

# INCLUSIVITY IN COHOUSING: A COMPARATIVE LEGAL ANALYSIS OF SUSTAINABILITY AND ENFORCEABILITY\*

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## **Introduction**

In this paper, I test and verify the scope and practical operability of the notion of inclusivity in the context of cohousing by exploring the legal solutions provided by statutory law and courts in France and in Italy. In particular, the analysis will assess if and to what extent the French and Italian legal systems adequately take into account the inclusive dimension of cohousing by testing the sustainability and enforceability of the rules used in this context. In Part I, I first introduce the notion of cohousing and identify its core features from a legal point of view; then I describe cohousing as an inclusive situation and clarify the meaning of sustainability and enforceability. Finally, I present the research question in which inclusivity is tested. In Part II, I develop my analysis of inclusivity in cohousing in relation to the French and Italian legal systems by using the research question formulated in Part I. Inclusivity is tested against selected legal regimes used in the two legal systems to set up cohousing. In Part III, I provide some conclusions as to the ability of existing legal regimes of sustaining and enforcing inclusivity in cohousing.

## **Part I – Definitions and methodology**

### **Section 1 - Cohousing: definition and context**

#### **1.1. The general meaning of cohousing**

For the purpose of the present paper, cohousing refers to small-scale residents-led housing with common spaces and shared facilities,<sup>1</sup> located either in cities or in rural areas, intended to foster values such as environmental sustainability, solidarity, participation, mutual cooperation, and sharing of resources, knowledge, and expertise among members of the community.

During the last decades, cohousing initiatives have re-emerged throughout Europe as a way to find better housing solutions while recreating neighbourhood and community living, and thus overcoming isolation, individualism, and speculation. Rather than relying on the private market or on public housing policies, groups of residents have

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<sup>1</sup> D. U. Vestbro, L. Horelli, *Design for Gender Equality: The History of Co-housing Ideas and Realities*, in *Built Environment* vo. 38 n. 3, 315-335. See also, D.U. Vestbro, *Concepts and Terminology*, in D. U. Vestbro (ed.), *Living together – Co-housing Ideas and Realities Around the World*, Proceedings from the International Collaborative Housing Conference in Stockholm, 5-9 May 2010, Stockholm: Royal Institute of Technology, 2010, 21-29.

increasingly been engaged in the conception, building, and management of their own housing project, so playing an active role in shaping their living space and neighbourhood in a way that better responds to their needs and expectations. In this sense, cohousing has been said to “help individuals and families to find and maintain the elements of traditional neighbourhoods – family, community, a sense of belonging”.<sup>2</sup>

Residents are the driving force that lies behind a cohousing project. First of all, they are highly and directly involved in the conception, design, and realisation of the project. They jointly design the project, sometimes with the help of professionals, find the suitable parcel of land, secure permission to build and other required authorisations; they are also responsible for providing the necessary amount of money to realise the project, either by using private savings or borrowing money from credit institutions. In some cases, the involvement of residents in the realisation of their project stretches as far as the self-building of their units and commons spaces.

Residents also play an active role throughout the life of the project. Once the project is realised and homes are available for ownership, residents establish their own rules for living together, jointly manage the common parts of the building, and share costs. To that purpose, they choose the legal arrangements that can best take into account their desires and expectations. Depending on the legal arrangements chosen, residents may insert some clauses in the legal documents of the cohousing project (deed or bylaws) that may help to sustain their project over time.

The collaborative dimension of the cohousing project also suggests that residents commit themselves to community living and do not get involved in cohousing because they want to resell their property on the market, but because they seek for an alternative way of living that is in accordance with their values and principles. Due to the high level of commitment and energy required by being part of a cohousing project, residents usually do not participate in more than one project; in some cases, this might become a formal requirement and residents might be asked to establish their main residence in the houses that they are going to occupy.

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<sup>2</sup> K. McCamant, C. Durrett, *Creating Cohousing. Building Sustainable Communities*, New Society Publisher, 4<sup>th</sup> ed., 2016, 1.

## 1.2. Essential characteristics of the cohousing model

Although cohousing projects may vary in size, location, values, and legal structure, also depending on the national context, the main characteristics of cohousing are the following:<sup>3</sup>

### 1) *The participation of future residents in the realisation of the cohousing project*

Participation of future residents in the cohousing project starts from the very beginning, as they initiate themselves the project and actively take part in the first stages of its realisation, such as planning, design, and building. Participation of residents is also essential in the daily management of the community, since members are involved in activities that demand and encourage participation (such as cooking for the community and cleaning collective spaces).

### 2) *The co-existence of private homes and common spaces*

Along with private homes, co-housing includes several common facilities designed for daily use and usually located in the common house, such as kitchens and dining rooms, laundries, meeting rooms, and a shared outside space for children. Common facilities might be placed in the middle of the cohousing development and surrounded by clustered homes, which means that the physical design of the project encourages a sense of community, social contact, and a strong neighbourhood atmosphere. At the same time, however, private homes allow residents to enjoy a high degree of privacy.

### 3) *Residents' Self-Selection*

The cohousing community is built through self-selection of future residents. Normally, a leading group of households recruits aspiring cohousers according to informal processes (meetings, interviews, etc.) before the project is launched and throughout its realisation. Self-selection guarantees that only residents who share the same view about the goals and ideals underlying the cohousing project can actually be part of the community, and this ensure the sustainability of the project over time. For the same reason, control over the composition of the community is crucial even after the cohousing is set up. It should be noted that, however, when cohousing is subsidised by the state or local authorities, or realised with the support of private financial institutions,

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<sup>3</sup> For this description, I have drawn extensively on K. McCamant, C. Durrett, *supra* note 2, 24-36; C. Scotthanson, K. Scotthanson, *The Co-housing Handbook. Building a place for Community*, New Society Publishers, Canada, 2005, 3-4; F. Chiodelli, V. Baglione, *Living Together Privately: For a Cautious Reading of Cohousing*, in *Urban Research & Practice*, 7:1, 2014, 21-23, which identified the main characteristics of cohousing.

residents are chosen according to allocation rules and procedures established by the promoters.<sup>4</sup>

#### 4) *Management of the community by the residents*

Residents usually manage their own community after they move in and throughout the life of the cohousing project. Common living and the collective management require residents to agree on constitutional and operational rules, which are meant to ensure the sustainability of the community in the long term. However, the freedom of residents to shape their own rules is strictly dependent on the type of legal arrangement used.<sup>5</sup>

#### 5) *Non-Hierarchical Structure and Decision-Making*

The community is governed in a non-hierarchical way. All residents are encouraged or expected to take part in the decision-making process, often using models such as consensus. Some communities also require all residents to undertake a set number of hours of work for the benefit of the community. These rules and practices aim to ensure that all members of the cohousing community are in an equal position as regards their rights and obligations towards the others and the community itself.

#### 6) *Shared Values and Principles*

The driving force of cohousing communities are anti-speculative goals, environmental sustainability, and common values such as solidarity, mutual cooperation, inclusion, and sharing of space, knowledge, and expertise among members of the community. Often, these values are formalised in a Charter of Values, which contains a set of non-monetary obligations such as cooking and cleaning for the community. Although its legal binding force is controversial, the Charter of Values may serve as a basis to orient the selection of future residents.

### **1.3. Top-down cohousing**

As noted earlier, cohousing projects rely most of the time on the spontaneous and autonomous mobilisation of a group of people. However, public authorities at a state or local level, private investment corporations, and not-for-profit entities (e.g., housing cooperatives) may also decide to support and realise a cohousing development. When this is the case, cohousing projects may fall within the scope of social housing programs.

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<sup>4</sup> See section I.3 below.

<sup>5</sup> See Part II below.

The expression social housing refers to a broad range of public policies, implemented at a state or local level, concerned with the provision of decent and affordable housing, both for rent and for sale, to categories of households that would be unable to otherwise enter the housing market (homeownership or private rental market, on the one side, and public housing market, on the other side). Despite the diversity of social housing policies implemented at a national level in each European country, a common definition of social housing is proposed by the CECODAS Housing Europe's Observatory, which describes social housing as "*housing for rent or for accession to ownership for which are defined rules governing access for households with difficulties in finding housing*".<sup>6</sup> Based on this definition, common features of social housing have been identified in: (i) the promotion, funding, and implementation of housing projects by public authorities at a state and municipal level and by new actors, such as public companies, non-profit companies, and cooperatives; (ii) the allocation of housing in accordance with strict rules that set the criteria for selecting the beneficiaries of the housing projects.<sup>7</sup>

When cohousing projects are helped along in a top-down fashion,<sup>8</sup> affordability, sustainability and cost-effectiveness are key concerns of cohousing projects, this impacting on the way residents are chosen and the cohousing project works. First of all, the design and realisation of the project is not led by the future residents themselves, but by some legal entity (be it the municipality, a company or a not-for-profit entity). Secondly, residents are not self-selected but chosen according to their income level, financial standing, and other criteria set by the cohousing promoters. Thirdly, restrictions to individual ownership and the right to dispose, such as resale price and buyer-eligibility restrictions, are commonly practiced. These restrictions are meant to rule out speculation by preventing the market from recapturing the subsidies that have flown into the project; conversely, they allow subsidies to pass from the first generation of eligible residents to the next.

