

Special Section: Cooperatives and other fields of law

PROPOSALS FOR BETTER GOVERNANCE IN WORKER COOPERATIVES

Gemma Fajardo¹

Tenured Lecturer in Commercial Law

University of Valencia

ABSTRACT

The purpose of this paper is to make a few contributions to designing a more appropriate legal framework for worker cooperatives. *Cooperatives and Employment: a Global Report* published in 2014 by CICOPA and the Desjardins Group, provides the starting point for this article. I have analyzed from this study the characteristics of cooperative employment, their impact on the economic sustainability of cooperatives and the proposed recommendations. I consider the existence of a specific legal status for cooperative employment unfeasible. It is impossible to find unity in such different activities as salaried work and self-employed work, whether individual or collective. The idea that a worker member has the same status as a salaried worker cannot be accepted. We need to accept that a cooperative is a particular form of business organisation and that there are specific cooperative relationships which cannot be classified as work contracts, based precisely on the undertakings the worker enters into on becoming a member of the cooperative. Cooperatives should be governed by a specific and appropriate legal system that respects the cooperative principles and values and allows cooperatives to develop autonomously, always respecting the fundamental rights of the individual.

A suitable legal framework should encourage self-management but should also establish the red lines it should not cross, including: the limits marked by the type of company (the principles that shape the cooperative); the limits that the organic and financial structure of the cooperative requires in order to guarantee its effective management and democratic control and safeguard the legitimate financial interests of members and others; and the limits that are a consequence of the recognised rights of the members.

Measures that can help to improve the legal framework that applies to cooperatives are among others: legislators should regulate the activity that the cooperative conducts with its members in pursuit of its social objective, the main rights and duties of the members, and the management accountability; ensure sufficient reserves and demand prudence in remuneration (to be prudent in deciding the advances and to complement them only when there are sufficient surpluses), and promoting the training and education of members and workers, promoting member participation in the cooperative as an instrument to improve its control and efficiency.

¹ Results of the research project: *Social economy, self-management and employment*. (DER-2016-78732-R. Ministry of Economy and Competitiveness. Government of Spain).

1. Main contributions of the Global Report on Cooperatives and Employment

The *Cooperatives and Employment: a Global Report* published in 2014 by CICOPA and the Desjardins Group² (the *C-GD Report*) examines cooperative employment from a quantitative and qualitative point of view, with its evolution and main trends, and ends with some conclusions and recommendations that should be taken into account, developed and implemented.

Firstly, it highlights the concept of “cooperative employment”, which it describes as “employment performed both in and within the scope of cooperatives”, “comprising both *employees* and worker-members working in cooperatives, and self-employed producer-members producing within the scope of cooperatives (in terms of processing, commercialization and/or inputs), as well as the employees of these self-employed producer members”.

This is evidently a broad concept of employment, covering any type of activity carried out within the scope of cooperatives by natural persons, whether worker-members, employees or associated self-employed persons, and even the employees of the latter. Consequently, it covers the work done by the worker members in worker cooperatives and other types of cooperative, that of those working as employees in cooperatives, the activities conducted on their own account by self-employed people, professionals and sole traders who are producer or service provider members of the cooperative, and also the work of the employees of the latter group.

Note that the term ‘employment’, with reference to cooperative employment, is used both in a broad sense, as we have just seen, and in a strict sense, referring to the salaried work of those who work in cooperatives but are not members. To avoid confusion, I will use the term ‘salaried work’ as equivalent to ‘employment’ in the strict sense and the terms ‘worker member’ and ‘producer member’ to distinguish between members who work in the cooperative and members who are self-employed, professionals or sole traders and are linked to the cooperative as suppliers of goods and services rather than as consumers or users.

Such a broad concept of ‘cooperative employment’ as that used in the C-GD Report would appear not to present any common features other than connection with the cooperative. It is an item of interest for quantitative analysis of the volume of work employed directly or indirectly by cooperatives, but otherwise it would seem difficult to find points of contact that might justify speaking of the qualitative characteristics of cooperative employment without limiting the scope of the concept. Not all this cooperative employment even takes place within the cooperative, as some occurs in companies of other types whose owners are cooperative members and market their products or services through a cooperative.

Nevertheless, the authors of the report conducted a qualitative analysis of *cooperative employment* in 10 regions, attempting to identify its defining characteristics. They did this by examining working conditions

² ROELANTS, HYUNGSIK y TERRASI (2014) *Cooperatives and Employment: a Global Report*. Ed. CICOPA and Grupo Desjardins

in cooperatives in these regions and the direct testimony of people whose work was directly linked to cooperatives.

From their examination of working conditions in the cooperatives included in the study, the authors did not find major differences compared to other non-cooperative types of company. The exception lay in their implementation, as in cooperatives they were not imposed unilaterally by the management. Nor did the authors find differences compared to other companies in the way in which members and workers are taken on, with the exception of worker cooperatives, where “*workers undergo a dual form of recruitment, as workers and as members (either at the same moment or later)*”. We may therefore deduce that in these cooperatives, being a member is not sufficient in order to take part in the cooperative activity (by working), which is subject to a separate contract.

A challenge to the cooperative identity is found when recruiting experienced staff and professionals in high positions, partly because of the wage gap they experience and partly because of their usual ignorance of cooperative culture. However, their technical expertise is valued more highly than the risks they present.

Regarding wages and other types of compensation, the wage gap is usually narrower than in other kinds of company and in some cases the same salary system is applied across the board. However, these practices are not always satisfactory. One reason is that they make it difficult to recruit or retain highly qualified personnel and another is that employees tend to make less effort if the wages are fixed without regard to the difficulty of the work involved.

