

# THE ADAPTATION OF THE INSTITUTION OF APARTMENT OWNERSHIP TO CIVILIAN PROPERTY LAW STRUCTURES IN THE MIXED JURISDICTIONS OF SOUTH AFRICA, SRI LANKA AND LOUISIANA

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## 1 Introduction

Since the maxim *superficies solo cedit* disallows separate ownership of land and parts of a building, special legislation was necessary in South Africa, Sri Lanka and Louisiana to breach this principle of accession and legitimize the institution of apartment ownership in these mixed jurisdictions.<sup>1</sup> At the time when urgent housing shortages, especially near centers of employment, compelled these jurisdictions to promulgate statutes to regulate apartment ownership, the most attractive workable precedents available were the common law statutes of New South Wales,<sup>2</sup> British Columbia<sup>3</sup> and certain United States' statutes.<sup>4</sup> The great success which especially New South Wales enjoyed in providing housing to thousands of Australians led to the transplantation of the New South Wales statute to South Africa<sup>5</sup> and Sri Lanka.<sup>6</sup> The impetus for the first generation Louisiana Horizontal Property Act of 1962<sup>7</sup> was the availability of Federal Housing Authority insured mortgages for condominiums in states where condominium regimes were authorized by local law.<sup>8</sup> This Act is copied almost *verbatim* from the Arkansas Property Act, which in turn borrowed from the Puerto Rican statute altering the civilian terminology in that

<sup>1</sup> For Louisiana, see Quienalty "Individual Ownership of Apartments in Louisiana" 1959 (19) *La LR* 683

<sup>2</sup> Conveyancing (Strata Titles) Act 17 of 1961

<sup>3</sup> Condominium Act 1966

<sup>4</sup> The most important statute was the Puerto Rican Horizontal Property Act, Acts 1958 no 104 PR Laws Ann Tit 31 § 1291-1293

<sup>5</sup> The first Sectional Titles Act 66 of 1971 was replaced by the second generation Sectional Titles Act 95 of 1986

<sup>6</sup> The first Condominium Property Act 12 of 1970 was repealed by the Apartment Ownership Act 11 of 1973 which was amended substantially by the Apartment Ownership (Amendment) Act 45 of 1982, the Apartment Ownership (Special Provisions) Act 4 of 1999 and the Apartment Ownership (Amendment) Act 39 of 2003

<sup>7</sup> La Acts 1962 No 494 §§ 1-22. This Act was repealed by the Condominium Act La Acts 1974 No 502 § 2. The deficiencies of this Act are discussed by Theriot "Louisiana Condominium Act of 1974" 1974-1975 (35) *La LR* 1203 1203 – 1206

<sup>8</sup> This was accomplished by an amendment of the National Housing Act of 1961 by the American Congress. See Van der Merwe "Apartment Ownership" in Drobnig & Zweigert (eds) *International Encyclopaedia of Comparative Law* 6 (1994) 9

statute to suit common law requirements.<sup>9</sup> Because of numerous shortcomings, the Horizontal Property Act was replaced by the Condominium Act of 1974<sup>10</sup> and finally the Condominium Act of 1979.<sup>11</sup> Although these second and third generation Louisiana statutes conform to the terminology of the Civil Code, the latest Act borrowed heavily from the Uniform Condominium Act approved by the Commissioners on Uniform State Laws in 1977. The Uniform Condominium Act and the New South Wales strata legislation are the two most sophisticated common law statutes in the world.

Since their adoption, the mixed jurisdictions concerned were confronted with the difficult task of clearing their statutes from “alien” common law terminology<sup>12</sup> and, more importantly, with incorporating the novel institution of apartment ownership into a civilian property law structure, which generally is regarded as the most unassailable domain of civilian jurisprudence in mixed legal systems.<sup>13</sup> Kahn Freund<sup>14</sup> has warned that legal concepts, although couched in appropriate legal terminology, cannot be easily moved either directly or by slow judicial process from one legal system to the other, like the “transfer” of a part from one machine to the other. Once the foreign material moves in, it unleashes a certain dynamic which affects both the external concept as well as the internal system into which it seeks to be integrated.<sup>15</sup> In the words of Palmer, it undergoes a metamorphosis, which results in the creation of *sui generis* rules.<sup>16</sup> The first aim of this study is to examine briefly how these three mixed jurisdictions dealt with alien common law terminology present in the statutes which fathered their statutes. The second and more important aim is to show how the civilian principles and concepts of accession, ownership and co-ownership, and the law relating to voluntary associations, have been breached, transformed, qualified and/or adapted to accommodate the novel institution of apartment ownership.

<sup>9</sup> See Armstrong 1985-1986 (46) *La LR* 71; Mashaw “The Condominium: Apartment Ownership in Louisiana” 1962-1963 (67) *Tul LR* 484

<sup>10</sup> L RS 9: 1121-1142 (1974) For the full text, see Theriot 1974-1975 (35) *La LR* 1236-1247

<sup>11</sup> La Acts 1979 No 682 § 1 (RS 9: 1121 101 – 1124 117) as amended by La Acts 1988 No 979 § 1; La Acts 2003 No 770 § 1; and La Acts 2006 No 358 § 1

<sup>12</sup> The use of the concept of “joint tenancy”, “tenancy in common” and “tenancy by the entirety” adopted in The Horizontal Property Act of 1962 La RS 9 § 1125 (Supp 1962) was replaced by the concept of “common ownership” in the later Condominium Acts

<sup>13</sup> See for South Africa: Zimmermann & Visser “Introduction: South African Law as a Mixed Legal System” in Zimmermann & Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 1 28 See also in general Palmer “A Descriptive and Comparative Overview” in Palmer (ed) *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001) 17, 57-59; Van der Merwe, “Interpenetration of Common Law and Civil Law as Experienced in the South African and Scottish Law of Property” 2003-2004 (78) *Tul LR* 257; Yiannopoulos “Property” in *Louisiana Civil Law Treatise* 2 4 ed (2001) § 6 at 12: “[O]ne would be entirely justified to affirm that Louisiana has a civil law system of its own. This is particularly so in the domain of property law”

<sup>14</sup> See Kahn-Freund “On Uses and Misuses of Comparative Law” in *Selected Writings* (1978) 294 299

<sup>15</sup> See Teubner “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences” 1998 *MLR* 11 12

<sup>16</sup> See Palmer “Overview” in *Mixed Jurisdictions* 59-62

## 2 Dealing with alien common law terminology and concepts

The Louisiana Condominium Act was the most successful in dealing with alien common law terminology. The use of the concepts of “joint tenancy”, “tenancy in common” and “tenancy by the entirety”, adopted in the Horizontal Property Act of 1962<sup>17</sup> to denote the relationship between co-owners of a condominium parcel was repealed by the Act of 1979.<sup>18</sup>