As will be seen in part II, the overlapping between cohousing projects and social housing programs may entail some consequences to which pay attention. As will be seen in relation to our analysis of inclusivity, when a cohousing project is part of a social housing program, restrictions on the right of the owner to dispose of her property

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<sup>6</sup> Cfr. D. Czischke, *Time for legal certainty for local authorities, social housing providers and millions of European households*, Paper to the European Commission, Brussels, March 2005, 5.

<sup>7</sup> A. Pittini, E. Lauro, *The Nuts and Bolts of European Social Housing System*, in *Housing Europe Review* 2012, 22-23.

<sup>8</sup> K. Krokfors, *Co-housing in the Making*, in *Built Environment*, vol. 38, n.2, Sept. 2012, 309-314.

could appear more justified and receive a more favourable treatment by courts on the ground that they constitute a reasonable consideration for getting access to housing.<sup>9</sup>

#### **1.4. Framing cohousing in legal terms: similarities and differences between cohousing and multi-owned housing**

As the description shows, cohousing is first and foremost a social phenomenon. In order to capture its legal dimension, cohousing will be first compared with traditional multi-owned housing; then, attention will be placed on the legal structures used to set up cohousing across the two legal systems under consideration.<sup>10</sup>

Cohousing clearly shows some similarities with traditional multi-owned housing, since in both housing arrangements residents have private homes and share common parts and facilities of the building. Multi-owned housing is one of the most common and widespread forms of housing in Europe and it refers to the situation in which residents individually own their own dwelling, share common parts and facilities of the building, and have a long-term collective interest in the way the building is maintained and run. Likewise, cohousing project usually consists of multi-unit dwellings or detached houses clustered around common spaces and shared facilities, such as guest rooms, laundries, kitchens, and other recreational facilities. Compared to the individual home-ownership scheme, both situations show a collective footprint and a greater degree of complexity since individually owned units are interdependent, and common parts of the building are structurally and functionally essential to the existence of the housing schemes.

However, although based on a mix of individual units and common spaces, cohousing also displays some special features that allow us to distinguish the two housing schemes. While in the multi-owned housing residents are forced to share common spaces and facilities for the benefit of their individual units and as a result of their physical interconnection, common spaces and facilities are instead the core of cohousing. First of all, common spaces and services are present in a much larger percentage, if compared to that of a multi-owned housing scheme, and are usually

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<sup>9</sup> See Part II, par 1.4.1 below.

<sup>10</sup> The legal dimension of cohousing – and more in general of collaborative housing - has so far received limited attention from the academic community. The most recent European projects on collaborative housing adopt a sociological, architectural, or urban studies perspective. From these perspectives, three journal's special issues have focused on the topic, and notably: *Built Environment* 38/3, 2012; *Urban Research & Practice*, 8/1, 2015; and a forthcoming one in the *International Journal of Housing Policy*. A working group on collaborative housing has been created in 2016 in the context of the European Network of Housing Research (ENHR): <https://www.enhr.net/collaborative.php>.

placed in one dedicated building at the centre of the cohousing development, with individual units clustered around them. Thus, common spaces are not ancillary to individual units but, on the contrary, they are the elements around which the entire cohousing project is arranged. Secondly, the life of the co-housing group is organised around common spaces and shared facilities. Driven by a different ethos - one that place solidarity, mutual cooperation, and sharing among residents at the heart of the cohousing project, residents share spaces, activities, common meals, and interact so as to form a community. In sum, the prominent role that common spaces and shared facilities play in cohousing, both at an ideological and practical level, make possible to distinguish it from multi-owned housing.

### **1.5. Legal structures for cohousing in France and in Italy: an overview**

As noted above, although cohousing shares some similarities with multi-owned housing, the former has a much more pronounced collective dimension than the latter. However, in the two legal systems under scrutiny, cohousing is not regulated by any specific set of legal provisions. For this reason, cohousing groups have resorted to existing legal structure, namely condominium regimes, cooperative and companies, or a combination of the two, to set up cohousing.

Before proceeding to an overview of the legal structures used in France and Italy, we shall remark that the type of legal structures used for cohousing may vary according to the stage of the project under consideration. In particular, the legal structures used at the stage of the construction of the building are different from those used when the project is realised and individual units are distributed among residents. In the first stages of the project, a legal arrangement is needed for prospective residents to organise as a group (in the event the project stems from the initiative of residents), to get funding, secure necessary authorisations from public authorities, and construct the building. Usually, the best way to achieve these results is to use a corporate legal structure. Since these arrangements concern the realisation stage of the project and thus do not entail the allocation of any legal entitlement to residents in a permanent way, they fall outside the scope of our analysis. Attention will be devoted only to legal structures used after the project is completed and whose main goals are to allocate legal entitlements to residents over individual units and common parts of the building and to organise the communal life of residents.



As regards the French legal system, either the *copropriété des immeubles* regime or a corporate legal structure may be used to set up cohousing. When cohousing is regulated by the *copropriété*, the statutory regime provided by the law applies<sup>11</sup>. In this case, residents may also decide to form an association to manage common parts of the cohousing development. Alternatively, cohousing may be set up by using either a *Société Civile Immobilière d'Attribution* (SCIA) or a *Société Coopérative de Construction* (SCCC)<sup>12</sup>; after the project is completed, residents may decide to dissolve the corporate structure and use the *copropriété* regime to regulate the life of the project. Sometimes, however, where cohousing groups do not want to dissolve the corporate structure, it becomes their permanent legal regime. Added to these legal structures, the Loi ALUR has freshly introduced a new legal framework for cohousing, namely the *cooperative d'habitants* and the *société d'habitation et autopromotion*, which is meant to replace – at least to a certain extent – existing legal regimes<sup>13</sup>.

In Italy, cohousing groups may set up cohousing by using either the Italian condominium law regime or a housing cooperative. A mix of condominium and cooperatives is also possible. Where projects use the condominium legal regime, residents might also decide to form a cooperative or another type of association to manage the common parts of the building<sup>14</sup>.

As this overview shows, the legal structures used to set up cohousing are significantly similar in two legal systems under consideration. Actually, despite national specificities, cohousing is usually realised by resorting either to a condominium law regime or a corporate structure that normally has legal personality, thus showing a sort of polarisation between the two solutions. Our analysis of inclusivity will be limited to *copropriété des immeubles* in French law and the condominium law regime in Italy. Although it might be desirable, an investigation of corporate legal structures used to set

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<sup>11</sup> The Law n° 65-557 of 10 July 1965 has introduced a self-standing legal regime for *copropriété des immeubles*.

<sup>12</sup> The SCIA is a particular type of *société de construction immobilière* governed by articles L 212-1 et suivants du Code de la Construction de l'Habitation (CCH). The SCCC is established by the Law 24 July 1867 and 10 September 1947 on cooperatives, now in the *Code de la construction et de l'habitation* (article L 213-1 ss and articles L 212-2, L 212-6, and L 214-1 to L 214-9).

<sup>13</sup> See Part II, section 1.2 below.

<sup>14</sup> See Part II section 2.2 below.

up cohousing will not be undertaken in this paper for reasons of space and time constraints.

## **Section 2 – Inclusivity in cohousing**

### **2.1. Defining inclusivity in cohousing**

For the purpose of this paper, inclusivity refers to a situation where the benefits of a resource are shared among a number of persons without anyone having the power to exclude others from the benefits of the resource.<sup>15</sup> According to the definition, inclusivity has three main features: 1) the resource is used in common based on a voluntary choice of the subjects involved; 2) the entitlements of the persons involved are intertwined; 3) the exercise of the right to exclude gives way to the inclusion of others in the enjoyment of the resource.

These three main features of inclusivity perfectly capture the essence of the cohousing model. The first feature of inclusivity corresponds to one of the main characteristics of cohousing. Actually, sharing a common resource between cohousing residents is not just incidental; unlike a traditional multi-owned housing scheme, cohousing residents voluntarily dedicate a certain amount of space to the use and enjoyment of the community. Common parts and facilities of the building are not ancillary to individual units and sharing is not simply incidental to the multi-owned housing scheme; on the contrary, the intention to share common parts and facilities of the building among residents is key to any cohousing community.