As regards employee remuneration, the report states that while employees are generally well paid, this is not the case during the start-up stage in worker cooperatives, or in cooperatives that are promoted as public policy instruments against poverty and unemployment or those that work in emerging sectors such as personal services. In the first case, start-up cooperatives go through similar difficulties to other types of company, where the founders cannot guarantee adequate remuneration for their work. In the second case, the level of remuneration is lower than in other companies in the same sectors and the authors doubt that the cooperative model is the solution in these situations.

However, the salary is not the only compensation that cooperative workers receive. Other non-material compensations are highlighted and viewed very positively, such as flexible working hours, less overtime, a horizontal and convivial workplace culture and democratic and participatory governance.

In terms of social protection and occupational safety, the general level of employee protection is similar or higher to that enjoyed in other companies but the same cannot be said for the worker members. The report highlights that in many countries, particularly in Latin America, “the fact that [...] worker-members are classified as self-employed creates a major problem in terms of social protection,” because “when workers transform an enterprise in crisis into a cooperative, they lose their previously acquired social protection”. In contrast, other countries either apply the same social protection to all workers (United Kingdom and Germany) or set up systems that make it easy for worker members to enjoy as broad a social protection as employees (Spain and France).

Lastly, the report examines the relations between the workers and trades unions, highlighting that employees, worker members and producer members all find it difficult to understand the role that a trade union could play in negotiations and conflict resolution in their cooperative, given the direct relations between the workers and the managers or directors.

Among the characteristics of cooperative employment highlighted by those interviewed, the following should be mentioned:

- Greater participation and democratic control. Among the aspects highlighted are greater flows of information (a precondition and outcome of participation) and transparency (less opportunity for corruption). Worker members take part in deciding their working conditions, based on the recommendations or suggestions of the cooperative's boards or committees. The report also emphasises that participation requires responsibility, as worker members perform the functions of both employee and employer (decision-making and control), and are also affected by the consequences of these decisions (liabilities, losses, etc.).
- The feeling of belonging to the cooperative and working as a community. The workers are more involved in the company, they feel like entrepreneurs and their involvement does not finish at the end of the working day.
- Variable remuneration depending on business results makes it possible to pay higher, more stable, and more secure wages if the business is doing well and lower, less stable ones if this is not the case.
- Efficient decision-making. Worker cooperatives are more nimble, flexible and resilient than traditional companies because they do not have excessive layers of bureaucracy, and this seems to be a key factor for the new cooperative enterprises in the liberal professions and knowledge-based businesses, according to Westerdahl and Westlund.³
- Cooperative employment is more flexible. This flexibility could be perceived negatively (because it could imply a lack of social security and institutional protection), but in some cooperatives it is an important value because it allows the workers to balance their work and family lives. At all events, it is acknowledged that individual autonomy and freedom are increasingly important and that the new technologies and globalised economy encourage flexibility⁴.
- Working in a cooperative fosters values that help those it employs to grow and develop integrally, because its objective is to meet the needs of its members and help to improve their environment more than to make a profit. Some of those interviewed even considered cooperatives as instruments for creating a more reliable and just economic system.

The report also studies what impact the specific characteristics of cooperative employment have on the economic sustainability of cooperatives, and vice versa, and highlights that:

- Since cooperatives have the objective of meeting the needs and aspirations of their members, their employment tends to be long-term, with slow but continuous renewal. However, job security is not absolute because it depends on the sustainability of the enterprise.

³ WESTERDAHL, S. y WESTLUND, H. (1998). "Social Economy and New Jobs: A Summary of Twenty Case Studies in European Regions", *Annals of Public and Cooperative Economics* Vol. 69 n°. 2, 193-218.

⁴ BOLTANSKI and CHIAPELLO (1999) *Le Nouvel Esprit du Capitalisme*, Paris. Gallimard.

- The fact of being a member and therefore an owner of the cooperative leads to greater involvement and participation by the members. The workers perceive that the cooperative's profitability is directly related to the work of each person, in the same way that the yields they receive are directly proportional to the company's results. Additionally, the members feel freer to organise their work to achieve the proposed target, which encourages personal initiative, productivity and innovation within the company. This greater involvement is also shown when debating and deciding adjustments in working conditions (reducing their advances, forgoing distribution of surpluses, reducing the share capital, sharing losses, or providing collateral). However, they also have this attitude because they trust in their cooperative's reliability and transparency. It is therefore necessary to generate trust among the members.
- The values of education and training are key components of the sustainability of the cooperative enterprise. If the cooperative wants to be sustainable and generate trust and loyalty among its members it needs to ensure these two components: professional competence and knowledge of the cooperative mode of functioning. It can demand these when recruiting staff or accepting new members, but above all it needs to invest in educating and training its members and employees.
- The importance of generating capital and reserves that will allow jobs to be kept in times of crisis.

Lastly, the report identifies various challenges to cooperative employment in view of today's globalisation. One of these, at a time of increasingly flexible and precarious employment, is to prevent the cooperative model being abused so that companies can avoid labour costs, or by engaging in subcontracts with no business autonomy. The report criticises the use of cooperatives as instruments to lay off, outsource and exploit workers and small producers. It also refers to a 'cooperativisation' of public and private sector activities in some countries that has led to a deterioration in working conditions, and mentions the creation of false or pseudo cooperatives, in other words, cooperatives that only act as labour intermediaries for other companies.

