

In the Absence of Law

The legal frame of an Non-Profit Association's General Assembly resolution

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Summary

The first aim of this study is to investigate what it takes for a nonprofit association (NPA) to become a legal entity, specifically regarding requirements addressing decision-making organs within the NPA's organization. Secondly, since within the legal framework of associations there exist general principles of law, this study also explores which general principles of law are applicable to a general assembly meeting and how these general principles affect the decision-making process. Thirdly, this study aims to investigate what possibilities members of NPAs have to put forward proceedings in response to a faulty resolution. Finally, this study has, in a limited form, tried to look into the question of whether the freedom of association would affect, or be affected by, the general assembly's decision-making process.

In this essay, the traditional legal method has been utilized in order to identify the fundamental legal principles that are applicable to NPAs. Since there is only one particular law for religious associations, a law that is very limited, one can state that most of the legal principles applicable to NPAs are unwritten rules.

Research has revealed that even in the absence of law there is law. The legal framework of NPAs consists of mandatory requirements for the NPA's constitution and form of organization as well as the freedom of association and general principles of law. Among the general principles of law, the general clause and the principles of equal treatment, majority rule, and conflict of interest have been identified as applicable to an NPA general meeting. The analysis shows that in order for an association to become a legal entity in the form of an NPA, it must have a hierarchical structure with a board and a general assembly. The NPA must conduct annual general meetings or similar. It seems that the NPA must be of a democratic nature. Non-democratic nonprofit associations that would like to become legal entities should organize themselves in the form of a different type of association. An NPA is not at liberty to abandon majority rule. The freedom an association has as a legal entity to decide internal matters is, in practicality, quite limited. This limitation of power is, however, not perceived as a limitation by legal authorities but as minority protection rules designed to protect members and third parties. An implication of the principle of equal treatment is a profound protection against abuse. Moreover, probably in particular because of the more democratic nature of NPAs, members have extensive rights to take action against faulty resolutions.

Sammanfattning

Det primära målet med denna studie är för det första att utreda vad som krävs för att en ideell förening skall kunna bli en juridisk enhet, då särskilt vad som gäller för den ideella föreningens beslutsorgan. För det andra utreds vilka av associationsrättens allmänna rättsgrundsatser som gäller för generalförsamlingsmöten samt hur dessa rättsgrundsatser påverkar beslutsprocessen. För det tredje utreds vilka möjligheter medlemmar i ideella föreningar har att via rättens väg överklaga felaktiga generalförsamlingsbeslut. Till slut utreds också, om än i begränsad omfattning om föreningsfriheten påverkar, eller själv påverkas av, kraven på generalförsamlingens beslutsprocess.

Med hjälp av juridisk metod har allmänna rättsgrundsatser som gäller för ideella föreningar identifierats. Dessa rättsgrundsatser är speciellt viktiga, då det endast finns en mycket begränsad lag som gäller för enbart några föreningar. Därför kan man säga att merparten av de juridiska principer som gäller för ideella föreningar består av oskriven rätt.

Forskning har visat att även när lag inte föreligger finns det lag. Det juridiska nätverk som omger ideella föreningar består av obligatoriska krav till organisationsform, stadgarnas innehåll samt allmänna rättsgrundsatser.

Bland allmänna rättsgrundsatser har utredningen visat att generalklausulerna, likhetsprincipen, majoritetsprincipen samt jäv gäller för ideella föreningars generalförsamlingsmöten. Analysen visar att en ideell förening måste ha en hierarkisk organisations struktur med styrelse och generalförsamling för att kunna bli en juridisk enhet. Ideella föreningar måste arrangera årsmöten eller liknande. Det verkar också vara klart att alla ideella föreningar måste vara demokratiska. Föreningar som inte är demokratiska måste organisera sig i en annan form av sammanslutning. Ideella föreningar kan inte överge majoritetsprincipen. Friheten en förening har som juridisk person för att avgöra interna frågor är, i praktiken, ganska begränsad. Juridiska auktoriteter uppfattar dock inte denna begränsning som en begränsning av föreningsfriheten utan kan ses som en minimumreglering designad att skydda medlemmar och tredje part mot övergrepp. Likhetsgrundsatsen ger ett omfattande skydd mot maktmissbruk. Till slut gäller det, säkerligen på grund av ideella föreningars demokratiska natur, att ideella föreningars medlemmar har vittgående möjligheter att överklaga felaktiga beslut.

*If one takes away the visibility of rules,
it might happen....
that the one who set the agenda
becomes king...*

Abbreviations

ABL	Aktiebolagslag (2005:551) - Unless otherwise specified, the Company Act of 2005:551
AD	Arbetsdomstolen – The Swedish Labour Court
AvtL	Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område – The Contract Act of 1915:218
Dir.	EU-direktiv
EEC	Europeiska ekonomiska gemenskapen – European Economic Area
FL	Lag (1987:667) om ekonomiska föreningar - Unless otherwise specified, the Co-operative Societies Act of 1987:667
FT	Rättsfall från Hovrätten/forordningsrätt – Claim cases from the Court of Appeal
HD	Högsta domstolen – The Supreme Court
KamR	Rättsfall från Kammarrätten - Cases from the Administrative Court of Appeal
LO	Landsorganisationen I Sverige
NJA	Nytt juridiskt arkiv avd. I
NPA	Ideella föreningar – Non-Profit Association
NUTEK	Tillväxtverket
Prop.	Proposition – Governmental bill
RF	Regeringsformen (1974:152) – Instrument of Government
RH	Rättsfall från hovrätterna – Cases from the Court of Appeal
RSV	Riksskatteverket
RÅ	Regeringsrättens årsbok
SKV	Skatteverket
SOU	Statens offentliga utredningar - Government Official Reports
SvJT	Svensk Juristtidning

1. Introduction

1.1 Background

In 2006, there were about 200.000 nonprofit associations (NPA) with members in Sweden.¹ These members enjoy the liberty granted them by the freedom of association put down in the Instrument of Government in Sweden (RF). Under this instrument, members of NPAs have the right to organize themselves in ways that they find reasonable, to regulate their constitutions as they find necessary, and to decide in their own internal matters. The right to organize and decide in the internal matter of the NPA's own has been empathized as an argument against when the question of a possible law for NPA has been up for discussion.² In fact, as of today, one finds that a written law exists only for religious societies and this in a very limited form. Still one find that legal literature advice that the legislation, case law and general principles of law that affect NPAs are extensive, and one is even advised very carefully to utilize the Co-operative Societies Act (FL).³ However, more than one attempt to apply FLs principles analogue on NPAs has failed.⁴

Relatively little literature addresses the legal conditions of NPAs. One finds assertions that general principles of law are applicable, but the literature is fragmented, and the principles are not explained. However, while many articles focus on specific principles (e.g., the principles of equal treatment and majority rule), not much has been said about the general clauses and conflicts of interest. In addition, the content and the implications of the principle of equal treatment, for example, seem to be unclear.⁵ Therefore, even if there were agreement in regard to which general principles of law apply, this would not mean that one would know what implications these principles would have for an NPA's decision-making process. In fact, so few studies about the legal aspects of NPAs have been published that, before starting this research, I did not even know if it was compulsory for an NPAs to have a board, to follow a written constitution, and to conduct an annual general meeting. Part of this investigation had to determine whether decision-making organs were compulsory, and if so, to identify which organs. It also turned out that while the literature included, in comparison, a wealth of expulsion cases, there was only a small amount of fragmented material that addressed the options members of NPAs have for taking action in response to faulty resolutions. Basically, then, this is an investigation of the legal conditions of NPAs in the absence of law with a focus on the legal framework of an NPA general assembly resolution.

¹ Prop. 2009/10:55, page 40

² LU 1979/80:1, page 7 and 9

³ Nerep Erik, Kartläggning för Justitiedepartementet 2007, pages 6–7; Hemström, Carl, Bolag Föreningar Stiftelser, En introduktion 2010 pages 96–97

⁴ See ex. 1958 s 438 and NJA 2008 s 255

⁵ Johansson 2011, page 156

1.2 Aim of study

The aim of this study is firstly to investigate what it takes for an NPA to become a legal entity, and this in particular in regard to requirements addressing decision making organs within the NPA's organization. Secondly; seeing that within the legal frame of associations there exist general principles of law this study also question which general principles of law are applicable on a general assembly meeting and if so how would these general principles affect the decision making process. Thirdly, this study aims to investigate which possibility's members of NPAs has to put forward proceedings toward a faulty resolution. Finally, this study has, in a limited form, tried to look into and question if the freedom of association would affect, or be affected by, a general assembly's decision-making process.

1.3 Delimitations

In this study, all NPAs that the court acknowledges as NPAs will be recognized as such; therefore, there will be little discussion of whether they are NPAs or not. While one can differentiate between democratic and non-democratic NPAs, the NPAs in this study will all be presumed to be democratic NPAs.⁶The legal framework used in the investigation is that which would apply to NPAs that are legal entities at the national level; furthermore, the legal whereabouts of economic associations or NPAs with artificial members will not be addressed.⁷ European associations will not be addressed. This thesis does not address fusions. Some NPAs also conduct public tasks, and in some circumstances, special conditions may apply to these associations. This will not be a subject of discussion in this paper. Another issue that deserves more attention than I can provide, and which therefore will not be discussed, is when a constitution has a clause stating that disputes should not be settled in court.⁸

Expulsions will be lightly touched upon but not discussed. The question of the decision-making powers of minors will not be addressed in this essay. In addition to what has been said one find that both Hemström and Nerep perceive good custom for the particular group of NPAs as a source of law, this will not be addressed in this thesis due to the insecurity involved in regard to a possible conflict with other sources of law.⁹ The thesis does not discuss situations when NPAs are affected by other laws that become activated when certain conditions are present. An example on activating conditions is requirements in regard to accounting.¹⁰

⁶ Hemström, Carl, *Ideella föreningar 1977*, pages 23–24. This since most NPAs appear to be democratic organizations. Democratic organizations might be a requirement for religious organizations (see Prop. 2009/10:55, page 148, ref. 152). The legislation emphasizes that NPAs should function as voice bearers, opinion leaders, and schools for democracy (prop. 2009/10:55, page 49). One can also ask whether a nondemocratic NPA would fulfill the requirements for receiving economic support from the government, but that is a different discussion.

⁷ Johansson, Svante, *Svensk Associationsrätt i huvuddrag 2011*, pages 37–38, and 68.

⁸ See e.g. NJA 1958 s 654 or NJA 1971 s 453.

⁹ Hemstrom 2011. pages 36 and Nerep 2007, page 20 see also chapter 1:4 in this thesis.

¹⁰ Hemström, 1977, pages 19–20, ref. SOU 2010:90, page 410.

1.4 Material and method

The methodology utilized in this thesis is traditional legal method. Legal texts, preparatory legislative material, directives, doctrine, and case law within the relevant areas of study have all been perceived as applicable sources of law and have been applied on the general assembly meeting.¹¹ This is a view that might be seen as dogmatic in that the aim is to investigate an internal perspective on what constitutes the legal frame at a given time. The strength in this method compared to a more socio-legal empirical study is that while the socio-legal empirical method would also investigate the internal praxes of the NPA and the current empirical situation, these praxes nor the current situation does not automatically ensure that the conduct of an NPA is in accordance with its legal frame. The traditional legal method here utilized can be perceived as less dogmatic than a dogmatic analysis in that the notion of traditional legal method allows the application of unwritten legal principles on a “real situation”.¹²

The only law concerning NPAs address one kind of NPAs namely religious societies and exist in very limited form; this law has been addressed in 3.3. NPAs have been addressed in governmental bills in different instances; firstly this has happened when the intention of the bill was to induce a law for NPAs. Seeing that no law has been introduced it made little sense to me to address the whereabouts of NPAs in these bills. The whereabouts of NPAs have however been addressed both in preparatory work predating the Act on Religious Communities but also FL. This essay has aimed to include these instances in its fundamental theoretical base. In practicality, the main source for legal requirements for NPAs is case law and doctrine. Case laws were selected based upon accessibility, visibility, and contribution; however, seeing that in order to answer the questions posed, what seems most important is how the legal frame is perceived today; in this light the historical development of principles becomes less interesting, while the news value of a case rates higher.

Accessibility and visibility seeing I have gone through 110 years of case law involving NPAs with the hope of having covered all. The selection of case law was based upon its level of contribution to revealing the particularity of the legal framework of NPAs as it could be applicable to an NPA general assembly meeting. When addressing legal principles this has required an investigation into the case law of other associations.

Seeing the lack of written law for NPAs there was a need to rest heavily upon authorities among legal writers when writing this essay. When doing this, I had to identify a hierarchy among the writers.

¹¹ Claes Sandgren, *Rättsvetenskap för uppsatsförfattare*, Ämne, material, metod och argumentation 2011, pages 37–38.

¹² The concept of Socio-legal empirical study is used to catch the Swedish meaning of the concept “rättsvetenskaplig metod” while dogmatic analysis reflects “rättskällelära”. Sandgren, page 38-39 ref. Kellgren, Jan & Holm, Anders, *Att skriva uppsats i rättsvetenskap* 2007, page 47

In 1972, Carl Hemström wrote his doctoral thesis on the subject of expulsion from NPAs. Hemström has since this time been active within the legal area of NPAs and is frequently quoted in case law. Hemström must therefore be perceived as the leading authority among legal writers when it comes to NPAs. Hemström has only written one book that in particular addressed the legal conditions of NPAs, and this was a thin book written in 1977. He has however written several books since this time from different perspectives where NPAs have also been addressed.

In 2007, Erik Nereps survey into the legal conditions of NPAs was published. Nerep seems, in his survey, to a certain extent to rest upon Hemström while still making his own conclusion. Nerep has also been perceived as a legal authority in this paper. Within legal literature addressing associations in general Svante Johansson, is a writer who is quoted by both the court but also by other legal writers. Johansson has also been perceived as an important legal authority.

To some extent I have also made use of Björn Lindquist as an authority within sports associations. Anders Mallmén in his commentary to FL also addresses NPAs from time to time. I have made use of these comments. Håkan Nial and Knut Rodhe have also addressed NPAs even in limited form. Both of them are authorities within the legal framework of associations. All these I have found belong to the group of main authorities.

I have also made use of legal authorities to fill in gaps or explain concepts or procedures. When it comes to gap filling or explanation of concepts I have first of all aimed to use the above legal authorities, but when specialist work has existed within the particular area, this has necessitated an investigation of this particular work. Among the particular authors consulted are Svante Johansson, who has addressed the general assembly meeting in particular, Ola Åhman addressing authorization and power, Jan Andersson, and Lars Pehrson, addressing the principle of equality and the general clauses, Carl Svenslöv, who has addressed the issue of freedom from liability. Daniel Stattin when discussing protection for minorities and the right to undertake proceedings and Nial Håkans in regard to faulty resolutions. These are all perceived as legal authorities and represent the main authors consulted in this work. By and large one can say that this essay, maps but also compares, what has been said in case law and legal literature in regard to the legal frame of NPAs that could be of relevance directly or indirectly when it comes to the general assembly meeting.

Since a detailed discussion of each legal principle or the issues involved would take up all space, I cannot claim that this thesis will be exhaustive. Instead, the aim is to discuss the fundamental principles that surround nonprofit associations' general assembly meetings. Here the main focus has been on identifying the constitutional and legal frame of NPAs. Thus, I recommend that those who would like to study in detail exclusions, freedom of association, the principle of equality, the general clauses, the majority rule, and so on should look for specialist literature within the given area.

Upon addressing the problem of investigating a legal framework consisting of unwritten law there were at least two possible ways of approach.

First seeing a tendency of the Supreme Court and legal literature to take recourse to FL for analogies it might have been easier to utilize comparative legal methodology comparing economic associations with NPAs when investigating the frame of an NPA's general assembly meeting. However resorting to this method could produce a less trustable result seeing the need of careful consideration when utilizing FL upon NPAs and in addition, the frame might be more fractionate and less complete.

Instead, the approach taken in this thesis is a presumption of preexisting deep principles and the notion that legal praxis, when translating these deep principles, takes into consideration the given legal figure and the prevailing situation. This is an approach that is more demanding than just looking for analogies, but might enable a deeper and more profound analysis of the legal area and the possibility of creating a more complete picture of reality. The minus with this approach is foremost that even if there is a certain stability in a legal area this might change and deviations might exist. A possible solution to this challenge has been to map text adopting a non-reducing perspective in order to more critically investigate the current situation, questioning simplifications while looking for coherence.¹³ When text was mapped conflict between expressions and rules more or less was explained away. Still things can and might change. This is in particular true considering the need to resort to analogies and logical reasoning which exist when addressing in particular a legal area consisting of unwritten law. Thus said it could still be possible to make comparisons as a secondary step, this would however require more space than is available in this thesis.

The structure is logical but influenced by the funnel method. The funnel method has been applied to a certain extent in the main design, giving that it starts out broadly but goes from general to more particular.¹⁴ At the same time, there is logic in the chaos of applicable rules, since, upon the establishment of the NPA as a legal entity, it is exposed to some of its first applicable legal rules, rules that will affect the design and also to a certain extent the content of its legally binding constitution.¹⁵

1.5 Outline

Because of the particularity of NGAs, chapter two, after a simple general historical introduction, address the particularity of the NPAs constitution investigating its role in the absence of law. Chapter three then goes on to address what must be in a given NPA's constitution in order for the association to become a legal entity. Chapter four investigate if the general principles of law already existing within the legal frame of associations are also applicable to NPAs. This chapter also looks into how these principles affect NPAs decision making, and this in particular when it comes to general assembly meetings. Chapter five addresses errors in conduct and proceedings at the general assembly meeting while chapters six addresses in particular the general assembly meeting, wraps up and concludes.

¹³ Dalberg-Larsen, Jørgen, Seks opfattelser af retspolitik (web), ref. Sandgren, page 14.

¹⁴ Jensen, Ulf et al.: Att skriva juridik, Regler och råd 2012, page 23.

¹⁵ Ibid, page 24.

2. Associations and their legal framework

2.1 Introduction

This chapter starts by in large addressing associations in general, then narrow down to the group of associations consisting of economic and nonprofit associations in order to lastly focus on the particularity of nonprofit associations and their constitution.

In this thesis, “the legal framework of association” is used as a general term to describe the legal area of a number of different types of companies and organizations, which all share some fundamental commonalities.¹⁶

2.2 About associations in general

Firstly, an association must be based on a voluntary agreement, often between two or more people, about pursuing a mutual aim.¹⁷ Legally, this is a kind of standard contract where the Contract Act (AvtL) (1915:218) is applicable. This agreement can be for a certain time or for an undefined period of time. For some association types, the agreement needs to be formalized in writing in order for the association to exist, while for NPAs, Hemström advise that this not always applies.¹⁸ One might question if Hemströms perception in this matter might be derived from Arsell who stated that NPAs that were not legal entities could have verbal constitutions.¹⁹

Secondly, generally, associations, whether they be companies, economic associations, or NPAs, need either natural or legal entities as members.²⁰ For some association types, the members will contribute funds and in return receive either shares or partnerships. Examples of these types of associations are limited companies, limited partnerships, trade partnerships, and economic associations.²¹

¹⁶ Johansson 2011, pages 19 and 31.

¹⁷ Ibid, pages 32–33. Exceptions exist, e.g., a limited company with one person, or the fact that under present legislation, an economic association has to consist of a minimum of three members. See also chapter 2.2.3.

¹⁸ Mallmén, Anders, Lagen om ekonomiska föreningar, En kommentar 2002, page 56 and Johansson 2011, pages 33–34; 38 and 68 and Hemström, Carl, Organisationernas rättsliga ställning, om ekonomiska och ideella föreningar 2011, page 22. Also worthy of notice is that Swedish law does not differentiate between commercial and civil law organizations; ref. Hemström, Carl, Corporations and Partnerships in Sweden, 1995.

¹⁹ Arsell, O.H., Utkast till Lag angående ideella föreningar 1919, page 67; Hemström 2011, page 23. These thoughts seem to agree with SOU 2010:90, page 57.

²⁰ Johansson 2011, pages 31–32; Hemström 2011, page 22; and Mallmén, page 35, and 56.

²¹ Johansson 2011, pages 23–32.

