A COMPARATIVE STUDY OF THE DISTRIBUTION OF OWNERSHIP RIGHTS IN PROPERTY IN AN APARTMENT OR CONDOMINIUM SCHEME IN COMMON LAW, CIVIL LAW AND MIXED LAW SYSTEMS

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I. INTRODUCTION

Most legal systems recognize that apartment or condominium ownership relates to two distinct components of the land and buildings comprised in a condominium development. Included in these components are firstly apartments, flats, or units which are intended for the exclusive use by apartment owners, and secondly, common property or common elements which are intended to be used collectively by all the owners. In most condominium statutes these two components are combined into an indivisible composite entity consisting of an apartment coupled with an undivided share in the common property. Even in countries like Scotland, which construe the new entity, created in terms of the Tenements Bill as a flat to which a right of common property in certain parts of the tenement scheme is attached as a pertinence, a distinction is still drawn between parts of the scheme which form part of the flat or apartment, and parts of the scheme which are considered part of the common property.

This distinction is important for the following reasons. Firstly, an apartment, unit or flat owner has exclusive ownership with regard to those parts of the scheme that are included in his unit, whereas he only has a form of collective ownership over the common property. This means that the owner has greater rights of use and enjoyment with regard to his or her apartment (as well as more power to alter his or her apartment according to individual taste) than he does to the common areas. Within the restraints of neighbor law, he

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or she is in principle allowed to follow his or her own discretion in enjoying and renovating the unit. Rights with regard to the common property are much more restricted. He or she has to respect that other owners have equal rights of use and enjoyment to the common property and that alterations to the common property can only be effected with the co-operation of the other owners.

Secondly, the responsibility and cost of maintaining an apartment rest with the owner, whereas the responsibility and cost of maintaining the common property must be borne collectively by all the owners with a share in the common property. In the United States, Germany and South Africa, the responsibility of maintaining the common property rests with the management body (unit owners’ association or body corporate), utilizing contributions paid by the unit owners to a common fund.

Thirdly, in some countries, such as South Africa, the floor area of a particular apartment or flat plays an important role in ascertaining the participation quota (unit entitlement) of an apartment. This is the formula by which inter alia the share of the unit owner in the common property and his or her liability for common expenses are calculated. In these countries, the quota is calculated on the basis of the floor area of an apartment in relation to the total floor areas of all the units. In order to ascertain the exact floor area of each apartment, it is important to know which parts of the scheme property belong to which particular apartment.

Finally, if an apartment or unit owner chooses to procure individual insurance for his or her apartment, it is important in most legal systems to ascertain precisely which part of the scheme is covered by such insurance. This aspect assumes particular importance where the management body has also procured insurance covering the whole building.

Some jurisdictions have created a further category of property within the apartment or condominium scheme by dividing the common property of the condominium into general common property and limited common property (or limited common elements). Limited common property is usually taken to refer to those parts of the building which are reserved for the use and enjoyment of some, but not all of the unit owners. In other jurisdictions, parts of the common property are allocated as exclusive use areas to particular unit owners.

The aim of this Article, in honor of Alan Watson, my former mentor, colleague, friend, and celebrated scholar in Roman and Comparative law, is to

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3 This will also be true in Scotland if the developer or the flat owners have decided to adopt Scheme B for a particular tenement scheme.
illustrate the distribution of apartment and condominium ownership in four different legislative codes. For this purpose, I have chosen one statute from a common law system, namely the Uniform Common Interest Ownership Act of the United States; one statute from a civil law system, namely the German Wohnungs eigentumsgesetz of 1951 as amended; and statutes from two jurisdictions having mixed legal systems, namely the South African Sectional Titles Act of 1986 and the Tenements (Scotland) Bill of 1998. To give the reader a proper background on each system studied, a brief introduction will precede the discussion of the distribution of ownership in each jurisdiction.

II. UNITED STATES

A. General Background

Borrowing extensively from European and Latin American experience, Puerto Rico was the first North American jurisdiction to promulgate a statute on apartment or condominium ownership in 1958.\(^4\) Despite this model, condominium schemes were still created on a common law basis in California and other states.\(^5\) This changed with the amendment in 1961 of the National Housing Act.\(^6\) This amendment empowered the Federal Housing Administration to insure mortgages on condominiums authorized by state law. For this purpose the Federal Housing Administration published a Model Statute\(^7\) for the creation of condominiums compatible with its standards. Within days Hawaii adopted condominium legislation based on this model and by 1963 more than 30 states had passed condominium statutes patterned either on the Puerto Rican or Federal Housing Administration models. By 1969, all 50 states, including the District of Columbia, Puerto Rico and the Virgin Islands, had enacted legislation enabling the establishment of condominiums.\(^8\) These ‘first


\(^{5}\) See Curtis J. Berger, Condominium—Shelter on a Statutory Foundation, 63 COLUM. L. REV. 987, at 1002-03 (1963) (listing examples of condominiums that predate legislative recognition).


\(^{7}\) See Berger, supra note 5, at 1004 (claiming that the Model Statute of 1962 was patterned on an earlier New York proposal rather than on the Puerto Rican model). See also PATRICK J. ROHAN & MELVIN A. RESKIN, CONDOMINIUM LAW AND PRACTICE, app. B-3 (1965) (providing a reprint of the full text of this model statute).

\(^{8}\) See ROHAN & RESKIN, supra note 7, app. B-1 (listing of the statutes currently in force).
generation' statutes, contemplating primarily single high rise building condominiums, soon proved too skeletal to regulate this fast-growing, concentrated form of housing. Consequently, some states enacted more detailed 'second generation' statutes dealing with matters like consumer protection and the development of condominium projects in stages. The varying and frequently inappropriate terminology used by these statutes, as well as the diversity in detail, made it extremely difficult for national financial institutions and purchasers across state boundaries to evaluate the suitability of condominium documents and financial arrangements in the various states. Furthermore, these statutes did not address many actual or potentially problematic areas involving such matters as termination of the condominium regime, expropriation, insurance and the interests of mortgage debtors on foreclosure.  

Primarily to resolve these and other matters, the National Conference of Commissioners of Uniform State Law, a national organization devoted to the attainment of uniformity in state legislation, approved the Uniform Condominium Act (UCA) at their annual meeting in 1977. The Act was approved by the American Bar Association in 1978, and by 1980 it was enacted, mostly with only minor amendments, in at least 14 states. As a result of the legislative processes in these states and a reconsideration of the Act by the drafting committee of the Uniform Planned Community Act, which evaluated a wide variety of multiple land ownership regimes similar to condominiums, a number of amendments were introduced in 1980. In 1982 the Uniform Condominium Act (1980) was consolidated with two other multiple real property ownership regimes, the Model Real Estate Cooperative Act (1981) and the Uniform Planned Community Act (1980) in the Uniform Common Interest Ownership Act (UCIOA). By 1994 UCIOA had become the law in at least five states,
while the Uniform Condominium Act, or substantially similar laws, existed in 21 other states.¹³

III. DISTRIBUTION OF OWNERSHIP

A. Unit

The most important entity created by the Uniform Common Interest Ownership Act relating to condominiums, is the condominium itself, which consists of two basic components: the unit coupled with an undivided share in the common elements. Although it is possible in terms of the Act to divide airspace into units,¹⁴ a unit is, as a rule, a physical portion of a building designated for separate ownership. This is borne out by the definition of a "unit" as "a physical portion of the [condominium] designated for separate ownership or occupancy."¹⁵ Note that a unit is described as a tangible, physical part of the condominium project rather than a right in, or claim to, a tangible physical object. What is included in a unit in terms of the Act will depend on the description thereof in the developer's declaration filed on record with the appropriate registering authority.¹⁶ Although the developer has complete freedom to incorporate any part of the building as part of a unit, rarely, in practice, are certain indispensable parts of the condominium designated as part of a unit.

With regard to boundaries of the unit, the Uniform Act has opted for the planes of the inside surfaces of the unfinished walls, ceilings and floors to be the designated outside boundaries rather than the center line of the walls, ceilings and floors. When the declaration merely defines unit boundaries in terms of floors, ceilings and perimetric walls,¹⁷ the Act provides that "all lath,


¹³ See UCIOA, supra note 13, § 1-103 (26), at 481 (defining Real Estate as including 'parcels with or without upper or lower boundaries and spaces that may be filled with air or water').

¹⁴ See id. § 1-103(31), at 482.

¹⁵ See id. §§ 1-103(31), 2-105(a)(5), at 482, 523. In terms of the latter section, the declaration must contain a description of the boundaries of each unit created by the declaration, including the unit's identifying number.

¹⁶ See id. § 2-102, cmt. 1, at 519-20. In a townhouse project, it may be desirable to describe the unit boundaries in the declaration as the "exterior surfaces of the roof and exterior walls with
furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and other materials constituting any part of the finished surfaces thereof are a part of the unit. One important consequence of this is that external structural elements of boundary walls, floors or ceilings could never form part of a unit. They are always common elements which must be maintained by the unit owners' association. Another consequence is that an owner is not in principle entitled to construct a niche or even to hammer in a nail into any boundary feature without the co-operation of the other owners.

With regard to the components of a unit, the Uniform Act states that all spaces, interior partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit. If indicated on the project documents, the main components of a unit may be complemented with either contiguous or non-contiguous parts of the condominium. It may thus include unenclosed contiguous spaces such as balconies, verandas or patios. Where a balcony is included in a unit, the inner surface of the walls, ceiling and floor of the balcony forms the external boundaries of the unit. If the walls are not the full height of the unit, imaginary lines being a vertical or horizontal continuation of the internal surface of the existing wall or ceiling would presumably qualify as the external boundaries of the unit. In addition, non-contiguous portions of the condominium, such as underground garages or parking lots, storage lockers or similar facilities, may also be included in the project documents as part of a unit, provided they are not designated as limited common elements.