The second feature of inclusivity, i.e. the interdependence of rights and obligations of cohousing residents, is linked to the collective structure of cohousing and reflects its practical and legal organisation. Since common spaces and facilities of the building are meant to be used in common, the rights of residents toward common parts are intertwined. Added to this, each resident is under an obligation to respect the rights of the others so that the enjoyment of the common resource is made possible for everyone. Sometimes, the residents' rights to enjoy and dispose of their property is restricted so as to promote the sustainability and enforceability of the cohousing project over time.<sup>16</sup>

The third feature of inclusivity, i.e., the absence of the right to exclude others, refers to the fact that residents have the right to access to and use the benefits of the resource

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<sup>15</sup> See S. Dusollier, *Research Project Context and Methodology*, 4 [unpublished, on file with the author].

<sup>16</sup> See Part. II below.

without anyone having the right to exclude other cohousing members. This feature is also linked to the collective structure of cohousing, which is organised as a collective property regime. It should be noted, however, that while cohousing members cannot exclude other members of the community, they still have the right to exclude non-members from having access to and the enjoying the resource.<sup>17</sup>

### **2.3. Assessing inclusivity: sustainability in the cohousing model**

The inclusive character of cohousing will be investigated by taking into account the two aspects of sustainability and enforceability. These two aspects will serve as indicators to assess if and to what extent existing legal regimes are able to give adequate legal recognition to inclusivity. According to our working definition,<sup>18</sup> sustainability has a twofold meaning, and refers to the capacity of existing legal rules both (i) to prevent any appropriation of the resource by members of the community or third parties through the exercise of their right to exclude, and (ii) to perpetuate the inclusive character of the situation over time, in particular along the chain of transfers that may affect the resource. When sustainability issues are transposed into the context of cohousing, some specifications are needed in relation to both meanings of the notion.

#### **2.3.1. Sustainability as the capacity of resisting to attempts of obtaining exclusive control of the resource**

The first meaning of sustainability is the ability to resist attempts by either a member of the cohousing community or a third party to obtain exclusive control of the resource, which would threaten the collective use and enjoyment of the resource. This first meaning is not directly relevant for cohousing. If we assume that the threat comes from a third party, whether it is a neighbour or a member of the general public, the possibility of gaining exclusive control over the common resource is quite difficult to envisage. In fact, cohousing communities are normally closed to non-residents, and third parties are allowed to enter the community only upon invitation by residents. Then, access and use of the common parts and shared facilities of the building will likely occur under the

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<sup>17</sup> Regimes that are commons with respect to the membership of the community, but property with respect to outsiders have been described as “limited-access property”: see C. M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, in 83 *Minn. L. Rev.* 129 (1998-1999), 132.

<sup>18</sup> See S. Dusollier, *Research Project Context and Methodology*, *supra* note 12.

supervision of residents, and any attempts to gain control over the resource would be almost impossible or blocked at an early stage. Even assuming that a non-resident could manage to gain exclusive control of a resource or a portion of it, it would be very unlikely that this appropriation would result in a serious threat to the inclusive nature of the project. Infringers would also be exposed to liability for trespass. Let's consider instead that the threat comes from a member of the community. When the resource is tangible – as it is the case for common parts and shared facilities of the building - taking control of the resource could be achieved by physically appropriating the resource (e.g., occupying, fencing it, building on it). This situation too has limited relevance for our analysis of inclusivity. Since residents share the same living space, there is a high degree of mutual control and oversight among them, especially in small, close-knit communities, and it is difficult to imagine that a member of the community could physically appropriate the resource. Even admitting that she could manage to obtain exclusive control over (a portion of) the common resource (e.g., building a little patio on her backyard, or fencing a part of the common garden), it is hard to believe that this would affect the functioning of the cohousing project so deeply as to destroy its inclusive character. For these reasons, these aspects of sustainability of inclusivity will not be analysed in the present paper. Rather, attention will be paid to issues of perpetuation of cohousing that relates to the second meaning of sustainability.

### **2.3.2. Sustainability as the ability to perpetuate the inclusive character of the situation over time**

The second meaning of sustainability – i.e., the ability to perpetuate the inclusive character of the situation over time – is particularly relevant in the field of cohousing. Cohousing residents may include in the deed or in the bylaws (that regulate their reciprocal rights and obligations) rules that help to preserve the inclusive character of the project over time. These rules normally prescribe some limitations and conditions on the transferability of the resource to newcomers and have the ultimate purpose to protect the values on which the community was built along the chain of successive transfers of the resource. Examples of these rules are (i) rules that allow restrictions on the right of the co-owner to dispose of her individual unit; (ii) rules allowing residents to choose methods of apportionment of costs based on a different ground than the size of residents' individual units; (iii) rules that condition the possibility of non-members to

enter the community - including legal successors in title – upon compliance with the values and the obligations of the community. Although these rules may sometimes be found in traditional multi-owned housing schemes, they are crucially important in cohousing projects: controlling who can become part of the community and at what conditions is a way to maintain control over the resource and ensure that the project will continue over time. Some of these questions will be explored further in Part. II.

#### **2.4. Assessing inclusivity: enforceability in the cohousing model**

Enforceability represents – like sustainability - an indicator of the ability of existing legal rules to take into account the inclusive nature of the situation under study. Enforceability refers to the ability of an entitlement holder to see her rights - along with its inclusive character - backed up by the State through its courts system. In other words, a prerogative - a right, a privilege, an immunity, or a duty – is enforceable not merely when it is claimable by its holder against those who are under an obligation towards her, but there exist “a specifiable mechanism for enforcing it, backed up by an effective method of implementation”.<sup>19</sup>

In the field of cohousing, the enforceability of residents’ entitlements will be investigated by referring to those situations where the inclusive character of the cohousing project is under threat. The situations in which enforceability will be analysed are the same used to test sustainability issues. However, while sustainability implies a static evaluation of the contractual rules that may limit the power of cohousing residents, enforceability can only be appreciated in a dynamic dimension; in other words, when one of these rules is disregarded or challenged by a resident the question of enforceability of residents’ entitlements takes on meaning. To give an example, in the event a resident or a prospective resident would sell her apartment at market value to a buyer who has not been previously approved by the community, questions regarding enforceability could include whom is entitled to take action against this violation, who could resist, what kind of remedies each of the litigants could have, and towards whom the possible decision of the court could be opposed.

Then, in relation to each of the hypothetical situations where sustainability is tested, three aspects of enforceability will be explored, and notably: (i) who is entitled to take action or resist in order to protect the common resource (would it be a prerogative of

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<sup>19</sup> S. James, *Rights as Enforceable Claims*, in *Proceedings of the Aristotelian Society*, New Series, Vol. 103 (2003), 133-147.

any resident or of the community as represented legal entity?); (ii) are there in place governance mechanisms to control and sanction the infringing behaviour? Or shall an action be brought before national courts?; (iii) what kind of instruments do residents have, individually or as a community, to act or resist before courts in the situations mentioned?; (iv) against whom, once recognised by courts, could the entitlement be opposed (third party-opposability)?. The analysis of enforceability will help clarify if and to what extent the entitlement a resident has to a resource, individually or as part of the community, is inclusive or not.

## **2.5. Research question**

In order to test sustainability and enforceability of inclusivity in cohousing I formulated a research question by asking if, how, and to what extent the distinguishing features of a cohousing project – notably, solidarity, participation, mutual cooperation and sharing among residents – are or might be translated into legally meaningful provisions. In this sense, the hypothetical situation concerns what in terms of legal rules (might) differentiate a cohousing project from a traditional multi-owned housing scheme, and are thus meant to capture the specificities of the cohousing model and stress its most critical aspects.<sup>20</sup>

The research question in which inclusivity will be tested in Part II concerns the case where a resident decides to leave the cohousing project and sell her individual unit to a third party. Since cohousing relies on a strong sense of community, any change in the ownership of an individual unit affects the composition of the community of residents and might have a negative impact on the way common parts are used and managed. Actually, if a new member does not share the values of the cohousing project and refuses to abide by the regulations set up by the community, the transfer of ownership might result in a threat to the inclusive character of the cohousing project in the long term. For this reason, control over who is going to live in the cohousing community becomes crucial to ensure the sustainability of the project. This situation can be summarised as follows:

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<sup>20</sup> Although the research question has been formulated by following a theoretical approach, I also interviewed people involved in cohousing projects, either as residents or representatives of cohousing associations, and examined relevant documents (where available).

*A member of the community wishes to leave the cohousing project and sell her individual unit to a third party, and her right to dispose is restricted to preserve the composition of the cohousing community*

In this respect, sustainability is tested against existing legal regimes that are used to regulate cohousing. In particular, I will assess if and to what extent rules imposing contractual restrictions on the right of the owner to dispose of her individual unit are sustainable under applicable law. Enforceability is tested by asking who has the power to act or resist, against whom could the claim be brought in case these rules are challenged, what remedies are available, and against whom a decision on the matter could be opposed.

