A. An excellent exposition of the subject of condominium, from a comparative perspective, is presented in chapter 5 of the sixth volume of the International Encyclopedia of Comparative Law, which has recently been published. Professor van der Merwe, who authored this chapter, should be congratulated for his fine work.

The modern legal framework for individual apartment ownership, which is known by a variety of terms (e.g., condominium, strata titles, horizontal ownership, apartment ownership), has become very popular in many parts of the world. The combination of an exclusively owned apartment, with a share in the common parts of a building, seems to have responded well to the widely felt need for housing ownership throughout the world. The spread of this legal framework in many countries, within a relatively short period of time, resulted in a legal regime which is particularly suitable for a comparative law approach. There is sufficient common ground among the various condominium statutes in the world to make the study of the variations among them profitable.

B. Van der Merwe lists the reasons for the expansion in our time of the condominium concept throughout the world. He mentions the shortage of rental buildings as a result of the rent control legislation; the saving in building costs of high rise apartment structures as compared with single houses; the attraction of investments of savings in realty in times of inflation; the advantages of living in a community of co-owners as compared with the solitude of living in separate houses; the psychological gratification of home ownership; the social stability achieved by the limited mobility of a population living in privately owned residences.

Naturally, not all reasons played the same role in different countries. Furthermore, differences of opinion may exist within a given country as to the relative significance of the various reasons to the adoption of the condominium regime. Thus, in one of the leading cases of the Israeli Supreme Court, differences of opinion among the judges resulted from
different views regarding the question, what were the principal aims of
the condominium law. According to one view the wish to accomplish
individual home ownership was the prime purpose of the law, while
according to the other view the communal framework offered by condo-
minium was the main purpose of the law.¹

C. Similarities among condominium statutes throughout the world
are considerable. Van der Merwe classified the statutes into the tradi-
tional legal systems. Accordingly, the main aspects of condominium law
were classified into the following groups: Western Europe, Anglo-Ameri-
can countries, Latin America, former European socialist countries, Is-
lamic systems, other countries.

In the last group, of “other countries”, one finds Middle East coun-
ctries (Israel is referred to under this heading), Asia (among them Japan,
China), and Africa.

The panoramic presentation of worldwide condominium statutes is
enlightening and offers a rich source for fruitful comparative work.
Israel law, for one, could greatly benefit by borrowing new ideas from
this remarkable review of world condominium law.

According to van der Merwe, leading among the different statutes are
the U.S.A. Uniform Condominium Act (in his chapter the author refers
to the 1980 version), and the statutes of Belgium, Italy, Greece, Ruma-
nia, and Poland.

Israeli law on condominium is fairly frequently referred to and, on
occasion, has received special attention.² The accuracy of the informa-
tion regarding Israel law is impressive.

D. The question how to characterize the right of an apartment owner
in a condominium has attracted some attention by legal scholars. This
issue is summed up by the author describing the two main approaches:

1. “The Unitary system”, according to which the common property in
the condominium is of primary importance, while the exclusive rights
accorded to each apartment owner are of an ancillary nature.

2. The “Dualistic system”, according to which the two elements in the
condominium (the share in the common parts and the individual rights


² For example on pp. 166-168, with regard to the provisions for the settling of disputes
among apartment owners.
in the apartment) are combined to form a new type of composite ownership, in which often the individual ownership is the most important element.

The question whether the right of an apartment owner in a condominium should be perceived as a new composite right (sui generis), which cannot be adequately described by reference to the traditional labels recognized by private law, such as "exclusive ownership" and "co-ownership" or, whether the nature of the right could satisfactorily be described as a right of ownership in addition to a share in co-ownership, has also been debated in Israel. The view taken by the present writer (in an article published in 1970) was that the right of an apartment owner in a condominium was sui generis. Neither the regular provisions of ownership nor the regular provisions of co-ownership, nor a combination of the two, applied to the right of a unit owner in a condominium.3 An opposite view was expressed by Professor Tedeschi. He was of the opinion that ownership and a share in co-ownership appropriately described the nature of a right in a condominium.4