B. Common Elements

In the allocation of common element components, the older United States condominium statutes based on the Model Statute of the Federal Housing Administration followed the inclusive approach by providing a list of such components. Since the developer is allowed wide discretion to designate most

the center line of the party walls constituting the perimetric boundaries of the units in that plane, and the undersurface of the bottom slab dividing the unit itself from the underlying land.” Id.  
18 See id. § 2-102(1), at 519.  
19 See id. § 2-102(3).  
20 These consist of the declaration, plats and plans of the condominium.  
21 See UCIOA, supra note 13, § 2-102(1), at 519.  
22 See ALVIN B. ROSENBERG, CONDOMINIUM IN CANADA, nos. 601.2 (1969) (interpreting similar provision in Canadian statute); see also Proprietors Strata Plan No. 6522 v. Furney (1976), 1 N.S.W. St. R. 412, 415 (interpreting similar provision in New South Wales' statute).
common elements as part of a unit in the project documents, these lists were usually not divided into mandatory and permissive sections. The older statutes, some with minor variations, adopted the list supplied by the Model Statute.\(^\text{23}\) The list includes the following: the land on which the building is located; foundations, columns, girders, beams, supports; main walls, roofs, halls, corridors, lobbies, stairs, stairways; fire escapes, entrances and exits of the building; the basement, yard, gardens, parking areas and storage places; premises for lodgings for maintenance and property management staff; installations for central services supplying inter alia electricity, gas, heating, air-conditioning and incinerating; elevators, tanks, pumps, motors, fans, compressors, ducts and other apparatus and installations destined for common use; community and commercial facilities as provided in the project documents; and all other parts of the project necessary or convenient for its existence, maintenance and safety.\(^\text{24}\)

The more recent United States statutes, following either the Uniform Condominium Act or the Uniform Common Interest Ownership Act, employ the exclusive approach and define common elements as all portions of the condominium other than the units.\(^\text{25}\) Two special provisions in the Uniform Common Interest Ownership Act supplement this. The first special provision is contained in the definition of a ‘unit’, which states expressly that all portions of boundary walls, floors or ceilings of a unit except the finished surfaces thereof are part of the common elements.\(^\text{26}\) The second special provision concerns any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture, which lies partially within and partially outside the designated boundaries of a unit. If any portion of such item serves only that unit, it is a limited common element allocated solely to that unit; if any portion thereof serves more than one unit or any portion of the common elements, it is part of the common elements.\(^\text{27}\) The rationale for inserting this provision is to minimize disputes in condominium administration with respect to liability for repair of pipes and other components of the building for which unit owners may expect the association to pay and for which the association may wish to


\(^{24}\) See Rosenberg, supra note 22, no. 108.2; see also Rohan & Reskin, supra note 7, no. 6.01(1)-(2); Richard R. Powell & Patrick J. Rohan, Powell on Real Property VII B no. 633.23 (1968).

\(^{25}\) See UCIOA, supra note 13, § 1-103(4), at 479.

\(^{26}\) See id. § 2-102(1), at 519.

\(^{27}\) See id. § 2-102(2).
have repaired by unit owners. A third special provision was added in 1994 to include as common elements any other interests in real estate for the benefit of unit owners which are subject to the declaration. The purpose of this amendment was first to clarify that common elements may include easements or other forms of servitudes, which benefit either the unit owners’ association or all the unit owners in the condominium. Examples of such interests include access easements to a landlocked parcel on which the condominium is located and easements for shared parking. A further purpose of the amendment was to enable condominium associations to acquire real estate (as for example additional parking areas or open space) in addition to the land originally submitted to the declaration without the formalities of an amendment to redefine the boundaries of the condominium. Any real estate physically located outside the boundaries of the condominium thus acquired by the association would automatically become a common element.

The distinction between the components constituting common elements and components that are part of the unit is, as already indicated, particularly important for the question of maintenance. The Uniform Act, subject to certain exceptions, makes the association responsible for the maintenance of common elements and each unit owner individually responsible for the upkeep of his or her own unit. In the field of insurance, the difference between unit components and common element components is of importance in the case of condominium projects, which contain units not divided by horizontal boundaries. In such projects only the common elements need to be insured and not the unit components. In a normal high-rise configuration, the unit owners’ association will normally insure both the unit components (exclusive of improvements inside the individual units) and the common element components that are part of the unit is, as already indicated, particularly important for the question of maintenance. The Uniform Act, subject to certain exceptions, makes the association responsible for the maintenance of common elements and each unit owner individually responsible for the upkeep of his or her own unit. In the field of insurance, the difference between unit components and common element components is of importance in the case of condominium projects, which contain units not divided by horizontal boundaries. In such projects only the common elements need to be insured and not the unit components. In a normal high-rise configuration, the unit owners’ association will normally insure both the unit components (exclusive of improvements inside the individual units) and the common element components that are part of the unit is, as already indicated, particularly important for the question of maintenance. The Uniform Act, subject to certain exceptions, makes the association responsible for the maintenance of common elements and each unit owner individually responsible for the upkeep of his or her own unit. In the field of insurance, the difference between unit components and common element components is of importance in the case of condominium projects, which contain units not divided by horizontal boundaries. In such projects only the common elements need to be insured and not the unit components. In a normal high-rise configuration, the unit owners’ association will normally insure both the unit components (exclusive of improvements inside the individual units) and the common element components that are part of the unit is, as already indicated, particularly important for the question of maintenance. The Uniform Act, subject to certain exceptions, makes the association responsible for the maintenance of common elements and each unit owner individually responsible for the upkeep of his or her own unit. In the field of insurance, the difference between unit components and common element components is of importance in the case of condominium projects, which contain units not divided by horizontal boundaries. In such projects only the common elements need to be insured and not the unit components. In a normal high-rise configuration, the unit owners’ association will normally insure both the unit components (exclusive of improvements inside the individual units) and the common element

28 See id. § 2-102 cmt. 2, at 519-20. The comment also points out that problems that arise as a result of the negligence in the use of the components—such as stoops and pipes—are resolved by § 3-107. This section imposes liability on a unit owner who causes damage to the common elements. Furthermore, § 3-115(c) permits the association to assess common expenses ‘caused by the misconduct of any unit owner’ exclusively against that person. This could also include clean-up costs incurred as a result of the unit owner’s misuse of the common elements.

29 See id. § 1-103(4) (ii), at 479.

30 This would typically require a two-thirds vote of the unit owners. See id. § 2-117(a), at 546.

31 See id. § 1-103, cmts. 6 and 7, at 483-84.

32 See id. § 3-107(a), at 585-86.

33 See id. § 3-113(a)-(b), at 594.
components, and the cost of such insurance will be a common expense borne by the association.\textsuperscript{34}

\textit{C. Limited Common Elements}

The UCIOA defines limited common elements as portions of the common elements allocated by the declaration for the exclusive use of one or more, but fewer than all, the units.\textsuperscript{35} Examples are special corridors, stairways, elevators and sanitary services common to units of a particular storey and parking spaces, laundry rooms, porches, patios, balconies and stairways contiguous to and serving only one or more owners exclusively.\textsuperscript{36} Section 2-102(2) and (4) of UCIOA further defines these limited common elements.\textsuperscript{37} The first subsection refers (as already noted) to any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture which lies partially within and partially outside the designated boundaries of a unit. If any portion of any such item serves only a particular unit, it will be considered limited common property allocated solely to that unit. The second subsection provides that any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but allocated outside the unit's boundaries, are limited common elements allocated exclusively to that unit.

The notion of limited common interest is employed in the UCIOA in order to achieve a more equitable distribution of the cost of maintaining that particular area by the actual users thereof. The UCIOA contemplates that a developer (declarant) will fund all common operating expenses during the fledgling stage of the project, until a sufficient number of units have been conveyed to warrant assessing the unit owners.\textsuperscript{38} However, once a unit owners' association has been established and assessments have been made, all units, including those owned by the developer, are obliged to contribute. The association is obliged to make assessments based on a budget adopted at least

\textsuperscript{34} \textit{See id.} § 3-113(a). Further, § 3-115(C)(3) authorizes an association to allocate the cost of the insurance on the basis of risk if the declaration so requires.

\textsuperscript{35} \textit{See id.} § 1-103(19), at 480.

\textsuperscript{36} \textit{See ROHAN & RESKIN, supra} note 7 at no. 6-01(5).

\textsuperscript{37} \textit{See UCIOA, supra} note 13, § 1-103(19), at 480.

\textsuperscript{38} \textit{See id.} § 3-115(a), at 598. For reasons why the developer would do this, see comment 1 to § 3-115 (discussing situations where a declarant might find it advantageous to pay all of the expenses of the common interest community himself rather than assessing each unit individually). \textit{Id.} 3-115, cmnt. 1.
annually by the association. In general, all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration.\textsuperscript{39} The UCIOA, however, stipulates that the declaration may provide that the expenses pertaining to the maintenance, repair and replacement of limited common elements must be assessed only against the units to which those common elements are assigned either equally or in any proportion the declaration provides. It further provides that expenses benefitting fewer than all the units must be assessed exclusively against the units benefited. Finally, the costs on insurance must be assessed in proportion to the risk and the costs of utilities must be assessed in proportion to usage if the declaration so provides.\textsuperscript{40}

IV. GERMANY

A. General Background

During the Germanic period, something akin to apartment ownership was already known in medieval Europe, especially in those parts which later became modern Germany. Under such names as Stockwerkseigentum, Geschosseigentum, Herbergsrecht and Kellerrecht, storeys of buildings acquired in individual ownership were used mainly for residences while separate rooms served as business premises; shops, taverns and butcheries are some examples.\textsuperscript{41} Interestingly, documentary evidence indicates that during the 12th century parts of buildings were already conveyed in individual ownership in Germany to be exploited as public houses.\textsuperscript{42} The Stockwerkseigentum of Germanic law was a primitive and undeveloped form of apartment ownership. Storeys in high-rise buildings were usually subdivided in individual ownership with the owner of the top storey owning the roof, the owner of the bottom storey owning the land, and the owners of the other storeys owning only their particular storeys. Permeated by the notion of

\textsuperscript{39} See id. § 3-115(b); see also § 2-107, at 529-30 (allocation of interest in the declaration); see also § 1-103(5)-(6), at 479 (defining 'common expenses' and 'common expense liability').

