</sup>R. Coase, "The Problem of Social Cost", Journal of Law and Economics 3(1): 1–44 (1960), p.126

<sup>40</sup>G. Stigler, "The Theory of Economic Regulation" Bell Journal of Economics 2: 3–21 (1971), p.126

<sup>41</sup> Djankov S. (ed.) and more, cited above at note 8, p.91

<sup>42</sup>Id. p.93

<sup>43</sup>World bank, The Cost of Doing Business in Ethiopia (2014), page 6.

<sup>44</sup>Id. p.7

<sup>45</sup>Id. p.9

<sup>46</sup>World Bank, Doing Business (2018), p.2

regulation alone does not bring the desired result but, it plays a great role. The combination of quality and strength of the legal infrastructure and institutions have great effect on the system.<sup>47</sup>

In reforming and modernizing the Ethiopian commercial registration and licensing system, even though the undertaken measures deserving of some appreciation, they are not fundamental. On piecemeal basis, parts dealing with business registration and licensing in the Code have been gradually modified by Proclamations. Thus, the system has been converted to socialism during the dergue and back to capitalism or so during the current government of Ethiopia. Scholars argue that depending on ideological orientation of a country market regulation could be encouraged or not. Nevertheless, the argument should not be to regulate or not but, how to regulate without making the market and business suffer.<sup>48</sup> After all, the notion of regulation in modern business environment is inevitable be it entry regulation or else. The issue that needs consideration is, when dealing with entry regulation such as the case of Proclamation 980/2016 is to determine its effect on the overall theoretical and conceptual orientation of the business world. This calls for it to be studied in comparison with relevant laws.

### 1.3. Statement of the Problem

The Commercial Registration and Licensing Proclamation No. 980/2016, tries to govern without explicitly stating what kind of market system and business environment it aspires to build. In contrast, its predecessors Proclamation 67/97 and Proclamation 686/2010 as amended have clearly stated, their intention of building a free market economy. The Proclamation in its preamble states to build a fair, modern, fast and accessible system that is supported by modern technology. Regardless, the Ethiopian business entry cost is high; in fact, it ranks among the highest in the world. This presents an argument for reform and streamlining of the system, which is yet to be realized by the laws.<sup>49</sup> Thus, it is necessary to see what provisions has Proclamation 980/2016 introduced to address issues that has not been addressed by previous laws. The basic focal point of the study is to show the difference in content and on program level between the Proclamation and past relevant laws. Thus, it will focus on identifying and showing the Salient features of Proclamation 980/2016 vis-à-vis the other relevant laws while weighing the fact that business world and environment are a delicate system that require utmost care should the

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<sup>47</sup>Id. p. 3

<sup>48</sup>Amitai Etzion, "The Capture Theory of Regulation Revisited", 2009, Springer Science and Business Media llc. Page 319.

<sup>49</sup>Fikremarkos Merso and more, sited above under note 1, page 7.

need for intervention arise. Having stated these, the research will try to answer the following specific questions: -

1. What kind of commercial registration and business licensing system does Proclamation 980/2016 aim to build?
2. What kind of theoretical and policy implications does Proclamation 980/2016 present for Ethiopian business environment?
3. What are the features of the Proclamation and their implication for the business environment in Ethiopia?
4. Compared to previous laws and legal regimes what kind of advancement does the new Proclamation brings on commercial business registration and licensing system in Ethiopia?

#### **1.4. Objectives and Significance of the Study**

##### **1.4.1. The general Objective**

The study will try to identify the features of Proclamation 980/2016 in light of the achievements of previous relevant laws and Proclamations. This will be done to figure out the Proclamation's and Ethiopian business entry regulation system's theoretical orientation and background implications to shade light in to why the law has been enacted in such a way and what it could contribute to the overall business environment.

##### **1.4.2. Specific Objective**

1. To identify any legislative advancement that the Proclamation makes.
2. To assess the theoretical and ideological orientation of the Ethiopian Commercial Registration and Business Licensing system that the Proclamation makes.
3. To check the compatibility of the Proclamation with the overarching system advanced by the Commercial Code and its implication.
4. To show any contributions that the Proclamation could make to the commercial registration and licensing system.

## 1.5. Scope and Limitation

The study will mainly deal with legislative coverage of commercial registration and business licensing regime in Ethiopia that culminated in Proclamation 980/2016 and comparing its features with previous laws and the Commercial Code. Thus, will not deal with the issue of agency problem that usually exists in implementation of the rules and regulation, regulatory or administrative body. The research will only deal with the incremental and salient feature of the Proclamation and its implications. The effects and costs of the system would be an empirical and social study of the implementation of the law would not be covered under this research. But, the study makes some inference and reference to qualitative and quantitative researches that have been conducted concerning the implementation of regulations. This will be for furtherance of arguments and hypotheses. Primarily, the research will only focus on the legal regimes doctrinal predisposition and apparent written latter indication and what it may contribute.

Main limitation of this research would be the lack of literatures that deals with the issue in context of Ethiopia. The existing literatures are about the economic aspect of regulation rather than theoretical. At most all the literature that is available on this area is a work done by the World Bank and the Ethiopian Chamber of Commerce for the purpose of improving doing business in Ethiopia. In addition, they are of empirical research that are predisposed at showing the situation of the business environment in Ethiopia rather than the theoretical background of the laws. Due to the newness of the Proclamation all, the available materials are prior to coming in to force of Proclamation 980/2016.

## 1.6. Research Methodology

This research is doctrinal in nature and would be a library-based research. It will be conducted using a black latter law legal research method. In doing so makes use of methods such as theoretical, reform oriented, and comparative legal research. The research is doctrinal in sense that the question it try to answer are purely of legalistic approach that solely concentrate on the contents of the laws or the letters of the laws. By using the legal principles, their relationships between each other and systematically analyzing them to show their relation and predict the future development of the laws.<sup>50</sup> Thus, the use of descriptive analysis of the legal rules and laws in order to compare their contents and recommend on their shortcomings this method will suffice.<sup>51</sup>

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<sup>50</sup>Machael Penleton, Non-empirical Discovery in Legal Scholarship – Choosing, Researching and Writing a Traditional Scholarly Article, in Research Methods for Laws (Mike McConville and Wing Hong Chui's, ed, 2007), p. 159

<sup>51</sup>Ibid.

The relevant laws would be technically ordered and coordinately analyzed in line with the salient features of Proclamation 980/2016. Such use of analysis will help in understanding the Proclamation's features and its lacking thereof. Thus, this method of analysis will help in better understanding of the laws not as a standalone legal regime but, rather interrelated rules and procedures that have led to the shaping of the current legal regime. Besides, the use of laws as a primary source of data, the research will use secondary sources such as books, journal articles, working papers and internet sources that deals with the concept in context of Ethiopian and worlds in general. The comparative aspect of the research will compare the content of different laws that used to govern the commercial registration and business licensing in Ethiopia to give progressive and regressive developmental aspect.

### **1.7. Structure of the study**

The research will comprise of four chapters. Chapter 1 will deal with the introduction and proposal of the research. Chapter 2 will be Business registration and licensing the international perspective. Chapter 3 will focus on identifying the salient features of Proclamation 980/2016, and comparing and contrasting them with previous laws. Finally, Chapter 4 will present the conclusion and findings of the research and posit some pointers for the future advancements.

## Chapter Two

# Business Registration and Licensing International Perspective and Ethiopian Context

## 1 Introduction

Government regulation of the business environment is supported by economic theory, especially of entry regulation.<sup>52</sup> This provides a foundation upon which regulations are explained. It also provides the incentive to regulate new ventures.<sup>53</sup> However, governments' inclination would have a profound implication on how the government regulates a business and an economy.<sup>54</sup> This shows that regulation and regulatory system that a country follows is dependent on how the government and society view the economy as a whole and how they perceive to intervene. Thus, it is imperative to know how rules and regulation come about and the theory behind the system and why it was chosen must be identified in order to understand them, especially entry regulations. This chapter will try to identify the existing theories and principles that are used to explain and sustain a regulatory system in the world in general and consider their relevance to the Ethiopian legal system and progressively identify the growth of regulatory systems in Ethiopia.

### 1.1. What is Regulation

Regulation is an economic and political term that can take many forms. The precise definition could prove to be problematic and may vary according to the context in which it is employed. Due to the involvement of regulation in economic policy and market, it could be difficult to generalize.<sup>55</sup> A survey on the notion of regulation reveals that there exists pronounced diversity and pluralistic interpretation of what constitutes regulation. Those who have ventured to define regulation described it as a government participation by either directly or indirectly to influence the decision-making processes of individuals or business groups or in simpler terms, a state's intervention in the market.<sup>56</sup> But, the state's position on

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<sup>52</sup> Rui Baptista, "Culture, Political Institutions, and the Regulation of Entry", Comp. Labor Law & Pol'y Journal (Vol. 28:785. 785, 2007), p.785

<sup>53</sup> Ibid.

<sup>54</sup> Id., p.786-787

<sup>55</sup> Allan Fels, "The Political Economy of Regulation", UNSW. Law Journal, v.5, (1982), p.31

<sup>56</sup> Robert C. Fellmeth, "A Theory of Regulation a Platform for State Regulatory Reform" The California Regulatory Law Reporter Vol. 5, No. 2, (1985), p.4

market institution could vary depending on its ideological and political predisposition.<sup>57</sup> Thus, the state's role in an economy drastically differ based on its subscription to individual centered ideology which is a market oriented or collective centered which is command economy.<sup>58</sup> Generally, regulation is any government laws or policy that affect the economy or the market in any way.<sup>59</sup>

Since the beginning of this century, legislators in all industrial nations have attempted to shape economic life, regulate markets and investments, and protect certain interest groups in the production, distribution, and consumption of goods and services in order to maintain the balance in the economy of the country.<sup>60</sup> This is irrespective of the country's commitment to the idea of market economy or not, because government intervention is inevitably linked with the protection of the market and the economy. Even though it is hard to explain the pattern of government intervention in the market it is generally accepted that economic regulation is good for the overall economic system of a country.<sup>61</sup>

From the collectivist perspective, regulation is an extension of a politico-economic concept that a country subscribes to. Best described by the different economic organization and legal form that maintain the regulation in a country.<sup>62</sup> Thus, regulation is government intervention in the market for collective interest.<sup>63</sup> From the individualistic perspective, intervention to correct market deficiency presents a possibility of exaggeration of its problem and government using it as a cover to intervene in the market. On the other hand, where serious deficiencies exist, the market may not function to allocate resources fairly or efficiently and the situation may call for intervention.<sup>64</sup> Thus, depending on who is asked and its ideological disposition and economic perspective the definition and purpose given to regulation could vary.

Generally, the thumb rule is that, intervention is viable if the benefit derived is greater than the adverse effect.<sup>65</sup> The skeptical view of the theoretical aspiration of regulation should also be noted, that remedying the market deficiency may lead to more market imperfections and prove to be costly and

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<sup>57</sup>Ibid.

<sup>58</sup>Anthony Ogus, cited above at note 27, P.15-28

<sup>59</sup>Allan Fels, cited above under note 55, p.31

<sup>60</sup>Jurgen Basedow, "Conflicts of Economic Regulation", The American Journal of Comparative Law (Vol. 42, 1994), p.2

<sup>61</sup>Richard A. Posner, "Theories of Economic Regulation", Bell. J. Econ. & Mgmt. Sci. (v.5, no.2, 1974), p. 335-336

<sup>62</sup> Cf. G. Majone, 'Introduction', in G. Majone (ed.), Deregulation or Re-regulation? Regulatory Reform in Europe and the United States (1990), p.1-2.

