

Interviews

Interview with Professor Dr. Isabel Gemma Fajardo García.

Questions prepared by Ifigeneia Douvitsa and Hagen Henry

Douvitsa & Henry: Thank You first of all Gemma for having accepted this interview!

You retired recently from editing - together with Professor Olavarría - the journal “CIRIEC-España, Revista Jurídica de Economía Social y Cooperativa”. This journal has gained a remarkable reputation. “Our” journal, the International Journal of Cooperative Law (IJCL), is still in its infant stage. This is its 3rd issue. It would be naïve to not measure the high risk to which we expose ourselves by interviewing such an experienced editor of a journal with a closely related core subject.

Your academic work addresses both cooperative law and social economy law. This attests to a wide view of things that, held separately, keep many a colleague more than busy. We wonder where you draw the line between the two fields, if indeed a line should be drawn? Do you see cross-fertilizing effects? If so, in which way?

Professor Fajardo: I conceive of the social economy as a way of identifying and at the same time claiming a business model that is not oriented towards obtaining benefits from and for the invested capital, but rather towards satisfying the needs of people and the best conditions for them.

Currently, the capitalist model is the main or the only one for the legislator, so it is good that another form of economy is claimed and that this claim is shared by both mutualistic companies and non-profit entities. And: cooperatives also need to be recognized and regulated, in a way that takes into account their characteristics.

Douvitsa & Henry: You are the master mind behind the Spanish social economy law (Ley 5/2011). How did You get involved in its development? What were the reasons to develop this law? Did You face opposition? If so, what were the arguments? Do the effects of the implementation of the law meet the expectations that the legislator pursued when adopting it? Should the law be amended? If so, why?

Professor Fajardo: Spanish social economy enterprises, represented by CEPES, the Confederación Empresarial Española de Economía Social [Spanish Business Federation for the Social Economy], asked for a law that would recognize and promote the social economy, as recommended by the European Parliament in 2009. For this reason, the Ministry of Labor commissioned CIRIEC-Spain with developing a “Law for the Promotion of the Social Economy”. José Luis Monzon, President of CIRIEC, invited me to participate, as well as professors Rafael Chaves, Rafael Calvo Ortega and Fernando Valdes Dal-Re, all of them highly recognized in their respective specialties.

In addition to our proposal, CEPES presented its own one. We proposed many more measures to promote social economy enterprises and included social enterprises in our draft. The law, as finally approved, integrates both texts and was supported by all political groups.

The law does not need to be modified, but it must be further developed and applied. For example, it must give space to social and solidarity enterprises. On the other hand, I believe that the development of the social economy should be a cross-cutting function of various ministries and not only the Ministry of Labor, as hitherto. The social economy is much more than worker-owned cooperatives and societies.

Henry: The International Labour Organization (ILO) and other international and regional organizations are about to develop guidelines for social economy legislation, implying the need for such legislation. In my view the debate does not differentiate sufficiently between organizational law and laws to support policies which aim to promote actors within the social economy. Do you think that I am seeing things correctly?

Professor Fajardo: Indeed, I believe that cooperatives, mutualistic and other entities of the social economy need regulation that allows them to function according to their characteristics more than social or fiscal aid. Currently, in Spain these entities are predestined for legal reasons to become capital companies, especially in sectors such as credit, insurance, commerce, agriculture, etc..

This must not be allowed. What is the use of the national constitution declaring that the public authorities must promote cooperatives through adequate legislation, if this is not the result?

There is also a great lack of knowledge of what the specifics of these entities are and how they operate, particularly amongst business promoters/advisors and those who must apply the laws.

Douvitsa & Henrÿ: Let us concentrate on cooperative law. As already mentioned, you played a central role in the creation of “CIRIEC-España, Revista Jurídica de Economía Social y Cooperativa”. That was 30 years ago. Did the creation of this journal coincide with your developing an interest in cooperative law? How and why did you develop this interest?