\textsuperscript{40} See id. § 3-115(c)(1)-(3), at 599.

\textsuperscript{41} See generally VON GIERKE, DEUTSCHES PRIVATRECHT II 39-41 (Sachenrecht) (Binding ed. 1895); JOHANNES BÄRMANN, WOHNUNGSEIGENTUMSGESETZ KOMMENTAR 6-8 (1st ed. 1958); BÄRMANN, PICK & MERLE, WOHNUNGSEIGENTUMSGESETZ KOMMENTAR 25 (4th ed. 1980).

\textsuperscript{42} See Möller, Die Problematik des Raum- und Stockwerkseigentums 7 (1957) (thesis) (on file with Goethe-Universität, Frankfurt am Main) (presenting the Schreinsurkunde of Cologne of 1135 tile 1142 A.D.).
individualism, management and maintenance of the building was left to the individual owners themselves without any central administrative body to deal with these matters. The rights and duties of the owners were not clearly demarcated; in most cases, no common property was recognized and there was no mechanism to resolve disputes amongst owners. The endless disputes amongst unit owners swiftly drew the designation of Streithäuser, or houses of dissent.\(^4\) The unsatisfactory experience with Stockwerkseigentum led to the non-recognition of apartment ownership in the codifications of the German states of Prussia and Saxony in the late 18th and mid-19th centuries, respectively, and the unqualified acceptance of the Roman maxim \textit{superficies solo cedit} in the German Civil Code of 1900. According to this maxim, a building is not capable of being separated from the soil and thus belongs, with the inclusion of all its parts, to the owner of the soil.

The devastation of World War I and II caused a desperate housing shortage coupled with an almost pathological psychological yearning for home-ownership. This compelled German legislators to reconsider a form of apartment ownership as a means of spreading home-ownership to a larger segment of the population. The idea that home ownership would bring not only social and economic stability, but also political stability, played a particularly important role in a war-damaged Germany, overrun by thousands of homeless people.\(^4\) Due to the initiative of Carl Wirths a member of the German Federal Parliament, special legislation on apartment ownership was promulgated in West Germany in 1951.\(^4\)

\(^4\) See generally 3 Eugen Huber, System und Geschichte des Schweizerischen Privatrechts (1886-1893) 241 (1891); Leyser, The Ownership in Flats, A Comparative Study 7 Int’l & Comp. L.Q. 31 (1958) (analyzing Continental systems of apartment ownership).

\(^4\) Carl Wirths, who is regarded as the father of the German Wohnungseigentumsgesetz, suggested in the first commentary on the statute written together with Hermann Weitnauer, that this was the primary justification for the promulgation of the German statute. See Hermann Weitnauer & Carl Wirths, Gesetz über das Wohnungseigentum und das Dauerwohnrecht 286 (1972) for the text of the first edition.

\(^4\) See Gesetz über das Wohnungseigentum und das Dauerwohnrecht—Wohnungseigentumsgesetz (Law on apartment ownership and long-term residential rights) v. 15.3.1951 (BGBl. I 175) [hereinafter Law on Apartment Ownership]. See also Bärmann, supra note 41, 65-72 (describing the legislative process).
Like most Western European statutes,46 the German condominium statute does not contain a list of the components that can form part of a unit (Wohnung, Raum, or Gegenstand des Sondereigentums). The reason for this is that the real estate developer and apartment owners are allowed a certain amount of autonomy to decide that certain parts of the scheme, which are usually designated as common property, can be included as components of apartments.47 Therefore, one has to refer to the project documents (plan of subdivision) to ascertain which parts of the scheme had been allocated by the developer or the mutual agreement of the owners to particular apartments.48

The German statute envisages an apartment or non-residential unit as part of the condominium building, which is intended for exclusive and independent use. Only parts of a building that are clearly isolated (abgesondert) from other apartments and the common property should form part of an apartment.49 It does not appear that an apartment can consist of portions of land or adjacent cubic airspaces.50 Parts of the surrounding masonry isolating an apartment from other apartments and the common property must therefore be included in an apartment. In this regard, the statute provides that only components of the building which can be altered, destroyed or inserted without duly encroaching on the rights of unit owners, and without changing the external structure of the building, can be included in an apartment.51

The German statute does not attempt to describe the boundaries of an apartment or unit. The criterion of independence and exclusiveness, however,

46 See generally Van der Merwe, supra note 1, § 107.
47 See Law on Apartment Ownership, supra note 45, § 5 para. 3.
48 See id. § 7 paras. 3, 4.
49 See id. § 3 "Sondereigentum soll nur eingeräumt werden, wenn die Wohnungen oder sonstigen Räume in sich abgeschlossen sind" (individual ownership should be established only if the apartments or other rooms form an isolated unit). Since this is a permissible condition, non-compliance does not invalidate the scheme; see also Bärmann, Pick & Merle Wohnungseigentumsgesetz, Gesetz über das Wohnungseigentum und das Dauerwohnrecht, Kommentar 37-50 (7th ed. 1997); see also Bub Die Anforderung an die Abgeschlossenheit von Räume als Voraussetzung für die Begründung von Wohnungseigentum, FESTSCHRIFT BÄRMANN UND WEITNAUER 69-90 (1990).
50 Bärmann, Pick & Merle, supra note 49, § 3, no. 17.
51 See Law on Apartment Ownership, supra note 45, § 5, para. 1; see also Bärmann, Pick and Merle, supra note 49, § 3, no. 3.
implies that apartments most probably must be isolated from each other and from the common property by physical features such as floors, walls, and ceilings. The above requirement as to the components of an apartment also implies that structural components of the boundaries of apartments or units can never form part of an apartment. The German position thus approximates the position in the UCIOA that regards the planes of the inside surfaces of the unfinished walls, ceilings or floors as the outside boundaries of units rather than the centre line of the walls, ceilings or floors. In the case of parking spaces, the German statute makes an exception to the requirement that a unit or part of a unit must be clearly isolated. It provides that parking spaces may be established in condominium buildings (usually in the basement) as part of a unit as long as they are distinct entities and clearly demarcated on the surface of the floor by some permanent physical features.\footnote{See Law on Apartment Ownership, supra note 45, § 3 para. 2. Lines which are merely painted on the surface of the floor are not considered sufficient. Low concrete or metal walls, firmly fixed railings and presumably also a line of faced bricks built into the concrete surface would be acceptable. See also Henkes, Niedenführ and Schulze, Wohnungseigentumsgesetz, Handbuch und Kommentar zum Wohnungseigentumsgesetz mit Anmerkungen zur Heizkosten- und Heizungsanlagen-Verordnung § 3, nos. 17-18 (3d ed. 1995); Röll, Münchner Kommentar zum Bürgerlichen Gesetzbuch Vol. 6 Sachenrecht § 3 Wohnungseigentumsgesetz EG no. 59 (3d ed. 1997).}

In Germany, it is accepted that an apartment need not be confined to one room or a set of rooms on a particular floor of the building. Certain contiguous or non-contiguous parts of the building could form a component of an apartment. Thus balconies, as well as cellars and garages (including parking spaces) can form part of a residential or non-residential apartment as long as they are described as such in the constitutive documents.\footnote{See Law of Apartment Ownership, supra note 45, § 7 para. 4. The additional rooms must (with the exception of parking spaces) be clearly isolated and indicated with the same color and number on the plans. See also Bärmann, Pick and Merle, supra note 49, § 5, no. 18; Henkes, Niedenführ and Schulze, supra note 52, § 7, no. 13.}

B. Common Property

The German statute initially defines common property exclusively by excluding land and those parts of the scheme which form part of an apartment or which are owned by a third person.\footnote{See Law on Apartment Ownership, supra note 45, § 1 para. 5.} Thus, land, including facilities on the land such as swimming pools and tennis courts, is always common property. The same applies to all parts of the building that do not form part of the
apartment. Thus the presumption is that all the components of the building are common property except when they are included in an apartment. Consequently a component of the building is classified as common property whenever there is doubt as to its classification. However, it then continues to enumerate in broad terms which parts of the scheme constitute common property. The Act makes it clear that all structural parts of the building, namely parts that are important for the existence and stability (Bestand und Sicherheit) of the building, are necessarily common property. Further components of the common property are all those parts the alteration of which would affect the outside appearance of the building. This would include all outside walls, balconies, windows, doors and other appurtenances to the outside walls. Further, all components of the building which are destined to serve the apartment ownership community, rather than the individual owners, are part of the common property. This applies in the first place to staircases, entrances, corridors, lifts and laundrettes. It further applies to all common facilities including central heating installations and other installations, as well as pipes, wires and ducts serving the community of owners as opposed to an individual owner.

