

REPRESENTATION AND DELIBERATION: DOES EVERY VOTE HAVE THE SAME INFLUENCE IN THE VOTING PROCESS OF ASSOCIATIONS?

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ABSTRACT

Voting rights and deliberation in civil associations is one of the most debated themes in Private Law. This essay outlines the possibility of giving different weight to the right to vote in civil associations, in civil law and common systems. The objective is to justify in an empirical way the different criteria in which associates could have particular types of voting rights, via a political overview. Dealing with the democratic theory of representation, one of the main concerns to be highlighted is the effect of political and democratic values in civil associations to justify the voting process. To achieve the goal, an initial analysis on the contemporary democratic theory will be explored and, as a consequence, some elements will provide us with some parameters to understand how associates could have particular voting rights.

Keywords: Associations, voting rights, different voting criteria, representation, deliberation

I. THE DRIVING FORCE OF SOCIAL GROUPS: FREEDOM OF ASSOCIATION

The proposed analysis of the theme of different voting criteria in associations will adopt as its starting point and theoretical background the study of the contemporary democratic theory on representation, participation and deliberation. From this conception it will be possible to address the dogmatic and investigative aspects related to that specific type of legal person.

And maybe the first attempt to elucidate the reasons why different voting criteria can be admitted in associations should start from an opportune

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predicament posed by Cass Sunstein¹. Let us suppose that freedom has a special and independent *status* in society; and, instead of common good, freedom is the true objective to be pursued. In this hypothetical scenario, the individuals – or, in this case, the associates – would have the full right to freedom, while the State would not be allowed to legitimately interfere in a private field of activity even if there is a perception that this would be the most appropriate decision.

Common purposes or the affinity of ideals are inevitably the elements of intersection that justify, to a certain degree, that individuals receive from the State a desired degree of freedom in order to join their efforts seeking the satisfaction of their own interests. These, on their turn, are sometimes based on unconscious collective representations and symbols², which contribute to self-comprehension and self-realization, or derive from historical, economic, political and social manifestations³. And these individuals are, invariably, assembled as guilds, clubs, leagues, sects, groups, parties, cooperatives, unions and associations, depending on the time in which they appeared and the motivation behind their assembling⁴. An association consists, therefore, in the public adherence of a certain number of individuals to specific ideals and their commitment to contribute for their maintenance⁵.

The freedom of association is, thus, an extension of private autonomy and, although it was only included in the Brazilian legal order as a constitutional guarantee in the 1891 Constitution (art. 72), it represents a social phenomenon that precedes the Declarations of Rights and the Constitutions of the 19th Century. Under another approach, the granting of legal personality to these social formations is a recent factor, which only fully occurred in the 20th Century, after the Second World War⁶.

Somehow, a certain degree of detachment from the State allowed groups of individuals to not only realize their freedom of association, but also to use it to make other freedoms more viable, such as the freedom of expression, of

1. See CASS R. SUNSTEIN, *WHY NUDGE?: THE POLITICS OF LIBERTARIAN PATERNALISM* (2014).

2. See CARL G. ET AL. JUNG, *O HOMEM E SEUS SÍMBOLOS* (Maria Lúcia Pinho tran., 2 ed. 2008).

3. KARL POLANYI, *A GRANDE TRANSFORMAÇÃO: AS ORIGENS DE NOSSA ÉPOCA* (Fanny Wrobel tran., 14 ed. 2000).

4. ERIC J. HOBBSBAWN, *A ERA DAS REVOLUÇÕES: EUROPA, 1789-1848* (M Teixeira, MTL; Penchel tran., 14 ed. 2000).

5. FRANCESCO FERRARA, *TEORÍA DE LAS PERSONAS JURÍDICAS* (Eduardo Ovejero y Maury tran., 2 ed. 2009).

6. Ángel J. Gómez Montoro, *Veinticinco años de derecho de asociación*, 58-59 REV. DERECHO POLÍTICO 241-267 (2003).

religion, and of conscience. Alexis de Tocqueville believed that “the right of association was, therefore, almost entangled with the freedom of writing” and “bore more force than the press”, which allowed “citizens to use it for different purposes”⁷. This means that the freedom of association is one of the instruments for obtaining other fundamental rights, as it involves the possibility of creating, adhering to, being disassociated from and dissolving an association, without the need of State participation or authorization, generally speaking. The State, therefore, does not have the option to interfere in the freedom of organization and functioning of an association, and is only allowed to extinguish it in situations of extreme exceptionality, subject to a final decision by the court (Art. 5, XIX, Federal Constitution)⁸.

The Brazilian Constitutions, in more or less degree, persisted with the protection of this fundamental right, capable of upholding the emergence of voluntary associations of individuals, for long or short periods, aimed at the attainment of common purposes through a variable body of members.

II. THE INCORPORATION OF THE ASSOCIATIVE EVENT

The key aspect to the formation of associations is the identification of a voluntary and spontaneous act, through a confluence of members – individuals or corporations – along with a legal purpose, and the stability and continuity of its activities⁹. It would certainly not be possible to give legal protection to a sporadic and occasional group of individuals, with erratic objectives¹⁰.

For the purpose of observing the constitutional guarantee of freedom, the granting of legal personality, with its own patrimony and domicile, does not encapsulate an indispensable requisite for associations; however, as an attribute granted by the legal order to such groups, it represents a technical construction destined to favor an inevitable contingency of life in society: the

7. See ALEXIS DE TOCQUEVILLE, *Livro I A DEMOCRACIA NA AMÉRICA: LEIS E COSTUMES* (Eduardo Brandão tran., 2 ed. 2001).

8. PABLO SALVADOR CODERCH, INGO VON MÜNCH & JOSEP FERRER I RIBA, *ASOCIACIONES, DERECHOS FUNDAMENTALES Y AUTONOMÍA PRIVADA* (1997).

9. JOSÉ EDUARDO SABO PAES, *FUNDAÇÕES, ASSOCIAÇÕES E ENTIDADES DE INTERESSE SOCIAL: ASPECTOS JURÍDICOS, ADMINISTRATIVOS, CONTÁBEIS E TRIBUTÁRIOS* (7 ed. 2010).

10. And one of the explanations for that fact is presented by Cass Sunstein “as means of collective self-organization and a precondition for personal self-development, rights are naturally costly to enforce and protect”. STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (2000).

associative event¹¹. If the freedom of association were conditioned to the incorporation, the State could use it as a means to restrict it, which would be a contradiction in terms of the protection of fundamental rights and guarantees. It is clear that the constitutional references to the freedom of association are not limited to securing the choice for the free incorporation or not of corporations and, especially, of associations¹². They also establish some fundamental rules regarding their autonomy and functioning, with direct consequences in the interpretation and application of the Civil Code¹³. In clarifying that aspect, it is worth-remembering that the US Supreme Court, in 1958, in the judgment of a case of the *NAACP (National Association for the Advancement of Colored People) v. Alabama*, dismissed the possibility that the State should reveal to the General Prosecutor the names, addresses and positions of all association members residing in the state, as it was an association of legal purposes, even though it was not endowed with legal personality¹⁴.

