
**MOVABLES AND IMMOVABLES UNDER THE CIVIL
CODE OF ETHIOPIA: A COMMENTARY****Muradu Abdo*****1. Introduction**

Book III of the Ethiopian Civil Code (hereinafter the Code) taxonomizes goods into those which are appropriable and those which are inappropriable.¹ Some goods are not susceptible of appropriation because of physical or legal impossibility.² Furthermore, the Code tacitly classifies those goods which are open to appropriation into corporeal goods and incorporeal goods. Corporeal goods, i.e., things perceivable through human senses, are classified into movables and immovables.³ Articles 1126-1139 of the Code

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¹ The title of Book III is headed as "Goods". The drafter did, it appears, consider it as axiomatic, and thus unnecessary and obvious, to explicitly write the division of goods into those which are within and those which are beyond the reach of persons.

² Non-appropriable things are those which belong to human beings in general, for examples, the Sun, the Moon and the atmospheric air. Excludability is not an issue in respect of these natural resources because everybody can enjoy them at the same time, as much as they want and without fear of exhaustion. Even if one attempts to have exclusive command over these public things, she cannot accomplish that physically just by virtue of the sheer size of such things. The human person might under some situations constitute property rights in the self; but seen as a comprehensive entity, the human person is in the contemporary world regarded by law as the bearer of entitlements, not the subject matter over which property rights is enjoyed.

³ The English version of Article 1126 of the Code classifies "all goods" into movable and immovable indicating the major division of things in the Ethiopian property law. This conclusion is made on the basis of the Amharic and French versions of Article 1126 of the Code. What is divided into a movable and immovable under this provision is not just goods but corporeal goods. See Billilegn Mandefro, Revised Unofficial Translation of Arts.

are set out to govern issues associated with classification of corporeal goods into movables and immovables. Determination of how things are related to one another in property law is not for its own sake. For example, issues arise as to the fate of a thing that is owned by one person but made the component part or accessory of another thing owned by another. In this case, the persons who should be the owner of the intrinsic element or the accessory shall be identified and such award of ownership shall be justified. In addition, there is a need to ascertain the ambit of the subject matter of transactions purporting to transfer or establish rights on a thing regarded as a principal or an accessory or an intrinsic.

Apart from a virtual absence of literature exposing Articles 1126-1139, going over these provisions is justified since there is a need to clarify these articles for students of property law and as the elementary is often the least understood and the most confused. What is more, Articles

1126-1500, 1647-1674 of Book III, Civil Code (1960) From the French Original Draft, (AAU, Law Library, Unpublished) (1973-1975). Billilegn's translation has amply demonstrated that the statement of the drafter which confirmed the accuracy of the translation is untrue. Rene David stated that: 'It is not within the province of a foreigner to judge the extent to which the nuances of the French text have been faithfully rendered in the Amharic text of the Code. Nevertheless I had the curiosity to have the Amharic text of the Code translated into French by an Ethiopian, on matters concerning articles 1763 to 1804 in Title XII of the Civil Code. The experience was conclusive and a favorable witness to the very precise work that the Ethiopian commission had accomplished. The French text restored in the translation of the Amharic text was doubtless not identical to the text from which the commission departed, but the sense of the articles was understood, and it is concerning the nuances only that the Amharic text can appear different from the French text.' See Rene David, 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries' 37TLR2 in Michael Kindred, Reading on the Historical Development of Ethiopian Civil Law (HSIU, Faculty of Law, 1968-1969 (Unpublished) at 117.

1126-1139 suffer from inconsistent terminologies, mistranslations, vagueness and lacunas. Therefore, this Commentary intends to make an exposition of these legal rules, figure out use of uniform terminology, single out and explain those erroneous translations, clarify the ambiguities and fill the gaps therein. To this end, the Commentary addresses criteria of, reasons for, current validity of, consequences of, and sub-classes of the classification of corporeal goods into movables and immovables under the Code.

2. Criteria of classification

The categorization of corporeal goods into movables and immovables is founded upon physical notion of mobility and legislative fiction. If a thing can normally move or be moved without thereby losing its individuality then it is a movable thing. Movables do not have fixity. If a thing cannot normally move or be moved, then it is an immovable product. An immovable thing is a product having relative fixity. Lands and buildings or things attached to buildings are fixed to a given place. Whether or not a thing actually can move or be moved with the aid of human beings is something ascertainable through perception. Thus, physical mobility is the major criterion for dividing things into movable and immovable. Besides, pure legal fiction which defies common sense might be another criterion of classification of things in property law. The Code treats things which are immovable in their natural condition as if they were movable things while certain things which are movables in their natural state are considered by the same Code as if they were immovable things; the driving force behind such artificial categorization of things is policy consideration. As will be elaborated in due course, for example, Article 1133/2 of the Code mobilizes things immovable by nature while Article 1136 of the same invokes fiction in order to treat certain movables by nature as

if they were immovable things. Further, the Code, though tacitly, equates interests in physical immovables, and interests in physical movables, which are obviously devoid of any material existence, with physical immovables and physical movables, respectively.⁴ When such legal fiction creeps into taxonomy of things into movables and immovables, the basis of classification can only be conceived by human intellect. Hence, for some purposes, the law mobilizes and immobilizes things following the conditions of things in nature; in other cases, the law interferes with the natural state of things to advance its own purposes.

3. Reasons for the classification

There are two reasons for the classification of corporeal goods into movable and immovable, namely technical and policy consideration. The technical justification is not unique to the classification of corporeal goods into movables and immovables; it is rather a common feature of any intelligible study. Division and sub-division of a subject matter in any discourse is in the nature of systematic knowledge. Hence, the first reason for the division under consideration is to bring sense and coherence into the study of property law.

The other key reason for the division of corporeal goods into movable and immovable goods is policy consideration, though physical notion of mobility is not entirely disregarded. As the history of property law depicts, societies organize classification of resources around those materials which they deem as central. What is a critical resource varies with time and the stage of development of community; classification and its foundation are fluid too. A fishing community values fishing grounds and implements

⁴ This refers to movable real rights and immoveable real rights to be examined in Sections 5.6 and 6.2.

more, a pastoral community pays greater attention to grazing land and cattle or camels, an agrarian community to farmland, an industrial society to things in commerce including, in the case of a technologically advanced society intellectual property.

Before 6th century, things, in Rome, were dissected into those which had greater economic, social and political significance, and those having less importance. In the course of this time span, land, cattle, beasts of draft and burden assumed a preeminent position while⁵ all other things having economic value fell into a subsidiary rank. The Roman jurists regarded this distinction cumbersome and fluid and Emperor Justinian abolished the distinction of things based on importance and replaced it with the dichotomy of things into movable and immovable in the 6th century A.D.⁶ The classification of things into movable and immovables by Emperor Justinian was more appealing as the mobility factor which initially meant physical movement of things had a considerable appeal to Emperor Justinian who was in search for legal certainty.⁷

During 14th to 16th centuries, jurists elaborated the Justinian distinction of things into immovable and movable and this dichotomy found its way into the civil law tradition as a heritage of the Byzantine period. For example, German law still defines immovable as tracts of land and their essential component parts; and movables as things which are neither tract of land nor essential component parts of tracts of land.⁸ Other civil codes on the continent also adopted the Justinian division of things into movable and immovable, from there it

⁵ These early legal traditions emphasized on durability and utility in stead of simply lay notions of physical mobility of things.

⁶ John H. Merryman & David S. Clark, The Civil Law Tradition: Europe, Latin America and East Asia (Virginia: The Michie Company Law Publishers, 1994) at 30.

⁷ Id.

⁸ See Articles 93-96 of the German Code (as revised in April 19, 2007).

was taken via transplantation to several countries in Asia and Africa including Ethiopia.⁹

The primacy of division of property around immovable assets is noticeable in the property law of countries which follow the common law tradition, though division of things based on mobility is not patent and the terms "immovable" and "movables" are not visibly and frequently employed in such jurisdiction. For example, in the United States, the subject matter of property rights is divided into real property and personal property. In general terms, real property means "anything that is part of the land or which is attached to the land" and "anything which is incidental or appurtenant to land or which is considered immovable by law" whereas personal property means "those items which are movable and can be removed from the property."¹⁰ Real property includes land, buildings and plants.¹¹ The equivalent of things "incidental or appurtenant to land" in code-based legal systems including the legal system of Ethiopia is accessories and intrinsic elements of land and buildings. This description has a striking similarity with the division of corporeal goods into movables and immovables in the civil law tradition.¹²

In the socialist legal tradition, the classification of things into movable and immovable had lost importance, for the ex-USSR abolished it in 1922 by its Civil Code. The abolition led to the ownership and hence the removal of all land from commerce. The Russians sought to wipe out

⁹ See John H. Merryman & David S. Clark, *Supra*, No. 6

¹⁰ Personal vs. Real Property: Can I Take The Chandelier? <http://www.escrowhelp.com/articles/19990903.html> (accessed 26 October 2007)

¹¹ See Geo P. Costigan, *infra* note 12.

¹² "The broad distinction between real property and personal property was, and in general is, that between (I) immovable things and rights in them, and (II) movable things and rights in hem." See Geo P. Costigan Jr. A Plea for A Modern Definition and Classification of Real Property, *12Y.L.J.7* (1903) at 426.

ownership of land which in feudal Russia presupposed social, political and economic status of a person. Besides, only one residential building could be owned. In place of the now old division, personal property, state property, cooperative property or things of production and things of consumption were adopted.¹³

In dividing things into movable and immovable, the Ethiopian property law as embodied in Book III of the Code appears to give primary importance to immovable property. The Code came into force just one decade after the middle of the last century. Then, Ethiopians gave, as perhaps they do now, greater value to immovable property than movable property.¹⁴ As an agrarian economy, the country wished to give greater legal protection of interests over plots. To stand as a candidate for election rested upon the ownership of land.¹⁵ To be settled and be part of a community meant to have home and land. To have a plot, urban or rural, meant to be related to once ancestors and to enjoy their heritage. Political, social and economic alliances were forged and broken around this critical asset.¹⁶ Religion maintained a symbiosis relationship with the state via the acquisition and protection of land. What is more the material foundation of the feudal system was obviously land. The nobilities and landlords who dominated the two houses of the parliament at the time of adoption of the Code had every reason to ensure the inclusion of rules in the Code

¹³ Articles 10-18 of the Soviet Constitution (1977).

¹⁴ Dessalegn Rahmato, Land Tenure in Ethiopia: From the Imperial Period to the Present: A Brief Discussion in Topics in Contemporary Political Development in Ethiopia, (PSIR, AAU, 2000) at 84-5

¹⁵ Yacob Arsano, People's Choice and Political Power in Ethiopia: Elections and Representation During the Three Regimes in Electoral Politics, Decentralized Governance and Constitutionalism in Ethiopia (PSIR, Addis Ababa University, 2007) at 156-7.