C. Limited Common Elements and Rights of Exclusive Use

Some German commentators endeavour to entertain notions similar to the United States' idea of limiting common property to schemes consisting of more than one building. They suggest that the ownership in the entrance, staircase, and lift serving a particular building could be construed in two ways. These items either belong in a kind of shared individual ownership (Mit-Sondereigentum), or in a distinct kind of co-ownership which is isolated and independent from the general common property (abgesondertes Miteigentum) of the apartment owners which they serve. The same construction is also applied to the non-load-bearing parts of the boundary walls between individual apartments. Although the main aim of the distinct co-ownership classifica-

55 See Henkes, Niedenführ and Schulze, supra note 52, § 5 no. 5.
56 See 81 BGHZ 81, 35 (1981) (declaring that all parts are included, denial of common use of which would infringe an interest protected by the law).
57 See Law on Apartment Ownership, supra note 45, § 5 para. 2.
58 See Henkes, Niedenführ and Schulze, supra note 52, § 5 nos. 18 and 19.
59 Bärmann, Pick and Merle, supra note 49, § 5 no. 42.
60 See id. § 5 nos. 7, 27, 66.
tion is to arrive at a fair distribution of maintenance expenses, both of these constructions are unpopular in practice.\textsuperscript{61}

Though not sanctioned by the Wohnungsseigentumsgesetze, the German Federal Court has recognized that rights of exclusive use (Sondernutzungsrechte) can be created for parts of the common property.\textsuperscript{62} Since these rights are created by agreement between the unit owners, it in principle only creates personal rights to that particular part of the property. It is, however, accepted in German practice that these rights can be registered in the land register.\textsuperscript{63} Whether such registration has the effect of creating a real right in favor of the particular owner is still disputed.\textsuperscript{64} The German Federal Court has taken the tantalizing view that registration does not create a new category of real rights but a right with real effect.\textsuperscript{65} One real effect is that the right of exclusive use, once registered, is enforceable against particular successors in title, such as purchasers of units or donees.\textsuperscript{66}

\section*{VI. SCOTLAND}

\textbf{A. General Background}

From medieval times, Scotland (especially the city of Edinburgh) recognized a form of apartment ownership that had an uncanny resemblance to Germanic Stockwerkseigentum.\textsuperscript{67} This is shown by the brief exposition of the law of the tenement in Stair's Institutions, first published in 1681.\textsuperscript{68} The owner of the topmost storey in a tenement building was the owner of the roof,

\begin{itemize}
  \item \textsuperscript{61} See Röll, supra note 52, § 5 WEG no. 22; see also Henkes, Niedenführ and Schulze, supra note 52, § 5 no. 26.
  \item \textsuperscript{62} See BGHZ 73, 146 (147).
  \item \textsuperscript{63} See Schnauder, Die Relativität der Sondernutzungsrechte Festshrift Bärmann und Weitnauer 567ss (1990); see also Mostert, The Regulation of Exclusive Use Areas in terms of the Sectional Titles Act 95 of 1986: An Evaluation of the Existing Position and Suggested Alternatives, 8 Stellenbosch L. Rev. 324, 343-45.
  \item \textsuperscript{64} See BGHZ 73, 146 (148).
  \item \textsuperscript{65} It is not enforceable against universal successors under a will and it is uncertain whether it will give some kind of priority on insolvency.
  \item \textsuperscript{66} See Frank Wordsall, The Tenement: A Way of Life 1 (1979) (stating that the tenement or 'land' was in existence as early as the sixteenth century).
  \item \textsuperscript{67} Sir James Dalrymple of Stair, The Institutions of the Law of Scotland § 11.7.6 (1681).
\end{itemize}
while the land belonged to the owner of the ground floor. The owners of the intermediate floors owned the portion of the outer wall which enclosed their apartment. The common passages and stairs belonged to the owners of the units to which they formed an access. The doctrine of common interest required owners to maintain their apartments. The owners of the lower storeys had to provide support to the upper storeys, while the owners of the upper storeys had to provide cover to the lower storeys and were not allowed to increase the burden on the lower storeys. Although some individual tenement schemes worked fairly well, the lack of a central organization and an effective mechanism to enforce reciprocal obligations prompted the following remark concerning tenement buildings in the 18th century: "Every house is a complete house, occupied by a separate family; and the stair being common to them all is generally left in a filthy condition; a man must tread with great circumspection to get safe housed with unpolluted shoes."

The explosion of tenement construction in the 19th century caused a modest increase in case law that competed with local customs for supremacy. By the end of the century, Rankine summarized the existing case law in his seminal work *Landownership*, and suggested solutions for the apparent defects that remained in the law of the tenement. Despite these deficiencies, no special legislation was considered necessary to cope with the admittedly less acute shortage of housing after the two World Wars in Scotland than on the continent of Europe. By the end of the twentieth century, a quarter of the housing stock in Scotland consisted of tenement buildings. The law, however, was still based on a handful of cases mixed with local customs and disputed extrapolations of academics. In practice, a heavy reliance was placed on experts in drafting conveyances to clear up the mess by supplying title documents of tenement buildings with appropriate conditions.

This unsatisfactory state of affairs eventually led to the publication in 1998 of a Report on the Law of the Tenement by the Law Commission, the first in a series of reports on property law. The report was preceded by the publication of a discussion paper on the law of the tenement in 1990.

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71 See generally SCOTS LAW COMMISSION, *supra* note 2, para. 2.1.

72 See id.

73 See *Fifth Programme of Law Reform*, SCOT. L. COMM’N no. 159 (1997) item 6, paras. 2.32-2.42.

followed by extensive consultation with interested parties\(^{75}\) and two seminars on the topic.\(^{76}\) Against this background final recommendations as well as a draft Tenements (Scotland) Bill were published in the Report of 1998. This draft legislation will be promulgated as a statute of the new Scottish Parliament in the near future.

The Scottish Law Commission acknowledged that the common law of the tenement, although vigorous and constantly refined by case law during a period of over two hundred years, was defective in a number of respects, primarily in failing to provide for "a proper mechanism for decision-making and for management."\(^{77}\) However, it adopts a minimalist approach\(^{78}\) as evidenced by the two general sets of reform proposals. The aim of the first set is to restate the existing common law principles applying to tenements\(^{79}\) so as to clarify them and to restate them in modern language.\(^{80}\) The second set is aimed at filling "a widely acknowledged gap" in the existing law by providing a proper system of management in the form of two alternative schemes for the management and maintenance of tenements. These management schemes borrowed extensively from existing schemes in title deeds and thus offer continuity rather than an abrupt break with the past. Furthermore, they are not rigid or compulsory, but optional\(^{81}\) in the sense that developers and conveyancers may adopt their own management schemes in the title deeds pertaining to particular tenement buildings. Both with regard to the distribution of ownership and the provision of management and maintenance schemes, the law proposed is essentially a background law, applying in the absence of express provisions in relevant title deeds. This caution not to

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\(^{75}\) These included legal practitioners, academics and representatives of the Property Managers Association Scotland Limited, the Royal Institution of Chartered Surveyors in Scotland and the Royal Incorporation of Architects in Scotland.

\(^{76}\) The first seminar was held in Edinburgh on 7 September 1995 on a Paper of the Scottish Law Commission titled \textit{Further Thoughts on the Law of the Tenement}. The second seminar was held on 25 September 1996 at the University of Glasgow on a Position Paper of the Scottish Law Commission titled \textit{The Reform of the Law of the Tenement}.

\(^{77}\) SCOTS LAW COMMISSION, \textit{supra} note 2, para. 2.30.

\(^{78}\) See generally P.F. Smith, \textit{Owning Flats: Scottish or English Style?}, 2000 SCOT. L. & PRAC. Q. 38, 42, 46 (referring to the lightness of touch of the Scottish reform proposals since much more freedom is allowed to individual title deeds, and the aim of the proposals to reform rather than to rewrite the existing law).


\(^{80}\) See SCOTS LAW COMMISSION, \textit{supra} note 2, para. 1.2.

\(^{81}\) Thus Scheme B is a voluntary scheme. See \textit{id.} at para. 6.1.
disturb existing titles is based on the acceptance that the new law should apply to both the new as well as existing tenements. Consequently, the reform can be described as evolutionary rather than revolutionary.¹²

B. Distribution of Ownership

1. Introduction

When examining the Scottish proposals on the distribution of ownership in tenement scheme, it must always be kept in mind that the Scottish proposals only present a background or residual law. The proposals provide certain basic rules but leave it to the discretion of developers and their conveyors to modify or even disregard these rules when preparing title conditions for the conveyance of flats in a tenement building.¹³ Unlike the position in South Africa and under the Uniform Condominium Act, there is no demarcation of boundaries in sectional plans or on plats and plans, but merely a description of the applicable boundaries in the provisions of the draft legislation. In general, the proposals contain merely a restatement of the common law rules on the distribution of ownership even if some of these rules have been criticized as inequitable. The justification for this is that a disturbance of existing rights would contravene the provision in the European Convention on Human Rights that property rights should not be appropriated without compensation.¹⁴ In the distribution of ownership, the Scottish law remains essentially individualistic in that a tenement is still basically “viewed as a series of separate houses, one built on top of the other.”¹⁵ This vision is entirely different from the approach in the United States and South Africa, where an apartment building is divided into various composite units consisting of an apartment inextricably linked to an undivided share in the common property. Put differently, an entirely new statutory composite res is created and then divided into two components and allocated to either individual property or common property.