The attainment of common objectives by joining efforts would be absolutely unfeasible if it started from the exclusive premise of the mere combination of individual behaviors and donation of goods¹⁵, reason why the incorporation was conceived as the means for a person under the law to become the holder of rights and obligations¹⁶. And the institution of legal incorporation only evidenced its usefulness and practical application when

11. See HANS KELSEN, *TEORIA PURA DO DIREITO* TRAD. JOÃO BAPTISTA MACHADO (João Baptista Machado tran., 4 ed. 2000).

12. The Italian Civil Code is one of the few to discipline unincorporated associations at Art. 36, “L’ordinamento interno e l’amministrazione delle associazioni non riconosciute come persone giuridiche sono regolati dagli accordi degli associati”. Available at: <<http://www.altalex.com/documents/news/2013/04/11/delle-persone-giuridiche>>; Access on June 13, 2015.

13. ANTÓNIO MENEZES CORDEIRO, *TRATADO DE DIREITO CIVIL PORTUGUÊS I, TOMO III* (2 ed. 2007).

14. GEOFFREY R.; STONE, CASS R.; SUNSTEIN & MARK V.; ET AL. *TUSHNET, CONSTITUTIONAL LAW* (7 ed. 2013); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* (2004).

15. In relation to the goods, Henry Smith underlines that the Private Law deals with an infinity of interactions between persons in the society and, therefore, the property is its true platform, given that it is one of the main forms of organization of these relationships. Henry E. SMITH, *Property as the law of things.*, 125 *HARV. LAW REV.*, 1681 e 1683 (2012).

16. F. C. PONTES DE MIRANDA, *I TRATADO DE DIREITO PRIVADO* (1999).

faced with the own interests of the institution created, which, generally speaking, should be of public character¹⁷, not limited to its own members¹⁸.

In the past, there was little distinction between associations and civil societies; however, with the specialization of certain activities closer to the associations, the economic objective, when exclusively destined for profit, was imputed as their distinguishing element¹⁹. With that, the associations were largely related to the philanthropic, religious, cultural and social character of their functions²⁰.

Ferrara, in opposition to the majority of the doctrine, preferred to use the objective and variability of the number of associates as criteria for the distinction, so that he contests the non-economic nature of the activities as the distinguishing element between societies and associations, since it would be completely admissible to carry out economic activities to the benefit of the attainment of their own objectives, as long as they do not seek profit exclusively with the purpose of distributing it among its members²¹.

And, indeed, the non-exercise of economic activity should not be considered a determining factor of associations²². First, because of the inappropriate confusion between the concepts of economic activity and exclusively profitable purpose²³. Second, because there is nothing that prevents them from performing economic activities linked to their own objectives²⁴. And third, there is no obstacle to the exercise of organized and customary economic activities, destined for the circulation of money by an

17. Although Duncan Kennedy and the *Critical Legal Studies* movement correctly indicate the decline of the public/private distinction, they occasionally appear correlated. Duncan Kennedy, *Form and substance in private law adjudication*, 89 HARV. LAW REV. 1685, 1351 (1976).

18. FÁBIO KONDER COMPARATO & CALIXTO SALOMÃO FILHO, *O PODER DE CONTROLE NA SOCIEDADE ANÔNIMA* (4 ed. 2005).

19. Rachel Sztajn, *Associações e sociedades*, 21 REV. DIREITO PRIV. 223 (2005).; PEDRO PAIS DE VASCONCELOS, *TEORIA GERAL DO DIREITO CIVIL* (2003).

20. Graciano Pinheiro de Siqueira, *O registro civil das pessoas jurídicas e o registro das associações e fundações*, 2 REV. DIREITO TERC. SET. 1–12 (2007).

21. Ferrara, *supra* note 5.

22. GIUSEPPE TAMBURRINO, *PERSONE GIURIDICHE E ASSOCIAZIONI NON RICONOSCIUTE* COMITATI 132 (1980).

23. Rodrigo Xavier Leonardo, in a remarkable Ph.D. thesis, uses the methodology of typological thinking to point out the common characteristics that would allow associations to be defined from a specific element. Rodrigo Xavier Leonardo, *As associações em sentido estrito no direito privado*, 2006.

24. Incidentally, this is one of the hypotheses linked to the tax immunity of not-for-profit welfare associations, acknowledged by art. 150, VI, “c”, of the FC, and endorsed by the jurisprudence of the Federal Supreme Court (AgRg/AI 785,459/RS, Rapp. Justice Celso de Mello, 2nd Panel, DJe 19.12.2011).

association, i.e. its characterization as a *company*, as long as this is not the main reason for its existence and the profit is not distributed among its associates.

The 2002 Brazilian Civil Code decided to follow the doctrinal approach whose parameter of distinction is linked to the exercise of non-economic activity by the association, in detriment of the essence of its field of activity (Arts. 53 and 981)²⁵. On the other hand, the new Argentinean Civil Code, whose *vacatio legis* finishes on August 1st, 2015, was more specific in the legislative technique and adopted both criteria of definition in its Art. 168, considering “it cannot pursue profit as its main purpose, nor have the purpose of obtaining profit for its own members or third parties”²⁶.

This might be an aspect of the 2002 Brazilian Civil Code to be criticized, since by adopting in Art. 53 the criteria of non-economic purpose as the distinction from societies²⁷, the legislator ended up gathering under the same discipline all types of association, however specific its statutory objectives and activities might be (class, religious²⁸, sports, cultural, philanthropic entities). By ignoring the criterion of purpose proposed by Ferrara, the legislator intuitively influenced the margin of discretion of restrictions for the admission of associates in view of their affinity with the association’s objectives, in such way that this aspect should be the object of specific treatment by the statute (art. 54), which will be subject to the normative

25. Clóvis Bevilacqua already indicated that criterion in relation to the 1916 CC, CLOVIS BEVILAQUA, I CÓDIGO CIVIL DOS ESTADOS UNIDOS DO BRASIL (9 ed. 1953). Likewise, HELITA B. CUSTÓDIO, ASSOCIAÇÕES E FUNDAÇÕES DE UTILIDADE PÚBLICA (1979).

26. Art. 168. Object. The civil association should have an objective that is not against the general interest or the common good. The general interest is interpreted as the respect to the several identities, beliefs and traditions, whether of cultural, religious, artistic, literary, social, political or ethnic nature, which do not violate the constitutional values. It cannot pursue profit as its main purpose, nor have the purpose of obtaining profit for its members or third parties. Available at: <<http://www.notarfor.com.ar/codigo-civil-comercial-unificado/articulo-170.php>>, Access on: June 11, 2015.