Thirdly, members of associations are in principle entitled to manage the association's affairs and can appoint, supervise, and empower an administrative body, most often the board, which will act as an instrument through which the association's activity will be performed. In principle, members of associations can also change the structure of the organization and even dissolve it to benefit from its resources.²²

Limited companies, limited partnerships, and trade partnerships are so-called closed associations, while both economic associations and NPAs are in general seen by legal writers as examples of open associations.²³ An open association is an organization without a fixed membership; that is, the number of members can vary, and this variation does not require acceptance from all members or a change in the bylaws/constitution or legal structure, as it does with closed associations.²⁴

In the rest of this chapter, the term "association" is, depending on the context, used to denote either an economic association or a nonprofit association.

2.3 Economic associations

In order to differentiate between economic associations and NPAs, one can start by studying the aim of the association. If the aim is to promote the members' economic interests through commercial activities, then normally that would be an economic association, in accordance with FL 1:1.²⁵ However, as one will see, this does not always apply, since economic associations can have more than one goal; for example, an economic association can aim to promote the members' economic interests but also have not-for-profit aims, thus engaging in both commercial and voluntary activities.²⁶

The legal literature classifies commercial activity as commercial, industrial, financial, or some other type of businesslike, organized activity. Here the activity is the method utilized to meet the association's goal, and it must be of a continual nature. Still, history shows that it does not require too much commercial activity in order to be able to register as an economic association.²⁷

The legislation defines an economic association as a cooperative that does not look to promote its own interests but rather to promote the members' economic interests.²⁸

Economic interest can be gained by bringing down members' expenses, increasing income, or even by preventing or limiting future cost increases, that is, decreasing living or work expenses.²⁹

²² Giertz, Magdalena, *Ideella föreningar en översikt 2012*, chapter 3, Melin, Stefan, *Associationsrätt 2010*, page 119 and Johansson 2011, page 31.

²³ Johansson 2011, pages 38–39. While it is true that, technically, the number of members in a limited company can change, what does not change is the actual number of shares. Here, the membership is a fixed number of shares and not shareholders; ref. Rodhe, Knut, *Föreningslagen, 1987 års lag om ekonomiska föreningar*, 1988, page 16, Hemström 1977, page 10

²⁴ Johansson 2011, pages 37–39; Rodhe, page 17; Hemström 2011, page 14; Malmsten, Krister och Pallin, *Christer, Idrottens föreningsrätt 2005*, page 17.

²⁵ Hemström 2011, page 13; Mallmén, pages 35–40.

²⁶ SOU 2010:90, page 381, NJA 2000 s 365.

²⁷ Mallmén, pages 39–40; see e.g. NJA 2000 s 365.

²⁸ Mallmén, pages 36–37, Prop. 1986/87:7, page 59.

The first law that regulated economic associations appeared in 1895.³⁰ At this time, if any insignificant commercial activity existed within an association, it could be incorporated as an economic association.³¹ Thus, no clear distinction between economic associations and NPAs appears to have existed.³² The 1895 law consisted of only a few sections, and even the next law (1911:55) was limited and left associations to regulate themselves through constitutions, even in such important matters as accounting and capital formation.³³

In 1951, law was introduced that separated this form of association of cooperative activity and expanded the regulations, following in many ways the pattern of the Swedish Company Act (1944:705).³⁴ With the Co-operative Societies Act (1951:308), a definition was implemented that more clearly separated economic associations from companies and NPAs. Also in 1951, a prerequisite was introduced requiring that members should participate in the organization's activity in one way or another, whether this be as consumers, producers, or workers. It was made clear that it was the members' economic interests, and not any other interests, that should be promoted through the association's activity.³⁵

The present Co-operative Societies Act (1987:667), which came into effect on January 1, 1988, enabled associations that were registered according to the 1895 or 1911 association laws to remain as economic associations, even if they did not fulfill all of the requirements and might today be considered NPAs.³⁶ Today even if an NPA fulfilled the requirements for incorporation as an economic association, the NPA would have significant freedom to decide whether or not it wanted to be an economic association seeing that economic associations that have mixed aims can still be accepted as economic associations under the condition that the association's main aim or activity is to promote the members' economic interests.³⁷ By "main," the legislators seem to mean more than half; however, this might not represent an absolute demand.³⁸

Today there are a number of so-called "social" companies that might have one or more aims that are not-for-profit. These aims could be main aims, such as integrating people who have difficulties in keeping a job, or providing care for old people. None of these would need to have a profit goal. In 2008, there were about 150 social companies in Sweden. One estimate is that about half of these exist in the form of economic associations, and the rest are registered as NPAs.³⁹

²⁹ Mallmén, page 36 and Hemström 2011, page 16.

³⁰ That is, not to this writer's knowledge.

³¹ Mallmén, page 39.

³² Johansson 2011, page 29, and Prop. 1986/87:7, page 75 See, for an example, NJA 1898 s 196, where the court found that a mission association without a constitution was similar to an economic association that had not been registered; see also RÅ 1921 s 215. Both of these indicate the wide perception of the economic activity needed to become an economic association.

³³ Prop. 1986/87:7, page 74-75.

³⁴ Johansson 2011, pages 28-29.

³⁵ SOU 2010:90, page 294 ref. Mallmén, page 41.

³⁶ Ibid. See e.g., Folketshusföreningar. See also Hemström 1972, Uteslutning ur ideell förening, pages 45-52, in regard to the similarities between cooperatives and NPAs.

³⁷ NJA 2000 s 365, page 371, ref. SOU 2010:90, page 23, 359; Mallmén, page 50.

³⁸ Mallmén, page 50; see also prop 1999/2000:88, page 13, 18 and 7.

³⁹ Ibid, pages 382-383; NUTEK, Programförslag för fler och växande sociala företag, page 21.

It is with this problem in mind that I hesitantly proceed into the discussion of NPAs, well aware that technically, some of the organizations recognized as NPAs by the Swedish Supreme Court might in fact be economic associations, and others who perceive themselves to be economic associations might be NPAs in the eyes of the court.⁴⁰

2.4 Nonprofit associations

Basically, an NPA is an association that does not fulfill the two main requirements needed to become an economic association in accordance with FL 1:1, namely either having an economic aim or engaging in commercial activity. This should imply that no NPAs are able to fulfill the requirements of an economic association. In reality, however, as economic associations, NPAs can also have more than one aim and may engage in different types of activities, some of which may be economical in nature.⁴¹ There does not appear to be a clearly defined border to tell when an aim or activity is so dominant that an NPA becomes an economic association.⁴² In addition one might question whether there is a tendency to see economic associations that have not been incorporated as NPAs, instead of unincorporated entities.⁴³

The legislation differentiates between three different types of NPAs. Firstly, there are NPAs that do not use commercial activities to accomplish their objectives. The organizations in this group are seen as “pure NPAs.” In this group, one finds religious societies, political parties, social associations, sports organizations, charitable associations, and more.⁴⁴

Secondly, there are associations that pursue their nonprofit aims through commercial activity. In this group one can find student organizations and different cultural organizations. These associations might, to a certain extent, also be seen as pure NPAs.⁴⁵

Lastly, there are organizations that promote their members’ economic interests but do not try to achieve this through commercial activity. In this group one finds labor market organizations, trade associations, employer associations, tenant associations, and more.⁴⁶

⁴⁰ For an example, see NJA 1977 s 129. Then again, one can question whether it is possible for a governmental institution to know that an economic association in fact is an economic association. See Hemström, Carl, *Festskrift till Gunnar Karnell 1999*, page 280.

⁴¹ Hemström 2011, page 22 and Hemström 1977, pages 20–21; ref. Rodhe, page 17.

⁴² See chapter 2.1.

⁴³ See NJA 2000 S 365, NJA 1998 s 717 and NJA 1998 S 293. See also NJA 1977 s 129, where a trade association claimed to the Court of Appeal that it was a nonregistered economic association, and as a consequence could not stand trial. The Court of Appeal stated that since the trade association did not fulfill the requirements of an economic association with respect to its commercial nature, it was an NPA.

⁴⁴ Prop. 2009/10:55, page 10, ref. Prop. 1997/98:116, page 18 and Prop. 2009/10:55, page 12, where it is made clear that despite the new Act on Religious Communities, religious societies are still seen as NPAs.

⁴⁵ Prop. 2009/10:55, page 10.

⁴⁶ Hemström, 2010, pages 96–97; Mallmén, page 57; Rodhe, pages 17–18; Hemström 2011, page 21. See also Malmsten and Pallin, page 17.

2.4.1 Nonprofit associations legal conditions

While economic associations were isolated and regulated through particular laws, NPAs were left “unregulated,” in that they did not get their own law.⁴⁷

In both 1910 and 1911, if one tried to find a regulation that shared some similarities with the law governing economic associations, they would not have succeeded. One of the reasons for this was that some NPAs were concerned that a particular law would make it difficult for them to work in accordance with the best interests of their organizations.⁴⁸ In 1938, the question of a particular law for NPAs came up for discussion again, but still no law was agreed upon.⁴⁹ In 1949, there was a discussion about whether NPAs could register themselves as economic associations if they so desired. The thought behind this was that the organizations might desire the possibility of using the particular legal framework of economic associations.⁵⁰ Nothing really came out of these discussions, as the option was left out of governmental bill that was presented in 1951.⁵¹ However, the discussion did not end in 1951 but has continued throughout the years.

Today, instead of there being direct, applicable law regulating NPAs, the legal frame of NPAs came to consist of case law, doctrine and analogies deducted mainly from FL.⁵²

Seeing the similarities in nature between economic associations and NPAs it might be tempting to rest heavenly upon analogies based upon FL but the supreme court in NJA 1958 s. 438 made clear that analogies with FL must be done with a certain carefulness; that is with consideration to the particular conditions and the situation in question.⁵³ It is made clear that in some conditions one should instead look for *e contrario* inferences.⁵⁴ Still seeing that an NPA’s organization, with general assembly meetings and a board, resembles that of economic associations, Johansson finds it natural that the rules governing decision-making procedures for general meetings in FL also are largely analogue applicable to NPAs.⁵⁵

⁴⁷ There is not enough space here to go deep into the history of how the legislators have tried to put forward suggestions with respect to laws for NPAs, but for those interested, see Augustsson, Oscar, *Ideella föreningar – i princip orörda av ”juridikens döda hand” – när blir de juridiska personer?*– 2008; see also Arsell, section 7–10, the oldest (in recent times at least) example of a law regulating the annual general meeting. Here one can, for example, recognize principles such as the majority principle, the equality of status principle, and conflict of interest.

⁴⁸ Hemström 1977, page 18.

⁴⁹ *Ibid*, page 19.

⁵⁰ *Ibid*.

⁵¹ Hemström 1977, pages 14 and 19; Hemström, pages 96–97; Rodhe, page 18. Rodhe emphasizes the large variation in NPAs: some are religious, some are related to sport, and so on. Rodhe also points out the lack of interest from labor organizations in having their freedom limited. While Hemström informs us that political parties, which also fall under the label of NPAs and which sometimes are connected with labor organizations, do not want regulation.

⁵² NJA 2008 s. 255 and NJA 2013 s. 233 ref. Smiciklas, *Associationsrättens grunder, bolag, föreningar och stiftelser* 2012 page 169, ref. Hemström 2011, pages 35-38, Nerep 2007, page 18-20 and Johansson 2011, page 162-163

⁵³ NJA 1958 s.438

⁵⁴ See Hemström 2011, page 37 and Nerep 2007, page 18-19

⁵⁵ Johansson 2011, page 189.

However it seems to this researcher that one should instead investigate if there are general fundamental principles which guide what should apply for NPAs, but also how and when this would apply. This line of thought could be in line with the prevailing view within doctrine giving that general principles of law applicable on other associations also are applicable on NPAs.⁵⁶ In fact, Nerep makes clear that NPAs are affected by general principles of laws, in the same way as all other legal entities.⁵⁷ Chapter four in this essay will therefore address general principles of law. In addition to what has been said one find in legal literature that the NPA's constitution supplemented by internal customs constitutes a legal frame, this is what chapter 2.4.2 will look into while chapter three investigate requirements to the constitution upon the NPA becoming a legal entity.

2.4.2 The importance of the constitution

Within the legal framework of associations there is a generally accepted understanding that an adopted constitution functions as a legal frame for association organs' actions or resolutions and that this also applies for NPAs.⁵⁸ The constitution is seen as an agreement between the members and the association, and to break it can lead to decisions being annulled and/or claims for damage being issued if the corporate veil has been broken.

In practical terms, an NPA or one of its members can file claims both in accordance with FL 7:17 analogue but also directly based upon a breach of AvtL 1:1. FL 7:17 requires membership at the time of the claim, while breaches of AvtL 1:1 do not. In expulsion cases, AvtL section 36 and the Discrimination Act (2008:567) chapter 2 section 11 can also be activated (see also 5.2 below).⁵⁹

2.4.2.1 Deviation from the constitution

Among else, the question of an NPA's right to deviate from the constitution was up for discussion in NJA 1958 s 438. This case addressed the general assembly's authority within the rules of the constitution to establish a new section that had rules deviating from the parent association and, if it had that authority, whether the members who were automatically assigned to the new section were bound by these rules.

In this case, two members, B.E. and N.E-d., filed a claim against a trade association in which they were both members. The reason for the claim was that the trade association, here Sveriges handelsträdgårdsmästareförbund, in its constitution section 24, had secured its right to establish new sections of horticulturists within the trade association and to assign members automatically upon belonging.

⁵⁶ Hemström 2011, pages 37-38, Nerep 2007, page 20-21 and Johansson 2011, page 162-163 and Smiciklas, page 169.

⁵⁷ Nerep 2007, page 20

⁵⁸ Johansson 2011, page 155 and 163 and Hemström 2011, page 48

⁵⁹ NJA 1973 s 355 and NJA 1998 s 717 and 1998 s 293; Hemström 2011, pages 110–111, 135; ref. Mallmén, pages 144, 317, and 319. Expulsions can be annulled if particular circumstances apply, even if they have been made in accordance with the constitution and thus do not represent a breach of contract in the straightforward meaning. Such particular circumstances could be discrimination according to law or when the member's need to be a member is more pressing than the NPA's need to exclude.

A new horticultural section was established with a deviating constitution in November 1952. Both B.E. and N.E-d. stated that the constitution of the new horticultural section had consequences that were serious. Among them was a rule that stated that the membership period was five years and that membership automatically renewed unless terminated one year in advance. Furthermore, disagreements were to be settled by the arbitrary court, and there were issues with quotas and import control.

In its evaluation, the Supreme Court looked into whether the members could have expected such a deviation from the constitution upon becoming members. Since there were no rules regulating exclusions in this association, this was a relevant question. The Supreme Court concluded that the members could not have expected such a deviation from the constitution upon becoming members.⁶⁰

2.4.3 The constitution and the purpose

Johansson states that neither NPAs nor other associations can undertake actions that are clearly foreign to their aims or their objectives for operations. This principle might apply to all the organs of the NPA, thus whether that is the general assembly, board, or managing director, these cannot issue resolutions, prescripts, or orders that are clearly foreign to those aims or directions, that is, unless all members of the association agree to this.⁶¹

The principle of adhering to the purpose was visible in the previous Co-operative Societies Act (1951:308), section 20, which stated that a general assembly must not use profit or other means nor take on a responsibility that is clearly foreign to the association's aim which also reflects the words of Johansson. Today one finds this principle in the present Co-operative Societies Act (1987:667) 7:17.⁶²

A possible "worst case" scenario of making a decision against the registered purpose of the association and acting upon it could be quite serious; one could get into a situation similar to "piercing the corporate veil," where the assembly becomes personally liable.⁶³

⁶⁰ NJA 1958 s 438; please see 3.1 for more details.

⁶¹ Johansson 2011, pages 145, 156 and 163, and Andersson and Pehrson, 2008, page 110 ref. 121; see also comment on NJA 2000 s 404 in 3.4. Andersson and Pehrson question whether the outcome of the case suggests that a violation of the purpose automatically implies a violation of the general clause as well. See pages 122–123, same ref. Andersson, Sten, Johansson, Svante, Skog, Rolf, Aktiebolagslagen, En kommentar, Del 1 2013, page 7:94 in regard to this. See also Prop 1986/87:7, page 142 and Skog, Rolf, 2006, pages 246–247.

⁶² Prop. 1986/87:7, page 11, ref Johansson 2011, page 163.

⁶³ Johansson 2011, page 156. See also Hemström 2011, page 56 ref. 1986/87:7, page 25. Another consequence can also be compulsory liquidation.

2.4.3.1 When actions undertaken are foreign

There exist at least a few cases involving an NPA where the question of whether the action undertaken was foreign.

In NJA 1987 s 394, the question of whether a general assembly resolution was against the NPA's purpose, as written out in the constitution, was up for discussion. The case was a dispute between Henrik A., three more members and a Swedish electrician labor market organization in regard to the assembly's right to sign the members up for obligatory home insurance, at a total cost of about 3–4 million, or 160 SEK per member, per year. Here, the Supreme Court referred to legal literature implying that in order for a general assembly resolution to be seen as against the NPA's purpose, the decision taken by the general assembly must be clearly foreign (FL section 50, 1951 act. analogue) to the NPA's stated aim.⁶⁴

When evaluating whether the decision taken was clearly foreign, the Supreme Court looked into how the NPA understood its purpose and how it had been understood historically by the general assembly, both in connection with the session in question and before it. In this case, it had been part of the NPA's previous praxis to sign members up for obligatory insurance deals with the intention of saving monies; therefore, this praxis could be seen as a development of a collective understanding of the given constitution in question, and with that, perhaps an approval and mutual understanding.⁶⁵ Thus, the NPA's activity had developed over time, expanding from traditional labor market organization activity to aiming at improving members' economic status, and the decision of obligatory home insurance became an attempt to indirectly increase economic status, since it was likely to be cheaper to sign up all of the members rather than making the home insurance a matter of choice. Home insurance could then be seen as promoting work performance indirectly. Also, the insurance fee was very low per member. While the Supreme Court doubted that the decision made by the general assembly was in agreement with the NPA's aim, the court felt that it could not be said that it was clearly foreign to the NPA's aim.

It should also be pointed out that the labor market organization's board made a decision in August 1986 (that is, before a decision was made in this case by the Supreme Court) that gave all members the right to choose whether or not they wanted the home insurance under dispute.⁶⁶

The question of actions clearly foreign has been discussed in other cases involving other types of associations. In one of the cases, NJA 2000 s 404, which will be more thoroughly discussed in chapters 4.3 and 4.5, it was made clear that removing the company's assets and making it unable to pursue future profitable commercial activities was clearly foreign to its purpose.

⁶⁴ NJA 1987 s 394, ref. Johansson 2011, page 156.

⁶⁵ NJA 1987 s 394, ref. Johansson 2011, page 62, ref. Mallmén, pages 86–87 and Hemström 2011, pages 13, 22.

⁶⁶ NJA 1987 s 394.

The decision in NJA 2000 s 404 in part reflected NJA 1967 s 313, where a general assembly made the decision to dissolve the company without the consent of the minority.⁶⁷

2.4.4 Summary - constitution, part of a legal frame

The constitution of an NPA participates in forming a legal frame around the NPA's general assembly meeting. Giving that the mandatory requirements for the constitution addressed in chapter 3 together with other rules and regulations applicable forms a border for the NPAs decision makers. The general assembly cannot cross this border without breaking a legal rule.

This principle became visible in NJA 1958 s 438 in that the trade association could not automatically assign members to a new section with stricter terms and more far-reaching conditions than what the members could have expected upon entering the trade association in the first place. The general assembly was neither free to establish a new section with deviating constitution nor automatic assign members to the same. In this case, it was clear that the general assembly had to stay within the line of its own constitution.

However in NJA 1987 s 394 one finds that the understanding of the aim can develop. To a certain extent, the aim can even change over time, but it does not seem plausible that this can happen to the extent of closing down operations without the consent of all members, in accordance with NJA 2000 s 404. Thus, if an NPA has more than one aim, it should accordingly imply that closing down either one of its objectives for operations and, or, the pursuing of one or more aims should require the consent of all members.

Otherwise, it seems that what is clearly foreign to an NPA's purpose should be evaluated from case to case and that with considerations to use of capital to pursue a clearly foreign goal, and still a possible quiet consent from members following a general assembly that has acted upon the change of aim might heal certain deviations from an NPA's aim by members' quiet consent.