In South Africa, the Sectional Titles Act included under its definition of “owner” of a unit the person by whom the unit is held under a lease for a period of 99 years or longer or for the “life of the building”.<sup>19</sup> The Sectional Titles Amendment Acts<sup>20</sup> changed the reference to leaseholder to “holder”, thus still retaining common law terminology which is difficult to integrate into South African civilian property concepts.<sup>21</sup>

The Sri Lankan Apartment Ownership statute seems to have had the most difficulty in getting rid of common law concepts. Although the Condominium Property Act of 1970 followed civilian concepts and provided that the common property comprised in a scheme shall be held by the owners of units as co-owners in shares proportionate to the quotas,<sup>22</sup> the Apartment Ownership Law as amended now provides that

“the common elements shall be held by the owners of all the condominium parcels as *tenants in common* proportional to their respective share parcels”.<sup>23</sup> (own emphasis)

This amendment was not followed through to the first Schedule of the Law. Rule 17 where the terminology of “co-owners” instead of “tenants in common”, is retained. Again, the Apartment Ownership (Amendment) Act of 1982 contaminated the civilian concept of ownership by referring to the owner of a parcel as the

“registered owner for the time being *having a freehold estate in the unit or where a leasehold estate has been created a leasehold estate in the unit* having an unexpired term of not less than twenty years”.<sup>24</sup>

The notion of estates in property is anathema to a civilian lawyer. The same Act also introduced the common law concept of “unity of seisin”, just to provide that the unity of seisin of two or more parcels shall not destroy servitudes or restrictions implied or created by the law.<sup>25</sup> In civilian terms it could have been stated that the amalgamation of more than one parcel in the hands of one owner does not destroy any limited real right existing between the two parcels.

<sup>17</sup> La RS 9 § 1125 (Supp 1962)

<sup>18</sup> Acts 1979 No 682, 3

<sup>19</sup> Sectional Titles Act 66 of 1972 s 1 sv “owner” and Sectional Titles Act 95 of 1986 s 1 sv “owner”

<sup>20</sup> 7 of 1992 and 44 of 1997

<sup>21</sup> See Van der Merwe “Sectional Titles” in *Sectional Titles, Share Blocks and Time-sharing 1* (1998-2007) 3-26 – 3-26(1)

<sup>22</sup> Condominium Property Act 12 of 1970 s 6(1)

<sup>23</sup> Apartment Ownership Law 11 of 1973 s 9(1) as amended by Apartment Ownership (Amendment) Act 39 of 2003

<sup>24</sup> Apartment Ownership Law 11 of 1973 s 26 as amended by Apartment Ownership (Amendment) Act 45 of 1982 s 12(f) (own emphasis)

<sup>25</sup> S 20

### 3 The adaptation of civilian concepts to accommodate the institution of apartment ownership

#### 3.1 The maxim *superficies solo cedit*

One of the most difficult obstacles the three mixed legal jurisdictions encountered was to breach the maxim *superficies solo cedit*.<sup>26</sup> In terms of this maxim, every thing built on the land forms part of the soil. Thus, although vertical delineations of plots of land are permitted, horizontal division or, more correctly cubic division, of the land and the buildings thereon, and subdivision of the building into various apartments or cubic entities are not allowed.<sup>27</sup>

The fiercest opposition to a breach of the “sacred” maxim was encountered in South Africa. At the time of the promulgation of the first Sectional Titles Act, the most prominent South African legal academic, Professor J C de Wet, combined with the most prominent legal practitioner, F St Tatham, to write a scathing attack on the new legislation.<sup>28</sup> They argued that a building is inseparably fused to the land and that its subdivision into various units is an attempt to divide something that is by its very nature indivisible.<sup>29</sup> They warned that the fragmentation of the ownership of a building would ultimately lead to the destruction of an important economic asset.<sup>30</sup> This view rests on the assumption that the purpose of the subdivision of an apartment ownership building is to physically divide the building into portions that can be removed, leaving what remains in an inhabitable state.<sup>31</sup> Two arguments can be advanced against this view. First, apartment ownership statutes do not envisage physical division of the building but only juridical demarcation of units for exclusive ownership leaving the building physically intact. Second, the land which forms part of an apartment ownership scheme is not – as argued by De Wet and Tatham – put into cold storage devoid of any utility under an apartment

<sup>26</sup> For literature on this maxim, see especially Meincke “Superficies solo cedit” 88 SZ 136; Schmidlin *Die römischen Rechtsregeln: Versuch einer Typologie* (1970) 87; Biermann “Superficies solo cedit” 1895 *Jherings Jahrbücher* 169

<sup>27</sup> Note that by contrast, English law recognized ownership in apartments since early times. See *Doe v Burt* 1 TR 701 99 ER 1330 (1787); *Fay v Prentice* 1 CB 820 ER 769 (1845); Coke *A Commentary on Littleton 48b* (1823)

<sup>28</sup> De Wet & Tatham “Die Wet op Deeltitels” 1972 *De Rebus* 209. See also the scornful attack on the Louisiana Horizontal Property Act by Mashaw 1962-1963 (37) *Tul LR* 505: “Nothing short of a reformulation of the act in terms of concrete policy decisions and civilian law concepts can convert the condominium form into a viable form of property ownership in Louisiana.”

<sup>29</sup> “In wese het die wetgewer die onmoontlike probeer bewerkstellig, naamlik om ’n ding wat van huis uit ondeelbaar is te verdeel.” This idea of a composite entity which is in essence indivisible, stems from the Pandectist doctrine of components (*Bestandteilslehre*) under which certain entities lose their individuality when combined with other entities. This doctrine is to some extent based on the Stoic view entertained in classical Roman law that certain physical compounds like compounds produced by welding (*ferruminatio*) and building (*inaedificatio*) were compounds with a single essence or spirit like a horse or a stone. Since building materials lose their very existence by being merged with the soil, it would be according to this view *contra ius naturale* to divide a building into its constituent parts. See, *inter alia*, Kreller *Römische Rechtsgeschichte* 105; Sokolowski *Philosophie im Privatrecht I* (1902) 111; Kaser *Römisches Privatrecht I* (1971) 382

<sup>30</sup> See Yiannopoulos “Property” in *Treatise* § 35 at 62: “In the light of considerations of economic utility, the law protects the relationship between the principal thing and its accessories and regards them as an economic unit.”

