GENERAL CLAUSES FOR THE PROTECTION OF MINORITY SHAREHOLDERS IN THE SCANDINAVIAN COMPANIES ACTS

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I. INTRODUCTION

One of the most important problems of modern company law is that of affording protection to single shareholders and minority shareholders against undue use of power by majority shareholders.[1] The more company law develops, the more the questions of minority protection come into the forefront. It has been said that "the relationship between majority and minority is the touchstone of progress in every system of company law. The more refined a system of company law becomes, the clearer is the definition of the rights of the minority".[2]

This situation is connected with many features of the evolution of society. We have long ago passed the "Gründer" period of the 19th century and the time before the first world war, when attention was focused on the questions pertaining to the formation of a company, and in particular on preventing bogus companies and securing the interests of creditors. Nowadays big new enterprises are no longer being formed to the same extent as before, and, above all, it seldom happens that a large enterprise is formed by means of capital contributions drawn from a large number of persons. At the same time, we can observe a continuous development towards larger business units through mergers and other similar measures, and in these connections minority protection becomes one of the central problems.

The attitude towards social questions in general affects company law as well. When efforts are made to protect the weak individual in society, it is only natural to find concern for a corresponding protection of the weak shareholder against abuse from the strong shareholders. It is hardly a coincidence that particular interest

[1] The term "company" is used throughout in the sense of "company limited by shares", "stock corporation", *société anonyme, Aktiengesellschaft, aktiebolag,* or *aktieselskap.*

[2] Schmitthoff, "The rule of majority and the protection of the minority in English Company Law", *La società per azioni alla metà del secolo XX,* Padua 1962, vol. 2, p. 682.

has been paid to the problems of minority shareholders in those countries where social security has been carried a long way, as it has in Scandinavia.

Mention should further be made of a point of view whose significance has been particularly stressed in connection with the work on the new German Companies Act.[3] If an effort is made to promote investment of savings in shares—"people's capitalism" —and thus to achieve a wider distribution of share ownership, the position of the individual shareholder and of a minority of shareholders must be safeguarded as far as possible. It is also of great importance to the companies themselves that they should be able to raise further capital, at least in part, by turning to their own shareholders and perhaps also to a larger public by way of new issues of shares or the like.

Although the aim of protecting the minority is clear, there is uncertainty as to what means should be applied to achieve the goal. Disproportionate minority protection creates obstacles to an effective running of company affairs. It may weaken the position of the creditors, and may thus limit the company's opportunities in the credit market. It may even lead to extortion of the majority by the minority, that is to say, to "oppression of the majority". It is hardly an exaggeration to say that the balancing of majority power and minority interest is an eternal question which in some form or other, and in various connections, will always confront those who have to tackle the problems relating to companies.

Setting the limits of majority power is a matter not of drawing a single line of demarcation but of tracing a number of frontiers which sometimes cross one another. There may be mandatory rules relating to the rights of shareholders—such as the right to vote, or the right to a dividend—rules on majority voting, rules for the general meetings, rules on minority representation on the board of directors and among the auditors, rules applicable to liability for damage, and rules pertaining to the law of procedure, etc. Some minority rights may be exercised by any one shareholder irrespective of the amount he has invested in the company. In the Scandinavian countries this is the case, for instance, with the right to bring an action against an unlawful decision of the general meeting. The exercise of other rights, however, may presuppose that the minority in question represents a certain mini-

[3] See, e.g., the *Bundesregierungsproposition* submitted to the Bundestag on June 13, 1960. *Drucksache* 1915, p. 93.

mum of the invested capital. Such is the case with the right to demand an extraordinary general meeting. Some provisions are cast with a specific situation in mind; such are the provisions regarding disqualification of shareholders from voting on certain matters at a general meeting. Other provisions again are general, and may be applied in a number of different situations.

In the Scandinavian countries, it is a fairly new feature to have, in addition to the more special provisions for minority protection, complementary general clauses which, so to say, fill the gaps left by those provisions. The first express general clause of this type in Scandinavian legislation was introduced in Finland in 1935 when that country's Companies Act of 1895 was supplemented with a number of provisions on minority protection. This general clause (sec. 30, subsec. 4), the model of which is to be found in German law, has the following tenor:

> The provisions of paragraph 3 [i.e. that a decision of the general meeting which is materially wrong may be contested in court] shall apply equally with regard to decisions by the general meeting whereby those shareholders who have carried the decision have ensured for themselves or a third party a manifestly unjustifiable benefit to the detriment of the other shareholders. . . .

This provision is still in force.

In the Swedish Companies Act of 1944 we find the following provision (sec. 76, subsec. 2) which in fact, but not in form, is close to the Finnish general clause:

> Furthermore, a general meeting of the company may not, unless the provisions stated elsewhere in this Act or in the company's articles of association permit otherwise, decide upon such use of the company's assets or upon any other such measure as will obviously give to certain shareholders advantages to the detriment of the company or of the other shareholders.

The present Danish Act, which dates from 1930, contains no equivalent of these provisions. However, in a draft of a new Companies Bill, dating from 1964, there is included a provision (sec. 73) which is essentially similar to the Finnish one. The text is as follows:

> A decision of the general meeting whereby in abuse of their right of voting shareholders have ensured for themselves or a third party a manifestly unjustifiable benefit may by a court ruling be declared void in a suit brought by a shareholder who has not voted in favour of the decision.

> Upon demand by the petitioner the court may instead order the company to redeem the petitioner's shares. Failing amicable agreement the sum to be paid by the company in redemption of the shares shall be fixed in accordance with the provisions of sec. 72, subsec. 2.