The Scots tenement reforms are aimed at effecting “a decisive shift from individual ownership to common ownership.”¹⁶ This remark, however, does

¹² See Smith, supra note 78, at 46.
¹³ See SCOTS LAW COMMISSION, supra note 2, para. 3.8.
¹⁴ See id. at para. 3.3.
¹⁶ SCOTS LAW COMMISSION, supra note 2, para. 3.1 (“Under the suggested new code there would be a move away from the individualism of the common law to a more community-based
not apply to the distribution of ownership in a tenement building since this aspect is clarified rather than altered in the proposals. It should instead be seen in the context of the proposals for reserve management schemes. In Germany, overt emphasis is placed on the importance of common property in an effort to guarantee proper maintenance of the structural parts and common facilities. In Scotland, the thrust of the reforms is to retain the existing distribution of ownership between individual and common property but to compensate for that by providing reserve schemes for the common maintenance of the building and the ‘strategic parts’ of a tenement.87

C. Unit

1. (Flat)

In Scotland, a flat (apartment or business unit) is not defined by reference to a sectional plan or a plat or plan as in the United States, but by a description in the title documents. The provisions of the draft legislation apply only if the boundaries and pertinents of units88 are not included in the title documents.89 According to these provisions, a flat is described as a “dwelling-house, or any business or other premises, in a tenement building.”90 In practice a flat consists of the airspace bounded by walls, floors and ceilings up to the median line of the particular flat.91 This result was achieved because the Scottish reformers rejected the approach that the boundary structures between individual flats are the common property of neighboring flatowners92 and adopted a simplifying approach by designating the mid-point of the dividing structure as the boundary between flats. Thus they accepted that “the boundary between two flats on the same level would be the mid-point of the distribution of rights and obligations”).

87 These ‘strategic parts’ include, besides flats (apartments and business units), the close and the lift (escalator) as well as any other three-dimensional space not comprehended by a flat, close or lift. The Tenements (Scotland) Bill is published in SCOTS LAW COMMISSION, supra note 2, app. A pp. 119-203.

88 See id. (defining ‘unit’ in a much wider context than in other jurisdictions).

89 See id., explanatory note 1-3.

90 See id. cl. 30(1).

91 See id. cl. 2(1) (stating “the boundary between any two contiguous units is the median line of the structure that separates them; and a unit (a) extends in any direction to such a boundary”); see also SCOTS LAW COMMISSION, supra note 2, para. 4.19.

common wall, while the boundary between an upper and a lower flat would be the centre line of the joists." The owner of the particular flat owns the wall separating the common passage from an individual flat in the inside up to the midpoint.

An exception is made, however, where the wall, floor or ceiling forms the outer shell of the building. Where a wall forms the outside boundary of a flat, such external surface also belongs to the owner of the flat which it bounds. Thus, ownership of a flat extends to any outside section of a wall whose inside is within any flat. The result is that the outside walls of the building are owned in individual sections corresponding to the different flats in the same building. If the outer boundary is formed by the top ceiling or the roof, not only the ceiling or roof, but also the triangular airspace created by the sloping roof belongs to the owner of the top flat which it bounds. The rationale for allocating the triangular airspace to the owner of the top flat is to enable him to insert a dormer window in that airspace immune from objections by the other owners that this would affect the stability or aesthetic appearance of the building. If the nethermost boundary of a flat is the solum or land underneath the building, the solum, the foundations of the building and cellars belong to the owner of the flat on the ground floor. In addition, the owners of all ground flats enjoy the additional benefit that all airspace surrounding the building (with the exception of the triangular airspace formed by a sloping roof) belongs to them. Thus, the special favor shown to the ground floor

93 See SCOTS LAW COMMISSION, supra note 2, para. 4.19.
94 See Tenements (Scotland) Bill, supra note 87, app. A, cl. 2 (1) (b) (providing that a unit (i) "extends to and includes the solum or any structure which is an outer surface of the tenement building, or (ii) "extends to the boundary that separates the unit from a contiguous building which is not part of the tenement building").
95 See SCOTS LAW COMMISSION, supra note 2, para. 2.10.
96 See Tenements (Scotland) Bill, supra note 87, app. A, cls. 2(3), 2(7).
98 See Smith, supra note 78, at 44 (pointing out that in France and in most other jurisdictions such works would be classified as an improvement to common property requiring the consent of a weighty majority of owners voting in the owners’ general assembly. Since this rigid rule makes it difficult to carry out desirable work such as installing entry-phones, Smith prefers the minimalist Scottish approach.).
99 See Tenements (Scotland) Bill, supra note 87, app. A, cl. 30(1) (defining “solum” as “the ground on which the building is erected”).
100 See id. cl. 2(4).
101 See id. cl. 2(6). Note that all land not built upon (including garden areas) belongs to the owners of the various ground flats as pertinents in proportionate shares. See id. cl. 3(3).
102 See SCOTS LAW COMMISSION, supra note 2, para. 2.9.
owner at common law is not altered by the proposed reforms. Does his ownership of the soil entitle him to dig out a wine cellar underneath his flat? This discussion of the notion of a flat clearly shows that the Scottish law remains fundamentally individualistic in that a tenement is still primarily viewed as a series of separate houses built on top of the other.

The problems encountered with regard to windows, doors and other items forming part of the outer boundary of the unit, is solved by allocating all such doors, windows and other items to the flat or unit which it serves. One result of this would be that a door entering upon the close would belong wholly to the flat which it serves.

D. Right of Common Property

In principle, the Tenements (Scotland) Bill does not expressly subdivide the tenement building into flats and common property. Instead, it draws a distinction between flats and other units in a tenement not included in a flat and allocates a right of common property in these other units as pertinents to the flats which they serve. It assumes that a close or lift serves more than one tenement and grants a right of common property therein to all the flats served by these units. If a close or lift does not afford a means of access to a flat, no right of common property in the close or lift attaches as apertinent to that particular flat. The law reformers opted for rough justice and allocated shares in such rights equally amongst the owners of the flat which it serves. An exception is made in the case of a chimneystack. There the right of common property is divided amongst the various flatowners served by it in proportion to the number of flues in the stack serving a particular flat in relation to the total number of flues in the stack.

103 See Tenements (Scotland) Bill, supra note 87, app. A, cl. 2(2) (stating that for the purposes of boundaries "[w]here the structure separating two contiguous units is or includes something (as for example, but without prejudice to the generality of this subsection, a door or window) which wholly or mainly serves only one of those units, the thing is in its entire thickness part of that unit").

104 Note that the definition of ‘unit’ of the Tenements (Scotland) Bill includes inter alia flats and any close or lift. See id. cl. 30(1).

105 See id. cl. 3(1).

106 See id. cl. 3(1).

107 See id. cl. 3(2).

108 See id. cl. 3(5).

109 See id. cl. 3(5).
The Bill mentions three examples of components of a tenement, which fall under the description of other units. The most important is the close, which is the enclosed space in a tenement building which does not form part of a flat. It consists of the connecting passage, stairs and landings, which together constitute a common access to two or more of the flats from the outside. The close extends to the three dimensional airspace formed by a sloping roof which forms the outer boundary of the close, as well as the part of the solum bounded by the close. This urge for consistency seems somewhat peculiar, since the rationale for allocating the triangular airspace seems out of place in the case of the close where the insertion of dormer windows is not envisaged. The second example of another unit is the lift, which includes the shaft and the operating machinery. A right of common property is allocated in the close and the lift as a pertinent to all the flats which it serves. It appears somewhat inconsistent that the roof and airspace above and underneath the lift shafts are not treated the same as the areas which bound the close. The third category comprises other three dimensional spaces in the building not covered by the description of either a close or a lift which is presumably treated in the same way as the close and the lift. In addition the Bill provides that any land pertaining to a tenement excluding the land underneath the tenement (solum), shall attach as a pertinent to the bottom flat most closely adjacent to such land. Any part of the land that constitutes a path, outside stair or other way affording access to any unit other than that flat is excluded from this provision and dealt with in the next category covered by the catchall phrase 'other pertinents.' This category includes miscellaneous parts of the tenement such as paths, outside stairs, fire escapes, rhones or downpipes, flues, conduit cables, tanks and chimneystacks. If the unit wholly serves only one flat, it is attached as a pertinent to that flat; if it serves two or more flats, a right of common ownership is attached as a pertinence to those flats to the extent that it serves them.

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110 See id. cl. 3(1)(a).
111 See id. cl. 30(1) (defining “close”).
112 See id. cl. 3(1)(b).
113 See id. cl. 30(1) (defining “lift”).
114 See id. cl. 3(3). The owners of the bottom flat presumably also share the land most closely adjacent to the close.
115 See id. cl. 3(3).
116 See id. cl. 3(4).
E. Scheme Property

In practice, title deeds regularly provide for the maintenance and management of the common elements of the scheme. If this is not done, individual owners must carry out repairs of their own accord or are obliged under the doctrine of common interest to do so on account of the physical proximity of benefited and burdened property. The common interest in the property is construed either as a proprietary interest in the whole building or no more than an ‘equitable restriction’ on tenement owners. The management scheme A, contained in the Bill, endeavors to develop the idea of common interest by providing that certain parts of the building that are used in common or are fundamental to the stability of the tenement, should be collectively maintained.