<sup>31</sup> The Pandectists also discarded the Roman law notion that the owner of the building materials remain the *dominus dormiens* of the materials until the building is pulled down again.

ownership regime. Far from destroying the physical unity between the land and the building, apartment ownership statutes allow exploitation of the land and the building to its full economic potential by an intensified community of apartment owners.<sup>32</sup> In short, similar considerations as those which led to the individualization of plots of land on the earth today apply to the subdivision of a building into apartments in order to alleviate the desperate shortage of individual accommodation.<sup>33</sup>

In Louisiana the introduction of the Horizontal Property Act and the later Condominium Acts did not encounter noteworthy opposition on account of the doctrine of *superficies solo cedit*. Nevertheless, a leading Supreme Court judgement had declared that horizontal ownership was illegitimate under a civilian understanding of property.<sup>34</sup> However, academics confirm that horizontal ownership of buildings and ownership of individual apartment was recognized implicitly in the Louisiana Civil Code of 1870.<sup>35</sup> Moreover, earlier Supreme Court authority confirms that the “heresy” of horizontal ownership was allowed in the 1930’s.<sup>36</sup>

Thus the legislators in the three mixed legal systems ignored contradicting maxims and doctrine and opted for a new compound entity on the grounds of social and housing considerations. Freed from the shackles of the maxim *superficies solo cedit*, which permitted only vertical delineation of land, it sanctioned cubic division of buildings and thus combined vertical division with horizontal division of land and buildings attached to the land. In the process, they turned the maxim *superficies solo cedit* upside down because the undivided share in the common property acceded as accessory to the apartment which is regarded as the principal entity.<sup>37</sup>

Several provisions of the statutes under consideration indicate that the legislatures regard a unit or condominium parcel as a new category of immovable property analogous to, and enjoying the same status as, a parcel of land. Under the South African and Sri Lankan statutes a unit is deemed to be land,<sup>38</sup> and the provisions with regard to land registration are applied *mutatis mutandis* to all documents registered or filed in terms of the Act.<sup>39</sup> The boundaries of a section (condominium parcel) must be clearly indicated

<sup>32</sup> Note that the apartment ownership statutes contains safeguards against the destruction of the building by placing a positive duty on apartment owners to maintain their apartments in a proper state of repair, by creating statutory implied reciprocal servitudes of lateral and subjacent support and by structuring most structural parts of the building as common property maintained by the association of apartment owners

<sup>33</sup> The demarcation of parcels of land on the crust of the earth did not lead to the destruction of the earth but to the creation of the most valuable entities that exist today. See in general Paulick “Zur Dogmatik des Wohnungseigentums nach dem Wohnungseigentumsgesetz vom 15 März 1951” 1952 *Archiv Civ Praxis* 420 422, 427; Börner “Das Wohnungseigentum und der Sachbegriff des Bürgerliche Rechtes” *Festschrift Hans Dölle I* 201 203; Hegelau *Das Wohnungseigentum und die Lehre vom wesentlichen Bestandteil* (1954) 112; Van der Merwe “Die Wet op Deeltitels in die Lig van ons Gemeenregtelike Saak- en eiendomsbegrip” 1974 *THRHR* 113 117-120

<sup>34</sup> *Layzone v Emerson* 220 La 951 57 So 2d 906 (1952)

<sup>35</sup> Yiannopoulos “Property” in *Treatise* § 143 at 332

<sup>36</sup> *Price v Town of Ruston* 171 La 985 132 So 653 (1931)

<sup>37</sup> See Van der Merwe *Sectional Titles* 2-8 – 2-10

<sup>38</sup> Sectional Titles Act s 3(4); Apartment Ownership Law s 9(4)

<sup>39</sup> Sectional Titles Act s 3(1); Apartment Ownership Law s 10(3), referring to the Deeds Registries Act 47 of 1937; and the Registration of Title Act 21 of 1998 respectively

on a sectional or condominium plan (analogous to a plan of subdivision)<sup>40</sup> and separate certificates of registered sectional title are issued with regard to each unit.<sup>41</sup> Once registered, units or condominium parcels can be disposed of as separate entities.<sup>42</sup> Several owners are permitted to become co-owners of units<sup>43</sup> and the individual unit may be mortgaged separately.<sup>44</sup> As in the case of land, prior approval of the local authority and approval of the sectional plan by the Surveyor-General is required.<sup>45</sup>

### 3.2 A unitary or dualistic approach?<sup>46</sup>

Depending on whether a clean break with the maxim *superficies solo cedit* is intended or not, apartment ownership systems are divided into unitary or dualistic systems. This division in turn depends on the manner in which ownership of a particular apartment is combined with common or joint ownership of the common parts of the scheme. Under a so-called unitary system only one kind of ownership is involved, namely a modified form of co-ownership. An apartment owner is in the first instance regarded as the co-owner of the land and buildings which comprise the scheme; the exclusive rights of use accorded to each owner with regard to a specific part of the building is merely regarded as an ancillary incident carved out of the co-ownership of the land and the building. Unitary systems, or refinements thereof, have been adopted mainly in legal systems which were unwilling to break decisively with the maxim *superficies solo cedit*, and which considered their notion of co-ownership sufficiently nuanced to accommodate exclusive rights of utilization of a particular section or apartment in a building.<sup>47</sup>

Under a dualistic system, adopted by a substantial majority of the legal systems of the world,<sup>48</sup> apartment ownership is not regarded as a subspecies of co-ownership, but comprises two autonomous species of rights, namely individual ownership of an apartment and common ownership of the land and common parts of the building. These components are combined to form a completely new type of composite ownership. Although construction techniques are based on the assumption that a building cannot exist with-

<sup>40</sup> Sectional Titles Act s 5(5); Apartment Ownership Law s 5A(1)(e) and see also s 3A(1)(j)(vii)

<sup>41</sup> Sectional Titles Act s 12(1)(d) and cf Apartment Ownership Law s 10(2) and (3)

<sup>42</sup> Sectional Titles Act s 2(a) and (b); Apartment Ownership Law s 11

<sup>43</sup> Sectional Titles Act s 15B(4); Apartment Ownership Law s 9(5)(implied)

<sup>44</sup> Sectional Titles Act s 15B(1)(c); Apartment Ownership Law s 9(5)(implied)

<sup>45</sup> Sectional Titles Act s 7 and Apartment Ownership Law s 5(1)

<sup>46</sup> For the division of apartment ownership systems into unitary and dualistic systems, see in general, *inter alia*, Aeby, Gevers & Tombroff *La propriété des appartements. Ses aspects juridiques et pratiques* 3 ed (1983) no 39, 42, 43; Givord & Giverdon *La copropriété* 3 ed (1987) no 157-172

<sup>47</sup> Only a few Western European jurisdictions, namely Switzerland, the Netherlands, Austria, and to a lesser extent Germany, adopted the unitary system. In Switzerland, apartment ownership features in the section of the Swiss Civil Code on co-ownership as *copropriété adaptée*, and the right to the exclusive use of an apartment is classified as either a right approximating ownership or as a peculiar servitude *sui generis*. Weitnauer *Wohnungseigentumsgesetz* 7ed (1988) pre § 1 no 17 describes German apartment ownership as “ein besonders ausgestaltetes Miteigentum”. See Van der Merwe *Apartment Ownership* 24-25

<sup>48</sup> Prime examples of Western European countries that adopted a dualistic approach to the construction of apartment ownership are France, Belgium, Italy and Spain. This is also the case in Canada, Australia and the United States, as well as in most of the Latin American countries. See Van der Merwe *Apartment Ownership* 25

out its structural components, which are commonly classified as part of the common property, most dualistic systems regard individual ownership as the most important element of this new composite ownership. Sociological and psychological considerations,<sup>49</sup> especially the imperative to expand the notion of home-ownership to apartments in buildings, have played an important role in perceiving the individual apartment as the primary object of this new composite right of ownership.