The Norwegian Act of 1957 contains a general clause, the scope of which is in part different from the other provisions so far mentioned. The Norwegian provisions (sec. 110, subsecs. 1 and 2), which have their models in English law, run as follows:

> Upon demand by a shareholder a company shall be dissolved by a court ruling if in detriment to the petitioner other shareholders have acted in a manner manifestly contrary to the assumptions underlying the formation of the company, and if in consequence thereof dissolution is justifiable on strong grounds of equity. If the company's share capital exceeds 100,000 kroner, the demand must be made either by shareholders representing not less than ten per cent of the company's share capital or by such number of shareholders as is stated in section 122, paragraph 2. The withdrawal of one shareholder, or the fact that he has disposed of his shares since the action was brought, shall not prevent the other shareholders from continuing the action.
>
> Instead of dissolution the court may order the company, so far as possible, to redeem the shares of the petitioners and to repay their shares in accordance with sec. 38, subsec. 2, para. 1, if such is demanded by the petitioners. The sum of redemption shall be fixed in the court order. If the redemption is not effected within the period stated in the court order, and the non-performance is not due to the petitioners themselves, the court shall upon request declare the company dissolved.

In what follows the quoted provisions of the Finnish, Swedish, Danish and Norwegian Acts will be analysed and compared in some detail. For the sake of brevity, the Finnish clause will be referred to as F.

II. THE FINNISH GENERAL CLAUSE

1. The idea of incorporating a general clause in the Finnish Companies Act was first presented in 1931 at the fifteenth Nordic Conference of Jurists by Professor L. Cederberg when introducing a discussion on minority protection in companies. His proposal

was that "such decisions by a general meeting as are intended to promote interests foreign to the benefit and the purpose of the company, whether to the advantage of the voters themselves or of any third party" should be annulled.[4] The chief inspiration of this proposal had been German law. During the somewhat lame discussion which followed Cederberg received no real support for his idea. The Swedish co-reporter, Mr. Treffenberg, more or less rejected it.

Two years later the Finnish Government entrusted Cederberg with the task of drafting provisions on minority protection to be inserted into the Finnish Companies Act of 1895. In the draft submitted to the Ministry of Justice one year later, the general clause held a central position.[5] As in the proposal of 1931 it was in the form of a rule regarding the annulment of decisions, and it was to be inserted among the other provisions on that subject in sec. 30 (subsec. 4, as compared with subsec. 3). Under this draft rule, shareholders would have the right to contest decisions by the general meeting through which the shareholders carrying the decision had improperly ensured for themselves or any other person special advantages at the expense of the other shareholders. It should also be noted that the draft included a particular provision in sec. 30 a to the effect that upon the demand of a minority the courts were to have the power to reduce unreasonably high fees payable to the members of the board of directors, etc.

At the request of the Ministry of Justice Cederberg's draft, altered only in minor respects with regard to the general clause, was submitted to the Supreme Court for an advisory opinion. The Court offered no objections to the general clause, and it was included in a Government Bill submitted to Parliament in the following year.[6] The text had then been reformulated in certain respects, and had received its present wording. It is not known on whose initiative these changes were made.

The reformulation consisted in the replacement of the words "have unduly ensured for themselves ... special advantages" by the phrase "have ensured for themselves a manifestly unjustifiable benefit". In Parliament the general clause did not give rise to a debate, and it was passed unaltered. It remains to mention that Cederberg's proposal for provisions regarding directors' fees, etc.,

[4] See *Förhandlingarna vid det femtonde nordiska juristmötet*, 1931, Appendix III, p. 1.

[5] See *Lakimies* 1934, pp. 1 ff.

[6] 1935 Rd (Parliament) no. 29.

had already been deleted from the draft submitted to the Supreme Court by the Ministry of Justice, a procedure against which the Court protested in vain. The contention of the Ministry of Justice was that there was no need for a separate provision relating to directors' fees in addition to the general clause.

2. Before dealing with the content of F it seems expedient to consider its relationship to the so-called *principle of equality*. This principle is to the effect that a general meeting, or any other company organ, must not make any decision which would change the existing mutual relationship between the shareholders with respect to their shares in the company. In discussions on the general clause, the principle of equality is often mentioned, and it seems that certain authors would not wish to keep separate the two principles involved.[7]

In Finland, it has been held that the principle of equality was already in force before the revision of minority protection effected in 1935.[8] For this view legislative support has been drawn from, for instance, sec. 27, subsec. 2, of the Companies Act, which concerns decisions "which have an immediate bearing on the shareholder's share in the company property or on his right to a profit". Such a decision requires the support of all shareholders.

There seem to be good reasons for distinguishing the principle of equality from the general clause. The former is concerned with the instances where the *formal* equality between shareholders is altered; no account is taken of the actual effects. Taken in this sense, the principle of equality is a rule which has its scope of application firmly fixed in advance. Its applicability is not dependent on the effect *in casu* of a decision made by a company organ. F, on the other hand, becomes applicable in those cases where neither the principle of equality nor any other particular prohibitive rule can be resorted to, and only if the *actual effects* of a decision lead to the state of affairs envisaged in the clause. It has been said that F is intended to prevent alterations of the *material* equality between shareholders, that it is thus a supplement to the formal principle of equality and is designed to prevent circumvention of this principle. The notion of material equality will hardly enhance the clarity of the discussion; rather the opposite is to be feared, and therefore it would be best to reserve the equality concept for what has here been called formal

[7] See, e.g., Rodhe, *Aktiebolagsrätt,* Stockholm 1964, p. 186.

[8] See, e.g., Taxell, *Aktiebolagsstyrelsens kompetens,* Turku (Åbo) 1946, pp. 218 ff., with references in particular to Cederberg.

equality. It is another matter that F perhaps presupposes the existence of such a principle of formal equality, and that since F has been given the force of law, one could deduce the existence of the principle of equality from it without seeking support in some other legislative provision.[9] It has been shown above that F is applicable, *inter alia,* as a supplement to a set of specific provisions on minority protection. There is no reason to assume that the specific provisions are exhaustive in the sense that F cannot be applied within their field of application.

3. One of the essential questions in the interpretation of F—at least from the point of view of principle—is whether application of the clause requires the existence of so-called subjective elements, i.e. an intention by the majority of the general meeting to ensure for themselves unjustifiable benefits, or at least a knowledge that the decision will have such an effect. In other words, is F a typical rule against wilful abuse or is it not?

