FREEHOLD FLATS IN DANISH LAW

BY

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I. THE INTRODUCTION AND DEVELOPMENT OF THE FREEHOLD FLAT SYSTEM IN DENMARK

1. *The Freehold Flats Act*

The form of freehold flats—named "ejerlejligheder" in Danish—which has been known for a long time in southern and central Europe was introduced into Denmark by the Freehold Flats Act of June 8, 1966.[1] The Act came into operation on July 1, 1966. the provisions of the Act governing the type of buildings that may be divided into freehold flats have subsequently been amended several times, cf. 2 below. After the latest amendment the Act has been promulgated as the Consolidated Act No. 550 of December 14, 1979.

As is stated in sec. 1 (1) of the Act a freehold flat is characterized by its being "separately owned". This implies that the flat is in principle the object of the general powers of an owner in the same way as is an owner-occupied house. Both in law and in fact the owner may thus basically freely dispose of the freehold flat. In particular the right of legal disposition implies free access to conveyance (at the market price) and a possibility of independent mortgaging. In fact the owner may use and fit up the flat at his own discretion, though consideration for the other owners results in various restrictions on his right of disposition.

A freehold flat is also characterized by the fact that conveyance and mortgaging are subject to the rules in force for real property, *inter alia* the rules governing registration. As far as Danish law is concerned this follows from sec. 4 of the Act according to which each freehold flat on the whole is to be deemed separate real property in the sense of the law. In this respect the freehold flat differs from certain types of flats that may be conveyed and mortgaged, but not according to the rules in force for real property. Reference is here made to co-operative flats, shareholder flats, etc., where the right to the flat is bound up with membership of an association or a company, which is the owner of the

[1] The Act (Act No. 199) is based on *Betænkning nr. 395/1965 angående ejerlejligheder m. v.* (Report No. 395/1965 concerning freehold flats, etc.—quoted *Bet.*). The basis for this paper is the author's book *Ejerlejligheder*, 2nd ed., Copenhagen 1982 (quoted *Blok*). Concerning the Danish rules on freehold flats reference is also made to *Boligministeriets cirkulære* (Ministry of Housing Circular) No. 177 of August 25, 1977, on freehold flats and on housing associations (Quoted *Bmcirk.*), Gesner, *Ejerlejligheder—en håndbog*, Copenhagen 1981, and Seidel, *Wohnungseigentum nach dänischem Recht. Eine vergleichende Darstellung* (Diss.), Kiel 1975.

real property, and where the individual flat-owners only have an "indirect" joint ownership of the property.

Finally, it is a fundamental principle in continental freehold-flat schemes that the right to the flat itself—the premises laid out as separate property—is inextricably connected with joint ownership of the common parts of the building.[2] This compulsory combination of separate and joint ownership is laid down in sec. 2 of the Danish Act. Here, mention is also made of a third element: rights and obligations imposed upon the owner as a member of a society termed "the association of flat-owners". This third element is, however, only an effect of the joint ownership of the common parts. See in this connection section II.4 below.

In certain countries the freehold-flat ownership is not described as constituting true ownership of the flat combined with joint ownership of the common parts (the dualistic view), but as a co-ownership part of the entire real property, with which a right of exclusive use of the flat is bound up (the monistic view). By way of example this is the case in Switzerland and Norway.[3] However, whether the first or the second legal construction is chosen as a basis is in itself without importance for the more explicit legal position, which will appear from a comparison between the rules in different countries. In Danish law it has been necessary to prohibit the conversion into freehold flats of the second type. Cf. 3 below on "co-ownership flats".

There is hardly any doubt that the Danish legislator has been inspired primarily by the West German Freehold Flats Act of 1951.[4] The Danish Act is, however, considerably briefer than the West German one. The legislators have confined themselves to establishing certain main principles and have deliberately left many issues of detail open for solution through case law.[5]

The brevity of the Act is, however, partly a result of the fact that a special legislative technique has been used as far as the rules for the administration of

[2] This fundamental principle does not apply in English law, where ownership of the common parts may vest in the original owner or be transferred to an independent "management company", cf. George & George, *The Sale of Flats*, 4th ed., London 1978, pp. 162 ff.

[3] Cf. the *Swiss* Code civil (Swiss C.c.) art. 712 a, Friedrich, *Das Stockwerkeigentum*, 2nd ed., Bern 1972, p. 40. Concerning *Norwegian* law reference is made to section 5. Also in *German* law is it natural to regard freehold-flat ownership as a qualified right of co-ownership, cf. Weitnauer & Wirths, *Wohnungseigentumsgesetz*, 5th ed., Munich 1974, pp. 31 ff. However, there is no agreement on that point in legal writing. Bärmann, *Wohnungseigentumsgesetz*, 3rd ed., Munich 1975, pp 109 ff., thus describes the freehold-flat ownership as "eine dreigliedrige Einheit", which is similar to the description in the Danish Act. The *French* Freehold Flats Act—loi n^0 65–557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis (loi 1965)—is based on the dualistic view, cf. arts. 2 and 4, see also Givord & Giverdon, *La copropriété*, 2nd ed., Paris 1974, pp. 142 ff., and Kischinewsky-Broquisse, *La copropriété des immeubles bâtis*, 3rd ed., Paris 1978, pp. 89 ff. This is also true in *Belgian* law, cf. the Belgian Code civil (Belg. C.c.) art. 577 bis sec. 9, Aeby, *La propriété des appartements*, 2nd ed., Brussels 1967, pp. 63 ff.

[4] Gesetz über das Wohnungseigentum und das Dauerwohnrecht (Wohnungseigentumsgesetz, WEG) vom 15. Märtz 1951. See *Bet.*, pp. 107, 110 ff.

[5] Cf. *Bet.*, pp. 140 f.

the common parts are concerned. According to sec. 7 of the Act the detailed provisions on the management of the association of flat-owners, statement of accounts, audit, etc., shall be laid down in a set of *standard regulations* ("normalvedtægt") drawn up by the Minister of Housing, which shall apply, unless nothing to the contrary has been resolved and registered. The standard regulations have been drawn up as Order No. 251 of June 14, 1966.[6] It is evident from sec. 7 of the Act that the provisions of the standard regulations must in actual fact be juxtaposed with statutory terms that can be replaced by contract. However, a special feature of application is that the provisions can be replaced not only by contract, but also by a resolution passed by a qualified majority at a general meeting. Cf. sec. 1 (4) of the standard regulations. The standard regulations suggest the common regulations of an association, and embody in particular formal rules on the business of the general meeting and the committee. However, some important provisions governing the substantive authority of the general meeting are embodied in sec. 1 (3) and (4). Cf. II.5 below. It is usual in connection with the division of a building to draw up "individual regulations", which will supplement and possibly in certain respects amend the standard regulations.

The majority of the rules laid down in the Danish Freehold Flats Act and all the rules in the standard regulations may be amended by provisions laid down in individual regulations. In contradistinction to this the legislation of certain countries, for example France, is characterized by being largely mandatory. Cf. also the Norwegian Bill mentioned in 5 below. The liberal Danish scheme ensures a desirable flexibility, and it can hardly be said to have given rise to any material misuse in practice, at any rate not to such an extent that it would not be possible—in most cases—to neutralize such misuse through application of the omnibus clause in sec. 36 of the Danish Contracts Act. See in this connection II.3 below.

2. Access to division of older dwelling houses

Since its coming into force in 1966 the Freehold Flats Act has been amended five times: in 1972, 1976, 1977 and twice in 1979. The amendments have almost exclusively concerned the access to division of older dwelling houses. In this connection this is to be understood as applying only to houses the erection of which started before the coming into force of the Act on July 1, 1966, and which are not used exclusively for commercial purposes. The access to division of such houses was already restricted in 1969, but this restriction applied only in municipalities with rent control, and therefore the rule was incorporated in

[6] Amended by Order No. 124 of March 16, 1976.

the Housing Regulation Act (sec. 67 a) then in force. This provision was made more stringent in 1970. Thus the rules on access to division of older dwelling houses have been amended no less than seven times since the coming into force of the Act.