## **Part II – Analysis**

### **Section 1 - Analysis of inclusivity in French cohousing**

#### **1.1. Cohousing in France: the notion of *habitat participatif***

The cohousing model described above has been known in France with the expression *habitat participatif*. Over the last years, the instability created by the financial, real estate and ecological crisis has served as the breeding ground for the re-emergence and spread of residents-led housing initiatives. Thus, since the beginning of the 2000s, new housing projects have developed throughout the country and they now number in the hundreds.<sup>21</sup> The multiplicity of terms that are used in France to describe these projects - *habitat groupé*, *habitat autogéré*,<sup>22</sup> *habitat alternative*,<sup>23</sup> *habitat participatif*, *habitat coopératif* or *coopératives d'habitants*<sup>24</sup> - captures the diversity of values, principles,

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<sup>21</sup> Data are taken from a survey of *habitat participatif* projects made by *La Coordin'action*, an association that gathers and coordinates fourteen French associations involved in the promotion, development and realization of *habitat participatif* projects as well as in keeping the dialogue with other institutional actors open. The mapping of existing *habitat participatif* projects, at the different stage of their completion, is available at <http://www.habitatparticipatif.eu/cartographie-de-lhabitat-participatif-2017/>.

<sup>22</sup> The expressions *Habitat groupé* and *Habitat autogéré* were used during 1970-1980 to designate squatters or self-managed groups occupying spaces for housing purpose. In 1983 the architect Philippe Bonnin found the “mouvement pour l’habitat groupé autogéré” (MHGA). This association has been re-established in 2008 with the name *Eco-Habitat Groupé* in order to stress the importance of ecological concerns. For further details and a comparison between *habitat groupé* and *habitat participatif*, see C. Devaux, *L’habitat participatif. De l’initiative habitante à l’action publique*, PUR, 2015.

<sup>23</sup> *Habitat alternatif* usually refers to initiatives that do not rely on professional organisms such as real estate promoters or HLM.

<sup>24</sup> *Coopératives d’habitants* have been defined as little and close-knight communities of individuals, based on stable justice agreements, and in which trust among members is important: see Y. Maury (ed.),

layout, design, and legal arrangements that characterise the projects.<sup>25</sup> However, in spite of this heterogeneous mix, the expression *habitat participatif* has gained momentum in the discourse of socio-legal scientists, architects and policy makers, and has been increasingly used as a term capable of referring to all housing projects whose common goal is to place the resident at the heart of the realisation and management of her living space and to provide a valuable alternative to both the private market sector and public-led initiatives.<sup>26</sup>

In 2014, *habitat participatif* has been formally recognised by the law. Actually, the *Loi ALUR* now defines it as a “citizens-based initiative that allows individuals to associate, if necessary with legal persons, in order to participate in the definition and design of their individual dwellings and common spaces, to construct or acquire one or more buildings and, where possible, to ensure their management”. Emphasis is placed on sharing and solidarity, since the *habitat participatif* is meant to promote “the construction and the supply of housing, as well as the development of collective spaces, under a logic of sharing and solidarity between inhabitants”.<sup>27</sup> Actually, the driving force of these residents-led mobilisations is an increased awareness of the importance of protecting and fostering values such as environmental sustainability, mutual solidarity, citizens’ participation, and sharing of resources, knowledge and expertise among the community.

## 1.2. Legal structures for cohousing in France

The wide variety of experiences that have been known in France under the *habitat participatif* umbrella is reflected in the different legal structures used to implement the projects. As noted earlier, either the statutory regime of *copropriété des immeubles*, a corporate structure, or a combination of the two may be used to set up cohousing in France. Where cohousing groups choose to adopt *copropriété*, the statutory regime

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*Les coopératives d’habitants. Méthodes, pratiques et formes d’un autre habitat populaire*, Bruylant, 2012.

<sup>25</sup> S. Bresson, S. Denèfle, *Diversity of self-managed co-housing initiatives in France*, in *Urban research and practice*, 8:1, 2015, 5-16. On the major trends of *habitat participatif* projects, their roots and ideologies, see A. D’Orazio, *La nébuleuse de l’habitat participatif: radiographie d’une mobilisation*, in *Métropolitiques*, 16 janvier 2012, available at <http://www.metropolitiques.eu/La-nebuleuse-de-l-habitat.html>.

<sup>26</sup> This is the definition given in the preambul of the *Livre Blanc de l’Habitat Participatif*. Cfr. *Livre Blanc de l’Habitat Participatif*, Strasbourg, 2011, 1. The *Livre Blanc* has been realised by the association *Eco-Quartier Strasbourg* on behalf of the *Coordin’action* in the aftermath of the national *habitat participatif* meetings held in Strasbourg during 2010.

<sup>27</sup> Art. 200-1.



applies along with its set of mandatory provisions. This has an impact on the degree of freedom that cohousing residents have to organise their reciprocal rights and obligations. In case cohousing is set up according to the *copropriété* regime, cohousing residents may also attempt to gain control over common parts and facilities of the building by forming an association to manage them.

Sometimes, however, cohousing groups may opt for a corporate legal structure. Actually, at the stage of the realisation of the cohousing project, prospective residents may opt for a *Société Civile Immobilière d'Attribution* (SCIA) or a *Société Coopérative de Construction* (SCCC), which allow a greater degree of flexibility compared to *copropriété*. Normally, these companies' main goal is to acquire and build a housing complex and assign its fractions to associates either through possession or ownership. Although these companies normally dissolve once the project is realised, groups often prefer to keep a SCIA or SCCC legal structure to regulate their rights and obligations even during the life of the cohousing project.

A combination of the two legal structures described above may also be possible when, for instance, a corporate structure is used to develop the cohousing project and is made to dissolve after the latter is accomplished. In this case, a SCIA or a SCCC may be used to ensure the realisation of the cohousing project, but residents' rights and obligations will be organised according to the *copropriété* regime.

Besides these three main models, a new legal framework for cohousing has been introduced by the Loi ALUR in 2014, notably the *cooperative d'habitants* and the *société d'attribution et d'autopromotion*.<sup>28</sup> Not only does the Loi ALUR provides a new framework that is specifically conceived for cohousing, but it also encourages already existing projects to adapt their corporate legal structures to the models provided by law. Although the new cooperative legal structure is likely to become commonly used to set up cohousing, it is noted that it will not completely replace the legal scheme of the *copropriété des immeubles*, which will still be applicable in situations where residents are meant to get access to housing by purchasing their units.

Among the different legal structures mentioned, the analysis of inclusivity in relation to French cohousing will focus on the legal regime of *copropriété des immeubles*. Actually, as of today, *copropriété des immeubles* is the most commonly used legal

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<sup>28</sup> See articles 201-1 to 201-13 and articles 202-1 to 202-11 of the *Code de la construction et de l'habitation*. More detailed rules are still in the process of being adopted through implementing decrees by the *Conseil d'Etat*.

regime for multi-owned housing, and a large portion of *habitat participatif* projects have resorted to the *copropriété* scheme.<sup>29</sup>

### 1.3. The *copropriété des immeubles* legal regime

*Copropriété des immeubles* defines the situation where a building (or more) is shared among residents so that individually owned private units co-exist with “undivided ownership” of common parts.<sup>30</sup> The main feature of *copropriété* is the fragmentation of ownership of the building into different lots. Each co-owner is the owner of a single lot, meaning that she has the exclusive ownership of her private unit and the undivided ownership of common parts and facilities.<sup>31</sup> As to the distinction between private parts and common parts of the building, co-owners have the exclusive free use and enjoyment of their private units, provided that they respect the destination of the building – i.e. the purpose for which the building has been built - and does not undermine the rights of other co-owners; in contrast, common parts of the buildings are held in common and used by all co-owners. The reciprocal rights and obligations of co-owners towards both their individual units and the common parts of the building are contained in the *règlement de copropriété*, which is the most important legal document of the *copropriété* regime. The *règlement* is an agreement between co-owners<sup>32</sup> that sets the conditions for the exercise of residents’ rights on their individual units, for the enjoyment of the common parts of the building, and the criteria used to calculate the amount of service charges due by each co-owner in relation to common parts.<sup>33</sup> The *règlement* also determines the way in which the building is organised and managed. Actually, the group of co-owners is organised as a legal person (*le syndicat*), whose main purpose is the maintenance and management of the common parts of the building;

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<sup>29</sup> C. Atias, *Copropriété des immeubles bâtis*, in *Répertoire de droit immobilier*, Dalloz, juin 2014 (actualisation: octobre 2015), [7] indicates that *copropriété* represents a widespread type of tenure within the real estate market because it satisfies the aspirations of people toward individual ownership while cutting down costs and diluting responsibilities.