¹⁶ The center stage accorded to land was expressed especially in the northern part of the country in the saying that a person cannot be let to mess with *rist* (one's rights in land) and wife.

more protective of rights in land.¹⁷ It is no wonder that the Code, the law considered to have a lasting effect, gave a special attention to immovable property. Given the fact that over eighty percent of the Code deals immovable things, in particular, land, and it would be correct to say that Book III of the Code is the law of immovable.¹⁸

One might be tempted to argue that the centrality of the division of corporeal goods to movables and immovable has lost importance following the collectivization of land in Ethiopia in the aftermath of the 1974 Revolution.¹⁹ In support of this conclusion, the removal of land from private ownership in Ethiopia since 1974 can be pointed out. Again, the scheme of classification built in the PDRE Constitution declared the rejection of the distinction between movable and immovable things. The PDRE Constitution, in lieu of the key dichotomy adopted in the Code, came up with the idea of socialist property and personal property.²⁰ The former mainly means productive assets in possession of government units, state enterprises, mass associations, cooperative societies as well as professional associations. Personal property is that which is held by private persons for survival and comfort. In order to

¹⁷ *Supra*, No 12.

¹⁸ The following articles in the Code do exclusively apply to immovable property: Article 1207-1256 (special rules applicable to immovable property and use and ownership of water), Articles 1359-1385 (servitude), Articles 1460-1488 (expropriation) and Articles 1553-1646 (registration of immovable property).

¹⁹ Harrison Dunning appears to question the importance of maintaining this division even in pre-1974 context in Ethiopia. See Harrison C. Dunning, *Property Law of Ethiopia: Materials for the Study of Book III of the Civil Code* (HSIU, Faculty of Law, 1967) at 7. Paton, in his book, *a Text Book of Jurisprudence*, says: "though nothing may be eternal, land is more enduring. The fact that land cannot be moved makes it especially valuable as a security. Land can be subdivided without losing its value. In agricultural society, land is the main form of wealth. Land will still remain the essential foundation for most human endeavors even in industrial societies."

²⁰ See Articles 12-18 of the PDRE Constitution (1987).

prevent the accumulation of wealth by private persons under the guise of personal property, the PDRE Constitution dealt with the idea of constant taking via requisition.²¹ Further, the FDRE Constitution seems to relegate the basic categorization of things into movables and immovables to secondary importance. For example, Article 40/2 of the FDRE Constitution divides private property into tangible and intangible products which further are linked to labor, physical or other wise.

It is submitted that the division of things into movable and immovable is and should be still alive in Ethiopia. In the aftermath of the Ethiopian revolution and thereafter, land has continued to be the material foundation of the Ethiopian society. At that time, politics may have dictated a change of vocabulary in the classification of property in Ethiopia from movables and immovables into personal and socialist property. But that change in vocabulary was a change in form but not in content of what was going on the ground. It is possible to argue that the change in terminology merely reflected the aspiration of the revolutionary elements in the country to transform the society; their emphasis on the centrality of labor, and their distrust towards the past economic relationship around landed property. In the term personal property, the exclusive control of land and ownership of buildings by individuals was permitted in the period between 1974 and 1991 in Ethiopia. Though the PDRE Constitution seemed to abolish the division under discussion, the Law Revision Committee formed in late 1980's maintained the division of things into movable and immovable goods for it appears that the members of the Committee were able to appreciate the practical consequences of the fixed nature of immovable and

²¹ Requisition refers to taking of movable property by the government with compensation and while expropriation relates to the taking of immovable property. Articles 1460 and ff of the Code provide for expropriation. Little is said about requisition in the Code.

the feeling that "certain things are more valuable than others as parts of individual estates and that, therefore, their conservation must be assured."²²

The collectivization of land has not done away with private ownership of buildings. Even in respect of land, people can still have exclusive possession over land, hold it in usufruct, lease it, donate it to a family member, mortgage their lease holdings, leave it to their heirs, testate or intestate, and enjoy other innumerable rights in land short of individual ownership.²³ Since 1974, in Ethiopia, what has been taken away from people with regard to land is that ultimate prize, i.e., sole ownership. In the language of property law, these rights people may enjoy over land allotted to them in this country are termed as immovables by the disposition of law as such rights are linked to an immovable physical asset-land. If the classification of thing has to be organized around a key asset, Ethiopia at present does not have an asset more important than immovable property. Ethiopia is an agrarian society; immovable property still retains the center stage in her economy. If the division of things into movable and immovable things is desired to be intelligible to laypersons, be in touch with life, and if law ought to be accessible to ordinary people, not only in terms of form (language) but also in terms of its content (idea)²⁴, it is sensible to retain the division of

²² See Articles 1-8, Draft on Book III of the Civil Code, Addis Ababa, Ministry of Justice, (Unpublished) (1987). See Aubry and Rau, *Supra* Note 19, as quoted in Harrison C. Dunning, at 6.

²³ It is not possible in Ethiopia currently to transfer, be it by way of donation or sale, land with its normal effect of transferring ownership to a transferee simply because of prohibition by law and because a person cannot transfer a right more than she has.

²⁴ See the Preface of the Code, which state, inter alias, that "...No law which is designed to define the rights and duties of the people and to set out the principles governing their mutual relations can ever be effective if it fails to reach the heart of those to whom it is intended to apply and does not respond to their needs..."

corporeal goods into movables and immovables under Ethiopian property law.

4. Consequences of the classification

Numerous provisions of the Code reflect the division of things into movable and immovable. Formalities such as authentication is one of the necessary conditions for the transfer of title over immovable things; without fulfilling the requisite mandatory formalities, transfer of title over an immovable thing would not take place.²⁵ One cannot obtain ownership over immovable things on the basis of possession in good faith.²⁶ In the case of ordinary movable things, a juridical act followed by delivery gives rise to ownership.²⁷ As to who shall be the owner of an accession to a piece of land hinges on whether or not the owner of such plot has consented to such addition; an entirely different set of rules does apply to the

²⁵ See Article 1185 of the Code. Under Article 1195 of the Code for a person to claim to be an owner of an immovable object, she must secure a title deed bearing her name from the concerned public authorities. See also Article 2878 of the Code. Under Articles 1723 and 2877 of the Code, the written requirement is also a condition for the validity of any contract, even as between the contracting parties, whose object is the creation or transfer of rights in an immovable asset while authentication is need for the contract to have effect on third parties. Recently, the Cassation Division of the Federal Supreme Court has reaffirmed the legal effects of written and authenticated contract on the parties and third parties. See Federal Supreme Court Cassation Division Decisions Vol. 4, *Gorfe Workneh v. W/ro Aberash Dubarge and others* (Fed. Sup. Ct., File No 21448, 1999 E.C.), (Sene 1999E.C.) at 40-48. *Id.*, *Kebede Argaw v. the Commercial Bank of Ethiopia and others* at 70-75. See also *Authentication and Registration of Documents*, Article 2/1&3/ cum Article 5, Proc. No 334, 2003, Fed.Neg.Gaz. Year 9th No 54.

²⁶ Articles 1161-1167 do exclusively apply to movable things.

²⁷ See Articles 1184, 1186/1 and 1193 of the Code. Here the term ordinary movable is employed to indicate that there are some movables such as a motor vehicles, ships and business which are given the status of immovable property for the purpose of transfer of title.

case of additions to movable things.²⁸ Mortgage usually, and antichresis always, charge immovables while pledge relates to movable property.²⁹ In the case of movable things, possession without the authority of the owner for ten years confers title upon the possessor while in the case of immovable property there are other requirements in addition to the fifteen years possession test for a possessor without authority to obtain title.³⁰

The legal effect of the division of corporeal goods into movable and immovable transcends property law. In succession law, the power of a liquidator to sell immovable property forming part of a succession is curtailed.³¹ In contract law, one cannot have a valid contract concerning immovable thing, or interests therein, if the contract is not made in writing, signed by the parties and attested by witnesses.³² In agency law, in order for the principal to validly appoint an agent to handle on her behalf transactions relating to immovable property, she must make a special appointment in writing.³³ An agent, for example, cannot validly sell or buy an immovable thing on behalf of the principal if her authorization is given orally. In civil procedure, there are special rules applicable to the attachment of immovable property distinct from that required for movable property; the method of organizing public auction depends on the category of the thing to be auctioned.³⁴ The division has also an impact on the jurisdiction

²⁸ See Articles 1172-1181 versus Articles 1182 and 1183 of the Code.

²⁹ See Articles, 2829, 3047 and 3117. Some special movables such as business may be mortgage.

³⁰ See Articles 1168 and 1192 of the Code.

³¹ See Articles 1023/3 and 1088 of the Code.

³² See Article 1723 of the Code.

³³ See Article 2205 cum Article 1723 of the Code.

³⁴ See Articles of 439-455 of the Civil Procedure Code of Ethiopia (1965). In relation to joinder of defendants, Article 36/4 of this Code requires any occupants of an immovable thing, irrespective of the nature of his/her

of the court; a court in the vicinity where the immovable is situated has jurisdiction over the immovable.³⁵ In commercial law, a manager is prohibited from selling and mortgaging immovable property without an express authorization to that effect.³⁶ In criminal law, there are rules applicable to the protection of interests over immovable property.³⁷ The division of things into movable and immovable has a bearing on the capacity of foreigners to acquire ownership over immovable in Ethiopia. For example, non-investor foreigners are not entitled to have property rights such as ownership or rights for a period exceeding fifty years or a similar right terminable at death in an immovable thing situate in Ethiopia.³⁸

5. A Movable thing

In general terms, a movable thing is a product that can move or be moved by human agent without losing its essential feature.³⁹ Animate things move by themselves. Inanimate things cannot move by themselves; human forces can be the only way to move some movables around. For example, one can use mechanical forces to move some prefabricated houses around. In the case of things that are movables because they can be moved via human agent, such movement should not alter the nature of the thing moved. For instance, one can move a house from place "X" to place "Y" by demolishing

proprietary interest therein, to be made part of a suit where a plaintiff sues for the recovery of such immovable property.

³⁵ *Id.*, Article 25.

³⁶ See Article 35/2 of the Commercial Code of Ethiopia (1960).

³⁷ See Articles 685 and 686/1(a) of the Criminal Code of Ethiopia (2005).

³⁸ See Articles 390-393, and Article 1089 of the Code. Foreign investors, be it in the form of sole proprietorship or business association, are entitled to acquire entitlements in immovable property including land for their investment purposes. See Article 40/6 of the Constitution of the Federal Democratic Republic of Ethiopia (1995). See also Investment Proclamation, Article 8, Proc. No 280, 2003, *Fed. Neg. Gaz.* 8th Year, No 27.