The amendments in 1969 and 1970 made the access to division in municipalities with rent control more rigorous, and the amendment of the Freehold Flats Act in 1972 meant a national prohibition against division of older dwelling houses with the exception of protected buildings. In 1976 it was again permitted to divide such houses subject to compliance with certain quality requirements and an offer from the owner to the tenants before division to take over the property on a co-operative basis. This liberalization was linked with a simultaneous prohibition against conversion into co-ownership flats (cf. 3 below), and with a desire to promote the foundation of co-operative housing societies through the operation of the rules of the Freehold Flats Act on an obligation to offer. The conditions for access to division were made more rigorous by the amendment in 1977, among other things, through the introduction of additional requirements as to a certain period of ownership before division could take place. The latest amendment in 1979 was essentially a return to the 1972 rule against division of older dwelling houses in that today it is only permitted to divide buildings with not more than two flats and protected buildings.

Whatever the view taken as to the importance of the motives that underlie the various amendments of the rules on division the most erratic course steered by the legislator is in itself quite deplorable. The introduction of more rigorous rules has resulted in difficult transitional problems. During the periods where division of older houses has been possible, the vacillating attitude of the legislator has in itself contributed to the problems, because the prospects of any possible new restrictions have created an extraordinary interest in owners to implement division as soon as possible, and in this way an "artificial" pressure on the system was built up.

The many amendments reflect a current and at times very heated political debate on the application of the freehold flat system to older dwelling houses. The background to this is that the rents of older dwelling houses are in most cases regulated, i.e. governed by a rent control system. To the extent this is the case, access for the owner to division into freehold flats is tantamount to access for the owner to transfer flats from a regulated market to a free one.[7] It is not

[7] Sec. 16 a of the Freehold Flats Act contains a provision according to which the courts at the request of a purchaser of a freehold flat may reduce the price, if it "is substantially higher than the value of the flat". In practice this provision has only been of very little importance, and in reality the price formation is as free in the freehold flat market as in the market for owner-occupied houses, see further *Blok*, pp. 136 ff.

surprising that the introduction of such an opportunity will liberate strong forces and may give rise to problems.

The arguments *against* the access to divide older dwelling houses have been *that* such access facilitates speculation and unreasonable profits, *that* it involves drawbacks and problems for the tenants, and *that* it implies a fall in the supply of flats with relatively low rents to the detriment of low-income groups. While particular reference was made to the two first-mentioned arguments at the introduction of the earlier more rigorous legislation, the amendment in 1979, which as mentioned virtually abolishes the access to division, was in particular motivated by the last-mentioned argument. The reason for this was probably that at that time a network of conditions and control measures had gradually been established, so that earlier misuse and problems could practically be considered remedied.

It is beyond dispute that the division of older dwelling houses into freehold flats will as a rule ensure a substantial profit to the owner. This is due to the fact that flats previously subject to a controlled price system in the form of rent regulation now can be sold at the market price. Whether the owner's utilization of this opportunity for financial gain should be described as speculation and the profit as unreasonable is a question of political conviction. However, it cannot be entirely ignored that the capital yield on tenement houses has been low for many years precisely because of rent control, and that the profit derived from the division into freehold flats may therefore be considered the redemption of an accumulated "deferred yield". Whatever the view on this matter, there is reason to point out that this particular opportunity for financial gain must be ascribed to rent control and not to the freehold flat system as such. A similar gain would materialize if a free housing market was established by the decontrol of rents.

In the interest of the tenants of a house divided into freehold flats it has been clear from the outset that they must be protected against a notice to quit as a consequence of the division. It has therefore been necessary to prevent a purchaser of a freehold flat from giving the original tenant notice on the ground that the purchaser wants to take over the flat himself. Cf. now sec. 84 (d) of the Danish Rent Act. It turned out, however, that this was not fully adequate to prevent a virtual deterioration of the status of the tenants. Of prime importance in this respect were the problems arising out of improvements carried out with a view to fulfilling the requirements as regards quality. To the tenants such improvements involved, on the one hand, inconvenience when undertaken and, on the other, rent increases, while at the same time such improvements often appeared as undesirable, unsatisfactory from a quality point of view, or outright inappropriate. There is even a popular expression in Denmark: "humbug renovations". To the legislator this posed difficult prob-

lems, inasmuch as there is much to be said for setting up relatively rigorous quality requirements as a condition for access to division into freehold flats.

As mentioned above the reason for the abolition in 1979 of the access to divide older dwelling houses containing more than two flats was in particular that such divisions would reduce the supply of low-rent flats. This argument reflects the opinion that for the time being the regulated sector of the housing market should not be liberalized, at any rate not through the instrument of the freehold flat system.

The views that have been adduced *in defence of* access to divide older dwelling houses are—more or less clearly expressed—based on another opinion of overall housing policy objectives: that the aim should be a liberalization of the regulated sector of the housing market, and that access to division into freehold flats is a suitable instrument in this connection. At the same time reference is made to the fact that the setting up of suitable quality requirements as a prerequisite for division would result in a much needed redevelopment of older dwelling houses without the spending of public funds. It can hardly be denied that the earlier access to division actually did have such a beneficial redevelopment effect. The renovations undertaken have not only been "humbug" ones—on the contrary. Moreover, the effect of redevelopment is not exclusively due to the quality requirements set up at the time of division, but also to the fact that freehold flat buildings are generally better maintained and are being renovated to a larger extent than is the case with tenement buildings.

The debate on housing policy can hardly be considered to have been brought to an end by the latest amendment. There is reason to point out that it cannot be said that the debate has centred upon the freehold flat system as such. This is evidenced by the fact that there has been current access to division of dwelling houses the erection of which started after July 1, 1966, without giving rise to any major criticism of the use of the freehold flat system within this sector. This is also true in respect of the access to division of buildings used for trade only. As far as new building is concerned it would on the contrary be justified to say that the freehold flat system has come up to the positive expectations of it when introduced in 1966.[8] A considerable part of private multi-storey house building was started with a view to division into freehold flats, and there is hardly any doubt that the freehold flat system has stimulated building activity as a whole. The Danish experience has thus been similar to that in other countries, where the main reason for the introduction of the freehold flat system was often the promotion of building activity.[9]

[8] See *Bet.*, pp. 129 f., on the desirability to raise capital for housing construction.

[9] Thus, for example, in West Germany, which after the Second World War suffered from a housing shortage of colossal dimensions, see about the previous history for WEG Weitnauer & Wirths, *op. cit.*, pp. 26 ff.

3. *The prohibition against conversion into co-ownership flats*

As was mentioned above, access to divide older dwelling houses into freehold flats was abolished in 1972 (apart from protected buildings). After that time older dwelling houses were instead increasingly divided into "co-ownership flats" ("anpartslejligheder"). In Danish terminology this is to be understood as a co-ownership part of real property to which is attached a right to exclusive use of a flat in the building erected on the land. The characteristic feature of a co-ownership flat is that—like a freehold flat—it is conveyed and mortgaged according to the rules in force for real property. The reason for this is that the Danish Land Registration Act is based on the principle that rights in a part of real property can and shall be registered according to the general rules of registration of rights in real property. On the whole, co-ownership flats are very similar to freehold flats. There are, however, certain differences, because in contradistinction to a freehold flat a co-ownership flat as such is not considered independent real property in the sense of the law. This is important, among other things, in relation to taxation on real property. Another consequence is that co-ownership flats do not have their own page in the Land Register, though this is merely a technical difference in the registration procedure. Finally, it should be mentioned that in general the Danish mortgage-credit institutes do not grant loans charged on a part of real property, so that normally the individual co-ownership flat cannot be mortgaged by a mortgage-credit institute.

From a comparative point of view a co-ownership flat is nothing but a freehold flat in the monistic form of this concept. Cf. 1 above. Thus a co-ownership flat in Danish law is similar to a freehold flat in Swiss and Norwegian law.