NJA 1958 s 438 made clear that members of NPAs enjoy some minority protection, in that the decision to deviate from the constitution was made by a majority of the general assembly. In its evaluation, the Supreme Court pointed on to the necessity for member conditions to not deviate from what could be expected by members upon them joining the association.

⁶⁷ NJA 1967 s 313 and NJA 2000 s 404.

2.5 The freedom of association and NJA 1958 s 438

The right to join an association is protected by RF 2:1, p. 5, which states that all Swedish citizens have a fundamental right to establish or join an association and work within the frame (constitution) of the association.⁶⁸ This right is also given to foreigners visiting the country, in RF 2:22, p10, 1st.⁶⁹

Nerep questioned if the right to form a legal entity follows directly the freedom of association but concluded that the freedom of association can be perceived as a right to unite in “legal entity” figures provided by the legal system giving that the government should provide legal entities which enable the possibility to exercise the freedom of association. He states that limitations in form of mandatory requirements to the constitution of an NPA in regard to becoming a legal entity cannot be said to limit the freedom of association.⁷⁰ This is in line with the lawgiver who perceives the legal requisites put down in laws for economic associations and companies as a legal frame for those who would like to utilize a particular legal construction and thus limit members’ liability for dept.⁷¹ The freedom members of an association have to establish associations and organize themselves will however have to be limited by necessary demands for protection of members, third persons and the society. This freedom can only be limited in order to protect society from military groups and movements that persecute ethnic groups and so on.⁷²

In RF, chapter 2, section 2, one finds that a person is not to be forced by the government, municipalities or employees of the same to join an association. A more clear right not to join, even when the force involved is not from the public sector, is contained in United Nations’s (UN) declaration of human rights. Here, one finds in article 20:2 that nobody can be forced into joining an association, which also means, according to the Supreme Court, that the right to leave an association must also be guaranteed.⁷³ This article is emphasized in the European convention of November 4, 1950, in regard to protection for human rights, article 11:1, where an unspecified right to join an association is guaranteed. Here one can assume that since the section is based on the UN declaration of human rights, it must follow that the meaning stays the same. This is made clearer when one considers that in the Yearbook of the European Convention on Human Rights, the freedom to join an association also implies that one has the right to choose not to join an association or group, and with that, also has the freedom not to join a labor market organization.⁷⁴ The principle of freedom to join or not to join also seems to apply in situations activated in the transformation of organizations by constitutional change.⁷⁵

⁶⁸ Prop. 1975/76:209 s 144; see also FT 3305-12 where the Court of Appeal states that this is a general rule applicable to NPAs.

⁶⁹ See Nerep 2007, pages 13–14 for a discussion on the limitations of the freedom of associations in Sweden.

⁷⁰ Nerep 2007, page 14

⁷¹ Prop. 1975/76:209, page 112-113

⁷² Nerep 2007, page 15-16

⁷³ NJA 1958 s 438.

⁷⁴ See NJA 1982 s 853, ref. Yearbook of the European Convention on Human Rights 13, page 708

⁷⁵ SOU 2010:90, page 410.

NJA 1958 s 438, addresses both a member's right to leave and member's right not to join an association. In September 1953, the general assembly updated the main organization's constitution section 24, which, among other things, thereafter stated that those members who imported or grew bulbs must be members of the new horticultural section. The decision was thereafter published in the membership magazine, where it was also made clear that those members who belonged to, but would not like to be members of, the new horticultural section could withdraw their membership.

B.E. and N.E-d. withdrew their memberships in May 1954 and March 1955, respectively. Both B.E. and N.E-d. denied that they were members of the new section.

In this particular case, there were no rules in the main organization's constitution that gave the members the right to leave the trade organization, while the constitution of the new horticultural section said that they were members for a minimum of five years.

In this situation, the general assembly applied FL (here section 68 in the 1951 act), which gave members who did not support a change of constitution the right to leave an association. Therefore, one question was whether an NPA in this situation could use FL's rules, which limited a member's right to leave, in that the members who did not consent had to notify the association within one month after the decision was made and then leave the association altogether.

NJA 1958 s 438 is famous for one single sentence: "One must be very careful when applying the fundamentals put down in the Co-operative Societies Act to NPAs."⁷⁶ One can question whether the negative freedom of association had an impact on why the Supreme Court emphasized the need for caution in this case. This is visible in a sentence uttered by the Supreme Court in the judgment, where they stated that "The actual membership should be based upon an individual's will to join."⁷⁷

The problem of negative freedom of association is also discussed in NJA 1982 s 853. In 1979, Christian J and Co. terminated in writing their membership in the Swedish municipal workers association, but the labor market organization did not allow them to leave. The labor market organization found their right to stop a member from leaving in section 10 mom 2 of their constitution, which at the time stated that a member could submit a written application to their labor market organization section's board, who would present the termination request with a recommendation to the unions board. The board of the labor market organization would thereafter either grant or deny the member their right to leave. If the member in question did not agree with the labor market organization board's decision, they could appeal to the labor market organization meeting within 30 days, in accordance with section 10, mom 5.⁷⁸

⁷⁶ NJA 1958 s 438.

⁷⁷ See also Sigurdur A. Sigurjonsson v. Iceland, judgement of 30th June 1993, series A, No. 264 and Nerep 2007, page 17.

⁷⁸ According to Lena Andersson of Kommunal, Stockholm, this was Kommunal's "old" union meeting, which consisted of elected representatives and union employees. The "old" union meeting was empowered to make decisions in regard to daily activities in between general assembly meetings, where more serious questions, like changes to the constitution, were addressed. At this time, Kommunal's general assembly met every fifth year, while the "old" union meeting had the power to address issues that could not wait. Today, the union meeting consists of the same delegates, who are elected for the general assembly, but its tasks are in principle the same. Phone conversation, December 18, 2013.

If, however, the member in question did not agree with the labor market organization meeting's decision, they could settle the matter in an arbitrary court whose majority of judges, in the case of disagreement, was to be selected by the labor market organization.⁷⁹

Also, in this case it seems that the main question addressed by the Supreme Court was deeply connected with negative freedom of association. The Supreme Court made a reference to the LO, which made it clear that "The principle perception within Swedish unions was that there existed no right for a member to leave a labor market organization." The Supreme Court questioned whether the clause put down in the constitution, referring a member to present their case in an arbitrary court in order to leave the labor market organization, was in reality a right to leave or not. The Supreme court found in this case, with support from AvtL section 36, that the rule in the constitution stating that disputes should be settled by an arbitrary court and not a court of general jurisdiction was unfair.⁸⁰

2.5.1 The freedom of association and the constitution

The freedom of association provides individuals with a right to join and establish the association of their liking. This freedom does not however seem to provide individuals with a right to establish a legal entity while ignoring the mandatory rules for legal entities. The freedom of association is limited by the need to protect society and do not seem to provide NPAs with the right to organize themselves without adhering to rules aimed at protecting members and third parties.

The freedom of association can be understood as requiring that all associations keep their doors open. Therefore, an association technically should not be able to deny a person membership unless this has been specified in the constitution. Thus while there might be customs in their niches that indicate "normal" conditions for entrance, NPAs should regulate this in their constitutions. Secondly, an NPA cannot deny members the right to leave an association; nor can it set down rules which, in practice, would hinder their leaving. A constitutional clause that blocks a member's right to leave or another clause that establishes hindrances in the form of abnormally high fees, as was the consequence of NJA 1987 s 438 or of procedures as in NJA 1982 s 438 and NJA 1987 s 438, can be rendered void in accordance with AvtL section 36.

⁷⁹ NJA 1982 s 853; see also NJA 1958 s 654 and 1946 s 83.

⁸⁰ NJA 1982 s 853.

3. What does it take for an NPA to become a legal entity?

3.1 Introduction

Upon its becoming a legal entity, an NPA's constitution has to fulfill some requirements which, according to Smiciklas, share some of the economic association's characteristics.⁸¹ Some of these requirements seem to affect the possibility an NPA has to organize itself and influence the decision-making process while others might affect the actual decision. This chapter aims to investigate mandatory requirements from a holistic perspective.

Mandatory requirements are partly or fully visible in at least three possible encounters through which an NPA's status as a legal entity is evaluated: firstly, when an NPA chooses to register at Skatteverket in order to acquire a corporate identity number. Secondly, upon acceptance as a claimant or respondent in a court case, and thirdly, if the NPA is a religious society and it would like to register under the Act on Religious Communities (1998:1593).⁸²

3.2 Legal entity a requirement for getting a corporate ID number

Since 1975, it has been possible for an NPA to apply for and receive a corporate identity number from Skatteverket in accordance the Identity Designation (Legal Persons) Act (1974:174) section 1:4 (religious societies) or section 2 (other nonprofit associations) respective section 5. Since an NPA must be a legal entity in order to receive a corporate identification number, Skatteverket lists on its homepage some mandatory requirements that must be fulfilled. Firstly, the NPA must have been established by at least three persons; secondly, it must have adopted a constitution of certain completeness which must include the association's name and aim and must define how decisions are made within the constitution; and thirdly, the NPA must have selected a board.⁸³

Since 2004, NPAs have been able to avail themselves of court expertise in order to appeal Skatteverket's refusal to issue corporate identity numbers and thus, in court, to have the question of their own status as a legal entity tried.

⁸¹ Smiciklas, page 170.

⁸² Being a legal entity seems also to be one of the requirements in order for an NPA to participate in an environmental dispute in accordance with the Swedish Environmental Code (1998:808), 16:13. An NPA must also be a legal entity in order to register at the Swedish Companies Registration offices trade register.

⁸³ Skatteverket, SKV 371, no. 11, 2012, chapter 6:2 (web).

This occurs first at the Administrative Court and then possibly also in the Administrative Court of Appeal and perhaps also, lastly, in the Supreme Administrative Court.⁸⁴

There appear to be no cases yet in the Supreme Administrative Court and only a few cases from the Administrative Court of Appeal. I would therefore like to address one by one the requirements discussed by the courts in regard to the evaluation of an NPA as a legal entity. The approach of the Administrative Court of Appeal is interesting, because in practice, it is the highest authority in the majority of cases, since only a small percentage of cases reach this court.⁸⁵

A case reaches the Administrative Court of Appeal when the decision of the court is needed in order to establish a precedent, that is, to provide guidance on how similar cases should be assessed in the future.⁸⁶

3.2.1 Constitution of certain completeness: Detailed and specified aim

In KamR 4128-07, the Administrative Court verified that an NPA becomes a legal entity as soon as it is established, and in order for an NPA to have been established, among other things,⁸⁷ it must have adopted a constitution of certain completeness.

In this case, the Svensk-Finska Kulturföreningen was denied a corporate identification number, since Skatteverket did not perceive them to have a precise and detailed aim.

The Aim of Svensk-Finska Kulturföreningen was to promote Swedish-Finnish culture. The Administrative Court, supported by the Administrative Court of Appeal, had emphasized that one of the most important functions of the constitution should be to provide detailed and specified information about the NPA's aim. A detailed and specified aim is needed in order to enable the board, members, and third parties to relate to the NPA. The court made clear that a detailed and specified aim is a requirement for a constitution of certain completeness. The Administrative Court emphasized the importance of the constitution both for the practical work within the association but also in that the constitution's definition of its purpose defines the NPA's character and motivates its existence and activity.⁸⁸

The question of detailed and specified aim came up for discussion again in KamR 1905:09, in a dispute between the Swedish Skatteverket and a Christian organization by the name of Mon Ami, which wanted to register at the taxation office in order to acquire an organization number.

⁸⁴ See the Law (2003:548) of amendments to the Identity Designation (Legal Persons) Act (1974:174), ref prop. 2002/03:99, page 275.

⁸⁵ Domstol.se/Supreme Administrative Court.

⁸⁶ Domstol.se/kammarrätten i Stockholm.

⁸⁷ See below.

⁸⁸ KamR 4128-07.

Skatteverket did not recognize Mon Ami as an NPA but questioned whether Mon Ami fulfilled the mandatory requirements for an NPA to be established, since Mon Ami did not have a specified aim.⁸⁹ Skatteverket was turned down in the Administrative Court, but the Administrative Court of Appeal made it clear that in order for an NPA to be established, it must have a clear enough aim. The aim of Mon Ami, which was to spread the Christian message and knowledge of God's creation to our health in accordance with Genesis 1:29, was not perceived to be a specific and detailed aim.⁹⁰

3.2.2 Constitution of certain completeness: The structure of decision making

In KamR 3690-12, Direktdemokratisk samling's (DS) application for a corporate identification number was turned down by Skatteverket, who did not perceive DS to be an NPA, since they did not have a hierarchical organization.

In DS appeal to the Administrative Court, they claimed that even if they did not have a board, they had a named mail recipient, enabling a third party to bring action forward against DS. In this case, the claimant, DS, felt that the question of main importance must be that there exist visible regulations in regard to how decisions are made, and that when DS chose not to have a permanent leadership but instead published on their webpage which persons would represent DS with respect to which particular questions, this should be enough.

The Administrative Court concluded that DS had adopted a constitution which, in addition to revealing their name and aim, made clear how decisions were made. That is, DS had an online meeting place named Kanalen, members of DS could meet online every Wednesday at 7:00 p.m., a keeper of the minutes was selected for each online meeting, resolutions were made through majority decisions, and lastly, every member had one vote each.⁹¹ The Administrative Court of Appeal also seem to include time and place of the general assembly meeting in the decision-making process. However, the Administrative Court of Appeal did not address this issue further in this case but focused on DS decision making structure.

3.2.2.1 Hierarchical organization, board, general assembly and the annual general meeting

In 2012 the question of a board was addressed quite fully by the Administrative Court of Appeal.⁹² In the case addressed above, DS claimed that the demand for an NPA to have a board in order to be a legal entity was supported neither by case law nor clear doctrine.⁹³

⁸⁹ KamR 1905-09.

⁹⁰ In KamR 1905-09 It is worth noting that in the taxation office's claim, they stated that the religious society should show that it had practically pursued its aim, that the decisions made by the general assembly were in accordance with the aim, and that there were members who worked to pursue the aim. Ref. KamR 4128-07.

⁹¹ KamR 3690-12.

⁹² Ibid

⁹³ One might get the feeling that the claim put forward by DS closely resembles that of Augustsson, Oskar Z comments; see page 29 in his work, ref. note 51.

According to the Administrative Court, doctrine states that in order for an NPA to be a legal entity, it must have selected a board. However, according to case law, this is not an absolute necessity.⁹⁴ The Administrative Court then went on to evaluate the particular nature of a board, finding that since a board can consist of only one person, there should be no problem in substituting the board with a deputy, as long as the function of the deputy will be the same as the function of the board.⁹⁵ When evaluating whether the deputy in question has the same function of a board, the characteristic of crucial importance is that there is someone who can always represent the NPA in relation to the court, government, and other third parties. Thus the Administrative Court concluded that a nonprofit association can be a legal entity, even without a board, as long as someone is responsible on behalf of the association for a contractual relationship. Thus, the court supported DS claim.⁹⁶

Skatteverket appealed to the Administrative Court of Appeal, emphasizing that a formal board was not the same as the flexible organization of DS's distribution of responsibility among different actors through the Internet. A board has a holistic responsibility covering a larger area, but with DS, a third party would not know what was included in a given responsibility, in particular since DS did not have someone who in all situations could take responsibility for all issues affecting the association. DS made clear that for each question that arose, they would appoint a member who was responsible. The responsible member would themselves have to make sure that their dealings were within the authorization given, which was also published on DS's homepage.

The Administrative Court of Appeal stated that through custom and court decisions, a general established practice has emerged.⁹⁷ Based upon this, the court concluded that in order for an NPA to have been established, the NPA must have selected a board or a similar management body but also that NPAs' different management bodies must be in a hierarchic relationship to each other. That is, the board is responsible to the general assembly, being the highest ranking governing body of the NPA at the annual general meeting.

In this case, the Administrative Court of Appeal found that DS had no annual general meeting. DS had no board and that its constitution, furthermore, did not allow the appointment of a board. The Administrative Court of Appeal stated that the constitution of DS gave the members right to on a weekly meeting dissolve the organization. Thus, DS had no reasonable solid organization. The lack of a board, annual general meeting and the unclear and incomplete representations toward third parties, as well as potential questions in regard to taxes and fees in case of dealings in conflict with the taxation rules, meant that DS did not fulfill the basic requirements for becoming a legal entity.⁹⁸

⁹⁴ KamR 3690-12

⁹⁵ Ibid

⁹⁶ Ibid

⁹⁷ Ibid

⁹⁸ KamR 3960-12. The Administrative Court of Appeal in its reasoning rests heavily on doctrine and Supreme Courts praxis e.g NJA 1987 s 394 and NJA 1973 s 341.

The question of a board was slightly addressed in KamR, 4128-07, where the Administrative Court made clear that an NPA must have selected a board that can represent the association toward third parties, and in KamR 1905:09, where the Administrative Court of Appeal mentioned the appointment of a board among the mandatory requirements in order for an NPA to have been established.⁹⁹

3.2.3 A constitution of certain completeness

According to the Administrative Court in KamR 4128-07, NPAs' constitutions should include rules for functions that are normal for NPAs to have in common, namely, controlling functions (accounting), determining functions (general assembly meetings), and executive functions (the board). This case also found that rules regulating membership and termination of the same are important to an NPA's constitution.¹⁰⁰ This principle—the need of regulating functions together with the notion of a constitution of certain completeness—is also found at the Skatteverkets.se homepage. In addition to name and purpose, a constitution of certain completeness should include information about the NPA's situation (where the board is situated), rules regarding membership and termination of membership, information regarding membership fees or rules regulating this, information regarding the accounting year, information and rules regarding the governing body, that is, general assembly meetings or extraordinary general assembly meetings, rules regulating notification of a general assembly meeting and rules governing the right for members to vote, information regarding how the board is selected, the board's responsibility and number of board members and substitutes to the same, information regarding the selection of accountants and changes in the constitution, and lastly, rules regulating the dissolution of the NPA, with information regarding the allocation of assets upon dissolution.¹⁰¹ It is important to note that Skatteverket's definition of what is included in a constitution of certain completeness does not define whether one is a legal entity or not but is more to be seen as a recommendation from a governmental agency that is not an entity that establishes law in this matter.

However, while it appears to be true that a corporate identification number indicate that one is dealing with a legal entity, according to Lindquist, this might not always be the case.¹⁰² For example, within sports organizations, it has happened that sections of a larger sports organization have received corporate identification numbers without being NPAs in their own right.¹⁰³

⁹⁹ KamR 4128-07 and KamR 1905:09.

¹⁰⁰ KamR 4128-07.

¹⁰¹ Skatteverket, SKV 371, chapter 6:3, web.

¹⁰² Lindquist, Björn, Om gränsdragning inom idrottsföreningar, SvJT 1997, pages 839–840; see also Pallin, Christer, Den ideella förening och andra verksamhetsformer, Faktahäfte nr. 1. RF, Juridik 1994, page 23. See also KamR 2754-02, where the Administrative Court of Appeal did not perceive a group of cooperating NPAs which did not have a constitution as one legal entity, even if this group had received a corporate identification number.

¹⁰³ Ibid

Thus said, while it might not be enough for an NPA to be recognized as a corporate entity by Skatteverket in order to become a legal entity, it seems less likely that an NPA being denied this recognition can be perceived to be a legal entity. The lack of recognition by the Administrative Court of Appeal should therefore be a strong indicator in regard to whether the NPA in question can be a legal entity. The mandatory requirements put forward from the court could then be perceived as minimum requirements.

