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Cooperative
Development

Labour Law and Cooperatives

Experiences from Argentina, Costa Rica, France, Israel, Italy, Peru, Spain and Turkey

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Foreword

In planning for a meeting of experts on cooperative law in 1995 the Governing Body of the ILO decided that the agenda of the meeting should address the impact of labour law, industrial relations systems and international labour standards on cooperatives and cooperative law. During the preparation of the background report for this agenda item it became evident that only very little documentation was available on the three aspects of the theme and that country studies had to be prepared.

The Cooperative Branch of the ILO therefore commissioned studies on labour law and cooperatives in Argentina, Costa Rica, France, Israel, Italy, Peru, Spain and Turkey which formed the basis for the background report of the Meeting of Experts on Cooperative Law, 22-26 May 1995 in Geneva. The texts of these country papers are reproduced in their original version. The contributions reflect the opinions of the authors and not necessarily those of the ILO Cooperative Branch. Through this working paper the Cooperative Branch hopes to stimulate the discussion on the subject matter and encourage further country studies on labour law and cooperatives. The ILO wishes to thank Mr. H. Henry who edited the country papers and prepared the general observations at the beginning of the text. Thanks are also due to the authors who drew up the country studies and to Mrs. Gabriele Ullrich of the Cooperative Branch and Mrs. Nippierd, consultant, who gave care and attention to this publication.

J. Fazzio
Chief
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Part I

Labour Law and Cooperatives

- General observations -

Labour law and cooperatives: General observations

H. Henrÿ

1. Introduction

Labour law and cooperatives as separate subjects have been at the centre of interest of the ILO ever since its inception in 1919.[1] The ILO built on and internationalized the activities of labour movements and cooperative movements whose formation were answers to the same social question of the 19th century in Europe: How to alleviate the social and economic hardships of the poorest strata of society?

On the one hand, labour movements and cooperative movements share a number of similarities and their interrelation is multi-faceted. They are both centred on the human being. Cooperatives create jobs. Workers establish their own enterprises in the form of a cooperative, or run a cooperative within the enterprise they are working for, in order to satisfy common needs. Trade unions support the creation of cooperatives. Employers join these efforts. Labour law influences the set-up of cooperatives.

On the other hand, labour movements and cooperative movements represent different approaches to the social question. The labour movements aim at bringing about a set of labour laws to protect employees, whereas the cooperative movements press their claim for legal recognition of self-help.

This difference might explain why the economic, social and political importance of these interactions in industrialized and industrializing societies contrasts sharply with a lack of interest in the subject. Whereas literature on the separate issues of labour law and cooperatives abounds, very little exists on the connection between the two.

In order to explore the potentialities of this connection in the ongoing world-wide economic, social and political restructuring, the subject must be analysed. The ILO, therefore, commissioned reports on labour law and cooperatives in Argentina, Costa Rica, Israel, Italy, Peru, Spain and Turkey reproduced in Part II of this working paper. The report on Argentina, Costa Rica and Peru includes ample material on other Latin American countries. The present

[1] cf. The impact of labour law, industrial relations systems and international labour standards on cooperatives and cooperative law, Report I, Meeting of Experts on Cooperative Law, Geneva, 22-26 May 1995, ILO, Geneva, 1995, Part III.

Part I is based on these reports and additional material and information on the situation in Belgium, France, Germany and Hungary.[2]

In order not to repeat what is said in these country reports, a summary of which may be found in the background report to the ILO Meeting of Experts on Cooperative Law (Geneva, 22-26 May 1995[3]), the following remarks are limited to analytically introducing some of the problems the subject raises, to suggest possible answers, and to ask whether cooperative principles might be used in rethinking labour law.

By its very nature this analysis should have been preceded by an in-depth comparative study on the different legal conceptions behind the components of the subject. Although there is now a universally recognized definition of cooperatives, its translation into the various national legislations and its practical implementation differ widely.[4] Even among countries as culturally close as most of those reported on, the key question of what makes a work relationship an employment relationship to which labour law applies[5], lacks common understanding. The author can therefore neither claim to make any universally valid statements nor deny that he may be misguided by his own legal culture.