The term co-ownership flat is new, but the reality behind the term has been known for a long time. So far the scheme had, however, normally only been applied to small buildings, in particular two-family houses. After the amendment in 1972 of the Freehold Flats Act the development was, on the other hand, characterized by the fact that now also larger and big tenement houses were divided into co-ownership flats as a substitute for division into freehold flats. This was an untenable development, because in actual fact it undermined the prohibition against the division of older dwelling houses into freehold flats. It was therefore maintained that the division into co-ownership flats should be deemed contrary to the prohibition against the division into freehold flats. Against this it was argued that in Danish law the concept of the freehold flat is bound up with the Freehold Flats Act, and that consequently the rules of this Act can only limit the access to division under this Act.

In 1975 the Supreme Court decided that division into co-ownership flats could not be prohibited as an evasion of the Freehold Flats Act.[10] Shortly afterwards, the Danish Parliament reacted to this decision by passing a prohibition against the conveyance of co-ownership flats, which in practice also means a prohibition against conversion into such flats.[11] This prohibition is now laid down in sec. 13 of the Consolidated (Co-operative Housing Societies and other Housing Associations) Act No. 515 of November 28, 1980. The prohibition itself is laid down in subsec. 1, which reads as follows: "All conveyances of a part of real property with more than two flats are prohibited, if the part is connected with a right to use a flat in the building, or if it is a condition for the conveyance that the purchaser acquires such a right".

Older houses as well as new ones are covered by the prohibition. Thus buildings comprising more than two flats the erection of which started after July 1, 1966, may only be divided into freehold flats, not into co-ownership flats, whereas older buildings with more than two flats must not be divided into either freehold flats or co-ownership flats (though protected buildings may be divided into freehold flats). There are certain exceptions to the prohibition laid down in subsec. 1. The most important one is in subsec. 2 (1), according to which "subsec. 1 (does) not bar an owner from conveying his entire part when such conveyance is effected in the aggregate and to a single purchaser". This exception will ensure that the person who has acquired a co-ownership flat before the introduction of the prohibition can lawfully resell his flat, and it also permits a total sale of the remainder of the property. As a main rule the creation of new co-ownership flats by way of additional division into parts is, on the other hand, not possible.

4. *Statistics*

Statistical information concerning freehold flats in Denmark is available in particular from the tax assessments of real property and the censuses of housing. The increase in the number of freehold flats of different types is shown below with the figures from the 14th, 15th, and 16th general assessment in 1969, 1973, and 1977, respectively, and the aggregate figures after the annual re-assessment in 1979.

It will be seen that there has been a sharp increase in the number of flats both for residential and commercial purposes. The term "parent house" means

[10] Cf. the decisions in 1975 UfR 1033, 1036, 1039 and 1041.

[11] Sec. 1 in Act No. 58 of February 25, 1976, on housing associations. The provision—now sec. 13 in the new Housing Association Act—seems to have been prepared in great haste and gives rise to many problems of interpretation, see in this connection *Blok*, pp. 659 ff.

The increase in the number of freehold flats

	As at Aug. 1 1969	As at April 1 1973	As at April 1 1977	As at April 1 1979
"Parent houses"	894	2 911	4 881	4 962
Flats for residential purpose only	15 491	65 406	102 727	122 636
Flats for residential and trade purpose	175	563	688	818
Flats for trade purposes only	795	3 068	5 316	7 328
Flats for manufacturing or warehousing purposes	240	748	895	1 041
Other flats	1 066	4 542	8 047	8 671
Freehold flats, total	17 767	74 327	117 673	140 494
Freehold flats, total exclusive of "other flats"	16 701	69 785	109 626	131 823

Source: *Huset* (The House) 1973, No. 10, p. 9, *Meddelelser fra statsskattedirektoratet og ligningsrådet* (Publications from the Inland Revenue Department and the General Commissioners of Taxes) 1977, No. 2, p. 77, *Statistisk Årbog* (Statistical Yearbook) 1980, p. 71.

a building that has been divided into freehold flats. The listing "other flats" comprises in particular garages, basements, lofts, etc., that have been converted into separate freehold flats. If these are left out of account the buildings divided as at April 1, 1979, contained 27 freehold flats on an average. Flats for residential purposes only constituted 93 %, flats for commercial purposes only 6 %, and mixed flats 1 % of the flats proper.

The census of houses as at January 1, 1980, gives more detailed information on freehold flats that are used for residential purposes (including mixed use).[12] At that time there were about 133,000 freehold flats for residential purposes, of which about 128,000 were contained in multi-family houses—i.e. multi-storey buildings, including horixontally divided two-family houses—about 4,000 in terraced, linked, or double houses, and a small residual group in buildings of another type. Freehold flats constituted 6.3 % of all housing, inclusive of owner-occupied houses.

If flats in multi-family houses are taken separately, the freehold flats constituted about 14 %. About 1/3 of these freehold flats were contained in buildings erected after 1965, which corresponds closely to buildings erected after the

[12] *Statistisk Tabelværk* (Collection of Statistical Tables) 1981: III, published by Danmarks Statistik (the Danish National Bureau of Statistics), Copenhagen 1981. The figures stated in the text have been further elaborated and documented by *Blok*, pp. 14 ff.

coming into force of the Freehold Flats Act. Freehold flats constituted about 21 % of all flats in multi-family houses erected after 1965, which may be taken as a standard for the use of the freehold flat system in new building since the coming into force of the Act.

5. *The other Nordic countries*

The freehold flat system is also known in *Norway*, which, however, has no special legislation on this subject, apart from the Act prohibiting the conversion of existing buildings into freehold flats mentioned below.[13] The system is known in two forms: As "true" ownership of the flat with attached right of co-ownership of the common parts (freehold flats in Danish law), and as a co-ownership part of the entire house with attached right of exclusive use of a flat (co-ownership flats in Danish law). The latter form is by far the most common.[14]

The development in Norway started in the mid-1960s. The point of departure was a statement from the Ministry of Justice dealing with a purely technical point of land registration. The Ministry stated that there were no objections to establishing separate pages in the Land Register covering parts of real property with attached user of a flat in the building. That was the cornerstone of conversion for registration purposes into freehold flats and for independent mortgaging of such flats according to the law on real property. In the following years, especially in the early 1970s, the development accelerated, and conversion into freehold flats took place both in new building and—to an increasing extent—in existing buildings. The Co-ownership Act of 1965 is applicable to both forms of freehold flat ownership, but the ensuing regulation was considered inadequate, and so a committee was set up in 1975 to consider the need for special legislation.

Some misuse had been observed in connection with the division of older dwelling houses into freehold flats, and to prevent this and generally to ensure a "period of consideration", a prohibition was introduced in 1976 against the conversion of existing buildings into freehold flats. Cf. the Act of May 28, 1976, No. 36.[15] According to this Act existing buildings with more than 4 dwellings

[13] Concerning the development and the existing legal position in Norway reference may be made to *NOU* 1980: 6, pp. 10 ff., 46 f., Bruvoll in *Lov og Rett* 1973, pp. 387 ff., Torkildsen in *Lov og Rett* 1970, pp. 417 ff., Sandvik in *Lov og Rett* 1968, pp. 226 ff. Mads Andenæs' treatise *Sameier og selskaper*, Oslo 1977, also contains many references to freehold flat co-ownerships, see in particular pp. 138 ff.

[14] An investigation made by the freehold flat committee showed that this form had been used in 94 % of the cases, cf. *NOU* 1980: 6, p. 13.

[15] Cf. *Ot.prp.* No. 50 (1975–76), *NOU* 1980: 6, pp. 15 f.

must not be converted into freehold flats; terrace and similar houses are, however, excepted, and exemptions may be granted in other cases. New buildings are only considered to be existing buildings one year after the permit to use the building has been issued. Apart from this time limit there is free access to conversion into freehold flats in new buildings.

