

## THE LEGAL FRAMEWORK FOR COOPERATIVE ENTITIES IN ANDALUSIA. EVOLUTION OF THE LEGISLATIVE MODEL

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### **1 Introduction**

At the end of 2021, 10 years had passed since the enactment of Law 14/2011 on Andalusian Cooperatives (LACS). In the Spanish legislative context regarding cooperatives, this law represented a step forward in making the economic and financial framework of this type of entity more flexible. It is for this reason that we have found it interesting for researchers on cooperative company law from other countries to explore some of the most novel and striking features of this law, which, however, has not been without criticism<sup>1</sup>.

With its about 8.5 million inhabitants the Andalusian Autonomous Community (Andalusia) is the most populated of the 17 Autonomous Communities that make up the Spanish state: It is also the one with most cooperative societies. More specifically, approximately 4,500 of the 22,000 cooperatives in Spain are in Andalusia, which represents more than 20% of the nation's total. In the Andalusian Community, there are cooperatives in all economic sectors, some of which clearly surpassing the rest. Such is the case of CAJAMAR with headquarters in the city of Almería, which stands out for being the most important credit cooperative in Spain. Several of the agri-food cooperatives that comprise the top ten with the highest turnover and exports are Andalusian, including DCOOP, one of the world's leading companies in the marketing of olive oil and olives, COVAP, which is a cooperative specialized in livestock, and CASI or UNICA GROUP, which are cooperatives excelling in the commercialization of fruits and vegetables.

Before presenting the most original features of the legal framework of cooperatives in Andalusia, it is essential to recall the origin of the current distribution of powers between the Spanish State and the Autonomous Communities as regards this type of entity. The breakdown of competences has resulted in the coexistence of a state law (hardly of any use) and sixteen regional cooperative laws. To explain this legislative strange peculiarity, the Spanish Constitution of 1978 must be considered as a starting point. By assigning exclusive powers to the State vis-à-vis the

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<sup>1</sup>On the legal framework of cooperatives in Andalusia, I have previously published several papers (Vargas-Vasserot, 2017a and 2018) and a few years ago I was the editor of a collective book (Morillas and Vargas-Vasserot, 2017b) that continues to be the reference academic work in this field.

Autonomous Communities, the Spanish Constitution did not make any reference to this particular business entity, although it did so for commercial legislation purposes<sup>2</sup>. This silence was used by several Autonomous Communities (Catalonia, the Basque Country, Andalusia, etc.) to, based on the non-commercial nature of cooperatives, to enact the first generation of autonomous cooperative laws.

Following the content of the Constitutional Court Sentence 72/1983, which resolved the conflict of jurisdiction between the Autonomous Community of the Basque Country and the Spanish State, the general State Cooperatives Law 3/1987 and several regional laws were enacted. However, Law 27/1999 on Cooperatives (LCOOP), which is the current state law in Spain, would significantly change its criteria with respect to the previous one and only applies “to cooperatives that operate in several Autonomous Communities, except when the main activity is developed in one of them”<sup>3</sup>. Therefore, for the State cooperative law to be applicable to a cooperative, two requirements must be cumulatively met: a) that it develops its cooperative activity (of a corporate and internal nature with the members) in several Autonomous Communities; b) that in none of these Autonomous Communities the cooperative operates primarily. In the vast majority of cases, it is normal for a cooperative to operate primarily in one Autonomous Community, and in others, it does so secondarily because it has, for example, fewer members. Thus, State law has little practical use, and it is the autonomous cooperative laws that are actually used. From these, as previously explained, Andalusia’s is the benchmark.

Political motives were the driving force that led the state legislator to restrict the scope of application of the LCOOP to the extent of almost emptying it of practical application. Its origin usually dates back to the pacts between the political party that won the general elections at the time (Partido Popular) with the main nationalist parties (Convergencia i Unió and Partido Nacionalista Vasco) to ensure the necessary support for the governance of the country<sup>4</sup>.

Additionally, the legislation’s fast-paced renewal activity regarding autonomous cooperatives has been astounding. In some communities (Andalusia: 1985, 1999, 2011; Catalonia: 1983, 2002, 2015; Basque Country: 1982, 1993, 2019; Valencia: 1985, 2003 and 2015) a third generation of cooperative laws has already been adopted. The progressive commercialization of cooperatives, i.e. the approximation of their features with those of commercial companies, is also noteworthy because the non-commercial character of cooperatives was the determining factor for the Constitutional Court to give the Autonomous Communities competences on the subject of cooperatives.