Professor Fajardo: My interest in cooperative law began because in 1985 I was hired by the Regional Government of Valencia to advise them on the development of the agricultural cooperative sector, once the regional Cooperative Law of 1985 was approved. A year later, I began my doctoral thesis on responsibility in the economic management of cooperatives, and in those years the Spanish association of CIRIEC was also established in the Faculty of Economics of the University of Valencia where I worked at the time and where I continue to work.

The Journal was born in 1990 as an annual compilation of jurisprudence on the social economy, accompanied by comments on the most important court cases. It was a proposal that I made to CIRIEC, together with Professor Jesus Olavarria. We both had experience in collaborating in the jurisprudence section of the Journal of Commercial Law. In 1991 the journal incorporated a section on social economy legislation, and from 1992 articles by researchers and professionals on the subject.

Henrÿ: We all seem to have spiritual mothers and/or fathers. Although you have not done so, I personally have used them first when trying to gain attention and then in order not to lose the inspiration. Who inspired and maybe continues inspiring you when it comes to cooperative law?

Professor Fajardo: I started studying cooperative law upon the suggestion by my thesis director Vicente Cuñat, who also transmitted his interest in research and in the critical analysis of law to me. The person from whom I learned the most about cooperative law was Professor Francisco Vicent Chuliá, who continues to be a great reference in the field in Spain.

Henrÿ: I had the privilege of being invited by you many times to contribute to publications that you directed and I had the pleasure of collaborating with you on several projects, not the least the one by the Study Group on European Cooperative Law (SGECOL) on the Principles of European Cooperative Law (PECOL). The former included colleagues from Central and South America, the latter colleagues from Western Europe. Obviously, language barriers are higher when working with colleagues from Western

Europe. But beyond this, what struck/strikes you most when exchanging opinions/views/knowledge? Do the differences, if any, allow us to speak of cooperative law in the singular?

Professor Fajardo: Thank you very much Hagen, but I have to correct you because the privilege was mine. Of course, Spanish cooperative law is very close to the one in Latin America, but there are also many similarities with cooperative law in Portugal, France or Italy. The divergences usually derive from the greater or lesser approximation with the law of capital companies; and in practice, I think, cooperatives in operation are much more similar to each other than the divergent laws might suggest. I am convinced that it is necessary to work on harmonizing cooperative law, based on the identity principles, as was done in the PECOL project.

Douvitsa & Henry: According to the Spanish Constitution powers to legislate on cooperatives lie with the central State and with the Comunidades Autónomas [autonomous communities]. Not the least because other fields of law that impact cooperatives are part of the exclusive powers of the central State, such as labour law, conflicts of law are inevitable. How are they solved? Do they affect the development of cooperatives?

Professor Fajardo: The competence to legislate in the matter of cooperatives was initially only requested by some Comunidades Autónomas in which the cooperatives had an important presence (País Vasco, Cataluña, Andalucía y Valencia) and it was a shared competence with the central State. Over time, the competences of the Comunidades Autónomas in cooperative matters increased, and eventually all of them assumed that competence. However, it is also true that the central State constantly seeks to extend the application of labor, civil and commercial legislation to the internal relations of cooperatives, limiting their autonomy. In my opinion, the situation is not very favorable to cooperatives, because it is tempting for the regional governments to use cooperatives to implement economic policies and to fight unemployment, putting more emphasis on their entrepreneurial than on their cooperative nature.

Douvitsa & Henry: Initiatives to harmonize the various cooperative laws of the Comunidades Autónomas and the national cooperative law - private initiatives, so we understand - have not yielded any result yet. Recent revisions of regional laws, such as the ones in Extremadura (Ley 9/2018) and in the Basque Country (Ley 11/2019), seem to run counter to any attempt to harmonize.

In this connection, has the Council Regulation (EC) No.1435/2003 on the Statute for a European Cooperative Society (SCE) had a harmonizing effect on the various cooperative laws in Spain?

Professor Fajardo: I do not know of any initiative to that end, although some of us have been requesting it for years. Instead, there has been an initiative to regulate cooperatives as yet another capital company, and therefore subject to the commercial legislation of the central State, but it has not yet led to any result.

The (EC) Regulation has not had a harmonizing effect, nor do I think this is desirable. The SCE Regulation is an instrument to promote the creation of trans-border cooperatives, but its legal regime is complex and “uncooperative”.