<sup>30</sup> F. Terré, Ph. Simler, *Droit Civil. Les biens*, Dalloz, 2006, 499.

<sup>31</sup> It may also be possible for one co-owner to be entitled to exercise an exclusive right of enjoyment over specific common parts.

<sup>32</sup> It is controversial if the *règlement* can be defined as an agreement *tout court*. Some legal scholars have pointed out that its nature is more regulatory than contractual, since the law mandatorily prescribes its existence and it might be imposed by a decision of the judge: see, Terré, Simler, *Droit civil. Les biens*, 7ème éd., 532.

<sup>33</sup> Art. 8, Loi 1965 provides that “un règlement conventionnel de copropriété, incluant ou non l’état descriptif de division, détermine la destination des parties tant privatives que communes, ainsi que les conditions de leur jouissance ; il fixe également, sous réserve des dispositions de la présente loi, les règles relatives à l’administration des parties communes”.

relatedly, it has the power to bring legal proceedings for the safeguard of co-owners' collective interests against other co-owners and/or against third parties. However, the *syndicat*'s right to take legal action does not exclude the right of a co-owner to take action for matters related to the ownership or enjoyment of her lot.<sup>34</sup> The *syndicat* takes decisions through the co-owners assembly, which is in charge of the daily management of the *copropriété*. The assembly has also the power to appoint the *syndic*, which is the executive body of the *syndicat des copropriétaires*. Along with the implementation of the decisions taken by the assembly and of the rules contained in the *règlement de copropriété*, the *syndic*'s main objectives are the management and maintenance of the building, the recovery of debts, among which those related to service charges, and the representation of the *syndicat* in legal proceedings.

#### **1.4. Restrictions on the right to dispose of individual units: analysis of sustainability and enforceability**

I now test sustainability and enforceability of inclusivity in relation to the hypothetical situation set out in Part I. This concerns the case where a resident decides to leave the cohousing community and sell her individual unit to a third party. As described in section I.2.5, since membership of the cohousing community – and consequently the access to and the enjoyment of common parts and shared facilities - is strictly dependent on the ownership of the individual units, any change in the ownership impacts the composition of the community and may threaten the sustainability of a cohousing project in the long term. For this reason, sustainability and enforceability of inclusivity will be tested against both the statutory regime of *copropriété des immeubles* that regulates the resale of individual units to third parties and contractual rules that, agreed by all residents, might impose restrictions on the right of the owner to dispose of her individual unit. In particular, the analysis will focus on those contractual restrictions that might prevent the owner to alienate her property or that could limit the owner's freedom to choose her contractual counterpart, for example by granting a pre-emptive right to other residents.

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<sup>34</sup> See art. 15, Loi 1965.

#### 1.4.1. Analysis of sustainability

According to the statutory provisions of *copropriété*, each co-owner has the right to dispose of her individual unit and the greatest freedom to use and enjoy individual as well as common parts of the building, provided that her freedom does not cause any harm to the enjoyment of other co-owners' rights or affect the purpose for which the building has been realised. Thus, in principle and except for some limitations, each co-owner enjoys the normal, elementary rights of any owner, as derived from article 544 of the French Civil Code, towards both private and common parts contained in her lot. In particular, each co-owner has the right to alienate, rent, or mortgage the lot, as well as the greatest freedom to exclude others from her property.

However, in practice, the specific situation of *copropriété* affects to a certain extent the rights of the owner to dispose of her individual unit.<sup>35</sup> Actually, the law itself clarifies that the right to dispose of private parts can be exercised provided that a co-owner undermines neither the rights of other co-owners nor the intended purpose of the building (*la destination de l'immeuble*).<sup>36</sup> Among those limitations imposed by the law, the purpose for which a building has been built is particularly important. Actually, the notion of *destination de l'immeuble* refers to the number, dimension, and use of both privately owned lots and common parts of the building, as well as on the characteristics of the building, including its comfort, aesthetic, and location.<sup>37</sup>

Added to these limitations, residents may decide to include restrictions on their right to dispose in the *règlement de la copropriété*. As described in section II.1.3, the *règlement* is an agreement entered into by co-owners to regulate their reciprocal rights and obligations toward both individual units and common parts of the building. The *règlement* is either agreed upon by residents before the *copropriété* comes into existence or drafted by the developer and then accepted by residents at the moment of the purchase of their homes. Alternatively, the *règlement* can be approved by a majority vote of the assembly or imposed by a judge. When the *règlement* is formed by a vote of the majority of the assembly or provided by the judge, it cannot impose any restrictions

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<sup>35</sup> C. Atias, *supra* note 24 [10].

<sup>36</sup> See Art. 9, al. 1, Loi 1965.

<sup>37</sup> The *destination de l'immeuble* is “the set of conditions for which the co-owner has bought the lot, taking into account all the clauses and contractual documents of co-ownership, the physical characteristics, the status of the building, as well as the social status of the occupants”: Versailles, 16 juill. 2009, Loyers et copr. 2010, n° 49, obs. Vigneron; Cass. Civ. 3e, 20 mai 2014, n° 12-25.822.

on the rights of a co-owner to dispose of her property.<sup>38</sup> Thus, the only way to impose restrictions that may affect the individual rights of residents is reaching an agreement among all co-owners. The reason is to ensure that co-owners are not bound by restrictions that affect their individual rights without having consented to them.

As regards the content of the *règlement*, the contractual freedom of residents in this respect has been strongly undermined by the fact that the content of the *règlement* has to comply with mandatory provisions of the law. Before the reform of the statutory regime of *copropriété* in 1965, residents were granted considerable freedom to include in the *règlement* a wide range of provisions that could limit their rights in accordance with their interests, and courts used to consider them valid. The situation changed completely after the *copropriété des immeubles* legal regime was introduced in 1965. Actually, the new statutory regime contains a wide set of mandatory provisions inspired by public policy concerns that considerably affect the possibility of residents to freely regulate their reciprocal rights and obligations.

For the purpose of this paper, we will focus on provisions of the *règlement* that may restrict the right of the owner to dispose of her property and, more specifically, the right to transfer her individual unit to a third party by means of sale. The law on *copropriété* does not specifically regulate the hypothesis of a restriction against alienation, but simply prescribes, in more general terms, that the *règlement de copropriété* “cannot impose any restriction on the rights of co-owners other than those justified by the intended purpose of the building, as defined by documents, its characteristics or its situation”.<sup>39</sup> Therefore, limitations contained in the *règlement* are valid only if they are justified by the intended purpose of the building, which becomes the measure of the contractual freedom enjoyed by co-owners. This implies that courts shall evaluate the lawfulness of a provision limiting the right to dispose by taking into account all the various elements of the case and, in particular, the purpose for which that specific building has been built.<sup>40</sup>

However, some examples taken from the analysis of case law may reveal how courts would rule on certain issues. As regards a clause forbidding alienation *tout court*, legal

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<sup>38</sup> Article 26 d, Loi 1965 prescribes that the assembly cannot impose by majority decisions any amendment of the *règlement* concerning the use and enjoyment of private parts, as it results from the *règlement*.

<sup>39</sup> Art. 8, subpar. 2 of the Law 1965 provides that “le règlement de copropriété ne peut imposer aucune restriction aux droits des copropriétaires en dehors de celles qui seraient justifiées par la destination de l'immeuble, telle qu'elle est définie aux actes, par ses caractères ou sa situation”.

<sup>40</sup> G. Vigneron, Fasc. 60: *Statut de la copropriété – Généralités*, in *JurisClasseur Copropriété*, 10 Octobre 2009, dernière mise à jour 6 Novembre 2014, 19.

scholars are firm in saying that the right of co-owners to sell her property is such an essential prerogative of her quality of owner that the *règlement de copropriété* should and could not restrict it.<sup>41</sup> However, besides the context of *copropriété*, clauses against alienability are commonly used in the field of gratuitous promises and courts and legal scholars have expanded their scope to “acts for consideration”. A clause against alienability is considered valid and enforceable when it does not infringe upon the right of property in a disproportionate way, and in particular, if (i) inalienability is limited in time, and (ii) inalienability is justified by a “serious and legitimate interest of one of the parties”. Although this principle is not specifically tailored for the *copropriété regime*, it is not clear why a restriction that complies with these two requirements should not be considered valid by courts where agreed upon by residents and contained in the *règlement de copropriété*. In any case, courts would have a great margin of discretion in appreciating whether, in each particular case, the interest of the parties is enough serious and legitimate to justify the restriction.