³⁹ See Article 1127 of the Code.

it. But here one is not moving a house; ruins of a house are being moved from place "X" to place "Y." One can move a mature tree around normally only after cutting it off and thus depriving it of life. In these examples, after the displacement, one has ruins of a building and wood, no more a house and a living tree. The house and the tree, in these examples, will lose their essence after the movement. The critical issue in order to appreciate the phrase "loss of individual feature" in Article 1127 of the Code is to ask the question: whether or not the quality of the thing is fundamentally altered after it is moved from place "X" to place "Y". Or perhaps also does the displacement change the purpose for which the thing is initially destined is a pertinent test. A movable thing is sub-divided into movable by nature, movables by the object to which they are applied, movables by anticipation, incorporeal movables, intrinsic elements and accessories. Some of these sub-divisions of movable things are latent and the others are patent in the Code.

5.1 Movables by nature

Movables by nature are those animate things that move by themselves. Those inanimate things that could move with the help of human power without losing their basic characteristics also fall under the sub-division of movables by nature. Article 1127 of the Code provides that "corporeal chattels⁴⁰ are things which have material existence and can move themselves or be moved by man without losing their individual character." For a thing to constitute a movable, there are three requirements, namely, the thing must have material existence or must be perceptible by the senses, such as table, chair, book, etc; it must be able to move itself, such as an

⁴⁰In Articles 1126-1139, one finds two terms, namely, "corporeal chattel" and "movable" which apparently have the same meaning.

animal or be moved by man, such as automobile; and it must not lose its individual character when moved.⁴¹

According to Articles 473 and 469 of the Civil Code of Louisiana, for the characterization of a thing as a movable by nature, controlling considerations should be, apart from economic value, the possibility of removal without application of extra-ordinary mechanical means or damage to the substance of the thing. A thing may be movable by nature although during its entire existence it may have a fixed place according to the wishes of its owner. Mobile homes and trailers are taken as movables by nature. Materials collected for the purpose of constructing a building remain movables until actual incorporation.⁴² Materials arising from the demolition of a building are also movables.⁴³ Materials detached from an immovable for repairs or additions and with the intention of replacing them do not thereby become movables by nature; they preserve their immovable nature.⁴⁴

Natural forces, when they meet certain requirements, are movables by nature even if the Code purports to create fiction here. Under Article 1129 of the Code, for a natural resource such as the sunrays, the atmospheric air and running water to be taken as a movable thing, it must be mastered by human beings; it should have economic value and be put to the use of human beings. Certainly, an object so as to constitute a movable thing, it must first be controlled by man. That object

⁴¹ There appears to be inconsistency between Article 1127 and the law of intrinsic elements and accessories. Movable things which become intrinsic elements of an immovable thing are not movables in the sense of this article; such things are immovable things. Movable things which are intrinsic elements of another movable thing are subsumed under the latter. Under some circumstances, accessories can maintain their own distinct existence within the meaning of Article 1127.

⁴² See Article 476 of the Revised Louisiana Civil Code (1978)

⁴³ *Id.*

⁴⁴ See Article 470 (2) of the Revised Louisiana Civil Code (1978). The same is true in the case of French property law.

must in fact be useful to man and it must be assessable in terms of money. The words "unless otherwise provided" in Article 1129 of the Code suggest that there should not be a legal provision which prohibits us from taking the end product as a corporeal movable, for instance, the law for some policy purpose may wish to regard the result of the mastered natural force as an immovable thing. If all of these elements are fulfilled, the end product is a movable thing, not by assimilation as the article under consideration purports to imply, but by nature.⁴⁵ The phrase "deemed to be incorporeal chattel" in Article 1129 of the Code sends the message that natural forces⁴⁶ are movables as a matter of law, not as a matter of fact. Yet, there is no need to create fiction. It is submitted that natural forces mentioned under Article 1129 of the Code should be taken as movables by nature. One uses running water to generate electric power and direct it via wires. The end product mentioned as an example, i.e., electricity, is as perceptible as any other material object. The mastery by man of the sunrays via electronic device leads to a supply of power, which is perceivable object. The mastery by man of the atmospheric air via, for example, those devices that inflate a flat tire is a corporeal good. There is no need to invoke legal fiction in Article 1129 of the Code; both the natural forces

⁴⁵Incidentally, if one takes the suggested legal fiction in this article as it is, the treatment of natural forces under this article suggests that the Code relies on the possibility of human appropriation is central in the definition of things rather than the possibility of perception with the senses.

⁴⁶ See A.Y. Yiannopoulos, 'Introduction to the Law of Things: Louisiana and Comparative Law, 22 L.L. R. (1961-1962)' at 762-3. According to the German Civil Code, natural forces (e.g. sound, electricity, and radioactivity) are incorporeal and therefore they are neither movables nor immovable things even if they are potential objects of pecuniary rights. The Greek Civil Code of 1947 regards natural forces things, by legal fiction. The latter Code responds to the critique directed against the former that in stead of making the possibility of appropriation in defining things as controlling it relies rather on perception with the senses of objects occupying space.

processed and the end products obtained are movables by nature.

5.2 Intrinsic elements of movables

Intrinsic elements of a movable thing are taken as movables by nature. An intrinsic element is an essential or an integral aspect of something. An intrinsic element makes a thing complete. The engine, mirrors and the main tires of a vehicle, for example, are movables by nature. These elements are taken as part and parcel of any vehicle because without them the machine would be incomplete. There are three kinds of intrinsic element under the Ethiopian property law: one customarily linked to the principal; the other materially united with the principal; the third is intrinsic elements as a matter of law⁴⁷ In the cases of customary and material link, there are two objects: the integral part called the intrinsic element; and the material to which the intrinsic element is attached called the principal. Both types of intrinsic elements apply objective tests: in the case of customary link, the fact to be proved is the practice of the relevant community on the question of the relationship between objects and in the case of material link the issues to be proved are the existence of material union between two or several things and whether detachment of one of the objects from the other would cause destruction or damages perhaps to the principal.

Article 1132 (1) of the Code provides that: "Anything which by custom is regarded as forming part of a thing shall be deemed to be an intrinsic element thereof." For this sub-article to operate there must first be custom. Custom means a practice habitually followed by majority members of a given community and for a longer period of time with the intention

⁴⁷ Intrinsic element as a matter of law applies to trees and crops and will be treated later in connection with intrinsic element of immovable thing. Here, intrinsic element by virtue of custom and material link as applied to movable things will be described.

to be bound by such conduct. The practice is expected to be observed regularly, not on and off basis. The person who stands to benefit in a litigation, which involves the issue of whether there is an intrinsic-principal relationship between two objects, must prove the existence of customary link. This assertion as to burden of proof is based the time honored principle of evidence: she who alleges the existence of a given fact in her favor must establish it.⁴⁸ The beneficiary of the litigation might prove the existence of customary rule by any means such as for instance by witnesses and anthropological writings. The proof must demonstrate that the repeated practice suggests that the concerned community regards a certain object as an essential part of a movable or an immovable thing. For example, certain farming community might take a plough as an essential part of oxen. If this is the case, the plough is, even if there is no material connection between the plough and the oxen, an intrinsic element of the oxen. To add another instance: a hay racker attached to a tractor, which is made not for the purpose of plough but for hay racking of grass, may be regarded as forming part of the tractor in a farming community. The hay racker can be detached from the tractor without damage and can be fitted with another tractor or similar power generating motor for the hay racking purpose. Thus, a thing may also be regarded by custom as forming part of the principal thing even if it can be detached from each another without damage.

Article 1132 (2) of the Code states that: "Anything which is materially united to a thing and cannot be detached therefrom without destroying or damaging such thing shall be deemed to be an intrinsic element thereof." In order for this

⁴⁸ "It is a general and well-settled principle that: "Where the subject-matter of a ... and the rule applies that he who alleges affirmative must prove it, ..."
See www.caselaw.lp.findlaw.com/scripts/getcase.pl?court (accessed March 31, 2008)

article to operate, there must be an object materially connected to another object, called the principal thing. The cause of the material union is not pertinent and the identity or conduct of the person who makes the linkage is also irrelevant. The attachment of one thing to another (principal) might be made accidentally or negligently or deliberately and by the person who is the owner of one or both of the things united or by a person having no proprietary interest in the two things. Even a thief or a burglar can establish the union of the two things. Second, separating the two objects must result in destruction or damage to the main thing. For instance, nuts and bolts, if used, for the making of a table or wardrobe become intrinsic elements of such table or wardrobe or the four wheels of a car are intrinsic elements of the car.

Property law does not define intrinsic elements without purpose. There are legal consequences attached to the relationship between intrinsic elements and principal things. As between the parties, Article 1130 of the Code states that: "Unless otherwise provided, rights on, or dealings relating to goods shall apply to all intrinsic elements thereof." Any transactions relating to the principal thing apply to the intrinsic elements, too. If a person sells the principal thing, she is assumed to have sold the intrinsic element unless she explicitly excludes the latter from the transaction. If a person pledges the main thing, the law assumes that she has pledged the intrinsic element thereof absent a contrary legal rule or agreement. In any transaction, the intrinsic element follows the principal, and not the vice versa, because it is not the interest of the law to prescribe that, absent contrary contractual or legal stipulation, in a dealing whose subject matter is the intrinsic element, the principal follows the intrinsic element.

In relation to third parties, Article 1134 of the Code extinguishes the interest of third parties in the thing which has become part and parcel of another thing-the principal; the property interests of third parties in an intrinsic element of a

movable thing melt away in the eye of law. It is no longer a thing with a distinct legal existence. Here, it is the law which kills the property interests of third parties in respect of an intrinsic element without the need to inquire into the culpability or otherwise of the person behind the formation of the intrinsic element. Such third parties may have contractual or extra-contractual recourse against the person who is going to benefit from this provision.⁴⁹

5.3 Accessories to movable

An accessory to a movable is also called a movable by destination. The Code following the German Civil Code employs the term 'accessories' in stead of the word 'destination.' the following questions capture the elements that make up an accessory: what may be an accessory, who may establish principal-accessory relationship and what is the nature of the link. There can be accessory-principal relationship between two movable things,⁵⁰ under Article 1136 of the Code, when a usufructuary or an owner intentionally and permanently destines a movable to the economic benefit of another movable. Because of the economic service accessories to movables give to a movable, the law considers them as integral component of the main thing. One may take extra-tire of a car as an example of an accessory to a movable. An extra-tire is not physically attached to a car in the sense that its detachment causes material damage to itself or the car. A car and its extra-tire independently exist. Yet, extra-tire of a car is thought as if connected to the car itself. Extra-tire of a car contributes to reliable and convenient use of the car. In the case of merger or embodiment, where one of the things so merged or embodied must be taken as an accessory the

⁴⁹ See Article 1134/3 of the Code.