The report ends with a series of recommendations that largely coincide with ILO Promotion of Cooperatives Recommendation no. 193 of 2002⁵. I would like to draw attention to those concerning:

- Employment policy. These recommendations are addressed to the public authorities. Among other measures, they call for the establishment of a policy and legal framework that are supportive of cooperatives, consistent with their nature and function and guided by the cooperative values and principles (ILO R193, art. 6).
- Entrepreneurship. This comprises a series of recommendations addressed to cooperatives, cooperative organisations and public authorities. In particular, they include promotion of participation and involvement by cooperative personnel (of whatever type) and investment in employee training and education; and promotion of business transfers to employees, highlighting the importance of an appropriate regulatory framework and the necessary technical know-how that cooperative organisations, professionals and specialised entities should possess. The last recommendation I would highlight is the call for regulations and policies that promote constituting the necessary financial reserves in cooperatives, as well as other mutualised financial instruments.

⁵

http://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R193

- Labour standards, transition towards the formal economy, social protection and the fight against pseudo cooperatives. The first of these recommendations is that employment in cooperatives (without distinction) should abide by the fundamental labour standards of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work “for all workers in cooperatives without distinction whatsoever” (ILO R193 art. 8.1.a). With regard to working conditions and social protection, the report recommends that cooperative organisations should dialogue with trades unions and public authorities on these issues, which should be integrated into collective bargaining processes. For “people with self-employed status working in or within the scope of cooperatives” (members), the report recommends that they should always enjoy a satisfactory level of social protection. To this end, cooperatives should work with public authorities to build an appropriate legal framework for their social protection and should develop complementary social protection systems. On the subject of formalisation of the economy, the report recommends recognising the cooperatives’ potential for transition towards the formal economy and formal employment, transforming marginal survival activities (the informal economy) into legally protected work (ILO R193 art. 9). Lastly, it recommends fighting against pseudo cooperatives “by ensuring that labour legislation is applied in all enterprises” (ILO R193 art. 8.1.b).

2. The unfeasibility of a specific legal status for “cooperative employment”.

The C-GD Report is very interesting because it contains information that contributes to a greater knowledge of the reality of what it calls cooperative employment and because its recommendations, if implemented, could contribute to improving the regulatory framework and functioning of the cooperatives.

As I feared from the start, however, it does not achieve a homogeneous view of this ‘cooperative employment’ that it attempts to present as a category with shared characteristics to which the same rules can be applied.

It is impossible to find unity in such different activities as salaried work and self-employed work, whether individual or collective (‘associated work’, as in worker cooperatives). Their objectives are not the same, nor are their areas of activity, nor, naturally, are their problems. This diversity can be seen in the report itself. The characteristics it records are not shared by all the subjects studied and the report finds itself obliged to specify their situation (employee, worker member, producer member). At other times this would have been desirable but the report does not make the distinction. For example, it declares that cooperative employment has been sustained thanks to job growth in worker cooperatives, social cooperatives and multi-stakeholder cooperatives, but have salaried work and the number of worker members grown at the same rate? Whatever the answer, its analysis would undoubtedly be interesting.

It might also be thought that there were no great differences between salaried workers and members (worker members or producer members) in the cooperatives studied. This might be the case where the salaried workers enjoy a high degree of political and economic rights in the cooperative, but in that case, why do not they not apply for membership? It could also be that the worker members of the cooperatives are equated with salaried workers, while other persons (members or otherwise) undertake the management and control of the cooperative, but in that case, is it a cooperative? There are also

(questionable) producer cooperatives with such limited autonomy compared to the power of another organisation (supplier, client, or owner of the means of production) that their de facto situation is equivalent to that of a salaried worker. The lack of differentiation between the different subjects examined also gives rise to many doubts about its cause.

While not agreeing that ‘cooperative employment’ can be considered a category from a qualitative point of view, I do agree that it is necessary to call for certain minimum fundamental rights to be recognised and applied to everybody, whether worker or not and whether self-employed or working for another. The human rights proclaimed by the General Assembly of the United Nations on 10 December 1948 are to be promoted and observed by progressive measures, national and international (Preamble to the Universal Declaration of Human Rights – UDHR). Consequently, it should be recognised that everyone has the right to work, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, and to just and favourable remuneration ensuring an existence worthy of human dignity and supplemented by other means of social protection. Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. Everyone has the right to an adequate standard of living for health, to medical care and necessary social services, to security in the event of unemployment, sickness, disability, widowhood and old age, and special care and assistance for motherhood, among others (UDHR, articles 23, 24 and 25). In accordance with this text, it is the public authorities’ responsibility to provide the means whereby everyone may come to enjoy these rights.

As well as this responsibility of the public authorities, when a person works for another in a dependent relationship the standards protecting workers, known internationally as the ILO International Labour Standards, should also be applied.

The standards protecting workers should not be applicable, however, or at least not across the board, to self-employed people, professionals, sole traders, artisans or worker or producer members of cooperatives, in that they represent rights with regard to an employer. The reason is that these categories are not employees. Quite the opposite, in fact: what defines them is autonomy in their work and in deciding how to do their work. When various people unite to work together this autonomy is no longer exercised individually but collectively, through the bodies set up to express the will of the group or the societal will. As there is no bilateral contractual relationship in their endeavour, who is supposed to guarantee them these rights?⁶

People usually form companies and cooperatives in order to work together. They can organise their contribution in different ways, such as contributing in exchange for a share of the profits (members of general partnerships), as obligations ancillary to the capital contribution (capital-based companies), by entering a work contract as an employee (in exchange for a salary) with the company of which the person is a shareholder/member, or on a cooperative basis.

⁶ We share Hagen Henry’s opinion when he states that in worker cooperatives: “*The various aspects of labour law might need different treatment*”, and “*Where the rules on social protection, workplace and product safety should apply in all cases, the rules of labour law in the narrow sense might required adaptation or not apply at all these relationships because the members freely consented to organize their work according to cooperative principles, instead of seeking to establish a work relationship*”. HENRY, H. (2012), *Guidelines for Cooperative Legislation*. International Labour Office, 3rd ed. rev. Geneva, 78-79).