<sup>63</sup> Anthony Ogus, cited above at note 27, p.15-28

<sup>64</sup>Robert C. Fellmeth, cited above at note 56, p.4

<sup>65</sup> Ibid.

difficult to implement. Even though this could be the result of the regulatory process being influenced by political and bureaucratic process rather than the need or pure outcome of the regulation.<sup>66</sup> Finally, regulation could be summed as a sustained and focused control by government over activities that is valued by the community.<sup>67</sup> Regulation in general contains the idea of control by a superior; it has a directive function to achieve the desired ends, individuals are compelled by a superior authority of the state to behave in particular ways with the threat of sanctions if they do not comply. Since regulation falls in the meaning of public law, it would be enforced by the state mechanism and is typically centralized to offset the idea of favoritism.<sup>68</sup> Overall regulation could mean the employment of legal instruments for the implementation of socio-economic policy objectives under the penalty of sanction in case of non-compliance with the required behavior. Thus, to understand regulation it is imperative to consider the theories behind and the distinction between economic and social regulation.

Over all, regulation is a multidimensional discipline that could be affected by economic, political, historical, philosophical, psychological, social, religious and other development that take place in the country and society. Vice versa, all of these could influence why and how a certain regulation comes in to existence in a country.<sup>69</sup> Thus, our understanding of regulation should include why the regulation was introduced.<sup>70</sup> Furthermore, the definition given to regulation could vary depending on the views of the government. Thus, if the classical economics way is accepted, it would mean that the market is self-contained entity and does not need intervention by the government. The government's role would be not to regulate but guide the market.<sup>71</sup> On the other extreme, the Marxian state would propose the government as the central economic owner. However, the neoclassical economist believes that the government's role in the market should be in correcting the market failure instances; hence, regulation by government is indispensable.<sup>72</sup> This means both keeping out those who might cause severe public

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<sup>66</sup> Paul L. Joskow and Roger G. Noll, Regulation in Theory and Practice: An Overview, in Studies in Public Regulation (Gary Fromm, ed., The MIT press, 1981), p.2, (found at <http://www.nber.org/books/from81-1> )

<sup>67</sup> Anthony Ogus, cited above under note 27, P.1

<sup>68</sup> *Id.*, P.2

<sup>69</sup> Solomon Abay, "Designing the Regulatory Role of Government in a Business: The Lesson from Theory, International Practice and Ethiopia's Policy Path", Journal of Ethiopian Laws, V. XXII no. 2 (2009), p.71

<sup>70</sup> *Ibid.*

<sup>71</sup> *Id.*, p.73

<sup>72</sup> *Id.*, p.74

harm and removing those who are already in business whose performance falls below minimum standards.<sup>73</sup>

## 1.2. Theories of Government Regulation

Even though regulation is advocated and propagated by many scholars it is also despised and vilified by equally many other based on theories of regulation and state ideology. The public interest theory holds that unregulated markets exhibit frequent failures, ranging from monopoly power to externalities.<sup>74</sup> Thus, regulation is a means of protecting the public.<sup>75</sup> For entry regulation, this view holds that government screens new entrants in to market to make sure that consumers buy safe, high quality products from desirable sellers.<sup>76</sup> This theory assumes that, a stricter regulation manifested in a higher number of screening procedures is associated with socially superior outcomes and regulation is supplied in response to demands of public for the correction of inefficient or inequitable market practices. This includes among other methods, entry regulation.<sup>77</sup> Accordingly, behind each scheme of regulation could be discerned a market imperfection, the existence of which supplied a complete justification for some regulation assumed to operate effectively and without cost.<sup>78</sup> Under this theory there is generally two assumption, that is, the regulator is benevolent, always aims to pursue public interest, and has sufficient information and enforcement powers to effectively promote public interest. Posner argues that this assumption is wrong and regulation is not always to remedy the market. The conception that government is a costless and dependable effective instrument for altering market behavior is not always true.<sup>79</sup> Some regulations cannot be explained on the ground of public interest alone. There are regulations that are socially undesirable but are wanted by the regulated or the regulatory body that invented them.<sup>80</sup>

The public interest theory attributes to legislators and others responsible for the designing of regulation an authority to pursue collective goals, but whether they will do so always is difficult to prove. It is, apparently, difficult to always grasp the motives of the legislature in laws. Laws, particularly in the form of legislation, are rarely the work of a single mind, and there are often conflicting expressions of what

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<sup>73</sup>Robert C. Fellmeth, cited above at note 56, p.4

<sup>74</sup>Arthur C. Pigou, The Economics of Welfare (4th Ed.1938)

<sup>75</sup>Rui Baptista, cited above at note 52, p.786

<sup>76</sup>Simeon Djankov, Rafael La Porta Florencio Lopez-De-Silanes Andrei Shleifer, "The Regulation of Entry", The Quarterly Journal of Economics, Vol. CXVII, no. 1 (2002), p.117

<sup>77</sup>Richard A. Posner, cited above at note 67, p.335-336

<sup>78</sup>Richard A. Posner, cited above at note 67, p.336

<sup>79</sup>For further detail see, Id. p.337

<sup>80</sup>Id., p.335-336

was intended and what materialized.<sup>81</sup> An attempt to formulate a comprehensive list of public interest goals that may be used to justify regulation would be futile. Because the notion of public interest itself varies according to time, place and the specific values held by the society or government.<sup>82</sup> This nature of problems has led to the development of another kind of theory, which is a private interest theory, which suggests that laws or regulations are promulgated to benefit private groups rather than the society.<sup>83</sup>

The public choice theory sees the government as less benign and regulation as socially inefficient. As has been said by George Stigler and later by Sam Peltzman, industry incumbents are able to acquire regulations that create rents for themselves because they typically face lower information costs than do consumers. The regulation is used to keep out competitors by making the entry procedures cumbersome.<sup>84</sup> Thus, the capture theory stresses that regulation is supplied in response to the demands of the interest groups struggling among themselves to maximize the incomes of their members rather than that of the public.<sup>85</sup>

From the other end a non-interventionist may point to the failures of regulatory systems. That the systems either did not succeed in achieving their professed aim of correcting the market failure or did so inefficiently. Thus, regulation based on public interest alone is not enough.<sup>86</sup> What the public interest theory assumes is that if market is left alone to operate on its own it will do so inefficiently and the assumption that government intervention does not have any cost is wrong.<sup>87</sup> But the notion of regulation is the only response from government to market failure is not always true.<sup>88</sup> This goes with the argument that regulation does not always positively correlate with the presence of market failure and does not cure

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<sup>81</sup>Anthony Ogus, cited above at note 27, P.6

<sup>82</sup>Id., P.28

<sup>83</sup>Id., P.7

<sup>84</sup>Sam Peltzman, "Toward a More General Theory of Regulation", J.L. & Econ. (v.19, 1976), p. 211; George J. Stigler, "The Theory of Economic Regulation", Bell J. Econ. & Mgmt. Sci. 3, (v.2. 1971). P.3

<sup>85</sup>Richard A. Posner, cited above at note 61, p.335-336

<sup>86</sup>C. K. Rowley and G. K. Yarrow, 'Property Rights, Regulation and Public Enterprise: The Case of the British Steel Industry 1957-1975' (1981)1 Int. Rev. Law & Econ. 63; A. Peacock (ed.), The Regulation Game: How British and West German Companies Bargain with Government (1984). There is a vast American literature to similar effect. For useful summaries, see P. W. MacAvoy (ed.), The Crisis of the Regulatory Commissions (1970); and C. Sunstein, After the Rights Revolution—Reconceiving the Regulatory State (1990), ch. 3), cited in Anthony Ogus, Regulation Legal Form and Economic Theory, (Oxford, 2004), P.56 (note 7)

<sup>87</sup>Richard A. Posner, cited above at note 61, p.335-336

<sup>88</sup>Ibid.

the market failure as proposed by it. This assumption leaves out many variables that could and want to influence the outcome of regulation.

There is also a strand of public choice theory, which suggests politicians, and bureaucrats are the main beneficiaries of government regulation. Because, they use it to extract rents from incumbents and potential entrants in the form of campaign contributions, votes, and bribes.<sup>89</sup> Under this theory regardless of its effect on the overall welfare of the society or the economy, every procedure, screening mechanism, licensing requirements, registration, and regulations are considered as an opportunity for the politicians to extract rents.<sup>90</sup> Thus, it would be in the best interest of the government or politicians to regulate more. The economic theory of regulation suggests that the power of government can be used to give valuable regulatory benefits to particular individuals or groups. Thus, regulations are as any product in the market are subjected to laws of demand and supply and are supplied to whosoever values it the most.<sup>91</sup> Thus, regulation depends on the cost of obtaining the regulation and who shall obtain it.

Finally, when considering these economic theories, they have to be taken with a grain of salt; because, they are highly assumptive and dependent on probability and fulfillment of conditions that are usually unexplained on logical terms. Hence, critiques directed against these theories are; the public interest theory does not explain how public interests are translated in to legislation. The capture theory does not explain how the regulated can capture the regulation and how they failed to prevent the regulation if they have the power to capture it in the first place. The economic theory assumes that interest groups are able to influence the regulation policies. But, these are dependent on the design of the political process and the form of the administrative organization of a country.<sup>92</sup> Over all the theories and scholars behind agree or disagree based on certain assumption and arguments. But, the general theme in the 21<sup>st</sup> century is regulations are inevitable and governments and scholars find the best way to utilize them without adversely affecting the economy.

### 1.3. Legal Systems and Business Regulation

As discussed under the previous topic theories suggest that government intervention is inevitable. Nevertheless, the issue how the legal system of a country sees and embrace regulation could be different

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<sup>89</sup>See Hernando De Soto, *The Other Path*, (1989)

<sup>90</sup>Rui Baptista, cited above at note 52, p. 787, see also, Simeon Djankov, Rafael La Porta Florencio Lopez-De-Silanes Andrei Shleifer, "The Regulation of Entry", *The Quarterly Journal of Economics*, Vol. CXVII, no. 1 (2002), p.117

<sup>91</sup>Richard A. Posner, cited above at note 61, p.344

<sup>92</sup>Solomon Abay, cited above at note 69, p.85-86

based on the systems' or political orientation. On the other hand, governments' intervention in economies could be explained by the role the state intends to play in the economies. Over all depending on these governments could be divided in to market-friendly, the developmental states and the market-enhancing ones.<sup>93</sup> The market-friendly and the developmental states consider market and government as forces that compete for the control of the economy. The market-friendly approach considers the market and government should be separate and market should be allowed to operate on its own and government intervention in the market is distortive. Contrarily, the developmental state believes that state intervention in the market is necessary to solve the problem of market failure, therefore should govern the market. The market-enhancing approach government could use its power and policy to promote private sectors coordination to correct the market.<sup>94</sup> All these approaches are considered from the point of taking market as base and market alone is not perfect.<sup>95</sup> Contrary to the mercantile approach the Marxists consider that the whole economy should be in the hands of the government. In developing economies such as in African states, the appropriate mix between the state and market approach is recommended based on their economic diversification and development of their private sectors.<sup>96</sup> Studies suggest that, countries with more open access to political power, greater constraints on the executive, and greater political rights have less burdensome regulation of entry than countries with less representative, less limited, and free governments.<sup>97</sup>

#### 1.4. Rationales and Features of Good Business Regulation

It would only be possible in the purest 'Robinson Crusoe'<sup>98</sup> society where interaction is nil, the society is self-sustained, and there is no market or transaction, that the issue of regulation could be set aside. Nevertheless, if market as a policy direction is preferred, there are certain areas where market can effectively perform in but there are also instances of market failures. These calls for regulation of relation and interaction of market actors for smooth functioning of market. Even though the rationale for regulation could change depending on ideological underpinning and political system of a country. For example, in a planned economy, the rationale could be ideological. However, for market economy, it may not be only ideological, rather the belief that the economy is better off in market system and while

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<sup>93</sup>Id., p.95

<sup>94</sup>Id., p. 95-96

<sup>95</sup>Id., p. 96

<sup>96</sup>Id., p. 101

<sup>97</sup>Simeon Djankov and more, cited above at note 78, p. 5

<sup>98</sup>

accepting instances where market alone could not govern.<sup>99</sup> Making the involvement of the government in the market inevitable.