⁵⁰ For the sake of avoiding repetition, these issues will be analyzed later in relation to the discussion of the types of immovable things.

ownership of such thing is conferred upon the owner of the principal, in stead of joint ownership.⁵¹

The principal movable thing may be a tangible or intangible thing; so is the accessory. One may take the case of business as principal and its intangible accessories, for example, good will, trade-names, patent and copyrights, the right to lease the premises in which the trade is carried on or some other rights attached to the business itself and not the trader.⁵²In terms of legal consequences, under Article 1135, accessories follow the principal as between the parties. Unlike the case of intrinsic-principal relationships, under Article 1138 of the Code, the property interests of third parties are not lost automatically because movable accessories in principle maintain their identity; they remain movable by nature.

One may raise the issue of whether or not there is a conflict between the application of the provisions of the Code dealing with intrinsic elements (Articles 1131-1134), on the one hand, and the law of possession in good faith provisions (Articles 1161-1164) of the Code, on the other. Suppose there is a principal-accessory relationship between a horse, owned by X, and a saddle, owned by Y but given in the form of loan to X. Assume that the saddle is taken by virtue of customary link, under Article 1132/1 of the Code, as part and parcel of the horse. X has sold the horse to Z. The contract of sale concerning the horse is moot about whether the saddle shall follow the horse. X has delivered the horse together with the saddle to Z. At the time of receiving delivery of the two items, suppose Z believes that X has the authority to sell out the saddle, not just the horse. In suit by Y to recover the saddle,

⁵¹ See Article 1183/2 of the Code.

⁵²See Article 127 of the Commercial Code of Ethiopia. Such elements may be taken as intrinsic elements of business. In the case of transfer of an enterprise or business as a going concern, accessories and incorporeal rights such as trademarks and patents are necessary for the business's continuous operation.

she (Y) might base her argument on Article 1134/1&2) of the Code while Z would invoke Articles 1161-1164 of the Code for she meets the elements of those provisions. Article 1134 of the Code gives title over the saddle to X while the possession in good faith provisions of the same award title over the saddle to Z. It is submitted that this case shall be disposed in favor of the party who relies on Article 1134. Article 1134 refers to things which have ceased to be distinct movables by virtue of their attachment, be it customary or material, for all legal purposes whereas Articles 1161-1167 relate to movables which maintain their distinct physical and legal existence. Further, Article 1134 of the Code applies to movables thing which have merged into another thing, be it movable or immovable; the material scope of this provision does not extent to all movables. On the other hand, Article 1161-1164 of the Code do apply to all movables with the exception of those which have become intrinsic elements, special movables as well as those movable which have become accessories to another thing. So, seen in light of material scope, it appears that the law of intrinsic element is special while the law of possession in good faith is general. Thus, the statutory interpretation rule: the special prevails over the general should apply in this case. Therefore, whenever things become intrinsic elements of another thing within the meaning of the Code, a person cannot successfully invoke possession in good faith provisions to recover the same.⁵³

5.4 Movable by anticipation

As per Article 1133 (1) of the Code, trees and crops are intrinsic elements of the land until they are separated

⁵³In the context of intrinsic elements of an immovable, Articles 1161-1164 may not be raised by a third party because such intrinsic elements are regarded by law as immovable thing and as these provisions do solely apply to movable things.

therefrom. Trees and crops are movables by nature, not by anticipation when removed from the ground, whether in consequence of a court order or a testament or a contract or a unilateral act of the owner thereof or another person with or without authorization. If trees and crops are still on a piece of land but are made subject to an agreement, perhaps a valid one⁵⁴, to separate them in the future, they are considered as movables by anticipation. A movable by anticipation is in fact an immovable by nature. The law marks on their removal in the future though they are at present attached to the ground and thus immovable by nature. The law, for some purposes, considers the immovable by nature as a movable.

Article 1133 (2) of the Code states that: "Trees and crops shall be deemed to be distinct corporeal movables where they are subject to contracts made for their separation from the land or implying such separation." Trees and crops are immovable by nature, but are expected to get the status of moveable things. Assume that W/ro Mulu owns some trees. She sells the trees to Ato Aberra. The buyer, Ato Aberra, plans to cut off the trees three years after the conclusion of the sale contract. The law considers the trees as movables by anticipation from the moment of the conclusion of the sale contract. The law anticipates the trees to be movables.⁵⁵ One can take another illustration of movables by anticipation based on Article 2268 of the Code.⁵⁶ W/ro Mulu owns an old house.

⁵⁴A successful attack on the agreement purporting to transfer title over, for example, a building to be demolished means depriving it to have validity and thus legal effect.

⁵⁵Assuming that W/ro Mulu is the owner of the plot on which the trees grow and assuming that she makes a deal with , for example, Ato Darara relating to the land before the trees are removed, the third party (Ato Drara cannot insist on the delivery of the trees subject to sale contract in favor of Ato Aberra.)

⁵⁶Sub-article 1 provides that "The sale of intrinsic element parts of an immovable shall be deemed to be a sale of movables where such parts are,

She sells the house to Ato Aberra. The sale contract relates to the ruins of the house, not the house itself. Ato Aberra plans to demolish and take the fragments of the house three months after the conclusion of the contract. The law takes the house as movable by anticipation from the moment of the conclusion of the sale contract.

Movables by anticipation are immovable by nature even if the law puts them under the category of movables. The law takes such immovables as movables when covered by a contract. The contract will as of necessity demand that these immovable be separated from the earth. The policy justification for this fiction is not difficult to see; the law seeks to facilitate market transaction in property interests. Since the things are to be removed in the future as stated or implied in the contract of sale or donation (perhaps including a testament and a court order), there is no reason for the law to require the transaction to be made in writing. For the purpose of transfer, they are movable things. A contract followed by delivery of possession of movables by anticipation is as good as transfer of ownership. Movables by anticipation can be acquired via possession in good faith; a contract pertaining to movables by anticipation can be validly made orally.

The Ethiopian law is silent about the issue of the interest of a third party in whose favor some property interest in the principal is established or who is a creditor of the owner of the thing anticipated to be removed. The answer to such query is implicit in the proposition that under the Code for all intents and purposes movables by anticipation are as good as ordinary movables. Suppose Ato Dinsa sells his standing crops to Ato Aberra. The former transfers the land on which the crops are grown (assuming that land is privately owned) to Ato Lipsa before Ato Aberra harvests the crops. The contract of

under the contract, to be separated from the immovable and transferred as a corporeal chattel to the buyer.”

sale of the crops precedes the contract of the sale of the plot. Assume as a third party, Ato Lipsa argues that he has purchased the plot together with the standing crops on the same on the basis of intrinsic principal relationship between the tract of land and the crops. The application of the Ethiopian law would mean, Ato Lipsa's claim over the standing crops shall be dismissed as the crops are ordinary movables the moment they are subjected to an agreement that implies their separation from the ground even though the removal of the crops may take place several months after the making of the agreement. French and Louisiana laws however require registration of contract pertaining to the transfer of movables by anticipation for the interests of third parties to be adversely affected.⁵⁷ In those systems absent registration of the act implying the separation of immovable things, it can affect only the parties, not third party.

5.5 Incorporeal movables

From the stand point of logic, the distinction between movables and immovables should apply to corporeal things only since rights are always devoid of corpus.⁵⁸ But classification in law defies lay notions of division of things; the law assumes entirely its own logic. It is with this in mind that discussion is here made about incorporeal movables. The Code in several places explicitly recognizes incorporeal goods, also called intangible products by the present Ethiopian Constitution. Incorporeal things cannot be grasped by the senses. Incorporeal movables are certain types of rights that do have economic value. Article 1128 of the Code provides for the assimilation of claims and other incorporeal rights⁵⁹

⁵⁷A.N. Yiannopoluos, "Movables and Immovables in Louisiana and Comparative Law," 22L.L.R., 1961-1962 at 562.

⁵⁸See Aubry and Rau in Harrison Dunning, *Supra* No 19 at 4.

⁵⁹Both the English and French version, as translated by Billilegn Mandefro, of this Article use the term incorporeal rights wrongly suggesting that rights

embodied in securities to bearer to corporeal movables. As per Article 721 of the Commercial Code, security to bearer is one type of negotiable instrument which may be transferred by delivery of the instrument without any additional legal requirement and the holder of the instrument to bearer establishes her right to the entitlement as expressed in the instrument by the sole fact of presentment of the said instrument. Non-bearer shares follow a different mode of transfer.⁶⁰ A business is an intangible thing with economic value. A business is a product of organization of resources for the purpose of obtaining profit; the tangible and intangible resources assembled for purposes of making profit are taken as a distinct patrimony which is termed in the vocabulary of commercial law as 'business.' For transaction purposes, the law assumes that a business is a movable thing.⁶¹

Interests in any of the business associations other than a joint venture recognized by the Commercial Code including cooperative societies should be taken as incorporeal movables as long as such associations are in existence.⁶² The interests in

are divided into corporeal and incorporeal. But rights are devoid of physical existence as any right denotes relationship among persons, not relationship between objects which exists in the physical world.

⁶⁰In the French Civil Code and the Louisiana Civil Code, Articles 529 and 474, respectively, the interests of members of associations are taken as movables by the disposition of the law while such associations are ongoing concern; but when the associations are dissolved and liquidated, and if there is a residual asset, the interests of the members are taken as movables or immovable depending on the type of residual property since after the legal existence of an association is brought to an end the former members now become joint owners of the left over.

⁶¹Business ``is an incorporeal movable consisting of all the movable property brought together and organized for the purpose of carrying out commercial activities...`` See Article 124 cum Article 127 of the Commercial Code.

⁶²In the case of a joint venture, being devoid of legal personality, the partners own either jointly or individually the property they contribute in order to materialize the objectives of the partnership. See Article 210 cum Article 273 of the Commercial Code.

business associations are commonly called shares. A share is not a certificate representing the rights and duties of a member of a business organization; a share rather denotes a set of rights and obligations attached to a member of a business organizations.⁶³ The certificate is not a material object over which shares are exercised; the certificate simply has evidentiary value. Like a property interest in tangible assets, shares can be donated, sold, pledged, abandoned and given in usufruct. The conditions under which shares may be transferred or rights therein may be duly constituted are outlined in the various provisions of the Commercial Code of Ethiopia.⁶⁴ Intellectual property is classed as incorporeal movable. Intellectual property is a generic term consisting of copyright, patent, industrial design, industrial models, trademark and trade secret. Copyright, patent and industrial designs are temporary monopoly rights granted to authors or inventors. Trademarks and trade secrets are pieces of information expressed in certain ways as described in the law and generally they are not curtailed by time limitation. The legal effect of characterizing claims embodied in security to bearers, shares in business associations and rights in intellectual property as movables under Article 1128 of the Code appears to mean: absent a contrary legal provision, the requirements necessary for the transfer and acquisition of ordinary or special corporeal movables do apply, with the necessary change, to the transfer and acquisition of incorporeal movables.⁶⁵

5.6 Movables by the disposition of the law

⁶³See Article 345 of the Commercial Code of Ethiopia which lists the rights of a shareholder.

⁶⁴See Articles 250, 274, 282-3, 302, 333 and 522-3 of the Commercial Code.