The member workers of a cooperative join together to work together. They commit themselves to this when they set up the cooperative or apply for membership of an existing cooperative. The right/duty to work is the object of the cooperative agreement.

Not all countries recognise the cooperative structure as a type of organisation in its own right. In some countries there is a special legal form for cooperatives (Germany, Austria, Portugal or Spain) or for some types of cooperative (in France, in relation to farmers' cooperatives), while other legal systems have no specific form for them. In these cases the founders have to adopt existing legal forms such as an association (Netherlands), or civil society or commercial company (Italy or France, for example in relation to *sociétés coopératives de production*), or the form that the founders consider best suits their interests (United Kingdom or Denmark)⁷. Nevertheless, the lack of a specifically cooperative legal form and the use of other existing forms is no impediment to recognising that in these cases the cooperative has a *sui generis* legal nature, distant from the for-profit cause of a partnership agreement or memorandum of association⁸.

The association between the worker member and the cooperative is not identical in every country, either. In some, membership in itself gives the right to take part in the cooperative activity and exercise any other political or economic right in the cooperative (Spain, art. 16 of the 1999 Act). In others, in order to work in the cooperative the members must hire out their work to it.

The double nature principle – *doublé qualité* o *identitäts prinzip*, applied to worker cooperatives, means that only workers may be members of the cooperative and only members may be workers of the cooperative. This principle is commonly recognised in all legal systems and has been interpreted sometimes as meaning that two relationships are required in order to be a worker member of the cooperative: an associative contract (in this case, as a public limited company or limited liability company) and a work contract.⁹ However, these two types of contract are linked, as resignation or dismissal owing to misconduct entail the loss of membership and loss of membership entails leaving the job. Also, the work contract can impose an obligation to apply for membership, in which case, if this application is not made it is understood that the person is giving up the job (France, Law 78-763, arts. 9 to 11).

It can be seen that the idea that a worker member has the same status as a salaried worker cannot be accepted. We need to accept that a cooperative is a particular form of business organisation and that there are specific cooperative relationships which cannot be classified as work contracts, based precisely on the undertakings the worker enters into on becoming a member of the cooperative.

⁷ MUNKNER, H. (2015) "Revision of co-operative law as a reaction to the challenges of economic, social and technological change". *CIRIEC. Revista Jurídica*, n° 26.

⁸ ESPAGNE, F (2001) *Le statut legal des cooperatives ouvrières de production (S.C.O.P.) en France*. Available at: http://www.les-scop.coop/export/sites/default/fr/_media/documents/statut-legal-scop.pdf

⁹ In this regard, the Italian law 142/2001 *Revisione della legislazione in materia cooperativistica, con particolare riferimento alla posizione del socio lavoratore*, states: "Il socio lavoratore di cooperativa stabilisce con la propria adesione o successivamente all'instaurazione del rapporto associativo un ulteriore e distinto rapporto di lavoro, in forma subordinata o autonoma o in qualsiasi altra forma, ivi compresi i rapporti di collaborazione coordinata non occasionale, con cui contribuisce comunque al raggiungimento degli scopi sociali" (art.1.3). See also FICI, A. (2013) "Italy", CRACOGNA, D; FICI, A.; HENRY, H. (editors) *International Handbook of Cooperative Law*. Springer, 486.

3. The appropriate legal framework for cooperatives and their worker members is not compatible with the application of the labour standards

An appropriate legal framework for cooperatives should include the specificities of this model of business organisation without having to borrow other legal institutions that are not entirely adequate for its functioning (the legal status of a public limited company or limited-liability company, work contracts or labour law).

This has been a constant demand of cooperatives and their representative organisations. Both the ICA and the ILO have called on countries to pass specific legislation and regulations for cooperatives, inspired by the cooperative values and principles¹⁰.

The Framework Law for the Cooperatives in Latin America (ACI-Américas, 2009), which aims to provide cooperatives with a specific legal framework for their organisation, functioning and regulation, including the definition, principles and values proclaimed by the ICA and the ILO, is a major advance¹¹. In this framework, the term ‘cooperative acts’ designates those performed between the cooperatives and their members in fulfilment of their purpose, which are subject to cooperative law (section 7), in other words, to the special laws and regulations governing the actions of cooperatives, “*excluding the application of other legal concepts or regulations which do not relate to the nature of cooperatives*”. Section 91 defines “cooperatives of associated work (workers’ cooperatives)” and declares that these are not subject to labour law: “*Labor relations and compensation systems shall be governed by the bylaws or special regulations approved by the General Assembly [sic] and shall not be subject to labor laws applicable to salaried dependent workers. However, they shall observe the law on social security and the protection against labor hazards, thus guaranteeing the members a decent job.*” The idea that the relationship between the member and the cooperative is special and that ‘associated work’ is not a labour relationship but a societal or associative one is present throughout Latin America¹² and in some European legal systems (Spain, Law 29/1999, art. 80.1 and 80.16, or the Basque Country regional law 4/1993, art. 101).

Returning to the C-GD Report, we may remember that it recommended that employment in cooperatives (without distinction) should comply with the fundamental labour standards of the ILO and the ILO declaration on fundamental principles and rights at work, and that labour law should apply to all

¹⁰ See section 6 b) of the Resolution submitted by the ICA Board to the General Assembly on “The ICA Statement on Co-operative Identity – The Declaration on Co-operatives Towards the 21st Century” (1996) or section 10.1 of the ILO Promotion of Cooperatives Recommendation (2002).