Another example concerns a clause that establishes a preemptive right in favor of other co-owners when an individual unit is sold. In this respect, the *Cour de Cassation* has constantly ruled against the validity of such a clause of the *règlement* on the ground that it unduly undermines the right of the owner to dispose of her property;<sup>42</sup> and this would prove especially true if the restriction is not justified by the intended purpose of the building.<sup>43</sup> Consequently, courts have considered these clauses as not written. More recently, however, the *Cour de Cassation* has ruled in favor of the validity of a *pacte the preference* building on the notion of *destination de l'immeuble* and has justified the restriction on the ground that its main purpose was to sustain and ensure the group's family structure.<sup>44</sup>

As the analysis of statutory and case law shows, it is very unlikely that courts would deem valid restrictions on the resale of individual units. The only way for cohousing residents to maintain a certain degree of control over the composition of their project is to use the notion of *destination de l'immeuble*. Since common spaces and values such as solidarity, mutual cooperation, and sharing among residents are crucial, this might

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<sup>41</sup> J.-N. Beaulieu, Fasc. 68-10: *Droits et obligations des copropriétaires – Aliénation de lot – Constitution de droits réels*, in *JurisClasseur Copropriété*, 24 mars 2015, mise à jour 5 Novembre 2015, 7-8; G. Vigneron, Fasc. 76: *Règlement de copropriété – Généralités – Champ d'application*, in *JuriscClasseur Copropriété*, 24 Novembre 2011, mise à jour: 26 Mai 2014, 18.

<sup>42</sup> See, *ex multis*, Cass. Civ. 3<sup>ème</sup>, 29 Mai 1979, n. 78-11530.

<sup>43</sup> CA Toulouse, 10 Janvier 2011, n. 09/00802.

<sup>44</sup> Cass. 3e civ., 30 juin 2009, n°07/21.146 and 08-13.405, unpublished. Cfr. J.-N. Beaulieu, *supra* note 36, p. 9

represent the actual purpose for which the building has been built. Thus, by eventually giving relevance to those elements, a judge might rule in favor of the validity of these restrictions. In this scenario, however, the ability of cohousing residents to maintain control over the composition of the community and, ultimately, to ensure the sustainability of the project in the long term would be totally dependent on the evaluation made by the judge in each particular case.

#### **1.4.2. Analysis of enforceability**

In order to complete our analysis of inclusivity in French cohousing, we now consider the issue of enforceability of clauses that restrict the owner's right to dispose. As the previous analysis has shown, such restrictions are treated with disfavor by both statutory law and courts. In spite of that, however, cohousing residents may decide to include such clauses in the *règlement* in order to retain some control over who is going to be part of the community. Actually, before this matter is challenged before courts, the provision remains applicable and shall be abided by the residents who agreed upon the content of the *règlement*. The relevant question will then be whether these restrictions are enforceable against a resident who sells her apartment to a third party in violation of such clauses.

Regarding the right to take action before courts, it should be noted that the *syndicat des copropriétaires* will be rightfully entitled to bring an action before courts against a resident who infringes the provision of the *règlement*. Actually, the *syndicat* represents the co-owners and its main purpose is to guarantee that the *règlement* is abided by; an action could be then brought on the ground that the *règlement* has been violated.<sup>45</sup> In contrast, it is not clear whether a co-owner can bring a claim in this respect, since her right to sue is limited to matters relating to the use and enjoyment of her individual unit. Conversely, she is entitled to seek judicial annulment of a provision of the *règlement*. In this case, the legal action shall be brought against the *syndicat des copropriétaires*, as represented by the *syndic*. Interestingly, this action cannot be barred by lapse of time. The reason for this is that, according to French law, an illegal provision is to be

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<sup>45</sup> Instead, the *syndic* has no autonomous power to act in this respect: see G. Vigneron, *Règlement de copropriété - Problématique des clauses nulles*, in *JurisClasseur Copropriété*, Fasc. 77-20, 15 déc. 2011, dernière mise à jour 26 mai 2014, 6-7; see also, G. Vigneron, *supra* note 35, 19.

considered as “not written”, which means that it never came into existence.<sup>46</sup> The *Cour de Cassation* has recently clarified that the same procedural rules apply to illegal provisions that have been adopted by a decision of the assembly.<sup>47</sup>

According to the existing case law, it is likely that a provision of the *règlement* restricting the right of the owner to dispose of her property would be deemed incompatible with either a mandatory provision of the law or the intended purpose of the building. In this case, the invalid provision will be removed from the *règlement*,<sup>48</sup> however, the judge shall limit herself to declare the unlawfulness of the provision, but cannot go as far as imposing a new provision to replace the old one. Actually, the *règlement* can be modified only by the intervention of the assembly. In this case, the sale that may have occurred between the co-owner and a third-party purchaser will then be perfectly valid.

In the unlikely event that a court would consider the provision valid and enforceable, the remedies granted to the *syndicat des copropriétaires* would depend on the type of restriction contained in the clause of the *règlement*. For example, in case the alienation has occurred in violation of a clause granting to co-owners a pre-emptive right, the *syndicat* will be able to obtain compensatory damages by the co-owner for breach of contractual duty.<sup>49</sup> However, the possibility of declaring the sale occurred in violation of the provision null and void depends on the position of the third-party purchaser.<sup>50</sup> If the third party is in good faith – i.e. she was not aware of the existence of the pre-emptive agreement - the prohibition cannot be opposed to her, despite the agreement is given publicity. On the contrary, if the third party is in bad faith, the beneficiaries of the pre-emptive right can seek for either the annulment of the sale or the replacement of the third party.<sup>51</sup>

To conclude, where the inclusive dimension of cohousing is realised through

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<sup>46</sup> Art. 43 provides that “toutes clauses contraires aux dispositions des articles 6 à 37, 41-1 à 42 et 46 et celles du décret prises pour leur application sont réputées non écrites. Lorsque le juge, en application de l’alinéa premier du présent article, répute non écrite une clause relative à la répartition des charges, il procède à leur nouvelle répartition”.

<sup>47</sup> *Ex multis*, Cass. 3e civ., 18 nov. 2008; Cass. 3e civ., 27 sept. 2000, JurisData n°2000-00634; Loyers et copr. 2000, comm. 279.

<sup>48</sup> However, this will not affect the rest of the *règlement*, which will remain valid and binding.

<sup>49</sup> Article 1123, subpar.2, of the French Civil Code provides that “where a contract is concluded with a third party in violation of an agreement containing a pre-emptive right, the beneficiary of the pre-emptive right may obtain compensation for damage suffered”.

<sup>50</sup> Cfr. article 1123, subpar. 2: “In the event the third party was aware of the existence of the agreement and that the beneficiary wanted to take advantage of it, the beneficiary may also seek annulment of the contract or request the court to replace the third-party purchaser”.

<sup>51</sup> The solution has been upheld by a decision of the Cour de Cassation, Ch. Mixte, 26 Mai 2006, in Bulletin 2006 MIXT. N° 4, 13.



contractual restrictions on the right of the owner to dispose of her property, even assuming that law permits the enforcement of these restrictions, it depends on the particular fact of the case whether these restrictions are opposable or not against third parties.

#### **1.4.3 Remarks on the specific case of top-down *habitat participatif* projects**

As noticed in section I.1.3, cohousing can either be based on the initiative of a group of residents or promoted by public authorities in a top-down fashion. The different dynamic behind top-down cohousing initiatives also impacts the way restrictions on the right to dispose of individual property are treated by French courts.

Actually, municipalities in France are allowed to resort to anti-speculative clauses to face the problem of housing affordability and access to property. The public policy strategy adopted by municipalities envisages two options: (i) either the municipality sells its land into lots directly to citizens at a preferential rate, or (ii) the municipality sells the land to a housing developer/promoter at a price lower than the market price of the land; in this case, while promoters can benefit from a reduced price, they are asked to keep construction costs low and to preserve public housing aids for the benefit of the buyers; housing affordability may also be realised by adding anti-speculative clauses to traditional sale agreements.<sup>52</sup>

In this respect, the *Cour de Cassation* has recently ruled on the validity of a contractual term that subordinated the resale price of property to some conditions.<sup>53</sup> The dispute culminating in this landmark decision revolved around the validity of a clause included in a contract entered into by the owners of a “municipality housing estate” – a *lotissement communal* - and the municipality where this estate was located. In particular, the contractual clause challenged before the Court required that owners who wanted to sell their property (i) stick to a fixed resale price for a twenty-year period, and (ii) allow the municipality to exercise a pre-emptive right during the same period of time. The owners challenged the validity of this clause by arguing, before the Court of Appeal, that it constituted an undue restriction of their property right and that, because in violation of article 544 of the French Civil Code, it should have been declared null and void. The Court of Appeal rejected the owners’ claim. The owners then brought the

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<sup>52</sup> C. Bosgiraud, *Les clauses dites anti-spéculatives*. – « En toute chose, il faut considérer la fin », in *La Semaine Juridique Administrations et Collectivités territoriales* n°46, 10 novembre 2008, 2257.