Recently the Supreme Court of Israel had an opportunity to express its view on this issue. Basing its opinion on grounds similar to those presented by this writer in the above mentioned article, the Court reached the conclusion that the right in a condominium is indeed sui generis.5 It would seem that van der Merwe would be in agreement with this view.6

E. In most Anglo-American condominium statutes the unit owners of a condominium form an association with a separate legal personality (p. 151). Under Israeli law the issue whether unit owners constituted a separate legal personality was for some time an open question.7 It was

6 See p. 27 in Chapter 5, where van der Merwe concludes that "as a legal institution sui generis ... it undoubtedly leads to a better understanding of the practical working of the institution". But compare p. 78 where he states that the right in an apartment "should be placed on the same footing as the ownership of land".
7 Weisman, supra n. 3 at 100-101.
put to rest by a Supreme Court decision holding that the unit owners of a condominium do not have a separate legal personality.\(^8\)

F. Of special interest is the possibility under Anglo-American law to create a "bare land condominium", with no building on the land. This might be useful for trailer parks, mooring sites at marinas and alike (p. 30). It would seem that this is impossible under Israeli law which requires the existence of at least two apartments as a precondition for the creation of a condominium.\(^9\)

Also interesting is the possibility under French law to establish a single condominium of more than one parcel of land, even if the parcels are not contiguous. This may be possible also under Israeli law. Section 142 of the Land Law, 1969 provides that two buildings or more sharing common facilities can be registered as one condominium. There is no requirement that the lots be adjacent.

G. Israeli law could benefit from the experience of some other countries regarding protection of purchasers of apartments in condominiums. Under Israeli law there is no efficient mechanism to ensure harmony among contracts between a developer and purchasers of units in a condominium, with regard to the common parts of the condominium. This has been a source of litigation by frustrated unit purchasers, when they realised that what was promised to them by the developer was inconsistent with contracts of other unit purchasers.\(^10\)

In Canada this problem was solved by requiring developers to deposit with an official authority a prospectus, open to the public, defining the rights of purchasers in the common parts (p. 173).

The American Uniform Condominium Act has a provision which should interest Israeli legislators in view of the fact that it addresses itself to a problem which is not foreign to the Israeli scene. The American provision authorizes purchasers of units in a condominium to terminate prior contracts entered into by the developer while still in control of the condominium, with regard to management of the condominium, employment agreements, leases of recreation or parking facilities, and similar such agreements.

\(^8\) Cohen v. Shamay, (1970) 24(ii) P.D. 388, at 390. The Court's position is in harmony with the view suggested by the present writer, in the above mentioned article (supra n. 3, at 101).


H. An important feature of condominium law is the need to clearly distinguish between parts of the building which are individually owned, and the common parts, shared by all unit owners. The author describes in detail the manner in which this issue has been dealt with in different countries. In essence there are two approaches to this question. According to the first approach the law specifies the elements in a condominium which are units and all the rest is common property. The other approach goes in the opposite direction; it defines the elements that constitute common property of the condominium and all the rest is considered as units. In addition, in some statutes the law lists certain components, which serve all unit owners, and should therefore be common property, e.g., bearing walls, installations used by all owners, etc. (pp. 45, 46, 47).

Israeli law follows the first approach. The law defines units and provides that the rest of the property is held in common. To this the law adds a list of specific components (such as the land, roof, staircases, elevators, etc.) which are included in the common property. However, in an original decision of the District Court of Jerusalem Justice Zeiler ruled that specific items listed by the law as “common parts” (such as part of the roof) could be incorporated into the units. The comparative material on this issue, presented by van der Merwe, would seem to lend support to the opposite view. The listing of specific items in the definition of common parts implies that these items should remain as common parts and not be incorporated in any of the units.

Another view expressed by Justice Zeiler in the above mentioned case finds support in the comparative material in Chapter 5. Justice Zeiler held that although the definition of an apartment in section 52 of the Land Law, 1969 refers to “room or compartment, or a set of rooms or compartments . . .”, also components which are not enclosed by walls, floor and ceiling (such as a patio or veranda) may form part of an apartment. A similar approach can be found in most Western European and Latin American countries (p. 47).