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<sup>2</sup>Article 149.1.6.<sup>a</sup> Spanish Constitution.

<sup>3</sup>Article 2.a LCOOP.

<sup>4</sup>See Vargas-Vasserot et al. (2015), pp. 63-83.

## 2 Double regulation, through law and implementing rules

One of the peculiarities of the LACS with respect to the previous law of 1999 (LACS 1999) and the rest of laws regarding Spanish cooperatives, is that much of its content was developed through a government regulation, to which its articles refer to many times, and which were approved by Decree 123/2014 (RLACS). This double regulation (Law/Decree) was presented in the statement of motives of the LACS as a “definite” legislative improvement. On the one hand, a “relatively brief” legal text was achieved. On the other hand, it allowed for the “autonomous development” of a good number of subjects according to the unique needs of each company and the “permanence” of the law over time was ensured. However, this peculiar legislative technique, in our opinion, has generated more drawbacks than benefits, apart from not complying with the premises on which the Explanatory Memorandum is based.

In regard to the intended brevity, the LACS has 126 articles, a figure similar to that of most Spanish cooperative laws, while the RLACS has 195. If we add the articles of the LACS to those of the RLACS, the total number is 321 articles. As a result of this, Andalusia holds the less than noteworthy record of having one of the most extensive legal regulations for cooperatives in the world at a time when the European Union has bet on the simplification of corporate rules to modernize companies. Furthermore, after using the excuse of flexibilization, the executive branch - with new authority taken from the legislative branch - was conferred with the possibility of modifying a large part of the legal framework applicable to Andalusian cooperatives - an aspect of serious constitutional concern for us.

The double regulation (law and implementing rules) of cooperatives in Andalusia has historically been used to develop aspects related to the operation of the Cooperatives Registry. However, the regulation of the implementation of the LACS through the RLACS is quite different, as can be seen from a simple reading of its extensive table of contents with a structure that is practically the same as that of the law and it is only totally original in the parts dedicated to the Cooperatives Registry<sup>5</sup> and the system of sanctions and disqualifications of non-compliant cooperatives<sup>6</sup>.

Furthermore, this double regulation is very difficult to use, since there is no clear criterion as to what matters to the RLACS and what to the LACS or, in other words, one is confused as to what has changed as compared with the previous regulation. Specifically, the LACS refers to the articles of the RLACS in 125 instances. So, there is a constant need to consult both texts to know what the applicable rule is when a legal question arises. It is also surprising that a good number of articles of the RLACS repeat unnecessarily much of the content of the LACS. This results in a very extensive and repetitive regulation<sup>7</sup>. However, it must be recognized that some of the

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<sup>5</sup>Articles 108-166 RLACS.

<sup>6</sup>Articles 167-195 RLACS.

<sup>7</sup> Vargas-Vasserot (2018), p. 4.

novelties contained in the LACS and in the RLACS with respect to the LACS 1999 are so important that the reform of some articles of the LACS 1999 would not have sufficed. This is the reason why the promulgation of new law was necessary.

### **3 The cooperative principles of the law**

As is known, the current formulation of the seven cooperative principles is contained in the International Cooperative Alliance (ICA) Statement on the cooperative identity, approved in 1995 at the XXXI Cooperative Congress. Such principles are recognized by many cooperative laws in the world, in some expressly and explicitly and in others by incorporating references to them throughout their articles. In Spain, the LCOOP and most regional laws expressly refer to the cooperative principles formulated by the ICA, while a few others, totally or partially transcribe their content in a specific article<sup>8</sup>. This latter mode was used by the previous Andalusian cooperative law, the LACS 1999, and it is being used by the LACS. In this matter the Andalusian legislator was very innovative by using the traditional list of cooperative principles of the ICA contained in article 4 and incorporating four new ones of undoubted social interest (promotion of stable and quality employment, with a singular impact on the reconciliation of work and family life; gender equality, with a transversal character to the rest of the principles; business and environmental sustainability; and commitment to the community and dissemination of these principles in their environment).