¹¹ Nevertheless it must be taken into account as Dante Cracogna says that this Framework Law “*should not be considered a last and final achievement, but rather an approach to a topic whose nature is complex and vulnerable to modifications*”. CRACOGNA, D. (2013) “The Framework Law for the Cooperatives in Latin America”, CRACOGNA, D; FICI, A.; HENRY, H. (editors) *International Handbook of Cooperative Law*. Springer, 168.

¹² Alberto García Müller quotes the cooperative laws of Bolivia (2013, arts. 9 and 10), Brazil (1971, art. 79), Argentina (1973, art. 4), Honduras (1987, art. 4), Colombia (1988, art. 7), Mexico (1994, art. 6), Paraguay (1994, art. 8), Puerto Rico (1994, art. 2.4), Costa Rica (1994, art. 2), Panama (1997, art. 3), Venezuela (2001, art. 7), Nicaragua (2004, art. 7), Uruguay (2008, art. 9), Peru (2010) and Ecuador (2011, art. 4). See GARCÍA MÜLLER, A (2014) “El acto cooperativo, construcción latinoamericana” in *Historia Social y Solidaria en la Historia de América Latina y el Caribe*, Vol. I. Mutuberria and Plotinsky (compilers). Ediciones Idelcoop, 241-242.

companies in order to combat pseudo-cooperatives. These recommendations also agree with those already made in arts. 6 and 8.1.b of ILO Recommendation no. 193.

The ILO Declaration on Fundamental Principles and Rights at Work (1998) calls for the elimination of forced labour, child labour and discrimination in respect of employment, and for freedom of association and the right to collective bargaining.

The former are demands based on fundamental rights and liberties, as we have seen previously, and can only be supported. However, the right to collective bargaining only applies to negotiations between an employer or group of employers, on the one hand, and one or more workers' organisations, on the other, for determining working conditions and terms of employment or regulating relations between employers and workers (art. 2, ILO Collective Bargaining Convention of 1981, no. 154). In a cooperative there is no employer or employee, only people who work together (co-operate) in a jointly-owned company and decide their working conditions by a majority resolution of their assembly. Equally, while trade union freedom cannot be denied, as the right people have to associate to defend their interests, I agree with those interviewed in the C-GD Report who do not understand what part trades unions have to play in a cooperative. Trades unions represent the workers' interests in relation to the employer who has hired them. In a cooperative, the members are not hired and do not need to be represented when taking decisions such as approving the conditions in which they are to work, as they all have the right to speak and vote and to be elected to management and administration positions in the cooperative.

In cooperatives with different classes of members (called multi-stakeholder cooperatives in the C-GD Report) where the worker members do not control the cooperative, the rules (cooperative statutes) must establish measures to favour the legitimate representation of these members on the governing bodies and ensure that their activity is not subordinated to the interests of other membership groups, or *vice versa*. Company law offers several instruments for meeting these objectives (sector meetings, joint committees, minority rights, etc.), so here too the presence of trade unions would seem unnecessary¹³. For instance, it could be established that resolutions which affect a group of members require the favourable vote not only of a majority of the members but also of a majority (qualified or otherwise) of the group affected.

For their part, the international labour standards are a global system of instruments (recommendations and conventions) regarding work and social policy, referring to subjects such as the right to organise, collective bargaining, forced labour, child labour, equal opportunities, equality at work, health and safety at work, labour relations, termination of employment, wage protection, minimum wages, working hours, weekly rest, paid holidays, social security, maternity protection, etc.

All these standards are normally reflected in the national labour legislation that applies to salaried workers, but can hardly be applied to other types of worker who have no dependent relationship with an employer.

In Spain, for example, different statutes with different rights and obligations apply, depending on the type of worker. Salaried workers are governed by the worker's statute (*Estatuto de los Trabajadores*,

¹³ Another issue would be to consider what other functions trade unions might offer to workers who opt for self-management. But that debate does not correspond us at this moment.

Legislative Royal Decree 2/2015), which applies “to workers who voluntarily provide remunerated services as employees [*por cuenta ajena*, literally “for the account of another”] within the sphere of organisation and management of another person, natural or legal, termed the employer or entrepreneur [*empleador o empresario*]” (art. 1). The self-employed workers’ statute (*Estatuto del Trabajo Autónomo*, Law 20/2007) applies to self-employed workers, defined as natural persons who habitually, personally, directly, for their own account [*por cuenta propia*] and outside the sphere of management and organisation of another person conduct an economic or professional activity for profit, whether or not they give employment to employed persons (art. 1). Lastly, the status of worker members of worker cooperatives is regulated by the cooperative legislation, comprising Spanish law 27/1999 and the cooperative laws of the autonomous communities (regions). This legislative framework recognises the right of the member to take part in the cooperativised activity (work), classifies the relationship between the member and the cooperative as societal and regulates aspects such as temporary suspension of the obligation to work, mandatory expulsion, the right to advance payments, to surpluses, to interest on capital, to updating, reimbursement and transfer of contributions to capital, etc. Regulation of the cooperativised activity (working conditions) is usually effected through the cooperative’s statutes and internal regulations, but in the case of worker cooperatives the law has established a special system. In the different cooperatives acts in Spain, the following models may be distinguished:

- The cooperative statutes or the general assembly decide the working arrangements of the worker members. They “may” regulate matters such as the working day, weekly rest, holidays, leave, functional mobility, extended leave of absence, causes of temporary or definitive suspension from work and any other matter directly linked to the rights and obligations derived from the performance of work by the worker member¹⁴.
- The model followed by the national legislators in Law 27/1999, which laid down how the members should regulate their work arrangements. It rules on aspects such as the length of the working day, what days may not be worked, what holidays they must have, the minimum number of days’ leave for marriage, illness of family members, moving home, etc. In no other type of cooperative (consumer or producer) have the lawmakers found it necessary to regulate how the members should organise themselves¹⁵.
- The third model, which is not incompatible with the first and, indeed, complements it, is that of the Catalan Cooperatives Act (art. 132, 1st to 4th). This states that the working arrangements must be set out in the cooperative’s statutes and internal regulations and indicates which matters they may regulate and which they may not. The latter are considered matters of public policy and may not be altered without express legal authorisation. They regard the rules concerning night work, unhealthy, arduous, harmful or dangerous work, the Social Security system and risk prevention.