⁶⁵ The provisions of the Code proposed to be analogized are Articles 1184, 1186 and 1193.

Movables by the disposition of the law are variously named.⁶⁶ The Code does not make explicit recognition of this class of things. Movable real rights are rights connected to physical movable objects. A pledge established in relation to a corporeal movable thing is a moveable right.⁶⁷ A usufruct created over a corporeal movable is a movable right as well.⁶⁸ Besides, a right of recovery or preemption or promise of sale established in respect of a movable object is a movable by the disposition of the law.⁶⁹ So is, it appears, a share of a person in a jointly owned corporeal movable thing. Though the Ethiopian property law is somewhat not clear on issue of mode of transfer of movables by disposition of the law, the procedure analogous to transfer of ordinary movables shall be followed where an interest short of sole ownership is constituted over ordinary movables while a procedure analogous to the transfer of special movables should be followed in connection with transfer of property interests less than individual ownership created over special movables.⁷⁰

6. Immovables

There are a couple of definitions of immovables built in the Code; one is explicit while the other is implicit. Though formulated to define a movable thing, Article 1127 of the Code may be employed for the purpose at hand. Thus, immovable things are physical things that lose their individual character when they are moved. This reading of Article 1127 of the Code in order to serve as a definition of an immovable thing is problematic. It sends the erroneous message that immovables

⁶⁶ They are also referred to as movables by the object to which they apply or movables by the operation of the law or movable real rights.

⁶⁷ See Articles 2825-2874.

⁶⁸ See Article 1309 for the definition of usufruct.

⁶⁹ Article 1386 defines a right of recovery. See also Article 1410 of the Code.

⁷⁰ This conclusion can be reached if Article 1310 of the Code is read in a broad manner.

can be moved. Yet we know that it is impossible to move, as it is, a plot of land around. Even an excessive excavation of a plot of land does not deprive it of its essence as a plot of land even if the quality of the plot will deteriorate in consequence of an excavation of such sort. There are some buildings, which can be taken to a great distance with the aid of extraordinary devices, and yet such buildings remain an immovable.⁷¹ An immovable in fact may or may not correspond with an immovable in law. Moreover, the definition of immovables inferred from Article 1127 excludes immovable real rights. If constituted over an immovable, right of recovery, right of preemption, promise of sale, usufruct and mortgage are real rights attached to corporeal immovables. The Code, though implicitly, considers them as immovable property.

The second definition of immovable things is located in Article 1130 of the Code, which offers us definition by way of listing the two most prominent immovable things, i.e., lands and buildings. As a matter of law and fact, lands and buildings are immovables. Immobility is their feature. Generally, these two items cannot move or be moved and are things of relative fixity. Article 1130 of the Code raises the issue of the meanings of the words 'land' and 'building'. Land may be defined as an individualized portion of the earth.⁷² It includes

⁷¹ In one case, a court held that "a three storey high permanent steel structure with a helicopter landing pad constructed above it, built at the cost of over 400,000USD and designed to house offshore workers" was an immovable on the ground that immobility is a legal concept and not an inherent quality of a thing "even if such structure could be transported by a powerful crane. See A.N. Yiannopoulos, *Civil Law Property* (3rd ed.) 1991 at 139.

⁷² *Id.*, at 138. See also A.Y. Yiannopoulos, *Civil Law Property* (6th ed.) (1996) at 114. Yiannopoulos states that "tracts of land are not empty space: they contain organic as well as inorganic substances, such as soil, minerals, vegetation, and buildings or other constructions permanently attached to the ground." Minerals are part and parcel of a plot as "minerals means any naturally occurring mineral substance of economic value forming part of or found on or within the earth's crust, including salt, mineral water, and

the airspace directly above and below the surface of the land as well as the upper soil. The spatial extent of a holder of a plot of land does not go upwards and downwards indefinitely. A provision is made in the Code to the effect that a plot of land held by a person extends to the airspace and the subsurface only to the extent necessary for the use of the land.⁷³ Ordinarily, the term 'land' in law also covers vegetations and buildings thereon by way of accession.⁷⁴ The Code uses the terms 'trees and crops' in Article 1133/1, to refer to any vegetation having its roots in soil. The vegetation can be perennial or short lived. Apparently, the words 'trees and crops' under Article 1133/1 of the Code excludes a shrub in a pot.

A building is any man-made structure (with or without, a foundation, habitable or otherwise) placed or affixed onto earth. The definition includes tower houses, roads, tunnels, irrigation channels, dwelling houses, office buildings, etc. The term 'building' goes beyond dwelling houses, stores, workshops, out houses etc; it extends to works of art of all kinds, such as bridges, wells, ovens, dikes, dams, tunnels, etc.⁷⁵ Buildings are immovables irrespective of the fact that they are not constructed forever. A building set up for an exhibition may be treated as an immovable even though it may be planned to be destroyed in several months or weeks. But portable constructions set up on the surface of the soil for several days, re-erected elsewhere and transported from place

geothermal deposits." See Article 2/14 of Mining Proc. No. 52, 1993, *infra*, Note No 86.

⁷³ See Articles 1208-1212.

⁷⁴ In common law, "land is any ground, soil or earth whatever together with everything on, in and over it that goes with it." The Ethiopian law does not know of such broad definition of land. See Deo P. Costigan, *supra* note 12 at 428.

⁷⁵ See Marcel Planiol, *Treatise on the Civil Law*, Vol 1., Part II 12th Ed. 1939 (Trans by Louisiana Law Institute) at 301-303.

to place such as booths at fairs and occasions are not immovable.⁷⁶ This is because these light constructions do not have fixed place. Currently, owing to technology, even, many storey buildings may be made movable. A prefabricated house is an immovable even if it does not have its foundation in the soil and thus, it can be moved around; prefabricated houses are not light constructions such as tents and makeshift huts. Accessories to or intrinsic elements of a building are integral parts thereof. The Ethiopian property law sub-divides immovable things into immovable by nature, immovables by the disposition of the law, intrinsic elements of immovables and accessories to immovables.

6.1 Immovables by nature

Under Ethiopian property law, immovable by nature comprises buildings and lands. As highlighted earlier on, buildings are any structures affixed onto earth. These structures need not be constructed 'forever' nor should they be intended for occasions. They should last for a relatively longer period of time. The purpose for which and the material out of which they are built are immaterial. They may or may not have a foundation for they might be merely placed on the surface of the earth. A building is an immovable regardless of whether its foundation is integrated with the soil. Unlike accessory to immovable, immovable by nature cannot be mobilized by the act or intention of its owner because its status is fixed by law.⁷⁷ As indicated earlier on, as a typical immovable, land is any portion of the surface of the earth that can be individualized, i.e., can be divided into units. Plants are also immovable things.

In both Louisiana and French laws, buildings are susceptible to horizontal division, the building and the ground on which such building is erected may have different owners.

⁷⁶ *Id.*

⁷⁷ A.Y. Yiannopoulos, *Civil Law Property* (3d ed. 1991) at 139.

In both legal systems, the old civilian conception that immovable thing is not open to horizontal division has been buried for it caused a considerable confusion and difficulty.⁷⁸ Buildings are immovable by nature whether or not they belong to the owner of the ground. Following this, it is not the case that buildings constructed with the consent of a landowner, by lessees or any other person having a contractual or real right, belong to these persons, not to the owner of the ground. Perhaps a similar approach is adopted by the property law of Ethiopia provided one reads those provisions referring to 'land owner' in the Code to mean land user.⁷⁹ For example, Article 1200/2, states a rebuttable presumption that "all buildings...and works on land shall be deemed to have been made by the owner at his own expense and to be his property."

These immovables erected on another person's ground, of course with the permission of such person, are immovables by nature for all legal purposes. Thus, these buildings may be mortgaged or given in usufruct or leased or encumbered with any kind of legitimate rights by the builder.⁸⁰ "Persons erecting houses on another's land with the consent of the landowner always enjoy the protection of real right vis-à-vis the owner of the ground, and, if their interests are recorded, with respect to third parties. Thus, in Louisiana law, unless recorded, a lease does not entitle a lessee to claim ownership of a building erected on the lessor's land against third parties in case of sale or mortgage executed by the landowner, in these

⁷⁸ See A.Y. Yiannopoulos, *Supra* Note 58 at 523

⁷⁹ See Article 1214 of the Code. See also Article 1179/1&2/ of the same which entitles a person who has constructed a building on another person's land without the objection of the latter ownership of such building. But she risks eviction anytime by the landowner. It seems that Article 1179 refers merely to the case where the land owner tolerates another person's construction activity on her land; this article does not refer to the case where the builder has obtained contractual or any other legal rights to undertake construction of houses or structures on another person's land.

⁸⁰ *Id.*, at 524

circumstances the title of the lessee is lost."⁸¹ The Ethiopian property law is silent about the issue of the interest of a lessor against third parties.

6.2 Immovables by the disposition of the law

Immovables by the disposition of the law are variously termed. They are also referred to as immovables by the object to which they are applied or immovables by the operation of the law or immovable real rights.

Both Louisiana and French laws have adopted this classification. In Louisiana, usufruct and the use of immovable things, servitude and an action for the recovery of an immovable estate or entire succession are considered as immovable by the object to which they apply.⁸² In those jurisdictions, lease of immovable for a long period of time and rights associated with the search for and reduction to possession of all minerals found are taken as immovable real rights.⁸³ French commentators are of the view that all fragments of ownership over physical immovable objects including the sum total of such dismemberments of rights over such immovable property (i.e., ownership) shall be taken as immovable real rights.⁸⁴ The commentators extend the scope of immovable real rights to a real action brought to enforce rights in, to, or upon immovable property including once right to inheritance.

Even if the Code does not make explicit recognition of this class of things, the distinction, though latently, is built all over it. Immovable real rights are rights connected to physical

⁸¹ *Id.*, at 525.

⁸² See Article 471 of the Revised Louisiana Civil Code (1978). Article 470 of the same provides that: incorporeal things, consisting only in a right, are not of themselves strictly susceptible of the quality of movables or immovables, nevertheless they are placed in one or the other of these classes, according to which they apply.

⁸³ See A.Y. Yiannopoulos, *Supra* Note 58 at 550.

⁸⁴ *Id.*, at 551.

immovable objects. Mortgage established in relation to a corporeal immovable is an immoveable right. A usufruct created over a corporeal immovable is an immovable right as well. The right to habitation, i.e., the right to possess and live in a dwelling house, should be seen as an immovable by the operation of the law.⁸⁵ A right of recovery or promise of sale or right of preemption established in respect of an immovable object is an immovable by the disposition of the law. Servitude is by definition an immovable real right.⁸⁶ Perhaps a share of a co-owner in an immovable, which she jointly owns ought to be taken as an immovable real right. An interest of a member of a business association in a residual immovable asset upon the dissolution and liquidation of a business association shall be taken as an immovable by the operation of the law.

