

# Rights and Limitations of Apartment Ownership Law with Special Reference to Sri Lanka

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## Introduction

The relationship between property and human is inseparable and indispensable. Without having properties a human cannot sustain. Property gets validities based on their nature and necessity. With the development of the society and world, property also develops with the amalgamation of human needs. With reference to the development of the society and the needs of humans, the traditional identity and characteristics of certain properties have changed their limits as required by the principles and law relating to properties. The concept of apartment ownership has developed in the past decades gaining much attention in the world. This article discusses the rights and limitation of apartment ownership law and will compare such with the traditional characteristics of the ownership rights and limitations of Roman Dutch Law, which is identified as the common law and the governing law of property in Sri Lanka.

***Superficies Solo Cedit*** allows everything that is built on land or on to another immovable to accede to the land or immovable and become the property of the owner of the land or immovable<sup>1</sup>. This term highly emphasizes the

traditional acknowledgment of the property and introduces parameters to estimate ownership of property in Roman-Dutch Law. However, apartment ownership law can be identified as an alternative to this concept which is directly and completely against the ***Superficies Solo Cedit*** subject to certain exceptions. ***Superficies Solo Cedit*** does not allow having an ownership of a part of a building which stands on the soil.

If one looks at the nature of apartment ownership, the following characteristics can be identified:

- **Individual ownership of an apartment.**
- **Joint ownership of the land and the common parts of the building**
- **Membership of the owner's Association<sup>2</sup>**

Any person who becomes an owner of an apartment is entitled to exercise the above mentioned characteristics. The law applicable to apartment ownership is the Apartment Ownership Act No. 11 of 1973 as amended by Act No. 45 of 1982, Act No. 4 of 1999, Act No 27 of 2002 and Act No. 39 of 2003 ('Apartment ownership Act').

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<sup>1</sup>Gaius *Inst* II 73: '*Praeterea, id quod in solo nostro ab aliquo aedificatum est, quaffvis ille suum in solo aedificaverit, iure naturali nostrum fit, quia superficies solo cedit.*' D 41.1.7.10 (Gaius libro secundorum cottidianarum sive auctorum): '*Cum in solo aliquis alienam aedificaverit, ipse dominus intelligitur aedificii, quia omne quod in aedificatur solo cedit.*' Grotius *Inleiding tot de*

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*Hollandsche Rechtsgeleertheit* 2.1.13 (trans R W Lee (1926)): 'Things attached to the earth or fixed to houses are considered to go with immovable property.'

<sup>2</sup>Prasantha De Silva, High Court Judge, Does, the Apartment Ownership Act Provide Adequate Provisions with Regard to the Enforcement of Social Obligations?, *Hulftsdorp Law Journal*, Volume 01, 2014, 66 pg.

**The rights of an apartment owner, have not been directly and expressly mentioned in the Apartment Ownership Act.** However, an examination of the four corners of the Apartment Ownership Act brings to light certain implied rights, duties and limitations attached to the apartment ownership.

The traditional rights of ownership are not dissimilar to the rights of an apartment ownership such as the right to possession (*Jus Possidendi*), the right to use and enjoyment (*Jus Frutendi*) and right to disposition (*Jus Disposendi*)<sup>3</sup>. However, it should be highlighted that an owner of an apartment enjoys limited rights of ownership and is subject to many restrictions compared to an ordinary land owner.

#### **Acquiring apartment ownership**

According to Section 3<sup>4</sup> of the Apartment Ownership Act any person, who wishes to become an owner of an apartment, should submit and register relevant condominium plan to the registrar of the relevant land registry. Furthermore, he or she will be able to acquire some rights attached to the common areas according to the bonds and restrictions as registered. This registration should be made under the provisions stipulated by Registration of Title Act No. 21 of 1998<sup>5</sup> or Registration of

Documents Ordinance No.23 of 1927 (as amended).