¹⁴ This is the case in the laws of the Basque Country 4/1993 (art. 101), Galicia 5/1998 (art. 107.1), Madrid 4/1999 (art. 106.3), Castile-Leon 4/2002 (art. 103.1) and the Balearic Islands law 1/2003 (art. 104).

¹⁵ The laws of La Rioja 4/2001 (art. 106) and the Valencia region 2/2015 (art. 89.3) contain similar provisions.

This last law provides a fairly satisfactory solution, in my opinion, because it distinguishes certain matters that are considered public policy and cannot be changed and leaves the rest to the members to decide freely.¹⁶

In conclusion, cooperatives should be governed by a specific and appropriate legal system that respects the cooperative principles and values and allows cooperatives to develop autonomously, always respecting the fundamental rights of the individual. What is not regulated in the cooperative statutes should be covered by the cooperative legislation or, failing that, by common law. The application of labour law by analogy should not be ruled out, either, if required by law or the judge considers it appropriate.

That the cooperative legislation allows the worker members to regulate their own working conditions constitutes one of the main advantages of cooperatives: their flexibility. The C-GD Report also highlights it on numerous occasions, such as when those interviewed stated that worker cooperatives are more nimble, flexible and resilient than traditional companies because they do not have excessive layers of bureaucracy, or when it notes that members feel freer to organise their own work and this encourages personal initiative, productivity and social innovation.

Indeed, flexibility is one of the main reasons why it has been possible for many cooperatives to keep going during the crisis, and is currently making it possible to create new cooperatives. A recent study on the behaviour of Spanish cooperatives during the economic crisis showed that they were holding up better than the rest of the business fabric and that the fundamental factors explaining this spring from their ownership structure, which gives them better mechanisms for adapting to market conditions. This study by Claudia Sánchez Bajo highlights their flexibility in deciding their organisation and working arrangements, accepting certain sacrifices if this makes it possible for the cooperative to continue; their ability to decide collectively to adapt their labour conditions to the circumstances of the market; and their flexible response to market conditions, which allows them to adjust their business model to market variations¹⁷. In addition, it emphasises the combination of flexibility and maintaining employment levels as a key factor in the cooperatives' resilience¹⁸.

The flexibility of cooperatives is also proving crucial for the creation of new enterprises. So found Westerdahl and Westlund (1998) in relation to new cooperatives set up by liberal professionals and

¹⁶ However, the new catalan law on cooperatives 9/2015 introduces an important exception to this general rule in paragraphs 5th and 8th: In the case of worker cooperatives with more than twenty-five worker members whose main activity is the realization, through commercial subcontracting of works, supplies or services of all or part of the activity or principal activity of another company or companies or contracting business groups or carrying out a market economic activity for a client with a dependency of 75% or more of the annual turnover of the cooperative, the statutes or the internal rules must guarantee as a minimum, the following conditions: A) Working conditions, especially in terms of working time and remuneration; B) The social protection of the worker members. These conditions must be at least effectively equivalent to those recognized in collective agreements applicable to employed persons in the sector or work place of the main enterprise for which provide services. With regard to social protection, it must be equivalent to that of workers included in the general social security scheme.

¹⁷ SABIN, F., FERNANDEZ, J.L. & BANDRÉS, I. (2013): "Factor C: Factores de resistencia de las microempresas cooperativas frente a la crisis y recomendaciones para un fortalecimiento cooperativo del sector de lo social", *Revista Vasca de Economía Social*. GEZKI, 9, 75-100.

¹⁸ SANCHEZ BAJO, C. (2013) David and Goliath—Cooperatives and the Global Crisis. Available at: [http://www.unrisd.org/unrisd/website/newsview.nsf/\(httpNews\)/8248A910D859F210C1257BAB002F52E2?OpenDocument](http://www.unrisd.org/unrisd/website/newsview.nsf/(httpNews)/8248A910D859F210C1257BAB002F52E2?OpenDocument)

knowledge-based enterprises. French business and employment cooperatives (*coopérative d'activités et d'emploi*) come under this heading. They are worker cooperatives (SCOP) in form but original in their purpose, being made up of people who organise their professional activities freely and manage themselves autonomously but have contractual ties to the cooperative as salaried employees and members. Their development has required French labour law to become more flexible and their system still gives rise to legal queries. Their model is half-way between a worker cooperative and self-employed producers¹⁹.

Another original model are the new Spanish entrepreneurship support cooperatives (*cooperativa de impulso empresarial*). These are worker cooperatives that have the objective of channelling the entrepreneurial initiatives of their members through professional guidance, providing the business skills they need to develop their ventures, tutoring them in the early years and providing certain shared services²⁰. In these cooperatives, worker members who provide the services can coexist with professional members who benefit from them (Andalusia, Law 14/2011, art. 93, and Cantabrian Law 6/2013, art. 130).

In cases where the relations between the worker member and the cooperative are subject to labour law, cooperatives have had greater difficulties in overcoming the economic crisis and it is currently also more difficult to set up new cooperatives. Consequently, many projects that would otherwise have formed a cooperative have found themselves obliged to found associations, or have set up cooperatives but have been unable to meet the obligations the labour laws impose on them²¹.