The legal effects of the classification in questions are not outlined by Louisiana and French codes. On this issue, failing clear legislative prescription, these jurisdictions fall back, as they do often when their laws have lacunas, to juristic suggestions and jurisprudence. It is opined by those jurists that most provisions governing immovable property should apply by analogy to immovable real rights. The procedural rule that the location of an immovable determines the place of litigation should apply to immovable by the objects to which they apply. So are the rules restricting transfer of an immovable by oral agreement, and those requiring recordation of transfer to become effective against third persons.⁸⁷ As mentioned earlier, in Ethiopia, the Code does not openly adopt this

⁸⁵ See Article 1353 of the Code. In Ethiopia, it appears that the exclusive right of a licensee to control a given piece of land for exploration and mining of minerals should be taken as immovables by the objects to which they apply as minerals are intrinsic elements of land and therefore they are immovables by nature. See Mining Proclamation, Articles 2/14, 8, 18, 22 and 32, Proc. No. 52, 1993, *Neg. Gaz.*, 52 Year No. 42.

⁸⁶ See Article 1359 of the Code.

⁸⁷ See A.Y. Yiannopoulos, *Supra* Note 58 at 556-557.

classification and thus one does not naturally expect it to deal with the consequences of this classification. Contrary to this expectation, in fact, there are a number of provisions in the Code which sufficiently have assimilated immovable real rights, at least some of them, to the transfer of corporeal immovable. In this regard, some provisions in the Code concerning transfer of usufruct, constitution of servitude and registration of immovable property can be cited.⁸⁸

6.3 Intrinsic elements of immovables

Those things that are attached to land and buildings are considered as immovable things. Intrinsic elements are known by the name essential things or component parts. These are things that are the integral elements of land and buildings. There are three types of intrinsic elements: intrinsic elements as a matter of law, custom and material attachment. The first sub-type of intrinsic element of an immovable thing is intrinsic element of land as a matter of law. The law provides that trees and crops are intrinsic elements of land. Article 1133 (1) of the Code reads: "Trees and crops shall be an intrinsic element of the land until they are separated therefrom." The legal effect of such relationship is that absent a contrary provision a transaction relating to land will also cover the trees or crops on such land.

In discussing intrinsic elements of movable things, it has been noted that custom⁸⁹ considers certain things as

⁸⁸ See Articles 1310, 1362-1368 and 1567-1574 of the Code. The latter group of articles requires the registration of virtually all interests one has over an immovable property.

⁸⁹ Custom may, in addition to the description provided earlier on, "ordinary societal expectations." It is not the expectation of every citizen but that of a pertinent community which should be taken. For example, in metropolitan areas, the average buyer of a dwelling house would not expect to see large hole that would be left if the bulbs and electrical lines were removed. This is an objective test to be established on case by case basis. See A.N. Yiannopoulos, "Conflict of Laws, Comparative Law and Civil Law: of

component parts of another movable. Likewise, custom may take certain parts of a house as its integral element. Customary nexus between objects arises in the situation where either there are no material union between an immovable thing and another thing or there is a material union between the two things but it is possible to separate such things from each other without destroying or causing damage in particular to the main thing, and yet the prevailing attitude of the pertinent community is such that the two things shall form a unity.⁹⁰ As Article 1132 (1) applies to movable things, it also applies to intrinsic elements of immovable things. Like the case of intrinsic elements of movable things, any transaction relating to an immovable will cover its intrinsic element, of course, absent a contrary provision.

In commenting on intrinsic elements of movable things, it has been noted that based on material attachment certain things are essential parts of another movable. Likewise, based on material connection certain parts of a house are its integral element. The lighting and the heating systems of a house are intrinsic elements of such house. A contract of sale relating to such building, if not specifically excluded, will cover the heating and the lighting system, too. The doors, the windows and the roofs of a building are intrinsic elements of such building. The contract of sale relating to such building, if not specifically excluded, will cover the doors, the windows and the roofs of such building. Anything that is attached to

Immovables, Component Parts, Societal Expectations, and the Forehead of Zeus,' 60La.L.Rev.1379 (2000).

⁹⁰ In one case, it was held that chandeliers removed with the assistance of persons with sufficient knowledge of electricity and electrical wiring to separate the internal wires from the unit wires without risking harm to the worker, or damage to the house and fixtures by the touching of exposed wires or the shorting-out of circuitry were intrinsic elements of the house on the ground of societal expectation. See A.N. Yiannopoulos, (6th ed.) *Supra* note at 73 106.

buildings and that makes the buildings complete is also an immovable by nature. In the case of intrinsic elements of immovable things based on material connection, the two items must be materially united and cannot be detached from one another without damage to the principal thing.

As to who has made the material union between the two things is not relevant. The state of mind of the one who has established intrinsic-principal relationship is not material. The extent of physical attachment of the intrinsic element to the main thing is a fact to be proved on case-by case-basis. Nor are, it seems, relevant the "cost and artistic value" of the intrinsic elements as well as complexity of the material union.⁹¹ The only decisive factual factors are whether or not there is a material union between such things and whether or not it is possible to detach one from the other without causing damage or destruction to main object.⁹² It appears that the extent of damage or destruction to either object is not a pertinent fact in the determination of intrinsic-principal relations between things, other wise the legislature would have given a hint to that effect. It is not clear whether or not the Code permits the owner of a principal thing to declare via recordation certain things as intrinsic elements of a building or other constructions.⁹³ A building is incomplete without the doors, windows, water pipes and other appliances attached to it. The building materials when once used and converted to immovable by nature no longer have distinct existence. There are no longer bricks, pipes, building stones or lumber. It is just a house of which these materials have become integral parts.

⁹¹ A Louisiana Supreme Court decided on one occasion that such considerations are pertinent. See A.N. Yiannopoulos, *Supra*, Note 90 at 109.

⁹² The French version of Article 1132/2 as translated by Billilegn Mandefro appears to be concerned with the damage or destruction sustained by the main thing, to the accessory while the official English text appears to refer to either of the object materially united.

⁹³ See Article 467 of the Revised Louisiana Civil Code (1978).

The fact of their physical integrity is evident that one forming part of the other object called principal is an intrinsic element; their physical unity is so strong that the two items cannot be detached without damage to either or both items.

Articles 1131 and 1134 regulate the legal consequences of essential components between parties to an agreement and third parties, respectively. As Article 1132 (2) applies to movable things, it also applies to intrinsic elements of immovable things. Like the case of intrinsic elements of movable things, any transaction relating to an immovable will cover its intrinsic element, absent a contrary provision. If a thing becomes an intrinsic element of another thing, unless there is a provision otherwise, any dealing on such thing also extends to the thing that constitutes an intrinsic element. For example, Ato Birratu sells his house to W/ro Meseret fulfilling the requirements of transfer of immovable property under the property law of Ethiopia. The contract of sale does not include nor does it exclude the doors and windows of the house. Pending delivery of the house, Ato Birratu plans to remove the doors and the windows from the house in order to transfer such parts of the house subject to the sale contract to W/rt Chaltu. W/ro Meseret files a lawsuit to take delivery of the house together with the doors and the windows from Ato Birratu. W/ro Meseret should win the case based on Article 1131 of the Code.

There are circumstances where a transaction pertaining to an intrinsic element involves the right of third parties for it is not always the case that the owner of the principal thing is also the owner of the intrinsic elements. Article 1134(2) of the Code provides that by the time the object is regarded by custom to form part of the principal thing or is materially united to another thing, the right of third parties on the intrinsic elements ceases to exist for it becomes the property of the

owner of the principal thing even if it does not mean that the third party is without a remedy.⁹⁴

The law stipulates that the claims of third parties over things now become the essential components of another object do cease to exist the moment such relationship is created. Consequently, the property law remedy of restoration of the thing is lost. A showing of the mental state of third party is to no avail to get the thing restituted. To illustrate, Ato Duguma steals ten quintals of cement from his neighbor. He sells the cement to Ato Belachew. Ato Belachew uses the cement to construct his house. The neighbor cannot get the cement back from Ato Belachew because the cement becomes intrinsic elements of the house. The link is based on material link under Article 1132 (2) of the Code. Article 1134 is relevant to handle this case. It states that: "A thing which becomes an intrinsic element of a movable or immovable shall cease to constitute a distinct thing. All the rights which third parties previously had on such thing shall be extinguished." The neighbor of Ato Duguma cannot recover the cement from Ato Belachew even if the latter knows the fact that Ato Duguma is not entitled to transfer title over the cement at the critical time, i.e., time of the sale of the cement or at the time of the delivery of cement.⁹⁵ The law of property does not always, however desirable it may, reward those who act honestly and punish those who act contrary to good faith. Sometimes, considerations other than the promotion of the social policy of honesty such as convenience and certainty of property rights are preferred.

6.4 Accessories to immovables

Sometimes, for a given immovable thing to be used efficiently, there is a need to have a movable attached to it.

⁹⁴Article 1134 (3) provides that the third party may base her claim on the provisions of extra-contractual liabilities and unlawful enrichment.

Articles 1136-1139 of the Code regulate cases where accessory principal relationship is created between a movable thing and an immovable thing.⁹⁶ Accessories ordinarily relate to those types of movable things annexed, in the legal sense, not in the physical sense, by a person who is an owner or who holds an immovable thing in the form of usufruct permanently to the economic service of such thing. Economic reason is behind such relationship. The movable promotes the efficient and convenient use of the principal thing, which is an immovable by nature. The two things form economic unity. There is no material attachment within the meaning of Article 1132/2 of the Code between the movable thing and the immovable thing nor is there customary link between the two objects.⁹⁷ Thus, the critical issue in the law of accessories is determination of situations whereby some things, which are physically united

⁹⁶It is difficult to imagine the case where an immovable becomes an accessory to a movable thing though the Code does not rule the possibility out. In France, the situation where an immovable property may be regarded as an accessory and dependent on a movable is unknown: See A.Y. Yiannopoulos, *Supra* Note 58 at 532. Accessories to immovables are also called immovables by destination. An immovable by destination is a movable by nature but considered by law as an immovable. Unlike the French and Louisiana civil codes, the Ethiopian code does not use the concept of immovable by destination in stead it elects to employ accessories to immovable property.

⁹⁷In some cases both the principal and the accessory can be immovables. For example, under the urban land lease holding law of Ethiopia surety (mortgage) of lease right over a plot which is an immovable real right covers the building (including accessories to such building) thereon in the absence of a contrary stipulation and vice versa. See the Re-enactment of Urban Lands Lease Holding Proc. No 272, 2002, Article 13, Fed.Neg.Gaz. No 8th Year 19.

On the issue of the possibility of considering a house to be taken as an intrinsic element of the plot on which it is erected, see a recent Federal Supreme Court decision; *Yesewzer Yebeltal v. Negussie G/Sellasia*, Fed. Sup. Ct., Civil Appeal No 26731, 1999 E.C. (Unpublished). In this decision, the Court stated that a house cannot stand by itself; it is unthinkable to have a house without a plot of land on which it is built.

with another thing, may be considered as indispensable elements of another thing.