In order to provide for the collective management and maintenance of a tenement building under Scheme A, the Bill creates an additional category of tenement property, namely ‘scheme property,’ in addition to individual and common property. The rationale for the creation of this peculiar kind of property is that certain parts of the tenement preserved as part of a flat are considered vitally important to the essential fabric of the scheme. Therefore, the individualism of the common law preserved in the distribution of ownership in a tenement had to make a place for collective responsibility for maintaining the structural integrity of the tenement by designating these parts “scheme property.” In the large majority of tenements, this result is attained under the title deeds, but the titles of older tenements are sometimes silent or extremely inadequate. Thus management scheme A will mostly apply only in those older schemes which do not have a management scheme or where

118 See Smith v. Guiliani 1925 SC (HL) 45 (comments in the context of a statutory award of costs (under § 381 of the Glasgow Police Act 1866) of a part demolition of a tenement building).
120 In contrast to a collective management scheme such as Scheme A, common interest, as laid down by the Institutional writer Bell, is individualistic: it requires each tenement owner to maintain his own wall for example. He retains the property in the wall, so that he can alter it as he thinks fit ‘provided he does not endanger the common interest.’ GEORGE JOSEPH BELL, PRINCIPLES OF THE LAW OF SCOTLAND, § 1086 (W. Guthrie ed. 1899) (1889); see also Smith, supra note 78, at 44.
121 See SCOTS LAW COMMISSION, supra note 2, paras. 5.1 and 5.9.
there are serious gaps in the scheme to new tenements which have adopted Scheme A. 122

Property under Scheme A does not encompass all parts of a tenement. Since owners can be expected to maintain their own flats, individual property is excluded. In principle, scheme property consists of two elements, namely any part of the tenement which is the common property of two or more owners and certain strategic parts of the tenement. Common property includes any part of a tenement (including any garden or other ground) which is the common property of some or of all the owners. 123 Thus, apart from the individual flats, their roofs and outside walls, other parts of a tenement form part of more than one flat which they serve. Thus, depending on the nature of the tenement, common property can include a long list of items ranging from rhones, down pipes, soil pipes, entry-phone systems, the close, common lighting and heating systems to outside pathways and fire-escapes. In practice, it may happen that this list will be substantially extended in the title deeds, which means that the precise content of scheme property will vary from tenement to tenement. 124 Strategic property includes those parts of the tenement that all the owners must preferably adequately maintain in order to preserve the structural integrity of the building and the individual flats. It includes all the external surfaces of the building (outside walls, the roof, the solum and the foundations and any part of the gable wall that is part of the tenement building) as well as load-bearing walls inside the building. 125 Although they do not fall into the Bill's definition of common property, some of them may be common property under the titles and accordingly already qualify as scheme property. 126 On account of its mandatory nature and the fact that experts disagree on the definition of "structural significance," scheme property is restricted to the absolute minimum (load-bearing walls). It does not automatically include any part of the building that is of structural significance.

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122 See Tenements (Scotland) Bill, supra note 87, app. A, cl. 5(1).
123 These parts are so strategically important to the building as a whole that they require common maintenance. See SCOTS LAW COMMISSION, supra note 2, para. 5.4.
124 This in turn depends on the application of the service test as explained in id. paras. 4.23—4.32; see id. recommendations 4(g)-(k).
125 See The Tenements (Scotland) Bill, supra note 87, sched. 1, rule 1, para. 1.2(a).
126 See SCOTS LAW COMMISSION, supra note 2, para. 5.5. In the case of flats registered in the Land Register, one should look at the A (property) section of the land certificate.
127 See Tenements (Scotland) Bill, supra note 87, app. A, sched. 1, rule 1, para. 1.2(a)(iv) (including any rafter or other structure supporting the roof).
128 See id. sched. 1, rule 1, para. 1.2(b).
129 See SCOTS LAW COMMISSION, supra note 2, para. 5.6.
regardless of nature such as floors, joists and columns. In addition, certain parts of the tenement are excluded from the definition of scheme property on the ground that the owner of a particular flat should maintain them. These are ground floor offshoots from an individual flat like rear kitchen extensions and protruding shop fronts; chimney stacks or flues which are not common property, and doors, windows, skylights, vents or other openings which serve a particular flat.

These proposals will rearrange the maintenance liabilities of tenement owners. At common law the owners on the top storey must maintain the roof while the maintenance of the walls, foundations and other structural parts fall on the owners of the lower storeys. Under the proposals, all owners will share in the maintenance of the scheme property. To a certain measure, these changes balance out. The owner of a lower flat will incur some liability for maintaining the roof, but will also lose some liability to maintain the walls. The owner of a top flat would have to contribute to the cost of maintaining the outer wall of the lower flats. Inevitably the exchange will not always be fair, especially where responsibility for the maintenance of the roof is added. Since existing title provisions are not affected, the object of the proposals is merely to replace a background law that was universally seen as unfair with a new background law aimed at an equitable distribution of costs. While a reduced responsibility for maintaining the roof might lead to an increase in the value of top flats, a corresponding decrease in the value of lower flats is not foreseen.

The Scottish reformers accept that ‘maintenance is a right not a duty’ and do not place owners collectively under a duty to repair or maintain scheme property. In the normal course of events, an owner who wishes to have a repair carried out will put the matter to a vote. If a majority is achieved, the repair can be carried out under scheme A. If not, the owner can seek to

130 See id. para. 5.7.
131 Therefore, a chimney stack which serves two or more flats will be common property and hence scheme property on that ground.
132 See SCOTS LAW COMMISSION, supra note 2, para. 5.8 (Dormer windows are also included except for the roof surrounding the dormer window).
133 See id.
134 Id. They should be common property only where they serve the close or other common part of the building.
135 See id. para. 5.10; see also Smith, supra note 78, at 45.
136 See Smith, supra note 78, at 45 (assuming that this will presumably be on a regular rather than an emergency basis).
137 See SCOTS LAW COMMISSION, supra note 2, para. 5.10.
enforce the obligation to repair scheme property from the other owners or repair the property himself and recover the cost from the other owners.138 By contrast, the South African provisions place the body corporate under a mandatory obligation to repair and maintain the common parts of the building in a good state of repair as part of their duty to manage.139 The trustees as executive branch of the body corporate can thus act without waiting for a resolution of the body corporate in general meeting.

VII. SOUTH AFRICA

A. General Background

Whereas no special legislation on apartment ownership has up to now been introduced in Great Britain,140 common law systems outside Great Britain recognized that the so-called common law condominium, patterned on the British model, relying primarily on conveyancing skills, was surrounded by too many uncertainties to achieve universal popularity. Supportive legislation was therefore considered necessary to encourage prospective purchasers and institutional lenders to invest in apartment ownership schemes and to simplify the task of the conveyancer. For these and other reasons, the Australian states considered it necessary to introduce special legislation on apartment ownership or strata titles. The most sophisticated Australian statute was the New South Wales Conveyancing (Strata Titles) Act of 1961, later replaced by the Strata Titles Act of 1973.141 It served as model not only for later condominium statutes of the other Australian states, but also for the condominium statutes of the various Canadian states, New Zealand, Singapore, Malaysia and South Africa.142

138 See id. paras. 5.45-5.46 and part 7.
140 See Smith, supra note 78, at 36 (discussing reform proposals and draft Bill on Commonhold).
141 This statute is the most detailed statute on apartment ownership in the world. This statute, which is almost six times longer than its predecessor of 1961, is unnecessarily detailed and complex.
142 See van der Merwe, supra note 1, §§ 11-13, 21 (discussing special legislation introduced in Australia, New Zealand, Canada, and Singapore).
South Africa has a mixed legal system combining civilian Roman-Dutch law with British common law. The system is uncodified and modern developments result mainly from case law and legislation. South African property law has remained mainly civil law with only a few English influences. Thus the maxim *superficies solo cedit* was taken over from Roman-Dutch law with the result that separate ownership in buildings or parts of buildings apart from the land was not recognized. Just as in European and American legal systems, legislation was necessary to introduce a system of condominium or ownership of sections of a building. The main reason for introducing sectional ownership in South Africa was, as in other countries, to provide urgently needed residential accommodation for all income levels within commuting distance from centers of employment. Another reason for introducing sectional ownership was that the main alternative, share-block company schemes, proved unsatisfactory. Share-block companies are something akin to American Real Estate Cooperatives with a company owning the building and the purchase of share-blocks entitling the purchaser to occupy a flat in the building. The fact that the purchaser's investment is not protected in the case of the insolvency of the share-block company, made this an unpopular alternative.

The idea was first mooted in the early 1950's and draft bills were introduced in 1956, 1957 and 1964 in the House of Assembly to provide for the registration of title deeds to sections of buildings. Select committees reported favorably on the New South Wales legislation and unfavorably on the practice of share-block schemes. The recommendations of a special commission of enquiry appointed in 1970 led to the promulgation of the first Sectional Titles Act in 1971. In the course of time, proponents of the adoption of a second-generation statute (as in the American states) were satisfied by the promulgation of the second Sectional Titles Act in 1986. While leaving the basic structure and the main principles of sectional ownership intact, the new act streamlined registration and introduced several new mechanisms to cope with modern demands. The Sectional Titles Act of 1986 has been amended

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143 See id. §§ 24-29 (discussing various reasons for introducing the condominium).
144 See id. §§ 489-500 (providing a comparison between share-blocks and similar schemes, and condominium); see also Van der Merwe & Butler, Sectional Titles, Share Blocks and Time-sharing, supra note 139, at 451-54.
146 See Sectional Titles Act 95, supra note 139.
several times, most importantly by the Sectional Titles Amendment Act of 1997.147

The South African legislation has been greatly influenced by the New South Wales Act and to a lesser extent by the German Wohnungsseigentums-gesetz of 1951 and the Israeli Cooperative Houses Law of 1961. Thus, a primarily common law statute was transplanted on the primarily civilian South African law of property. This has led to an attempt to harmonize the concept of sectional ownership with traditional ideas concerning single and composite property objects, exclusive ownership, traditional co-ownership in undivided shares and the essentials of the body corporate or incorporated association which manages the scheme’s affairs.148

B. Distribution of Ownership

1. General

The Sectional Titles Act has created a new composite thing, namely a unit consisting of a section together with an undivided share in the common property of the scheme apportioned according to the participation quota of the section.149 The component parts of a unit are indivisible. Legal transactions encompass the entire unit and separate transactions cannot normally be concluded in respect of the unit or its accompanying share in the common property.150 Since a unit is deemed to be land (real property) and urban immovable property,151 ownership of a unit can be registered in the Deeds Registry and the Deeds Registries Act applies mutatis mutandis unless otherwise provided.