Even though regulation is advanced on many grounds, it is also condemned on many grounds. One of such grounds is regulation brings various types of costs on individuals and national economy as a whole. Any type of regulation has some adverse effect in some way on the economy or the market accordingly. These are costs associated with formulating, implementing and maintaining the regulation, compliance with the regulation and transaction costs, deadweight costs, rent seeking and etc.<sup>100</sup> Thus, the amount of benefit that could be derived from regulation must outweigh the costs associated to recommend regulation.

A basic premise for regulation would be, to act, and be seen to act, in the interest of the public. But, for good regulation to deliver results it must consider different and often competing aims and objectives.<sup>101</sup> Thus, what a regulation must show is why the regulation was needed in the first place. A well-functioning regulatory system provides a stable environment for a business by reducing transaction costs, providing certainty and encouraging healthy competition in the market.<sup>102</sup> In modern economy, as experience have taught the world, a regulation is imperative to have a full functioning market without its adverse effect. In fact, the question is not whether to have or not, but, rather how to regulate without negatively affecting the market. Because there are good reasons to justify regulation and the world has experienced it firsthand. In general, regulation should only be had if the expected outcome is greater than its adverse effect on the market.<sup>103</sup> Additionally regulation has to be efficient, administered in a transparent, reasonable and impartial manner to achieve its objectives.<sup>104</sup> Otherwise, a regulation would become a hindrance to the smooth functioning of the economy and it would be counterproductive to public interest.

### 1.5. Entry Regulation

Countries differ significantly in the way they regulate entry of new businesses. In economic regulation the rationale, as mentioned above is market failure or unregulated market would not suffice to be efficient

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<sup>99</sup>Solomon Abay, cited above at note 70, p. 101

<sup>100</sup>Coskun Can Aktan, "The Possibility and Impossibility of Rational Regulation in Government", International Journal of Economics and Finance Studies, v.8, no.1, (2016), p.227

<sup>101</sup>Stavros B. Thomadakis, What Makes Good Regulation? (IFAC Council Seminar, unpublished, 2007), p.23

<sup>102</sup>Fikremarkos Merso and more, cited above at note 1, p.47

<sup>103</sup>Ibid.

<sup>104</sup>Ibid.

or protect public interest. This warrants states' intervention in the market. Nevertheless, the question remains how governments intervene in market, one way is through regulation of entry. Entry regulation could be defined as a governments screening of new entrants to make sure that consumers buy high quality products and services from desirable sellers.<sup>105</sup> This is to make sure that new entrants would meet minimum standards needed to provide a desired services or products that are needed in the market and could advance public interest at the same time.

What is peculiar about entry regulation is countries with heavier regulation of entry have higher corruption and larger unofficial economies, not necessarily better quality of public or private goods. In other words, regulation of entry does not always coincide with better and socially desired outcome. Countries with more democratic and limited governments have lighter regulation of entry.<sup>106</sup> Since entry regulation is, a legal requirement that a business startup should meet before it opens its door for business,<sup>107</sup> depending on the time and procedure<sup>107</sup> that a business is required to go through, it could be costly for a business startup. This might be affected by theoretical and ideological background of the country and it might be used to serve ideological purposes.

If regulation of entry serves public interest, it should be associated with higher quality of goods, fewer damaging externalities, and greater competition. Public choice theory, in contrast, predicts that stricter regulation is most clearly associated with less competition and higher corruption.<sup>108</sup> Additionally the issue of who should regulate is also important, because government whose interest and desire is more in line with that of the consumer tends to regulate entry strictly. On the other hand, public choice predicts that governments that are subjected to least popular oversight tend to regulate entry strictly to generate rent to benefit the bureaucrats.<sup>109</sup> Thus, knowledge of who regulates helps in trying to decipher the underpinning interest of the regulator and predict what kinds of regulation it might choose and for what purpose. For an entrepreneur, legal entry could be extremely cumbersome, time-consuming, and expensive depending on who is regulating and based on what ideology and principles or justification. To understand entry regulation and regulation as a whole, the origin of regulation and business within a constitutional state should be understood. The business effects of regulation and the different

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<sup>105</sup>Simeon Djankov and more, cited above at note 76, p.1

<sup>106</sup>Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Id. p.4

<sup>109</sup>Ibid.

functionalities of regulation and legal requirements must be acquainted with also. This makes it desirable to know the theoretical model of regulation a country and its policy implications.<sup>110</sup>

Another way of regulating is through the use of license. License as regulation could be associated with the fact that it could be costly for business person or organization to obtain. Additionally, license could lead to more entry restriction which could result in unhealthy competition in the market.<sup>111</sup> All of these may have adverse effect on the overall condition of the economy if not handled properly and with great caution. Even though licensing is considered to have adverse effect on market, governments use them to achieve economic, social, safety, security or environmental goals while mitigating its negative effects.<sup>112</sup> In the arena of entry regulation even though licensing is possible, it is considered extreme level of regulation.<sup>113</sup> Licensing is where a regulator prohibits the practice of a trade, profession or enterprise unless license has been obtained. This gives a state a prerogative for barring entry into a trade or profession, and through its denial, or revocation, confers an ancillary power to promulgate rules.<sup>114</sup> This gives a draconian power of denying any one from practicing a trade unless certain conditions that has been set by government has been fulfilled, or the state could regulate through the use of permits or certification which are the use of few barriers to entry.<sup>115</sup> Generally, it is within states' authority to regulate entry but the outcome the requirements that would be set for entry regulation must be foreseen beforehand or the consequence could be adverse and may result in discouraging private sector's involvement in the formal economy.

## 1.6. Overview of the Commercial Licensing and Registration Regime in Ethiopia Up-to Proclamation 980/2016

### 1.6.1. Purpose of Commercial Registration and Business Licensing Laws

Different laws were introduced in Ethiopia with the intention of governing businesses within the general framework laid out by the Commercial Code of Ethiopia. Namely, Proclamation No. 67/1997(as amended) and No. 686/2010(as amended), currently Proclamation No. 980/2016 were introduced with their respective regulations and directives that have been issued by the Ministry to govern the commercial

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<sup>110</sup>Andre' Nijssen (ed.), John Hudson, Christoph Muller (ed.), Kees van Paridon (ed.) Business Regulation and Public Policy, (Springer, 2009), p.27

<sup>111</sup>Fikremarkos Merso and more, cited above at note 1, p.48-49

<sup>112</sup>Id., p.48

<sup>113</sup> Robert C. Fellmeth, cited above at note 56, p.4

<sup>114</sup>Ibid.

<sup>115</sup>Ibid.

registration and business licensing regime. Save Proclamation No.980/2010 that would be discussed in detail under chapter three of this research. When considering the purpose of the laws, usually it could be found in the preamble of the laws. Thus, under the preamble of the laws starting from the Commercial Code up to Proclamation No.686/2010 are discussed as follows. The Commercial Code puts the general framework of the commercial registration and business license in place and it has not been fully changed or repealed since coming to force in 1960. However, piecemeal attempts have been made to modify or bring up to date some parts of the provisions of the Code. Among these, Proclamations that were issued to govern commercial registration and business licensing in Ethiopia are mentionable. Before considering these Proclamations, it would be fitting to consider the purpose envisaged in the Commercial Code. The Code in its preamble states that it was introduced to capitalize on the progress made in the field of commerce at that time in the country.<sup>116</sup> The Code further stresses that it was introduced to facilitate trade growth and commerce of the country.<sup>117</sup> Generally, the Code was introduced to facilitate the country's transition to market economy feasible. The Code clearly for pro-market system, as could be discerned from the contents of its preamble and provisions, putting emphasis on facilitating the market rather than governing and controlling of the market.<sup>118</sup>

Proclamation No. 67/97 tried to change the provisions of the Code that deals with commercial registration and business licensing aspect. The Proclamation also states that, the very purpose of the Proclamation is to direct the country's economy towards free market. Further declares that the Proclamation is put in place to ease impediments to start a business for law-abiding citizens in Ethiopia. The proclamation is intended to facilitate business creation and regulate entry by making less cumbersome to ease impediments to start a business. The preamble of the Proclamation states that it will create an environment that would attract legal businesspersons and organizations by facilitating the transition of businesspersons from an informal economy to the formal one. In addition, the law intended to create a consolidated commercial registration and business registration system, which used to be carried out by different government institutions in to one place under one pertinent institution of the trade and industry sector.<sup>119</sup>

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<sup>116</sup>Commercial Code of Ethiopia, Proc. No. 166/1960, Fed. Neg. Gaz., year 19, no.3, p.III (The Preface of the Code)

<sup>117</sup> Ibid.

<sup>118</sup> Id. And Art.117-122

<sup>119</sup> Commercial Registration and Business Licensing Proclamation, Proc. No. 67/97(preamble)

Proclamation 686/2010 in its preamble declared that it was issued to create a conducive environment in every field of commercial activity along the line of free market policy. In line with this development, the commercial registration and business licensing had to be directed towards the promotion of free market economy. Similar to the preceding law, the proclamation's main purpose was to eliminate impediments that befall on persons or business organizations wishing to lawfully engage in business. So that the involvement of persons in business could contribute to the overall economic development of the country.

Generally, the overall objective of the commercial registration and business licensing regime up to Proclamation 686/2010 was to facilitate market economy. The laws advocated market economy, removal of impediments to business, improving the system with modern technology, tackle illegal activities and improve the overall system of commercial registration and business licensing. The preamble of these Proclamations refers to a host of ideals as its objectives that are principles of market economy. First, the two Proclamations put forward what may be treated as an overarching goal, which is creating an environment conducive to commercial activities in keeping with a free market economic policy. Based on this, all the contents of the preamble of the two Proclamations is based on free market mentality, as free market economic policy seems to form the basis of action and the organizing economic principle to do business in Ethiopia under these legal regimes.

#### 1.6.2. Commercial Registration and Business Licensing System

In 2015 G.C the World Bank conducted a research titled 'The Cost of Business Registration and Licensing in Ethiopia and the Option for Reforms' which deals with issue of business registration and licensing in Ethiopia.<sup>120</sup> The study pointed out that the macro implication of the system was not good.<sup>121</sup> Since the system requires business persons and organizations to engage in additional requirements, which entailed additional costs on business startups, such as extensive use of competence, certificate, cumbersome documentation and other requirements that are time and money consuming.<sup>122</sup> All the laws that were issued before Proclamation 980/2016 starting from the Commercial Code have the same approach to business registration and licensing. Under the Code and Proclamation No.97/1997 have similarity between them in in not allowing a person to engage in any business activity without getting

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<sup>120</sup> World Bank website: <http://documents.worldbank.org/curated/en/506611468197369773/The-cost-of-business-registration-and-licensing-in-Ethiopia-and-options-for-reform>, (accessed on October 6, 2018)

<sup>121</sup> Fikremarkos Merso and more, cited above at note 1, p.4

<sup>122</sup>Ibid.

registered in the commercial register engage in the time and money consuming documentation process.<sup>123</sup> However, under Proclamation 686/2010, Art. 6(1) seems to state only business activities that require business license are required to be registered. Which seems to indicate that there are business activities that do not need license hence forth registration. Which seems absurd when seen in light of the license requirement of the Proclamation itself under the provision of art. 31(1), which clearly indicate that no one would engage in any business activity without obtaining a valid business license. The Commercial Code stipulates that for a person to be called a trader under the Code registration is a mandatory requirement. The application has to be made within two months after commencement of the commercial activity.<sup>124</sup> Again even though the requirement of registration mandatory at least a person could start conducting the business and get registered within the two month, but not for business that require license.