27. It is important to note that the criticism made here has no relationship with its denial to make an economic analysis of Private Law, which is essential for the understanding of certain implications of legal decisions and legal institutes, as observed by Mariana Pargendler & Bruno M. Salama, *Law and economics in the civil law world: the case of Brazilian Courts*, 117 SSRN ELECTRON. J., 2 e 5 (2014).

28. And although Law 10,825/03 has altered art. 44 of the Civil Code to admit religious organizations to be considered as a special category of legal person of private law, despite also being capable of being organized as an association, the differences between the legal regimes are so evident that they will not be analyzed. For a better comprehension of the legal regime of religious organizations in Brazil, see Paulo Sanches Campos, *As associações no novo Código Civil e a liberdade de religião*, 819 REV. TRIB. 77–85 (2004). Antônio Chaves, *Natureza jurídica das associações religiosas*, 3 DOUTRINAS ESSENC. DIREITO CIV. 793 (2010).

control of the distinction²⁹. And although Perlingieri supports the existence of a principle of democracy within the associations, aimed at allowing the full development and participation of its members, it does not seem to contradict the doctrinal position of the majority in relation to the viability of imposing restrictions to the admissibility of members³⁰.

However, before the delimitation of the core characteristic of associations, an intense debate was held on the existence or not of the legal person *per se* considered, as a category protected by the legal order³¹. The fact that it is composed by individuals and the difficulty in separating the acts practiced by each of them from those attributed to the entity has given rise to a number of theories to explain the normative bases of the legal person³². As a whole, two major categories analyze the status of the legal person: one that denies its existence (*fiction*), and another that reaffirms its autonomous character from its members (*reality*).³³ Strictly speaking, in the current stage of development of the legal-dogmatic framework of the theory of legal persons, it would make little sense to re-examine each of the doctrinarian

29. CELSO A. BANDEIRA DE MELLO, O CONTEÚDO JURÍDICO DO PRINCÍPIO DA IGUALDADE (3 ed. 2000).

30. PIETRO PERLINGIERI (ORG.), MANUALE DI DIRITTO CIVILE (6 ed. 2007). Gazzoni notes that the freedom of association of art. 18 of the Italian Constitution refers to relationships with the State, which does not mean that it is reproduced under the same terms in the internal environment of associations, because there it is possible to have free choice over whoever will meet the requirements to be accepted as a member or not. FRANCESCO GAZZONI, MANUALE DI DIRITTO PRIVATO (14 ed. 2009).

31. Ana de Oliveira Frazão, *Aspectos funcionais da personalidade jurídica de direito privado das organizações sociais e das organizações da sociedade civil de interesse público*, in O NOVO DIREITO ADMINISTRATIVO BRASILEIRO (Cláudia Fernanda de Oliveira. Pereira ed., 2010).

32. MARLON TOMAZETTE, CURSO DE DIREITO EMPRESARIAL (2012). Max Kaser notes that “the Ancient times did not recognize this idea. However, the Romans noticed that there can be a plurality of people, capable of having a collective will and whose patrimony differs from that of the members and is, therefore, subtracted to the disposal of each of them [...] But the Romans did not see these associations as separate legal person from their members, but understood the universality of their respective members as holders of rights, analogous of the “common hand” in the German law. With this, it is compatible that the patrimony of the universality is kept rigorously separated and that the universality have individuals specially named to its functions, who are its legal representative.” MAX KASER, DIREITO PRIVADO ROMANO (Samuel Rodrigues e Ferdinand Hämmerle tran., 2011).

33. To Konder Comparato and Salomão Filho, it is no coincidence that the German Pandectists of the 19th Century have followed the theories of reality and fiction when developing the concept of legal person, not to mention the circumstances in which the term was first used at that time. COMPARATO AND SALOMÃO FILHO, *supra* note 18.

currents and their specificities around the acknowledgement or not of an entity endowed with the capacity of practicing legal acts³⁴.

It is important to note, however, that the idealization of a legal person does not originate from an arbitrariness of the legislator or from an unmeasured voluntarism, but it corresponds to a reality, a social need³⁵. To Konder Comparato and Salomão Filho, the “expression ‘legal person’, as already mentioned, is a conspicuous example of ‘incomplete symbol’”, i.e. “outside the normative context in which it can be inserted, it does not indicate anything precisely”³⁶. Therefore, the incorporation of groups is a technical-legal construction (*theory of technical reality*), and not a fiction, which ensures them the capacity to exercise activities that justify their constitution³⁷.

With the definition of this scenario, two main characteristics of legal persons can be noted, the autonomous legal capacity and the separation of their patrimony in relation to the patrimony of their members³⁸. While legal capacity confers aptitude to contract obligations and acquire rights, the limitation of responsibility and the patrimonial separation ensure that the goods of the associates do not answer for the obligations of the legal person, except for the exceptional hypotheses of disregard of legal entity or piercing the veil³⁹. It must be emphasized that the granting of legal personality, aimed at fostering the performance of legal relations, only justifies the patrimonial autonomy of the effective organization in relation to the exclusive interests of the entity, and not in relation to particular pleas of its members, reason why the disregard should be considered an exceptionality⁴⁰.

34. For a closer analysis of the theories on legal persons, see *Ferrara, supra* note 5.

35. FÁBIO ULHOA COELHO, *DESCONSIDERAÇÃO DA PERSONALIDADE JURÍDICA* (1989).

36. *Comparato & Salomão Filho, supra* note 18. Curiously, the reference to the concept of legal person as a symbol is also found in NIKLAS LUHMANN, *INTRODUCTION TO SYSTEMS THEORY* (Peter Gilgen tran., 2013).

37. *Ferrara, supra* note 5.; *Tomazette, supra* note 32.

38. MacCormick supports this condition of legal persons, considering “in so far as corporate status is explicitly conferred by law on particular appointed or elected bodies, and in so far as it results from incorporation by statutory procedures (through exercises of power by persons with appropriate capacity) under legislation about incorporated companies, the corporate persons which result therefrom have in principle the full range of capacity appropriate to their corporate character.” NEIL MACCORMICK, *INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY LAW, STATE, AND PRACTICAL REASON* (2008).

39. Ana de Oliveira Frazão, *Desconsideração da personalidade jurídica e tutela de credores*, in *DIREITO SOCIETÁRIO EM PORTUGAL E NO BRASIL* 479–514 (Maria de Fátima Ribeiro & Fábio Ulhoa Coelho eds., 2012).