4. Measures that can help to improve the legal framework that applies to cooperatives

Firstly, as already mentioned, the law should provide a specific legal framework for cooperatives that not only promotes them but above all recognises their peculiarities, essentially based on their mutualist nature and on the cooperative principles and values.

A suitable legal framework should encourage self-management but should also establish the red lines it should not cross, including: the limits marked by the type of company (the principles that shape the cooperative); the limits that the organic and financial structure of the cooperative requires in order to

¹⁹ HIEZ, D. (2013) *Coopératives*. Ed. Delmas, 62.

²⁰ ALZOLA, I. “Las Cooperativas de Emprendedores” y SÁNCHEZ, G “ Cooperativas de impulso empresarial: el caso concreto de Smart Ibérica de impulso empresarial S. Coop. And”, *Empresas gestionadas por sus trabajadores. Problemática jurídica y social*. FAJARDO, I.G. (coord), CIRIEC, 2015, 225 y ss.

²¹ As shown by the study in Brazil on the application of the Worker Cooperatives Act (Law 12690/2012), which was intended to ensure social rights for the worker members of cooperatives. This study found that worker cooperatives in the solidarity economy do not make employment precarious but do not currently possess the financial strength to guarantee their members these rights. The rights they should guarantee refer to minimum wages, maximum working periods of 8 hours a day and 44 hours a week, and work accident insurance. ANJOS, E. (2015) “Cooperativas de trabalho e trabalho precário: um longo percurso para constituir os direitos sociais”. Paper presented at IX International Congress of the Red Rulescoop: *Respuesta de la Universidad a las necesidades de la economía social ante los desafíos del mercado*. Universidad de la Plata (Argentina), 2-4 September 2015).

guarantee its effective management and democratic control and safeguard the legitimate financial interests of members and others²²; and the limits that are a consequence of the recognised rights of the members.

The legal framework must be suitable for its purpose. Capital-based companies are formed to engage in activities that generate profits which can be divided among the shareholders in proportion to the capital invested. In this case it is important to regulate the capital, the rights it confers, the making of profits and their distribution. In a cooperative, the objective is to meet the needs of the members, which in the case of worker cooperatives are mainly the need to work. Legislators should regulate the cooperativised activity (the activity the cooperative conducts with its members in pursuit of its social objective), the main rights and duties of the members, and management accountability.

Traditionally, legislators have not taken excessive pains to provide an appropriate legal framework for cooperatives. As we have seen, it is not unusual for cooperatives to have to take the legal form of other types of business organisation, and even when they have a framework of their own it is usually highly contaminated by the classic rules and institutions of capital-based societies, which are not compatible with its structure and purposes.

This is the context in which legislators need to establish the rights, obligations and responsibilities of cooperative members and the rules by which the cooperativised activity are to be governed. Texts such as the Framework Law for the Cooperatives in Latin America or the Guidelines for Cooperative Legislation (ILO, 2012), as well as other necessary reference works²³, are of great assistance in this task.

The rules governing the cooperativised activity (the provision of work) can be regulated in a number of ways, as we have seen, allowing the members more or less autonomy. A mixed system such as that provided for in Catalonia's Law 12/2015 (art. 132, 1st to 4th), would seem to strike the right balance.

One of the main problems that cooperatives encounter in their early days or in times of crisis is how to pay wages and social security contributions. If the cooperative does not obtain sufficient income and does not have reserves available for this purpose it can hardly meet its obligations, and doing so under these circumstances will probably lead to insolvency and closure. As the C-GD Report has highlighted, a prudent measure that has proved very useful in recent years is the existence of reserves, which have allowed cooperatives to continue in existence and to attend to their members' remuneration, however minimally. Consequently this is a good practice that cooperatives should not forget, as the cooperative principle of member economic participation clearly reminds us. It is also good practice to be prudent in deciding the advances (remuneration on account against surpluses) and to complement them only when there are sufficient surpluses²⁴. When distributing surpluses, assignment to indivisible reserves and to share capital are both favourable for the cooperative, as they constitute equity. However, reserves contribute more effectively than capital to the long-term sustainability of the cooperative, since capital is

²²

²³ Including MÜNKNER, H. (2015) *Co-operative Principles and Co-operative Law*, 2nd ed. Revised. LIT VERLAG, or FAJARDO, I.G; FICI, A.; HENRY, H., HIEZ, D.; MÜNKNER, H. and SNAITH, I. (2017), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*. Intersentia.

²⁴ We share with Virginie Pérotin that "Employee control is thought to increase productivity, and in a labour-managed firm adjusting pay to preserve jobs makes sense for the employee-owners", PEROTIN, V. *What do we really know about worker co-operatives?* Co-operatives UK, 20.

variable and can be reduced at any time if a member leaves. Also, generating a large volume of share capital makes it difficult for new members to join if they are required to match the older members' contribution (Spain, Law 27/1999, art. 46.7).

The right to social security should be a universal right that guarantees adequate care and social benefits in situations of need. Every worker in Spain, whether self-employed, worker member or employee, is obliged to contribute to the Social Security, but through different systems. The protection provided by the general system, which applies to employees, is greater than that of the self-employed system, although the benefits are tending to converge even though the sums continue to differ. One rule that benefits cooperatives is that they can choose which system they wish to apply. In their cooperative statutes they can opt to contribute through the general system or through the self-employed system. This choice can only be made through the statutes, for a minimum period of five years, and applies to all the worker members of the cooperative (Spain, Royal Decree 1278/2000). This is a highly suitable system for cooperatives, as during start-up and at critical moments they can opt for the cheaper system even though it provides less protection, and when the moment has passed they can change to the system that gives greater protection.