The Commercial Code has established central registry, which is administered by Ministry of Commerce and Industry, and local registry that is established in the Teklay Gizat. The local registers forward any registration and their complementary entries made to the central registry that shall cause their publication in official newspaper.<sup>125</sup> Under subsequent laws the idea of centralization of the commercial registry continued. Local registry was authorized to register business that are within their jurisdiction and transfer the registry information to the central registry. The organs are namely the Central Trade Registry under the Ministry and the Local Registry administered by the Regional Trade Bureaus.<sup>126</sup>

#### 1.6.2.1. **Business Registration**

The main requirement for the need to get registered is the desire to start a commercial activity. All the laws starting from the Commercial Code have clearly stated that any person desiring to start a commercial activity must be registered. Overall the requirement of registration was traditionally only once with subsequent business involvement in different localities only requiring summary registration and notification to the local registry.<sup>127</sup> Principally a business is required to be registered only once. However, if it has branches and conducts other businesses it has to be summarily registered.<sup>128</sup> The procedure for

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<sup>123</sup>Commercial Code, Art. 100(1), Art. 5(1), Commercial Registration and Business Licensing Proclamation, Proc. No. 67/97, Fed. Neg. Gaz, year 3, No. 25, Art. 6(1), Commercial Registration and Business Licensing Proclamation, Proclamation no. 686/2010, Fed. Neg. Gaz, year 16, no.42

<sup>124</sup>Commercial Code, Art.101

<sup>125</sup>Commercial Code, Art.85-86

<sup>126</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.67/1997, cited above at note 122, Art.12, Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 122, Art.5

<sup>127</sup>Proclamation No.97/1997, Art.5(2-4), Proclamation No.686/2016 Art.6(2-4)

<sup>128</sup>Commercial Code, Art.103-105

registration is that any interested persons or organizations that wants to engage in a commercial activity will apply to the commercial registry by filling forms that are provided by the Ministry. The requirements for application may vary depending on different legal regimes. For instance, under Commercial Code art. 105 the requirements are provided. However, under the subsequent legal regime Proclamation No. 97/1997, the requirements were left to be handled by regulation. However, under Proclamation 686/2010 the requirements were again provided in the body of the Proclamation and it came up with different list of requirements for each business type. Some of the requirements under Proclamation 686/2010 for a person or business organization to be registered is to come up with a trade name that does not create any confusion or conflict.<sup>129</sup> A business organization founders must first have its memorandum and article of association authenticated.<sup>130</sup> Before the signing of memorandum and article of association they must make sure that the name of the business organization is not taken by another from the registry.<sup>131</sup> One of the common requirement that should be met by anybody or business organization to get registered under Proclamation No.686/2010, 97/1997 or the Code is the requirement of business address confirmation through title deed, authenticated lease or verification letter from local authority.<sup>132</sup> Anybody who has successfully registered according to the requirement set for by law for registration could holdout itself to be a trader. On the contrary, anyone who failed met these requirements could not hold himself to be a trader or commercial business, but could be liable as one.

The question when should a business person apply for business registration is answered by Proclamation 67/1997 and it is before starting the commercial activity and Proclamation 686/2010 one month before starting the operation.<sup>133</sup> Both proclamations did not fix a period within which an application for registration has to be either accepted or rejected.<sup>134</sup> In fact, the Commercial Code is silent on the period for action on the registration application. As for the requirements of registration, the Commercial Code

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<sup>129</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 122, Proc. No.686/2010, Art.6(5)

<sup>130</sup>Id. Art.6(7)

<sup>131</sup>Id. Art.6(8)

<sup>132</sup> Id., Art.10(7), 11(1)(e), 12(1)(f), 13(5), 14, 15(4)

<sup>133</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.67/1997, cited above at note 122, Art.6(1), Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 122, Proc.No.686/2010, Art.7(1),

<sup>134</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.67/1997, cited above at note 122, Art. 6(3 & 4), and Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 122, Art.7(2 & 3),

listed the documentary and procedural requirements needed for principal registration.<sup>135</sup> These requirements were later on relegated to be handled by regulation under Proclamation 97/1977.<sup>136</sup> Perhaps these moves may have been sighted as signs of flexibility. However, these requirements have made a comeback under Proclamation 686/2010.<sup>137</sup> Among these requirements under Proclamation 686/2010, the requirement for presenting a title deed or authenticated agreement of lease for premises for a sole business is mentioned. The requirements of document authentication and capital deposit for business organization other than share companies is a mentionable requirement under the latter Proclamation.<sup>138</sup>

The requirement of publication has been set as a mandatory requirement for business organizations under the Commercial Code. Thus, is a must procedure for businesspersons even though the registration would take effect as of the next day.<sup>139</sup> However, business organizations will not acquire legal personality until all the procedures pertaining to publicity and registration has been fulfilled.<sup>140</sup> The Code clearly stipulates that registration of a businessperson must be published. Nevertheless, unlike that of a business organization its effect is not to confer legal personality. Because, the legality of the registration would take effect the next working day from the day of entry without the need for publication and the publication requirement seems to notify public.<sup>141</sup> Proclamation No. 97/1997 has provided that publicity is required only for matters that needed one. Thus, presently was made a requirement for businesses registered by the Ministry and where the commercial activity is carried out across more than one region.<sup>142</sup> Depending on the decision that was to be made, the publication could be made, on outlets along nationwide circulation or regional newspapers.<sup>143</sup> But, the effect of publicity has not changed for a while until the introduction of an amendment via Proclamation No. 376/2003 ‘A Proclamation To Amend The Commercial Registration And Business Licensing Proclamation’ which introduced the idea of business organizations acquiring legal personality by registering in the commercial register without being publicized in a newspaper as provided for under Article 87, 219, 220, 223, and 224 of the Commercial

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<sup>135</sup>Commercial Code, Art.105

<sup>136</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.67/1997, cited above at note 122, Art.6(1)

<sup>137</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 122, Art.10-17

<sup>138</sup>Id., Art.10 & 11

<sup>139</sup>Commercial Code, Art.87 & 219

<sup>140</sup>Commercial Code, Art.219-223

<sup>141</sup>Commercial Code, Art.87-88

<sup>142</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.97/1997, cited above at note 122, Art.8

<sup>143</sup>Ibid.

Code for their establishment and amendments to their memoranda of Associations. Thus, according to Proclamation No. 376/203 any commercial Registration will become effective from the date of the Registration of the applicant in the commercial register. Similarly, Proclamation 686/2010 stated that business organization shall acquire legal personality upon registration without the need for publication.<sup>144</sup> Thus, effectively killing the need for publication to get legal personality that has been implemented under the Commercial Code.

According to the Commercial Code cancelation of a commercial registration occurs when the trader ceases to operate, die or the Ministry as of right cancels the registration.<sup>145</sup> Under Proclamation No. 97/1997, cancelation occurs when the trader ceases to operate or is lawfully prohibited to operate. The cancelation will be effective from the date of publication.<sup>146</sup> Under Proclamation No. 686/2010, cancelation occurs in addition to the above-mentioned requirements, if the registration or renewal was made on false statement.<sup>147</sup> On renewal of registration, Proclamation No.686/2010 has stipulated that registration has to be renewed annually. The option for registration or once renewal for at least for five years once was given but, never materialized.<sup>148</sup> Under Proclamation 97/1997 and the Code the annual renewal used to be the order of the day without any exceptional provisions whatsoever.

#### 1.6.2.2. **Business Licensing**

Licensing is a commonly used type of regulation, by which governments regulate business entries into markets and operations within markets. This can involve the use of permits, certification, and other forms of authorizations and notifications.<sup>149</sup> Using licenses governments impose a range of conditions, obligations and rights on a business the breach of which would entail imposition of sanctions by the relevant regulatory authority. The penalty that could be imposed by the authority could be, such as a fine or revocation of permission to perform an activity.<sup>150</sup> From the perspective of private sectors, the existing licensing system in Ethiopia is viewed as costly, cumbersome and complex.<sup>151</sup> Such kind of negative effect of licensing could play a role in keeping out the private sector from the formal business sector.

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<sup>144</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 122, Art.9

<sup>145</sup>Commercial Code, Art.112-114

<sup>146</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.97/1997, cited above at note 122, Art.10

<sup>147</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 122, Art17(1),

<sup>148</sup>Id. Art.18

<sup>149</sup>Fikremarkos Merso and more, cited above at note 1, p.47

<sup>150</sup>Id., p.47-48

<sup>151</sup>Id., p.51

The Commercial Code has envisioned a business world where a business license is necessary and the legislator indicated that anybody who wants to be registered should be licensed.<sup>152</sup> However, the wording of provision of Art. 105(n) of the Commercial Code seems to indicate the existence of businesses that do not require licenses. On the contrary, Proclamation 67/1997 provided anybody who wants to operate a commercial activity must obtain a business license from the appropriate authority.<sup>153</sup> Likewise, Proclamation 686/2010 states that no person shall carry out a commercial activity without obtaining a valid business license.<sup>154</sup> Thus, according to the laws having a business license in addition to registration in the commercial registry is a mandatory requirement to engage in a commercial activity. The authorities were authorized to close any business that ventures in to commercial activity without having a valid business license.

Based on the power given to it under Proclamation 686/2010, the Ministry of Trade developed the Ethiopian Standards Industrial Classification (ESIC) which classified licenses into 10 major categories, and identified the licensing agencies as well as the agency in charge of competence certification for each license. There are over 1,320 licenses categorized under nine major business sectors for the purpose of licensing. Each category is further subdivided into major groups, groups and sub-groups.<sup>155</sup> Proclamation 686/2010 indicates the need for activity specific license. Meaning a licensed trader can only carry out commercial activities that are clearly indicated on the license and that may go together with the business stated on the license or may not cause any adverse effect on public health and environment.<sup>156</sup> Thus, the era of general license is no more under Proclamation No.686/2010. Up to Proclamation 686/2010 getting registered and business license used to be based for different purpose. But after Proclamation 680/2010 there have been restrictions because, the Proclamation itself seems to put registration and license as a mandatory requirement equally.<sup>157</sup> The Commercial Code has stipulated that if the commercial activity that the person ventures on requires a license, it has to be acquired before applying for registration.<sup>158</sup> Effectively acknowledging that the requirement of license was an activity specific rather than a general requirement as has been advocated by latter proclamation.