40. As it is not the purpose of the study, this paper will not analyse on the disregard of legal personality. Two warnings, however, should be made. First, the theories developed with

III. REPRESENTATION AND DELIBERATION IN ASSOCIATIONS: THE WEIGHT OF VOTE

With some reason, at this point of the analysis it would be unavoidable to pose a few relevant questions for the comprehension of the proposed line of argumentation: How to identify the correlation between freedom of association, the common purposes that justify the formation of groups and the legal incorporation? To which extent is there an interaction between these vectors of the transformation of factual reality into a legal entity and how that would reflect in the establishment of different voting criteria among its members? Maybe the phenomena of participation, representation and deliberation are the closest points from of the premises analyzed so far.

First of all, an analysis on contemporary democratic theories will allow us to conclude that the mere existence of common interests within an association does not have immediate effects in representation, participation or deliberation⁴¹. Similar ideals do not converge in weight for the vote of associates, however philanthropic their motives might be or however cohesive its members might be. Although it is intuitive to suppose that in a legal person marked by altruistic, charitable, cultural, religious, political or social values all the members are gathered seeking equal opportunities of manifestation, the deontology gives space to an unquestionable factual

didactic purposes for the comprehension of the theme – major theory, minor theory, in inverse theory – were incorporated to the *ratio decidendi* by the Brazilian courts and, specially, the Superior Court of Justice (REsp 279,273/SP, Rapp. of judgment Justice Nancy Andrichi, Third Panel, DJ 29.03.2004; EREsp 1,306,553/SC, Rapp. Justice Maria Isabel Gallotti, Second Panel, DJe 12.12.2014; AgRg in AREsp 159,889/SP, Rapp. Justice Luis Felipe Salomão, Fourth Panel, judged DJe 18/10/2013). However, this classification does not find wide repercussion in foreign legal orders and, furthermore, have been adopted equivocally and in isolated occasions, not being frequently replicated by the Superior Courts, especially in relation to irregular dissolution. Second, an exponential increase has been noted in legal provisions of disregard as a means of affecting the patrimony of members or associates, inverting the premise that it is an exceptional, specific and temporal phenomenon. More recently, besides the Consumer Protection Code (art. 28), the Brazilian Tax Code (art. 135), the Law against Environmental Crimes (art. 4), and the Law of the Brazilian Competition Defense System (art. 34, sole paragraph), the Anticorruption Law (art. 14) also established a hypothesis of disregard and even extinction of a legal person. It should be added to that the fact that the Brazilian Supreme Court has been authorizing the Courts of Accounts to execute a legal act named expansive disregard of legal personality in administrative level, without the need of intermediation by the Judicial Power (MS 32,494/DF, Rapp. Justice Celso de Mello, DJ 13.11.2013).

41. To Mansbridge, “this fundamental equality in *status* does not necessarily imply equal influence on decisions”. JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1983).

development: that equals manifest themselves in different ways, even when institutionally grouped⁴².

The union among equals is not properly reflected in representation and, even less, in participation, no matter how much Waldron recognizes in that “the right of rights”⁴³. Although freedom of association may be the driving force for the gathering of groups of expression around certain common values, this aspect is not capable of eliminating the natural differences between each member in their associative participation and in the defense of their interests⁴⁴. It would be something close to the reference made by George Orwell in the rich excerpt from the book *Animal Farm*, when he mentions that “all animals are equal, but some animals are more equal than others”⁴⁵.

Extreme cases converge in specific social groups. Jane Mansbridge recalls that in mid-1965 the government of the United States of America insisted for an indigenous tribe of Kansas to formally elect their leader, before being allowed to receive governmental funds. However, none of the natives wanted to elect or become the leader under the argument that all natives were recognized by the same weight of vote⁴⁶. The idea around the precept of *one man, one vote* has been marking studies of democratic theory since *Reynold v. Sims* (1964)⁴⁷ up to *Evenwel v. Abbott* (2015)⁴⁸, and it has been seeking to present elements capable of contesting the effectiveness of the participation and of the power of deliberation behind this ideal of representation. Likewise, Henri Mansmann and Mariana Pargendles transpose this analysis to the perspective of share companies which, in the United States, in the late 18th Century and beginning of the 19th Century, had voting systems that deviated from the *one share, one vote* rule which, later on, became the norm⁴⁹.

42. Avritzer claims that the representation observed within the civil society, as in associations, takes form in a pluralist manner which is very distinct from that of party-political nature. Leonardo Avritzer, *Sociedade civil, instituições participativas e representação: da autorização à legitimidade da ação*, 50 DADOS 443–464 (2007).

43. See JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999). Arguing that participation should be understood as a different right.

44. HANNA ARENDT, *SOBRE A REVOLUÇÃO* (Denise Bottmann tran., 2006).

45. GEORGE ORWELL, *A REVOLUÇÃO DOS BICHOS* (Heitor Aquino Ferreira tran., 2003).

46. MANSBRIDGE, *supra* note 41., p. 12.

47. *Nowak & Rotunda, supra* note 14., p. 1040-1041. See also *Gray v. Sanders, Wesberry v. Sanders, Forston v. Morris*.

48. Available at: <<http://www.theatlantic.com/politics/archive/2015/05/one-person-one-vote/394502/>>, Access on May 29, 2015.

49. According to the authors, “In the late eighteenth century and much of the nineteenth century, U.S. corporations frequently had schemes of shareholder voting that deviated from the one-share-one-vote rule that subsequently became the norm. In particular, many nineteenth-century corporations restricted voting in ways that made it difficult for a single

Nowadays, only a procedural and formal perspective would admit that the weight of vote of one subject is identical to that of another, to the point of accepting that the construction of decisions by majority deliberation represents the will of all and the common interest of the associates, for example⁵⁰. Rosanvallón shows that majority deliberation, although it still has as the starting point a formal equality among the actors involved, contemplate a means of imposition of demands, which, deep down, hides an intolerable distortion of reality: the common interests are not translated into a required parity of votes, to the point of legitimating some deliberations⁵¹. Therefore, this is the impact of the weight of vote in representation, even if understood as an action on the interests of the represented persons in a *responsive* way, under the traditional line of conception⁵². Majority vote, combined with votes of different weights, is unavoidably translated as a divorce between representation, participation and deliberation, to the point of affecting the degree of legitimacy of the decision-making process.

And this legitimacy can be understood as the social acknowledgement of some form of power or being in conformity with a given norm or system of values.⁵³ For that reason, it is fundamental to go beyond the proposal of representation presented by Hanna Pitkin and accept criticisms of the contemporary democratic theory⁵⁴. The *acting on behalf of another* receives a clear substitution for the idea of *acting with the other*, an element so important for the comprehension of associations⁵⁵.