2. Employment and/or cooperative membership?

Modern, genuine cooperatives as defined by the ILO[6], and as recognized now by the international community, are organizations which all the legislations under review confer the status of a legal person either as a specific, separate form, or as a variant of another type of business organization. As a legal person, cooperatives must respect the law of the country that recognizes them as such. This includes the duty to abide by labour law since labour law regulates employment situations regardless of the legal form of the employer.

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[2] For Hungary see Zsohár, András, Co-operative Law and Labour Law in Hungary, in: The relationship between the state and cooperatives in cooperative legislation, Geneva, ILO 1994, pp. 149 seq.; for Germany see Münkner, Hans-H., Co-operatives and Organized Labour, Marburg, Institut für Kooperation in Entwicklungsländern 1991.

[3] The impact of labour law, ..., op. cit.

[4] For similarities and differences within the European Union see Münkner, Hans-H., Die Rechtstypik der Genossenschaft in den Partnerstaaten der EG, Münster, Institut für Genossenschaftswesen 1993, pp. 23 seq.

[5] The term "work relationship" is used to describe a relationship in which one person performs work for another natural or legal person. It is a generic term. The term "employment" is used for those work relationships to which labour law applies. The terms "worker" and "employee" correspond to this distinction. These terms must be distinguished from the sociological term of "labour/industrial relation", cf. footnote 18.

[6] Recommendation concerning the Role of Co-operatives in the Economic and Social Development of Developing Countries, 1966 (No. 127), para. 12(1)(a).

This general statement reflects the undisputed applicability of labour law to a work relationship between a cooperative (of whatever type) and a non-member working for the cooperative.

The question to be analysed is whether a work relationship in a cooperative, i.e. a work relationship between a member and his cooperative may be qualified as employment giving rise to the application of labour law.

Unless we define employment in order to be able to ask where in cooperatives employment occurs we may not answer this question. The approach to first define what we mean by employment and then to ask where in cooperatives such a relationship exists is to prevent a discussion which narrows down too early on problems the application of labour law may cause in cooperatives. The fact that a member works for/in his cooperative does not automatically confer upon him the additional status of an employee. The qualification of the work relationship between a member and his cooperative is - notwithstanding explicit regulations - an open question.

By extension, this approach is to avoid an analysis by categories of cooperatives. For example, on one side, worker cooperatives[7], where work relationships to which labour law supposedly applies and where the conflicts resulting from the possible double status of member and of "employee", must be solved; and on the other side, other types of cooperatives[8], where the question of whether labour law may be applied to their work relationships, is open. And finally, integrated and market linkage cooperatives[9], which are somewhere in between.

This distinction is inadequate for the question to be analysed here. First of all, with the exception of "coopératives professionnelles"[10] work relationships between a member and his cooperative may be found in any cooperative. Furthermore, labour law does neither apply to organizational patterns of business enterprises nor to certain types thereof. It governs employment relationships. Where there is no such relationship labour law lacks its object. Even where labour law has an impact on the organizational structure of a cooperative, e.g. on the set-up of the board or the supervisory council through co-determination laws, the application of such laws requires employment relationships to exist in the cooperative. Whether and in which cooperatives these exist may only be established in assessing individual

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[7] Also called joint production cooperatives, production cooperatives, worker production cooperatives, producer cooperatives or productive cooperatives.

[8] Service (promotional), housing, consumers', thrift and loan cooperatives and cooperatives dealing with insurances, health care etc.

[9] Definition in: The impact of labour law, ..., op. cit., Part II. 4.

[10] Definition in: Münkner, Hans-H., Co-operatives and Organized Labour, op. cit., p. 21.

cases taking into account cooperative principles, cooperative law and regulations as well as the by-laws of the cooperative in question.