Dualistic systems entail one or more of the following innovations depending on the extent to which traditional legal principles have been breached: (1) a clean break with the maxim *superficies solo credit* so as to create a completely new composite entity consisting of an apartment inseparably linked to an undivided share in the common parts of the scheme;<sup>50</sup> (2) the acceptance of an apartment – and not the land – as the primary element of this new composite entity, thus relegating the undivided share in the common parts to only an ancillary part of the new composite entity; and (3) the creation of a completely new type of composite ownership, namely a combination of individual ownership of an apartment coupled with common ownership of the common parts of the scheme.<sup>51</sup>

All the precursors of the apartment ownership statutes in the three mixed legal jurisdiction under consideration by implication adopted a dualistic approach to apartment ownership. This is the position with the New South Wales statute,<sup>52</sup> which formed the model for the South African and Sri Lankan apartment ownership statutes, as well as with the French statute<sup>53</sup> and the Uniform Condominium Act,<sup>54</sup> which influenced the earlier and later condominium statutes in Louisiana. The South African Sectional Titles Act does so explicitly by expressly providing for apartment ownership “notwithstanding anything to the contrary in any law or the common law.”<sup>55</sup>

### 3 3 Ownership of an apartment?

In the discussion of the dualistic approach it has been noted that not only a novel type of composite entity, but also a new type of composite ownership, had to be devised to accommodate the institution of apartment ownership. The new composite ownership consists of individual ownership of an apartment coupled with ownership in undivided shares – or in Louisianan terms

<sup>49</sup> See Van der Merwe *Apartment Ownership* 16-17

<sup>50</sup> Sectional Titles Act s 1(1) sv “unit”: “‘unit’ means a section together with its undivided share in common property...”; Louisiana Condominium Act § 1121 103(7): “‘Condominium parcel’ means a unit together with the undivided interest in the common elements which is an inseparable component part of the unit” See also Apartment Ownership Law s 9(5) This combination is somewhat bizarre in that a physical object is combined with an abstract co-ownership share

<sup>51</sup> Van der Merwe *Apartment Ownership* 21

<sup>52</sup> 25

<sup>53</sup> Givord & Giverdon *La copropriété* no 167-172; Hébraud «A propos d’une forme particulière de copropriété par appartement» 1938 *Rev trim dr civ* 23-66

<sup>54</sup> See Van der Merwe *Apartment Ownership* 25

<sup>55</sup> Sectional Titles Act 95 of 1986 s 2



“ownership in indivision” – of the common parts of the scheme.<sup>56</sup> In what follows, an attempt will be made to accommodate the notion of ownership of an apartment and joint ownership of the common property with the traditional civilian notions of ownership and co-ownership in undivided shares respectively.

A basic premise of the statutes under consideration is that a purchaser, taking transfer of a unit in an apartment ownership scheme, acquires individual ownership of the apartment.<sup>57</sup> Civilian ownership is in principle the most extensive right with regard to an entity, embracing the entitlements of use, enjoyment, disposal,<sup>58</sup> reclaiming possession and resisting unlawful invasion.<sup>59</sup> However, several provisions in the statutes under consideration restrict these entitlements. The Louisiana Condominium Act caters for use restrictions and limitations upon conveyance, sale, leasing, ownership and occupancy of units in the declaration, the main constitutive document of a condominium scheme.<sup>60</sup> Further restrictions are contained in the bylaws, rules and regulations which the management association is free to adopt or amend, subject to the provisions of the regulation.<sup>61</sup>

Under the Sectional Titles Act and the Apartment Ownership Act, ownership in a section or parcel is in the first place curtailed by implied reciprocal servitudes for subjacent and lateral support, and for the passage or provision of certain services such as water and sewerage through pipes, wires, cables and ducts. These servitudes and their ancillary rights are not only implied in favour of each section (parcel) and the common property (common elements), but also as against each section (parcel) and the common property. These servitudes are further deemed to be incorporated without incorporation in the

<sup>56</sup> The Louisiana Condominium Act § 1121 103(1) encapsulates this notion eloquently: “‘Condominium’ is the property regime under which portions of immovable property are subject to individual ownership and the remainder thereof is owned in indivision by such unit owners” This has been likened to the common ownership of two adjoining owners in respect of a common boundary wall See also Sectional Titles Act s 2(b) and (c)

<sup>57</sup> Sectional Titles Act s 1(1) sv “owner”; Louisiana Condominium Act § 121 103(1) sv “condominium” and (3) sv “unit”: “‘Unit’ means the portion of the condominium property subject to individual ownership” Apartment Ownership Law s 9(5) states that the condominium parcel together with the common elements appurtenant thereto “shall be deemed to be absolutely owned by the person or persons described in the relevant plan as the owner” This corresponds roughly to the common law “freehold estate in a parcel” referred to in s 26 sv “owner of parcel”

<sup>58</sup> The Louisiana Condominium Act § 1122 103 uses the phrase “free merchantability of title to a condominium parcel”

<sup>59</sup> Milton “Ownership” in *Southern Cross* 692 – 699 Reid & Van der Merwe “Property Law: Some Themes and Some Variations” in Zimmermann, Visser & Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 637 659: “In the tradition of the *ius commune*, ownership is still, at the beginning of the twenty first century, viewed as absolute, exclusive and abstract in nature In principle it embraces the power to use (*ius utendi*), to enjoy the fruits (*ius fruendi*), to consume (*ius abutendi*), to possess (*ius possidendi*), to dispose (*ius disponendi*), to reclaim (*ius vindicandi*), and to resist any unlawful invasion (*ius negandi*)” For criticism of this notion, see Van der Walt “The South African Law of Ownership: A Historical and Philosophical Perspective” 1992 *De Jure* 446

<sup>60</sup> Louisiana Condominium Act § 1122 105B(3), (7) and (8)

<sup>61</sup> Louisiana Condominium Act § 1123 102(1) The Sri Lankan Apartment Ownership Law s 20G(4) provides that the management corporation may by special resolution make additional by-laws “for safety and security measures, details of any common property of which the use is restricted, the keeping of pets, parking, floor coverings, garbage disposal, behavior, architectural and landscaping guidelines to be observed by the owners of condominium parcels”



title deeds of the owners affected.<sup>62</sup> In addition, the Apartment Ownership Act makes provision for a wider implied servitude of shelter<sup>63</sup> and a servitude for the uninterrupted access and use of light to, and for, any windows, doors or other apertures existing at the date of registration of the condominium plan.<sup>64</sup> Owners are given the right – to be exercised by the body corporate – to have access to every section or parcel for the purpose of maintenance, replacement or renewal.<sup>65</sup>