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<sup>152</sup>Art.105 (N), Commercial Code

<sup>153</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.97/1997, cited above at note 122, Art.21 & 22,

<sup>154</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 122, Art.31(1)

<sup>155</sup>Fikremarkos Merso and more, cited above at note 1, p.57

<sup>156</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 122, Art.32 & 34,

<sup>157</sup>Id., Art.6(1)

<sup>158</sup>Commercial Code, Art.105(N)

Generally, a business license could be suspended if the licensee failed to observe the health, sanitary, environmental protection, quality standards and failed to observe duties prescribed for a license holder.<sup>159</sup> As regards the procedure of suspension, the concerned body will notify the licensee in writing of the reasons of the suspension and the measures to be taken subsequently. This will enable the grounds for suspension to be rectified within a specified period of time. In the meantime, the business may be sealed by the appropriate authority. Under both Proclamation No.686/2010 and 97/1997, a license could be cancelled due to fraudulent misrepresentation, use other than the purpose it is intended for, unfair trade practices, cessation of operation, failure to renew license, cancellation of commercial registration, fear for public health and safety or national economy.<sup>160</sup> Proclamation 686/2010 clearly provided that a business license is only valid if it is renewed yearly. Thus, it has to be renewed within four months as of the end of the budget year. If not renewed within this time and additional time with penalty the license will be cancelled.<sup>161</sup> Proclamation no.67/1997 also provided that a business license which is not renewed within six months after expiry of a budget year and if not renewed within the next three months with penalty would be cancelled.<sup>162</sup>

#### 1.6.2.3. **Trade Name Registration**

Under the Commercial Code trade name is required for commercial registration.<sup>163</sup> Trade names are used for the purpose of distinguishing the business endeavor of one trader from another. Under the Commercial Code a trader may use the combination or one of his names, family names, or an assumed name. The requirement set is that a name should not create confusion in a manner which would be prejudicial to the interest of another trader. In this case a trader name creating confusion would open him to liability suit under unfair competition.<sup>164</sup> The reason behind is the business person business could be able to identified by the consumers in the market from generic products. The requirement to have a trade mark generally not mandatory, but of trade name even if the trader has not registered trade name, he will continue the trade under his own name or assumed name under the provision of trade name registration art.135-139 of the Commercial Code. These combined with the provision of Art.105(i) of the Code,

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<sup>159</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.67/1997, cited above at note 122, Art.26 &27, Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 122, Art.37

<sup>160</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 122, Art.39, Commercial Registration and Business Licensing Proclamation, Proc. No.97/1997, cited above at note 122, Art.28

<sup>161</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 122, Art.36

<sup>162</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.67/1997, cited above at note 122, Art.25

<sup>163</sup>Commercial Code, Art.105 (I)

<sup>164</sup>Commercial Code, Art.135-139

shows that trade name is a mandatory requirement to have and the law goes as far as assuming it if the applicant didn't present valid one. This indicate that a businessperson or organization who wants to be registered must have a valid trade name before registration in the commercial registry. However, this requirement is done away with under Proclamation 67/1997, which clearly states it is optional to register trade name for principal commercial registration.<sup>165</sup> Contrarily Proclamation 686/2010 has reinstated trade name registration as mandatory requirement for commercial registration.<sup>166</sup>

Proclamation No.67/1997 stipulated that for trade name registration a commercial registration certificate and business license must be presented.<sup>167</sup> Indicating that commercial registration and business license could be obtained without a valid trade name registration, which is contrary to the requirements of the Commercial Code. Trade name being not identical or misleading or not contrary to morality or public order were similarly indicated as a prerequisite. The latter requirement under Proclamation 686/2010 was expanded in detail by including the trade name not being descriptive or generic or a common name, not represented by number alone, not similar to public body or enterprise, has not get license to use the name, a well-known trade name in another country, not presented by adding suffix or prefix on already registered tradename, and etc.<sup>168</sup>

The trade name presented for registration will be checked against lists of registered trade names. However, descriptive, generic, or common names that may be included in a trade name will not be used as points of comparison to establish the similarity and differences. Before trade name registration in commercial register and trade name register, it shall be verified that not another businessperson has registered trade name. The Proposed trade names would be published on newspapers and if no objection were lodged within the given time, the authority would issue certificate of tradename registration which will serve as a prima facie evidence of entitlement and validity. In case of trade name not being used or application for cancellation is presented by the owner, or registration is made based on fraudulent evidence the registration would be canceled by the authority.<sup>169</sup>

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<sup>165</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.97/1997, cited above at note 122, Art.5(5),

<sup>166</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 122, Art 6(5), 0

<sup>167</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.67/1997, cited above at note 122, Art.14

<sup>168</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 122, Art.24

<sup>169</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.67/1997, cited above at note 122, Art.14-18, Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 122, Art.22-28

## CHAPTER THREE

### Salient Features of Proclamation No. 980/2016 vis-à-vis the Commercial Code and Other Relevant Laws

#### 1 Introduction

Proclamation 980/2016 is the latest law issued to govern commercial registration and business license in Ethiopia under the general framework of the Commercial Code's governance of the commercial world. Registration and licensing are the dual obligations of any business person planning to operate in Ethiopia. Proclamation No.686/2010 used to regulate the process of commercial registration and business licensing system. Now has been repealed and replaced by Proclamation No.980/2016. Under this chapter the content of Proclamation No. 980/2016 will be analyzed against the contents of the previous laws and Commercial Code in order to find what legislative milestone have been achieved by the Proclamation. Furthermore, the salient feature of the Proclamation will be identified and compared and analyzed against the theoretical and philosophical identification that has been made under Chapter Two of this research and general overview of the previous legal regimes that used to govern commercial registration and business licensing in Ethiopia.

#### 3.1. Purpose of the Proclamation

Proclamation 980/2016 puts as its objective the need to put in place a fair, modern, fast and accessible system of commercial registration and business licensing system.<sup>170</sup> The provisions of the Proclamation are intended to close loopholes in legislation and working procedures rather than basically revolutionizing the system.<sup>171</sup> Furthermore, the Proclamation states that it will build a commercial registration and licensing system that will enable the business community and the society obtain the services they require and expect from the commercial system.<sup>172</sup> The Proclamation claims that it will enable the business environment to contribute to the overall economic progress of the country. In

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<sup>170</sup> Commercial Registration and Business Licensing Proclamation, Proc. No. 980, Fed. Neg. Gaz, year 22, No.101, (Preamble of Proclamation)

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

addition, the Proclamation puts as its objective the need to modernize the commercial registration and licensing system through introduction of technology.<sup>173</sup> The Proclamation states that illegality would be dealt with through introduction of technology and modernization.<sup>174</sup> Overall all of the assertions and statements made in the preamble of the Proclamation point the fact that the Proclamation will work to increase the transfer of economic actors from the informal sector to the formal sector. But the issue that should be seen in light of this assumption is that how is technology alone going to serve in battling against illegality in commercial registration and business licensing world.

The Proclamation nowhere in its preamble states what kind of market and economic system it would work to build. For its economic policy and implication reference to another document could be necessitated to understand the system fully. The terms and objectives that were set in the Proclamation could be interpreted in any number of ways without statement indicating what kind of business environment it intends to build. When compared to the previous laws that governed the commercial registration and business licensing regime Proclamation 980/2016 has not indicated its full intention, because the previous laws have clearly stated their ambition of building free market and free economic policy. Further on the previous laws have presented their vision of how a commercial registration system should contribute to the market economy that is being built.<sup>175</sup>

Close examination of some of the wordings of the preamble of Proclamation 980/2016 suggest less of what might be expected from the Proclamation. The term ‘to close a loophole in legislation and working procedure’<sup>176</sup> suggests that the Proclamation is an incremental edition on the previous ones. The content of the Proclamation suggests it was an upgrade rather than basically changing the commercial registration and licensing procedures. Furthermore, the use of promise ‘enable the business community and the society obtain the services they require and expect from the commercial system’ is a vague and does not denote what the society should expect from the system. Because the expectation of society as a goal would be a subjective goal and would lead to a subjective measurement of excellence without any ideological and theoretical backing that sets overall paradigm of the society’s expectation. Finally, the overarching intentions that the Proclamation stipulate in its preamble is to create ‘a fair, modern, fast and

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<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> See Preamble of Commercial Registration and Business Licensing Proclamation, Proc. No.67/1997, cited above at note 122, Commercial Registration and Business Licensing Proclamation, Proc. No.686/2010, cited above at note 169, and Preface of the Commercial Code

<sup>176</sup> See Preamble of Commercial Registration and Business Licensing Proclamation, No. 686/2010, cited above at note 122.

accessible system of commercial registration and business licensing services' which is meaningless without above mentioned context. Overall, the lack of ideological and theoretical foundation that have been clearly stipulated in previous laws since the Commercial Code may during interpretation and implementation of the provision of the proclamation prove to be problematic.

### 3.2. Commercial Registration

Proclamation 980/2016 gives the power to undertake trade name registration to the Federal Government. Regional organ can only undertake commercial registration only if the power is delegated to them by Ministry of Trade.<sup>177</sup> This continues the tradition of centralization of commercial business registration and licensing system that is started by the Commercial Code. All the registration made in the country will be kept in a central data base. Thus, the Ministry is the highest organ under the Commercial Registration and Business Licensing Proclamation that is entirely responsible for the administration of the system.<sup>178</sup> Proclamation 980/2016 states that no person shall obtain any kind of business license without being registered in commercial register.<sup>179</sup> This indicates that registration is mandatory procedure to be undertaken before any commercial activity. Registration in the commercial registry is only once and for branch business only requires notification to the authority the place the branch is situated and summary registration at the principal registration.<sup>180</sup> This will put to rest the issue triggered by Commercial Codes art. 105(n), which requires business license to be presented for commercial registration. Which indicated that persons or business organizations must be licensed before registration. The previous laws Proclamation No. 67/1997 and No. 686/2010 respectively are in congruent with this assertion.

Registration of any person in the commercial register pursuant to the Commercial Code will be done after verifying that the company name shall not cause conflict of interest against another business person.<sup>181</sup> The memorandum and articles of association of a business organization must be signed and authenticated by Document Authentication and Registration Agency before applying for commercial registration.<sup>182</sup> This procedure will require the founders of the business organization to ask and verify

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<sup>177</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.980/2016, cited above at note 169, Art.4

<sup>178</sup>Id., Art.4

<sup>179</sup> Id. Art.5

<sup>180</sup>Ibid.

<sup>181</sup>Id., Art.5(5)

<sup>182</sup>Id., Art.5(6)

from the registry that the name they intend to use for their business has not been taken by another.<sup>183</sup> According to Proclamation No.980/2016, application for commercial registration must be submitted before the commencement date of commercial activity<sup>184</sup> contrary to the Commercial Codes requirement of within two months of commencing the commercial activity.<sup>185</sup> The previous laws Proclamation 67/1997 art.5 and 686/2010 art.6(1) respectively require the business person or organization to be registered before commencing the commercial business operation unlike that of the Commercial Code.

Proclamation 980/2106 stipulate that registering authority will require the tax authorities in writing to assign taxpayer's identification number to the applicants before commencing with registration.<sup>186</sup> If the application accepted, certificate of registration would be issued, but, if rejected a written statement explaining why would be issued to the applicant.<sup>187</sup> But, the Proclamation does not set a time limit within which this procedure would have to happen. Depending on the kind of business, whether or not it is sole business or organization or whether the entrepreneur is foreigner or not the authority that conduct the registration may vary. Accordingly, it could be the Ministry or delegated regional organs administering commerce.<sup>188</sup>

The Proclamation states that an objection filed in accordance with law shall bar a sole proprietor or a business organization from registration in the commercial register.<sup>189</sup> But, the Proclamation does not state how the objection would be addressed and in what manner it should be presented. The time frame within which the objection should be presented is also not clear. This provision of the Proclamation is the exact word by word copy of the provision of Proclamation No.686/2010 art. 7(14). The question remains when and how the objection would be presented and addressed is not clear.

The Proclamation provides that business organizations attain legal personality upon registration. Under Proclamation No.67/1997, as well as in the Commercial Code, registration would be effective as of publication. The Previous Proclamation No. 686/2010 did away with the publication requirement permitting business entities to assume legal personality without publication. The New Proclamation revived the requirement of publication, in a newspaper with a nationwide distribution. Publication as a

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<sup>183</sup>Id., Art.5(7)

<sup>184</sup>Id., Art.6

<sup>185</sup>Commercial Code, Art.101(2)

<sup>186</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.980/2016, cited above at note 169, Art. 9(1),

<sup>187</sup>Id., Art.6

<sup>188</sup>Id., Art.6

<sup>189</sup>Id., Art.6(6)

mandatory requirement has been provided and should be fulfilled at the time of formation. Even though, the Proclamation states that commercial registration is valid as of day of the business organizations registration in the commercial register, it also states that a business organization's formation must be published on newspaper having a nationwide distribution. This pretty much indicates that the publication requirement has been revived under this Proclamation.<sup>190</sup> But on individual business the law seems to be silent.