It seems obvious that Cederberg at the Nordic Conference of Jurists in 1931 wanted to introduce a specific rule against wilful abuse. The model was taken from certain German drafts, which included typical rules against abuse such as are found also in the German Companies Act of 1937: "... that by his voting a shareholder seeks to achieve benefits for himself or for a third person to the detriment of the company and its shareholders, which benefits are alien to the company ..."[10] (sec. 197, subsec. 2).[11] However, in the event F was given another wording, one which does not clearly express whether the subjective requirement is included or not. Cederberg himself, commenting upon the Act, is rather vague on this point. Sometimes he says that it is a requirement for the application of F that there shall be an intention of the majority to damage the minority, and sometimes he says that the majority must know that the decision will have such effects.[12] Apparently Cederberg has in mind here the expression in the Swedish text *bereda sig* ("ensure for themselves"), which seems to imply a certain conscious activity on the part of the

[9] Cf. Taxell, *op. cit.,* pp. 221, 229 ff.

[10] The original German text has the following wording: "... dass ein Aktionär mit der Stimmrechtsausübung vorsätzlich für sich oder einen Dritten gesellschaftsfremde Sondervorteile zum Schaden der Gesellschaft oder ihrer Aktionäre zu erlangen suchte ...".

[11] The provision has an equivalent in the new German Companies Act, 1965, sec. 243, para. 2.

[12] *Lakimies* 1934, p. 17, *T.f.R.* 1935, pp. 440 f., 1937, p. 426; cf. Cederberg & Ylöstalo, *Vähemmistön oikeuksien turvaamisesta,* Porvoo 1966, pp. 22 f.

majority of the general meeting. The word used in the Finnish text, *hankkia,* of the Companies Act is perhaps even more clearly indicative of an intentional activity; it could be translated by "acquire".[1] A Swedish writer, Professor Nial, while not disputing the correctness of this interpretation, nevertheless considers it unsatisfactory from the point of view of legal policy.[2] The Finnish writer Professor Taxell, on the other hand, considers it sufficient for the application of F that the violation of minority interests shall be so clear and obvious that the majority ought to have realized it;[3] the Government Bill gives some support for this view.[4]

In Court practice this question seems to have been touched upon by the Supreme Court only once, in a case from 1962 which is described below. The majority seem to have followed the view held by Taxell, while the minority have chosen the Cederberg line. As has been pointed out by Nial, in practice the difference between the two possible interpretations is of no great significance.

4. It remains somewhat obscure what is intended to be included by the expression "ensure for themselves benefits" used in F. It may justifiably be argued that often a decision of the general meeting as such neither ensures anyone benefit nor causes anyone harm, but that it is the implementation of the decision which carries these effects. However, such ideas have hardly guided the legislators. Instead, it must be supposed that benefit and harm respectively are supposed to be already at hand when the decision is made, in so far as its execution would entail benefit or harm. This could be put more precisely as follows: F may be applied provided the decision as such, or its implementation, will in all probability result in benefit or harm respectively. It could thus be said that the Act ought properly to have spoken of decisions which are likely to bring benefits. However, F is not applicable to instances where the intention of the shareholders has been to ensure benefits for themselves but where the decision is not of such a nature as to cause any such effect.

The benefit in question must accrue either to those shareholders who have carried the decision or to a specific third party.

[1] Finnish statutes appear in the two official languages.

[2] *Om klanderbara och ogiltiga bolagsstämmobeslut,* Stockholm 1934, pp. 40 f.

[3] *Op. cit.,* pp. 227 f.

[4] Reg. Prop. (Government Bill) 1935, no. 29, p. 2.

The third party may be, for instance, a company in which the shareholders making the decision have certain interests, or it may be a mere tool of the majority of shareholders; but it may also be a completely independent person. Thus according to F no proof is needed of the connection between the majority of shareholders and the third party.

To the benefit there should correspond a loss sustained by those shareholders who have not supported the decision ("at the expense of"). Although the text of the provision might be taken to imply that all these shareholders ought to have sustained a loss, this cannot very well be the intention of the law. It is sufficient that the suing shareholder shall be able to show that the decision has caused damage to him.

The Act does not expressly state that the contested decision shall be to the detriment of the company. This seems to be a deficiency. It may be that generally, if the majority appropriate for themselves a benefit to the detriment of the company without the minority getting the same benefit, this will occur at the expense of the minority. But such is not always the case. It is possible that the majority could approve a decision concerning, for instance, a contract which is manifestly disadvantageous to the company and just as obviously advantageous to the majority of shareholders, or to a third party, without the minority sustaining real material loss. The minority may be in such a position that they cannot influence the dividend policy, still less demand that the company be dissolved. If in such an instance the unfavourable contract is not of such great significance as to affect the price of the shares, the minority would not in reality suffer any damage.[5] The only damage which could be claimed to have occurred is that the liquidation ratio has diminished. It is uncertain whether this would be sufficient proof of a benefit having been granted at the expense of the minority. However, it may readily be admitted that a liberal interpretation in this respect would be most in line with the basic ideas upon which F was based.

The expression "manifestly unjustifiable" serves as a bulwark against too rash a use of F. First, in certain cases a decision which benefits the majority at the expense of the minority may nevertheless be to the benefit of the company, and as such unobjectionable. As an example one might take the case of raising the share

[5] Cf. *infra*, the comments on the decision 1939 Meddelande 188.

capital through contributions by property consisting of inventions that belong to the majority and are of vital importance to the company. This may possibly lead to a diminished dividend during the following years, which may fall much more heavily on the minority than on the majority, possibly even to the extent that those in the minority will be forced to sell their shares. Despite these consequences the benefit which the company receives in the long run—it was presupposed that the inventions are vital to the company—may be considered to outweigh the immediate damage suffered by the minority.

According to an opinion common among legal writers,[6] the cited expression further includes the requirements that the violation must be manifest in the sense that it is obvious (and consequently no violation shall be considered to be at hand in marginal cases), and that the violation must be substantial, or at any rate not immaterial. In view of the restrictive attitude taken by Finnish courts in the administration of general clauses, this means that a far from insignificant barrier has been raised against the application of F.