#### **Management Corporation**

The Management Corporation plays a huge role with regard to the rights and limitations of apartment ownership. **It is not incorrect to articulate the idea that this Management Corporation is the entity which imposes rights and duties attached to the apartment ownership in that particular building.** The Management Corporation is clearly interpreted by Apartment Ownership Act as *"in relation to any one or more completed subdivided buildings shown in a condominium plan or any one or more partly completed buildings shown in a semi condominium plan, means the management corporation established for those buildings"*<sup>6</sup>. The constitution of Management Corporation is *the owners of the units (shall, by virtue of this Law), upon registration of the Condominium Plan be a body corporate with perpetual succession and a common seal and shall be called 'the management corporation'*<sup>7</sup>. Therefore, all owners of units in the building will be members of Management Corporation. This membership is not based on their choice and once they become an owner of an apartment, they involuntarily become a

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<sup>3</sup>Lee RW, *Introduction to Roman-Dutch Law*, Fifth edition, 121pg

<sup>4</sup>(1) The owner of any Condominium Property any Provisional Condominium property or any semi Condominium Property as the case may be, 'may make application in the prescribed form to the Registrar with the prescribed fee for the registration of a Condominium Plan, or a Provisional plan' Condominium Plan or a semi Condominium Plan as the case may be.

<sup>5</sup> 50(1) Subject to the provisions of this Act and of the Apartment Ownership Law, No. 11 of 1973, the owner of any land parcel registered under this Act upon which a building comprising more than one storey has been constructed, may, upon payment of the prescribed fee

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make application in the prescribed form to the Registrar-General of Title for the registration of horizontal subdivision of buildings (hereinafter referred to as "condominium parcels") in accordance with a cadastral map called a condominium plan which shall accompany such application. (2) The reference number of the land parcel on which the building is constructed and the number of the condominium parcel as depicted on the cadastral map shall together be a sufficient reference to a condominium parcel. (3) The Registrar of Title shall refer such applications together with the condominium plan and the cadastral map to the Superintendent of Surveys for certification.

<sup>6</sup> Apartment Ownership Act No.11 of 1973 (as amended),Section 26

<sup>7</sup> Apartment Ownership Act No 11 of 1973 (as amended), Section 20 B

member of the Management Corporation. This Management Corporation should take appropriate measurements to maintain the building in a good manner for the sake of all the owners of the apartment.

Management Corporations have power to make by-laws according to the section 20 B of the Act as every subdivided building shown in a Condominium Plan or in a Semi Condominium Plan shall be regulated by by-laws which shall provide for the control, management, administration, use and enjoyment of the condominium parcels and the common elements. The management corporation may, subject to the provisions of Apartment ownership Act and any other written law by special resolution make additional by-laws, not inconsistent with the by-laws set out in the Second Schedule to this law, for safety and security measures, details of any common property of which the use is restricted, the keeping of pets, parking, floor coverings, garbage disposal, behavior, architectural and landscaping guidelines to be observed by the owners of the Condominium Parcels, and any other matters **necessary for the efficient management of apartment.**

#### **Scope of the rights, duties and limitations of an Apartment Ownership**

It should be noted that the rights attached to the apartment ownership is limited as compared to an ordinary ownership of a land. This fact can be identified with the analysis of right to possession, right to use and enjoyment and right to dispossession of an apartment ownership. An Owner of an apartment should always think about other owners of the apartment before exercising their ownership rights. Furthermore, these rights will be limited according to the resolutions and rules made by

the relevant management corporation of such apartment. Therefore, it is reasonable to articulate that an owner of an apartment exercises limited ownership rights with regard to his ownership status.

It should be highlighted that the nature of possession of an apartment ownership is not really different from an ordinary possession of a land. The required elements of possession, animus (mental element) and corpus (physical element) will be same as an ordinary ownership under the mode of possession. However, when it comes to the right to use and enjoyment of an apartment ownership rights will be restricted from several interventions. This connotation can be identified as follows;

Normally, servitudes restrain ownership rights. Therefore, servitudes attached to the apartments also restrain particular rights of an apartment ownership with regard to the right to use and enjoyment. Section 13<sup>8</sup> of the Apartment Ownership Act makes provision with regard to servitudes. The servitude of support created by subsection 1 of 13 entitles the owner of the dominant tenement to enter on the servient tenement to **replace, renew or restore any support**. Every owner of a parcel is entitled to have his parcel sheltered by all other parts of the subdivided building that are **capable of affording shelter**. The servitude of shelter created by above shall entitle the owner of the dominant tenement to enter on the servant