The Sectional Titles Act and the Apartment Ownership Law, and the model rules (by-laws) attached to these statutes, contain the following express restrictions on the freedom of an apartment owner to use his apartment: Entry must be allowed to authorized persons at reasonable hours to inspect the apartment and to perform necessary maintenance work on common installations;<sup>66</sup> the apartment must be kept in a state of good repair;<sup>67</sup> the apartment may not be used or allowed to be used in such a way as to cause a nuisance or danger to any other occupant of the building,<sup>68</sup> or to bring the good name of the scheme into disrepute<sup>69</sup> or to cause an increase in the insurance premium payable in respect of the building;<sup>70</sup> animals may not be kept in the apartment without the written consent of the executive board of the scheme;<sup>71</sup> and the apartment may not be used for another purpose as that indicated in the constitutive documents of the scheme.<sup>72</sup> Restrictions on the right of disposal under the Sectional Titles Act are that the apartment may not be disposed of unless all assessment due has been paid,<sup>73</sup> and no other interdicts or caveats have been served on the apartment;<sup>74</sup> that the management association must be notified forthwith of any alienation or charge on the apartment;<sup>75</sup> and that the apartment may not be disposed of independent of its appurtenant undivided share in the common property.<sup>76</sup>

<sup>62</sup> Sectional Titles Act ss 28(1)(a)(i) and (ii), 28(1)(b)(i) and (ii), 28(2)(a) and 30; Apartment Ownership Law s 13(1), (2) and (6) and 14

<sup>63</sup> Apartment Ownership Law s 13(3)

<sup>64</sup> Apartment Ownership Law s 13(7)

<sup>65</sup> Sectional Titles Act s 28(2)(b) and Apartment Ownership Law s 13(3), (5) and 14

<sup>66</sup> Sectional Titles Act s 44(1)(a); Apartment Ownership Law Second Schedule rule 2(a)

<sup>67</sup> Sectional Titles Act s 44(1)(c); Apartment Ownership Law Second Schedule rule 2(c) The Louisiana Condominium Act § 1123 107 provides that each unit owner is responsible for maintenance, repair and replacement of his unit

<sup>68</sup> Sectional Titles Act s 44(1)(e); Apartment Ownership Act Second Schedule rule 2(e) The Louisiana Condominium Act § 1122 105B(3) provides that the condominium declaration may contain provisions on the purpose or purposes for which the condominium property and units are intended

<sup>69</sup> Annexure 8 to Sectional Titles Act rule 68(1)(i); Apartment Ownership Law Second Schedule rule 6(a)

<sup>70</sup> Annexure 9 to Sectional Titles Act rule 9 *Cf* Apartment Ownership Law Second Schedule rule 6(b) which prohibits an owner from using as fuel any substance or material which may give rise to smoke or fumes or obnoxious smells

<sup>71</sup> Annexure 9 to Sectional Titles Act rule 1 Under Apartment Ownership Law Second Schedule rule 6(d) an owner is not allowed to keep any animal on his unit or the common elements which may cause annoyance to any other owner

<sup>72</sup> Sectional Titles Act s 44(1)(g); Apartment Ownership Law Second Schedule rule 2(f)

<sup>73</sup> Sectional Titles Act s 15B(3)(a)(i)(aa)

<sup>74</sup> This is the implication of Sectional Titles Act s 15A(3) *in fine* See Van der Merwe *Sectional Titles* 10-12(1)

<sup>75</sup> Sectional Titles Act s 44(1)(f); Apartment Ownership Law Second Schedule rule 2(g)

<sup>76</sup> Sectional Titles Act s 16(3); Apartment Ownership Law s 11 This is also implied by Louisiana Condominium Act §1121 103(7): “‘Condominium parcel’ means a unit together with the undivided interest in the common elements which is an *inseparable component part* of the unit” (own emphasis)

These multiple limitations on the entitlements of ownership have caused critics of apartment ownership statutes to conclude that an apartment owner does not acquire civilian ownership of an apartment but only a “nebulous something” closer to the estate of an English law leaseholder.<sup>77</sup> The truth is, however, that the absolutist perception of ownership<sup>78</sup> has to a considerable extent been hollowed out since the days of Grotius<sup>79</sup> and the Pandectists.<sup>80</sup> Social and political changes in Europe and the jurisdictions concerned – and especially the emergence of new forms of ownership like ownership of airspace, property time-sharing, nature conservation areas and apartment ownership – has led to a radical reconceptualisation of the notion of ownership. The influence of social, economic and political forces led to a reformulation of the traditional notion of ownership, which no longer regards ownership as autonomous and individualistic, but recognizes that ownership carries with it social obligations and that the concept needs to be broken down and rendered more amenable to comply with the requirements of the day.<sup>81</sup> This is accompanied by an understanding that the content of ownership is determined by the special characteristics of the object to which it pertains.<sup>82</sup>

The characteristic features of apartment ownership are the following: the object of apartment ownership is not indestructible land as in landownership but apartments which form part of a destructible building; the apartments in an apartment ownership building are structurally interdependent and not individualised parcels of land; the community life in an apartment building is much more intensified than the community life of a group of neighbouring landowners; and the community of apartment owners is more or less permanent in view of the strict requirements for its dissolution.<sup>83</sup>

In my submission, these peculiar features of apartment ownership justify more intensive limitations and restrictions on the powers and entitlements of an apartment owner with regard to his apartment. Although this implies a special type of ownership, coloured by the characteristic features of the

<sup>77</sup> See De Wet & Tatham 1972 *De Rebus* 205: “Hierdie belang word vleënd 'n 'eenheid' of 'deel' genoem waarop by 'geregistreerde titel' het ooreenkomstig die bepalings van die Wet, maar inderwaarheid het hy slegs 'n newelagtige iets onderworpe aan die gebreke waarmee hierdie wet ryklik bedeel is” (“This interest is referred to in flattering language as a ‘unit’ or ‘section’ over which he acquires ‘registered title’ by virtue of the provisions of the Act, but in reality he acquires merely a nebulous something subject to the deficiencies with which the Act is richly endowed”)

<sup>78</sup> In terms of which ownership is regarded as an absolute, exclusive, and abstract right

<sup>79</sup> *Inleidinge* 2 3 10: “Volle is den eigendom waer door iemand met de zaak alles mag doen nae zijn geliefte ende t'sijnen bate wat by de wette onverboden is”

<sup>80</sup> See eg Von Savigny *System des heutigen römischen Rechts* I 367; Yiannopoulos “Property” in *Treatise* § 9 at 16: “The predominant property right is ownership, which is a *complete, free, and exclusive right*”

<sup>81</sup> See Yiannopoulos “Property” in *Treatise* § 5 at 8: “In the long history of civil law property in western civilization, simple unencumbered ownership was known almost exclusively at the beginning and end of the Roman period and again after the French Revolution”