Currently, representation is no longer a phenomenon exclusively identified in the relations between State and the society, but overall in the

shareholder to obtain control of the firm. Such voting schemes were of three types: *graduated voting*, in which the number of votes exercisable by a single shareholder increased less than proportionately with the number of shares owned; *capped voting*, in which a ceiling was imposed upon the total number of votes that a single shareholder could exercise regardless of the amount of stock he or she held; and *per capita voting*, which is the rule of one shareholder, one vote". See Henry Hansmann & Mariana Pargendler, *The evolution of shareholder voting rights: separation of ownership and consumption*, 123 YALE LAW J. 948–1013 (2013).

50. See THAMY POGREBINSCHI, JUDICIALIZAÇÃO OU REPRESENTAÇÃO?: POLÍTICA, DIREITO E DEMOCRACIA NO BRASIL 121 (2012).

51. PIERRE ROSANVALLON, DEMOCRATIC LEGITIMACY: IMPARTIALITY, REFLEXIVITY, PROXIMITY (2011).

52. See HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967).

53. Rosanvallón, *supra* note 51.

54. In particular those of NADIA URBINATI, REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY (2008).; Mark E. Warren, *Citizen representatives*, REPRESENT. ELECTIONS BEYOND 269 (2013).; e de Archon Fung, *Associations and democracy: between theories, hopes, and realities*, 29 ANNU. REV. SOCIOL. 515–539 (2003).

55. Pogrebinschi, *supra* note 50.

relations directly formed between the citizens, of which associations are an example⁵⁶. This is the main reason why Thamy Pogrebinchi and other authors have proposed a new meaning for the concept of representation, which admits identification in the most varied types of legal relations⁵⁷.

Through the associations, individuals seek the opportunity to express their opinions and influence the decision process. Archon Fung, one of the authors that most notably analyzed representation in the scope of associations, defends that they contribute to improve democracy through six essential factors:

[T]hrough the intrinsic value of associative life, fostering civic virtues and teaching political skills, offering resistance to power and checking government, improving the quality and equality of representation, facilitating public deliberation, and creating opportunities for citizens and groups to participate directly in governance⁵⁸.

Although other criteria of deliberation are used in an attempt to compensate the eventual democratic deficit, due to the weight of majority vote and its difficulty in providing the satisfaction of common interests, it is a fact that the minority votes of associates are not limited to a simple homogeneous mass of an inexpressive group, dissociated from the idea of representation⁵⁹. The plurality with which these votes are manifested in associations or other types of legal persons is resulting in a gradual construction of mechanisms to guarantee their positions, such as the right of withdrawal or recess⁶⁰, the right to summon a general assembly⁶¹ and the efficacy of the fundamental rights in private relationships (horizontal effects

56. Leonardo Avritzer, *Um desenho institucional para o novo associativismo*, LUA NOVA 149–202 (1997).

57. See Pogrebinschi, *supra* note 50.

58. Fung, *supra* note 54, at 518.

59. *Urbinati*, *supra* note 54.

60. In the case of share companies, it is possible to mention art. 254 of Law 6,404/76 as a right assured to minority share-holders, who hold shares with a right of vote, in the sense of offering them the opportunity to sell their shares under the same conditions offered to the majority share-holder.

61. In the Italian Civil Code, art. 20 establish that an assembly may be summoned by 1/10 of the associates: “Art. 20. L’assemblea deve essere inoltre convocata quando se ne ravvisa la necessità o quando ne è fatta richiesta motivata da almeno un decimo degli associati. In quest’ultimo caso, se gli amministratori non vi provvedono, la convocazione può essere ordinata dal presidente del tribunale. Available at: <<http://www.altalex.com/documents/news/2013/04/11/delle-persone-giuridiche>>; Access on: June 13, 2015.

of fundamental rights or *drittwirkung*)⁶², endorsed by the Supreme Court⁶³. And this has been occurring largely because representation does not occur simply as the result of a process or from the well-functioning of conventional institutions but, above all, is desired as a fundamental piece of the development and exploration of a large variety of formal and informal institutions⁶⁴.

The idea of majority vote can, here, be perfectly contrasted with the research problem of this article⁶⁵. After all, if even under conditions of supposed formal and procedural equality, votes clearly do not have the same weight, in principle there could be no obstacle for the statute of a given association to admit, according to the rules of freedom of association and organization, the establishment of different voting criteria through distinct categories of associates, just as verified in share companies with the figure of the *golden shares*⁶⁶.

IV. VERIFICATION CRITERIA OF THE JUSTIFICATION: CATEGORIES OF RIGHTS, CONSENT AND STATUTORY PROVISIONS

Having understood the relationship between representation, participation and deliberation, we are left with the specific examination of the aspects related to different voting criteria in associations under the perspective of rhetorical and topic, as the means of identifying the premises

62. See THIAGO LUIS SANTOS SOMBRA, *A EFICÁCIA DOS DIREITOS FUNDAMENTAIS NAS RELAÇÕES PRIVADAS* (2011).

63. BRAZILIAN SUPREME COURT, Extraordinary Appeal 201.819/RJ, BRAZILIAN SUPREME COURT, Extraordinary Appeal 158.215/RS.

64. See Michael Saward, *The representative claim*, CONTEMP. POLIT. THEORY 297–318 (2006).

65. See Rosanvallon, *supra* note 51 at 4.; URBINATI, *supra* note 54, at 44.

66. The *goldens shares* surfaced in Brazil through Law 10,303/01, which added paragraph 7 to the art. 17 of the Law on Share Companies. In this category of shares, the Union and the States, although having alienated the equity control of state companies and semi-public enterprises of which they were majority shareholders with right of vote, they maintained a special class of preferential share that ensures them the right of vetoing certain deliberations of the new shareholders, under the terms of the constitutive act. See Juliana Kruger Pela, *Origem e desenvolvimento das golden shares*, 103 REV. FAC. DIREITO UNIVERSIDADE SÃO PAULO USP 187–238 (2008). Stefan Grundmann & Florian Mölein, *Golden shares - state control in privatised companies: comparative law, european law and policy aspects*, SSRN ELECTRON. J. (2003).

around the problem have a decisive influence in the determination of solutions⁶⁷.

One possible starting point could be the identification of factors that give rise to these *categories with special advantages*, which, according to art. 55 of the 2002 Civil Code, can be established in the statute of associations⁶⁸. Would vote be covered by the idea of special advantages deriving from the establishment of different categories, to the point of admitting its exclusion or the assigning of a higher weight to specific associates?

The first aspect to be clarified involves the separation between a class of rights granted to all associates indistinctively and another one only given to a few, with the objective of identifying in which of those vote is inserted, and how the assignment of different weights or even its exclusion should be structured. In sequence, an analysis of the jurisprudential repercussion of the subject will be made, through a random choice of judgments of the Federal Supreme Court and the Higher Court of Justice.