The Norwegian freehold flat committee reported in 1980.[16] On the basis of this report a bill on freehold flats ("eierseksjoner") was tabled in the spring of 1981.[17] The bill did not go through all readings, but a new bill, modified in certain respects, was introduced in the spring of 1982. As in Denmark the central political issue is the extent to which permission should be given to divide existing dwelling houses into freehold flats.[18] The Norwegian Bill is more comprehensive and detailed than the Danish Act. Furthermore, the provisions of the Norwegian Bill are intended to be largely mandatory. Otherwise, there is good conformity between the Norwegian Bill and the Danish law.

Freehold flats in the usual sense of the word and in the sense used in this context are not known in *Sweden*. The question of introducing freehold flats on continental European lines has been debated for many years and is a controversial political issue in Sweden. Proposals for the setting up of a committee to deal with the question have repeatedly been discussed by the Swedish Parliament in the period since the Second World War.[19] Now a positive decision has finally been taken in that a one-man committee has been appointed (in 1980) to consider, among other things, the amendments to the legislation on real property that would be necessary in the event of the introduction of the freehold flat system.[20] It is still too early to say anything about whether the investigation in progress will result in any legislation.

Nor are freehold flats known in *Finland*. In *Iceland*, however, freehold flats have been known for a longer period than in Denmark. The first Act to that effect came into force in 1959. It has now been superseded by the Multi-family House Act of May 31, 1976, No. 59.[21] Regulations concerning flat-owners' associations similar to the Danish standard regulations are annexed to the Act.

[16] *NOU* 1980:6, *Eierleiligheter*.

[17] *Ot.prp.* No. 76 (1980–81).

[18] According to the 1981 Bill it should only be possible to divide existing buildings with more than four flats with the approval of the local council and two thirds of the tenants. The 1982 Bill, *Ot.prp.* No. 48 (1981–82), introduced by a new government, allows division of existing buildings without making any special conditions.

[19] Cf., *inter alia*, the reports 3LU 1958:19, 3LU 1967:60, LU 1975:26, and LU 1975/76:20, all submitted by Riksdagens lagutskott (the Standing Committee on matters of law), see in this connection *NOU* 1980:6, pp. 17 ff., *Bet.*, pp. 112 ff.

[20] Cf. *Kommittédirektiv* (Terms of Reference) 1980:55. Prior to that, Statens institut för byggnadsforskning (the Government Institute for Building Research) had prepared a report on freehold flats, cf. Janson and others, "Ägarlägenheter i flerbostadshus. En kunskapsöversikt och några tankeexperiment", *Meddelande/bulletin* M79:15, Gävle 1979.

[21] See *NOU* 1980:6, pp. 28 f., cf. also *Bet.*, pp. 120 f.

II. SOME SELECTED LEGAL PROBLEMS

A systematic presentation of the situation in Danish law of the multitude of peculiar legal problems presented by the freehold flat system will not be given in this paper. Within the compass available such a presentation would be of a very summary nature, and it would only show that Danish law is broadly speaking in good general agreement with continental European legislation on freehold flats. The differences that sometimes emerge are concerned with details. For this reason a somewhat random choice has been made of major and minor legal problems sharing the common denominator that they have, on the one hand, been the focus of attention in Danish law and, on the other, must be considered of some interest from a comparative point of view.

1. *Caretaker flats*

Sec. 3 of the Danish Freehold Flats Act stipulates that buildings may only be converted into freehold flats if the division of the building is total. From the explanatory statements accompanying this provision it appears that the purpose was to prevent a partial division that would result in the building consisting of both tenement flats and freehold flats. However, the Ministry of Housing has interpreted the provision to mean that it also prevents a flat from being laid out as a common part.[22] The question is of importance particularly in the very common situation where it would be desirable to reserve a certain flat as a caretaker flat. In this situation the flat is to be used for a common purpose, and therefore—as is the case in foreign law— it should be possible in Danish law to lay it out as a common part.[23]

The alternative is that the caretaker flat will be converted into a separate freehold flat which will then be transferred to the flat-owners' association. The reason for the common adoption of this procedure in Danish practice can hardly be attributed primarily to the conviction about the correctness of the Ministry of Housing's interpretation of sec. 3 of the Act. It would be more correct to say that the reason is that it involves certain advantages, in particular from the point of view of the original owner. This would provide him with the possibility of obtaining a profit from the sale of the caretaker flat to the flat-owners' association. It should also be mentioned that the flat-owners'

[22] Cf. *Bmcirk.*, item 30. It appears that the Land Registrars have generally interpreted the provision in the same way, but examples of an opposite interpretation are known. It is generally recognized that sec. 3 does not prevent cellars, lofts, garages, etc., from being laid out as common parts, which often will be the most practical procedure. It would then be possible in the regulations to give the individual flat-owners exclusive rights to use a cellar or loft, etc.

[23] See concerning foreign law WEG sec. 5 (3), cf. Bärmann, *op.cit.*, p. 245, Givord & Giverdon, *op.cit.*, pp. 52 f., Swiss C.c. art. 712 b (3), cf. Magnenat, *La propriété par Etage*, Lausanne 1965, pp. 54 f.

association would have a freer hand, if at a later date it was found convenient to discontinue the use of the flat as a caretaker flat and sell it.

Often an existing caretaker flat will be converted into a separate freehold flat without any decision being taken at the time of the division (in the individual regulations) as to when and on which terms it should be transferred to the flat-owners' association. According to sec. 1 (4) of the standard regulations a resolution by the association to purchase the caretaker flat will normally require a qualified majority. Cf. 5 below. In addition, the question arises of whether such a decision can be taken by virtue of the original owners' votes. A position was taken on this issue in a recent decision by the Supreme Court.[24] The case concerned a building containing 29 freehold flats, of which only 6 had been sold, while the remaining flats still belonged to the original owner. By virtue of the votes attaching to the unsold flats the original owner held a qualified majority, and at a general meeting it was resolved solely by the votes of the original owner that the flat-owners' association should purchase the caretaker flat at a price fixed according to the assessment. This resolution was considered binding on the 6 flat purchasers. The Court, *inter alia*, dismissed the view that there was in the particular circumstances an abuse of the majority vote. The judgment serves as an illustration of the fact that in Danish law there is no general prohibition against self-dealing.[25]

When the association of flat-owners owns a caretaker flat (or another freehold flat) the distribution quota of that flat must be disregarded at the distribution of costs and when voting at a general meeting.[26] This "disorder" is avoided if the flat is laid out as a common part. Another difference between the two arrangements is that only where the caretaker flat is converted into a separate freehold flat and transferred to the flat-owners' association will it come under the assets of the flat-owners' association, with the effect that it can be seized by common creditors, see 4 below. Finally, the procedure adopted will also trigger off some consequences in respect of taxation, *if* the association of flat-owners is deemed an independent legal person for purposes of tax law. Cf. also 4 below.

2. *The costs of maintenance or repairs of balconies etc.*

The freehold-flat system is based on the principle that each flat-owner disposes of the flat itself and must pay all costs of indoor repairs, whereas the associ-

[24] 1980 UfR 552.

[25] The German WEG, sec. 25 (5), and the Norwegian Bill, sec. 18 (2), differ in this respect.

[26] Held by the Supreme Court in 1980 UfR 552. With reference to this fact the High Court had held that the resolution passed by the general meeting was invalid because the distribution figures had been altered, and because such alteration requires agreement. The latter is correct, but the Supreme Court rightly dismissed the argument that it was a question of alteration of the distribution figures.

ation of flat-owners disposes of the site and the common parts of the building, and the costs involved in this connection are common costs to be distributed over the individual flat-owners according to the registered distribution figures. The more detailed demarcation between individual and common parts and between individual and common costs may sometimes give rise to doubt. This is for example the case in connection with balconies, terraces, and the like.