<sup>82</sup> See Van der Merwe, De Waal & Carey Miller “Property and Trust Law” in Blanpain & Verbeke (eds) *International Encyclopaedia of Laws* (2004) 160-165 and the literature cited in the footnotes. See also for Louisiana, Yiannopoulos “Property” in *Treatise* § 5 at 9: “Modern legislation and judicial practice exhibit a distinct tendency toward limiting the intensity of ownership in the interest of all but, at the same time, toward extending ownership to new forms of wealth. These developments tend to indicate that ownership in contemporary civil law systems, is an *exclusive* rather than an *absolute* right, with two sides to it, one *individual* and the other *social*”

<sup>83</sup> See Van der Merwe 1974 *THRHR* 122-124

institution, it still remains genuine ownership.<sup>84</sup> Consequently, the genuine ownership that an apartment owner acquires in terms of a dualistic system differs from traditional land-ownership in that it is subject to restrictions inherent in apartment ownership flowing naturally from the structural and social interdependence of the apartment owners. Apartment ownership should therefore not be degraded to a lesser limited real right or a “nebulous something”, but should be placed on the same footing as the ownership of land. Moreover, unlike limited real rights like lease and leasehold, apartment ownership is residual in the sense that it is without term and survives the expiry of all lesser rights.<sup>85</sup> Consequently, condominium is distinguished from the far-ranging limited real rights of *superficies* and *emphyteusis* still recognised in Louisiana.<sup>86</sup> Finally, the maxim *nemini res sua servit* does not apply in the case where all apartments belong to the same person. If apartment ownership was a limited real right, such occurrence would lead to the extinction of the limited real right, which is not the case.<sup>87</sup>

If apartment ownership is regarded as genuine ownership, it would be easier for courts to invalidate draconian provisions contained in the bylaws or rules of a particular scheme, on the ground that these are in conflict with the fundamental rights of an apartment owner. Thus German and Canadian courts have, *inter alia*, invalidated provisions containing an absolute prohibition on the keeping of pets.<sup>88</sup> This would also invalidate bylaws which allow owners who consistently commit flagrant breaches of bylaws to be excluded from the scheme.<sup>89</sup> In final analysis, the primary aim of apartment ownership is to satisfy the psychological and social need of most people to own their own home.<sup>90</sup> By placing apartment ownership and house ownership on a par, the dream of home-ownership becomes a reality for a greater section of the population. Consequently, property developers and local building authorities should be encouraged to raise the standards for apartment ownership build-

<sup>84</sup> This is in line when the idea of Reid & Van der Merwe “Property Law” in *Mixed Legal Systems in Comparative Perspective* 659: “[C]ertainly the statutory restrictions on ownership are today so far-reaching as to call into question the nature of the underlying right. Yet if the content of ownership is different from before, the concept remains the same. For the very idea of restriction presupposes the idea of absoluteness, and unless ownership is to be reduced merely to a fixed list of permissible acts – which seems hardly possible – it must continue to be defined, by exclusion, as a right to use property in any way not prevented by law or by agreement.”

<sup>85</sup> See Cowen “New Patterns of Landownership” in *Trust Bank Series of Continuing Legal Education Lectures (Law Students Council, University of the Witwatersrand)* (1984) 72; Reid & Van der Merwe “Property Law” in *Mixed Legal Systems in Comparative Perspective* 639-640: “Ownership is a residual right in the sense that it is without term and survives the expiry of all lesser rights; and it is an absolute right in the sense that, in principle it is enforceable, in respect of the property (or ‘legal object’), against all other people (or ‘legal subjects’) Other real rights are absolute but not residual.”

<sup>86</sup> See Yiannopoulos “Property” in *Treatise* §§ 224 and 225 at 428-435

<sup>87</sup> This is acknowledged expressly in Apartment Ownership Law s 20

<sup>88</sup> For Germany, see Bärmann, Pick & Merle *Wohnungseigentumsgesetz* 7 ed (1997) § 13 no 58-66, § 15 no 8-13. For Canada, see Oosterhoff, Anger & Honsberger *Law of Real Property II* 2 ed (1985) 1899-1902.

<sup>89</sup> For the inclusion of such provisions in amongst others the German *Wohnungseigentumsgesetz*, see Van der Merwe *Apartment Ownership* 105-107 and Van der Merwe & Muñoz-Argüelles “Enforcement of Conduct Rules in a Condominium or Apartment Ownership Scheme” in Arkan & Yongalik (eds) *Liber Amicorum/Festschrift für Tuğrul Ansay* 247 259-263

<sup>90</sup> See Van der Merwe *Apartment Ownership* 16-17. According to Weitnauer *Wohnungseigentumsgesetz* 7 ed (1988) preface § 1 no 11a *in fine*, this was the most important reason for introducing apartment ownership in post-war Europe which suffered from a severe housing shortage

ings and ensure that apartments are adequately isolated and insulated. Once it is possible to distinguish at a distance an apartment ownership building from a mere rental building, a sectional owner would be more enthusiastic to call his apartment his castle.<sup>91</sup>

### 3.4 Collective ownership in common parts of the scheme

Under a dualistic system, an apartment is inextricably linked to an undivided share in the common parts of the scheme in order to create a somewhat bizarre, novel composite entity. Likewise, the ownership of an apartment is inextricably linked to a kind of collective ownership of the common parts of the scheme to form an equally novel type of composite ownership.<sup>92</sup> Although the collective ownership is referred to as ownership in undivided shares,<sup>93</sup> *ownership in indivision*,<sup>94</sup> or undogmatically as *tenancy in common*,<sup>95</sup> the community of property created between apartment owners with regard to the common parts differs materially from the traditional civilian institution of *communio*, co-ownership or ownership in undivided shares (*pro indiviso*).<sup>96</sup> Under a system of *communio*, co-owners are interconnected in an individualistic relationship which guarantees the greatest possible freedom to the single co-owners. Co-owners all pursue their own individual interests. There is no overriding common interest which binds them together. In line with the maxim *communio est mater rixarum*, dissolution of the relationship whenever friction arises is a normal occurrence.<sup>97</sup> By contrast, the community of property under apartment ownership statutes are universalistic in character. The rights of the individual common owners are restricted in the interest of the apartment ownership community. The use and enjoyment of the common parts of the scheme are regulated by statute, by-laws and resolutions taken at general meetings. The community of property serves the common interests of the apartment owners and is aimed at preserving the relationship amongst them for as long as possible.<sup>98</sup>

The main differences between traditional co-ownership and the community of the common parts of the scheme in terms of the apartment ownership statutes are the following. First, any ordinary co-owner may at any time unilaterally demand partition of the common property and proportional division of the

<sup>91</sup> See also Van der Merwe "Is Sectional Ownership True Ownership?" 1992 *Stell LR* 134-136

<sup>92</sup> See also Quienalty 1959 (19) *La LR* 672, 674; Theriot 1974-1975 (35) *La LR* 1206

<sup>93</sup> Sectional Titles Act s 1(1) sv "undivided shares" and "unit"; s 2(c): "the owners of such sections shall own such common property in undivided shares in accordance with the provisions of this Act"; Louisiana Condominium Act § 1121 103(7) and § 1121 105: "undivided interest"