<sup>53</sup> Cass. 3ème civ., 23 sept. 2009, n° 08-18187 : *Les petites affiches* 201060PA, note N. Randoux.

matter before the *Cour de Cassation*, which confirmed the appellate decision. In particular, the Court stated that (i) the owners had voluntarily entered into that agreement and (ii) they had accepted the resale price restrictions in consideration for the opportunity to enter a market protected from real estate speculation.

Although the French *Cour de Cassation*'s judgment is tailored to the specific facts of the case (one of the contracting parties was a public entity, and the resale price restriction was limited to a twenty-year period), the reasoning of the *Cour de Cassation* is very interesting for the purpose of our analysis. Actually, the Court describes the contractual clause under its scrutiny as a mechanism put in place for preventing real estate speculation, and therefore justifies on grounds of public policy a restriction on rights traditionally associated with ownership. This means that courts might be more inclined to justify limitations on the owner's right to dispose of her property when cohousing projects are helped in a top-down fashion.

## **Section 2 – Analysis of inclusivity in Italian cohousing**

### **2.1. Cohousing in Italy**

In Italy, co-housing is a relatively recent phenomenon. It was initially envisaged in a public survey promoted by the municipality of Rome in 2009 with the aim of testing its legal and economic feasibility in the metropolitan area. In 2010, the first Italian cohousing network – “Rete Italiana cohousing” – was founded in Florence, where it launched its manifesto.<sup>54</sup> Besides setting the goals of the organisation, the Manifesto described cohousing as a residential solution consisting of private housing units and shared spaces and facilities, characterised by a common, shared, sustainable, and solidarity-based planning and management.<sup>55</sup> Nowadays, in Italy there are around 20 cohousing projects, of which 4 have been completed; at the same time, several cohousing associations have come into being – such as CoAbitare, E/co-Housing, Cohousing Toscana, Solidaria, Ecohousing. These are part of the Italian national cohousing network.<sup>56</sup>

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<sup>54</sup> F. Guidotti, *La Rete italiana cohousing*, in F. Guidotti, *Ecovillaggi e cohousing*, Terra Nuova Edizioni, 2013, 161-162.

<sup>55</sup> The *Manifesto* is available at [http://www.cohousingsolidaria.org/allegati/SOLIDARIA\\_t2\\_allegati/31/FILE\\_Allegato\\_MANIFESTO\\_RETE\\_NAZIONALE\\_PER\\_IL\\_COHOUSING2011.pdf](http://www.cohousingsolidaria.org/allegati/SOLIDARIA_t2_allegati/31/FILE_Allegato_MANIFESTO_RETE_NAZIONALE_PER_IL_COHOUSING2011.pdf).

<sup>56</sup> F. Guidotti, *Associazioni di promozione del cohousing*, in F. Guidotti, *Ecovillaggi e cohousing*, Terra Nuova Edizioni, 2013, 188-193.

## 2.2. Legal structures for cohousing in Italy

The Italian legal system does not contain any specific set of legal provisions for cohousing. For this reason, existing legal structures, namely condominium law regime, cooperatives, or a combination of the two, are used to set up cohousing projects.

First of all, a cohousing project may adopt the condominium law regime. In this case, each resident owns her individual unit and has a share of the ownership of common spaces. Provisions on the rights and obligations of residents over common spaces and shared facilities are contained in the condominium's bylaws. Condominium is the most widespread legal structure for cohousing in Italy; according to Zucchini, however, where residents choose to adopt the condominium law regime, the only difference between a traditional multi-owned housing and a cohousing is that co-residents share a greater number of common spaces in the case of cohousing.<sup>57</sup> For reasons of exposition, the consequences of the application of the condominium regime to cohousing in terms of enforceability and sustainability of inclusivity will be discussed in the next subsection.

Alternatively, cohousing may be set up through a cooperative, of which residents become members. In this case, the legal entity is the owner of both housing units and collective spaces within the cohousing development. Residents are then allocated the right of enjoyment of individual dwellings and collective spaces upon the periodical payment of a fee. The cooperative bylaws usually regulate the use of collective spaces, the exercise of common activities, and the amount of service costs due by each member. The cooperative may take the particular form of a "housing cooperative" as regulated under Italian law.<sup>58</sup>

Another legal structure that is suitable for cohousing is a mix of condominium law regime and cooperatives. If residents have opted for condominium, they may decide to create a legal entity, of which they also become members, and rent out to it common

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<sup>57</sup> M. Zucchini, *Aspetti operativi: il cohousing dal punto di vista giuridico*, in A. Sapio (ed.), *Famiglie, reti familiari, e cohousing*, Franco Angeli, Roma, 2010, 215.

<sup>58</sup> A housing cooperative (ndr. *cooperativa edilizia di abitazione*) is a specific type of not-for-profit company whose mutualistic purpose is to provide, at a reduced price, accommodation for its members. More specifically, the co-operative acquires the piece of land, enters into a procurement contract with the building constructor, and finally manages to allocate the housing units among its members. The Italian legal framework for co-operatives is very complex and fragmented, provided that some norms are specifically tailored for state-helped cooperatives that provide housing for low-income people. For an overview see S. Merz, *Manuale pratico e formulario delle società cooperative*, Padova, 2016, 367-368.

spaces and facilities for the purpose of ensuring their management. The legal entity may be an association, a foundation, or a limited-liability company, but is more often a cooperative. Since a legal entity allows a great degree of flexibility, this solution is considered particularly suitable for cases in which common parts and facilities are not limited to cohousing residents but are open to the general public.

### **2.3. The Italian condominium law regime**

As mentioned in the previous sub-section, our analysis of inclusivity under Italian law will focus only on the condominium law regime.<sup>59</sup>

The main characteristics of the Italian condominium regime are the following. Like the French *copropriété des immeubles*, condominium is a legal structure where exclusive ownership of the individual units coexists with shared ownership of common parts and facilities of the building.<sup>60</sup> Actually, each owner is entitled to a unit and all of them share ownership of “necessary” common parts of the building, such as the entrances, walls, elevators, hallways, and the like. Residents also share costs related to the use and maintenance of those common parts. Common parts and facilities of the building are meant to be complementary and ancillary to the individual units: they cannot be isolated from the individual units and they are meant to make individual units’ use and enjoyment possible.

Rules concerning residents’ rights and obligations over individual units and common parts are normally included in the bylaws (*regolamento di condominio*). Where residents are more than ten, the law prescribes the adoption of the bylaws as mandatory.<sup>61</sup> Bylaws can be adopted either by the majority vote of the assembly (*regolamento assembleare*), or agreed upon by all residents, usually before the condominium comes into being (*regolamento contrattuale*). As we will appreciate in the next sub-sections, this difference impacts on the type of restrictions allowed on ownership of individual units.

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<sup>59</sup> See *Condominio negli edifici*, articles 1117-1139 of the Italian Civil Code. Two statutes have reformed the law of condominium in recent years (l. 11 dicembre 2012, n. 220 and l. 21 febbraio 2014 n. 9): while preserving the overall structure of the field, the reforms have adopted specific amendments that translate into positive law case law trends of previous decades.

<sup>60</sup> Italian law describes condominium as a special form of co-ownership, to which the set of rules dedicated to co-ownership apply as default rules for some aspects not covered by condominium’s specific provisions. See *Comunione*, articles 1110-1116, Italian Civil Code.

<sup>61</sup> See art. 1138 of the Italian Civil Code, which provides that “when the number of residents in a condominium exceed ten, bylaws must be agreed upon which contain rules concerning the use of common parts and the allocation of service charges, in accordance with rights and obligations of each resident, as well as rules concerning the building and the administrator”.

Decision-making and executive bodies in condominium regime are respectively the assembly and the administrator. The assembly makes decisions in relation to a complex range of different matters, which include the nomination and powers of the administrator, common parts of the building, and costs and expenses relating to those parts. Along with the assembly, the administrator – who is formally nominated by the assembly - is in charge of the implementation of the assembly’s decisions, management of common parts of the building, and collection of service charges. The administrator normally represents residents and acts on behalf of them. She also has the right to initiate legal proceedings on behalf of the residents against any resident or a third party, and has legal standing for claims concerning the common parts of the building. The role of administrator can be conferred either to a professional or to one of the residents. It is noted that, although the administrators and the assembly are said to be organs of the condominium, condominium has neither legal personality nor patrimonial autonomy, which the Italian law traditionally grants to associations, foundations, partnership, and companies.<sup>62</sup> This implies that the administrator acts in her capacity as authorised representative of residents, and not as an organ of the legal person, in relation to the management of common parts of the building; for the same reason, residents normally retain a right to take legal action when their interests relating to common parts are directly threatened.<sup>63</sup>

#### **2.4. Restrictions on the right to dispose of individual units: analysis of sustainability and enforceability**

We now test the sustainability and enforceability of inclusivity under the condominium law regime in relation to the research question formulated in Part I. As we observed earlier in section I.2.5, the situation concerns the case where a cohousing resident decides to leave the project and consequently sell her individual unit to a third party. Since cohousing relies on a strong sense of community, any change in the ownership would potentially constitute a threat to the sustainability of the cohousing project over time. For this reason, cohousing residents might agree to introduce restrictions on their

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<sup>62</sup> The concept of “patrimonial autonomy” refers to a limited exposure to risks realised through a separation between the estate of the legal entity and that of its members. This implies that creditors of the legal entity cannot sue members (and seize their estates) to collect debts; vice versa, the legal entity is not responsible for debts assumed by its members. For further details see Alpa, G., Zeno-Zencovich, V., *Italian Private Law*, 2007, 132.