A. The General and The Preferential Special Rights of Associates

From the development of a concept of membership, understood as the legal relationship resulting from associative participation, Pontes de Miranda presented a relevant classification of the rights of associates in preferential special rights and general special rights, which will allow determining and understanding the elements of the justification of different criteria related to the right of vote⁶⁹.

Strictly speaking, the quality of member of an association requires unity at least in regard to one or some rights among the associates⁷⁰. These rights derive, generally speaking, from the constitutive act of the entity, i.e. its statute, or from deliberation in general assembly. When granted to all members, it is called a general special right; on the other hand, a preferential special right is only related to one or some categories of members.

In view of these two basic classes of rights, the principle of equality acts as to prevent discriminatory behavior within a same class of associate, be it

67. See THEODOR VIEHWEG, *TÓPICA E JURISPRUDÊNCIA* (Tércio Sampaio Ferraz Júnior tran., 1979).

68. In line with the 2002 Civil Code, the new Argentinean Civil Code admitted in subsection "j" of art. 170 the possibility of establishing different classes of associates. Available at: <<http://www.notarfor.com.ar/codigo-civil-comercial-unificado/articulo-170.php>>, access on: June 11, 2015.

69. *Miranda, supra* note 16.

70. *Id.*

a general or preferential one⁷¹. Therefore, it is the direct application of a constitutional provision (art. 5, heading, of the Federal Constitution), which does not tolerate deliberations that impose the practice of inequality, without the consent of all and its statutory provision, because this could culminate in a maneuver of the majority to decrease the number of associates or even to propose the exclusion of some of them⁷².

The right to vote and representation in assemblies is pointed out by Pontes de Miranda as modalities of preferential special rights, which means to say that within this category the establishment of different voting criteria for the same associates is not admitted. It will only be possible to stipulate diverse voting standards when in contrast with the general special rights which all individuals are entitled to. The power of veto in the choice of administrators would be a good example of that.

There is, however, a slight controversy around the classification proposed by Pontes de Miranda, which is perceptible when analyzing the former Art. 1394 of the 1916 Civil Code, which already established the right of vote in assemblies to all associates, despite being considered a preferential special right by the eminent jurist. And in the 2002 Civil Code this topic was not treated differently, as Art. 59 established among the competencies of the general assembly the authority to change the statute, subject to a quorum in which all members are considered, without any mention to the possibility of exclusion of the vote of any category. That is, vote is a common right to all associates in matters deliberated at the assembly – therefore, a general special right – and, as it seems, its exclusion was not admitted in 1916 Civil Code, and this continued to be the case in 2002 Civil Code. The freedom of association does not authorize, therefore, that the representation is fulminated through the exclusion of a right common to all categories, according to art. 58 of the 2002 Civil Code.

It is important to clarify, however, that one thing is to prohibit the exclusion of the right of vote, but a different one is the establishment of different voting criteria, according to each category of associate. For the purpose of the normative control of deliberative standards, it is sufficient to investigate if the associate has previously agreed with the establishment of any specificity on their voting rights, if it was established in the constitutive act or if it was included in a deliberation which they authorized themselves (art. 58 of the Civil Code). These beacons of the definition of different voting

71. *Id.*

72. *Perlingieiri (ORG.)*, *supra* note 30.

criteria should keep strict observance with the elements that justify the established differentiation. In the words of Celso Antônio Bandeira de Mello, “it is important to have more than an abstract logical correlation between the differential factor and the consequential differentiation; it is imperative to also have a concrete logical correlation, measured in function of the interests encapsulated in the constitutional positive law”⁷³.

Hence, nothing prevents the statute from establishing different weights of vote according to the condition of an individual or collective associate⁷⁴, a category of associate with differentiated vote in virtue of a higher contribution or with special powers and reduced/increased benefits. However, such precept will only be applicable subject to deliberation and agreement by both old and new members⁷⁵.

In other words, in order to evaluate the rationality of the justification around the criterion of differentiated votes it will be necessary to identify if (1) it predates the adhesion of a new associate; (2) if it was object of statutory provision or subject to vote in an assembly with a specific quorum, (3) if there is a rational justification for the elected discrimination and (4) if it affects the associates which already integrated the association, with their consent. Based on these vectors, it is possible to admit, in very particular cases, the establishment of votes with particular parameters in relation to a given category of associate, as long as it does not imply in the obliteration or undermining of the right of vote itself.

B. The position of the Jurisprudence of the Higher Court of Justice and the Federal Supreme Court

Invariably, the precedents of the Brazilian Superior Courts face the problem with a focus on the exclusion of the right of vote for certain categories of associates and, only indirectly, analyze the theme related to the assignment of different criteria or distinct weights. To illustrate the position of the superior courts, a broad research was carried out and a random sample of judgments related to the right of vote in associations was selected.

73. *Mello, supra* note 30.

74. To corroborate this fact, it is worth-mentioning the statute of the Brazilian Association of Oral History, which establishes differentiated weights according to each category of associate in it art. 4, paragraph 11. If the associate is collective they will have weight 4; if individual, weight 1. Available at: <<http://www.historiaoral.org.br/estatuto>>, Access on: June 12, 2015.

75. Orosimbo Nonato, et al., *Associação civil*, 3 DOUTRINAS ESSENC. DIREITO CIV. 1129 (2010).

In the first case, related to Extraordinary Appeal 74,820, Rapporteur Justice Antônio Neder⁷⁶, the Brazilian Supreme Court examined a dispute between the associates of Mackenzie Institut, of which the Presbyterian Church of Brazil had special powers of appointment for hiring the president, vice-president and treasurer of the Deliberative Council, in virtue of its condition of lifelong associate⁷⁷. The repercussion of the case was such that it counted with technical opinions from noteworthy jurists such as Miguel Reale, Pontes de Miranda, Caio Mário da Silva Pereira, Orosimbo Nonato and Orlando Gomes⁷⁸.

In the occasion, the Court judged the case based on Art. 1394 of the 1916 Civil Code and understood that the “preferential or exceptional right of the Church to nominate the directors of Mackenzie is unarguable, so clear are the terms of the document [...]”⁷⁹. It is interesting to note the tautology used by the Rapporteur in the construction of the decision’s base ground and the use of rhetorical and authority elements, as seen in the expressions “unarguable” and “so clear”⁸⁰. Although the solution of the judgment had not presented consistent legal margins, the technical opinion of Miguel Reale on the case reveals that it is within “the acts of competence of the assembly or social body to form its own administration, even though the final decision might be conditioned to a previous statement of a qualified associate for that end”, such as the Presbyterian Church of Brazil⁸¹. And, in that case, the termination of the contracts of the president, vice-president and treasurer was object of a majority vote in an assembly by part of the total number of members of the association, including the representative constituted by the Presbyterian Church of Brazil⁸².