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<sup>8</sup>(1) In respect of each parcel there shall be implied (a) in favour of the owner of a parcel and as appurtenant thereto, a servitude for the subjacent and lateral support thereof by the common elements and by every parcel capable of affording support; (b) as against the owner of each parcel and to which the parcel shall be subject, a servitude for the subjacent and lateral support of the common elements and of every other parcel capable of enjoying support.

tenement to **replace, renew or restore any shelter**.<sup>9</sup>

In respect of each parcel, there shall be implied in favor of the owner of a parcel, and as appurtenant thereto, servitudes for the passage or provision of water, sewerage, drainage, gas, electricity, garbage, artificially heated or cooled air and other services (including telephone, radio and television services) through or by means of any pipes, wires, cables or ducts to the extent to which those sewers, pipes, wires, cables or ducts are capable of being used in **connection with the enjoyment of the parcel**.<sup>10</sup> As against the owner of a parcel, and to which the parcel shall, be subject, a servitude for the passage or provision of water, sewerage, drainage, gas, electricity, garbage, artificially heated or cooled air and other services (including telephone, radio and television services) through or by means of any sewers, pipes, wires, cables or ducts, as appurtenant to the common elements and also to every other parcel **capable of enjoying** such servitudes<sup>11</sup>.

In respect of each parcel and the common elements, there shall be implied in favor of the owner of the dominant tenement and against the owner of the servient tenement, a servitude for **uninterrupted access** and use of light to or for any windows, doors or other apertures existing and enjoyed at the date of registration of the relevant Condominium Plan<sup>12</sup>. Further more, the **right to maintain and use**

overhanging eaves and other projections existing<sup>13</sup>.

Section 14 of the Apartment Ownership Act states that “All ancillary rights and obligations reasonably necessary to make servitudes effective shall be implied whenever servitudes are created or implied by or under this Law, including the right of an owner of a dominant tenement, with the permission of the management corporation, **to enter a servient tenement and replace, renew or restore anything which the dominant tenement is entitled to benefit from.**” According to these provisions of apartment ownership Act, directly and indirectly restraints the ownership rights of apartment ownership with reference to the use and enjoyment of an apartment.

If one looks at the right to dispossession of an ownership, an ordinary land owner can exercise it with his/her whims and fancies. An ordinary land owner can alienate his property to anyone he wants. However, when it comes to the right to dispossession of an apartment ownership, an owner of an apartment is unable to alienate his ownership rights as he or she desires. Most of apartment owners should obey the rules and regulations imposed by the management corporation of relevant apartment. Due to that reason also rights attached to an apartment ownership will be limited with reference to the right to alienate his/her apartment.

Therefore, an owner of an apartment should exercise his ownership rights with certain restrictions which imposed by the Apartment Ownership Law and by-laws made by relevant Management Corporation of the apartment.

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<sup>9</sup> Apartment Ownership Act No. 11 of 1973 (as amended), Section 13(5)

<sup>10</sup> Apartment Ownership Act No. 11 of 1973 (as amended), Section 13(6)(a)

<sup>11</sup> Apartment Ownership Act No. 11 of 1973 (as amended), Section 13(6)(b)

<sup>12</sup> Apartment Ownership Act No. 11 of 1973 (as amended), Section 13(7)(a)

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<sup>13</sup> Apartment Ownership Act No. 11 of 1973 (as amended), Section 13(7)(b)

The Latin term called “*Sic utere tuo ut alienum non laedas*” can be identified as the underlining rationale of restraining apartment ownership rights which means use your own property in such a manner as not to injure that of another<sup>14</sup> For the reason that an owner of an apartment enjoys his/her ownership rights without making any inconvenience to other neighboring apartment owners.

### **Conclusion**

It is clear that the rights of an owner of an apartment are vastly different from an ordinary owner of land when exercising their ownership rights. Apartment owners have to think twice before carrying out a simple action and they cannot enjoy their rights according to whims and fancies of their desires. The Apartment Ownership Act and amendments made to the Act and some common law principles govern the law relating to this area and for the maximum utility of the concept of apartment ownership. These restrictions can be justified on the basis of increase of population and achieving developing goals. It certainly does not mean not to have a proper balance between law and minimum standards of enjoyments of rights.

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<sup>14</sup><http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100504563>