3.3 Legal entity a requirement in court

According to the legal literature, in order for an NPA to become a legal entity, it has to consist of members or legal entities who have made an agreement for a certain period or until further notice, and who pursue a mutual aim within and through the association, have formalized their agreement in a similar form to the articles of incorporation, and have adopted a constitution of certain completeness.¹⁰⁴

In such constitutions, one finds the NPA's name, aim, and headquarters address, a description of how decisions are made, and hierarchical authority structure that has been established between the different organs so that the organs on the lower levels are required to follow the instructions given by the organs situated higher up in the decision-making process.¹⁰⁵ For guidance on some of the fundamental principles of hierarchical authority structure, Johansson, in his book addressing the shareholders' general assembly meeting, advises that the board being subordinated to the general assembly.¹⁰⁶ This also seems to apply for NPAs.¹⁰⁷ In principle, the general assembly is omnipotent in its authority to decide; however, it is also the case that a general assembly cannot intervene in the board's authority to such an extent that the board cannot function as responsible for the managing administration of the company.¹⁰⁸ The general assembly may delegate the power of authority to decide to the board, but it does not authorize the board to take decisions that belong to the general assembly's exclusive competence unless something else has been stated in law.¹⁰⁹ As an implication of a hierarchical authority structure, it becomes visible who represents the association. The constitution is an NPA's sign of identification and should clearly identify the NPA.¹¹⁰

The members must have selected a responsible board or equivalent governing body to represent the NPA and to be responsible to the general assembly, and they must have adopted rules governing the board and the general meeting.¹¹¹

Regulations in regard to accounting (such as the accounting year and so on), how the constitution is to be amended, and so on, should also be included in the constitution.¹¹²

¹⁰⁴ Mallmén, page 56; Rodhe, page 18; Hemström 2011, page 22; Hemström, Carl, Om vertikala organisationsstrukturer I Festskrift till Henrik Hessler 1985, page 259; Hemström 1972, page 5, ref. NJA 1973 s 341 and NJA 1987 s. 394.

¹⁰⁵ Johansson 2011, page 38 and 68; Mallmén, page 56; Hemström 1985, page 256; Hemström 2011, pages 22–23; ref. NJA 1973 s 341, NJA 1987 s. 394 and Lindquist, page 836.

¹⁰⁶ Johansson, Svante, Bolagstämma 1990, page 81, 149 and 152.

¹⁰⁷ Hemström 2011, page 23, 48 and 54.

¹⁰⁸ Johansson, Svante, Bolagstämma 1990, page 81, 149 and 152 and Hemström 2011, page 23, 48 and 54.

¹⁰⁹ Johansson 1990, page 152; Hemström 2011, page 54.

¹¹⁰ Lindquist, page 836; Hemström 1985, page 270.

¹¹¹ Hemström 2011, page 23; Nerep 2007, page 25-27.

The necessity of a board has been questioned by Nerep, who perceives that the question of a board should be settled with consideration to the given NPA's scope of activity, while Johansson, Lindquist, Hemström, Mallmén, and Melin all perceive a board to be a necessity.¹¹³ Hemström emphasizes the need of a board to represent the association toward third parties but also indicates that such a board can consist of only one member, if agreed in the constitution.¹¹⁴

It is important to note that the board or substitution for a board must function as a board in an NPA; that is, it must perform identical tasks and have the same responsibility, since it appears to be the tasks performed that determine who and what constitutes a board in an NPA.¹¹⁵ The need of a board is due to the NPA becoming a legal entity.¹¹⁶ The board must promote the interests of the association.¹¹⁷

Another requirement, put forward in the legal literature (addressed in 2.5), while not yet supported by case law, is the need for an NPA to be an open association that is, accepting of new members, unless something else has been agreed to in the NPA's constitution. According to Lindquist, this also implies that an NPA cannot consist only of the persons who established it.¹¹⁸

Hemström also states that from time to time, there has been a discussion in legal literature regarding the question of the necessity for an NPA to have its own capital in order to be a legal entity. However, the question may perhaps be if its economy is separated from its members. How, if, and to what extent this applies appears not to be certain.¹¹⁹

The question of requirements that should be fulfilled in order for NPAs to become legal entities has been addressed by the Supreme Court a number of times through the years.

3.3.1 Hierarchical organization, constitution and board

In NJA 1913 s 393, a case involving a national masonic lodge with a hierarchical organization consisting of a national lodge, district lodges, and local lodges, the court emphasized the need of a constitution of a given nature and completeness in order for an NPA to be perceived as a legal entity.

A question in this case was whether a local lodge that did not have its own constitution (while the national and the district lodge had their own constitution) but seemed to have a board could be a legal entity.¹²⁰

¹¹² Johansson 2011, pages 38, 68 and 75; Mallmén, page 56; ref. NJA 1973 s 341 and NJA 1987 s. 394.

¹¹³ Johansson 2011, pages 68; Lindquist, pages 836–7; Mallmén, page 56; Melin, 2010, page 119; ref. Hemström 2011, page 23; Hemström 1985, page 259 and Nerep 2007, page 12.

¹¹⁴ Hemström 2011, page 23; Hemström 1985, page 259

¹¹⁵ Hemström 1985, page 259; Hemström 1977, pages 40–41 and 1972, page 5 and 2011, pages 63–64, 69.

¹¹⁶ Hemström, Carl, Giertz, Magdalena, Bolag-Föreningar-Stiftelser 2014, page 115

¹¹⁷ Lindquist, pages 836–837.

¹¹⁸ Hemström 1985, page 270; see also Lindquist, pages 835–836. It is here worth noticing that a limitation in a given constitution of the right of potential members to join an association might have implications for taxation in accordance with the Swedish Income Tax Act 7:13, ref. prop 1976/77:135 page 78 and RÅ 2007 ref. 54; RÅ 1989 ref. 60; RÅ 1979 not. 160.

¹¹⁹ Hemström 1985, page 259 and 274.

¹²⁰ NJA 1913 s 393.

In NJA 1935 s 106, the association claimed, and was perceived as such by the court, that it had the status of an NPA and was a legal entity, since, in accordance with established legal understanding, it had adopted a constitution and installed a board.¹²¹

In AD 1972:1, the Swedish Labor Court dealt with the question of whether an NPA was a legal entity in a dispute over whether a section of a labor market organization could be part of a collective agreement or not.

In this case, the Labor Court found that the local section was a legal entity and could stand court trial and could also be seen as being party to a collective agreement, despite the fact that the local section did not have its own constitution but could be seen as a branch of the national labor market organization's departments (which, in themselves, were regulated through add-ons in the national labor market organization's constitution). However, the members of the local section were entitled to select their own board. But this board was dissolved at the time of the dispute.¹²²

In 1973 s 341, a trade association stated that it could not participate in a court trial, since it was not yet fully established, seeing that even if the association in question had selected a chairman and a board, it had not yet adopted a constitution. In this case, three different NPAs were merged into a new NPA, Mellersta Norrlands Köpmannaförbund (MNK). Two of the NPAs were dissolved. The court secretary said that even if MNK had not yet adopted its own constitution, it functioned in accordance with the constitutions that the new trade association replaced. MNK organized annual general assembly meetings, had a board, rented premises in its own name, and had both employees and its own bank account. Also in accordance with certain older legal praxis, an NPA with a fairly firm organization became a legal entity. In order to have a fairly firm organization, an NPA must have adopted a constitution that reveals how decisions are made within the NPA and must have selected a board. Even if MNK, in this case, had not formally adopted a constitution, in praxis it was following a constitution. Even if MNK was not recognized as a legal entity in this case, the Supreme Court emphasized the need for a person who is in conflict with the association in its activities to have the possibility of having his or her dispute tried by the court.¹²³

In NJA 1987 s 394, the Supreme Court referenced established legal praxis that an NPA also must have adopted a constitution of certain completeness in order to become a legal entity. In a constitution of certain completeness, one finds the NPA's name and purpose as well as information regarding how decisions about the NPA's affairs are made.¹²⁴

¹²¹ Worth noticing is that the court refers to the Supreme Administrative Court decisions in RÅ 1920 s 215 and RÅ 1929 s 40.

¹²² AD 1972:1.

¹²³ NJA 1973 s 341 ref. NJA 2013 s 223 below

¹²⁴ NJA 1987 s 394

In NJA 2013 s 223, an NPA, temporarily without a board or an equivalent governing body, had leased an area for allotment gardening from the Swedish traffic board. The Swedish traffic board wanted to end the lease and made a public announcement in order to notify the NPA. The questions in the dispute were whether the NPA was a legal entity and whether it had been properly notified. What is interesting in this case is the thoughts of the Supreme Court, since while it is true that an NPA must have a selected representative in the form of a board or something similar in order to become a legal entity, it is also true that a third party, here the Swedish traffic board, can file a complaint against an NPA that does not have a board and is accordingly not a legal entity. The Supreme Court decided that an NPA without a board or a similar representative body can be a respondent in a court case, but it cannot appeal the judgment, unless a board is selected shortly thereafter. The notion here introduced by The Supreme Court is that of a *non-complete legal entity*.¹²⁵

3.4 Religious societies

Today, the Act on Religious Communities regulates the registration, rights, and obligations of religious communities. Here one finds that in order to be registered, according to section 7, the community must have a constitution and a governing board or equivalent body.¹²⁶ The religious society furthermore needs to have a stable organization in accordance with requirements put forward in NPA case law, and in this one finds a constitution of certain completeness, a constitution that specifies the religious community's purpose and how decisions concerning its affairs are made.¹²⁷ In section 9, one finds that when a religious community has been registered, it may acquire rights and assume obligations and be party to legal actions before courts or other authorities. Today one finds that guidance on liability issues for elected officers in registered faith communities may be derived from what is seen as custom and precedent for NPAs.¹²⁸ Which is in line with the legislator which indicated that religious communities should not have a special legal position in other respects than the basic requirements for registration as a religious community, including its dissolution and so on and that the internal relationship with members will still be categorized under the legal framework of associations.¹²⁹

For NPAs registering under the Act on Religious Communities, one can question whether an NPA finally becomes a legal entity seeing that or if it is necessary to be a legal entity in order to register. It is a necessity to be a legal entity in order to register; it also seems that is necessary to remain a legal entity in order to continue being registered, since the law regulates legal entities.¹³⁰

¹²⁵ NJA 2013 s 223.

¹²⁶ Prop. 1997/98:116, pages 24–25.

¹²⁷ Ibid, page 25.

¹²⁸ Församlingsjuridik 2012, page 48; Liability then sorts under the legal framework of associations.

¹²⁹ I Prop. 1997/98:116, page 18 and 120, Prop. 2009/10:55, page 12 see also Skog, Rolf, Rodhe, Knut, Rodhes Aktiebolagsrätt 2011, page 20.

¹³⁰ Prop. 1997/98:116, pages 32–33.

3.5 Summary - the structure and whereabouts of decision-making

Due to a lack of space, I aim to focus on “must” requirements in this section and will therefore leave out those “should” requirements that are not indirectly included. What is left, then, is a set of minimum requirements, depending on the nature of the NPA in question. There might be a need for more details, some of which, such as the need to regulate who can become a member, will be discussed in 2.5.

3.5.1 The particularities of a hierarchical authority structure

Within legal literature and in the Administrative Court of Appeals case law (see sections 3.3 and 3.2.2.1 above), one finds that in order for an NPA to become a legal entity it must have a hierarchical authority structure. In a hierarchical authority structure the organs on the lower levels are required to follow the instructions of organs situated higher up in the decision making process.

This chapter aim to look into which organs are needed in order for an NPA to have a hierarchical authority structure.

3.5.1.1 Is a board requirement for legal entities?

Within the legal literature, one can ask whether or not the question of the necessity of a board has been settled.

Being aware of Augustsson’s challenging essay, there still does not appear to me to be a real dispute or even a matter of disunity in the legal literature with respect to whether or not it is a requirement for an NPA to have a board. The reason for this is found in the wide scope of organizations identifying themselves as NPAs. However, while it seems clear that the question of a board should be settled with consideration of the given NPAs’ scope of activity, it is likewise clear that if an NPA is also to become a legal entity, an NPA must have either a board or a similar organ that has the same functionality, that is, that has the same responsibilities and performs the same tasks as a board. The board or its substitute must be responsible for the affairs of the NPA and must promote the NPA’s interest. Thus said, according to the legal literature, this board or substitute can consist of only one person. This conclusion would also be in line with the legislator which makes clear that religious societies which because of their non-economic nature belong to the group of pure NPAs must have a board or a similar functioning organ in order to register as a religious society, and thus be confirmed as a legal entity.

In case law (see section 3.3.1), one finds in AD 1972:1 that an NPA with a dissolved board and without its own constitution was considered a legal entity in a dispute over being part of a collective agreement, and in NJA 2013 s 223, one further finds that another NPA, temporarily without a board, could be a respondent in a court case. In NJA 2013 s 223, the Supreme Court made clear that while the NPA could be a respondent in the case, it could not appeal the judgment unless a board was selected in time. How, then, can the legal literature seem so clear while case law indicates something else?

The explanation might be found in the circumstances of the cases.

The labor market organization and the NPA in NJA 2013 s 223 had existed for a time, so it is not unreasonable to believe that they had their own capital and a stable organization, and that even if they temporarily did not have a board, they normally would have had a board. One might say, then, that both organizations had certain autonomy and that the lack of compliance with the requirements for being a legal entity was only of a temporary nature and was therefore not in accordance with what was normal. Thus one could say that if an NPA has a stable organization, it appears, at least to a certain degree, to remain a legal entity even if it is temporarily without a board. It seems likely that a concern for third parties' interest would influence the timeframe during which an NPA can remain in a temporary condition without a board.

Such an explanation could also be in line with the Administrative Court of Appeals judgment in KamR 3690-12, which made clear that it is a necessity for an NPA to be able to have a board in order to be a solid organization, and that, as a consequence of not having a board, an NPA will have an incomplete and unclear representation toward third parties as well as governmental agencies in regard to taxation and the like. Since Direktdemokratisk samling did not have a hierarchical organization and believed in flexible leadership, the splitting of leadership responsibility and its variation resulted in the consequence that the organization became more of a loosely knit group of interested people than a firm organization.

3.5.1.2 Is a general assembly a requirement?

One find that legal literature take for granted that an NPA has a general assembly, but this question do not seem to have been addressed scientifically by legal professionals, nor by students of law.

In legal literature (see section 3.3), one finds that the board is subordinated to the general assembly. This accountability of the board to the general assembly is one of the essential features of the hierarchical authority structure. This is also visible in KamR 3690-12 where one finds that the general assembly constitutes the highest ranking governing body of the NPA at the annual general meeting. In the same case one finds that in order for an NPA to become a legal entity the NPA must have a general assembly, have selected a board and conduct annual general meetings. The reason legal literature perceives general assembly as obvious in an NPA might be that it is a mandatory feature of the organization form of associations in that members of associations are entitled to manage the association's affairs, authorize a board and so on. Thus, while the question of having a general assembly has not been an issue of dispute in court yet, it might look like that in order to become an association the NPA must have a general assembly.

What is new in KamR 3960-12 is the mentioning of an annual general meeting as belonging to the basic requirements for becoming a legal entity. In this case, DS conducted general assembly meetings once per week. The members of the association were continuously involved in the association's decision-making process so it was not a question of lack of influence in regard to the NPA's internal affairs. In the case, we find that the Administrative Court of Appeals emphasizes the need of a board that can be held accountable toward members and represent the association toward third parties.

3.5.2 The constitution, a frame of the legal entity's decisions

3.5.2.1 Is a formal constitution necessary?

In NJA 1913 s 393, the Supreme Court found that a local section of a masonic lodge without its own constitution but with a board was not a legal entity, while in AD 1972:1, the Swedish Labor market court found a labor market organization without its own constitution and with a dissolved board to be a legal entity. Also the Supreme Court in NJA 1987 s 384 emphasized the need of a constitution.

AD 1972:1 and NJA 1973 s 341 share some common features. Firstly, both NPAs had existed for a while and had stable organizations. The labor market organization section followed the constitution of its parent organization, which might have regulated the particular section, thus giving third parties a way of identifying the particular section.

It could also be that in case of a dispute, the parent section would cover for the local section. MNK, on the other hand, came into life by way of three trade organizations merging into a new NPA; the constitution it followed was the constitution of one of the NPA it replaced. Thus, MNK constituted a new entity, still there was some continuity, seeing that MNK also had both employees and its own bank account. The lodge, on the other hand, also seems to have been regulated by its parent constitution, but since this was a bankruptcy case, one can but question whether the court at that time had a higher demand for security. It is also possible that there could have been a development to a more liberal perception of the constitution over time. However, as with the discussion regarding a board, it is my perception that the Supreme Court has a holistic perspective on what constitutes an NPA and that the court takes into consideration the particularity of the situation while emphasizing the need for the protection of both third parties and members. Still, in the legal literature and in NJA 1987 s 384, it is made clear that a constitution is a prerequisite for becoming a legal entity, and since the function of the constitution is to identify the particular NPA by stating its aim and describing how decisions are made within the organization, together with its name and headquarters address, it becomes difficult to understand how a constitution can exist only in a verbal form.

Thus, while it is understandable that internal praxis can work as a filler of gaps when it comes to the constitution, it seems plausible that as a general rule, in order to ensure that an NPA is to be perceived as a legal entity, it must have a written constitution. Still, there could be exceptions. For example, if an association has been connected to a parent association for a given amount of time but starts to act more and more on its own, in that, for example, power is decentralized and its ability to make its own decisions increases, there could be a situation that resembles AD 1972:1.

3.5.2.2 What is a constitution of certain completeness?

In the governmental bill predating the Act on Religious Communities, in a constitution of certain completeness, one also finds the purpose and how decisions concerning an NPA's affairs are taken. In addition, in the legal literature one finds that when considering how decisions are made, one has to take into account the necessity of a hierarchical authority structure.

The importance of the aim and objective for operations

In KamR 4128-07, Svensk-Finska Kulturföreningen-Skatteverket, it was made clear that the aim must be precise and detailed enough to enable the association's board, members, and third parties to relate to the NPA on both a practical level that motivates its activity and existence. The aim express the character of the NPA. This implies that an NPA's aim is defining the NPA and the scope of its activities and must be clear and detailed enough to enable evaluation.

How can decisions be made in an NPA?

Given the necessity of having a hierarchal structure, with a general assembly and a board, since the board and leadership are responsible to the members and the lower organ is to follow the instructions of the higher organ, it follows that in order for an NPA to fulfill the requirement for legally correct decisions, the NPA constitution must include the following:

Some NPAs, because of their size or type, have rules in their constitutions in regard to delegates. If the general assembly consists of delegates, the constitution must state what constitutes the general assembly, how the general assembly is selected, and who selects it. The right to participate and vote seems likely to influence the selection of these delegates since delegates represent and substitute for members at a general assembly meeting. As a consequence, in a hierarchical democratic institution, these delegates must be selected by the members and not by the board. Secondly, it must be clear in the constitution how the general assembly makes its decisions. This should necessitate rules in regard to process. In regard to changes of the constitution it seems plausible that these must be adopted by the general assembly in order to apply. Thirdly, it must be clear how the board is selected and that this should be done by the general assembly and how many should be on the board and for what lengths of time; information should also be provided in regard to substitutes. Fourthly, the constitution must include information about how decisions are made within the board and whether there are any limitations on or expansions of the board's power. The right to participate and vote seems likely to influence also what happens after the meeting, since a member cannot exercise their right to participate as a member or delegate if they cannot bring forward proceedings against faulty resolutions after the meeting.

When addressing how decisions are made in KamR 3690-12 the Administrative Court seem to include when and where decisions are made (see section 3.2.2. above). The Administrative Court of Appeal also mentions time and place when addressing the decision-making process. Thus one might get the impression that the constitution must reveal when and where decisions are made. Due to the necessity of a board to be granted freedom from liability and enable third parties transparency and security it is likely the board should be granted freedom from liability in connection with adoption of the accounts therefore it seems likely that while NPAs might be able to have more meetings throughout the year NPAs must conduct some kind of annual general meeting. Also it seems likely that in order to protect vendors and third parties the constitution must include information in regard to how decisions about dissolutions will be made. Basically then the constitution should reveal when decisions are made, by whom will decisions be made and how will decisions be made.

Chapter five will deal more with the whereabouts of faulty resolutions and proceedings.

4. General principles of law

4.1 Introduction

In addition to being regulated through the mandatory requirements concerning its constitution, whose legal status was also addressed above in 2.4.2 and 2.4.3, an NPA that is a legal entity might be regulated by the general principles of law existing within the legal framework of associations; some of them which adhere to the class of unwritten law.¹³¹ Legal framework that are unwritten need not be invisible, if the rules once existed in writing or still exist today within the particular framework of some given associations.