<sup>63</sup> This has recently been clarified by a decision of the *Corte di Cassazione*, see Cass. civ., SS.UU., 8 aprile 2008, n. 9148.

ability to resell individual units. Issues of sustainability of inclusivity arising in this hypothetical situation will be tested against the statutory condominium regime and those restrictions on the right to dispose that might be agreed upon by the parties.

Ownership of individual units in a condominium is regulated under the general provisions of the Civil Code (articles 832 ss.). According to article 832 c.c., each owner has the right to dispose of her unit and the right to use and enjoy it, provided that duties and limitations established by the law are abided by (such as, e.g., rules on nuisance or limitations contained in the Italian Constitution). The right to dispose entails the ability of the owner to dispose of her property by means of sale, mortgage, rent, gift, and inheritance, as well as the ability to exclude anyone else from her property. The right to use and enjoy implies that the owner can derive from her unit all sorts of benefits, either by directly using it or by granting some rights to third parties. Thus, the owner of a unit in a condominium is rightfully entitled to freely use and dispose of her property, and restrictions that prevent the owner from disposing of her unit, or make some acts of disposition subject to the approval of other residents, are not allowed as a matter of principle.

However, residents might agree upon adding specific clauses in the contractual bylaws (*regolamento contrattuale*) that restrict an owner's right to dispose of her individual unit. As we mentioned in the previous sub-section, the bylaws regulate the rights and obligations of residents vis-à-vis both their individual units and common parts of the building. Whether residents can effectively insert restrictions in the bylaws will depend on a distinction between contractual and non-contractual bylaws. While non-contractual bylaws are those approved by a majority vote of the assembly, contractual bylaws are agreements entered into by all residents. Contractual bylaws may be either prepared by the real estate developer/constructor and accepted by each prospective resident at the time of the purchase of her unit or approved by a unanimous vote of all residents during a general meeting.<sup>64</sup> According to established case law and the prevailing opinion of legal scholars, contractual bylaws (and only them) can impose restrictions on the owner's right to dispose of her property. As to their formal requirements, since the main effect of these clauses is to restrict the right of ownership, they must be expressed in writing and in a sufficiently explicit and clear manner.<sup>65</sup> The reason why these limitations have to be clearly stated is to guarantee the feasibility of judicial assessment

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<sup>64</sup> Cass. Civ., 15 giugno 1991, n. 6768; Cass. Civ., n. 5065/86; Cass. Civ., 27 marzo 2015., n. 6299.

<sup>65</sup> Cass. Civ., 26 gennaio 2004, n. 1314.

of their validity.

Actually, courts have adopted different solutions in relation to the validity of these clauses depending on how they are drafted and on how deeply the restriction included in the bylaws affects the right of ownership. For example, Italian courts generally are in favour of the validity of a contractual clause containing a right of pre-emption that benefits the other residents. Actually, although a pre-emptive agreement makes the “free movement of the good” more difficult, the *Corte di Cassazione* has considered that this restriction does not undermine the right of the owner to dispose of her property, who will still be able to sell her unit and set all the other conditions of the sale (including the price).<sup>66</sup> Also, the pre-emptive agreement has been considered valid even if it is not limited in time.<sup>67</sup> In contrast, a clause of the bylaws forbidding alienation of a condominium’s unit will be permissible under article 1379 of the Civil Code only if it is limited in time and corresponds to an “appreciable interest of at least one of the parties”, because it would otherwise too deeply undermine the exercise of the owner’s right to dispose.

In terms of enforceability of inclusivity, each owner can claim the enforcement of the restriction included in the contractual bylaws against any other owner who had infringed upon her right of ownership. The reason for this is that, first, owners are bound immediately *ex contractu* by the bylaws, and, secondly, the clause directly affects their individual property. Recently, the *Corte di Cassazione* has clarified that the administrator as well can bring a legal action and seek compliance of the contractual bylaws by the infringing owner. Concerning third-party opposability, normally, where contractual restrictions on the right to dispose are duly recorded in the Land Registry or expressly mentioned in the deed of transfer, they are enforceable against a third-party purchaser of a unit and any successors in title who have accepted or have known them. In this sense, restrictions contained in the bylaws have been said to constitute “real burdens” (*oneri reali* or *obligationes propter rem*) that attach to the units. However, where a resident or a third-party purchaser bring an action to courts to challenge the clauses on the ground that they constitute an undue restriction on their right of ownership, court decides according to the type of restriction envisaged and how deeply it affects the right of ownership in the specific case.

For example, in the case of a provision against alienation under article 1379 of the Civil

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<sup>66</sup> Cass. Civ., sez. II, 12 aprile 1999, n. 3571.

<sup>67</sup> Cass. Civ., Sez. II, 13 maggio 1982, n. 3009; Cass. Civ., sez. II., 28 luglio 1983, n. 5213.

Code, the prohibition is enforceable only against persons who are parties to the contract, but not against a third-party purchaser. In case a provision against alienation is incorporated in the bylaws, a resident could only bring an action for damages against the other resident who infringed the provision. On the contrary, the sale completed in breach of the agreement is valid and the purchaser is protected even if she was in bad faith. Thus, an agreement against alienation is binding only between the parties who entered into it, but it does not affect the position of third-party purchasers, even though the purchase occurs in breach of covenant. Courts have upheld the same solution in case one resident sells her property to a third party in violation of a clause containing a right of pre-emption in favour of the other residents. Actually, since the obligation covered by the agreement is no longer enforceable by means of specific performance, the violation only results in the award of compensatory damages.<sup>68</sup>

### **Part III – Conclusion**

In this paper I have explored the notion of inclusivity in relation to cohousing in the French and the Italian legal system. By focusing on specific restrictions on ownership that affect a cohouser's right to dispose of her individual unit, I have tested the adequacy of selected legal structures (*copropriété* and condominium law regimes) in sustaining and enforcing inclusivity in the context of cohousing.

The analysis has first shown that inclusivity in cohousing operates in a similar way in France and in Italy. In each system, restrictions on the right to dispose are implemented through contractual agreements which work as exceptions to the titleholder's right of ownership. However, the research has also highlighted that inclusivity is sustained and enforced to different extents in the two legal systems considered. Actually, although the two legal systems might adopt different views as to the degree of contractual freedom to be accorded to co-owners within condominium regimes, it is the type of restriction envisaged and its capacity to affect the right of ownership that play a crucial role in deciding whether inclusivity is sustainable and enforceable.

In relation to the French *copropriété des immeubles*, inclusivity is hampered by mandatory provisions contained in the *copropriété* legal regime that considerably undermines the freedom of contract of residents. Even when the law allows to include some restrictions or amendments by way of agreement between the parties, courts treat

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<sup>68</sup> See, on this point, Corte d'Appello di Milano, 23 marzo 2007, sez. IV. See also Cass. Civ., 20 giugno 1986, n. 4116.



them with disfavour on the ground that they might amount to an undue restriction on the right of ownership. Relatedly, remedies possibly granted by courts to enforce inclusivity often do not ensure opposability against third parties. This means that the ability of residents to sustain and enforce their inclusive entitlements is not adequately guaranteed under the French *copropriété* regime.

In relation to the Italian condominium regime, our analysis has highlighted that residents have considerable freedom to opt for rules that may affect the right of ownership, and courts are more prone to recognise their validity. Thus, in principle, inclusivity is more sustainable under Italian condominium regime than under the French *copropriété*. However, in practical terms, courts enjoy much discretion to decide whether in each specific case the restriction envisaged by residents affects the right of ownership in a disproportionate manner. In addition to this, remedies available to residents often prove to be insufficient to ensure the enforceability of their inclusive entitlements.

In sum, although well-tailored contractual rules may prove sufficient in some cases, the design of existing legal regimes can undermine the collective arrangements agreed by the parties and thus represent a threat to the sustainability of both the cohousing project and the common resource. A better understanding of the nature of residents' legal entitlements may serve as a viable instrument for curing existing flaws and reaching a greater level of sustainability and enforceability in the context of cohousing.