Douvitsa & Henry: Could you give us some insight into the differences between these various cooperative laws in Spain, which might hinder their harmonization?

Professor Fajardo: The diversity of laws does not necessarily involve a great difference between them, but rather a competition to create a regime increasingly open to the market and profit, while preserving the benefits reserved for cooperatives. In general, the laws are very similar, but each one goes further in that. I do not think that harmonizing the cooperative legislation in Spain is a technical problem; it is a political one.

Henry: Let me be a bit provocative! Doesn't the answer to the question of whether or not to harmonize lie in the recognition (or not) of the international cooperative values and principles, as laid down in the 1995 International Cooperative Alliance Statement on the cooperative identity (ICA Statement) and in the Promotion of Cooperatives Recommendation, 2002, of the International Labour Organization? And, related to this, do the cooperative laws in Spain translate these values and principles into legal rules?

Professor Fajardo: Yes, cooperative values and principles should inspire the regulation and operation of cooperatives. Therefore, I consider that they are an essential element also in any harmonization process.

Cooperative laws in Spain usually include the ICA principles as rules for interpreting their rules. The Basque Country Cooperative Law of 1993 broke with cooperative principles, and this was imitated by other later laws. However, the new 2019 Law has incorporated them again as rules with which the cooperatives must comply, in their structure and operations. This change is good news.

Douvitsa & Henry: It is commonly accepted that membership of a cooperative should be conditional upon contributing to the capital of the cooperative. Also referring to the ICA Statement I (Hagen) have asserted this many time. But You have insisted that this assertion is incorrect. Which of the cooperative laws in Spain allows for cooperatives to be set up without any capital? What is the idea behind it and does this not slow down the development of cooperatives, not to speak of negative effects it might have on their creditability and the motivation of members to control the management? Apparently, we did not read your doctoral dissertation, which was published, was it not? Were these issues part of your doctorate?

Professor Fajardo: Yes, in my doctoral dissertation, on the “Economic Regime of the Cooperative: Responsibility of the Members” (Ed. Tecnos, 1997), I analyze the limited function that social capital plays in cooperatives as compared to capitalist companies.

I do not consider it wrong that membership is conditional upon the contribution of share capital to the cooperative, but rather that a certain minimum amount of share capital is set as a requirement for the establishment of a cooperative, because this requirement can hinder the establishment. The same is true for membership fees. An excessive fee can prevent people from becoming members.

In Spain, most laws require a minimum capital to form a cooperative, similar to that required for limited liability companies (3,000 euros). However, in many cooperatives it is not necessary to have this initial capital, since the main resources are provided by the members and the cooperative does not have to acquire them (work, funds to acquire goods and services, goods to be marketed by the cooperative, etc.).

With the arrival of the 2008 crisis and to favor business initiatives, the minimum capital requirement for the formation of a limited liability company (which is a capital company) has been abolished. But it is still necessary to have that minimum share capital to be able to form a cooperative. At this very moment when cooperatives are most needed, the requirement of this minimum capital is an obstacle to their establishment.

The important thing is that the cooperative has its own resources that offer guarantee and stability, but that patrimony can also be constituted from the results of the year, results that can be used both for reserves and for distribution among the members as shares in the social capital.

Douvitsa & Henry: Research on and teaching of cooperative law have improved over the past few years. You yourself have contributed to this improvement at all levels of university studies, not only as researcher and teacher, but also by setting up and administering programs. In your opinion, should more be done and if so, what would be appropriate measures to improve cooperative studies, in general, cooperative legal studies, in particular?

Professor Fajardo: I do not know if I understand the question well, but of course research related to cooperatives must be promoted and it must have access to existing public and private funding.

Cooperative research should preferably be multidisciplinary. And from a legal perspective, I believe that it is essential that the researcher has a good legal background, in particular in company law and other forms of organization (associations, foundations, etc.), that they know the history of institutions, comparative law and the reality of practice, so that our research does not stray either in its approach or in its conclusions from the reality that it seeks to improve.