11 Land Law, 1969, section 52.
12 Divon v. Hamemuneh al Hamirsham, C.A. (Jerusalem) 190/84, P.M. 5745 (2) 265, 267, 269 (with the exception of those components which serve more than one unit owner).
13 Criticism of the opinion of Justice Zeiler can be found in: J. Weisman, “Jointly and Severally in Condominiums”, supra n. 1, at 198-202.
Is it essential for a component to be physically adjacent to a unit in order to be considered part of that unit? Thus, could a parking space form part of a unit although not attached to the unit? There is no clear answer to this question under Israeli law. The above mentioned opinion of Justice Zeiler implies that this is not possible. Comparative material on this question indicates that in other countries the law explicitly permits it.

Common parts can belong to some of the unit owners, not necessarily to all of them. This aspect of condominium law attracted criticism by van der Merwe. He states:

The statutes which utilize the notion of “limited common property” do not make any attempt to state how the characteristics of this type of property differ from apartments or common property (p. 45).

This criticism is relevant also in the case of Israeli law. Section 59 of the Land Law, 1969 deals with “condominium complexes” and makes possible the creation of limited common property, belonging only to unit owners in a specific structure or wing of the condominium. However, the law is silent on the question what is the nature of such limited common property. Is it subject to the normal rules of co-ownership or is it regulated by the rules which apply to common parts in a condominium?

Little attention is given in condominium statutes (Israel’s statute included) to property which does not fall within the definition of common parts of the condominium but which is owned in common by all unit owners. Thus, gardening equipment, cleaning tools, garden furniture, money held by the treasurer, etc., belong in common to the unit owners but, presumably, are not subject to the rules applicable to the “common parts” in the condominium. What is the legal regime that applies to such property? If the regular law of co-ownership applies, would it then be possible for every co-owner to bring an action for partition of such property? What happens to this property upon sale of a unit?

The author dealt with this question only briefly. Some reference to this problem can be found in Canadian statutes (p. 56). French law provides that common parts include not only corporeal parts but also

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14 Divon case, supra n. 12, at 269, 271.
15 This is the case in most Western European and Latin American countries (p. 47).
certain accessory rights such as the right to add another storey, or to excavate a cellar (p. 51).

The Supreme Court of Israel held that development rights, while owned in common by the unit owners, were not within the definition of the "common parts" in the condominium. The court did not address itself to the question whether, as a result of its holding, an action for partition of such development rights was possible, or whether a unit owner could assign his share in the development rights to another unit owner in the condominium or to an outsider.16

According to French and German law party walls, separating units, are held in co-ownership of the owners of the units separated by the walls (p. 55). In Israel, a District Court case held that such walls were owned separately by each unit owner up to the middle of the wall.17

I. Most Western European countries use the relative value of the units as a basis for calculating participation quota of each unit (p. 58). "Only the Israeli and South African statutes . . . provide that the quota should be calculated on the basis of relative floor area" (p. 62). This seems to be inconsistent with a statement by the author in another part of his chapter that in Kentucky and — to an extent — in British Columbia, the relative floor area is the criterion for calculating the quota (p. 60).

The author describes the radical change that took place in the U.S.A. where, according to the Uniform Condominium Act of 1980, "The American developer . . . has complete freedom to allocate quotas either equally, according to relative size or value . . . or any other basis" (p. 60). This statement happens to describe accurately also the situation under Israeli law. Israeli law provides that the relative area of the units is the factor on the basis of which the quota is to be calculated but this does not prevent developers, before conveying any unit, from adopting a different criterion.18

J. Some interesting provisions can be found with regard to voting in general meetings. Though voting can be by proxy, French law provides that one person may not accept more than three proxies, except in cases

18 Land Law, 1969, sections 63, 58, 57(a).
in which the total of votes united in the proxy does not exceed 5 percent of the total voting power (p. 145). In Turkey one person cannot represent more than a third of the owners (ibid.). In some statutes (in Canada, U.S.A., New Zealand) it is provided that no votes may be cast in respect of a mere accessory unit, like a unit for parking, storage, etc. (p. 154). Some statutes do not allow an owner to vote if he is in arrears with the payment due by him (in Canada, New Zealand, New South Wales) (ibid.). Under Israeli law if a quorum is not present at a general meeting, the meeting can be reconvened on the same day, and then it will be legally valid with any number of participants.\textsuperscript{19} Not so in some other countries where the second meeting can be convened only after a certain period has elapsed (e.g., ten days or two weeks after the date set for the first meeting) and also then provided that a certain minimum of owners are present (e.g., representing a third of the shares in the common property) (p. 145).