According to sec. 1 (2) of the Freehold Flats Act only "separately delimited rooms in the building" can be converted into freehold flats. The inference from this is that balconies, etc., cannot be laid out as parts of the freehold flats themselves (individual parts), even though they are attached to the individual flats.[27] Therefore they must be described as common parts of the building subject to rights to exclusive use. In what follows mention will be made only of balconies, but the statements apply similarly to terraces, etc.

The formal qualification in respect of individual or common parts should not, however, be considered decisive in the evaluation of the different individual questions.[28] As a starting point balconies should be placed on the same footing as the closed rooms of the flat. Hence it follows that the flat-owner should be in a position to dispose of the *internal sides* of a balcony where painting, etc., is concerned, and that he must defray the costs of ordinary inside repairs himself, whereas the association of flat-owners must pay for maintenance of the *external sides* of a balcony. The general principle that a flat-owner must not on his own initiative do anything that would alter the appearance of the building is of special importance in connection with balconies.

Within recent years it has been realized that the replacement, removal, or repair of balconies in older buildings has in many cases become necessary for reasons of safety. A very difficult problem arises in this connection as far as freehold-flat buildings are concerned, namely whether the—often very substantial—costs involved are to be considered common costs or will have to be borne solely by the flat-owner concerned. The question is not very important if all freehold flats have balconies (the same number of balconies), or if all balconies are to be replaced (removed) or repaired to about the same extent. This would, however, rarely be the case, for the very reason that some flats—for example ground-floor flats—often have no balcony.

All things considered the best solution would probably be to deem such costs

[27] Cf. *Bmcirk.*, item 31.

[28] In foreign law it is a controversial point whether balconies, etc., are to be considered individual or common parts, but the predominant view seems to be that internal sides are individual parts while external sides are common parts, and via this construction the same results are arrived at as stated in the text for Danish law. See Bärmann, *op.cit.*, pp. 234 f., 239, 357 f., Weitnauer & Wirths, *op.cit.*, p. 81, Kischinewsky-Broquisse, *op.cit.*, pp. 84 ff., Givord & Giverdon, *op.cit.*, pp. 54 f., 63, Aeby, *op.cit.*, pp. 130 f.

common costs.[29] It is true that decisive importance cannot be attached to the fact that formally the balconies are common parts and not individual parts in the sense of the law. On the other hand, it is a weighty argument that the work affects load-bearing structures, which as a general rule must be deemed common parts. The load-bearing structures of a balcony would therefore have to be deemed common parts, *even though* the balconies had been laid out as individual parts. A contrary view, which attaches importance to the fact that the individual balcony exclusively is for the benefit of the flat-owner concerned, could be adduced in a similar way in many other circumstances. Thus such a view could also be adduced in support of the—untenable—result that the costs of a necessary replacement or repair of load-bearing structures of a floor deck would have to be borne solely by the owners of the two flats concerned. By extension this view would also mean that the repair costs of the roof on a freehold-flat terrace house would have to be borne solely by the owner concerned, which cannot be deemed the rule of law. A different result *could* arise out of the individual regulations, but the existing regulations will probably only in rare cases have dealt with this question.

3. *Disregard of unreasonable provisions in the regulations*

As mentioned in I.1 above, individual regulations which will supplement and possibly in certain respects amend the standard regulations are normally set up in connection with the division of a building into freehold flats. In general these individual regulations are a unilateral and preceding document in that this is drawn up by the original owner (his lawyer) and registered on the property prior to the formation of the association of flat-owners, i.e. the first sale of a freehold flat. This procedure involves a certain risk of laying down provisions in the regulations which unilaterally safeguard the interests of the original owner or certain third parties, or which unilaterally express the view of the original owner on the regulation of the relationship between the flat-owners. The question therefore arises of the opportunities that are afforded of disregarding unreasonable provisions in the original regulations. The question does not refer to the right to amend or rescind a provision in the original regulations by a resolution passed by the majority required for amendment of the regulations. The question is to which extent the individual flat-owner can contest a provision in the regulations. Of course, this would not preclude the

[29] Cf. as to the result Vang Jensen in *Ejendomsmægleren* 1981, pp. 117 f., Bang and Gangsted-Rasmussen in *Ejendomsmægleren* 1981, p. 119, and an unpublished judgment pronounced by the City of Copenhagen Court on April 3, 1981 (Case No. K 2002/1980). The issue has not been dealt with in the foreign legal writing mentioned in note 28.

possibility that several flat-owners may join in a demand for disregard of a provision.

In this connection the interest focuses on *the omnibus clause in sec. 36 of the Danish Contracts Act* (inserted by Act No. 250 of June 12, 1975) according to which "a contract can be set aside in whole or in part if it would be unreasonable or contrary to honest conduct to enforce it". This omnibus clause should also be applicable to provisions in original regulations for an association of flat-owners. Against this it cannot be argued that the regulations cannot be deemed a contract in the sense of sec. 36, when they have been unilaterally drawn up by the original owner. At the sale of a freehold flat the regulations are accepted by the purchaser and then they must be considered a contract between the purchaser and the other flat-owners, including the original owner. The fact that it is a question of unilaterally fixed terms—a contract of adhesion—is, on the contrary, a matter to which substantial importance must be attached when deciding whether sec. 36 should be applied. Nor can the applicability of sec. 36 be generally repudiated on the grounds that the purchaser of a freehold flat should carefully examine the provisions of the regulations prior to the purchase, and that he could have refrained from buying if he could not accept these terms, since it would be possible to adduce such an argument in most of the cases where the application of sec. 36 is at issue. This does not exclude the possibility of attaching importance—even substantial importance—to this point of view, but it will have to be balanced against other circumstances, among them the fact that the ordinary purchaser of a freehold flat very seldom examines the regulations in detail prior to the purchase, and—even if he does so—he would often be unable to form an estimate of the consequences and reasonableness of the individual provisions. Often the purchaser is not represented by his own lawyer. Furthermore, because of the housing shortage and other factors the purchaser will often find himself in a situation that leaves him no other choice but to purchase the flat on the terms offered.

It goes without saying that it is not possible to give an exhaustive enumeration of the types of provisions in regulations that may be exposed to interference in pursuance of sec. 36 of the Contracts Act. Generally, it can be pointed out that it is neither a necessary nor an adequate condition that the provision concerned directly or indirectly secures special advantages for the original owner or his successors. It is evident, however, that the most obvious application of sec. 36 is concerned with provisions which unreasonably safeguard the interests of the original owner to the detriment of the others.

The last-mentioned point might be illustrated by a provision which on no objective grounds exempts the original owner from contribution to the common costs to the same extent as the others. Another example consists of

provisions in regulations the purpose of which is to secure for the original owner a decisive influence on decisions in the association of flat-owners even when so many flats have been sold that he no longer holds a majority by virtue of the votes attached to the unsold flats.[30] Provisions that give the original owner special influence on the election of the administrator of the association of flat-owners will be mentioned below. Provisions of a similar nature are those according to which the flat-owners in the event of work on individual or common parts are bound to use certain workmen, or according to which the flat-owners in the event of conveyance of the freehold flat must have the sale completed by the administrator, by a lawyer appointed by the committee, or otherwise by some particular lawyer. It seems that such provisions should normally be set aside in pursuance of sec. 36.

According to circumstances it should also be possible in pursuance of sec. 36 of the Contracts Act to disregard a provision which—without discriminating—unreasonably or unnecessarily restricts the disposal of the freehold flats. As examples of provisions where this could be a possibility may be cited: An absolute prohibition against leasing; a provision concerning the number of occupiers and their family circumstances which aim at reserving the flats for nuclear families; a provision which lays down that flat-owners and possible tenants shall be Danish subjects or which in any other manner aims at keeping out aliens.