Henry: It is, of course, a common place to say that the factors of globalization (digitalization and telecommunication technology) are redefining/redesigning the world of work and enterprises. But I think we cannot deny that the blurring of the borderline between public and private, which is impacting on and stemming from a shift of the share-holder and member value paradigms to the stake-holder paradigm; that the confusion of the positions of producers and consumers and the digitalization-induced confusion of the positions of entrepreneurs and workers; that the integration of cooperatives into (global) value chains, composed of various kinds of enterprise types; and that the transformation or rather de-formation of the component parts of the value chains and the tendency towards enterprising through networks of actors are having their effects on cooperative enterprises and, hence, on cooperative law.

If that is so, where do you see the challenges for cooperative law?

Professor Fajardo: I think that the context you describe offers a great opportunity for cooperatives as a way of organizing people to respond to their needs and concerns, and also to those of their environment.

All the changes you indicate are going to have consequences that must be thought through and regulated. Cooperative law must adapt, not in its essence, which remains universal, but in a way which allows current models to be regulated. Cooperative law must take into account the existence of cooperatives whose members may have different interests even if they share the same social purpose; cooperative activities carried out in virtual environments; frequent international transactions of goods and services; online assemblies, etc.. I believe that cooperatives must meet conditions to respond to new needs, and cooperative law must provide them with the adequate legal resources.

Douvitsa & Henry: To come back to the IJCL: we are eager to learn from you on how to improve it. Is the interest in the subject of cooperative law increasing, as we want to believe? Have you noticed an increase in publications over the past years? Are there topics that you think are important, but are neglected by our or other journals?

Professor Fajardo: In Spain, there is currently a good production of articles and books on cooperative law and there are also good specialized journals on cooperative law. Possibly in other countries it is more difficult to publish or there are no specialized journals on cooperative law.

I think that the key to deciding where to publish is in the academic consideration of the journal in question, because the recognition that the author receives also depends on it. It is important that the journal is well positioned in the ranking of prestigious journals because it benefits the author (productivity index, remuneration, promotion, etc.). We all want the result of our research to be positively valued and this, today, depends on where it has been published.

Regarding the topics, it is difficult for me to suggest important topics, but I think that exploring the jurisprudence and the problems of cooperatives should inspire academics to study the problems and propose good solutions.

Douvitsa: Any advice Gemma for young (legal) scholars?

Professor Fajardo: The study of cooperatives allows you to combine the world of business and the world of social values, and that, as my friend Rafael Chaves says to young researchers, catches and absorbs you. I think that research in cooperative law is very formative and generates great personal satisfaction, because you end up sharing those values that are so important for life, such as mutual aid,

solidarity, equity, and social justice. You feel that what you are doing is worthwhile, you find your research meaningful and you are proud to work for a better world.

My advice to young researchers is to be honest as researchers, to be judicious and courageous in presenting your results, and to create or join networks of researchers. In Spain there is the REJIES Network of young researchers in social economy, which is a good example of good practice.

Henry: One last question. Our colleague and friend Professor Deolinda Meira inspired me to ask it. It relates to our work ethos as researchers and teachers in general. At the beginning of the mentioned PECOL project there were some - rather hidden - divergent views amongst the members of SGECOL as to whether we would/should pursue an aim beyond delivering the outcome of our scholarly reflections. The question is: To what extent does your work as a researcher and teacher contribute to a different, more inclusive and solidary world?

Professor Fajardo: I am sure that it is so, especially as a teacher. We train people and transmit ideals, we make them reflect not only on what is possible, but also on what is most appropriate to the interests of the cooperative, its members and the public at large. We create new perspectives for them and encourage their professional instinct to lead or join social and cooperative economy projects, aimed at improving the well-being of people and their communities.

But also from the perspective of research, and especially applied research, we contribute to improving the conditions in which the entities and organizations of the social and solidarity economy carry out their activity, which has an impact on their performance and the well-being they generate.

Douvitsa & Henry: Thank you again for the interview Gemma!

Professor Fajardo: Thank you very much. It has been a great honor for me. I wish you success with the International Journal of Cooperative Law.