None of the legislations under review seem to provide an explicit definition of employment. It is, therefore, difficult to determine a common denominator of the conceptions in the different legal orders. To find a common denominator similar to the universally accepted definition of cooperatives would have to be the first step in future studies of the subject.

Generally, employment is described as the relationship between a natural person (employee) and another natural or a legal person (employer) to which labour law applies. Labour law, in turn, is defined as that branch of law (acts of parliament, judicial precedents, jurisprudence and any other national legal source) that applies to this relationship (individual labour law) or to the relationship between the associations of employees and employers or between such an association and a member of the opposite association (collective labour law). The instruments used are individual labour contracts and agreements reached through collective bargaining.

Social security law, rules protecting certain categories of "workers" and safety regulations are generally mentioned as part of labour law or at least as a necessary supplement to labour law legislation.

Furthermore, the definition of a work relationship in a cooperative has implications for the applicability of a wide range of other national public and of public international law (e.g. the Labour Standards of the ILO).

The definition of employment as a relationship to which labour law applies leaves us with the question of what employment is. Since the application of labour law presupposes an employment situation we have to review the concepts underlying this situation.

The concepts vary from country to country leading to different legal perceptions. Less obvious is the fact that the definition of work relationships in cooperatives seems to be determined by two factors which must be considered. These factors are:

- The political attitude towards the consequences of the three possible answers to the question of whether labour law is applicable to work relationships in cooperatives. The possible answers are: labour law is applicable; labour law is not applicable; cooperative members may have a double status of member and employee.
- Employment, entailing the application of labour law, is defined by distinguishing it from other work relationships to which labour law does not apply.

2.1 The consequences of the application of labour law to work relationships in cooperatives

From the legal point of view, the immediate consequence of an employment relationship between a member and his cooperative is the applicability of labour law, exclusively or alongside the cooperative law. It is further discussed whether social security law, safety regulations and rules protecting certain categories of workers are to be applied as well. Finally, other national public and public international law rules have to be considered. This consequence of the definition of a work relationship in a cooperative not only influences politicians, trade unionists and representatives of cooperative movements, but also lawyers.

2.1.1 Individual and collective labour law

The individual and collective law comprises, for example, rules on -

- minimum wage, dismissals, (paid) vacation, work conditions, liability for damages caused to the employer and/or to third parties, liability for the consequences of events causing interruption or cessation of production etc.
- the freedom of employees and employers to associate, the right to collective bargaining and agreements, the establishment of work councils and co-determination, granting, in some cases, non-members access to the supervisory council or the board of directors despite the principle of self-management.

In weighing the detailed consequences of the applicability of individual and collective labour law one must consider that -

- most of this law is binding to the potential parties of a labour contract. The right to freely stipulate the contents of one's contract, guaranteed under general private law, is therefore limited. In cases where the work council has a say in hiring or dismissing an employee, not even the generally guaranteed freedom to conclude a contract exists;
- the application of labour law to work relationships in cooperatives may, unless the law stipulates otherwise, lead to a double status of the member working for his cooperative. Rules must be found to solve the conflicts arising when the respective branches of the law partly overlap.[11]

[11] Examples of this are especially given in the country papers on France and Spain.

2.1.2 Social security law, safety regulations, rules protecting certain categories of workers

Social security laws, safety regulations and rules protecting certain categories of workers are generally mentioned as being applicable whenever an employment situation exists. Dealing with questions like health, pension, invalidity, unemployment, accidents, maternity, the protection of children, safety at the work place, night work, minimum vacation etc., these rules, which are advantageous to the working person, are a cost factor for the employer. A widespread assumption is that, depending on how a work relationship in cooperatives is defined, one could either secure the benefits of these rules or escape from the costs arising from them. This assumption needs scrutinizing.

First of all, social security law, safety regulations and rules on the protection of certain categories of workers belong to the realm of public law, i.e. to the relationship between employees and employers on the one side, and the state on the other, but not to the relationship between employees and employers.