### **4 Novelties in the process of constitution of the cooperative**

One of the most outstanding novelties of the LACS was to establish the capacity for cooperatives to be constituted and acquire legal status by simply registering the act of the constituent assembly (whose celebration is imposed as mandatory) in the Registry of Andalusian Cooperatives<sup>9</sup>. The intervention of a notary is required in the incorporation process only when real estate is involved<sup>10</sup>. With this measure, Andalusia moves away from an established principle in Spain of notarial control of company law to theoretically facilitate the constitution of cooperatives. It was assumed that having to pass through a notary constituted more of an obstacle than a guarantee for the correctness of the constitutive process. Everything is left in the hands of a Public Law Registry (in the sense of public or administrative law), dependent on the corresponding Autonomous Community. Given the limitation of the liability of the members for corporate debts and for losses to the capital stock, we consider that the notarial control of the process of constitution of cooperatives in Andalusia should have been maintained.

The LSCA 1999 imposed that the capital stock with which a cooperative must be constituted should be at least € 3,000. This is generally the minimum capital contribution required for

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<sup>8</sup> Vargas-Vassero et al. (2015), pp. 36-38.

<sup>9</sup> Article 9.1 LACS and article 5 RLACS.

<sup>10</sup> Article 119.1 LACS. See Feliú (2017), pp. 63-65.

compliance with the rest of cooperative laws. But the current one does not legally impose a minimum share capital figure. In our opinion, it does not seem acceptable to be able to establish a cooperative with ridiculous figures of capital stock, nor that this is the best way to promote cooperativism as an alternative form of business<sup>11</sup>.

## 5 Investor or capitalist members

One of the novelties of the LACS was the admission of *investors as legal figures*, although great care is taken not to refer to them as *members*. No matter how much euphemism is used, these investors are true members of the cooperative. As established by the article that regulates them, these members contribute capital stock, have a voice and vote in the general assembly<sup>12</sup> and can form part of the governing body<sup>13</sup> and are subject to the same legal rules as are the ordinary members<sup>14</sup>. Paradoxically, Andalusian legislation, which was previously the most restrictive when regulating the possible existence of investor members, is now the most liberal of all the Autonomous Communities, especially regarding their remuneration for their participation in the entity (up to 45% of the positive annual results in proportion to the paid-in capital) and the interest they can receive for contributions to the capital stock (a maximum of 8 points on the legal interest of the money, while for ordinary members it is fixed at 6).

## 6 Free transmission of share contributions

Given that cooperatives are open-ended corporations, there is theoretically free access to the social organization of new members and the voluntary withdrawal of current members, such that the transmission of contributions does not have the sense that it has in capitalistic corporations. For this reason, it had barely been regulated in cooperative laws beyond transfers among members. For example, the LACS 1999 only allowed the transfer of contributions to the capital stock *inter vivos* among the members, as opposed to that of the associates, admitting the possibility that the heirs and legatees of the deceased member could acquire the status of member. However, the 2011 LACS went much further since it practically liberalized the transmission of capital contributions to third parties when provided for in the bylaws<sup>15</sup>, which meant a more flexible system for the transmission of capital contributions, unparalleled in any other autonomous Spanish cooperative law.

## 7 Corporate bodies

In relation to the structure of cooperatives, the main characteristic features of the LACS are the reconfiguration of their legal structure with a clear intention of approximating it to the law of

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<sup>11</sup> Vargas-Vasserot (2017c), pp. 369-370.

<sup>12</sup>Article 31.3 LASC.

<sup>13</sup>Articles 17.2 and 38.2 LASC.

<sup>14</sup>Article. 25.5 LASC.

<sup>15</sup>Articles 61.1.a, 89, 96.3 and 102.2 LASC.

capitalistic corporations. On the one hand, it limits the existence to only two required bodies (general assembly and administrative body and prohibition of the existence of the traditional intervention body that is only allowed for cooperatives with more than 10 members). On the other hand, it incorporates new information and communication technologies broadly, both in how it relates to the members of the corporate bodies and to their operation<sup>16</sup>.