It is possible in the legal literature addressing NPAs to identify at least four different but sometimes overlapping general principles of law perceived as applicable to NPAs.¹³² Here one finds the principle of equal treatment, the general clauses, the majority rule and conflict of interest.¹³³

4.2 The principle of equal treatment

4.2.1 Content

The principle of equal treatment provides that no member should be placed in a better or worse position than another member, but it does not require that an actual benefit for one member is combined with another member's disadvantage.¹³⁴

The particular nature of the principle of equality has not been discussed much in the legal literature addressing NPAs, so it seems reasonable to look for guidelines, where such are lacking, in other parts of the legal framework of associations.

One can argue that the equality principle is visible in the Company Act (ABL) 4:1, where it is written that "all shares shall carry equal rights in the company, unless otherwise provided in sections." According to Nial, the principle's purpose was to ensure that the position between shares that once was assured to the stockholder was maintained.¹³⁵

¹³¹ SOU 2010:90, page 323, ref. Tryuver, Filip, *Aksjonærernes myndighetsmisbruk – en studie av asl./asal*, section 5–21 og uskrevne misbrukspinsipper 2005, pages 208–211.

¹³² Hemström 2011, page 37, and 1977, page 30.

¹³³ Hemström 2011, pages 37–38 and 54; Johansson 2011, pages 156 and 163; Stattin, Daniel, *Minoritetsskydd och klander*, pages 90–91; Andersson, Jan och Pehrson, Lars, *Likhetsprincipen och generalklausulerna*, pages 110, 118 and 121, both in *Aktiebolagens minoritetsskydd* (Red. Svernlöv, Carl) 2008.

¹³⁴ Hemström 2011, pages 37–38; Mallmén, page 304 ref. Andersson and Pehrson, page 139.

¹³⁵ Nial 1934, pages 23 and 26.

Andersson and Pehrson argue that the present understanding of the equality principle has its base in the Second Council Directive 77/91/EEC of December 13, 1976, article 42, which states that “For the purposes of the implementation of this Directive, the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position.”¹³⁶ And they argue that therefore, the Swedish equality principle should be translated and applied in accordance with article 42, meaning that all shareholders in the same situation have equal rights and should receive equal treatment.¹³⁷ For corporations, the principle of equality seems to apply to all agreements or actions undertaken that affect the management of the company’s affairs.¹³⁸

4.2.2 Deviations

For NPAs, it appears that all members should be entitled to equal treatment unless something else is stated in the law or the NPA constitution or occasionally if it can be objectively justified as in the interest of the particular NPA.¹³⁹ If one adopts constitutional rules justifying the different treatment of members, all members should agree.¹⁴⁰ A constitutional clause aimed at limiting the principle of equal treatment can be rendered void if the conditions are right.¹⁴¹ If an NPA would like to treat some members differently from others, it seems in line with the principle of equality that this must be objectively justified.¹⁴² When considering what would count as objective, justifiable reasons for companies, one might take into account the relative strength of the reasons provided, the number and frequency of the deviations, the time periods, and the actual member advantages or disadvantages in comparison to other members in the particular case.¹⁴³ The principle of equal treatment can also be set aside occasionally with the actual member who has been treated unequal’s consent.¹⁴⁴

Johansson state that in order to deviate from the principle of equal treatment the decision made must not be unreasonable, and outside the conditions for the actual members’ admission.¹⁴⁵ When addressing corporations, Johansson states that it should not be possible to deviate from the principle of equal treatment in regard to such rights that, according to the law, are directly related to the membership.¹⁴⁶

¹³⁶ Andersson and Pehrson, page 117.

¹³⁷ Ibid, pages 118–119, ref 125.

¹³⁸ Ibid, page 130.

¹³⁹ Hemström 2011, page 38 ref. Prop. 1973:93 s 137; This is based upon the considerations put forward in the legal literature about its application in ABL; see also Rodhe and Nial’s critique of the concepts business economic correct and in the company’s interest in Skog, Rolf, Rodhe, Knut, Rodhes Aktiebolagsrätt, 2002, page 244 and 248 samt Nial, Håkan and Johansson, Svante, Svensk associationsrätt i hovuddrag 1991. Compare with Andersson and Pehrson, pages 133–137; see also Johansson 2011, page 158.

¹⁴⁰ Hemström 2011, page 38, ref. SOU 1949:9; Andersson and Pehrson, page 120, SOU 2010:90, page 428. ref. NJA 1977 s 393 and Mallmén, page 310. It is not possible generally to say what objective reasons are; However there seem to exist fundamental principles which might guide.

¹⁴¹ Hemström 2011, pages 38–39 and 47–48; Mallmén, page 310 ref. NJA 1977 s 393.

¹⁴² Hemström 2011, page 38, ref. SOU 1949:9; Andersson and Pehrson, page 120, SOU 2010:90, page 428. ref. NJA 1977 s 393 and Mallmén, page 310. It is not possible generally to say what objective reasons are; However there seem to exist fundamental principles which might guide.

¹⁴³ Andersson and Pehrson, page 138.

¹⁴⁴ Hemström 2011, page 38

¹⁴⁵ Johansson 2011, page 162-163.

¹⁴⁶ Ibid, page 161.

Among these, the right that can be applicable to democratic NPAs is the right to participate and vote at a general assembly meeting.¹⁴⁷

Andersson and Pehrson feel that limited companies should have more reasons for deviations from the principle of equality than other associations, such as economic associations, since a limited company is a capitalist association, which is more weakly rooted in the democratic ideal than a number of other associations.¹⁴⁸

A conflict with the principle of equal treatment can only exist when unequal treatment has been established.¹⁴⁹ Therefore, a claimant normally must show that as a consequence of a decision that discriminates between members, a real advantage or disadvantage for members exists, while the defendant must prove that objective reasons for unequal treatment exist.¹⁵⁰

There seem to exist a few Supreme Court cases in more recent times where deviations from the principle of equal treatment have been addressed. However, no NPAs have been involved in any of these.

In NJA 1977 s 393, Gertrud A, after expulsion from the cooperative housing association for not having paid membership fees, claimed that it was against the principle of equal treatment to expel her. Seeing that the rest of the members (here between 5 and 10) who had not paid the same fees was not expelled. The economic association gave three reasons for the expulsion: firstly, Gertrud's provoking behavior, in that she had made clear that she intended not to pay until the matter had been settled in court; secondly, that they would expel the other members after the court had dismissed Gertrud's case; and lastly, that Gertrud had moved out of her apartment. The Supreme Court made clear that there need to exist objective reasons for unequal treatment of members and that the reasons put forward in this case were not deemed objectively justified.¹⁵¹

In NJA 1989 s 751, there was a question of a possible violation of both the equality principle and the general clause; in this case, a member disputed the cooperative housing association's right to allocate a cable television fee depending on the size of the apartment. The court stated that main aim of the principle of equality was to target clearly unfair or otherwise improper cases of favoritism or discrimination against certain members. The court found that neither the principle of equality nor the general clause had been violated in this case; the Supreme Court established this judgment.¹⁵²

¹⁴⁷ Ibid, page 162.

¹⁴⁸ Ibid, pages 137–138; see also Mallmén, page 308 with ref. for a discussion of the general clause's more extensive application to economic associations.

¹⁴⁹ Andersson and Pehrson, page 140.

¹⁵⁰ Ibid; ref. Mallmén, page 309.

¹⁵¹ NJA 1977 s 393, summary of conclusions in NJA 1999 s 171.

¹⁵² NJA 1989 s 751, summary of conclusions in NJA 1999 s 171.

The issue of objective reasons for deviating from the principle of equality was up for discussion in NJA 2009 s 550, a dispute by a member of a cooperative housing association who was denied the right to build a balcony while others in the same apartment house were granted such right. Reasons put forward by the association for denying this right were architectural and aesthetic but also economic in the form of possibly decreasing value. In this case, the Court of Appeal made clear that a court can only try general assembly decisions made in due order if the resolutions conflict with the constitution, law, or legal praxis applicable to associations. In this case, it was not a question of conflict with the law or the constitution, but with the legal framework of associations' well-established principle of equal treatment. The Court of Appeal further stated that if the association could put forward objective reasons of some weight that could justify a deviation from the principle of equality, it would be permissible for an association to set aside the principle.

There was nothing in the examination of the case that indicated that the decision was aimed at discriminating between members and that therefore was unfair or illegal. The reasons put forward by the cooperative housing association were supported both by an architect, who emphasized the esthetical and architectural reasons, and also the office for building permits, who put forward reasons for not building the balcony (oddly enough, a building permit was still granted). Lastly, there existed rules put forward by the municipality that supported the cooperative housing association's decision.

The Court of Appeal concluded that the objective reasons put forward in this case by the housing association were sufficient for putting aside the principle of equality.¹⁵³ Worth noticing is that in his analysis of this case, Munukka stated that an objective justification need not be the most eligible solution.¹⁵⁴

In NJA 2012 n 13, a dispute over the need of noise barriers and the distribution of the cost of building them involved another cooperative building association case. The court made clear that it cannot be required that all members should benefit alike from all decisions; it is more or less inevitable that some decisions in reality bring greater benefits for some members than others do. This cannot constitute a violation of law, at least not when it is question of a necessary or reasonable utility. The court in this case concluded that while some members in the housing association benefitted more than other members from the decision to build a noise barrier, the decision was not in itself illegal. This conclusion was supported by the Supreme Court.¹⁵⁵

¹⁵³ NJA 2009 s 550.

¹⁵⁴ Monukka, Jori, Analys: Likhetsprincipen i BRF forfarande oklar trots nytt HD-avgörande.

¹⁵⁵ NJA 2012 n 13

4.2.3 Applicability on NPAs

In chapter 2.4 one find, that one of the essential features of the organization form of associations is that members of associations are entitled to manage the association's affairs. Chapter 3.5.1.2 made clear that members of associations are entitled to manage the association's affairs through participation in general assembly meetings. The question that then arises is whether all members enjoy the same right to participate in the management of the association's affairs at the general assembly meeting.

Both the legislator, case law and in legal literature one finds that the principle of equal treatment belongs to the group of general principles of law applicable on all associations.¹⁵⁶ In the preparatory work predating the Act on Religious Communities one find that the general principles of law works as fillers of the gaps in NPAs and applies when nothing else has been specified in law or the constitution.¹⁵⁷ The applicability of general principles of law on NPAs is also visible in case law, se for example NJA 1987 s 394 where one find that in the absence of law, general principles of law are applicable on NPAs. Also, NJA 2013 s 223, and NJA 2008 s 255 name general principles of law among the sources of law for NPAs.¹⁵⁸

In "A policy for the civil society", one finds that the principle of equal treatment is considered to be one of the most important general principles of law.¹⁵⁹ The reason to this perception might be that the principle of equal treatment is a fundamental feature of democracy and the understanding that the Swedish democracy was born out the equal treatment practices pre-existing within non-profit associations.¹⁶⁰

In the middle of the 19th century, a democratic meeting process had been developed within Sweden's Free Church movements and the temperance movement which eventually was adopted by labor organizations. This democratic decision-making process spread to the governmental sector mainly since many political active actors came from the non-profit sector and worked to implement political democracy but also through cooperation with non-profit associations.¹⁶¹ Thus, one can say that it seems like the Swedish democracy originated in NPAs.

Today the principle of equal treatment is visible in RF 1:9 and secure that all people are equal before the law. This principle is also perceived to be an objectivity principle when it comes to governmental decision making in that governmental agencies and -companies are to show no favoritism but treat all people equal in their decision-making process.¹⁶²

¹⁵⁶ Johansson 2011, page 85 and 156. and prop. 2009/10:55, page 10

¹⁵⁷ Prop. 1997/98:116 page 18, 22 and 143

¹⁵⁸ NJA 1987 s. 394, NJA 2008 s. 255 and NJA 2013 s. 223

¹⁵⁹ Prop. 2009/10:55, page 10

¹⁶⁰ Ibid, page 26

¹⁶¹ Ibid

¹⁶² Warnling-Nerep, Wiweka el. al., Statsrättens grunder 2010, page 40-41. This principle of equality before the law is also visible in article 7 of UN's declaration of human rights.

Nerep states that the principle of equal treatment apply in NPAs unless the members unanimous has agreed to something else. Hemström emphasizes that it is beyond doubt that the principle of equal treatment is applicable on NPAs general assembly meetings while Johansson state that the principle of equal treatment is applicable but the principle of equal treatment's implications are not fully known.¹⁶³ Chapter 4.2.4.2 aim to address the implication of the principle of equal treatment on an NPA general assembly meeting.

4.2.4 Concluding remarks

4.2.4.1 Is the principle of equal treatment applicable on an NPA's general assembly meeting?

In "A policy for the civil society", one finds that internal praxis based upon the principle of equal treatment in NPAs predate the principle's implementation in the Swedish society as a part of democracy. Even today NPAs are perceived to be democratic organizations that are deeply rooted in the democratic ideal. Therefore, it seems difficult to understand if the principle of equal treatment should not be applicable on NPAs.

The principle of equal treatment are considered to be one of the most important general principles of law and one find that governmental bills, case law and legal literature alike emphasize the applicability of general principles of law on NPAs.

The principle of equal treatment when applicable would be applicable on decision-making in NPA and according to Hemström this includes general assembly meetings.

4.2.4.2 What implication does the principle of equal treatments have for a general assembly resolution?

As a result of the principle of equality applicability on an NPA's general assembly meeting, all members of NPAs must necessary enjoy the same right to participate in the management of the association's affairs at the general assembly meeting. According to the principle of equal treatment, members in the same positions should be dealt with, in the same way, unless something else has been specified in the constitution, and the constitutional clause is reasonable and has been adopted in a correct way.

Under the principle of equal treatment, all members enjoy the same right to participate in a general assembly meeting and to vote. In order to enjoy the same right to participate in a general assembly meeting and vote, a member must receive the same information as other members in regard to when the meeting will be. Therefore, a member must receive notification of the meeting in due time before the meeting; the principle further implies that a member should know the agenda beforehand. This would apply in particular to larger NPAs or to NPAs with longer general meetings.

¹⁶³ Nerep 2007, page 20, Hemström 2011, page 38, also see Johansson 2011, page 163 and 156.

The order of cases in the agenda should not be subject to change without the consent of all members or delegates present at the general assembly meeting, since members must know when a case will be dealt with at the meeting in order to make sure that they are present and can exercise their right to participate.

In order for a member to participate in the meeting, the member must have access to the necessary documents needed to prepare himself or herself. Furthermore, members must be given the same possibility as other members to have their voices heard at the meeting. A member can also let their voice be heard if they issue a motion, and this motion has the same right as all other cases to be dealt with at the meeting. Thus, one cannot deny a member the right to have his or her motion dealt with at the general assembly meeting. However, it is likely that through the constitution and/or through information given to members beforehand, one can regulate how to deal with motions in a committee and what kinds of motions are adequate to issue to the general assembly.

4.2.4.3 When is it possible to deviate from the principle of equal treatment?

It seems that a deviation from the principle of equal treatment is not acceptable unless something else has been stated in law, constitution or occasionally if it can be objectively justified. In order for something to be objectively justified it must also be in the interest of the NPA, and there must exist objectively justified reasons carrying some weight. Deviation can also occasionally happen when the actual member who has been treated unequal consent. In order for a constitution to sanctify deviation from the principle of equal treatment in the constitution there are reasons to believe that this is only possible with the unanimous consent from all members. Thus, different treatment of members can be acceptable from time to time while unfair actions or decisions, improper favoritism or discriminations against certain members is prohibited. Also, it seems not possible to deviate from the principle of equal treatment when it comes to members' right to participate and vote at a general assembly meeting.

In NJA 1977 s 393, one could see that a member could not be dealt with differently than other members. However, with that said, objective reasons for dealing with members differently can exist, even if the reasons might not be the optimal solution, as in NJA 1989 s 751, where the cable television fee correlated with the size of the apartment and in NJA 2009 s 550, where some had balconies while others did not. Members cannot always expect to benefit alike from all resolutions.

4.3 The general clauses

4.3.1 Content

The general clauses supplement the rules on a qualified majority for certain general assembly decisions, provide limitations to the general assembly's freedom to make decisions, and aim to prevent operations that circumvent the equality principle. The general clauses can also to a certain extent overlap the principle of equal treatment.¹⁶⁴ The overlapping functionality is visible in the legal literature as well as in case law.¹⁶⁵ AvtL section 36 seems also to overlap the general clauses.¹⁶⁶

The general clause is visible in FL 7:16 (general assembly) and 6:13 (board). FL rules derive from ABL's general clauses in 7:47 (general assembly) and 8:41 (board) and state the following: "The general meeting may not adopt any resolution which is likely to provide an undue advantage to a member or another person to the disadvantage of the company or another member," and "The board or deputy may not undertake a transaction or any actions which is likely to provide an undue advantage to a member or another person to the disadvantage of the company or another member."¹⁶⁷ While a decision or action marking a breach of the principle of equality must cause a real benefit or disadvantage, the general clause is applicable already when a decision is aimed at providing an undue advantage or disadvantage.¹⁶⁸

Again looking for guidance in corporate law, one finds that there can be three types of decisions aimed at providing undue advantage with the consequence of a disadvantage or vice versa. Firstly, one has decisions aimed at providing someone else with an advantage but which means a disadvantage for a company.¹⁶⁹ Secondly, one finds decisions aimed at benefitting one or more members, to a disadvantage for the company, and thirdly, decisions that are aimed at providing an undue advantage for some members, to the disadvantage of other members.¹⁷⁰

¹⁶⁴ Andersson, Johansson and Skog, page 7:92, Andersson and Pehrson, page 128, Mallmén, pages 303–304.

¹⁶⁵ Petterson, Per, ekonomiska föreningar, en lagkommentar 1991, page 74, Mallmén, page 304, and NJA 1989 s 751.

¹⁶⁶ Andersson, Johansson and Skog, page 7:93; Johansson 2011, pages 160–161, AvtL 36 is perceived as AvtL's general clause.

¹⁶⁷ Mallmén, pages 304–305; Petterson, page 74, Prop. 2004/05:85 page 615 and prop. 1986/87:7 page 114 and 140 and Prop. 1975:103 page 377.

¹⁶⁸ Johansson 2011, page 159 ref. Mallmén 2002, page 309 and RH 2010:71...for members under same conditions, that is.

¹⁶⁹ Nerep, Erik, Samuelsson, Per, En djup kommentar till ABL 7:47, at Karnov (web) ref. Mallmén, page 306 see also 3.2.1. above.

¹⁷⁰ Nerep and Samuelsson.

Andersson and Pehrson emphasize that the general clauses' main aim is to deal with decisions characterized by the abuse of power; thus, they are applicable both when a decision do not disrupt the legal relationship between shares, for example, when it is possible for a third party to acquire a privilege that otherwise should have been given to shareholders and where this privilege is an undue benefit, and in situations where it is legally correct to deviate from the principle of equality but where the resolution means an undue deviation while acknowledging that shareholders cannot always expect to benefit alike from all decisions.¹⁷¹

The undue requisite is also to be found in AvtL; a reason for this might be that the Swedish general clause could be perceived as a development, or rather as a specification, of an old fundamental principle, perhaps even from German law, stating that legal acts that conflict with good praxis are invalid. Today this principle is visible in AvtL section 33.¹⁷²

When addressing the undue requisite, Adlercreutz explains that one should take into consideration the agreement's content, the context of its establishment, and whether something happened later on that changed the prerequisites or other circumstances.¹⁷³

4.3.2 Deviations

As with the equality principle, one can set aside the general clause through constitutional agreement; however, it also suggests that decisions aimed at setting aside general clauses can be faulted.¹⁷⁴ Breaches of the principle of equality and the general clause may induce liability for damage.¹⁷⁵

A claimant must show that the decision is aimed at benefitting members or someone else at the expense of the company or of another member, or vice versa, and that the decision is unfair.¹⁷⁶ The defendant, on the other hand, must show that there exist reasonable reasons for the action or decision undertaken.¹⁷⁷

While there does not seem to exist, at least in more recent times, case law addressing the implication of deviating from the general clauses for NPAs nor cases defining the particular important requirement of undue treatment, this has been addressed in a few cases involving other forms of associations.¹⁷⁸

¹⁷¹ Pehrson, Lars, *Generalklausuler i aktiebolagslagen*, Festskrift till Sveriges

Advokatsamfund 1887 – 1987, page 483ff; Andersson, Johansson and Skog, page 7:92.