Furthermore, safety regulations and rules on the protection of certain categories of workers apply to work places and certain persons irrespective of their status as employees. The definition as employment does not have any binding effect as regards their applicability. Vice versa, their application is no proof for the existence of an employment relationship in the sense of labour law. Strictly speaking, these rules do not belong to labour law. Their nature as public law makes them binding upon the parties. Since every branch of law is independent in defining its objects[12] these rules have, however, no precedence over cooperative principles when assessing the nature of a work relationship in a cooperative.

Despite the independence of these different branches of the law, their definitions of employment are reciprocally indicative, especially since social security law and labour law complement each other by relating both to the status of employee. Being complementary means that they have distinct objects. This distinction is to be kept in mind while defining the work relationship in a cooperative.

The object of labour law is an active employment situation (beginning, end, work conditions, salary etc.). The object of social security law is a deficit which either interrupts or ends definitely this active employment against the will of the parties (e.g. deficit of work/unemployment, deficit of ability to work/sickness, old age, invalidity, pregnancy).

In order to keep the core of these complementary areas separate it is necessary -

[12] This independence may lead to unacceptable results like, for instance, in Belgium.

- to question whether social security must continue to be an exclusive privilege of a social class which in many a country has become a political class[13] and to ask whether its basic standards should not be extended to all working people,
- to clarify that the definition of employment in labour law has no binding effect on social security institutions,
- to prevent a political definition of work relationships in cooperatives as employment with the laudable intention of securing social security benefits. The possible definition of a work relationship in a cooperative as something different from employment does not imply a statement to the effect that nothing has to be done to secure the objectives of social security in these relationships as well. It even seems impossible to exempt the parties to the work relationship in a cooperative from the obligation to cater for social security. The question of whether this can only be done by adhering to a public social security system must be left open for consideration, and finally,
- to suggest to preserve the (possible) originality of work relationships in cooperatives as a model when rethinking labour law.

2.1.3 Other national public and public international law

Besides considering the consequences of the applicability of individual and collective labour law and the implications for social security law, the rules on the protection of certain categories of workers and safety regulations, attention must also be paid to the possible effect of the definition of a work relationship in a cooperative on other public law areas such as -

- taxation,
- competition (e.g. if the member/cooperative relationship in an integrated cooperative were to be defined as employment),
- bankruptcy and insolvency (status of outstanding payments/salaries to members working for their cooperative),
- judiciary (labour, civil, cooperative court?),
- administration (labour ministry and/or ministry in charge of cooperative affairs? Possible conflicts).

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[13] This development is described, for instance, by Heinze, Meinhard, Möglichkeiten der Fortentwicklung des Rechts der Sozialen Sicherheit zwischen Anpassungszwang und Bestandsschutz, Gutachten E zum 55. Deutschen Juristentag, München 1984.

The definition of work relationships in cooperatives as employment would also have implications for the application of public international law, specifically the International Labour Standards of the ILO. Standards like the prohibition of forced labour might affect those cooperatives which, in their by-laws stipulate certain time restrictions for withdrawal from membership or which require the agreement of the general assembly to withdrawals. Likewise, the prohibition of child labour might affect cooperatives.[14]

The applicability of public international law does not require formal transformation of these standards into national law. It is maintained here that all legal entities, i.e. not only states, are nowadays the addressees of public international law.[15]

Here, as with the national rules on social security, the protection of certain categories of workers and on workplace safety, a careful distinction must be made between rules which apply to an employment relationship and those which apply to specific persons or the work-place irrespective of the status of the working person as an employee.

2.2 The definition of employment

The implicit definitions of employment, presupposed by the application of labour law, seem to be arrived at by distinguishing employment from other forms of work relationships with the exception of work relationships in cooperatives. Employment is generally delimited from service contracts, works contracts, the work of independent professions, the civil service. Work relationships in cooperatives are never mentioned in this context. Labour law evolved around these delimitations, apparently not taking into account the situation in cooperatives. The legal history of labour law does not, per se, exclude its application to work relationships in cooperatives. But it is a prima facie argument against its application. The mere existence of work relationships in cooperatives is therefore not a sufficient argument for the application of labour law. It must be demonstrated that these work relationships match in all respects the definition of employment.