The question of interference in unreasonable provisions in regulations has chiefly been considered in *French* law. By an enactment of 1965, art. 8 (2), the following provision to that effect was introduced: "Le règlement de copropriété ne peut imposer aucune restriction aux droits des copropriétaires en dehors de celles qui seraient justifiées par la destination de l'immeuble, telle qu'elle est définie aux actes, par ses caractères ou sa situation". It is assumed that the provision not only refers to restrictions of the disposal of individual parts but also to other types of provisions which restrict the rights of the flat-owners, and which cannot be justified by reference to "la destination de l'immeuble". The rule has given rise to many questions of interpretation, but generally it has been given a wide scope, and it is believed that it prevents most of the provisions mentioned above.[31] In *German* law, provisions in the regulations of an association of flat-owners can be disregarded in pursuance of the general law of contract, including in particular the maxim about "Treu und Glauben"

[30] Cf. Suenson in *Advokatbladet* 1975, p. 355. See also Hellstrøm-Møller in *Huset* 1981, No. 7, p. 6, which as a deterrent example refers to regulations according to which the original owner is to exercise 51 % of the total number of votes according to distribution figures until all the freehold flats have been sold.

[31] See Givord & Giverdon, *op.cit.*, pp. 262 ff., Kischinewsky-Broquisse, *op.cit.*, pp. 108 ff. In addition to art. 8 (2), loi 1965 contains in art. 12, cf. art. 10, a provision the purpose of which is to safeguard against an "unequitable" distribution of costs.

(BGB, sec. 242).[32] In principle, the state of the law is thus the same as in Danish law.

Provisions in regulations that secure for the original owner special influence on *the appointment of the administrator of the association of flat-owners* are of particular importance within the complex of problems treated here. The form in detail is different: A person appointed beforehand by the original owner—possibly himself—is installed as admininistrator for a longer period, e.g. 10 years after the division of the building; the original owner shall be entitled to appoint the administrator as long as he owns flats in the building, etc. Such provisions are often met with in practice and have given rise to justified criticism.[33]

Provisions of this nature have also been common abroad, where they have also been exposed to substantial criticism. Therefore in France as well as in Germany this practice has been checked by mandatory statutory rules. Thus the French enactment of 1965, art. 17 (2), embodies a provision to the effect that an administrator appointed in the original regulations shall be approved at the first general meeting of the association of flat-owners, which should be seen in connection with the provision in art. 22 (2) according to which no single flat-owner can dispose of more than half of the votes at the general meeting.[34] In Germany an amendment of 1973 now stipulates that the administrator cannot be elected for a longer period than 5 years. Cf. WEG sec. 26 (1).

As far as Danish law is concerned there is for the time being no alternative but to refer to the possibility of having such provisions disregarded in pursuance of sec. 36 of the Contracts Act. However, it is doubtful how far the courts will be prepared to apply this provision.[35] It seems therefore that legislative measures would be desirable in this field. The best solution would probably be to insert a provision in the Freehold Flats Act to the effect that the administrator, irrespective of provisions in the regulations to the contrary, can be removed by a resolution passed by a simple majority at the general meeting of the flat-owners' association.

[32] Cf. Bärmann, *op.cit.*, p. 314, Weitnauer & Wirths, *op.cit.*, pp. 93 f., 133 and 153. In the Bill of the German Federal Government, now shelved, for an amendment of WEG, cf. *Bundestag Drucksache* 8/2444 of December 28, 1978, it was proposed to insert as sec. 15 (2) a provision the purpose of which was to counteract provisions in regulations which unreasonably restrict the disposal of individual parts. A provision of similar nature is embodied in the *Norwegian* Bill, sec. 11 (2), cf. subsec. (3). According to this provision it shall at the first sale of a freehold flat only be possible to lay down certain enumerated limitations for the legal disposal of the freehold flat.

[33] Cf. Bjørst in *Advokatbladet* 1970, pp. 45., and Suenson in *Advokatbladet* 1975, p. 355.

[34] Furthermore, art. 28 (2) in décret n^{0} 67–223 du 17 mars 1967 annexed to the Act stipulates that the administrator cannot be elected for more than three years, in certain cases only for one year.

[35] In an unpublished judgment of February 24, 1981 (Case 2nd Division No. 217/1979) the Eastern Division of the High Court has—surprisingly—refused to set aside a provision according to which the original owner shall have a right to appoint the administrator until all mortgage deeds issued to him have been redeemed. The Danish General Council of the Bar has, on the other hand, criticized such provisions, cf. *Advokatbladet* 1980, p. 208.

4. *The legal status of the association of flat-owners*

According to sec. 2 (2) of the Freehold Flats Act all the flat-owners (and only the flat-owners) are compulsory partners in a community which in the Act is termed "the association of flat-owners" ("ejerforeningen"). This is, however, no association in the ordinary sense of the word but must be characterized as the administrative body of the co-ownership of the common parts of the property. In the *travaux préparatoires* of the Act it is stated: "The association is solely to be characterized as a joint administrative body in that it is to administer the common business as the owners' agent".[36] The main reason why the association of flat-owners cannot be compared with an ordinary association is that it cannot be regarded as an independent legal person in respect of the obligations of the community. This is because it is generally recognized that the flat-owners are personally, jointly and severally, and directly responsible to the creditors of the community (the association of flat-owners).[37]

In respect of liability the association of flat-owners must thus be compared with a common co-ownership or a partnership. As to the internal organization—the existence of a general meeting, a committee, etc.—the association of flat-owners is, on the other hand, suggestive of an association or a company. Therefore it may be said that the association of flat-owners as a "legal construction" is somewhere between the co-ownership/partnership and the association/company.[38]

The fact that the association of flat-owners is not an independent legal person in respect of the obligations of the community does not imply that it is devoid of any capacity to act as an independent legal person as against third parties. Thus the association of flat-owners can *contract in its own name*, e.g. a contract for work or a contract of insurance. The point here is that it has authority to bind all the flat-owners by using the name of the association.

Furthermore, the fact that contracts entered into by the association of flat-owners bind the flat-owners personally, jointly and severally, and directly does not prevent these contracts from binding *also* the association of flat-owners as such. This is important, because as a rule there are common assets—*the assets of the association of flat-owners*—that must be held separate from the individual assets of the flat-owners and concerning which the creditors of the association

[36] Cf. *Bet.*, p. 144. The observation has without comments been reproduced in *Bmcirk.*, item 42.

[37] Cf. *Bet.*, p. 141, containing a discussion on joint and several contra pro rata liability (joint and several liability is the general rule in Danish law, when more persons are jointly liable). This discussion implies that the liability is personal and not limited to the assets of the association. Nor is there hardly any doubt that it was assumed that the liability is direct in the sense that common creditors do not have first to seek satisfaction in the assets of the association. See further *Blok*, pp. 404 ff.

[38] Cf. Bärmann, *op.cit.*, p. 113.

have a right of priority over the individual creditors of the flat-owners. The assets of the association of flat-owners consist in particular of a "capital fund" or the like, other money paid into the association, movable property that does not form part of the real property, and freehold flats, e.g. a caretaker flat, which has been transferred to the association. These assets "belong" to the association of flat-owners in the same way as the assets of a partnership may be said to belong to the partnership. It should be pointed out that no part of the real property, nor its common parts, come under the assets of the association of flat-owners.[39]

In connection with what has just been said it is generally recognized that the association of flat-owners has the *capacity to sue and be sued*.[40] Thus common creditors may decide whether to sue the association of flat-owners, one or more flat-owners or the association of flat-owners together with one or more flat-owners. A judgment against the association of flat-owners may be executed on the property of the association. It has not yet been clarified whether a judgment against an association of flat-owners may also serve as a basis for execution on the individual property of the flat-owners, including the freehold flats, but the presumption is that it does.[41]

An association of flat-owners cannot as such be adjudged a bankrupt. The assets of the association of flat-owners may, however, be subject to proceedings similar to proceedings in bankruptcy in the—not particularly practical—case where all flat-owners have gone into bankruptcy at the same time. Also in this respect the same rules apply as in the case of partnerships.