76. Brazilian Supreme Court, Extraordinary Appeal 74.820, .

77. Nonato, et al., *supra* note 75.

78. *Id.*

79. *Id.* BRAZILIAN SUPREME COURT, *supra* note 76.

80. Katharina Sobota, *Don't mention the norm!*, 4 INT. J. SEMIOT. LAW 45–60 (1991). Katharina Sobota, one of the followers of Viehweg, was one of the authors that best analyzed the use of enthymemes, rhetorical syllogisms, and elements of authority in legal argumentation, through the use of expressions like “thus”, “therefore”, “hence”, “as mentioned”.

81. Nonato, et al., *supra* note 75.

82. According to Miguel Reale “Because we are dealing with a contract, the disagreement of the representative of the Presbyterian Church nips the issue in the bud, as nothing can be done without his consent; but the same is not true in the hypothesis of the judgment of the Deliberative Council by the majority of the members, being necessary to reverse the adjustment made. [...] Having clarified this – as this is the principle of the whole matter – that the acts of the lifelong associate, however special they might be, can never be prevented from being performed ‘*intra corpus*’; it is clear that, if the Church prefers to act through a dutifully

The judgment of Extraordinary Appeal 74,820 evidences a typical statutory provision of special category of associate with a right of vote by veto and by appointment, but never mentions the exclusion of the right of vote⁸³. The peculiarity given to the Presbyterian Church of Brazil, in the condition of lifelong associate, was the power of appointing the candidates to be hired for board positions, but the election and the deliberation were under the scope of the general assembly formed by all of the associates with a right to vote⁸⁴. Orosimbo Nonato was more incisive in his technical opinion on the assignment of different criteria and weights to the lifelong associate, the Presbyterian Church of Brazil:

It is perfectly legal to grant, in the Statutes, some prerogatives to a member of an association such as, for example, the right to the presidency, to a permanent position in the board, of a plural vote, etc. (Paez, ob. cit. page 158, F. Ferrara, ob. cit. page 715). In exemplifying these special rights, Enneccerus – Nipperdey indicates ‘the right to appoint and destitute the board’ (ob. cit. page 496). The Statutes of the Institute, thus, did not exceed in granting to the lifelong associate the prerogative of appointing members of the General Administration. This could be consigned, being legal and incapable of being contested in their disposition to do so. [...] Nevertheless, the technical opinion can be condensed in the following theses: 1) The Statutes of the association ensure a prominent position to one of the categories of associates, granting the so-called lifelong associate with prerogatives to decisively influence the direction of the Institute; 2) the constitution of an association in which an associate, or group of associates, is given special rights, including the right of appointing the members of one of its directive bodies, is completely valid; 3) the statutes of an association may subordinate the choice of temporary members to the approval of associates which are expressly given this prerogative⁸⁵.

accredited “representative”, his decisions are binding and are not conditioned to the ‘nihil obstat’ of the entity as an external organization.”. *Id.*

83. The new Argentinean Civil Code, in its art. 171, state that “The right of associates to participate in the directive commission cannot be abusively restricted”. Available at: <<http://www.notarfor.com.ar/codigo-civil-comercial-unificado/articulo-170.php>>, access on: June 11, 2015.

84. *Nonato*, et al., *supra* note 75. “From the reading of these statutory provisions, it can be inferred that the Institute is an association composed of associates with uneven rights, with one of the categories having privileges that ensure it a markedly prominent position.”

85. *Id.*

Generally speaking, it is possible to admit that the prerogative given to the Presbyterian Church of appointing members of the administration had serious repercussions in a deficit of representation and participation in relation to the other associates, to the point of undermining their right of vote and the deliberation. Only in relation to the destitution, the position expressed by Orosimbo Nonato could not be contemplated under the 2002 Civil Code, since art. 59 exclusively established to the general assembly of associations the power to destitute administrators and, under another perspective, art. 58 guarantees that no associate can be prevented from exerting a right or function legitimately ensured by its statute⁸⁶.

Before the entry into force of Law 11,127/05, the original text of art. 59 of the 2002 Civil Code disposed that only the general assembly could approve the accounts, change the statute, and elect or destitute administrators. This caused a serious deadlock to the functioning of large and national associations, such as football clubs and class entities⁸⁷.

Currently, only the destitution and statutory changes are prerogatives of the general assembly, in such way that the election of administrators can be assigned to a body of the association formed by categories of associates with different criteria and weight of vote – indirect election⁸⁸ –, as long as that was previously established in the statute⁸⁹. This way, there is no reason to conclude the exclusion of the right of vote of any associate on matters that are object of exclusive deliberation by the general assembly, but it would be admissible that on other issues dispositions are made in the sense of assigning

86. It is worth-mentioning the affirmation by Duncan Kennedy, as “rights occupy an ambiguous status in legal discourse, because they can be either rules or reasons for rules. See Duncan Kennedy, *The critique of rights in critical legal studies*, LEFT LEG. CRIT., 185 (2002).

87. The statute of the Club Regatas Flamengo, for example, establishes in article 6 that the club is composed of 10 categories of associates, with distinct conditions: Art. 6 – the social body is constituted of the following categories: I – Most Honorable Member; II – Honorable Member; III - Member; IV - Laureate; V - Honorary; VI - Remitted; VII - Proprietary; VIII - Patrimonial; IX - Contributor; X – Athlete. However, although article 20, subsection V, confers to all the right of vote and be voted on, article 80 mentions that athlete and honorary associates will not take part in the general assembly. Available at: <http://www.flamengo.com.br/site/upload/editor/20130425102732_298189.pdf>; access on June 13, 2015.

88. On the indirect elections by the assembly, *Gazzoni* seems to be one of the few Italian authors to address the topic: “l’assemblea è formata da tutti gli associati ma lo statuto può anche disapplicare il principio totalit rio e prevedere un’assemblea formata da delegati degli associati eletti da questi ultimi secondo vari criteri, derogandosi cos  al principio della democrazia diretta in favore di quella rappresentativa.” *Gazzoni, supra* note 30.

89. ANT NIO C. PELUSO (ORG.), C DIGO CIVIL COMENTADO: DOUTRINA E JURISPRUD NCIA (2008)., p. 63.

different voting parameters – according to the amount of contribution, for example – as advocated by Miguel Reale:

It is, thus, not mentioned, that the positions that compose the board of the association should be elected by the general assembly, for each one of them, and the social statute may establish that the assembly chooses all members of a council, which will then be responsible for appointing, among its members, the persons who will occupy the board positions. With these measures, it is preserved the right of associates to freely decide on the process of administration that they judge is most adequate to the interests of the entity, preferring the indirect election of its directors, or that the election is not general, but only for one part of the Council, in previously established dates and proportions. It seems to me that the election of the board held in two or more pleas is more appropriate for major associations with traditional values to be preserved, since that, with these provisions, the renewal of the direction board will take place without undesirable disruptions or discontinuity. As one can see, the understanding I am giving to the determinations of the new Civil Code on associations is the one that best suits the exercise of the “freedom of association” established by subsection XVII of article 5 of the Federal Constitution, without its harmful immobilization, resulting from a restrictive interpretation of the law, which does not attend to the essential value of freedom⁹⁰.