K. Apportionment of management expenses is generally based on the quotas of each unit. In some countries an attempt was made to reach a more equitable solution and base the apportionment on utility. He who derives greater benefit from a certain service should contribute more than he who benefits less. This is the case, for example, in France, where apportionment is on the basis of objective utility. However, this system has provoked disagreement and litigation. "This often involves insurmountable difficulties in measuring the objective utility of a particular service . . ." (p. 64).

This lesson should not be ignored by those who feel uncomfortable with the Israeli system which is based on the relative floor area of the apartments.\textsuperscript{20} Admittedly, the relative area is a mechanical criterion, but it has the advantage of being clear, easy to apply, and it approximates, to some degree, the relative value of the units, avoiding, at the same time, the complications which arise with a criterion based directly on the relative value (e.g., the effect of improvements by apartment owners on the evaluation of the apartment, etc.).

Of special interest is the provision in the law of British Columbia which obliges developers to participate in the common expenses in proportion to the quotas reserved by them for future additions of apartments to an existing building (p. 99).

\textsuperscript{19} Section 8 of the Schedule of the Land Law, 1969.
\textsuperscript{20} Sections 57, 58 of the Land Law, 1969.
Under U.S.A. law when a unit is sold the transferor and the transferee are jointly and severally liable for outstanding debts attributable to the unit for management expenses (p. 108). In France and Belgium the law provides that debts which became due before transfer took place are borne by the transferor; debts which fall due after transfer are borne by the transferee (p. 83). Israeli law is silent on this matter which, presumably, implies that a purchaser is not liable for debts accrued before his purchase.

L. Israeli law on condominium does not state whether by-laws of a condominium bind only unit owners or whether they bind also third parties who occupy an apartment, such as lessees, guests of a unit owner, etc. Other condominium statutes provide that by-laws bind also tenants and other occupiers of units (pp. 73, 114, 121). Some American statutes regard restrictions in the by-laws as equitable servitudes and as such bind also third parties (p. 118). According to some statutes, lessees and mortgagees may vote in general meetings on matters that affect their interests, if a provision to this effect was introduced in the appropriate documents of the condominium (pp. 70, 115, 154).

M. We have already referred to the question what is the nature of a right in a condominium (supra, para. D). Even those who claim that the right can be described as ownership admit that this ownership is subject to special rules. The features which distinguish this ownership from regular ownership stem from the fact that in a condominium there is intensive interdependence and close proximity among unit owners. This results in greater restrictions on the use made of a unit and on the use allowed in the common parts. The law of nuisance is applied more strictly than among regular neighbours (pp. 73, 78). Thus, in the U.S. most statutes provide that an owner must keep his unit in good maintenance. 21 Spanish law provides that a unit owner must refrain from irritating activities in his unit (p. 73). In New South Wales the by-laws provide that an owner must keep glass windows or doors forming boundaries of his unit clean, and he may not hang in any part of his unit any washing visible from the outside of the building. Furthermore, owners must be adequately clothed when venturing into the common property and must not use language likely to cause offence or embar-

21 At p. 74. Similar provisions can be found also in Austria and Spain, at p. 73.
assment. Their children must not be allowed to play in the common parts if unaccompanied by an adult.²²

If one accepts that the contents of the right in a condominium is indeed significantly different from the contents of regular ownership, then the debate whether this right should be termed “ownership”, or should be recognized as a new right of property, *sui generis*, becomes a semantic one. As such its importance should not be overrated.