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149 See Sectional Titles Act 95, supra note 139, 1(1). In non-residential schemes the developer determines the participation quota. In residential schemes, it is allocated in proportion to the floor area of each section.

150 See id. (creating a statutory exception dealing with transactions regarding common property).

151 See id. § 16(3). Even insurance of a section is deemed to cover its share in the common property. Id. § 16(4).

152 See id. § 3(4).
2. Section

A section is defined as "a section shown as such on a sectional plan." The Act requires that each section in a condominium scheme be defined with reference to its floors, walls and ceilings and distinguished by a separate number on the sectional plan. A sectional plan must, in addition, show the floor area of each section to the median line of its boundary walls. The Act further provides expressly that the common boundary between any two sections or between a section and the common property is the median line of the dividing floor, wall or ceiling.

A section is thus basically a cubic entity formed by the walls, ceilings and floors of a residential apartment or business premises, with the median lines of the boundary walls forming the vertical boundaries and the median lines of the floors and ceilings forming the horizontal boundaries of a section. Since parts of the surrounding masonry and other materials comprising the boundary walls, floors and ceilings up to the median line are included in a section, a section always has physical substance and is not confined to a piece of enclosed airspace. None of the problems encountered by those American states on condominiums that accepted the notion of airspace—condominiums are thus relevant to South African law.

The boundaries of a section are identified with reference to physical data and not with reference to survey beacons as in the case of conventional plots of land. The Act allows such boundaries to be defined either with reference to the floors, walls, or ceilings thereof or in a manner acceptable to the surveyor-general. The surveyor-general would presumably accept sections that only have a roof and no ceiling, sections without solid walls and parking lots in a parking garage which do not have walls, but are sufficiently demarcated as sections by permanent beacons and a survey in accordance with

153 See id. §§ 1(1), 2(c), and 6(2).
154 See id. § 5(3)(d).
155 See id. § 5(3)(e).
156 See id. § 5(4).
157 Note the somewhat wider definition in the New South Wales Strata Titles Act 68 of 1973, N.S.W. stat. 1043, § 5(3): "A reference in this Act to a cubic space includes a reference to space contained in any three-dimensional geometric figure that is not a cube."
159 See Sectional Titles Act 95, supra note 139, 5(5)(b); GN R664 of 8 April 1988 § 5(1)(a).
the Land Survey Act. The fact that a section must be part of a building excludes the possibility of structuring sections entirely without at least a floor, roof, or walls.

Apart from the main component, a section can include an adjoining stoep, porch, balcony, atrium or projection if shown as part of the section on the sectional plan. Since these terms must be given their ordinary meaning, it is difficult to include courtyards, patios, and carports under these terms. These appurtenant parts need not be defined with reference to floors, walls, or ceilings, but again must be defined in a manner acceptable to the surveyor-general.

A section can further include non-contiguous parts of the scheme such as laundries, servants' quarters, and garages that are not in close proximity to the main component. The regulations only require that these rooms be given the same numbers on the sectional plans as the sections to which they belong. A section may thus consist of various portions of a building. Thus, the main residential component (comprising several rooms) may be supplemented with a garage and a laundry. As long as they are identically numbered on the sectional plan, they constitute one section even though these components are situated at different extremities of the building.

C. Common Property

In the Sectional Titles Act, the term "common property" consists of three components. Firstly, it includes the land on which the condominium scheme is situated. This encompasses all land, whether it is the soil underneath the

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160 See Land Survey Act 8 of 1997, 2001 JSRSA 2-432 (Painted lines would be unacceptable, but not a line of face bricks cemented into the concrete floor).
161 See Sectional Titles Act 95, supra note 139, § 5(5)(b).
162 See van der Merwe, supra note 1, §§ 3-8, 3-9.
163 See § 5(5)(b) of Sectional Titles Act 95 of 1986, GN R 664 § 5(1)(a) of 8 April 1988 (stating requirements for boundaries of section appurtenant to part of section previously defined).
164 See § 5(6) of Sectional Titles Act 95 of 1986; GN R664 § 5(1)(k)(iii) of 8 April 1988. Non-adjoining parts of the building, e.g. garages, need not necessarily be incorporated in the residential sections: they can be registered as separate sections (by allocating distinctive numbers on the sectional plan) or as exclusive use areas, or left as part of the common property of the scheme. This mechanism provides greater marketing flexibility, but problems related to on-street parking can arise and the homogeneity of the project can be impaired if non-residents are allowed to acquire garages in a residential project.
165 See Sectional Titles Act 95, supra note 139, § 1(1).
166 Id.
building, land for the yet undeveloped parts of the scheme, or developed land. The fact that the land is necessarily part of the common property has the following consequences. One, the owner of a section on the ground floor has no special rights in the soil underneath his or her section; he cannot excavate in order to provide himself with a new wine cellar. Two, portions of the land can never form part of a section; a garden area or parking space cannot be incorporated as part of a section. Secondly, the common property comprises all parts of the condominium buildings that are not included in a section. Examples are the outer shell, the roof and the foundations of the building, all means of access to sections, ventilation shafts, common installations, and radio and television antennas (intended to serve all the owners). Means of access include inter alia entrances, lifts, lobbies, hallways, stairways, passages, landings, foyers, and fire escapes. Self-contained portions of a building, for example laundries, garages, an indoor swimming pool, a crèche, a recreation hall, and storage facilities can be designated for common use. Even separate buildings can be reserved by the developer as common property; for example, a detached building can serve as a clubhouse, community hall, or a residence for a caretaker. Finally, common property includes land referred to in section 26 of the Act. Section 26 deals with the extension of a condominium scheme by the addition of land to the common property. The aim of the addition is primarily to provide additional amenities and facilities to the members of the scheme.

D. Exclusive Use Areas

An “exclusive use area” is defined in the Act as “part or parts of the common property for the exclusive use by the owner(s) of one or more sections, as contemplated in section 27.” In principle, sectional owners must make reasonable use of the common property and may not, therefore, appropriate any part of the common property for their exclusive use.

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167 All improvements on the land, whether they are trees, flowers, vegetables, gardens and lawns, or special amenities like parking areas, drying yards, swimming-pools, tennis courts or children’s playgrounds, are included.

168 But see Sectional Titles Act 95, supra note 139, § 27 (allowing their incorporation as exclusive use areas).

169 See Sectional Titles Amendment Act 44 of 1997, 2001 JSRSA 2-128 (stating that the use of the additional land was not restricted to facilities and amenities but could be used for the erection of additional condominium buildings).

170 Sectional Titles Act 95, supra note 139, §1(1). See also Mostert, supra note 64, at 32455.
Developers, however, soon realized the need for certain portions of the common property to be allocated to individual sectional owners to be utilized as parking bays, courtyards, patios, garden areas, store-rooms, attics, basements and even outer shells of buildings for advertising purposes. The Sectional Titles Act of 1971 did not provide for the creation of exclusive use. Consequently, mechanisms such as notarial leases, servitudes and the amendment of the rules (regulations) of the scheme were employed to establish exclusive use areas, with the amendment of the rules being the most popular. On account of developer malpractices, inter alia collecting the cost of maintenance of these areas as common expenses and retaining these areas as 'nest-eggs' after leaving the scheme, the Sectional Titles act of 1986 provided stringent technical rules for the registration of exclusive use areas. The high cost of surveying exclusive use areas and public demand then prompted the legislator to revive the cheaper, old method of providing for exclusive use areas in the rules of the scheme. One thus has to distinguish between real (genuine) exclusive use areas pursuant to section 27 of the Act and personal (non-genuine) exclusive use areas established by inserting special rules in the model rules of the scheme in terms of section 27A.

The mechanism of exclusive use areas are therefore utilized to provide some or all the unit owners with inter alia exclusive parking or garden areas carved out of the common property of the scheme. These areas are indicated on the sectional plan that shows the individual sections and the common property of the scheme. As already indicated, exclusive use areas can be created in two ways, namely, either as independent real rights registered in the sectional title register, or as mere personal rights included in the rules of the scheme. As independent real rights, they can be reserved by the developer on registration of the sectional plan and then transferred by unilateral cession to some or all the individual owners. Alternatively, they can be created by unanimous consent of the body corporate and allocated to some or all the...
sectional owners. The purpose for which exclusive use areas are to be used must be clearly indicated on the sectional plan and they must be uniquely numbered. Exclusive use areas may only be transferred to another owner in the same scheme. Special arrangements are made for allocating the cost of the upkeep of the exclusive use area to the holder of the right of exclusive use.

VIII. COMPARISONS AND CONCLUSIONS

From the above survey it is clear that the provisions on the distribution of ownership of apartments or condominiums are not mandatory, except perhaps in the case of the South African statute, but merely provide background law where distribution had not been regulated in more detail in the project documents. The U.S. and Scottish developers have complete freedom to designate any part of the building either as part of a unit (flat) or as part of the common elements. Though this is to a large extent also true of their German counterparts, German developers are not allowed to designate certain parts of the building which are usually common property as part of a unit. The South African developer has the least flexibility in this regard. He is only allowed to make minor adaptations to the statutory distribution of property in the model rules of the scheme when registering it as a sectional title scheme.