Regarding the plural or weighted vote of the autonomous cooperative laws, the LACS 1999 did not recognize it in any case for first-degree cooperatives. Nevertheless, current regulations allow it for all service cooperatives, including agricultural cooperatives, in proportion to the volume of cooperative activity carried out by each member<sup>17</sup>, without any member being allowed to have more than 7 votes<sup>18</sup>.

## 8 Reduction in the endowment of funds

Regarding the funds that must be provided by the cooperative, the Mandatory Reserve Fund (MRF) - intended for the consolidation, development and guarantee of the cooperative entity - is still considered, as in the previous law, partially distributable in case of termination of membership or liquidation of the cooperative, if so established in the bylaws<sup>19</sup>. This is a very rare measure in Spanish cooperative legislation.

The traditional Education and Promotion Fund (EPF) was renamed to “Training and Sustainability Fund (TSF)” and its purpose is diversified to include, in theory, together with traditional purposes, the realization of some of the cooperative principles which are added by the LACS, such as gender equality or environmental sustainability.

Yet, the truly significant modification regarding mandatory funds with the current law was in their endowment. One must recall that according to the previous regulations, the Mandatory Reserve Fund (MRF) was endowed with a minimum of 20% of the cooperative results (until it reached an amount equal to 50% of the share capital, at which point the percentage was reduced to 15%), with 80% of the results of operations with third parties, and 80% of the extraordinary results. The Education and Promotion Fund (EPF) was endowed with 5% of the cooperative results, with 20% of the results of operations with third parties, and with 20% of the extraordinary results. With these endowments, the LACS 1999 was the strictest Spanish cooperative law regarding the provision of mandatory funds. But, with the enactment of the LACS, the percentages of results destined to provide the Mandatory Reserve Fund (MRF)

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<sup>16</sup> For details see Morillas (2017), pp. 241-242.

<sup>17</sup> Article 102.1 LACS.

<sup>18</sup> See Baena (2017), pp. 194-199.

<sup>19</sup> Articles 90.3 and 60. 5 LACS and article 48.3 RLACS: up to 50% of the amount of said fund generated from the income of the member that is determined in function of the cooperative activity developed.



greatly decreased<sup>20</sup>.

When the cooperative maintains a single-entry bookkeeping of the total results of the cooperative entity (something that was not allowed under the previous legislation), at least 20% is allocated to the MRF until it reaches an amount equal to 50% of the share capital, and 10% is allocated to the TFS without any limit<sup>21</sup>. If the cooperative has split book-keeping, which will be normal and necessary if it wants to benefit from the special tax regimen for cooperatives contained in Law 20/1990, it must provide the MRF with at least 20% of cooperative results. But, unlike what was required before, the obligation to endow this fund with these results ceases when it reaches 50% of the capital stock figure<sup>22</sup>. The endowment reduction is noteworthy when that ratio between the fund's figure and the actual or subscribed capital stock is reached.

The provision of the MRF with the extra-cooperative results, as we have seen, now includes the old extraordinary items. They must be at least 25%<sup>23</sup>. In addition to an obvious reduction in the minimum endowment (from 80% of results with third parties and from extraordinary results to now 25%), there is an important exception that allows this fund not to be endowed when its amount is applied to productive investments, cooperation and integration between companies or in regard to internationalization<sup>24</sup>.

Regarding the TSF, there is a certain increase in the endowment with respect to the previous legislation, since the previous endowment of cooperative results was maintained (minimum of 5%) and the percentage of extra-cooperative results destined to endow this fund is increased by 5 points<sup>25</sup>.

## **9 Changes in the configuration of the results of the cooperative and reduction in the endowment of funds**

In the LACS 1999, a distinction was made among a) cooperative results (those derived from cooperative activity with members and investments in cooperative companies or mostly owned by cooperatives), b) results from operations with non-member third parties, and c) extraordinary results (those derived from investments in non-cooperative companies and those derived from the disposal of elements of fixed assets). However, the LACS only distinguishes between cooperative results and extra-cooperative results, which now include both the results of operations with third parties and the extraordinary ones<sup>26</sup>.

One of the main consequences of this change in the accounting of the positive results of

<sup>20</sup> Vargas-Vasserot (2018), pp. 22-23.

<sup>21</sup> Article 52 RLACS.

<sup>22</sup> Article 68.2.a LACS.

<sup>23</sup> Article 68.2.b LACS.