¹⁷² Nial 1934, pages 40–43, ref. Adlercreutz, Axel, *Avtalsrätt I 2002*, pages 269–273. One can ask if section 28, 30, and 36 in AvtL also have been influenced by this principle.

¹⁷³ RH 2010:71 ref. see also Nerep and Samuelsson's discussion regarding what can be considered to be economically justifiable; compare with Skog and Rodhe 2011, pages 246–247 and Adlercreutz I, page 300.

¹⁷⁴ Andersson, Sten in a comment to FL 7:16 at Karnov and Hemström 2011, pages 38, 47–48.

¹⁷⁵ Johansson 2011, page 160, Applicabilty to NPAs probaly depends on the situation.

¹⁷⁶ Mallmén 2002, page 309 ref. Andersson and Pehrson, page 140 and Andersson, Johansson and Skog, page 7:93.

¹⁷⁷ Andersson and Pehrson, page 141 ref. Mallmén, page 309.

¹⁷⁸ Andersson, Johansson and Skog, page 7:93, Also, according to Mallmén, the principle of equality and the general clause can in large part have the same meaning and implications for economic associations as they have for corporations. Mallmén, page 304 and 178

AD 1988 nr. 20 addressed a dispute about whether a golden parachute agreement between Jan Lundberg and Consilium Trading & Information AB (CTI) could be unfair according to ABL 8:13 (1975:1385), here benefitting Lundberg at the cost of the company. It was made clear that an agreement under which the previous managing director of a daughter company was left with two years' payment, seemingly a normal procedure in this company at the same level of management, was not undue. This was the case even if the company, as such, was facing economic difficulties and went through a restructuring which, for the daughter company, meant the sale of shares and new owners.¹⁷⁹

The question of whether an action was unfair was up for discussion in NJA 2000 s 404, where a company's property were transferred to the majority shareholders' company by the board; the minority holder was thus left with shares of no value. In this case, the Court of Appeal stated that a company's scope of purpose as defined in the company's constitution is legally binding for the company's different organs. The board's decision was thus in conflict with both the company's constitution and purpose.

When questioning whether the decision was in conflict with the general clause in ABL 8:13 (1975:1385), the Court of Appeal evaluated the reasons for the decision as put down by the defendant.

Among else there existed no documentation confirming that the action was undertaken by necessity and the economic and administrative reasons put forward by the respondent were made with the aim of benefitting the company that took over the asset and not the company that was emptied. In this case the Supreme Court like the Court of Appeal found that the board's decision was intended to damage the minority holder. The Supreme Court put words to this, stating that the decision must be seen as providing the majority holder an unfair benefit at the cost of the minority holder. The members of the board became personally liable to pay damage to the claimant.¹⁸⁰

In NJA 2013 s 117, a cooperative housing association filed a claim for damage against the previous board, questioning whether FL 6:13 was applicable to a decision supported, at the time, by all members of the association. According to the Supreme Court, the general clause is a protection against disloyal actions toward the association or its members and can as a general rule only be set aside with the consent of all the affected members at the time. A general rule can only be set aside if there exist sufficient reasons. A change in building plans of a garage, which was approved by the previous board and granted freedom from liability by all members in the association at the time, was not perceived to provide such sufficient reasons.¹⁸¹

¹⁷⁹ AD 1988 nr. 20.

¹⁸⁰ NJA 2000 s 404.

¹⁸¹ NJA 2013 s 117

4.3.3 Applicability on NPAs

According to Nerep, the general clauses of ABL might be applicable on NPAs.¹⁸² Hemström perceive the general clauses as included in the principle of equal treatment and, therefore, applicable on NPAs general assembly decisions.¹⁸³ The inclusion of the general clauses in the principle of equal treatment one also finds in Johansson, who states that the general clauses sometimes has been perceived as expressing the principle of equal treatment.¹⁸⁴ Rohde/Skog also sees the general clauses together with other clauses as an expression of the principle of equality. Thus, in legal literature one can perceive a tendency to categorize both the general clauses and the principle of equality under the umbrella of the principle of equality.¹⁸⁵

The perception of the general clauses as an expression of the principle of equal treatment is confirmed by the legislator and also in case law.¹⁸⁶

4.3.4 Conclusive remarks

4.3.4.1 Is the general clause applicable on an NPA's general assembly meeting resolution?

If the general clause were not applicable on an NPA general meeting, this would conflict with the notion that all members of NPA's enjoy the same right to participate in the management of the association's affairs at the general assembly meeting.

In addition seeing a tendency in legal literature, and that both the legislator and case law perceive the general clauses to be an expression of the principle of equal treatment it seems reasonable to believe that the general clauses are applicable on an NPA general assembly resolution (see 4.3.3 above).

4.3.4.2 What implication does the general clauses have for a general assembly meeting

The foremost function of the general clause on a general assembly meeting must be to secure materially correct resolutions. The implication of the general clause ensures that a general assembly cannot adopt resolutions that aim to provide someone else, or even a member, with an undue advantage to the cost of the NPA; nor can the general assembly issue resolutions aiming at providing an undue advantage for some members to the disadvantage of other members.

¹⁸² Nerep 2007, page 21

¹⁸³ Hemström 2011, page 38, ref. Hemström, Carl, Föreningen och dess medlemmar, 1987, page 228

¹⁸⁴ Johansson 2011, page 159

¹⁸⁵ See e.g., Skog och Rodhe 2011, pages 246–252 and Andersson and Pehrson, pages 109–144; and Mallmén, page 304.

¹⁸⁶ Prop. 1986/1987:7 s 114, NJA 2009 s 550 and 1998 s 153

4.3.4.3 When is it possible to deviate from the general clause?

Within the frame of the general assembly meeting it seems possible to set aside the general clause with the consent of all affected members at the given time. There must exist sufficient reasons for setting aside the principle. In order for the general clause to be set aside the resolution in question must not aim to enable an undue advantage to someone else's disadvantage or directly to aim at providing an undue advantage to someone else's disadvantage.

What is to be considered undue depends on the situational context. In AD 1988 nr. 20, quite extensive golden parachute agreement was not to be considered undue, since golden parachute agreements were the praxis of the company; nor did it then matter, either, that the company was facing economic difficulties. While NJA 2000 s 404 made clear that the abuse of power must be intentional and that in order for the abuse of power to be intentional, the action should not have been based upon objective reasons. In order for objective reasons to exist the action must be necessary and not aiming at providing the majority with an unfair benefit at the cost of the minority or the NPA. This case also indicated that a resolution that aims to close down established operations as mentioned in 2.4.3.1 and 4.3.2 also can be categorized under the general clause. With that said, one must bear in mind that to close down operations might not always have economic implications; the closing down must, of course, result in a disadvantage. How exactly this applies to an NPA without any economic goal is difficult to say, but if the decision will affect an NPA's income, possible growth, and existence, then it should have some effect, at least for larger NPAs.

NJA 2013 s 117 showed firstly that the general clause protects only existing members and not future members from abuse but also that even the right to set aside the general clause with the consent of all members can be revoked if there exist sufficient reasons for doing so.

4.4 The majority rule

4.4.1 Content

In principle the majority rule provides that a simple majority applies when voting, unless the constitution prescribes more extensive conditions.¹⁸⁷

4.4.2 Deviations

For NPAs, it seems to hold that, even if normal changes to the constitution require a qualified majority, that is, two-thirds of the votes at least for more serious changes, it is possible to make adjustments to the constitution even with a simple majority.¹⁸⁸ Here again, it seems to imply that changes to the constitution of a serious nature, such as significant changes to an NPA's objectives, should require consent from all members.¹⁸⁹

¹⁸⁷ Hemström 2011, page 37-38 and 55, Johansson 2011, page 162. See also Mallmén, page 304 and 2009/10:55, page 10

¹⁸⁸ Hemström 2011, page 55.

¹⁸⁹ Ibid.

Johansson states that decisions to discontinue activity, radical changes of objective, drastic increases to member fees, or the use of the association's money for public or similar purposes that are not related to the association's goals should be invalid, that is, unless all members have consented to these decisions.¹⁹⁰ Johansson advises that in some cases, the majority should proceed to establish a new NPA instead. The principle behind this seems to be that if a decision is so radical that it can be objectively perceived as undue, with consideration of the constitutional conditions that existed when the members started their membership, it should be invalid.¹⁹¹

When addressing corporations, Johansson adds the relationship between stocks to other changes of a serious nature. He also states that in order for serious changes to be valid, they must have the consent of all members present at the general assembly meeting, and these members must represent at least 9/10 of all shares in the company.¹⁹²

There appears to exist just one case that addresses deviation from the majority rule, and again, this is not an NPA case.

In NJA 2012 s 198, there was a dispute in regard to whether a simple or a qualified majority was needed in order to make a decision. In this case, the Supreme Court made clear that the association (the claimant, a cooperative housing association) should bear the burden of proof for justifying why a qualified majority was needed.

The court concluded that the association was in charge at the general assembly meeting, had more resources than individual members, and thus was better able to make an investigation and ensure that the legal rules were interpreted correctly, ensuring that decisions were based upon the correct information. The Supreme Court emphasized the necessity that the association should carry the burden of proof in these matters, as this could work as prevention against future misuse from the association's side. It is worth noticing in this case that the association's perceived need for a higher majority came from a legal rule and not from its own constitution.¹⁹³

4.4.3 Applicability on NPAs

Both the legislator and in legal literature one finds that the majority rule belongs to general principles of law.¹⁹⁴ Nerep emphasizes that the majority principle and the principle of equal treatment belong to the most important general principles of law while Hemström make clear that the majority rule is applicable in all associations that is unless members has agreed on something else¹⁹⁵ Johansson seem to perceive the majority rule as a minimum requirement for NPAs and adds that the majority rule can be used as a filler of the gaps in NPAs, this is in line with the legislator's word in the preparatory work predating the Act on Religious Communities.¹⁹⁶

¹⁹⁰ Johansson 2011, page 162, ref. Hemström 2011, page 55

¹⁹¹ Ibid.

¹⁹² Johansson,1990, page 469.

¹⁹³ NJA 2012 s 198.

¹⁹⁴ Johansson 2011, page 85 and 156. and prop. 2009/10:55, page 10

¹⁹⁵ Nerep 2007, page 20, ref. Hemström 2011, page 37

¹⁹⁶ Johansson 2011, page 162 ref. Prop. 1997/98:116 page 18, 22 and 143

Case law makes clear that general principles of law are applicable on NPAs.¹⁹⁷ Legal literature perceives the majority rule to be applicable on NPA's internal relations.¹⁹⁸ The majority rule is also a fundamental feature of democracy and an expression for the opportunity members in NPAs has to participate in the association's affairs. Thus, one can question if not the majority rule also originated in NPA's.¹⁹⁹

4.4.4 Conclusive remarks

4.4.4.1 Is the majority rule applicable on an NPA's general assembly meeting?

It seems clear that the majority rule belong to the most important general principles of law which is applicable on all associations, unless something else has been put down in law or agreed upon in the constitution. The majority rule is applicable on NPA's internal relations and also general assembly meetings. Historical there are reasons to believe that the democratic tradition of issuing resolutions through majority votes in Swedish NPAs is older than the Swedish democracy.

4.4.4.2 What implication does the general clauses have for a general assembly meeting

For a General assembly meeting the majority rule is a minimum requirement which generally seems to imply that resolutions are made by a simple majority unless something else is required by law or in the constitution. Resolutions as serious changes to the constitution, disruption of the relationship between members and clear deviations from the aim of an NPA seem to require consent from all members. However, when consent from all members is required, it seems plausible that at least in a larger NPA, this might imply consent from all delegates at the general assembly meeting, since these represent 9/10 of the members.

According to NJA 2012 s 198, it is up to the association in question to make sure whether or not a decision requires a simple majority. Significant changes to an NPA's objectives should require consent from all members. Resolutions aiming to discontinue activity, radically change the objective and nature of an NPA, drastically increase members' fees or use the association's money for purposes not in line with the NPA's goal all seem to be significant changes.

¹⁹⁷ NJA 1987 s. 394, NJA 2008 s. 255 and NJA 2013 s. 223

¹⁹⁸ Hemström, Carl, Föreningen och dess medlemmar, 1987, page 228; Johansson 2011, page 162.

¹⁹⁹ prop. 2009/10:55, page 26

4.4.4.3 When is it possible to deviate from the majority rule?

Seeing that the majority rule belong to the same group as the principle of equal treatment one could expect that it would be possible to deviate from the majority rule occasionally with the consent of all members. However the right to deviate from the majority rule as a minimum rule appears not to be expressed in legal literature. Instead one finds that NPAs can adopt more comprehensive regulations like for example 2/3 majority and so on.

4.5 Conflict of interest

4.5.1 Content

One finds the conflict of interest rules for the general assembly in FL 7:3, which in large part reflect ABL 7:46, where a member may not, in person or through a proxy, vote in respect of legal proceedings against him or her, his or her discharge from liability for damages or other obligations toward the association, or legal proceedings or a discharge as referred to in the first two matters in respect of another person, if the member in question possesses a particular interest that may conflict with the interests of the association. These provisions in respect of members might also apply to members' proxies.²⁰⁰ The perception of conflict of interest applicable to members' proxies is shared by Samuelsson and Nerep who state that it is possible to extend the application of the conflict of interest rule in ABL 7:46, directly or analogously, to include all legal agreements that aim to establish, preserve, change, or terminate a legal agreement affecting economic rights and obligations between two or more participants.²⁰¹

For companies, breach of the conflict of interest rules might activate liability for damages, according to ABL 29:1. As elsewhere, one also finds here a certain overlap between the principle of equality, the general clauses, and conflict of interest, and one might get the impression that the principles also work as extensions of each other.²⁰² This relationship is visible in that consent from all affected members seems to be able to render the conflict of interest rule void.²⁰³ The general clause in ABL 7:47 seem to cover up for the shortcomings of 7:46 when it comes to general assembly meetings.²⁰⁴ To a certain extent conflict of interest rules do not seem to apply to internal corporate matters.²⁰⁵ When addressing internal corporate matters, conflict of interest rules do not hinder a person from voting; the person with the conflict of interest can also be present and express their opinion when the matter is discussed.²⁰⁶ In cases of majority misuse regarding agreements, Johansson finds it more reasonable to apply the general clauses.²⁰⁷

²⁰⁰ Svernlöv, Carl, *Ansvarsfrihet* 2007, page 234, see discussion in 227-239 for holistic unity

²⁰¹ Nerep and Samuelsson who also include agreement constructions within legal framework of associations, such as the establishment of an association and fusions, ref. Åhman, Ola, *Behörighet och befogenhet i aktiebolagsrätten* 1997, page 772.

²⁰² Johansson 2011, page 145 and Skog och Rodhe 2011, page 248.

²⁰³ Nerep and Samuelsson, *Aktiebolagslag* (2005:551) chapter 7, section 46, Lexino 2013-02-01.

²⁰⁴ Nerep and Samuelsson 2013, ref. prop. 1975:103 page 291.

²⁰⁵ Prop. 1975:103, page 379.

²⁰⁶ Johansson 2011, page 171; SOU 1995:44 page 165 and prop. 1997/98:99 page 101.

²⁰⁷ Johansson 2011, page 171.

The board of an NPA can issue motions and make recommendations to the general assembly meeting; in both these situations a possible conflict of interest situation at the board level will have an effect for the general assembly meeting. Seeing this it becomes interesting to understand in which situations conflict of interest can arise also in board meetings. FLs regulations partially reflect ABL 8:23 for board members; this is visible in FL 6:10, where one finds that neither a board member nor the administrative director may participate in a matter regarding an agreement between the board member and the association or in an agreement between the association and a third party, where the board member in question has an essential interest that may conflict with the interests of the company. A board member must not participate in decisions that in an obvious way affect him/her directly or indirectly whether that is in regard to their own working conditions, salary or so on. With decisions, one includes all legal binding agreements and also litigation or other legal proceedings between the board member and the association but also gifts to him or her from the association.²⁰⁸ Looking for guidance in corporate law, one finds that these rules are understood to be extensive and are thus also applicable to one-sided acts that are of importance for the formation of a contractual agreement, the change of an agreement, or the termination of an agreement.²⁰⁹ The main issue here might be whether the members with the conflicting interest could be in the majority, or if in a minority, have such an influence that their presence makes a difference. In practical terms, ABL 8:23a means that all questions about agreements with board members, close connections, or close companies are removed from the board to the general assembly.²¹⁰ A board cannot breach the conflict of interest rule in situations where the board presents a proposal to the general assembly without taking a stand.²¹¹

4.5.2 Deviations

At the general assembly meeting, a board member can only participate in votes regarding his or her own freedom from responsibility if such a right is given in the constitution. However, one can question whether this particular change in the constitution must be accepted by all or at least by a majority of the affected members and thus, not just by delegates. Johansson states that it is not possible to set aside conflict of interest rules with majority decisions, since all members' voices must be heard in regard to these decisions. Thus one gets the impression that what he has in mind is that all members must be notified and allowed to make their voices heard, since the decision affects all members.²¹²

²⁰⁸ Hemström 2011, page 64.

²⁰⁹ Nerep and Samuelsson, Aktiebolagslag (2005:551) chapter 7, section 46, Lexino 2013-02-01 and Prop. 1975:103, page 379.

²¹⁰ Nerep and Samuelsson.

²¹¹ Prop. 1975:103, page 379.

²¹² Hemström 2011, page 54, and Johansson 2011, page 150.

It is not made clear whether a person who has a conflict of interest as chairman can lead a general assembly through discussions and voting on the particular question. Johansson is not very clear on this issue, in that he believes both that the person should be able to function as chairman as long the decision is made by acclamation and that the person does not utilize his casting vote; otherwise, he should find someone else to function as chairman even if he would have such a right.²¹³ A member who has a conflicting interest could possibly influence the result of a vote just by their presence, because the members would take this presence into consideration when voting, and also because the mere presence would prevent freedom of expression and factual consideration. However, while this might not always apply to general assembly meetings, it seems reasonable that a member should always leave the room if it is a case where a conflict of interest could exist.²¹⁴

There don't appear to be any recent cases from the Supreme Court that address the conflict of interest for NPAs. However, there are a few other cases addressing other associations, which will be briefly addressed below.

The court in NJA 1981 s 1117 made clear that the conflict of interest rules in the ABLs exist to protect shareholders and not third party interests, since the rules presuppose a conflict of interest between the company and the shareholder. The court furthermore made clear that a conflict of interest cannot exist if board members with conflicting interests also own all shares in the company.²¹⁵

In NJA 1982 s 1, the Supreme Court found a breach of the then applicable conflict of interest rule section 86 in ABL of (1944:705). In this case, the chairman of the board, DM who was married to MM, issued a bond to his wife, who had worked for the company for some time but had agreed with her husband not to ask for a salary until the business went better. DM issued the bond after he experienced that the company was suffering economically and was to be sold. When considering what would be a breach of the conflict of interest rule, the Supreme Court based its conclusion on the following: Firstly, it was not clear that there existed an agreement prior to the issuing of the bond or if the bond represented an individual commitment for the company. Secondly, it was clear that when DM issued the bond, his interest could conflict with the company's interest. Thirdly, even if the board had been granted freedom from responsibility, as in this case, this freedom did not cover the bond, whose existence was not revealed. Fourthly, MM should have known that DM was aware that the other owner, who eventually bought out DM before the company was sold, would not have agreed to the bond. Therefore, DM exceeded his authority when he issued the bond on behalf of the company.²¹⁶

²¹³ Johansson 2011, page 171; SOU 1995:44 page 165 and prop. 1997/98:99 page 101.

²¹⁴ Hemström 1972, page 79; SOU 1971:15, page 228. See also Gunnar Flodhammar, *Associationsrätt, en introduktion* 1990, pages 49 and 53, who partly deviate, perhaps because he have in mind the members' right to put forward an argument for motions.

²¹⁵ NJA 1981 s 1117 is probably also applicable when a conflict of interest exists between deputies and members.

²¹⁶ NJA 1982 s. 1.