The South African statute is the most comprehensive with regard to various components constituting a unit (section). It provides clearly that a section can consist of the main set of rooms, together with certain contiguous parts (e.g. a balcony) and also non-contiguous parts (e.g. a garage in the cellar of the building). Although the other statutes provide less express detail, the same result is either tacitly assumed in their statutory provisions or it can be expressly provided for in the title documents.

The statutes which provide for the delineation of sections in plats and plans (or sectional plans) provide a much clearer picture of what parts of the condominium property is included in a section. In this regard the Scottish Bill that provides merely for the description of flats in the title documents is the least satisfactory.

175 See Sectional Titles Act 95, supra note 139, § 27(2)-(3).
176 See id. § 27(1)(a), reg 5(1)(k); see also van der Merwe, supra note 148, § 262.
177 See Sectional Titles Act 95, supra note 139, § 27(4).
178 See id. § 37(1)(b).
179 See van der Merwe, supra note 148, § 262.
With regard to the boundaries of units (sections or flats), the South African statute and, to some extent, the Scottish Bill, have accepted the median line of the boundary floors, walls and ceilings as boundaries. This facilitates the driving of nails into the walls for hanging pictures and even the alteration of the inside of the section up to the median line by fashioning a niche in the inside of the outside wall. However, the problem is that certain structural parts of the building may be located wholly or partially within the boundaries of a section. The owner will in principle be inhibited from altering these parts on account of statutory implied reciprocal servitudes (easements) of subjacent and lateral support.

The crucial point is, however, that since these structural parts are considered part of the section, the individual owner will be responsible for their repair and upkeep which could amount to a considerable expense. The Scottish position is basically similar to that of South Africa. Again, the midpoint of the dividing walls, floors or ceilings is taken as the boundary between neighbouring flatowners. This means that flatowners are in principle allowed to freely alter their side of the wall. Express provisions in the Bill prohibiting interference with support or shelter however, as under the South African Act, inhibit this power. The problem is, however, that flatowners would, like their South African counterparts, be responsible for the maintenance of structural parts of the building located inside their flat. The only exception allowed by the Bill is loadbearing walls which are considered 'scheme property' and thus subject to collective repair. The legislator's unwillingness to include any other structural parts in the definition of 'scheme property,' leaves the owner unprotected against considerable expenses in repairing a structural part which forms part of his flat. The American UCIOA avoids this problem by designating the unfinished walls, ceilings and floors as the outside boundaries of the flat. The UCIOA thus warrants the non-alteration and simultaneously the common maintenance of all structural parts of the building. However, the problem of driving nails into the outside walls of a unit and of inside alterations reaching into the unfinished walls, floors or ceilings, has not been solved unless appropriate provisions are made in the project documents. Perhaps the German statute reaches the most acceptable result by refraining from express provisions on the boundaries of units, and by

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180 This is, of course, subject to limitations contained in the statutory implied reciprocal servitudes (easements) of subjacent and lateral support referred to in the next sentence.

181 See Sectional Titles Act 95, supra note 139, § 28; see also van der Merwe, supra note 148, § 228.

providing that all structural parts of the building should be common property. The implication is that the driving of nails and the alteration of inside portions of outside boundaries are allowed as long as structural parts of the building are not affected.

The position with regard to doors and windows in outside or inside walls of a unit differs in the four statutes discussed. The position is perhaps most unsatisfactory under the South African statute where the ownership of these items seems to depend on which part of the median line they are located. The only apparent solution is presumably to designate them either as part of the section or part of the common property in the rules of the scheme. In Germany the courts have held that the outer portions of doors and windows are common property whereas the inner parts belong to the individual units. German academics however, argued against the division of doors and windows into inside and outside portions and insisted that since the alteration of these items could affect the harmonious outside appearance of the building, they should be classified as common property. This is in principle the position adopted by the American UCIOA, which provides that windows and doors which only serve a single unit, should be allocated as limited common elements to that particular unit. The Scottish Bill has opted for the opposite solution by allocating doors and windows to the flats that they serve. We have seen that as a result of this, the owner of a door which fronts on the close will be the sole proprietor of that door. This provision facilitates the replacement of doors and windows by the owners concerned with items of their choice.

The position of service items such as wires and down pipes that supply individual units with electricity and water are difficult to track in the South African Act. In principle their allocation as part of a section or the common property again depends on which side of the median line they are located. If this is the case, a sectional owner may not only have wide powers with regard to pipes and wires inside the median line of his boundary walls, but would also, more importantly, be responsible for their maintenance. However, this position is countered by two other sections in the Act. The first places an obligation on the owner to allow an authorised person to enter his section to inspect, maintain, repair or renew items capable of being used in connection

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184 Bärmann, Pick & Merle, supra note 41, § 5, no. 36; see also Weitnauer, supra note 44, § 5 no. 9.
185 See UCIOA, supra note 13, § 2-102(4), at 519.
186 See Tenements (Scotland) Bill, supra note 87, app. A, cl. 2.
with the enjoyment of any other section or the common property. 187 The second creates reciprocal servitudes of passage through individual sections for these wires, pipes, and ducts. 188 These provisions seem to imply that these items are common property subject to collective maintenance wherever they are located. This is the solution adopted by the UCIOA that provides that wires and pipes that serve more than one unit or the common property, whether located inside or partially outside the boundaries of a unit, are always to be classified as common property. The German statute presents a similar solution. It provides that all installations and facilities that serve all unit owners can never be part of a unit. 189 Wires and pipes that only serve a single unit will, however, be considered part of a section as long as their alteration does not affect the common property. 190 The Scottish Bill that classifies, inter alia, wires and down pipes under the catchall category of other appurtenances achieves the most satisfactory result. If the wire or down pipe wholly serves only one flat, it is attached as appurtenant to that flat; if it serves two or more flats, a right of common ownership is attached as appurtenant to those flats to the extent that it serves them. 191

The UCIOA, the German and the South African statutes divide the land and buildings comprised in a condominium scheme into components which belong to a unit and components which belong to the common elements. To each unit, an undivided share in the common elements is attached, thus creating in effect a new composite thing. The share value for each unit is determined by a fixed formula. In Scotland, the position is different. The building is divided into flats and “other units.” 192 The term ‘other units’ covers most of the compo-

187 See Sectional Titles Act 95, supra note 139, § 44(1)(a).
188 See id. § 28(1)(a)(ii), (b)(ii).
189 See Law on Apartment Ownership, supra note 45, § 5(2).
190 See Weitnauer, supra note 44, § 5 no. 11.
191 See Tenements (Scotland) Bill, supra note 87, app. A, cl. 3(4); see also SCOTS LAW COMMISSION, supra note 2, para. 4.25 (The legal position with regard to entry-phone systems, television aerials, satellite dishes should be governed by similar principles. Depending on the service test, it should be regarded either as belonging to the flat which it serves or as part of the common property. Thus the individual phones of an entry-phone system should be allocated to the individual flats it serves, while the common wiring should be treated the same as all other common wiring. Television aerials and satellite dishes, including their wiring, should be allocated to the individual flats that they serve.); Report on the Law of the Tenement, supra note 72, para. 4.23 (The Tenements (Scotland) Bill cl. 20 expressly entitles an owner to fix television aerials and satellite dishes to the outside surface of any roof of the tenement or to any chimney stack and to lead any wires or cables required from the aerial or dish to his or her flat.).
192 This term is very confusing in the condominium context, where it usually refers to the parts of the building that are individually owned.
DISTRIBUTION OF OWNERSHIP RIGHTS

ments (for example the close and the lift) that are classified as common elements in the other jurisdictions. Applying the service test, it is not an undivided share in such units, but a right of common property, that is attached as appurtenant to the flats that they serve. Peculiarly, the service test is not employed to determine the share in the right of common property in the unit. Such share is distributed equally amongst the owners served by the particular unit and not according to the use made by the owners of that particular unit. 193

Under the UCIOA, the German, and South African statutes, land is always treated as common property. So-called bare land condominiums194 where a plot of land is divided into several caravan sites and sold off to prospective purchasers, is not permissible under any of these statutes. Nor is it possible to add land (e.g. a parking space) as part of a unit except in South Africa in the form of an exclusive use area. Under the South African statute and the UCIOA, land added to the condominium scheme at a later stage is incorporated into the existing common property. The Scottish treatment of land is peculiar. In accordance with an individualistic trend, land, including the surrounding airspace is treated as part of the property of the owner of the ground floor to which it is most closely adjacent. It attaches as appurtenant to that flat and allows ground floor offshoots like kitchens and protruding shop fronts. This is quite different from the other jurisdictions where the land is treated as common property. This means that all kinds of modern developments that occur in the field of condominium law like the extension of units, the erection of common facilities, and the development of a condominium project in stages are not regulated by the Bill but must be catered for in the project documents.195

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193 In most condominium schemes it would be equitable to endeavor to distribute the cost of maintaining such common elements as a staircase and especially a lift in accordance with the use made thereof by the owners of the various units. See van der Merwe, supra note 1, § 161 (describing an application of this test of 'objective utility').

194 For a survey of statutes that provide for these types of condominiums, see van der Merwe, supra note 1, § 69; see also Thomas J. Beale & Kevin M. Kohls, Site Condominiums as Alternatives to Conventional Subdivision Platting, 1989 MICH. BAR J. 1188-92; Soles, Site Condominiums—Fast Homes for a Price, 6 COLLEY L. REV. 511-26; A.R. Buck, Drafting Dockominium Documents, 4 PRACT. REAL. EST. LAW. 27-39 (1988).

195 The first step will be to designate the land as common property and then to add title conditions covering the development envisaged. The provisions of the Bill will particularly straightjacket the development of shopping centers and other big commercial concerns as condominiums.