<sup>24</sup> Article 68.2.b LACS and article 53 RLACS.

<sup>25</sup> Article 68.2.a LACS.

<sup>26</sup> Article 65.3 LACS.

cooperatives and of the relaxation of the obligation to endow the MRF, which we have previously seen, is that a higher percentage of these can be assigned to the members via returns, which is the sensitive way that cooperative laws use to designate the benefits of cooperatives<sup>27</sup>. From the following table we can deduce the importance that the modification of the LACS has at this point.

LACS 1999	MRF	EPF	AVAILABLE
Cooperative results	20% > 15%	5%	80%
Results with third parties	80%	20%	0%
Extraordinary resultus	80%	20%	0%
LACS			
Cooperative results	20% > 0%	5%	95%
Extra-cooperative results	25% > 0%	25%	75%

Source: Compilation based on the legislation above mentioned.

That is to say, before, only 80% of the cooperative results were available, but not the results with third parties, nor the extraordinary results. Currently, it is possible to distribute 95% of the cooperative results and 75% of the extraordinary results.

## 10 Reform of the law to reduce the minimum number of members

In Spain, the significant reduction of the minimum number of members legally required to establish a first-degree cooperative at the state level (the Cooperatives Law of 1931 required twenty, that of 1942 fifteen, that of 1974 seven, and the LGC of 1987 five), and in the Autonomous Communities should be interpreted as a measure to promote this type of entity. In doing so, projects that require a very limited number of persons for their viability can materialize.

<sup>27</sup> See Paniagua (2017), pp. 434-436.



Originally, the LACS followed the trend by establishing the minimum number of persons to constitute a first-degree cooperative at three<sup>28</sup>. However, in 2018 the LACS was reformed and the number was reduced to two, as had already done the 2015 Law of Cooperatives of Catalonia, among others. The reasoning behind this change was to provide flexibility, as it aimed at facilitating the development of a strategic sector of Andalusia. Based on the 2019 data, it seems that this measure has paid off, because that year the creation of cooperatives in Andalusia grew by 175%, among which worker cooperatives represented 83% of the newly established, and of these, the 78% were made up of two members<sup>29</sup>.

## 11 Conclusion

Since the promulgation of the Spanish Constitution in 1978, Spanish cooperative legislation has evolved between two trends: on the one hand, fidelity to the model that defends cooperative principles and the formation of a collective equity; and, on the other hand, the relaxation of these objectives in order to satisfy the promotion of the socio-economic interests of its members. The first, more social and classical orientation of cooperativism, was the one that dominated Spanish legislation until the promulgation of the Basque Country Cooperatives Law of 1993, which is recognized as the first *economistic* cooperative law in Spain, followed by the LCOOP and some regional laws. Today, most of the Spanish cooperative laws are integrated in this so-called moderate functional model. Yet, successively, with each new autonomous cooperative law, greater approximations to the *economistic* model are perceived (lower endowments of funds, more distribution of results, distribution of the MRF, single-entry bookkeeping, etc.) affecting, therefore, the financial structure of corporations.

Despite important differences between the various Spanish cooperative laws, a certain balance or homogeneity was achieved, as these differences spanned from a moderate social orientation to a moderate economicist orientation. This balance was altered with the enactment of the LACS. It contains a cooperative legal status that breaks with the more conservative cut of its predecessor, the LACS 1999, in several respects<sup>30</sup>.

Legislating is an extremely difficult task, especially when the essential characteristics of the principle to be regulated are not clear. It is also hard because there is a business interest not to hinder the development of cooperatives, and a political interest on the part of the respective governments of the Autonomous Communities to meet the demands and desires of the cooperative members. And lastly, there is a real interest to make this business type attractive for the largest number of economic initiatives. This makes it difficult to navigate between the approximation with capitalistic **corporations** and an approach that is more respectful of the

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<sup>28</sup>Article 10 LACS.

<sup>29</sup> Europa Press (2020).

<sup>30</sup> Paniagua (2013a), pp. 53-72, Paniagua (2013b), pp. 188-190, Vargas-Vassero (2017a), pp. 14-21, Vargas-Vassero (2018), pp. 33-35.

cooperative principles. For this reason, the easiest way is probably to limit any excesses by establishing real tax incentives for genuine cooperatives.

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