Any alteration to entries of the registered business has to be registered with the authority within sixty days and until such confirmation letter is given by the authority any alteration would not stand. The procedure of registering alteration has to go through procedures for registration, such as authentication and publication.<sup>191</sup> On the requirement of publication Proclamation 67/1997 art. 9 stated that for business organizations registration would not have any effect until publicized. But for other business including sole-entrepreneur registration will become effective as of the date of registration. Contrary to this Proclamation 686/2010 art. 9 provided that business organization will acquire legal personality upon registration without the need for publication. On the contrary the Commercial Code provides the requirement of publication to be mandatory.

According to the Proclamation being considered cancellation of a business registrations may occur if the concerned business person abandons his business, legally prohibited to continue, registration is based on fraudulent information, registration is done in violation of the law, failed to obtain business license within one year of registration.<sup>192</sup> Under Proclamation 67/1997 art. 10(1) the fact that the business person has ceased to operate is provided in addition to the Commercial Code's provisions of art. 112, 113 and 226, which provided additionally the death of a trader, cancellation as of right by the trader and dissolution and winding up of business organization as reason. The current Proclamation, in addition to the Commercial Code's provision adds similarly reasons such as ceasing operation, lawful decision to quit operation, not renewing registration would lead to cancellation of registration after hearing from the business person if he does not respond within the given time or not found at his registered address.

Proclamation 980/2016 does not provide for renewal of commercial registration of business. The Proclamation did not mention non-renewal of commercial registration as grounds for cancellation either.

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<sup>190</sup>Id., Art.7(1)

<sup>191</sup>Id., Art.10

<sup>192</sup>Id., Art.11

On the Contrary Proclamation 686/2010 under art. 18 stipulates that commercial registration has to be renewed annually or once for five years or else this would result in the cancellation of the registration. Under Proclamation 67/197 the order used to be annual renewal of registration. But, under the new Proclamation the issue of renewal of commercial registration could be said to be done away with.

Overall need for commercial registration might be agreed on, since there is a consensus on one-time requirement of registration. But, the requirement for registration could vary depending on who is asked and any ideological predisposition.<sup>193</sup> The very idea of renewal of commercial registration every year remains questionable. Renewal of commercial registration is of course on top of renewal of business licenses and whatever legitimate objective there might be in renewal of commercial registration could be achieved through renewal of licenses.<sup>194</sup> Proclamation 686/2010 has provided for the possibility of registration once for five years. Still the idea of commercial registration renewal as a necessary requirement was not yet abandoned. But, what should be noted is that why registration is needed and why its annual renewal needed is not clear. The updating of the status of the business would not be the case since there is another procedure put in place for that purpose. Finally, what could be taken as a positive move by the Proclamation is that the idea of scraping the requirement of renewal of business registration. Unless otherwise non-renewal is to be taken as a ground of cancellation of commercial registration business organization acquires legal personality through registration and the cancellation of the Commercial registration certificate puts an end to its legal personality.

Furthermore, the requirement of the Commercial Code of Ethiopia about the minimum capital requirements to establish a private limited company and share company are ETB 15,000 and 50,000 respectively. Sole proprietors and other forms business organizations were also required to indicate capital during registration. At the time of registration, business persons have been required to show the fulfilment of the capital requirement by producing a bank statement which confirms the deposit of the minimum capital in a blocked bank account. This requirement is also included in the previous Proclamations 67/1997 and 686/2010. But under the current Proclamation the capital requirement is not included as a requirement for commercial registration certificate. But, this does not mean that for formation of the business organization a capital requirement is scraped rather the requirement to show a document evidencing the deposit of it in a blocked account has been removed. It must also be noted that

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<sup>193</sup>Fikremarkos Merso and more, cited above at note 1, p.14

<sup>194</sup>Ibid.

this does not include share companies which are still required to deposit their capital in a blocked bank account and show proof to that effect prior to registration due to their nature.

### 3.2. Trade Name Registration

The Commercial Code defines a trade name as the name under which a person operates a business and which clearly designates its business.<sup>195</sup> Under Proclamation No. 980/2016 any person desiring to engage in a commercial activity shall register its trade name at the place where it is registering in the commercial register.<sup>196</sup> Before the registration of a trade name in the commercial register and in the trade name register, it shall be verified that the trade name has not been registered already, is not confusing with, public institution names, famous person's name, show sector of engagement and against moral ethical values.<sup>197</sup> The registration of a trade name shall be a prima facie evidence of entitlement to and validity of the same trade name.<sup>198</sup>

A registered trade name could be cancelled if the owner applies for cancellation, if it was fraudulently gained, if the commercial registration and business license has been cancelled, if the court of law renders the trade name null, if alteration or amendment has been introduced according to the law or if the business is dissolved or wound-up.<sup>199</sup> The procedure for registration and cancellation of registration of trade name has not changed since the Proclamation 67/1997. Even though the procedure and requirement for trade name registration has not been changed much since the Commercial Code, the mandatory requirement of trade name registration have. Under the Commercial Code, as has been seen under Chapter Two the requirement of having a trade name registered before applying for commercial registration has been a mandatory requirement. Under Proclamation 67/1997, this has been done away with and later on under Proclamation 680/2010 has been reinstated as mandatory requirement for commercial registration.

### 3.3. Business License

A business license will be issued based on the detailed Ethiopian Business License Issuing Categories and identification number will be given accordingly.<sup>200</sup> Regarding the power to issue a business license the legal regime that govern and used to govern the licensing system in Ethiopia have stipulated that the

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<sup>195</sup>Commercial Code, Art.135,

<sup>196</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.980/2016, cited above at note 169, Art.15

<sup>197</sup>Id. Art.16

<sup>198</sup>Id. Art.17

<sup>199</sup>Id. Art.18

<sup>200</sup>Id. Art.21

appropriate authority and the relevant authority will determine based on the detailed Ethiopian Business Licensing Issuing Categories that would be determined by laws. The current Proclamation clearly stipulates that no one should engage in a business activity without obtaining a valid business license. Thus, after registration in the commercial registry the next step for a business person would be to get business license without which the registration would mean nothing for the purpose of operation of the business. Generally, a business person or organization is not required to obtain additional license for branch office for the same type of business, or to wholesale his products at its production site.<sup>201</sup> The general picture that is forwarded by the current Proclamation is that the Proclamation is pro-specific license. Furthermore, the Proclamation provides that the licensee must act within the scope of the license only. Thus, the licensee can only perform activities that are permitted and similar to that which is provided in the license and laws and regulations governing the license.<sup>202</sup> Indicating that every specific business needs a specific license to acquired by a business person which is counter intuitive for business persons flexibility in performing different businesses at the same time.

The requirements for license application are left to be regulated by Council of Ministers Regulation No.392/2016. The relegation of requirements for the application to regulation is good for flexibility. The requirement of license to engage in any commercial activity has been stipulated by all of the Proclamation being considered. Among these requirements a document evidencing the deposit the capital allocated for the commercial activity used to be a mandatory requirement. But this requirement has been done away by Proclamation 980/2016 and Regulation No. 392/2016. All the Proclamations being considered have stipulated that business license as a mandatory requirement for conducting any commercial activity. That the appropriate authority can close a business that is found to be operating without having a valid business license. Under the new Proclamation, the requirement for licensing has been also delegated to regulation and directives that is issued by the appropriate Ministry. As requirement under art. 23-26 of Regulation 392/2016 provides among other requirements that are commonly justifiable, the requirements for valid title deed or valid authenticated lease agreement or a confirmation letter issued by local administration of the existence of the address. This shows the flexibility that could be offered for a business startup by encouraging business persons even if they don't have a place or can't secure valid lease agreement. But,

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<sup>201</sup>Commercial Registration and Business Licensing Proclamation, Proc. No. 980/2016, cited above at note 169, Art.21(1), 6

<sup>202</sup>Id., Art.25

the question remains about the possibility of business that really don't need a physical address in Ethiopia and the laws are not open enough to accommodate the possibility.

Because, in this new millennial age there is a new social and economic reality, largely based on new communication technologies.<sup>203</sup> A number of factors such as globalization and internet directly impact the world of business and its transformation.<sup>204</sup> Now days in the world of new economy and internet economy it would be unwise to capitalize on this development for an economy to pose a significant advancement in its economic sector.<sup>205</sup> This news economy refers to business that are centered in and around internet and e-commerce.<sup>206</sup> This new business paradigm is one where core business processes may need to be rethought and redesigned, new organizational forms and interorganizational forms may need to be developed as well as their regulatory and registration mechanism must equally be advanced with them.

The current proclamation further provides that business license shall be valid as long as it is renewed within the given time frame after the expiry of a budget year with or without penalty.<sup>207</sup> Accordingly, Regulation 392/2016 states for the renewal of licenses, the applicants must fill the form prepared for this purpose. According to art. 30 of this Regulation, among other requirements that could be justified in line with the purpose of renewal of license, one requirement seem to be odd, which is the requirement to provide statement of address again. The issue with this requirement is that, it is already provided during the initial licensing and any need to additionally provide annually seems redundant. The law has stipulated that, if the license is renewed every year, it will remain valid.<sup>208</sup> This means the requirement of annual renewal is still mandatory and the failure to renew will cause the cancellation of the license.

The new law states the possibility of business license being suspended if business does not meet the required occupational, health and sanitation, environmental standards required, failure to discharge the obligation clearly specified under the law, to provide information or accurate information to the authorities, use the license for an authorized purpose, not being found at the registered address and other requirements that are provided under the Proclamation, Regulation, the Commercial Code or suspended

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<sup>203</sup> Janice Burn Peter Marshall Martin Barnett, "e-Business Strategies for Virtual Organizations", (1<sup>st</sup> ed. 2002), p.1

<sup>204</sup> Ibid.

<sup>205</sup> Id., P.2

<sup>206</sup> Ibid.

<sup>207</sup> Commercial Registration and Business Licensing Proclamation, Proc. No.97/1997, cited above at note 122, Art.25

<sup>208</sup> Commercial Registration and Business Licensing Proclamation, Proc. No.980/2016, cited above at note 169, Art.28

by a decision of court of law. If these conditions materialize the authorities will immediately suspend the license and seal the business facility. If the licensee will not rectify these causes of suspension within the given time, the suspension would not be lifted. Additionally, if the business needs certificate of competence and the certificate is suspended then the license will be suspended automatically.<sup>209</sup> Finally, the cancellation of a business license could come due to the business person's terminated his business or the license is based on fraudulent information or the use of license for an authorized purpose or bankruptcy, non-renewal of license and if the above-mentioned defects are not rectified within the given time the authorities could cancel the license.<sup>210</sup>

Furthermore, the Proclamation introduces the concept of period of time within which a license could be acquired after registration.<sup>211</sup> Unlike the Preceding Proclamation which did not set a time limit for businesses to secure their business licenses and start their business operations after their registration, the new Proclamation requires businesses to acquire business license within one year of their registration. If the businesses do not acquire their business license within one year of registration, the Ministry of Trade will be entitled to cancel their commercial registration certificate. However, a business person engaged in manufacturing or engineering or other similar activities is exempted from this time limitation. The exemption will apply only if the business person is able to submit sufficient justification for not completing its investment phase and acquiring a business license. Such registration remains valid if applied every two years within the period set by the law to renew a business license.

As has been discussed under chapter two and the topic dealing with license, the issue of licensing needs reform to make the licensing regime cost less and the procedures simple and it must be streamlined to make it easier for business startups. This has been what is suggested under different studies conducted by the World Bank under the topic of 'Doing Business'. In fact, the studies conducted suggest that reducing the compliance cost through simplifying and streamlining the licensing regime in Ethiopia could lead to more involvement from the private sector in the economy.<sup>212</sup> This has not been the case under the new legal regime, Proclamation 980/2016, because the licensing procedure and requirements are still more or less identical or even more than previous proclamations at times.