5. According to its tenor, F presupposes for its application a decision made by the general meeting. Thus the clause cannot be resorted to as a barrier against abuse by the minority in cases where a group of shareholders make use of their powers outside the general meeting, for instance, by bringing an action against a member of the board of directors, or by demanding an extraordinary audit (Companies Act, secs. 26 a, 26 c). But what is the case when the minority opinion comes to form the decision of a general meeting? In such instances, it does not seem impossible to apply F. However, it looks as if the legislators had not intended F for use in such cases. Professor Nial, who has expressed his opinion in respect of the Swedish Companies Act of 1910,[7] seems to hold the general clause inapplicable in cases where the minority merely put a brake on progress; for instance, a qualified majority may be required, and the minority vote against the proposition, the result being that it is rejected. On the other hand, he seems to be of the opinion that the general clause could be applied in cases where the minority pass a decision entailing a change—where the decision is, so to say, of positive content.[8]

It may well be asked whether there are material grounds for

[6] See Taxell, *op. cit.*, pp. 226 f.
[7] *Op. cit.*, pp. 39 f., 60.
[8] Regarding such decisions, see Rodhe, *op. cit.*, p. 176.

separating these two instances. Even in a case where the minority shareholders "merely obstruct", there is a decision by the general meeting—admittedly only a decision by which a proposal is rejected—and it does not seem out of the question that F should be applied to such a case, provided the courts have the right not only to repeal but also to alter a decision of the general meeting upon action being brought in contestation of the decision. Finnish courts would nevertheless in all probability adhere to the opinion of Nial, though so far as is known the matter has not been brought before them. Such a view would lead to F not being directly applicable in cases of abuse by a minority, as under the Companies Act the minority have no right to dictate a positive decision of the general meeting in any respect. Formally this applies to the distribution of a profit as well. According to the Companies Act (sec. 22, subsec. 2), the entire profit shown on the profit and loss account is to be distributed, unless the articles of association contain a provision permitting deviation from the rule or the general meeting decides by qualified majority to make an appropriation to a fund. The opinion just expressed does not imply a contention that a court could not in any case make use of F *ex analogia* to prevent abuse by the minority, for instance in the situation described.

Generally speaking, application of F by analogy should not be rejected *a priori*. Already in the legislative material analogical application is suggested in one instance, namely regarding decisions by the board of directors and by other administrative organs.[9] This analogy has also been accepted in legal writing.[1] It is another matter that the system of sanctions of the law, concerning which more will be said in the next section, is not modelled with a view to application of F to anything but decisions by the general meeting.

6. The sanctions naturally differ according to whether F has been violated because of a decision made by the general meeting or a decision of the board of directors.

A decision of the general meeting which is in contravention of F is invalid, but this invalidity only consists in "voidability" or "contestability", and consequently it will be remedied unless action is brought within the time limit of six months from the decision, as prescribed by the Companies Act, sec. 30, subsec. 5.

[9] Reg. Prop. (Government Bill) 1935, no. 29, p. 2.

[1] See, e.g., Cederberg & Ylöstalo, *op. cit.*, pp. 24 f., Taxell, *op. cit.*, pp. 222 ff., Hakulinen, *Lakimies* 1945, pp. 440 ff.

Before the expiration of this period the board of directors are not permitted to bring the decision into effect if they know of the ground of invalidity. It might perhaps be thought that the same rule would apply to the authorities which have to approve and register the decisions. However, such a conclusion cannot be considered correct. The authorities do not possess the facilities for arranging for such an application of the principle of *audi alteram partem* as would be necessary in order to establish whether or not there exists a violation of F. It is another matter that the authorities would have power to postpone dealing with the question if a shareholder had notified his intention to bring an action to contest the decision. Such postponements occur rather frequently in practice. If the action is not subsequently brought, it is evident that the possible faults have been remedied. If, on the other hand, action is brought, it is not so clear whether the authorities can remain inactive and wait for the outcome of the action; possibly the decision ought to be put into effect despite the action, unless in accordance with the Companies Act, sec. 30, subsec. 1, the shareholder has acquired a decree prohibiting execution.

Can a decision made in contravention of F give rise to a claim for damages? The board of directors may naturally become liable if they execute the decision in spite of their knowledge of the grounds for invalidity.[2] According to the Companies Act, sec. 30, subsec. 3, an action for damages may be brought by a shareholder who contests a decision of the general meeting. On the other hand, Finnish law does not admit any action against a shareholder on the ground of his voting, save for a few exceptional instances which need not be considered in this context.[3]

Where the violation of F is caused by a decision of the board of directors damages are one of the main sanctions. If the company has suffered a loss by the decision, action may be brought against the board by a competent company organ, or by a minority of not less than ten per cent (Companies Act, sec. 26 a; cf. secs. 26 c and 26 d). However, the main emphasis in F is put on loss caused to shareholders. Can a shareholder in such a case claim damages on his own behalf? In principle the answer is considered to be in the negative.[4] Only if the decision is alleged to be directly in-

[2] Cf. Companies Act, sec. 38, para 2.

[3] See, e.g., Companies Act, sec. 33.

[4] See in particular Taxell, *op. cit.*, pp. 214 ff., with references, *inter alia*, to the discussion in 1938 in the "Juridiska Föreningen i Finland" (*F.J.F.T.* 1939, pp. 519 ff., 585 ff.).

tended to cause damage to one or more specific shareholders can such a shareholder bring an action.[5] However, the additional burden on the shareholder is not very considerable, since generally such an intention must be shown in those cases where F is to be applied (whether directly or *ex analogia*).

A decision by the board of directors in contravention of F is also invalid. However, the invalidity may not be invoked against a third party in good faith with whom, for instance, the board decided to conclude a contract.

7. What significance has been attached to F in Finland? This question cannot, of course, be answered exactly. We have no means of exactly measuring the effect of enactments. The creation of such a means would appear to be a worthwhile task for the sociology of law. Here we must rest content with some points of view which throw light on the problem without, however, answering it exhaustively.