Under another panorama, the Superior Court of Justice, in two not-so-specific judgments, one of the Especial Appeal 20,982, Rapporteur Justice Dias Trindade⁹¹, considered illegal the clause of the statute of a civil association which prohibited the right of vote for a certain category of associate; and, in another, Especial Appeal 161,658, Rapporteur Justice Sálvio de Figueiredo Teixeira⁹², related to the famous soccer team Sport Club Corinthians Paulista, recognized the legitimacy of the other associates in suspending the effects of the decision of the Deliberative Council, which decided on an exclusive issue of the general assembly, related to a statutory change and the prorogation of direction mandates⁹³.

90. Miguel Reale, *As associações no Código Civil*, O ESTADO DE SÃO PAULO, Mar. 29, 2003.

91. SUPERIOR TRIBUNAL DE JUSTIÇA, Especial Appeal 20.982/MG.

92. SUPERIOR TRIBUNAL DE JUSTIÇA, Especial Appeal 161.658/SP.

93. It is important to clarify that the sole paragraph of article 22 of Law 9615/98, which deals with Brazilian sports, expressly established votes with differentiated weights. As for the inapplicability of art. 59 of the 2002 Brazilian Civil Code to football clubs and other sports

It should be highlighted, however, the judgment of Especial Appeal 650,373/SP, Rapporteur for the judgment Justice Luís Felipe Salomão⁹⁴. In this precedent, the Superior Court of Justice – STJ analyzed a case related to the social statute of the Brazilian Society of the Defense of Property and Familiar Traditions – PFT, where the center of the controversy involved the “declaration of nullity of statutory clauses that gave exclusive right of vote to the eight founding members of the requesting association, besides temporarily limiting the permanence of the effective associates at the entities”.

The original Rapporteur, Justice João Otávio de Noronha, headed the defeated line of argumentation by sustaining that art. 1394 of the 1916 Civil Code did not apply to associations, which were still subject to the norms of Law 173/1893, not revoked by the former. Under this understanding, Justice João Noronha concluded that only after the 2002 Civil Code the right of vote in associations became mandatory, which means to say that previously the statutes could determine other means to exclude it in relation to specific categories of associates⁹⁵.

The winning line of argumentation was headed by Justice Luis Felipe Salomão, who in his vote first attested the revoking of Law 173/1893 by article 1807 of the 1916 Civil Code and, in sequence, clarified the misunderstandings of the terminology used by the legislator, who at the time did not distinguish societies from associations. He stressed, therefore, that the association was incorporated and its constitutive act was registered under the scope of the 1916 Civil Code, in such way that the issue to be resolved was just to know whether an associate could be deprived of their main right, the right of vote.

As the constitutive act had been improved under the scope of the 1916 Civil Code, by force of article 1394 all associates should have *the right to vote in general assemblies*. Furthermore, he observed that the legal order is refractory to purely authoritative conditions which deprive or submit the

associations, see Ives Gandra da Silva MARTINS, *Inteligência do art. 59 do Código Civil e do art. 217, inciso I, da Constituição Federal para as associações esportivas: aspectos espaciais e temporais dos regimes jurídicos pertinentes*, 4 REV. BRAS. DIREITO DESPORT. 194–208 (2003).; Carlos Miguel C. Aidar, COMENTÁRIOS SOBRE O ART. 59 DO NOVO CÓDIGO CIVIL MIGALHAS (2004), <http://www.migalhas.com.br/dePeso/16,MI6499,41046-Comentarios+sobre+o+art+59+do+novo+Codigo+Civil> (last visited Jun 9, 2015).

94. SUPERIOR TRIBUNAL DE JUSTIÇA, Especial Appeal 650.373, .

95. *Nonato*, et al., *supra* note 75. vote Justice João Otávio de Noronha, p. 32-33, 63 and 67. Just as in the aforementioned judgment of the Supreme Court, to the dockets were attached technical opinions of a number of renown jurists.

effect of legal acts to the discretion of only one of the parties⁹⁶. And, on the subject which is particularly interesting to the problem under analysis on this article, Justice Salomão asserted that article 55 of the 2002 Civil Code, by firming the equality of rights and duties among associates, “allows the division of associates in different categories, that, most evidently, do not reserve the exclusive exercise of the rights listed in article 59, which are inherent to all and any category of associate⁹⁷”, in such way that all associates have *the right to participate and vote in ordinary and extraordinary general assemblies, with equality of rights*.

V. CONCLUSION

The purpose of the present article was to advance in the examination of one of the least studied subjects by the contemporary Private Law doctrine. Indeed, the analysis of the possibility of different voting criteria has been finding a fundamental obstacle in an ideological arena that occasionally overwhelms the limits of its adequate field of manifestation. Faced with essential premises such as freedom of association and manifestation, the assembling of individuals around a common objective, be it of economic connotation or not, should not be subject to restrictive parameters, defined in abstract and indelible ways, such as the imposition and the supposition of equality of vote weights in all and any kind of association.

Across the analysis, an approach less accepted by jurists was sought, although a familiar one with political scientists and an essential one to the comprehension of the political dimension of the topic. Incidentally, maybe it is exactly the lack of proximity between Politics and the Law that has caused the dogmatic entrenchment of civilists, in detriment of a perception that themes such as the right of vote – even if in private entities – require a previous delimitation of political variables such as the ideals of representation, participation and deliberation. The Law is not endowed with the whole dogmatic framework capable of empirically justifying the reason why a private entity could, just because of the choice of the legislator, assign different criteria to the right of vote.

The 2002 Civil Code advanced immensely in the discipline of the right of vote in associations by defining the subjects of mandatory deliberation in

96. *Id.* at 30.

97. *Nonato, et al., supra* note 75., p. 31.

assemblies, as well as determining the mandatory participation of all associates in relation to specified topics, even if through indirect representation. Through the criteria indicated by Pontes de Miranda and the democratic theory of representation, it was possible to point out the basic premises related to the circumstances in which it is possible to grant different weights to the right of vote, according to rationally justified discriminations.

Private autonomy, exerted with the adequate and prudent monitoring of the State, should be preserved as the ideal of motivation of the associative event and, with it, also the understanding that the differences between individuals are not set aside simply because of the circumstance that they are gathered together; on the contrary, they are reverberated and unfolded in phenomena such as the right of vote.