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<sup>209</sup>Id., Art.29

<sup>210</sup>Id., Art.30

<sup>211</sup> Id. Art.11(e)

<sup>212</sup>Fikremarkos Merso and more, cited above at note 1, p.7

### 3.4. The Penal Features of the Proclamation

According to the penal provision of Proclamation 67/1997, for crimes committed by business person or organization a fine and prison term as penalty has been provided, exception being corruption crime, for which prison term only is provided. What peculiar about these provisions is that business persons are sentenced to prison terms in addition to the financial penalty. The question of what would be the fate of their business establishments remain in question if the business person is sent to prison for every violation. The reason behind the penal provisions of the Proclamation to have coupled financial punishment and prison term is not clear and would not be in line with the encouragement of businesses. Similarly, Proclamation 686/2010 penal provisions have provided the same. Again, this would not go in line with the business friendliness thought of the Proclamation. Because the businesses would face fine and prison terms cumulatively if they are found to be in violation of the provisions of the Proclamation. This is not the case in other countries.<sup>213</sup> The same is true for Proclamation 980/2016 which also elaborately coupled monetary punishments with prison terms. Under the current Proclamation any activity termed as a crime is going to be punished with prison term and fine.

Under the Commercial Code, the penal provisions regarding commercial registration and business licensing refer to the Penal Code of 1957 specially Arts. 428 and 387. Art. 428 of the Old Penal Code prescribe fines without invalidating the acts that are not duly entered in to the registry where the formalities are material. Art. 387 of the Penal Code prescribes incarceration as the mode of punishment if the crime is committed intentionally. Thus, depending on the intention of the parties the punishments prescribed could be different in the Commercial Code. This goes in line with the creation of a free market and encouragement of the business persons' involvement in the economy. On the other hand the reason for providing such kind of penal provision in a special laws would negate the purpose of having a penal code. Because the provision of the new penal code would have been enough to take care of such kind of problems.

### 3.5. Miscellaneous Provisions

#### 3.5.1. Commercial Representatives

It has become a mandatory in Ethiopian to be registered with the authorities to act as a commercial representative.<sup>214</sup> The Commercial Code under art. 38 defines commercial representative as a person not

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<sup>213</sup>Fikremarkos Merso and more, cited above at note 1, p.19

<sup>214</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.980/2016, cited above at note 169, Art.33

domiciled at the place where the head office of the business is situated and bound to the trader by a contract of employment. What a commercial representative does according to the Commercial Code is to offer goods or services to clients found in specified places on behalf of the company or business. Accordingly, commercial representative can negotiate and enter in to a contract on behalf of the trader. But, the commercial representative themselves are not traders and can only represent exclusively one trader. What should be noted about commercial representative is that their power of representation is less than that of an agent.

Under the Provisions of Proclamation No.980/2016 commercial representative must be registered in commercial register and obtain special certificate. The Proclamation also introduces special obligation that should be performed. Commercial representatives can only promote products and services of a company they represent. Accordingly, they can only conduct market survey and trade expansion that could help the company invest in Ethiopia in the future or promote Ethiopian export products in the country the company is situated. Thus, commercial representative would not enter in to a contractual agreement on behalf of the company they represent, and engage in the supply of good and services. The difference between Proclamation 980/2016 commercial representative and the Commercial Codes reiterations is that, under the Code it is more of an agent and can represent and act on behalf of the trader it represents if agreed upon between them. But, under Proclamation No.980/2016 it is more of an information gatherer and the introducer between customer and the trader, any deal is made directly. Additionally, the Proclamation clearly indicates by name only companies could be represented, while the Commercial Code talks about trader as a whole.

### 3.5.2. Holding companies

Broadly defined, a holding company is a company that doesn't have any operations, activities, or other active business itself. Instead, the holding company owns assets.<sup>215</sup> A holding company is a company that owns other companies outstanding stock.<sup>216</sup> A holding company usually does not produce goods or services itself, rather, its purposes is to own shares of other companies to form a corporate group. Holding companies allow the reduction of risk for the owners and can allow the ownership and control of a number of different companies.<sup>217</sup> Furthermore a holding company is defined as type of business organization

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<sup>215</sup>Joshua Kennon, understanding a Holding Company: A Basic Introduction to Holding Companies and How They Work, <https://www.thebalance.com/understanding-a-holding-company-357341> (accessed on august 22/2018)

<sup>216</sup> Commercial Registration and Business Licensing Proclamation, Proc. No. 980/2016, cited above at note 171, Art.34(1)

<sup>217</sup>Holding company, Wikipedia, [https://en.wikipedia.org/wiki/Holding\\_company](https://en.wikipedia.org/wiki/Holding_company) (accessed on august 22/2018)

that allows a firm (called parent) and its directors to control or influence other firms (called subsidiaries). This arrangement makes venturing outside one's core industry possible and, under certain conditions, to benefit from tax consolidation, sharing of operating losses, and ease of divestiture. The legal definition of a holding company varies with the legal system. Some require holding of a majority (80 percent) or the entire (100 percent) voting shares of the subsidiary whereas others require as little as five percent.<sup>218</sup>

A holding company is defined under the Proclamation as a company incorporating two or more limited liability companies that are issued with special registration certificate and managed by the holder.<sup>219</sup> The Proclamation allows the formation of a Holding Company, but only for a Private limited company.<sup>220</sup> The law clearly stipulates that the established company should not disturb the market and must be registered with the Ministry. Generally, a holding company as the name implies, is a company which has control over another company.<sup>221</sup> This is a concept that is re-introduced by the Proclamation not covered by the previous proclamations but the concept was de-jure covered in a sketchy fashion in the Commercial Code. Because there was de-jure recognition of affiliated and holding companies in Ethiopia under the Code. The concept of holding company was covered under Codes' art. 344, 384, 379 and 441. But, their coverage was in such a fashion that holding company is possible without cross holding each other shares. What should be noted about this coverage of holding companies' concept under the Commercial Code is that all the mentioning is under the context of share companies not under the context of private limited companies like what the Proclamation provides for.

The Proclamation stipulates that the holding company would be jointly and severally liable with member companies for the claims of third parties.<sup>222</sup> Furthermore, the Proclamation provides for the responsibility of the holding company by stating that it should keep annual financial records and other information of its members and itself.<sup>223</sup> Accordingly the holding company needs a special certificate of registration that is issued according to the provisions of Regulation 392/2016 art. 37-41. To be registered as a member of a holding company the members' organizational credibility and legality must be checked

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<sup>218</sup>Holding Company. BusinessDictionary.com. WebFinance, Inc. <http://www.businessdictionary.com/definition/holding-company.html> (accessed: August 22, 2018).

<sup>219</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.980/2016, cited above at note 169, Art.34

<sup>220</sup> Ibid.

<sup>221</sup>P.P.S. Gonga (2004), A Textbook of Company Law (New Delhi: S. Chand and Company Ltd., 5th ed.), p.9, as cited in Getahun Seifu, "Revisiting Company Law with The Advent of Ethiopia Commodity Exchange (Ecx), *Mizan Law Rev*, Vol. 4 No.1, (2010), p.118

<sup>222</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.980/2016, cited above at note 169, Art.34

<sup>223</sup>Id., Art.34

according to the Regulation and this is an understandable and justifiable criterion. But, the issue that could be discerned from this provision of the Regulation is the requirement that has been prescribed for renewal of the registration. Which is literally the same as that of the requirement set for the formation of the company in the first place. This means that the company is formed new every year. The question when and how the registration of holding-company would take place is answered by the commercial registration system provided by the Proclamation itself. Any change that is made to the membership of the holding company must be duly notified to the registering authorities and the necessary change to the register should be made.<sup>224</sup> The law is concerned with the holding companies disturbing the market, because it has clearly stated that would be licensed in a way that would not disturb competition. Furthermore, the Proclamation stipulated that the holding company would be jointly and severally liable with its member companies for the claims of third parties which would make the concept of separation of owners and business organization and insulation of owners from liability that make business formation appealing to the traders worthless.

### 3.5.3. Border Business

Border trade or business is designated under the Proclamation as a type of commercial activity through which a person or business person residing at boarder areas undertake activities of commercial nature on the boarder of Ethiopia and a country sharing boarder with Ethiopia. This could be done as per bilateral agreement of the countries or through unilateral decision of one of the countries.<sup>225</sup> This is a new concept introduced by the Proclamation that is not enshrined in any of the previous laws. To work as a border business person the law requires having a special business license issued by Ministry or office delegated by Ministry.<sup>226</sup>

### 3.5.4. Competence Certificate

The definition that is given for “certificate of competence” is that it is a certificate issued by the concerned sector for a business organization or a person that is by law required to have a certificate of competence to justify that he/she has the technical capacity required for the trade.<sup>227</sup> This certificate is by law required to be had prior to the obtaining of a business license. The Proclamation has made statement that the Ministry shall determine, in consultation with other sector offices, the business sectors which do not

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<sup>224</sup>Id., Art.34

<sup>225</sup>Id., Art.2(41)

<sup>226</sup>Id., Art.35

<sup>227</sup> Id. Art.2(30)

require certificate of competence as prerequisite for issuance of business license.<sup>228</sup> Thus, it is an accepted science and reasonable to ascertain a financial and technical competence of a business before operating any business. But is that the only way and is it necessary for all businesses should be answered by the law.

Proclamation 686/2010 used competence certification extensively, for that was hailed as ‘one of the radical innovations of the Ethiopian licensing regime’.<sup>229</sup> The central objective of the competence certificate is to certify whether or not a business person or organization has the required capacity and capability to operate the business. Art. 32(8&9) of Proclamation 686/2010, provided that there are businesses that are designated by law that need certificate of competence. If such requirement is set by laws then the government body that is authorized to issue business license must demand the presentation of certificate of competence before the issuance of the business license.

The issue of certificate of competence has been carried over to Proclamation 980/2016, Art. 2(30) defined as a “certificate issued by the concerned sectoral government offices to a certain relevant commercial activity in accordance with directives issued by the Ministry upon verifying that the required standards needed for certain business operation is fulfilled.” Furthermore the Proclamation provides that the relevant sector offices shall issue directives on criteria for issuance of certificate of competence for types of business activities that need competence certificate as will be determined by regulations.<sup>230</sup> This shows the extensive use of certificate of competence under the Ethiopian commercial registration and business licensing regime has been toned a little bit down but not as much as needed as has been suggested by the studies conducted by the World Bank.

The international trend in many economies and the best practice is to limit the very requirement to obtain these certificates only for selected activities which may have a significant impact on health, security, environment, etc. Thus, ex-ante verifying the competence of a business person is an exception required only in limited sector-specific licenses. However, contrary to this international best practice, the requirement of certifying the competence of a business person prior to issuing a business license has become the rule, not the exception by Proclamation 686/2010 and the Ethiopian Standard Industrial

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<sup>228</sup>Id., Art.42(4&5)

<sup>229</sup> Fikremarkos Merso and more, cited above at note 1p. 11

<sup>230</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.980/2016, cited above at note 169, Art.42(1)

Classification.<sup>231</sup> This has been done despite Proclamation 686/2010 art. 32(8) wording which clearly indicates that not all businesses need a business certificate. Thus, the Ethiopian Standard Industrial Classification which seems to indicate the extensive use of competence certification seems to go against the proclamations provision. This has been clearly remedied under the provision of Proclamation 980/2016, Art. 42(4) states that certificate of competence is only needed for business licenses that will be determined by directives to be issued. But the matter is complicated by provision of Art. 42(5) of the same, which indicates that certificate of competence is not needed for specially designated businesses by the Ministry that will be determined in consultation with the relevant authorities. The misconception under this assertion in general competence certificate is needed and exceptionally some businesses that do not need will be determined by the Ministry in consultation of the relevant authorities. If this is to be true, assertion made regarding the extensive use of certificate of competence for Proclamation 686/2010 stands for Proclamation 980/2016 also. Art. 20(5) of Proclamation 97/1997 indicates the possibility of existence of businesses that require a certificate of competence due to their particular nature. These are termed as a business that require specific professional qualification or certificate of competence and such evidence would be issued by appropriate government sector empowered to do so. The point being not all business require certificate of competence, but few determined by law.