If we look first at legal writings in order to discover in what circumstances authors consider F to be applicable, we gain the impression that its significance is considerable. Some of these possible situations may be mentioned:

(1) the majority approve balance sheets containing unreasonably large hidden reserves, or otherwise prevent a reasonable distribution of dividend—what has been called "starving the minority";

(2) the majority decide to increase the share capital by a new issue of shares, with the purpose of reducing the minority shareholding in the company;

(3) the majority decide to make a new issue of shares on conditions of contribution by property which are unfavourable to the company, but favourable to the majority;

(4) the majority decide not to let the shareholders exercise their preferential right to subscribe for shares in a new issue, when this procedure is not justifiable on the ground of important company interests;

(5) the general meeting decides to reduce the share capital, or, as prescribed in the articles of association, to redeem the company's shares with the approval of the shareholders (Companies Act, sec. 21, subsec. 3), in a way which favours certain shareholders at the expense of others;

(6) the general meeting decides to amend the articles of associa-

[5] See, in addition to Taxell, Hakulinen, *loc. cit.*

tion in a way which is especially detrimental to the minority, e.g. by removing or amending clauses restricting voting, or clauses dealing with shareholders' options to acquire shares on a transfer or otherwise restricting the acquisition of shares;

(7) the general meeting decides on remuneration to directors which is unreasonable or on concluding contracts which favour the majority at the expense of the minority;[6]

(8) the majority exploit group relations (holding and subsidiary companies) to the detriment of the minority;[7]

(9) a majority based upon preferential voting rights exploit their power to the detriment of those who represent the major part of the company capital.

The significance of F is, admittedly, partly dependent upon the pronounced lack of special rules in the Companies Act for the protection of minorities. However, this reasoning can also be reversed, and it can be said that we can manage without many special rules provided there exists a well-formulated general clause which the courts are willing to apply.

What position, then, have the courts in Finland taken in relation to F? It should be said at once that F has not often been invoked by courts in judgments. According to information from practising lawyers, the inclination to apply F is even smaller in courts of lower instance than it is in higher courts. In the following published cases from the Supreme Court, the application of F was in issue.

> 1939 Meddelande 188: The main question in this case was that of the amount of the fee payable to members of the board of directors. The City Court found that the majority of shareholders had, by deciding the fee (and electing majority shareholders to the board), provided for themselves an undue advantage at the expense of the other shareholders; the Court therefore annulled the decision. The Court of Appeal, whose judgment was affirmed by the Supreme Court after a vote, stated that "it had neither been shown that the aforementioned fee was unreasonable, nor that the shareholders who have carried the decision of the company meeting would through this decision have ensured for themselves or a third party

[6] The Companies Act lacks general rules on legal disqualifications for officers of a company who have interests opposed to those of the company; on this question and the use of F regarding such disqualifications, see in particular Taxell, *Aktierätt*, Turku (Åbo) 1961, pp. 61 ff.

[7] *Inter alia*, the right of voting of a subsidiary company on the basis of a holding of shares in the parent company (which is permitted under Finnish law); see Taxell, *F.J.F.T.* 1959, pp. 281 ff.

a manifestly unjustifiable benefit to the detriment of the other shareholders", and the case was dismissed. Strangely enough, none of the courts referred *expressis verbis* to sec. 30, subsec. 4, of the Companies Act although the *verba formalia* of F were used. One interesting point in the reasons given by the Court of Appeal is that the Court appeared to presume, on the one hand, that an unreasonably large remuneration accruing to the majority shareholders, who were at the same time board members, did not injure the minority and, on the other hand, that a decision providing an unreasonable fee could be contested on a ground other than F.[8]

1945 Redogörelse 26 and 1948 Meddelande 250. In each of these cases the Supreme Court annulled, with express reference to F, a decision by the general meeting on the compensation (rent) to be paid by the shareholders in a tenant-owners' company, since the new basis for calculation of the rent entailed by the decision was of greater advantage to certain shareholders than to others. See also 1946 Meddelande 300, where the Courths, with reference to what had been proved in the case, found that F could not be applied.

1962 Meddelande 134.[9] The general meeting had decided on a pension scheme according to which pensions would be paid to certain named persons belonging to the shareholding majority of the company. With reference to this, and on the ground that the pensions would, having regard to the company's position, constitute an unreasonably heavy economic burden for the company, the decision was annulled by the Supreme Court. The judgment was rendered after a vote. The minority Justices wished to affirm the judgment of the Court of Appeal, which had affirmed the decision of the City Court dismissing the action on the ground that the plaintiff had not shown that it had been intended through the general meeting's decision to ensure for certain shareholders a manifestly unjustifiable benefit. One of the dissimilarities between the majority and minority opinions lies in the fact that the Supreme Court minority, like the lower courts, appear to have proceeded from a purely subjective criterion—what the majority shareholders had intended—whereas the majority Justices held to objective criteria, and stated that the company majority *must be considered* to have ensured for the shareholders in question an unjustifiable benefit.

In assessing the significance of F with a view to the future, one may observe that the general clauses constitute something fairly new in Finnish law, but that their number has increased sub-

[8] Cf. 1924 Domar Meddelande 219, in which case the Supreme Court, with reference to the Companies Act, sec. 27, para. 2, annulled a decision regarding the payment of an unreasonably large bonus to a company director.

[9] Published also in *Defensor Legis* 1963, pp. 49 ff., with comments by Huttunen.

stantially during the last few decades. Lawyers—both judges and advocates—often have a conservative conception of the legal system and tend at first to be cautious in applying new general rules. But when in course of time a better insight is gained into the content of the general clauses and their application—and here the opinion of legal writers is not the least important factor—they will be applied in an increasing number of cases in the courts. It can be assumed that this will be the case with F as well.

When appraising the application of a rule of law, it is easy to make the mistake of measuring it solely by the frequency of cases. Nevertheless, many rules of law are of such a type that they may be of significance without ever becoming especially topical, or frequently referred to in the courts. This is true with regard to the general clause of company law, too. In many instances it operates purely by virtue of its existence as a check on a majority, which has always to bear in mind that the clause can be adduced by a suppressed minority; and a legal adviser who is opposed to what he considers an incorrect mode of action on the part of a company majority finds it easier to get a hearing if he can make reference to a written rule.