<sup>94</sup> Louisiana Condominium Act § 1121 103(1) and § 1122 112C

<sup>95</sup> Apartment Ownership Law s 9(1)

<sup>96</sup> The Roman concept of ownership *pro indiviso* or undivided ownership is explained in *Digesta XIII* 6 5 15: "et ait duorum quidem in solidum dominium vel possessionem esse non posse: nec quemquam partis corporis dominum esse, sed totius corporis pro indiviso pro parte dominium habere" ("and he says that ownership or possession cannot vest simultaneously in its entirety in two persons: and that someone is also not the owner of a portion of corporeal property, but that he owns the entire corporeal property in undivided shares")

<sup>97</sup> See in general, Van der Merwe *Sakereg* 2 ed (1989) 378-394; Kleyn & Wortley "Co-Ownership" in *Mixed Legal Systems in Comparative Perspective* 703-734

<sup>98</sup> See Van der Merwe *Sectional Titles* 2-16

property amongst the co-owners.<sup>99</sup> By contrast, the common property regime under an apartment ownership scheme is in principle permanent, and can only be dissolved on termination of the scheme.<sup>100</sup> Second, the undivided share of a traditional co-owner entitles him to use the common property freely and to alienate his share whenever he pleases. An apartment owner, by contrast, may make only reasonable use of the property<sup>101</sup> and he cannot dispose of his undivided share in the common property without the apartment to which such share is inextricably linked.<sup>102</sup> Third, under a co-ownership regime, management of the common property is left to the whims of the individual co-owners, who have reciprocal *veto* rights.<sup>103</sup> Unanimity is required for administrative measures. Under an apartment ownership scheme, a permanent administrative body is established by the legislature to manage the common property by resolutions taken by owners at general meetings, and administrative measures are authorized, normally by majority vote.<sup>104</sup> Fourth, every traditional co-owner has an abstract share in the object of co-ownership. No physical part of the common property is linked to a specific undivided share and no co-owner is entitled to claim any portion of the common property exclusively for himself.<sup>105</sup> Under an apartment ownership scheme, the common property is not simply divided *in abstracto* between the co-owners, but realized, concretized and localized by their inextricable connection to the ownership of the apartment concerned.<sup>106</sup> Consequently, it is not the undivided share in the common property, but the apartment ownership parcel consisting of an apartment coupled with its undivided share in the common property, for which a title deed is issued.<sup>107</sup> This unit can be mortgaged<sup>108</sup> and owned in co-ownership by two or more persons.<sup>109</sup>

<sup>99</sup> Van der Merwe *Sakereg* 386; Kleyn & Wortley "Co-Ownership" in *Mixed Legal Systems in Comparative Perspective* 725

<sup>100</sup> In terms of ss 48 and 49 or s 17(5) of the Sectional Titles Act, this can only happen where the building owned collectively is destroyed or deemed to be destroyed and the owners unanimously decide not to rebuild, or where the owners unanimously agree to dispose of the scheme in its entirety to a single purchaser. See also Apartment Ownership Law s 20Q; Louisiana Condominium Act § 1122 108C: "The common elements shall remain undivided and shall not be subject to partition, except with respect to that part or all of the condominium property that has been withdrawn from the provisions of this Part" Termination of the scheme and consequent withdrawal of the scheme from the condominium regime can in terms of § 1122 112 occur "by the consent of all or a percentage of the unit owners and mortgage creditors as provided in the condominium declaration" See also Quienalty 1959 (19) *La LR* 672: "By their very nature and destination, these common parts must be held in forced indivision"

<sup>101</sup> Sectional Titles Act s 44(1)(d); Apartment Ownership Law Second Schedule rule 2(d) Further restrictions are imposed in the by-laws of the scheme. See eg Sectional Titles Act Annexure 9 rules 1-9; Apartment Ownership Law Second Schedule rules 2(dd) and 6(c)

<sup>102</sup> See in general Van der Merwe *Apartment Ownership* 82-83, 85-86, 89-92; Sectional Titles Act s 16(3); Apartment Ownership Law s 11

<sup>103</sup> Originally, the *veto* applied even with regard to measures which were necessary for the maintenance of the property, with the result that the co-ownership regime had to be dissolved where agreement could not be reached on appropriate maintenance measures

<sup>104</sup> See Sectional Titles Act s 36; Apartment Ownership Law s 20B

<sup>105</sup> See Van der Merwe *Sakereg* 378

<sup>106</sup> Liver "Das Miteigentum als Grundlage des Stockwerkseigentum" 1963 *Gedächtnisschrift Ludwig Marxer* 143 152; Cowen "The Sectional Titles Act in Historical Perspective: an Analysis and Evaluation" 1973 (6) *CILSA* 1; Seifert *Die Rechtsnatur des Wohnungseigentums* (1954) 52

<sup>107</sup> Sectional Titles Act s 12(1)(d); Apartment Ownership Law s 10(1)

<sup>108</sup> Sectional Titles Act s 15B(1)(b) and (c); Apartment Ownership Law s 9(5)

<sup>109</sup> Sectional Titles Act s 15B(4)

These differences indicate that common ownership of the common parts of the scheme should be classified as a type of “bound” common ownership (*gebonde mede-eiendom*)<sup>110</sup> with affinities with the property regime of spouses married in community of property and the common property of adjoining owners of a common wall.

### 3.5 Membership of a management association

We have already seen that apartment ownership statutes create a firm management structure to administer the common parts of the scheme. The peculiar type of community of property created under an apartment ownership scheme cannot function properly without a permanent management structure whereby members can protect their common interests. Through membership of the association, owners acquire the right to take part in general meetings to consider policy and to elect an executive committee to manage the daily operation of the scheme.

It is to the lasting credit of Johannes Bärmann, one of the fathers of the German *Wohnungseigentumsgesetz*, that he linked the property aspects of apartment ownership with its associational aspects into a threefold unity.<sup>111</sup> Thus apartment ownership consists of three components namely (1) individual ownership of an apartment, (2) joint or common ownership of the common parts of the scheme, and (3) membership of an incorporated or an unincorporated management association. Consequently the purchaser of an apartment not only acquires ownership of his or her apartment, but he or she simultaneously acquires joint ownership in the common parts and becomes a member of the apartment ownership’s management association.