6.4.1 Requirements

For an accessory-principal relationship between a movable and an immovable object to take place, there are certain conditions which must be established by the person who stands to benefit from a finding of the existence of accessory principal relationship between things. There has to be a relation of permanent destination between the principal and the accessory as provided under Article 1136.⁹⁸ Where the usufructuary⁹⁹ or the owner of the principal object destines the accessory for the use, improvement and exploitation of the principal object with such intention, the principal be it, land, industrial, commercial or manufacturing establishment, it can be said there is permanent destination and it in no way is to be measured by the service life of the thing alone.¹⁰⁰

Several deductions can be made from the requirement that a person referred to under Article 1136 of the Code has to have either ownership or usufructuary relationship with the would-be main thing. A person who has ownership right in two things can establish principal-accessory relationship between them for she has a sovereign right over both. A person who is neither the owner nor with any property interests in the things associated in the context of Article 1136 of the Code cannot have the power to create accessory-principal relationship for

⁹⁸ There are disparities between the English and Amharic versions of this article. The Amharic version uses two critical terms, which do not appear in the former. These are usufructuary and intention.

⁹⁹ In the English version of Article 1136 of the Code, a possessor or an owner of the principal thing is given an entitlement to destine a movable thing to the former. Yet, the Amharic version as well as the master French version identifies a usufructuary instead of a possessor of the principal thing as having the power to make a destination, of course, in addition to an owner of the principal.

¹⁰⁰ See A.N. Yiannopoulos Supra Note 89.

she has no authority over both. A person who is the owner of the main thing but possesses no legitimate property interests in the other thing which might become an accessory cannot establish de jure as opposed to de facto accessory-principal relationship between such things because she does not have legally recognized power over the latter. The same is true, and for the same reason, in cases where a person does have no right over the would-be principal and has ownership entitlement or other subordinate property rights in the thing which might become an accessory. There is a connection between the requirement, under Article 1136 of the Code, that the person creating accessory-principal relationship must be either the owner or usufructuary of the principal and the requirement of permanent linkage provided for in the same provision because only an owner or a person who is entitled to enjoy use and fruits of the main thing can have the authority to establish a lasting relationship between two things.

Under French property law,¹⁰¹ the owner of the accessory and the principal thing has to be the same. It is a requirement that the person making the dedication must be the owner of the movable and the immovable thing. Ownership of the movable and the immovable by a single person is called unity of ownership. The French system requires unity of ownership because it is only an owner who has a permanent interest in the immovable to which a movable is destined. As only an owner of an immovable property or another person on her behalf creates the destination, only she can terminate the relationship between an accessory and a principal. In this jurisdiction, movable things attached by lessees or borrowers or other persons to an immovable on their own account do not

¹⁰¹ Louisiana abrogated the unity of ownership test in 1978. Now, even a person who does not own would be accessory may make it an accessory of another thing. In the same system, as of 1978, the test of "the use or convenience of an immovable property" was abandoned.

become immovables by destination; such things remain distinct movables.

In addition, the thing called an accessory has to be destined for the proper exploitation of the principal object and not for the mere convenience of the owner or the usufructuary of the principal object. The thing must serve the economic purpose of the principal thing to which it is destined. The reason for destination hence is to get an enhanced benefit from the immovable thing. Intention of the person entitled to destine is a requirement. The act of creating accessory-principal connection between things must be deliberate; with the purpose of achieving the efficient utilization of the principal object.

Further, such deliberate act should be something more than a transient action. Placing a movable object with a temporary relation with another does not constitute accessory principal relationship. The length of time the movable is used to the service of the immovable or some other overt acts by the owner or usufructuary or somebody else acting on their behalf, the importance of the movable thing to the immovable (economic considerations), the practice in the community, etc. can be resorted to show whether an object is permanently and intentionally put to the use of another object.¹⁰² The issue of permanent link is not just a matter of factual determination; there is policy consideration behind it. There are certain resources which the Code deems as accessory; namely, water and gas pipes, electrical and other lines are considered as accessories of the undertaking (enterprise) from which they originate; but contrary evidence can be produced.¹⁰³ In cases where the law does not single out certain things in order to regard them as accessories, the party who stands to benefit from a finding of the existence of principal-accessory

¹⁰² This is an orthodox way of defining the notion of customary law. Note that Article 1132/1 refers to custom, not to customary law.

¹⁰³ See Article 1203 of the Code.

relationship between two things within the meaning of Article 1136 of the Code must prove it. Thus, the element of permanent attachment under Article 1136 is not presumed. There are situations where an accessory-principal relationship may be established between two immovables¹⁰⁴ or between a movable principal and an immovable accessory¹⁰⁵ or even between a tangible thing and an intangible thing¹⁰⁶ or as stated elsewhere between two movable things¹⁰⁷

Unlike French law, German property law does not know of the use of the term 'immovable by destination'. The preferred terminology there is accessory. Accessories are movables that, without being parts of the main thing, are intended to serve the economic purpose of the main thing and are in a spatial relationship to it that corresponds to this intention; a thing is not an accessory if it is not regarded as an accessory in business dealings¹⁰⁸. One learns from the German law of accessory that: there must be two things, one is called the main thing and the other is called an accessory, the accessory must be a movable thing; the principal thing may be a movable or an immovable; both the principal and the accessory must be physical things;¹⁰⁹ the accessory should not be the component part of the main thing; the accessory must be

¹⁰⁴ See Article 1372 of the Code which envisages a right of way (which is an immovable right) as an accessory to a right to take water from a well, which, too, is an immovable right.

¹⁰⁵ See Article 1203 of the Code, which regard certain fixtures (gas, water, telephone and electrical lines) as accessories to an enterprise, which by virtue of Ethiopian commercial law is business and thus a movable thing.

¹⁰⁶ See Article 127 of the Commercial Code of Ethiopia.

¹⁰⁷ Unlike French and German laws, it appears that in the Ethiopian Code, there can be an accessory to a movable thing.

¹⁰⁸ See the German Civil Code (last amended in April 19, 2006).

¹⁰⁹ See Article 90 of the German Civil Code as revised in April 19, 2006. This provision states that "only corporeal objects are things as defined by law." Thus in Germany, intangible things may not have accessories nor can they be regarded as principals.

intended to serve, either by the owner or another person on her behalf, the economic purpose of the principal permanently or the pertinent business community should take a certain movable thing as an accessory of another thing; and there must be some spatial relationship¹¹⁰ between the accessory and the principal thing.

The German Civil Code exemplifies, apparently with an open ended enumeration, this general description of accessories. Thus, the following are intended to serve the economic purpose of the main thing: in the case of a building that is permanently equipped for commercial operations, in particular a mill, a smithy, a brewery or a factory, the machinery and other equipment intended for other operations; and in the case of a farm, the equipment and livestock intended for the commercial operations, the agricultural produce, to the extent that it is necessary to continue the farming until the time when it is expected that the same or similar produce will be obtained, and manure produced on the farm.¹¹¹ In relation to this list, proof of economic purpose is dispensed with; in other cases, the party who seeks to benefit by the finding of an accessory-principal association between things must prove it. The temporary use of a thing for the economic purpose of another does not make it an accessory. The temporary separation of an accessory from the main thing does not stop it being an accessory.¹¹² The Ethiopian property law has a striking similarity with the German law in respect of the law of accessory.

¹¹⁰Bodily contact between the two is not required. Proximity is decided in each case as a fact. The accessory need not be in its proper place. It was held by courts in that country that machinery brought in and left in the courtyard of a factory was an accessory since it was destined to replace worn-out parts. See A.Y. Yiannopoulos, *Supra* Note 58 at 573.

¹¹¹ See Article 98 of the German Civil Code (as revised in 2006).

¹¹² *Id.*, see Article 97.

6.4.2 Legal effects

Articles 1135 and 1138 of the Code regulate the legal consequences of accessories between parties to an agreement and third parties, respectively. Article 1135 stipulates that: "In doubtful cases,¹¹³ rights on, or dealings relating to, things shall apply to the accessories thereof." The effect of being an accessory is that rights and dealings relating to the principal thing are applicable also to accessories. For all legal purposes accessories are taken as immovables by nature. For instance, if a building is mortgaged, all its accessories are also subject to the mortgage. In case, there is an accessory principal relationship between a farm plot and oxen, absent contrary contractual provision, any dealing relating to the farm will cover the oxen. In case, there is established an accessory principal relationship between door keys and a building even if there is no material link between the building and such keys, the latter make the use of various parts of the building secure. Absent a contrary contractual provision, any dealing relating to the building will cover the keys. However, these extensions are not of unconditional application. The legal effect follows when there is no agreement which excludes the accessory from following the principal. If there is a clear agreement stating that the accessory shall not follow the principal; it is that agreement that applies. In the presence of a contrary covenant, the transaction covers only the principal, not the accessory.

One may inquire whether or not government should be obliged to pay separate compensation for accessories in the

¹¹³ The phrase "...in doubtful cases..." appears to suggest that Article 1135 is a fallback provision. In case, the relationship between two things cannot be established based on customary link, for example, the existence of a repeated practice by the wider relevant community is open to interpretation, then the definition under Article 1136 will apply. Or the phrase means when the contract pertaining to the principal is ambiguous as to the exclusion or inclusion of the accessories, then Article 1135 will be used to settle the dispute. The phrase means both.

case of expropriation. The law of expropriation as embodied in the Code does not offer us solution to this issue.¹¹⁴ Assuming that the target of the expropriation proceedings is the thing as a whole, not just the principal nor is the accessory in isolation, one approach to this question is that there should not be a separate compensation for accessories as the accessories have become part and parcel of the principal. Thus, to assess the economic value of the principal for compensation purposes by the competent authorities means to take into account of the value of the accessories thereof, as for legal purposes the distinct existence of the accessory has been brought to an end at the moment it is attached to the principal.

The other approach would be since accessories retain their individuality, and thus can be separated from the main thing without destruction or damage, the authority should assess the accessories independently from the principal and effect compensation to the owner of the accessories. In the latter approach, if the owner elects to take the accessories away and if the competent authority undertaking the expropriation is not interested in having such accessories, then the owner should retain them and thus no compensation is due in relation to those accessories. On the grounds of practicality and the spirit of the law of accessories, it appears that the first approach should be followed if similar issues arise in the case of expropriation of things with accessory-principal relationship as well as the expropriation of things with intrinsic-principal relationship.

The transaction referred to in Article 1135 is comprehensive to include a wide array of contractual relation having the principal as its object (e.g., usufruct, mortgage, sale,

¹¹⁴ See Articles 1460-1488 of the Code. Articles 1471-2 state that any interested person may express objection to the amount of compensation offered by the competent authority. This interested person may include those who have property interest in accessories or intrinsic elements of immovable property under expropriation.

testament, donation, servitude, preemption, right of recovery). The term also includes expropriation and court order. Simply stated, Article 1135 has in mind bilateral and unilateral acts, and decisions of competent public authorities affecting the principal object. The same conclusion is plausible to reach in respect of Article 1131.