III. THE SWEDISH AND DANISH GENERAL CLAUSES

1. As has already been said, Cederberg was criticized by Swedish speakers, among others, when in 1931 he proposed the introduction of a general clause in company law.[1] Mr. Treffenberg held that a general clause was unnecessary, at least as far as Swedish law was concerned. He referred to a provision in the Swedish Companies Act of 1912 (sec. 55, subsec. 1) which has its counterpart in the present Swedish Companies Act of 1944 (sec. 76, subsec. 1): "A general meeting of the company may neither decide upon the distribution of the company's profits or other assets, nor assume obligations for purposes which are obviously unrelated to the purposes of the company's activities. However, a meeting has the right to employ the assets for the public good or for any similar purpose if this course can be considered reasonable having

[1] See *supra*, pp. 274 f.

regard to the nature of each object, the financial position of the company, and other circumstances." He also pointed out that as a rule the more important decisions of a company are made at board meetings, and not at general meetings. He further referred to the Swedish procedural system, which was then still undeveloped. It may also be added that Swedish law, then as now, contains rather strict rules as to disqualifications because of interests opposed to those of the company, which prevent a shareholder from voting for resolutions in which he may have a personal interest.

The justification of the general clause has subsequently been discussed, so far as Swedish law is concerned, by Professor Nial.[2] While not in agreement with Treffenberg's criticism of Cederberg's proposal, Nial thinks that, partly through application of the principle of equality, partly by an extended interpretation of the provision on disposal of the company's property—which would apply to all measures that would disagree with the purposes of the company—approximately the same result would be achieved as through a general clause as proposed by Cederberg. The real difference would seem to be that the principles set out by Nial are purely objective, whereas the application of the general clause would require proof that the majority group was aware of the injurious nature of the decision. Nial considers that in principle the first alternative is to be preferred. However, he says that the difference would be of no great significance in practice. "When the objective requisites exist, the circumstances themselves will surely in most instances indicate the existence of the necessary subjective requirements."[3]

It should be noted that the legislators in Sweden did not content themselves with such an interpretation. The Law Revision Committee considered— contrary to Nial's opinion[4]—that an addition to the previous rules was of importance, *inter alia* as a means of preventing circumvention of the principle of equality; for reasons of deterrence, it would be of value to have an express rule in the statute itself.[5] In consequence, the rule in sec. 76, subsec. 2, was enacted.

In present Danish law, without support in statutory law,[6] the

[2] *Op. cit.*, pp. 22 ff., *Sv.J.T.* 1941, pp. 714 ff.
[3] *Ibid.*, p. 41.
[4] *Sv.J.T.* 1941, p. 716.
[5] *S.O.U.* 1941: 9, pp. 302 f.
[6] The leading case is a decision by the Danish Supreme Court of 1921, see 1921 U.f.R. 250.

principle has long been acknowledged that the decision of a general meeting can be annulled if the majority have used their voting power to provide for themselves advantages at the expense of the minority.[7]

In the Danish draft of 1964 for a new Companies Act the rule in sec. 73 was accordingly adopted. In 1962 the chairman of the committee which put forward the proposal, Professor Borum, had written in an article in a periodical[8] that the clause, which had a Finnish prototype, was a comprehensive provision which made it possible to prevent abuse of power in a number of situations, for example by the majority attempting to "starve" the minority. According to Borum, however, such a provision would not bring anything essentially new into Danish law. The committee characterized the proposed general clause as an important complement to current legislation, and as regards its assumed workings referred in particular to its deterrent effect.[9] It can be noted that an equality rule has been laid down in the Danish draft (sec. 72), and that the proposal is obviously based on the same idea as was submitted earlier in respect of F, viz. that the general clause and the rule of equality are from the point of view of principle two different things.[1]

2. When a comparison is drawn between F and the Swedish and Danish general clauses, the similarities dominate, although divergences are not lacking.

Above it was stated to be a characteristic of F that it constitutes a complement to other, more restricted rules for the protection of minorities, which accordingly cannot be regarded as completely exhaustive. In virtue of what has been said above, this should also apply to the Danish clause. It remains to discuss the question whether this is also the case with the Swedish clause. This matter was brought to a head in a decision of the Swedish Supreme Court in 1963.[2] The issue concerned an amendment of the company's articles of association. The minority were opposed to the change. The special rules in Swedish law laid down for such cases—re-

[7] See, further, Sindballe & Klerk, *Dansk Selskabsret*, Copenhagen 1949, pp. 237 ff., Krenchel, *Håndbog i dansk aktieret*, 2nd ed. Copenhagen 1954, p. 282, Gomard, *Aktieselskabsret*, Copenhagen 1966, pp. 228 ff., in particular pp. 237 ff.

[8] *Juristen* 1962, pp. 116 f.

[9] See *Betænkning om Revision af Aktieselskabslovgivningen*, Bet. No. 362/1964, p. 155, cf. pp. 162 f.

[1] See p. 276, cf. also Gomard, *op. cit.*, pp. 237 f., 236, footnote 32.

[2] 1963 N.J.A. 431, and the comments by Nial, *Sv.J.T.* 1965, pp. 582 ff.

quiring a certain qualified majority vote—had been complied with. The minority pleaded the general clause as one of their arguments inasmuch as the decision of the general meeting, in the opinion of the minority, entailed obvious advantages for some shareholders (the majority). The Supreme Court ruled that as the conditions for amendments of the articles of association had been exhaustively laid down elsewhere in the Companies Act, there could be no question in this case of applying the general clause. The case has been discussed in Sweden. Some consider that the decision of the Supreme Court should be treated as a leading case as regards the relation between the general clause and the special provisions in the Companies Act.[3] Others, however, do not wish the decision to be viewed as such a general precedent, and consider that it would be extremely unfortunate if such a precedent were to arise.[4]

Let us return to the question of subjective or objective criteria for application of the general clause, a question which, as suggested above, is of no great practical significance. It has already been argued here, contrary to Nial's opinion, that F should be construed as relying upon objective criteria, in other words, that it is not necessary to prove intention on the part of the majority for application of the clause. The Danish clause, however, is obviously purely subjective. It requires clear evidence that the majority have, in the situations concerned, actually abused their voting right, and "abuse" implies intention.