In NJA 2000 s 404, addressed among else in 4.3.2 and 4.3.4.3, there was also a question with regard to conflict of interest. In this case, the court, supported by the Court of Appeal and the Supreme Court, stated that the conflict of interest rule in ABL 8:10 (1975:1385) is only applicable to agreements, proceedings, and other types of claims and not to decision-making within a company's organs.²¹⁷ In NJA 2013 s 117 also addressed in 4.3.2, the Supreme Court made clear that the conflict of interest principle in 8:23 is only applicable to existing members and thus not to future members. This principle was also perceived applicable to economic associations. The Supreme Court in this case made clear that both the general clause and the conflict of interest paragraph in FL belongs to the group of dispositive rules in that they can be deviated from when all members agrees. If then, as here, all members of the NPA at a given point in time free the board from responsibility this would ban future members from making a claim.²¹⁸ However according to NJA 2012 s 198 a board cannot be granted freedom from liability in regard to a matter that has not been revealed.²¹⁹

4.5.3 Applicability on NPAs

The court in NJA 2013 s 117 state that the main function of the conflict of interest principle and the general clause is to protect the minority. Above in regard to the general clause it was made clear that the aim of the general clause was to ensure that the majority not secured an unfair benefit at the cost of the minority or the NPA. The court in NJA 1987 s 394 emphasized the importance for a minority in NPAs to enjoy protection against abuse from the majority.²²⁰

In legal literature one finds that the conflict of interest principle is applicable on NPAs. In Hemström's opinion, the conflict of interest regulations in FL are by analogy applicable to NPAs.²²¹ Johansson also states that conflict of interest rules, at least to a certain extent, possibly could by analogy be applicable to NPAs.²²²

Also in case law the general clauses and the conflict of interest, seem to belong to the group of general principles of law aimed at protecting a minority from abuse.²²³

²¹⁷ NJA 2000 s 404.

²¹⁸ NJA 2013 s 117 with ref.

²¹⁹ NJA 2012 s 198

²²⁰ NJA 1987 s 394

²²¹ Hemström 2011, page 54.

²²² Johansson 2011, page 190.

²²³ NJA 2013 s 223

4.5.4 Conclusive remarks

4.5.4.1 Is the conflict of interest rule applicable on an NPA's general assembly meeting?

While the general clause target the resolution, the implication of the conflict of interest are more far reaching in that a board cannot make suggestion to the general assembly when there is a conflict of issue within the board. Furthermore the general clauses cannot hinder member of the board to vote on their own freedom from liability. Thus without the applicability of the conflict of interest rule the minority of NPAs will enjoy a faulty protection toward abuse. The same applies to protection of third parties interest in that the best interest of the NPA cannot be secured when members are free to follow their own interest and not those of the NPA and the members they represent.

Thus while there has not been much written about the conflict of interest rule in relation to NPAs it would be difficult to understand if it would not apply. In particular this applies since case law sort the conflict of interest principle among the general principles of law aimed at protecting a minority from abuse.

4.5.4.2 What implication does the conflict of interest rule have for a general assembly meeting

The implication of the conflict of interest rule on the general assembly meeting seems to be twofold. In the first category one finds the existence of conflict of interest situations which exist before the general assembly meeting but which influence the decision-making. Here the conflict of interest principle give that a board cannot make suggestions to the general assembly when there exist a conflict of interest situation within the same board. In situations where conflict of interest can be an issue for the board in the decision making in that particular issue it should per default be transferred to the general assembly.

In the second category one find situations which arise at the general meeting. For general assemblies the conflict of interest rule seems to have implication for general assembly meetings mainly in question of liability. Thus a board member cannot vote for his/her own freedom from liability. In practical terms, a chairman cannot be a sitting chairman in matters that affect his or hers own liability. It seems plausible that in questions of liability, people should have the right to express themselves, but thereafter, it would be better for the association that they leave the room, depending on the situation.

4.5.4.3 When is it possible to deviate from conflict of interest rule?

It is possible to deviate from the conflict of interest rule when all members agree. This seeing the conflict of interest rules only target situations where one or more persons have an interest that can be in in conflict with the interest of the NPA. It might also be possible to deviate from the conflict of interest rule when all affected members agree.

5. Erroneous conduct and faulty contents

One can differentiate between two types of error that can make a resolution unlawful. Firstly, there can be errors in the actual decision-making process, and then there can be errors in the content of an actual resolution.²²⁴

Errors in process are perceived as errors in the formal procedures. When a decision is challenged based upon erroneous formal procedure, the claimant claims that the decision has not been made in due order. That is, it has not followed the decision-making process as put down in the constitution or the law, or it has been decided in a way that cannot reasonably be expected from the type of organization in question.²²⁵ It also seems that certain decisions that go against the fundamental principle of equality of status among members can belong to this category.²²⁶ In addition to what has already been said examples of formal errors include the members having not received documentation; the general meeting issue a resolution without the needed members present or there being a conflict of interest; unauthorized voting or authorized voters being denied their right to vote; changes in the constitution having been made without a majority decision; or otherwise being in violation of the constitution.²²⁷

If a decision is challenged on the basis of its substantial contents, this means that the general assembly made a resolution they were not entitled to make or that the decision made was against the members' interests as protected by the legal framework of associations' general principles of the law or the constitution.²²⁸ In these cases, the meaning of the constitution can be under dispute, and Mallmén states that is reasonable to assume that when one interprets the constitution, one should utilize an objective method of interpretation that is based on the constitution's actual wording but that also takes into consideration how the constitution in question has been understood previously, based upon existing praxis within the organization.²²⁹ Here it is the NPA's responsibility to make sure that the rules are clear. Any unclearness could be interpreted in the member's favor, since the NPA had the responsibility of preventing the situation from happening.²³⁰

²²⁴ Nial 1934, page 8.

²²⁵ Prop 1986/87:7, page 141, ref. Mallmén, page 317.

²²⁶ Hemström 1977, page 37

²²⁷ If the error has not influenced the decision made, then the decision is still valid; ref. Prop 1986/87:7, page 141, ref. Mallmén, page 317. See also NJA 1906 s 251 and 1932 s 243

²²⁸ Mallmén, page 317 ref. Nial 1934, page 20.

²²⁹ Mallmén, page 87. See also Hemström 1977, pages 36–38 and Hemström 2011, page 36. Prop 1986/87:7, page 141. Decisions that conflict with laws other than the FL have been left out by legislators.

²³⁰ See ex. NJA 1981 s 552, where the court emphasized the interpretation that caused the least obligation for the member. See also Mallmén, page 87, ref. Hemström 1972, page 29.

5.1 Applicable rules of proceedings

The legislator, legal literature, and case law all seem to agree upon the preexisting fundamental legal principles that give the members, the board, and the managing director the right to bring proceedings against an NPA before a court of general jurisdiction in order to set aside or amend a resolution that has not been adopted in due order or that contravenes the law or the constitution.²³¹ This principle, visible in FL 7:17, might have originated from the *Corpus juris civilis* principle *pacta sunt servanda* in AvtL 1:1²³² General principles of law equal law and/or the constitution when it comes to proceedings.²³³

The legal rules of proceedings in FL 7:17 seem to apply analogue unless the members have agreed to something else through the constitution.²³⁴ However, it does not seem plausible that it is possible to derogate the rules of proceedings by contract through the constitution without all members' consent.²³⁵

In situations where there is a question of a decision's validity, Stattin argues that it makes most sense to apply AvtL's invalidity rules. In a claim context, these rules can be applied in two ways, firstly, by the application of AvtL's invalidity rules or secondly, by rendering a decision invalid on contractual grounds. In the first situation, no period of limitation applies.²³⁶ However, there seems to exist a difference between rules annulling rules within company laws and annulments based upon contractual law, since the first are strong annulment rules while the second, with the exception of AvtL 28, are weak.²³⁷

One might argue that there is a certain overlap of legal framework of associations' rules of proceedings and the invalidity clauses in contractual law. Since voting and resolutions made in a general assembly meeting, according to Swedish rules, are perceived as a one-sided legal action *sui generis*, one can ask whether an NPA member might find situations where both are applicable.²³⁸ One can ask whether deliberate deceit (when the general assembly believe they have voted for something but the resolution has been twisted and does not reflect the perception of the general assembly in part or as a whole at the time of the vote) can be categorized under both AvtL and annulment rules.²³⁹ A fault must always be of significance *in casu* in order for the rules to apply.²⁴⁰

²³¹ See e.g., prop 2009/10:55, page 10, which emphasizes the existence of general legal rules applicable to all types of NPAs, unless otherwise specified in their constitutions. See e.g., NJA 1987 s 394 and Hemström 2011, page 136; Johansson 2011, page 193 and 196; Hemström, 2010, page 102. See also prop 1986/87:7 s 140 and 142 analog.

²³² Skog and Rodhe 2011, page 16, 18–19, ref. chapter 2, first part.

²³³ Stattin, pages 90–91 and Nial, Håkan, Om klanderbara och ogiltiga bolagstämmobeslut 1934, pages 42–43.

²³⁴ Pending a possible arbitration clause being determined as fair by the court...

²³⁵ Johansson 2011, page 123; Adlercreutz I, pages 301–302; Sandström, Torsten, Svensk aktiebolagsrätt, 2007, page 188; Hemström 1977, page 30. Pending the consent given, the situation and the members involved in such a consent could possibly activate an AvTL 33§ or 36§ breach.

²³⁶ Stattin, pages 79–83.

²³⁷ Ibid.

²³⁸ Stattin, pages 79–80. There seems to be a certain exchange in regard to content and meanings in between.

²³⁹ Adlercreutz I, pages 275–276.

²⁴⁰ Stattin, page 92.

FL 7:17 differentiates between the general rules of proceedings and annulment rules.²⁴¹ Since not much has been said about the rules of proceedings in the legal literature dealing with NPAs, it seems reasonable again to resort to other types of associations for guidance.

5.1.1 General rules of proceedings

In addition to being applicable to resolutions that contravene the constitution, the general rules existing within the legal framework of associations are also applicable to resolutions aiming to change the constitution, that is, unless these are included in annulment cases. In these cases, Nial, addressing resolutions that conflict with the constitution within company law, exempts decisions that establish a constitutional future praxis.²⁴² One can question whether or not most constitutional changes establish a future praxis.

Faulty resolutions categorized under general rules of proceedings need to be challenged within a stipulated time in order to avoid the changes in question being implemented, and this applies even if this is not a majority decision according to the constitution or the law.²⁴³ There exists a prevailing perception that the standard three-month timeframe (from the date of resolution) for commencing general proceedings in both FL 7:17 and ABL 7:51 is not analogue applicable to NPAs.²⁴⁴ RH 2012:33 confirmed that a general claim for amendment can be filed after three months by a member or a group of members from an NPA; however, it was also made clear that if the claimant does not act within a reasonable timeframe, the member(s) will lose their chance to file a claim.²⁴⁵ What is considered to be a reasonable timeframe, one could assume, would depend on the particular circumstances of the case. Seeing that in this case the claim was made more than six years after the date of the resolution, and the Court of Appeal stated that the members, having been informed of the decision years ago, had remained passive for too long.²⁴⁶

Breaches of the general clause and the principle of equality both come under the general rules of proceedings.²⁴⁷

The normal outcome of a dispute is the revocation of the contested resolution, since the court may not at its own discretion alter a decision's content.

²⁴¹ Adlercreutz I, pages 231–232, has a good explanation for the principal difference. Also in FL 7:17, it appears that only members and so on can bring forth proceedings, but Johansson, when addressing corporations, actually writes that annulment can be claimed by anyone, even someone outside the company. One can question whether he has AvTL in mind, but this is not clear. See Johansson, 1990, page 91.

²⁴² Nial 1934, pages 73–74.

²⁴³ Prop 1986/87:7 s 141, see e.g., NJA 1970 s 394 and Petterson, page 112.

²⁴⁴ Johansson 2011, page 196; Hemström 2011, pages 133–134 and 136; Prop 1986/87:7, page 141, ref. Mallmén, pages 317–318.

²⁴⁵ RH 2012:33, ref. Hemström 2011, page 136 and Johansson 2011, page 196.

²⁴⁶ RH 2012:33.

²⁴⁷ Johansson 2011, page 118 and 160; Mallmén, page 305; and Andersson and Pehrson, page 141, ref. Stattin, pages 90–91. Here, Stattin, when addressing corporations, emphasizes the need to be able to file a claim based upon general legal principles existing within the legal framework of associations.

Modification of a decision may only be done if it can be determined what content the decision rightfully should have had, for instance, where the general assembly voted on two proposals, and where the one proposal declared adopted was not the one preferred by the majority.²⁴⁸

Stattin, dealing with ABL's rules, informs us that the general rules are not limited only to general assembly resolutions but apply also to other decisions of a similar nature. He suggests that it is possible to utilize the general rules of proceedings when one would like to bring an action regarding decisions made by the board or another corporate body that can make binding decisions on behalf of the company. That is, one can do so if the board or corporate body have received authority in the matter either through explicit or implicit delegation and unless, firstly, the decision should have been made by the general assembly according to law or the constitution but has been made by the board, or secondly, if the decision according to the principles of nonperforming exclusive General assembly competences should be taken by the general meeting but has been taken by the board of directors or other corporate bodies.²⁴⁹

In the first exception, one finds a usurpation of the general assembly's competence according to the law or the constitution, which means that the resolution/agreement/action is not legally binding and can induce tort action, while in the second case, the resolution/agreement/action will bind the company.²⁵⁰

When considering an extended application of the general rules of proceedings, Stattin puts forward three fundamental principles for analogies, firstly, that the analogy serves to realize the same purpose as its stipulated intention, secondly, that the legal area and rules enable an analogy, and thirdly, that the situational context suggest the possibility of an analogy.²⁵¹

The right to take action according to the general rules is to a certain extent unrelated to a given shareholder's action at the general assembly; however, it also seems to be that under certain conditions, one can lose this right, that is, by voting yes or by giving one's consent.²⁵² A member can give his/her consent before the decision, under or after the decision or in the form of implicit acquiescence. Implicit acquiescence can consist in the member's participation in the enforcement of the decision or, as advised in the legal literature, the member's participation in making decisions based upon the faulty resolution.²⁵³ However, Stattin suggests that participation in decision making cannot be enough; the member in question has to actively vote in accordance. Thus, if a shareholder refrains from voting, he or she is close to being perceived as not being present at the actual meeting.

²⁴⁸ NJA 1989 s 751 ref. Johansson 2011, pages 195–196; Stattin, page 104.

²⁴⁹ Stattin, pages 85–86; see also NJA 1987 s 394, where the members claimed a decision made by both the NPA's controlling and executive bodies.

²⁵⁰ Stattin, pages 85–87. Whether one can bring forward tort action is another discussion.

²⁵¹ Ibid, page 85.

²⁵² Ibid, page 93 ref. NJA 1932 s 243

²⁵³ See ex. SOU 1971:15 page 234 and 248.

Since those who are not present have not lost their right to put actions forward, Stattin is reluctant limit their right.²⁵⁴ In addition there can exist qualified cases where faulty or deceitful information has been provided and acted upon.²⁵⁵

If a member fails to act within the given timeframe stipulated, he or she loses the right to put action forward. The period of limitation normally starts when the faulty decision has been made, unless it could not be assumed that the shareholder(s) knew that the general assembly conducted a meeting and that at this meeting, decisions could be made or were made that could affect the shareholders.²⁵⁶ However, if one did not participate at the general assembly meeting, or if there was deceit involved either in the protocol or at the meeting, the time period would first start when the shareholder got to know that the decision was made. According to Stattin, this is when the decision can be seen as received by the member.²⁵⁷

5.1.2 Annulments

According to the legal literature, rules of annulment for the general assembly exist in accordance with the principles set down in FL and ABL.²⁵⁸

The rules of annulment apply when a resolution, through its creation or content, contains such a serious breach of the law or of the constitution that it is considered nonexistent.²⁵⁹

In FL 7:17, third part, there are three types of situations where one can request an annulment of a general assembly resolution in court.²⁶⁰

The first situation is when a resolution has been made that is against mandatory legal rules, and the resolution is such that it cannot be adopted, notwithstanding the unanimous consent of all members. Here one finds a type of rule that is put down in order to protect other than the members, whether they are new members, creditors, or employees of the organization. An example of this type of rule is the rules governing the composition of NPA's organs, as well as their authorizations and responsibilities.²⁶¹ It might also look like situations involving the usurpation of power belong here.²⁶²

The second situation becomes activated if consent to the resolution was required from all or some particular affected members, and no such consent was granted.²⁶³

²⁵⁴ Stattin, page 93 ref. NJA 1932 s 243.

²⁵⁵ Stattin, page 93.

²⁵⁶ Ibid, page 95.

²⁵⁷ Ibid.

²⁵⁸ Johansson 2011, page 196; Hemström 2011, pages 133–134 and 136; Prop 1986/87:7, page 141, ref. Mallmén, pages 317–318.

²⁵⁹ Prop 1986/87:7, page 141 ref. Adlercreutz I, page 229 and Petterson, page 111.

²⁶⁰ Mallmén, page 320.

²⁶¹ Prop 1986/87:7, page 141, ref. Mallmén, page 321.

²⁶² Stattin, page 96. Stattin refers to conditions for corporations and state that in practical terms, it might be better to file for damage and

²⁶³ A person present at the meeting who did not vote against the resolution can be seen as approving. See Mallmén, page 321.

An example of these decisions are those that are against certain clauses within the constitution,²⁶⁴ but possibly also when the constitution is to be amended in or from the same session where the vote has been taken seeing this affects all members.

There seems to be a confusing disunity in the legal literature in regard to whether resolutions made in disagreement with the principle of equality and/or the general clauses can fall under the second annulment rule or not. Rodhe states that decisions against mandatory rules such as the principle of equality or conflict of interest will never be valid, since no limitation exists on the timeframe for making a claim.²⁶⁵ According to Stattin, in Nerep's view, the second annulment rule should be interpreted extensively to include all rules that require all members' consent, while Stattin emphasizes the need for a restrictive interpretation, since both the history of the particular rule and its function and purpose indicate that it should be limited only to include such particular rules within the constitution that demand positive consent from all shareholders or that are particularly required by law.²⁶⁶ This perception is also shared by Andersson and Pehrson, who emphasize the need not to damage the practical economic life of the company by keeping decisions hanging in the air.²⁶⁷

Andersson and Pehrson perceive a certain disunity in Nerep and Samuelsson, who both appear to say that decisions in conflict with the principle of equality and the general clauses are categorized under the annulment rule but also under the general claim rules.²⁶⁸

In the third situation, a notice to attend the general meeting has not been given, or significant parts of the provisions governing the notice to attend the general meeting have not been complied with. In this case, there has been a serious deviation from the notice rules in FL chapter 7, sections 7 and 8. FL does not specify what serious deviations are.²⁶⁹ However, this should imply that if all members have been given a fair chance to participate in the general meeting, or if the procedural error committed has not affected the outcome of the resolution under dispute, a serious deviation from the notice rules has not happened.²⁷⁰ However, according to chapter 7, section 9 (error of notice), this type of error can be resolved with all affected members' consent.²⁷¹

²⁶⁴ See Hemström 2011, page 38 and Hemström 1972, page 15 and Petterson, page 111

²⁶⁵ Rodhe 1988, page 190. it seems that all have to agree for a deviation to exist.

²⁶⁶ Stattin, pages 98–100.

²⁶⁷ Ibid, page 100. See also Andersson and Pehrson, page 142, which emphasizes the need for shareholders and third parties to know what applies.

²⁶⁸ Andersson and Pehrson, page 141.

²⁶⁹ Prop 1986/87:7, page 141 and Mallmén, pages 318 and 321.

²⁷⁰ Prop 1986/87:7 s 128–129 ref. Mallmén, page 318, ref. Petterson, page 112. Also, left-out members who have in one way or another obtained information about the general meeting, or who have participated in the general meeting, cannot dispute a given resolution based on lack of notice. This also applies if left-out members have afterward accepted the decision or if members have had information relating to decision documents available for investigation before the general meeting but have not utilized it.

²⁷¹ Prop 1986/87:7 s 127–128 ref. Mallmén, page 266.