### 3.5.5. Other Miscellaneous Introductions

The Proclamation has done away with sole importer by clearly stating that, it is prohibited to engage in business as a sole importer under Art.38. But, the issue still lingers on, since the law has provided a leeway based on the types of business and its national significance for a government to allow such kinds of businesses under Art.38(2). Of-course it would be determined according to regulation to be issued by the Council of Ministers. Still the executive branch of the government which is highly susceptible to ideological and political affiliation might be influenced by other than public interest.

The Proclamation also introduced the concept of franchise agreement under Art.37. The Proclamation acknowledges the acceptance of franchise agreement under the Ethiopian legal system. But how it would be implemented is left for regulation that would be issued in accordance by the Ministry. The Previous Proclamations were silent on the subject and, in practice, it was not clear whether the Ministry of Trade would recognize such agreements which were, for all practical purposes, presumed to be governed based

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<sup>231</sup>Fikremarkos Merso and more, cited above at note 1, p.12

on the principles of the law of contracts in general. The New Proclamation has provided a definition of franchise agreement as an agreement concluded for consideration between the franchiser and the franchisee in order to undertake business activities by using the trade name of the known product or service in order to share the nature and experience of the work under the leadership of the owner of the product and the service that have got recognition. The New Proclamation calls for the products of the franchisee to be at the same level of quality with the products of the franchisor. Meaning consumers should be able to get the same quality of product and service from the franchisee. Having underlined the obligation of registration, the New Proclamation postpones detailed steps and procedures necessary for the registration to future regulations to be enacted to ensure its implementation. The Proclamation with the implementing regulations and directives, is expected to pave the way for legitimizing franchisor and franchisee relationships and clarifying what has been a grey area. Generally, the Proclamation has put emphasis on what kind of service or product a customer would come to expect from the franchisee rather than providing the detail of what relation it would be.

Furthermore, the Proclamation has provided for Domestic and foreign Chamber of Commerce. Previously organizations established to support and protect the interests of the business community under Proclamation No. 341/2003, which allows only the formation of local Chamber of Commerce only. The New Proclamation also allows foreign chambers of commerce's to open their branch in Ethiopia and conduct the same activities as a domestic chamber of commerce.

### 3.6. Grievance Handling Procedure and the Penal Clause of the Law

The Proclamation has included a procedure for grievance handling if anyone has one against the administrative measures taken by the authorities. It states that any person aggrieved by the decisions of relevant authority on matters covered in this Proclamation, regulation and directives issued hereunder may submit his grievance to the head of the relevant authority within 10 days. And if not satisfied with the decision of the head of the relevant authority or if the relevant authority would not respond within 5 days, appeal could be taken to court of law. But, the problem is that the aggrieved person can take appeal only on points of laws.<sup>232</sup> The issue here is the laws has only provided one solution for two different problems. Namely for a person whose right to be heard has been respected and not. If no answer is given by the authorities it would be narrowing the appellant's right, since ordinary courts are authorized only

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<sup>232</sup>Commercial Registration and Business Licensing Proclamation, Proc. No.980/2016, cited above at note 169, Art.47

on issue of laws only. A compliant whom the authority has not answered could not be equated with the one that has been fully answered by the authority. Similarly, under Proclamation 686/2010 art. 61 has provided the possibility of appeal against the administrative decisions made by government authorities to the court of law. But, the appeal will be only on issue of law.

Oddly, the grievance handling procedure was not mentioned under Proclamation 67/1997. This means the Commercial Code provisions would be implemented to handle grievance. Proclamation 980/2016 has clearly provided under Art. 61 that, any person or a business person or a commercial representative against whom an administrative decision has been taken by the registering office or the appropriate authority may lodge appeal in connection with his complaints to regular courts only on matters of law. Again, the provision of the law is clear that the appeal is only on the point of law alone. This could be problematic for appeals that is going to be based on the material or factual elements of the case that has not been heard by the authority. But, the introduction of timelines in the grievance review process would contribute to the predictability of the entire grievance hearing mechanism and enhance due process.

## CHAPTER FOUR

### Conclusion and Recommendations

#### 4.1. Conclusion

Under the introductory chapter and subsequent chapters, the researches have tried to paint what system Ethiopia has as a business registration and licensing system. The study has tried to show laws that governed the business environment in Ethiopia and their theoretical and analytical value for developing a system. Furthermore, it tried to show the progress that has been made through various legal regimes starting from the Commercial Code up to the current Proclamation. After this assertion the following conclusion could be reached. The overall identity of the Proclamation through ideological underpinning could not be inferred from the text of the preamble of the proclamation. This could be problematic for interpretation of the provisions of the Proclamation. Because the lack of aspiration of the laws would cloud the interpretation and implementation of the Proclamations procedure and provision. This might lead to the Proclamation becoming more of a procedural and black lettered that would drain of any flexibility in implementation and interpretation of its provisions. Even though Proclamation 980/2016 could be said to have certain provision that are new to the commercial registration and business licensing regime in Ethiopia. The Proclamation suffers from the same incremental syndrome that the previous proclamation suffered. The lacking of ideological orientation in the Preamble of the Proclamation 980/2016 could be used to show the ideological and theoretical dilemma that exist in the economic policy of the country. Because unlike its predecessors which have clearly stated they are striving to create a market-oriented system the Proclamation could be identified with the lack of it. This may be attributed to the developmental state mentality that could be categorized as leaning toward far left, I.e. that of command economic ideology.

Proclamation No. 980/2016 has not revolutionized the registering procedure and requirements. In fact, it could be said it is more of traditionalized and added some incremental values. Additionally, the Proclamation has revived the publication requirement. But, the Proclamation in a positive move have scrapped the requirement for annual renewal of business registration. This would work in line with the making the registration procedure more business friendly. Additionally, the requirement of presentation of bank statement evidencing the deposition of capital allocated for the business for some business has been scrapped. This could be taken as positive move by the Proclamation in making the procedure easy.

As for the use of license in commercial registration and business licensing the prudent use of the method is advised. Under Proclamation No.980/2016 the relegation of stipulating the requirement of for licensing to regulation is encouraging. It offers a degree of flexibility that is not present previously under previous laws. Overall the prudent use of licensing as an entry regulation mechanism could work. But, if the licensing is overused or over specified it could be counterproductive to business startup. Because, most of the license would be to specific and not issued or issued rarely or could have been generalized under on general license. This was the case that has been observed under the regime of Proclamation 686/2010 by the study conducted by the World Bank under the title ‘The Cost of Doing Business in Ethiopia: Option for Reform’. The extensive use of competence certificate that has been seen to be of problematic under studies conducted during Proclamation 686/2010 by World Bank has not been clearly addressed by the new Proclamation. The use competence for every business would be counterproductive and against the purpose of the certificate. Coupling prison terms with monetary punishments under Proclamation 980/2016 could prove to be problematic for the business environment world. The penalties need to be revisited with a focus on educating and reforming rather than driving people out of business or the deterrence effect.

#### 4.2. Recommendation

After considering laws relating to commercial registration and licensing in Ethiopia, the study indicated that the system is indeed in need of making progress towards achieving the set economic goals that would make it more inclusive of the private sector. This could be quickly achieved through legal provisions that specifically catered for this purpose. Generally speaking the provisions of Proclamation No.980/2016 are strikingly similar to that of its predecessors despite some new additions that are put by the Proclamation as “miscellaneous”. Thus, to make the provisions of the Proclamation more effective and business friendly some of the underlying principles and theories must be revised in line with such thought and avoid over specification and focusing on procedures. Further on the Proclamation provision provide government as firm regulator of the business environment because it allows the government to shape all aspect of the environment and does not provide much involvement from the business world. Based on this thought the following points are offered as considerations; .

- ➔ Future laws that govern commercial registration and business licensing must be able to present the overarching paradigm within which the law would operate and explained, such as the building market economy or any ideological orientation. So that any requirements that should be set in a

commercial registration system should be value based. That means any provision or the law that is posed should bring or accomplish value that is at least compatible with the overarching paradigm that the proclamation sets.

- ➔ The revival of publication requirement as a mandatory is especially good for business organizations but the procedure could be costly and time consuming thus other means of publication such as online publication that could be performed immediately after registration and could take immediate effect should be implemented to make the process more time and cost sensitive for business organizations founders. But for sole entrepreneur the requirement of publication is unnecessary or at least online publication should be considered.
- ➔ The requirement for registration should be as much as possible minimalist, since these requirements could be ascertained later on through the procedure of licensing depending on specific business. The prior registration of business should be revised to allow business person to explore the viability of the business and be registered within a specific time limit that used to be presented by the Commercial Code.
- ➔ The registration process should be a one stop shop complemented with electronic documentation and registration system. The documentation processes that the laws seem to indicate for different formalities that is needed to be complied with such as registration, licensing, certification and etc. should not be repetitive. Since this could increase the cost of business startups the solution such as the use of one-time documentation across all platform should be explored. The use of electronic forms would also be great.
- ➔ The licensing regime in Ethiopia is over specified and complicated. Out of the over 1300 licenses and counting on by the day, there are licenses that have never been issued or rarely issued. Thus, the Ministry should as the solution suggested by the study titled ‘The Cost of Doing Business in Ethiopia and Options for Reform’ indicated the licensing regime in Ethiopia is over specified and sometimes overlapping. The licensing regime should also introduce a general license that could include similar types of businesses other than that is allowed by law now.
- ➔ The law indicate that all business should be registered and licensed. But the issue of small business that their operation capital is minimum must be reconsidered as has been done by

Proclamation 97/1997 Art. 3(2), which allowed local government to determine and set floor capital to exempt small businesses.

- ➔ The requirements for physical addresses should be modernized in line with the possibility of businesses that may not require physical addresses the informality of land holding rights that is persistent in Ethiopia. Additionally, these requirements should also be revisited as now a day's businesses are becoming virtual.
- ➔ Even though the requirement of showing paid up capital has been largely no more, it has to extend to all the businesses except share companies.
- ➔ Some of the requirements for renewal of registration and licensing must be revised, the law has already provided a special requirement and procedure for registration of any change or alteration that is made during the life span of the business. The documentation requirement that have already filled with the authority should be used rather than requiring additional documentation which have not been changed.
- ➔ The annual renewal of business license should be avoided by making one-time licensing and follow up inspection procedure or license for specific time, at least crating license that could be valid for more than a year. The relationship between license and inspection should be specifically identified and dealt with in order to make licensing renewal less frequent.
- ➔ The Proclamation does not prescribe the maximum period for time allowed from the submission of an application to the issuance of certificates. There is a need to include the maximum period of time the entire process should take once the necessary requirements have been complied with. This gives a right to the applicant to ask for a license within the prescribed time while creating accountability on the licensing office. Thus, the introduction of statutory time limit for reviews of the applications should be introduced.
- ➔ For trade name registration the authority should provide an advance knowledge of available trade names and so that applicants could be able to check the availability of the name online.
- ➔ For advancing of the holding company concept introduced by the Proclamation, notions such as, issues of liability and third-party protection in relation to cross holding between two companies must be clearly dealt with as has been done in the Commercial Code. The issue of insulation of

owners from liability in case of legal person should also be clearly dealt with. The concept it self should clearly be defined.

- ➔ The penalty feature of the Proclamation should be pro-business while at the same time serving its purpose. Thus, it should be revised so as to present optional penalty such as monetary and incarceration as an optional punishment that depends on the severity of the case.

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