The Finnish and Danish general clauses obviously also apply to cases in which a decision will *in all probability* result in advantage or damage.[5] According to the legislative material of the Swedish Act, the general clause does not relate to cases of such a nature, but merely to measures which obviously *imply* advantages for the majority. "It is not sufficient that it should appear as a mere possibility or probability that the measure could bring about such advantages."[6] The Swedish general clause is also more restricted than the Finnish and Danish ones in so far as it does not relate to advantages which accrue to a third party whose interests cannot be more or less closely identified with the majority shareholders.[7] In such cases it is, however, often possible in

[3] Pehrsson, *Sv.J.T.* 1965, pp. 695 f. It should be mentioned that in the case Mr. Pehrsson represented the company.
[4] Nial, *loc. cit.*, and *Sv.J.T.* 1965, pp. 696 f.
[5] Cf. *supra*, p. 278.
[6] *S.O.U.* 1941: 9, p. 303.
[7] *Loc. cit.*, p. 304.

Sweden to apply the provision in sec. 76, subsec. 1, to measures which conflict with the purposes of the company.

But the Swedish clause is not in all respects more restricted than its Finnish and Danish counterparts. It should be especially noted that it expressly covers cases in which the majority cause harm to the *company* even if it is not proved that the minority suffer actual damage. As has been remarked above,[8] it is improbable that F could be accorded an interpretation of equally wide scope, and this should apply to the Danish clause as well. Swedish law is more extensive than Finnish or Danish law in other respects too. The Swedish Act includes an express provision that the general clause shall be applied also to decisions of the board of directors (sec. 91), and a violation of the general clause may lead to the board members being held liable for compensation with respect to the shareholders who have suffered harm from the decision concerned (sec. 209). It should be remembered that F is in general considered to apply also to decisions of the board, but that counterparts to the Swedish rule as regards compensation are lacking in Finnish law.[9] It is difficult to decide whether the Danish clause should also apply to decisions of the board.[1]

3. One special rule in the Danish general clause is the stipulation on redemption in sec. 76, subsec. 2. Under this rule, a minority shareholder can, instead of bringing an action for the annulment of such a decision of the general meeting as is referred to in subsec. 1, demand that the shares be redeemed by the company at their real value. It is pointed out in the legislative materials of the Act that there is nothing to prevent one shareholder from claiming redemption while another shareholder demands that the decision of the general meeting shall be quashed.[2] Corresponding rules in Swedish law are lacking. In Finnish law there exists a provision which at first glance appears to resemble the Danish one just discussed. In the Finnish Companies Act, sec. 30, subsec. 5, it is stated that the court has the right, when a shareholder contests a company meeting decision and invokes subsec. 4 or another provision, "to state that the plaintiff should be satisfied with accepting redemption" of his shares. Nevertheless this provision has no legislative connection with the general clause. It was incorporated in the Finnish Companies Act from

[8] See p. 279.
[9] See *supra*, p. 282.
[1] Cf. Gomard, *op. cit.*, p. 241.
[2] *Betænkning*, p. 163.

the beginning, and initially was not justified by reference to any aspects of minority protection. On the contrary, the intention was that of safeguarding the interests of the company and of third parties in the event that the annulment of a decision of the general meeting would affect them too severely. The redemption provision had been excluded from the proposal remitted by the Ministry of Justice to the Supreme Court in 1934. The Supreme Court remarked on this, and considered that the provision should remain in the Act. The Court justified this view by stating that in certain cases a (materially) incorrect company meeting decision could be harmless to both the company and shareholders, whereas its annulment could entail significant damage to the company.[3] The Government, having taken the Court's comment *ad notam,* allowed the redemption provision to pass into the proposal without amendment, and the proposal was similarly approved by Parliament without amendment.

According to the Danish general clause, the question of redemption arises solely on the demand of the petitioner, whereas according to the Finnish Companies Act a demand is in principle irrelevant.[4] The possibility of redemption has been applied by Finnish courts only rarely, and as far as is known, always in the interests of the company. The formulation of the Finnish Companies Act, sec. 30, subsec. 5, also implies that the interests of the petitioner should not constitute the point of departure for the considerations of the court. The interests of the shareholders thus come into the picture, so to speak, negatively; if the company would derive benefit from the remaining in force of the decision of a general meeting despite its being wrong, it is a matter of judging whether the shareholder's right to redemption can counterbalance the detriment he may suffer by the decision remaining in force. Against this, the court would not be justified in granting the shareholder the right to redemption in such a case where the decision of the general meeting could be annulled without harm to the company but where it would be of more advantage to the shareholder to be able to free himself from the company. On this rather important point the Danish clause accordingly deviates from the prototype in the Finnish Companies Act.

[3] Government Bill 1935, no. 29, p. 11.

[4] Taxell, *Aktieägares rättsskydd,* Åbo 1958, p. 225, points out that the court will more readily decide in favour of redemption if the shareholder has declared his consent to redemption.

IV. THE NORWEGIAN CLAUSE

1. As mentioned above, the Norwegian clause has its model in English law, i.e. in the Companies Act of 1948, secs. 222 and 210.[5] When the older Norwegian Companies Act was being prepared, a proposal was made that a similar rule be embodied in it, but it was rejected. The Norwegian Supreme Court has nevertheless not considered itself precluded from declaring that the contract established by the formation of a company can be rescinded because the assumptions underlying the contract have failed to apply.[6] In the legislative material of the current Act it is stated that the new rules should be regarded as an expression of the fundamental idea already accepted by the Supreme Court. It is disputed whether the general clause, after the introduction of the Act of 1957, can be deemed exhaustive, or if the courts are able to order dissolution under circumstances other than those specified in the clause.[7]

In the original draft, the condition for dissolution was that "dissolution was considered reasonable and justified with regard to the position of the other shareholders". This formula was criticized for its vague nature and wide scope, and it was amended to take its current form. In the bill the provision was described as a last resort which called for great caution on the part of the courts. It may be remarked that in the legislative material much emphasis was laid upon the aspect of deterrence. The provision, by reason of its very existence, should be capable of preventing the majority from misuse of power.