An example of a situation where a serious deviation from procedural rules can render a resolution void is when a general assembly makes a decision in a matter that the members have not been previously notified of and which not all members have agreed to discuss.²⁷² Situations where the chairman of the general assembly meeting states that the general assembly has made a different decision than the decision the general assembly actually made might also pending the situation belong here.²⁷³ In situations where procedural rules have been seriously breached, it might become a situation where the resolution cannot even be named a resolution.²⁷⁴ Legal theory differentiates between situations that render one single decision void and situations where all decisions can be considered void, that is, where the general assembly meeting is considered not to have occurred.²⁷⁵

In NJA 1970 s 394, which actually is an NPA expulsion case, the Supreme Court made clear that the board acted outside their power of authority when they made a decision to exclude a member, who also was a member of the board, since it is the general assembly who should decide who should be on the board. The Supreme Court stated that this decision was against the fundamentals of the constitution.²⁷⁶

5.2 Exclusions

Many of the NPA disputes taken to court and that reach The Supreme Court of Sweden seem to deal with the issue of exclusion. This might not be strange, since the act of exclusion places a member beyond the outer boundary of the membership organization. In the category of exclusions, one also finds denials of membership.²⁷⁷ In the cases I have looked at, the exclusion decisions were made either by the general assembly or by the board. While it is possible to bring proceedings against an NPA because of an expulsion on formal procedure or on substantial content grounds, expulsions do not fall under the rules of proceedings in FL 7:17 (see 2.4.2).²⁷⁸ Seeing the amount of material and the complexity of the issue, it has been necessary not to proceed further in this subject at this time. There are extensive works on the subject of expulsions from NPAs; see, for example, Hemström, 1977 and Petersén, Maria's essay discussing expulsion from sport associations.²⁷⁹

²⁷² Prop 1986/87:7 s 127–128 and 141, ref. Mallmén, page 266. Here it also applies that even if the subject of discussion has been included in the given notice, if the resolution made clearly deviates from the suggestion proposed, and this affects other members who are not present, then the affected members should consent to the deviation.

²⁷³ Skog, Rolf, Rodhe, Knut, Rodhes Aktiebolagsrätt, 2006, page 254.

²⁷⁴ Another example is when a number of members, who are not entitled to vote members, vote at the given general meeting. Prop 1986/87:7 s 141, Mallmén, page 322 and Johansson 2011, page 193.

²⁷⁵ Stattin, page 101, and Adlercreutz I, page 232. Theoretically, one should also find situations that Adlercreutz names as partial invalidity, in that just part of a resolution is perceived valid.

²⁷⁶ NJA 1970 s 394.

²⁷⁷ NJA 1948 s 513.

²⁷⁸ NJA 1973 s 355 and NJA 1998 s 293 and Hemström 2011, page 135 ref. Mallmén, pages 144, 317, and 319. Mallmén makes it clear that one has to be a member at the time of the claim in order to fall under the rules of proceedings in FL and that there exists no explicit legal rule regulating the right to challenge an expulsion in court.

²⁷⁹ Petersén, Maria, Rättsskyddet som idrottare - Rätten att få ett uteslutningsbeslut prövat i domstol 2013.

6. Conclusive remarks

This research has made clear that the legal framework of NPA general assembly resolutions consists of (1) mandatory rules that an NPA must include in its constitution in order to become a legal entity, (2) the implications of freedom of association, and (3) general principles of law applicable to all associations. This chapter will sum up these findings and conclude.

6.1 Requirements for becoming a legal entity

This investigation has revealed that in order to become a legal entity an NPA must have a hierarchical organizational structure and must have adopted a formal constitution of certain completeness.

6.1.1 The whereabouts of a hierarchical organization

In order to become a legal entity, an NPA must have a general assembly and a board selected by that assembly. Since functionality determines what constitutes a board, the board of an NPA might consist of only one person. However, the board must carry the normal responsibilities of a board and perform the same tasks as a board, namely being responsible for the affairs of the NPA and promoting the NPA's interests.

An NPA whose constitution allows for a board and which normally has one, but are temporary without, can for a limited period be perceived by the court to be a non-complete legal entity, which can be a respondent a court case.

The board must be subordinate and accountable to the general assembly and must be granted freedom from liability by the general assembly. While the general assembly can select a board, the board cannot select a general assembly or the delegates to it. The general assembly can delegate extended authority to the board to a certain extent.

6.1.2 A formal constitution

An NPA must have adopted a formal constitution in order to be considered a legal entity. However, under certain circumstances, such as when a section of an trade association or labor market organization starts to act more and more on its own so that the power of the NPA is decentralized and the section's ability to make its own decisions increases, there could be situations that resemble AD 1972:1, in which a section without its own constitution, although regulated in the parent association constitution, was perceived to be a legal entity on its own.

Verbal agreements and internal customs might, to a certain extent, fill the gaps when it comes to praxises but cannot replace a written constitution of certain completeness.

6.1.3 Necessary rules in a constitution of certain completeness

In order for a constitution to be of certain completeness, the constitution must include the association's name, the NPA's aim and reveal how decisions concerning its affairs are made.

The constitution must specify the aim of the association. The aim must be detailed and clear enough to allow identification of the NPA's particularity and enable members and third parties to relate to the aim. In order for the board to be granted freedom from liability and to assure that the general assembly stays within the aim, an evaluation of conduct based on the aim must be possible.

Based on KamR 3690-12, the constitution should delineate when decisions are to be made, by whom they will be made, and how they will be made. The constitution must state what constitutes the general assembly, how general assembly delegates are selected by the members, the frequency and time of general assembly meetings, and the process by which resolutions are made. The constitution must specify if and when rules stricter than majority rule are applicable. The constitution must also reveal how changes to the constitution are to be made by the general assembly. It must also be clear about how the board is selected by the general assembly and for how long a period of time. The constitution must indicate how many will be on the board and give the rules for substitutes. Information must be given in regard to how decisions are made on the board in cases when rules stricter than majority rule apply. The constitution must indicate if there are any limitations or expansions of the board's authority to make decisions. It must also include rules in regard to accounting. Third parties should have information in regard to the accounting year and the timing of the adoption of the accounts. The constitution must therefore as a minimum include information about the annual general meetings. Rules regarding claims and extraordinary general assembly meetings should also be included in the constitution, but analogies based on FL can probably function as a filler of the gaps in the absence of clauses. It seems plausible that the constitution must advise in regard to decisions about dissolution.

In principle, then, in a constitution of certain completeness, the NPA must regulate controlling functions (accounting), determining functions (general assembly meetings), and executive functions (the board).

6.2 The implication of freedom of association

It has been made clear that freedom of association is not to be perceived as freedom from the law. Instead, the freedom of association seems to enable members to establish an association with an aim of their liking and to do this without adhering to rules in regard to the necessity of profit.

However, once an association has been established as a legal entity the members are compelled to not deviate beyond what can be expected from the aim.

In addition, the freedom of association enables a nonprofit association that would like to become a legal entity to choose among the available forms of legal entities. All legal entity forms come with pre-set rules, and this also applies to the form of NPA.

6.2.1.1 Freedom of association and general assembly resolutions

The implication of freedom of association seems to be that NPAs are by default open associations. This means that if an NPA does not want to be an open association, this should be spelled out in its constitution. However, the question arises whether a general assembly can deny someone membership based on internal praxis or type-specific custom. Nowadays, in the absence of rulings to guide, this might very well be the case. It also seems less likely that an NPA can consist only of the persons who established it, but again the absence of cases makes this difficult to determine. A general assembly cannot set down rules or issue resolutions that deny members the right to leave the association.

The freedom of association also seems to limit the right of a general assembly to automatically assign members to a new section of for example an labor market organization or trade association or to enforce stricter rules than were previously agreed on without consent of the affected members. The freedom of association protects people from being forced into joining an association.

6.3 General principles of law applicable to general assembly meetings

This analysis has revealed that as a minimum the general clause and the principles of equal treatment, majority rule, and conflict of interest are all applicable to the NPA general assembly meeting.

The general clauses, most likely included in the principle of equal treatment, the principle of equal treatment and majority rule seem to have originated in NPAs. Thus, praxes previously set down in law for companies and economic associations seem to have emerged in NPAs but in a more democratic form. They are more democratic because the possibilities for deviating from these principles were probably more limited than what can be seen in associations with an economic aim today.

While majority rule functions as the basis for a democratic decision-making process, the general clauses, the principle of equal treatment and that of conflict of interest together form the minority protection rules. These rules are primarily intended to protect members from abuse, but in practicality they also protect the association itself and third parties since without this protection neither the association nor third parties can ensure continuous activity in the interest of the association.

6.4 The effect of applicable general principles of law on the decision- making process

6.4.1 The principle of equal treatment

It does not seem possible to deviate from the principle of equal treatment when it comes to the members' right to participate and vote at a general assembly meeting. Thus, all members of NPAs must necessarily enjoy the same right to participate in the management of the association's affairs at the general assembly meeting. In order to do so, each member must receive the same information as other members in regard to when the meeting will be. This notification must include information about where and when the meeting will take place and must be received in due time before the meeting. The time and the place of the general assembly meeting must be selected with the intention of securing the participation of all members. The principle of equality should also ensure that members have access to the same information at approximately the same time.

In order for members to participate in the meeting, they must have access to the necessary documents needed to prepare themselves. Therefore, all members must have access to or receive an agenda in due time before the general assembly meeting. This agenda must have a fixed order of the matters to be addressed at the general meeting. The order of cases cannot be changed without the approval of all members or delegates present at the meeting.

The general assembly can consist of NPA members or delegates. If the general assembly consists of delegates, these delegates must have been selected by the members. Each member/delegate has one vote and an equal right to have his or her voice heard at the general assembly meeting. Following the reasoning of Johansson, a member cannot be denied the right to have his or her motion heard at a general assembly.

In order for all members to enjoy the same right to participate in the general assembly meeting, members who are not present at the meeting must be given a fair opportunity to bring forth proceedings in response to faulty resolutions.

6.4.2 Majority rule

For the general assembly meeting, majority rule is a minimum requirement, which implies that resolutions are made by simple majority unless law or the constitution demands more. Serious decisions such as changes in the nature, aim, or purpose of operations stated in the constitution or clear deviations from the aim of an NPA seem to require consent from at least 9/10 of all members.

6.4.3 Conflicts of interest

The implication of the conflict of interest rule on the general assembly meeting seems to be twofold. In the first category are conflict of interest situations which arise before the general assembly meeting has taken place, but which influence its decision-making.

Here the conflict of interest principle means that a board cannot make suggestions to the general assembly when a conflict of interest situation exists within the same board. In situations where a conflict of interest can be an issue for the board in making a decision, that particular issue should by default be transferred to the general assembly.

In the second category are situations that arise at the general meeting. For general assemblies, the conflict of interest rule seems to apply mainly to questions of liability. Thus, a board member cannot vote on his or her own freedom from liability. Then in practical terms it seems likely that a chairman cannot be a sitting chairman in matters that affect his or her own liability. In such situations, people should have the right to express themselves, but it would be better for the association if they leave the room after that.

Since the conflict of interest rules only target situations where one or more persons have an interest that may be in conflict with the interest of the NPA, it may be possible to deviate from the conflict of interest rule when all affected members agree.

6.5 The effect of applicable general principles of law on the material content of a general assembly resolution

6.5.1 The principle of equal treatment

The principle of equal treatment ensures that members are dealt with fairly. However, while unfair actions or decisions and improper favoritism or discrimination against certain members are prohibited, a general assembly might occasionally issue resolutions that deal differently with certain members when there are objective reasons for doing so. When considering what would count as objective, justifiable reasons, one should take into account the relative strength of the reasons provided, the number and frequency of deviation, the period, and the actual member advantages or disadvantages in comparison to other members in a particular case. Consideration should be given to the possible need for stronger reasons for deviation from the principle of equal treatment in NPAs, so the need to aim for the most eligible solution might be higher. Still, all members cannot expect to benefit alike from all resolutions.

While it is possible to set aside the constitutional principle of equal treatment with the consent of all the members, one can but wonder to what extent this can apply, given the strength of the principle, which is a long-standing custom, and the possibility of rendering a constitutional clause void.

6.5.2 The general clause

The general clause ensures that the general assembly cannot adopt resolutions that aim at providing someone else, even a member, with an undue advantage at the expense of the NPA; nor can the general assembly issue resolutions aimed at providing an undue advantage for some members to the disadvantage of other members. Resolutions whose content contradicts the aim or purpose of operations might also fall under the general clause.

In the context of the general assembly meeting, it seems possible to set aside the general clause with the consent of all affected members at a given time. There must be sufficient reasons for setting aside the principle. In order for the general clause to be set aside, the resolution in question must not aim to enable an undue advantage to a member to other members disadvantage or provide an undue advantage to someone else at members or the association's disadvantage. If there are sufficient reasons for doing so, a resolution setting aside the general clause with the consent of all affected members can be revoked.

6.6 Options for proceedings in response to a faulty resolution

Fundamental legal principles give members, the board, and the managing director the right to initiate proceedings against an NPA before a court of general jurisdiction in order to set aside or amend a resolution that has not been adopted in due order or that contravenes the law, the constitution, or general principles of law. In doing this, one can to certain extent draw on an analogy with the legal rules of proceedings in FL and ABL or the generally weaker annulment rules of AvtL. The fault must be significant *in casu* in order for the rules to apply.

The right to take action exists unless members have voted in favor of the faulty resolution or given their consent. A member can give his or her consent before the decision, under the decision, or after the decision in the form of implicit acquiescence. Implicit acquiescence can consist of the member's participation in the enforcement of the faulty resolution or in making decisions based on a faulty resolution.

The normal outcome of a dispute is the revocation of the contested resolution. Modification can only be made if it can be determined what content the decision rightfully should have had.

If a member fails to act within a given time frame, he or she loses the right to put an action forward. For members participating in the actual general assembly, the period of limitation, depending on the situation, can be expected to start when the faulty resolution is made. For other members, the period seems to start when they become aware that the protocol is available.

It may be possible to derogate the rules of proceedings by contract with the consent of all members. However, it does not seem to be possible to derogate the rules of proceedings to such extent that members are not able to exercise their right to participate in the affairs of the NPA. The limitation must be reasonable and still allow all members, both delegates and other members, to initiate proceedings.

6.6.1 General rules of proceedings

Under the general rules of proceedings are all the following situations with the exception of what is said in section 6.6.2 below.

Faulty resolutions categorized under the general rules of proceedings need to be challenged within a stipulated time in order to avoid changes in question being implemented. It seems clear that the time frame of three months required in FL does not apply to NPAs. What counts as stipulated time is not clear, but six years is too long a time. The Supreme Court in RH 2012:33 set forth the concept of reasonable time. It seems plausible that what counts as reasonable would depend on the particular situation.

Generally, changes in the constitution made in disagreement with the procedure set forth in the constitution count as formal errors and can be considered under general rules of proceedings. It seems clear that a resolution issued in disagreement with the principles of equality and conflict of interest can be faulted. It is not entirely clear which rules apply. It seems plausible that non-intentional, non-regular, and non-serious faults fall under general rules of proceedings. It is unclear whether breaches of majority rule fall under general rules of proceedings or annulment rules. (See the discussion of these principles in section 6.6.2.) It seems clear that when the constitution or the law has requirements in regard to which majority should apply, deviations from these requirements fall under general rules of proceedings.

Generally, resolutions whose content contradicts the constitution count as material errors and are governed by general rules of proceedings. It seems clear that a resolution whose content contravenes the principle of equality and the general clause can be faulted. However, it is not entirely clear which rules apply. It seems plausible that non-intentional, non-regular, and non-serious faults fall under the general rules of proceedings. (For discussion see 6.6.2.)

It seems clear that resolutions that directly or indirectly force someone to join an association or that deny members the right to leave the association can be faulted in accordance with ex. NJA 1958 s 438 and NJA 1982 s 853. Because of the delimitation of this essay, it will not address this issue any further given the need for careful discussion of expulsion cases.

6.6.2 Annulment rules

According to the legal literature, rules of annulment exist in accordance with principles in FL and ABL. Rules of annulment apply to any resolution that through its creation or content contains such a serious breach of the law or the constitution that the resolution can be considered non-existing.

FL 7:17 differs according to three different situations in which annulment rules can be activated.

(1) The first situation involves rules that aim to protect people other than the members, whether they are new members, creditors, or employees of the organization. The literature mentions rules governing the composition of NPA organs as well as their authorization and responsibilities. These relate to usurpation of power and include resolutions that cannot be adopted even with the consent of all members. While the legal literature is silent on the matter, it seems that certain breaches of majority rule fit into this group. Although Hemström and others mention nondemocratic NPAs, it does not seem possible for such an association to exist as a legal entity in the form of an NPA. Due to the combination of mandatory requirements for becoming an NPA in the first place and the general principles of law, it might seem that nondemocratic nonprofit associations must choose to adopt a form of legal entity other than that of an NPA. Becoming an NPA activates a certain set of expectations, one of which is majority rule. This may apply more to resolutions that address constitutional rules than to the question of a non-intentional minority ruling. Even though there is a lack of case law and support in the legal literature, it does not seem unreasonable to believe that a resolution mistakenly issued with less than a simple majority should be claimed to be in accordance with the general rules of proceedings.

(2) In the second situation, consent to the resolution was required from all the members or from the affected members, but no such consent was granted. While there may appear to be disunity in the legal literature regarding how to classify such a situation, this might not necessarily be the case. Given the importance of an NPAs aim as both a tool of identification and a means of evaluation as well as a guide to the establishment of the contractual relationship in the first place, it seems that if an organ of an NPA is going to undertake actions that are clearly foreign to the aims or objectives for operations, this would require the consent of all the members. Based on what has already been said (see 2.4.3, 3.5.2.2 and 4.4.4.2), a constitutional change in the aim without the consent of all members or the undertaking of a clearly foreign action should be governed by the annulment rules. Seeing that this will most likely be a resolution that can be categorized as a breach of the general clause, such breaches should fall under the second annulment clause. This perception is in line with Rodhe, who considers both the general clause and the principle of equal treatment to be under the umbrella of equal treatment. Deviations from the principle of equal treatment might be categorized as annulment cases in situations involving members' right to participate and vote at a general assembly meeting. Rodhe also states that situations that violate the principle of conflict of interest must follow the annulment rules.

Deviation from the conflict of interest principle is possible if all the members agree. However, in some cases there may be sufficient reasons to set aside consent.

In some cases where the general assembly accepts a proposal put forward by the board the conflict of interest situation might be of such a serious nature that the resolution, therefore, can be perceived as non-existing. In conclusion, then one might infer that the perceived disunity in Nerep and Samuelson indicates greater complexity when it comes to the question of whether fundamental principles come under the rules of annulment or not. It might turn out that in the case of single or occasional mistakes these situations, depending on their nature, should follow the general rules of proceedings while intentional, regular, and serious breaches might activate annulment rules.

(3) In the third group are serious breaches in formal procedure (e.g., situations where notice to attend the general meeting has not been given or significant parts of the provision governing the notice have not been complied with). However, if members have been given a fair possibility of participating and voting or if the procedural error has not affected the outcome in the resolution under dispute, a serious deviation from notice rules has not occurred. This group also includes situations where the general assembly issues a resolution concerning a matter about which members have not been notified and which not all members have agreed to discuss. It also seems that situations where those who have voted were not members can be included. In some situations, all decisions made can be considered void because the general assembly meeting suffered from such serious errors that it is considered as non-existing.

6.7 Final comments

This research has revealed that even in the absence of law there is law. The deep principles of law that regulate NPAs might not always be visible for association members. Therefore, this essay represents an attempt to identify which rules apply and to make those rules visible. It is my personal view that when the rules are visible, then everyone knows how to play the game.

Because of the lack of case law and the limitations of the legal literature dealing with the legal framework of nonprofit associations, some of the findings of this investigation may be surprising: This analysis showed that in order for an association to become a legal entity in the form of an NPA, it must have a hierarchical structure with a board and a general assembly. The NPA must conduct annual general meetings or similar. The NPA must be of a democratic nature. The NPA is not at liberty to abandon majority rule. The freedom of association that a legal entity has to decide internal matters is, in practically, quite limited in its power. This limitation, however, is not perceived as a limitation by legal authorities, but mainly as minority protection rules intended to protect members and third parties against abuse. The effect of the principle of equal treatment is profound. And finally, probably in particular because of the more democratic nature of NPAs, their members have extensive rights to take actions in response to faulty resolutions.

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