This principle that, absent a contrary agreement excluding an accessory, dealing with the principal means dealing with the accessory thereof too is based on the expectation theory of contract law. The expectation theory also called the reliance theory states that legitimate expectations of parties to a contract should be honored.¹¹⁵ People in transacting with a principal believe, in the absence of a contrary term of contract, that they are going to take the accessory thereof. The same theory lurks behind the case of a contract covering a principal intrinsic-principal thing.

Article 1138/1 of the Code, in part, states that destination of a thing to an immovable thing does not affect rights which previously existed over the accessory to the benefit of third parties. Unlike, the case of intrinsic principal relationship, where the rights of third parties on an intrinsic element are terminated, the rights such parties have on an accessory will not be affected except in one situation described in Article 1138/2. In the language of this sub-article, the rights third parties have on a thing that has become an accessory to another will be affected only when transactions evidencing such rights are made in writing, and authenticated¹¹⁶ prior to the

¹¹⁵ See www.bepress.com/cgi/viewcontent.cgi?article (accessed March 31, 2008).

¹¹⁶ See the Amharic version of Article 1138/2 of the Code. To authenticate an agreement means: witnessing by a public officer of the signing of the agreement by the parties or verify their signatures as affixed onto the agreement with a sample signature deposited in her office, sealing and registering and depositing a copy of the agreement.

destination of such thing.¹¹⁷ Authentication is required to prevent predating or antedating of the agreement.

An example might clarify the message of Article 1138/2. X owns an ox and Y is a usufructuary of a plot of land. X assigns the ox to Y in the form of usufruct for four years. Y attaches the ox to the use of his parcel. Just a few days before the termination of the contract of usufruct, Y assigns his parcel to Z. The contract of sale of the parcel between Y and Z is silent about whether or not the ox is included. Z claims the delivery of the ox together with the principal. X can recover the ox provided the contract of usufruct pertaining to the ox is made in writing and authenticated prior to the attachment of the ox by Y, or by another person on her behalf, to her (Y's) farmland, i.e., formality should precede destination. If these formalities are observed, X can recover the ox irrespective of the good faith of Z. If Z knows the fact that the ox belongs to some body else, X can get his ox restituted even if the usufruct contract in respect of the ox has not been made in writing, and unauthenticated. Z, thus, can succeed in getting the delivery of the accessory if the contract of usufruct is not made in writing and he is in good faith.

It is submitted that good faith within the meaning of Article 1138/2 of the Code means actual or constructive knowledge on the part of a third party the fact that the accessory belongs to a person other than the one with whom she is dealing with.¹¹⁸ To destroy the claim of the third party to retain the accessory, such awareness should be proved to exist at the time of delivery.¹¹⁹ The formality requirement in the

¹¹⁷ The reason for the requirement that destination must follow the contractual formality (i.e., formality first; destine next) is difficult to tell though it might have something to do with the publicity requirement.

¹¹⁸ The definition of good faith provided for under Article 1162 of the Code should be extended to the situation envisaged under Articles 1138/2 and 1139 of the same.

¹¹⁹ This is an extended application of what is provided for under Article 1163/1 of the Code.

provision under consideration means the contract is made part of the public record. Generally, there is this presumption that third parties know acts made part of public record. Third parties cannot argue that they have not consulted those records. The existence of public records makes it legally impossible for third parties to invoke good faith.

6.4.3 Accessories versus intrinsic elements

There are several distinctions between Articles 1131-1134 of the Code, on the one hand and Articles 1135-1139 of the same, on the other. There may be a material union in relation to intrinsic elements whereas accessories do not have physical connection with the thing destined to. Once, intrinsic-principal relationship is established whether by custom or material link or legal link, the object which has become intrinsic element ceases to be a distinct thing. Cessation of the independent existence of the component part does not necessary mean the melting away of such thing. Materially such thing might exist; but legally speaking it does lose its individuality either by virtue of its material link within the meaning of Article 1132/2 or because of the prevailing notion of the relevant community under sub-article 2 of this article. On the other hand, the independent existence of a thing which has become accessory to another thing is maintained. The rights of third parties in intrinsic elements are extinguished without exception, reducing their claim to compensation based on contract or tort. In the case of accessory principal relationship, there is a possibility for third parties to recover their rights in a thing attached to another thing designated as a principal. So long as the interests of third parties are concerned, it is impertinent as to who makes a thing component part of another thing while that is relevant in the case of accessory-principal relations. The mental state of the third party (her good faith or bad faith) is important in the case

of provisions concerning accessories while that is not taken into account in relation to intrinsic-principal relationship.

6.4.4 Termination

Article 1139 of the Code assumes that the person who establishes an accessory principal relationship between two objects is the owner of the accessory. As an owner, she has several prerogatives including the right to terminate the accessory-principal nexus. The termination might be effected via sale or donation or mortgage or pledge or usufruct or destruction or transformation or some other acts indicating the end of the close association of an accessory with the immovable.¹²⁰ In addition to the exercise of rights inherent in ownership, an owner has an interest to raise additional funds by disposing of accessories. On the other hand, there is also this concern of safeguarding the interests of innocent third parties and those of the mortgagee. The issue of termination of the character of accessory thus involves two interests: the right of an owner to dispose her property as she pleases and the interest of innocent third party.¹²¹ Here the law states that an owner of an accessory thing may end such relationship anytime and through any legitimate means provided the interest of innocent third parties is not adversely affected thereby. As an illustration, X owns a tractor which is destined to his farmland in the sense of Article 1136 of the Code. X sells the plot to Y reserving usufruct for three years. Y buys the farmland believing that X will deliver it with the tractor. Upon the expiry of the usufruct, X sells the tractor to Z. In relation to the contract of sale of the tractor, all persons in the world including Y are third parties whose rights over accessories are protected by Article 1139. This effort by X to terminate the accessory nature of the tractor should not curtail

¹²⁰ See A.Y. Yiannopoulos, *Supra* Note 58 at 556.

¹²¹ *Id.*

the right of Y to require the delivery of the same upon the expiry of the usufruct. Here, unlike the rights of third parties protected under Article 1138/2, the formality precondition is not necessary to the application of Article 1139. What is critical for the application of the latter stipulation is the mental state of the third party at the time of the delivery of the principal or at the time of the conclusion of the agreement with the owner of the accessory.¹²²

An owner can assign the accessories, of course including intrinsic elements, thereof independently even if the principal (such immovable) is encumbered with mortgage.¹²³ That kind of assignment poses no problem if the value of the immovable is not thereby diminished at the expense of the mortgagee. Yet the law provides that mortgage does not extend to accessories of the main thing mortgaged if those things have already been separated and transferred to a third party even after the date of the creation of such mortgage and even if the transfer reduces or endangers the value of the thing mortgaged.¹²⁴ The same rule applies to any object expressly specified as an accessory in the act creating the mortgage. It is unclear if the Code refers only to accessories brought in after the establishment of the mortgage or those added to the immovable mortgaged on or after the date of creation of such mortgage or both kinds of accessories. The words "separated and transferred" here imply that for a third party to benefit from this stipulation, she must meet the following conditions: the accessory must be detached from the principal; there must be a cause of transfer of such accessory (judicial act or court

¹²²This requirement should be injected into Article 1139 from Article 1163 of the Code.

¹²³See Article 3064/2 of the Code, which entitles the mortgagee to demand new securities and discharge of part of the debt where the assignment which reduces or endangers the value of the immovable mortgaged is intentional or made negligently.

¹²⁴See Article 3065 of the Code.

order), and delivery to the third party, in case of an ordinary movable; and in addition to cause, the necessary formalities must be complied with in case of a special movable. It seems that it is immaterial whether or not the transfer is made for free or for consideration or by the authority of the mortgagee or court.

An act of removal of accessories covered by a mortgage without assignment to a third party does not adversely affect the rights of third parties. For example, accessories detached from the thing mortgaged for the purpose of repair or inspection do remain part and parcel of the mortgage. The mortgagee does not have the right to follow up and recover intrinsic and accessories so transferred from the third party. In a sharp departure from what is stated in the provision under discussion (Article 1139 of the Code), it seems that such third party is not required to be in good faith merely because such third party is transacting with the mortgagor in respect of a registered property; for sure, the law might and should deprive the third party of the right to retain accessories detached and transferred to her if she has acted in fraud or in collusion.

7. Conclusion

The utility of a clear, coherent, comprehensive and contextualized division of things over which property rights are exercised cannot be overemphasized. A sound classification of things in property law enhances the determination of the rights of parties to a dispute by informing one about which things shall go which other things and which procedure shall lead to a valid and effective flow of property rights in things from one party to another.

Classification of goods in law may or may not rely on the physical condition of things. A thing which is movable by nature may be immobilized by law; an immovable by nature may be mobilized by law; a thing that is devoid of any material

existence might be clothed with corpus by the legislature. The student of property law should appreciate the import of such fiction as the lawmaker does not engage in the creation of fiction in vain.

A classification of things, however carefully crafted, cannot avoid open textures. When indeterminacy arises resort to case-by-case factual determination of the association of things is inevitable. There are numerous indeterminate aspects of some of the fourteen provisions treated in this Commentary. Issues of the degree of material attachment, and the content of customary practice envisaged, under Article 1132 of the Code, and the question of ascertaining the existence of economic unity between things under the law of accessory rest on subjective factors. The legal rules under consideration leave many unaddressed issues, for instances, in relation to the place and effect of moveable real rights and immovable real rights in the scheme of the Code. The English and Amharic versions of Articles 1126-1139 suffer from numerous material disparities and a reliance on the English version of these provisions alone might be quite misleading.

The different designations of the objects of property rights given by Articles 1126-1139 of the Code perhaps do convey the same meaning. Terms used by these articles to refer to both movable and immovable things are a thing, corporeal thing, corporeal movable or goods while words employed to refer to movable things are corporeal chattel and movable. It is a convention in legal drafting to employ a given term uniformly throughout that text so long as the drafter does not have a different meaning in mind, which must be made clear in the text. Usage of inconsistent terms in one legal text compounds the already muddy ground in legislative interpretation. In order to avoid surprises and enhance correct appreciation of this portion of the Code, those who study and teach property law should not just rely on the English version

of the provisions under discussion; there is a need to look at the Amharic version of these rules.

What has been attempted in this Commentary is to resort to textual inferences, reliance on unauthorized translation of Articles 1126-1139 from the original French version and make use of foreign sources, having striking similarities with the Ethiopian law of classification in the hope to assist in judicious settlement of cases in vague areas, to fill voids, and to bring out mistranslation problems and to suggest uniformity in the use of terminologies.