2. The first impression to be gained from the Norwegian general clause, in comparison with the others discussed here, is that it is considerably wider in scope than the others. The Norwegian clause does not apply solely to decisions by general meetings but appears also—and above all—to be aimed at the actions of the board of directors, and in practice it is frequently the board that makes the most important decisions. Here, however, the re-

[5] As regards the legislative material referring to the Norwegian clause, see *Instilling fra Aksjelovkomiteen av 1947*, Oslo 1952, p. 106, and Government Bill 1957 no. 4, pp. 118 ff.

[6] See 1924 N.Rt. 226, 1952 N.Rt. 967.

[7] In the opinion of Marthinussen, *Aksjeloven*, Oslo 1960, pp. 337 f., the Norwegian clause should be considered to be exclusive. Marthinussen refers to the Government Bill, pp. 120 f., which is not, however, quite clear on this point. A contrary view is held by Augdahl, *Aksjeselskapet efter norsk rett*, 3rd ed. Oslo 1960, p. 386, footnote 1.

minder may be given that the Swedish and Finnish clauses apply not only to the decisions made by general meetings, but also to decisions of the board. It can also be pointed out—and this is perhaps of greater importance in reality—that the Norwegian clause, in contradistinction to the others, gives the court the power to dissolve the company. This is a far-reaching power, but its importance to the minority is in many cases subordinate, particularly when the value of the shareholder's portion upon liquidation is low. As an alternative, the Norwegian clause opens the possibility of redemption; this possibility is also admitted in Danish law. But even the possibility of redemption is sometimes of no particular value, e.g. if the price of redeemed shares, as indicated in the legislative materials, is to be determined by the value upon liquidation;[8] in this respect the Danish rule provides what seems to be superior protection.[9]

In reality, however, the Norwegian general clause is in many respects narrower in scope than the others as regards minority protection. First, an individual shareholder in a company with a share capital exceeding 100,000 Norwegian kroner (about 15,000 dollars) is not entitled to sue unless he possesses at least ten per cent of the share capital. Secondly, the conditions laid down in the clause are extremely strict. To begin with, it is required that the majority shareholders shall have acted in contravention of the assumptions underlying the formation of the company. This seems to imply, for example, that a single decision of the general meeting by means of which the majority acquired for themselves advantages at the expense of the minority would not constitute sufficient evidence. An action could hardly lie, unless there was a long series of measures (for example a retention of profits over a lengthy period); if there was only one measure, this measure would have to be one of extraordinary importance. But not even this condition is sufficient. In addition, there is the requirement that dissolution, or redemption, be justifiable on strong grounds of equity. Thus it is obvious that the Finnish, Swedish and Danish clauses could be applied much more frequently than the Norwegian one.

[8] Government Bill 1957 no. 4, p. 121, and Marthinussen, *op. cit.*, p. 340.

[9] When the draft Bill was sent, as is customary, to interested parties for their comments, the Norwegian Shipowners' Association submitted that it was not satisfactory if only the value on liquidation could come into question and demanded that the principles of valuation should be made more precise. See Government Bill 1957 no. 4, p. 120.

In this connection it should be observed that, according to an opinion stated in Norwegian legal writing, the power of the majority at a general meeting is limited, in so far as an individual shareholder need not yield to a decision by the majority which constitutes an encroachment contrary to good faith and honour.[1] Such a rule would appear to be reminiscent of the Finnish and Danish clauses, but its validity and scope in Norwegian law are, however, difficult for an outsider to appraise, as no court cases involving this point seem to exist.

The Norwegian Act came into force in 1959. It is not easy to say what the true significance of its general clause has been so far, and even more difficult to forecast what significance it will acquire in the future. By Scandinavian writers outside Norway, the clause has been criticized, although on differing grounds. In a lecture delivered in Iceland in 1958, Professor Borum held that a dissolution in consequence of abuse by the majority was an unsuitable measure, and that the provision gives the courts such extensive power that it cannot be considered justified under the conditions prevailing in Scandinavian countries, where the law provides other means of redress, such as an action for damages against the board.[2] Professor Rodhe takes a favourable attitude to the Norwegian clause in principle, but considers it rather ineffective, at least if the value of the shares on redemption is supposed to be equivalent to the value on liquidation.[3] He also regards it as a deficiency that the courts, in contrast to what is the case in England, are restricted to only two alternatives, dissolution and redemption, when protecting the minority. With an eye to future Scandinavian legislation, he recommends as a third possibility that of compelling those in the majority to redeem personally the shares of the minority.

3. It can be said—though naturally with a great deal of simplification—that the Finnish, Swedish and Danish rules represent the German type of general clause for the protection of the minority, whereas the Norwegian rule represents the English type. The foregoing investigation should have shown that the functional differences between these two types, as they are formulated in Scandinavian law, are not especially significant. In fact, a division of the general clauses into a German type and an English type is not meaningful if such a division has reference to the function

[1] Augdahl, *op. cit.*, pp. 357 f.
[2] *Timariti Lögfraedinga* 1958, pp. 19 ff.
[3] *Festskrift til O. A. Borum*, Copenhagen 1964, pp. 441 ff.

of the clauses; and we have seen that in certain respects a clause of the German type may in its function be more reminiscent of the Norwegian one than of the other two, which are supposed also to be of the German type.

In the five Scandinavian countries, joint efforts are at present being made with a view to unifying, or at least harmonizing, the national Companies Acts. It seems likely that a general clause will be introduced into the common text in some form. As to what that form should be, it is more difficult to express an opinion. Should the German type be chosen, or the English? One possibility would be to combine the two types.