N. The question whether a dissenting minority can be compelled to participate in expenses for adding improvements to a condominium (as distinct from maintenance), is dealt with in a variety of ways. German law requires unanimity of opinion for adding improvements (p. 93). So does Israeli law.²³ Other statutes allow improvements by a majority vote (80% in Canada, 2/3 in Italy, 3/4 in Massachusetts).²⁴ In some countries, improvements by a majority vote are allowed provided they do not involve an extraordinary expenditure (10% of the value of the condominium, in Massachusetts). If the desired improvements are costly the dissenting minority does not have to contribute towards them but is not permitted to enjoy the improvement (if practically possible). This is the case in Italy (p. 93). In Massachusetts the dissenting minority can in such a case force the majority to purchase their units (p. 97).

O. One of the drawbacks of Israeli law on condominium is that, practically, it prevents transactions with non unit-owners with regard to the common parts. Thus, leasing to an outsider parking or storage space, or granting a right of way, is virtually impossible. This is a result of a provision in the law that transactions in common parts necessarily extend also to the units. The exceptions to this rule are transfer of ownership of part of the land, or annexation of land to the common property if unanimously voted for.²⁵ This seems to be the case also in German law (p. 91). French law is more flexible in this context. It permits by a decision of a majority alienation of non-vital parts of the common property (p. 91). Dutch law is also flexible in that it allows charging the common property with a praedial servitude in favour of neighbouring land (p. 91).

²² At pp. 75, 80, 81 (with regard to New South Wales), and see also p. 82 (with regard to South Africa and Singapore).
²³ Section 58 of the Land Law, 1969.
²⁴ So does France as well (pp. 93, 94, 97).
²⁵ Section 55 (b) of the Land Law, 1969.
P. If a condominium is seriously damaged, reconstruction requires, under Israeli law, a majority of 3/4.\textsuperscript{26} German law on this issue reasonably distinguishes between the case in which there was no insurance for the building and cases of coverage by insurance. If the condominium was not insured then reconstruction requires unanimity. If insured, a majority decision suffices (p. 129). Under German law the damaged building must be restored to its previous condition (\textit{ibid.}). Israeli law does not have explicit provisions on the question how the restoration should be conducted. In a recent case, the Supreme Court ruled that one should not insist on exact restoration. Modern architectural style and equipment, and new construction techniques might justifiably require some deviation from the condition of the pre-existing building, which might have been built many years earlier. Such reasonable changes, if they do not involve a substantial expenditure are permitted by the court if supported by a 3/4 majority.\textsuperscript{27}

Q. Of special interest are the findings with regard to typical problem areas in condominiums. It seems that the greatest difficulty arises with regard to dilapidated buildings, when no agreement can be reached by the owners to renovate or demolish. In such stalemate situations, the building deteriorates and it becomes increasingly difficult for unit owners to sell their units (p. 221). The relatively young condominiums in Israel have not as yet revealed this difficulty. However, other areas of litigation described by the author are shared also by the Israeli experience. Thus, as in other countries, in Israel too central heating problems are a major issues at general meetings of unit owners (p. 64).

In sum: Professor van der Merwe has done an excellent job in Chapter 5 of volume VI of the International Encyclopedia of Comparative Law. He presents the reader with a wealth of information as to how condominiums are dealt with by the many countries in which this institution is recognized. The many aspects of the law of condominiums were addressed by him in a clear and methodological manner, fully substantiated by primary sources. If the reliability of the data in Chapter 5 is to be judged by the sample of Israeli law then it is a highly reliable source of information on the subject of condominiums.

Lest this review be judged as biased in favour of the author of Chapter 5, I should like to conclude with one critical remark. A major

\textsuperscript{26} Section 60 of the Land Law, 1969.
\textsuperscript{27} Tzodler v. Yoseff, supra n. 5.
problem with condominiums in practice, in Israel, is that the quite satisfactory legal scheme is frequently circumvented by developers who contract out of the statutory provisions. The fact that the overwhelming majority of condominium law is dispositive rather than imperative gives rise to serious problems in Israel. This aspect, although not entirely ignored by the author, merits greater attention unless, of course, this problem has not plagued other countries as well.

Joshua Weisman*

* Professor of Law, The Hebrew University of Jerusalem.