Under the Louisiana Condominium Act, the statutory association created to control and administer the scheme must be organized as a profit or nonprofit corporation or an unincorporated association.<sup>112</sup> Under the Sectional Titles Act and the Apartment Ownership Law, the management corporation, the body corporate, is a *universitas* with legal personality.<sup>113</sup> However structured, this association has its own peculiar characteristics and differs from ordinary voluntary associations such as sport or social clubs and co-operative societies<sup>114</sup> in the following respects:<sup>115</sup>

<sup>110</sup> For the distinction between “free” and “bound” co-ownership, see Kleyn & Wortley “Co-Ownership” in *Mixed Legal Systems in Comparative Perspective* 705

<sup>111</sup> For the notion of a threefold unity (*Dreigliedrige Einheit, Trinität*), see Bärmann et al *Wohnungseigentumsgesetz* Introduction no 19 and 45, § 3 no 85, § 5 no 79, § 6 no 1, § 7 no 17 and 30, and § 8 no 39 See also Pascual *El derecho de propiedad horizontal. Un esajo sobre su estructura y naturaleza juridica* (1974) 207, 285

<sup>112</sup> Condominium Act § 1123-101 and § 1121 103(8)

<sup>113</sup> See Van der Merwe *Sectional Titles 2-22* for South Africa

<sup>114</sup> See in general for South Africa, Bamford *The Law of Partnership and Voluntary Association in South Africa* 3 ed (1982)

<sup>115</sup> See Van der Merwe *Sectional Titles 2-20*; Asser, Mijnsen, Davids & Van Velten *Mr C. Assers’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* 3 II Zakelijke Rechten no 528; Den Tonkelaar “Geld thans het algemene verenigingsrecht van boek 2 BW voor het vereniging van appartements-eigenaren?” 1979 *WPNR* 128 See also Pienaar “Die Beheersregpersoon by Deeleiendom – ’n Noodsaaklike Rariteit” 1983 *THRHR* 62



First, membership of the management association is not the only legal relationship between the members. They are also owners of apartments in the scheme and collective owners of the common parts of the scheme. Second, membership of the management association is inextricably linked to ownership of an apartment.<sup>116</sup> A non-owner cannot become a member of the association and an owner cannot revoke his membership.<sup>117</sup> Membership expires only when the parcel is transferred to a successor-in-title or if the management association is dissolved on termination of the scheme.<sup>118</sup> Third, membership of the association is not voluntary. Once an apartment is registered in the name of a person, that person automatically becomes a member of the body corporate.<sup>119</sup> Fourth, unlike in limited companies, the legal personality of the association does not extend far enough to shield its members from personal liability for the unsatisfied debts of the association.<sup>120</sup> Fifth, unlike in ordinary associations, the default rule of equal voting rights can be altered by any member at any time to a vote weighted according to the quota of each apartment.<sup>121</sup> Sixth, the management association can be dissolved only by an application to court.<sup>122</sup> Finally, the management association can represent the owners in judicial proceedings against outsiders or against members of the association.<sup>123</sup>

#### 4 Conclusion

The main features of apartment ownership were introduced almost seamlessly into the existing fabric of the civilian property law existing in the three mixed legal systems. This was done by replacing common law terminology like “freehold” and “joint tenancy” with the civilian concepts of “ownership” and “co-ownership” or “ownership in undivided shares” or “undivided ownership”. The main achievement is, however, the adaptation of the traditional civilian concepts of ownership and co-ownership to fit the particular mould required for the novel institution of apartment ownership. One civilian stronghold had to crumble, namely the maxim *superficies solo cedit*, which

<sup>116</sup> Sectional Titles Act s 36(1); Apartment Ownership Law s 20B(1); Louisiana Condominium Act § 1123 101: “The membership of the association at all times shall consist exclusively of all the unit owners...” See also § 1121 103(8)

<sup>117</sup> Under the Louisiana Condominium Act § 1122 105B(4) the declaration of a condominium can contain procedures “whereby a unit owner may convey his unit to the association and thereby release himself of any further obligation for the common expenses of the condominium” It is not clear whether this would automatically terminate the membership of such owner

<sup>118</sup> Sectional Titles Act s 36(2)

<sup>119</sup> Sectional Titles Act s 36(1)

<sup>120</sup> Sectional Titles Act s 47; *In re: Body Corporate of Caroline Court* 2002 1 All SA 49 (A) para 8 Apartment Ownership Law s 29K(1) This liability is subsidiary in the sense that the assets of the association must first be exhausted before the members can be sued This fundamental principle of apartment ownership statutes has in the case of the Sectional Titles Act been eroded by a 2005 amendment of s 47 which provides for the non-joinder of members as joint judgment debtors where the particular member has already satisfied the same debt The same result seems to follow from s 29K(1) of the Apartment Ownership Law

<sup>121</sup> The quota of each apartment is either related to the proportional floor area or the proportional par value of a particular apartment to other apartments in the scheme

<sup>122</sup> Sectional Titles Act s 48(6); Apartment Ownership Law s 20Q(14)

<sup>123</sup> Sectional Titles Act s 36(6); Louisiana Condominium Act § 1123 102(4)



impeded the cubic subdivision of a building into individual, privately owned apartments. In this instance the historic maxim and the interrelated dogma of indivisible components had to retreat against the onslaught of social and legal policy considerations. In the process, the maxim was turned upside down in order to shape an institution which could alleviate the desperate shortage of accommodation and facilitate the extension of home-ownership to a larger sector of the population. The content of ownership of an apartment was reshaped to fit the peculiar characteristics of the object of such ownership, namely a destructible building and structurally interdependent apartments in an intensified community. Again, the individualistic characteristics of co-ownership of the common parts of the scheme had to be restructured to achieve a stable and harmonious community of owners, managed and administered by an efficient central management body. Finally, the characteristics of the primarily common law institutions of corporations and voluntary associations had to be adapted to produce an essentially self-governing management structure consisting of all the apartment owners in the scheme.

### SUMMARY

This study investigates the reformulation of the concept “ownership” in three mixed jurisdictions, in order to accommodate and legitimize the institution of apartment ownership in legal systems where the maxim *superficies solo cedit* militated against the possibility of separate ownership. Social and legal policy considerations compelled South Africa, Sri Lanka, and Louisiana to promulgate statutes, based on common law legislation and accompanied by “alien” terminology, to regulate apartment ownership. The mixed jurisdictions concerned were confronted with the difficult task of clearing these newly imported laws of inappropriate vocabulary. Moreover, they had to incorporate the novel institution of apartment ownership into a civilian property law structure, which law is generally regarded as an unassailable domain of civilian jurisprudence in mixed legal systems. This study thus aims to illustrate how the civilian concepts of accession, ownership and co-ownership, and the law relating to voluntary associations, have been transformed, qualified and/or adapted to accommodate the novel institution of apartment ownership.

In order to accomplish this objective, the significance and circumvention of the maxim *superficies solo cedit*, which permitted only vertical delineation of land, are discussed. Thereafter, the choice between the adoption of a unitary or dualistic system of apartment ownership is briefly explained in an attempt to shed light on the nature of the new concept of composite ownership – consisting of individual ownership of an apartment coupled with ownership in undivided shares of the common parts of the scheme – resulting from the need to recognise apartment ownership. Finally, the process whereby voluntary associations had to be adapted to produce an essentially self-governing management structure consisting of all the apartment owners in the scheme, is traced in an effort to identify the defining characteristics and legal nature of these bodies.