Whether the association of flat-owners should then be termed a "legal person" is—at any rate from the point of view of Danish law—solely a question of terminology. Decisive importance is, however, generally attached to whether or not the community concerned may be characterized as an independent liable person. If the issue is based on this delimitation the association of flat-owners cannot—any more than a partnership—be described as a legal person.[42]

[39] Cf. Givord & Giverdon, *op.cit.*, pp. 288 f., Kischinewsky-Broquisse, *op.cit.*, pp. 307 f. In German law it is a controversial issue whether what has here been described as the property of the association of flat-owners, i.e. in particular money, constitutes common property in the sense of the WEG or a separate co-ownership, see Bärmann, *op.cit.*, pp. 142 ff., 612 ff., and Weitnauer & Wirths, *op.cit.*, pp. 214 f.

[40] Cf. e.g. 1980 UfR 225 (Western Division of the High Court), and 1980 UfR 249 (Western Division of the High Court). In the latter case a right of action for the association of flat-owners as such against the original owner of the property was recognized as to defects in respect of the common parts of the building. The special character of this situation lies in the fact that the claim does not arise out of a contract with the association of flat-owners, but out of the individual contracts for sale of freehold flats.

[41] The similar question in respect of partnerships is also in dispute, see further *Blok*, pp. 294 ff.

[42] Today it must be considered an accepted fact in Danish law that it is solely a question of terminology—which actually requires no answer—whether a partnership should be described as a legal person, see e.g. Sindballe, *Dansk selskabsret*, vol. 1, Copenhagen 1928, p. 115, Gomard *Aktieselskabsret*, 2nd ed., Copenhagen 1970, pp. 17 ff., and Mads Andenæs, *op.cit.*, pp. 37 ff.

The *German* Freehold Flats Act contains no provision similar to that of sec. 2 (2) of the Danish Act on membership of an association of flat-owners. The freehold flat community is regarded as a special form of co-ownership, cf. WEG sec. 10 (1), and from that it is concluded that the community as such is devoid of any legal personality.[43] On the other hand, the following provision is laid down in the *French* Act, art. 14 (1): "La collectivité des copropriétaires est constituée en un syndicat qui a la personalité civile". Consequently, the community as such can be subject to rights and obligations, can own property, and has the capacity to sue and be sued, cf. also art. 15 (1). As in German law the basis of *Swiss* law has been the rules on co-ownership, but it is provided that the freehold flat community as such can stand possessed of property, in particular funds, and has the capacity to sue and be sued. Cf. C.c., art. 712 (1). This does not imply that the community can be deemed a legal person.[44]

The different bases in the individual countries do not, however, result in any essential difference in practice. For example, the fact that "le syndicat" is considered a legal person in French law does not mean that the creditors of the community can only assert their claims against the community as such, as the individual flat-owners are personally and directly, though in contradistinction to Danish law, only *pro rata* liable for common commitments.[45] Conversely, the importance of the absence of legal personality in German law is weakened by the provisions in WEG sec. 27 to the effect that the administrator may act on behalf of all the flat-owners, also in proceedings. It will be seen that the position of Danish law is closest to the intermediate position expressed by the Swiss rules.

The exposition given above has dealt exclusively with the question of the legal personality of the association of flat-owners within the province of *civil law*. However, similar questions arise both within *criminal law* and *tax law*. The general position of Danish law is that the fact that a community cannot be characterized as a legal person in respect of civil law does not preclude the community from being considered an independent legal person in relation to the rules of criminal law or tax law.

The problems within criminal law arise in particular in relation to the extensive public law regulation of the disposal of real property. In general, the legislation to that effect, which of course also applies to buildings divided into freehold flats, provides that penalties for violation of the provisions of the legislation can be imposed on an association, company or the like as such. To

[43] See Bärmann, *op.cit.*, pp. 116 ff., 495 f., Weitnauer & Wirths, *op.cit.*, pp. 35 ff. It seems that the *Norwegian* Bill is based on the same view, cf. in this connection the special provision in sec. 21 (5) of the Bill stipulating that the chairman of the committee can sue and be sued binding all co-owners.

[44] Cf. Friedrich, *op.cit.*, p. 42, Magnenat, *op.cit.*, pp. 119 f.

[45] Cf. Givord & Giverdon, *op.cit.*, pp. 227 ff., Kischinewsky-Broquisse, *op.cit.*, pp. 314 ff.

the extent the prohibition or order in question concerns the disposal of common parts the question arises whether under such a provision a penalty can be imposed on an association of flat-owners as such. There are practical and real reasons in favour of answering the question in the affirmative, but the issue has not been finally clarified.[46]

The question of whether an association of flat-owners can be regarded as an independent legal person in respect of tax law is, among other things, of importance for the taxation of the income of the association and for the allowable interest deduction in respect of instruments of debt issued by the association to third parties or by the flat-owners to the association. So far the taxation authorities have answered the question in the affirmative, but it is problematic whether this view is tenable.[47]

5. *Improvements, new acquisitions or alterations concerning common parts*

One of the central issues of the freehold flat system is the delimitation of the material authority of the general meeting, i.e. the right to decide on matters concerning the building by a majority vote (simple or qualified). A basic principle recognized in all countries is that the authority of the association of flat-owners at any rate as a predominant rule only includes common parts, not individual parts. As to measures concerning common parts it is usual to distinguish between measures that are usual or necessary for the purpose of preservation or use of the building—*conservative administration*—and measures in the form of improvements, new acquisitions or alterations—*progressive administration*. As regards measures in the field of conservative administration the rule in most countries—also in Denmark, as will be seen below—is that they can be decided by a simple majority—in some countries voting is according to the distribution figures, in others per head—and that this is true irrespective of the importance of the measure, in particular the size of the costs. On the other hand, there is an essential difference between the rules of the various countries on the access to implement measures in the field of progressive administration by a majority vote. For the time being reference is only made to the access to implement measures at the expense of the association of flat-owners, i.e. all the flat-owners.

In *German* law the authority to take decisions by a majority vote includes in principle only conservative administration, cf. WEG sec. 21 (3) and sec. 22

[46] See further *Blok*, pp.220 ff.
[47] See further *Blok*, pp.625 ff.

(1).[48] According to the latter provision "bauliche Veränderungen und Aufwendungen, die über die ordnungsmässige Instandhaltung oder Instandsetzung des gemeinschaftlichen Eigentums hinausgehen" cannot be implemented by a majority vote, but only with the consent of all the flat-owners. That was also the legal position according to the former *French* Act of 1938.[49] One of the most important reforms of the 1965 Act was to introduce a wider authority of the association of flat owners in this respect. According to art. 26 and art. 30 it is now possible by a resolution carried by a qualified majority of at least one half of those entitled to vote and three fourths of the votes according to distribution figures to take decisions on alterations and new acquisitions, etc. The *Swiss* C.c. art. 647 c—647 e make a distinction between three types of work: necessary, useful and luxurious ("pour l'embellissement et la commodité"). Necessary work, i.e. work only serving the purpose of maintaining the value of the building, may be decided by a simple majority. Useful measures are those which would increase the value of the property or improve its use. Such measures require a qualified majority of more than half of the votes both according to number and according to distribution figures. Work that is considered of a luxurious nature can only be implemented by the consent of all the flat-owners.

As far as *Danish* law is concerned the authority of the majority is determined by sec. 1 (3) and 1 (4) of the standard regulations. According to subsec. 3 the general rule is that decisions are taken by a simple majority according to distribution figures among the votes given. According to subsec. 4 a qualified majority of two thirds of all the votes of those entitled to vote both according to number and according to distribution figures is required for amendments of the regulations and for "decisions on essential alteration of common parts and fittings or on the sale of important parts thereof".[50] In the absence of sufficient support another general meeting may on certain conditions be convened at which meeting the proposal may be carried by two thirds of the votes *cast* both according to number and according to distribution figures. The individual regulations *may* contain a deviation from sec. 1 (3) and 1 (4) of the standard

[48] This very restrictive arrangement has been criticized. According to the now shelved Bill of the German Federal Government for an amendment of WEG, *Bundestag Drucksache* 8/2444 of December 28, 1978, it was the intention to allow implementation of renovations, etc., by resolution passed by a qualified majority, cf. sec. 29 a (2) (3) of the Bill.