The C-GD Report also recommends adopting other measures – which should be shared – to improve the legal framework that applies to cooperatives and their worker members: promoting the training and education of members and workers, and promoting member participation in the cooperative as an instrument to improve its control and efficiency.

Indeed, a suitable legal framework should require cooperatives to draw up an annual cooperative education and training plan for their members, workers and directors, devote the necessary means to carrying it out and report on the resulting actions and achievements at the close of the year. At all events, the activities to be carried out should fit the needs of their beneficiaries and should be approved by the members at the assembly.

As regards information, while this is a right of the members of any type of company there is even more reason for the members of a cooperative to be informed of everything concerning the organisation, functioning and future prospects of their cooperative. The members' involvement in the cooperative is greater than in other companies because not only have they invested capital in it, they also cooperate directly in its economic, training and social activities and therefore need information on the cooperative in general and on the activities in which they participate. This information should be complete, clear and accessible to the members.

The cooperative needs its members' cooperation to pursue its objectives. The needs it has to attend to are those that its members decide, and it needs the cooperation of its members in order to meet these needs. Consequently, the members' participation in deciding the annual objectives, carrying them out and monitoring their fulfilment is an essential factor that should not be neglected. The members should have the right and the duty to participate in the cooperative through its management bodies, economic activities and activities of other types decided by the assembly.

The law therefore needs to establish mechanisms that make this participation possible and it is the task of the cooperative to promote it. As the C-GD Report emphasises, there is a close relationship between

information and participation, and the greater the transparency, the greater the trust and involvement of the worker members.

REFERENCES

ANJOS, E. (2015) “Cooperativas de trabalho e trabalho precário: um longo percurso para constituir os direitos sociais”. Comunicación presentada en IX Congreso Internacional de la Red Rulescoop: *Respuesta de la Universidad a las necesidades de la economía social ante los desafíos del mercado*. Universidad de la Plata (Argentina), 2-4 septiembre 2015.

ALZOLA, I (2015) “La cooperativa de emprendedores”, *Empresas gestionadas por sus trabajadores. Problemática jurídica y social*. Ed. Ciriéc, 225-230.

BOLTANSKI, L. y CHIAPELLO, E. (1999) *Le Nouvel Esprit du Capitalisme*, París. Gallimard.

CRACOGNA, D. (2013) “The Framework Law for the Cooperatives in Latin America”, CRACOGNA, D; FICI, A.; HENRY, H. (editors) *International Handbook of Cooperative Law*. Springer, 165-186.

ESPAGNE, F. (2001) *Le statut legal des cooperatives ouvrières de production (S.C.O.P.) en France*. Disponible en: http://www.lesscop.coop/export/sites/default/fr/_media/documents/statut-legal-scop.pdf.

FAJARDO, I.G; FICI, A.; HENRY, H., HIEZ, D.; MÜNKNER, H. and SNAITH, I. (2017), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*. Intersentia.

FICI, A. (2013) “Italy”, CRACOGNA, D; FICI, A.; HENRY, H. (editors), *International Handbook of Cooperative Law*. Springer, 479-501.

GARCÍA MÜLLER, A. (2014) “El acto cooperativo, construcción latinoamericana” en *Historia Social y Solidaria en la Historia de América Latina y el Caribe*. Tomo I. Mutuberria y Plotinsky (Compiladores). Ediciones Idelcoop, 241-242

HENRY, H. (2012) *Guidelines for Cooperative Legislation*. International Labour Office, 3rd rev. ed., Geneva.

HIEZ, D. (2013) *Coopératives*. Ed. Delmas.

MUNKNER, H. (2015) “Revision of co-operative law as a reaction to the challenges of economic, social and technological change”. *CIRIEC. Revista Jurídica*, nº 26.

MUNKNER, H. (2015) *Co-operative Principles and Co-operative Law*, 2^o ed. Revised. Ed. Lit Verlag.

PEROTIN, V. *What do we really know about worker co-operatives?* Co-operatives UK. Disponible en:

https://www.uk.coop/sites/default/files/uploads/attachments/worker_co-op_report.pdf

ROELANTS, HYUNGSIK y TERRASI (2014) *Cooperatives and Employment: a Global Report*. Ed. CICOPA and Grupo Desjardins.

SABIN, F., FERNANDEZ, J.L. y BANDRÉS, I. (2013): “Factor C: Factores de resistencia de las microempresas cooperativas frente a la crisis y recomendaciones para un fortalecimiento cooperativo del sector de lo social”, *Revista Vasca de Economía Social*. GEZKI, nº 9, 75-100.

SÁNCHEZ, G. (2015) “Cooperativas de impulso empresarial: el caso de Smart Ibérica S. Coop. And.” *Empresas gestionadas por sus trabajadores. Problemática jurídica y social*. CIRIEC, 231-236.

SANCHEZ BAJO, Cl. (2013) David and Goliath—Cooperatives and the Global Crisis. Disponible en:

[http://www.unrisd.org/unrisd/website/newsview.nsf/\(httpNews\)/8248A910D859F](http://www.unrisd.org/unrisd/website/newsview.nsf/(httpNews)/8248A910D859F210C1257BAB002F52E2?OpenDocument)

[210C1257BAB002F52E2?OpenDocument](http://www.unrisd.org/unrisd/website/newsview.nsf/(httpNews)/8248A910D859F210C1257BAB002F52E2?OpenDocument)

WESTERDAHL, S. y WESTLUND, H. (1998). “Social Economy and New Jobs: A Summary of Twenty Case Studies in European Regions”, *Annals of Public and Cooperative Economics* Vol. 69 no. 2, 193-218.