[49] Cf. Givord & Giverdon, *op.cit.*, p. 397, Kischinewsky-Broquisse, *op.cit.*, pp. 677 ff.

[50] Sec. 18 (3) and 18 (4) of the *Norwegian* Bill is very suggestive of sec. 1 (3) and 1 (4) of the Danish standard regulations. The words "according to number" in sec. 1 (4) of the standard regulations have been interpreted as meaning the number of flats contrary to the number of owners, cf. 1976 UfR 583 (Western Division of the High Court), and 1980 UfR 552 (Supreme Court), cf. II.1 above in respect of the latter judgment. This is of importance in cases where the same person owns more flats in the building, which will be the case in a transitional period as far as the original owner is concerned. The original owner's right of voting should be limited by law, see *Blok*, pp. 444 ff.

regulations. Cf. I.1. above. They will, however, in most cases merely embody the provisions of the standard regulations. In other cases a deviation may have been made—especially from subsec. 4—but in such manner that the distinction between decisions that can be taken by a simple majority and decisions requiring a qualified majority have been maintained.

The provision in sec. 1 (4) of the standard regulations applies in the first place only to measures in the field of progressive administration, and secondly requires only a qualified majority in cases where the measure must be deemed *essential*. Consequently, a decision can be taken by a simple majority according to sec. 1 (3) if it is either (*a*) usual or necessary for the preservation or use of the building—i.e. comes within conservative administration—or (*b*) consists in improvements, new acquisitions or alterations that cannot be deemed essential in the sense of sec. 1(4). As regards the latter point Danish law differs from the foreign rules mentioned above in that these rules require consensus (German law) or a qualified majority (French and Swiss law) for all measures in the nature of improvements or alterations, etc., in principle without regard to the essentiality of the measure.

The Danish solution seems preferable. The requirement of consensus or a qualified majority, respectively, as soon as the question transgresses the mere maintenance of the status quo, seems an exaggeration of the consideration for the individual or the minority, respectively. It may at times be no easy matter to draw the line between conservative and progressive administration. Repairs or replacements which, on the one hand, must be considered necessary, could, on the other, often be implemented in several ways, of which some would imply certain improvements compared with the previous standard. In such cases it seems both reasonable and practical that the majority is left with some freedom of action to choose between the different solutions.

When deciding whether an improvement or alteration must be deemed essential in the sense of the standard regulations it is not sufficient exclusively to attach importance to the costs of implementing the measure. Irrespective of the size of the costs a qualified majority must be required if an essential alteration in the use of the common property would be the result. A decision to build garages on the site would normally be essential for both reasons: the costs are substantial, and the alteration in the use of the site would be essential. A decision to build underground garages would be essential because it would involve heavy costs. The proposal to turn a garden into a parking ground would, on the other hand, often be an essential decision, not because of the costs, but because of the alteration in the use of the site.

Even though sec. 1 (4) of the standard regulations according to its wording generally allows the implementation of alterations by a resolution carried by a qualified majority, it is presumed, however, that also in questions concerning

common property there must be *certain maximum limits to the authority of the general meeting*. A decision may affect the individual flat-owner to such a decisive extent that it should not be possible to proceed with it without his consent. Cases where a decision cannot be taken even by a qualified majority are also recognized in French law and Swiss law.

In French law the costs of new acquisitions and other improvements—both the initial costs and subsequently the maintenance costs, etc.—shall be distributed according to the benefit each flat-owner will derive from the arrangement.[51] Such a rule does not apply in Danish law, where the costs are to be distributed in the normal way according to the distribution quota registered. Cf. sec. 6 (1) of the Freehold Flats Act. The aim of the French scheme is an equitable distribution of the costs, but in practice it may easily give rise to difficulties, because a useful (equitable) standard for determining the benefit accruing to the individual flat-owner often does not exist. The reasoning expressed in the French rules is, however, not entirely without importance in Danish law. Thus it should be recognized that a flat-owner can resist distribution of costs according to distribution figures, when this would result in obviously unreasonable costs to be defrayed by him in relation to the benefit he would derive from the arrangement.[52] Consequently, in such cases the association of flat-owners has no authority to decide by majority. Such a measure can only be implemented by agreement between the interested parties and at their own expense. Cf. below. Reference is here made to a narrow exemption rule, which might be said to be a consequence of the general prohibition against abuse of a majority. The rule might for instance be of importance in the classic example concerning the installation of lifts.

The object of the association of flat-owners is to administer the common parts of the building. Arrangements that would involve an extension in relation to this object can only be implemented with the consent of all the flat-owners. Actual commercial activities are outside the object of the association of flat-owners, and there must be consensus if, for example, the association of flat-owners is to open a shop or a restaurant in common premises. Purchase and operation of a caretaker flat is within the object of the association of flat-owners.[53] If, on the other hand, the purpose of the purchase is to gain profit from renting or re-sale the consent of all flat-owners is required.

Extension, including addition of an extra floor, new building on the site, etc., may mean such important alterations in the character or architectural value of the building or in the possibility of the individual flat-owner to use the common parts that the project should not be proceeded with against the

[51] Cf. loi 1965, art. 10 (1), art. 11 (1), and art. 30 (2) and 30 (3).
[52] A rule of a similar nature is found in the Swiss C.c. art. 647 d (3).
[53] Cf. 1980 UfR 552 (Supreme Court), mentioned in II.1 above.

protest of a flat-owner. Where exactly the limit should be set is difficult to tell. It is a question of a safety valve as expressed in both French law and Swiss law by the rule that alterations and renovations must be in accordance with "la destination de l'immeuble".[54]

A reservation should also be made in respect of the authority of the association to force the individual flat-owner to contribute to costs of arrangements that must be considered highly luxurious.[55] It should be possible for the individual flat-owner to protest against the association's embarking upon projects that are far beyond the usual service arrangements for a building of the nature concerned. In such cases it if often possible to refer also to the fact that the object of the association has been transgressed.

Finally the individual flat-owner must be in a position to oppose an arrangement that would result in permanent disturbances of real importance to him.[56]

If the required majority—simple or qualified—cannot be obtained to initiate new acquisitions or other improvements at the expense of the association, the flat-owners who nevertheless want to implement the arrangement will under certain conditions be able to do so at their own expense. According to German law this is in principle the only possibility for the implementation of improvements, and also in France and Switzerland this right has been expressly recognized.[57] However, measures concerning common property will affect the interests of all flat-owners, also apart from the question of costs. Therefore the association of flat-owners must approve the arrangement.[58] It would not always be sufficient to pass a resolution to that effect by a simple majority, since a qualified majority or possibly the consent of all must be required to the same extent as mentioned above, in so far as the requirement to that effect had no connection with the question of costs.

On the other hand, the requirement of approval by the association of flat-owners is not to be understood in the way that a majority quite arbitrarily can refuse a minority to implement a certain arrangement at its own expense. If the interests of the others are not at all affected by the arrangement or only in a way that must be deemed immaterial, it must according to circumstances be considered an abuse if the majority refuses to give its permission.[59]

[54] Cf. loi 1965, art. 30 (1), the Swiss C.c. art. 648 (2).
[55] Cf. loi 1965, art. 34, the Swiss C.c. art. 647 e.
[56] Cf. the Swiss C.c. art. 647 d (2).
[57] Cf. WEG sec. 22 (1), compared with sec. 16 (3), loi 1965, art. 25 (1) (b), the Swiss C.c. art. 647 d (3), and art. 647 e (2).
[58] Cf. the provisions in French law and Swiss law mentioned in note 57. On the other hand, German law stipulates that (only) the flat-owners whose rights (interests) are encroached upon shall give their approval, see Bärmann, *op.cit.*, pp. 526, 530, Weitnauer & Wirths, *op.cit.*, pp. 185 f.
[59] Compare loi 1965, art. 30 (4). On the whole, the German rules give the same result.