Besides a financial stake an employee may have in the company he is working for in "normal" employment relationships, the only personal link between the employee and the employer is the labour contract governing the circumstances and conditions under which work is to be performed by the one for the other. Due to the hybrid nature of cooperatives, membership in

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[14] Further details in: The impact of labour law ..., op. cit., Part III.

[15] For a more detailed discussion of this argument cf. Henry, Hagen, Co-operative Law and Human Rights, in: The relationship between the state and co-operatives in co-operative legislation, Geneva, ILO 1994, pp. 21 seq. Specifically related to the International Labour Standards of the ILO, Schnorr argued as early as 1960 convincingly that international (labour) law conventions are to be implented not only by states but also by other legal entities (Schnorr, Gerhard, Das Arbeitsrecht als Gegenstand internationaler Rechtsetzung, München, Beck 1960, p. 237).

a cooperative constitutes a close personal tie with the cooperative. The question is whether this personal membership tie is compatible with an employment relationship.

The arguments put forward here are of an extreme summary nature. A thorough comparative study of the histories of labour law and of cooperative law is needed to fully assess the subject and to arrive at conclusions to be used for discussions on future developments.

2.2.1 Criteria of employment versus cooperative membership

In the absence of a legal definition, courts and jurisprudence have established the following criteria to determine whether a work relationship is employment. The list is neither exhaustive nor does the mere number of criteria found in any single work relationship determine whether it is an employment relationship. The determining factor is an overall assessment of the work relationship including consideration of the factors mentioned under 2.1.

Indication for employment:

- regular remuneration according to personal/professional qualification for continued, repetitive work;
- salary regardless of the economic situation of the employer;
- salary regardless of quality of performance;
- subordination, i.e. the worker is subject to orders/supervision given/performed by employer related to the kind of work, how and when it is to be performed;
- work performed on behalf and on account of the employer;
- no liability (no risk) in case of insolvency or bankruptcy of the employer;
- high degree of integration/incorporation into the enterprise of the employer. For example, necessity to work continuously in close collaboration with other employees in order to be able to reach the result defined by the employer.

Indication for cooperative membership:

- participation in economic result regardless of personal/professional qualifications according to other criteria;
- remuneration depending on economic situation of cooperative;
- liability (risk) through share and possibly through obligation to supplementary payments;

- varying from no integration in service cooperatives of the "coopératives professionnelles" type, a mounting degree of incorporation in market linkage and integrated cooperatives, to a high degree of incorporation in most worker cooperatives.

As mentioned, these criteria are only a guideline. Categorizing is not possible.

In addition, the most commonly cited criterion of employment is social, economic and/or personal dependence. It is highly questionable whether dependence in any of these forms should be (or continue to be), a distinctive essential element of employment.[16] Dependence is the sign of slavery and service.

Furthermore, some do still see a work relationship as a reciprocal *Treue- und Fürsorgeverhältnis*. Such considerations would take us back to a pre-contract stage, which all those trying to improve the lot of the wage earners, believed to be a matter of the past. In a *Treue- und Fürsorgeverhältnis*, the worker tends to be denied his right to have his person separated from the work he is performing. The essence of a labour contract is that there are at least two subjects or parties and at least one object.[17]

2.2.2 Labour contracts in cooperatives?

The differentiation of employment from work relationships, other than the one possibly existing in cooperatives, implies a contractual aspect without making it an explicit requirement for employment.

Hence, the work relationship between a member and his cooperative must, in addition to meeting the criteria mentioned above, also be based on a labour contract in the legal sense if it is to match the definition of employment.

The problem attached to this requirement is typical of the situation in question here: a member working for his cooperative. This is why this contractual aspect has to be made explicit.

A contract in the legal sense may only be concluded on a distinct object between two parties which are independent of each other.

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[16] Alonso Olea rightly points out that the very essence of a labour contract as a contract is the exclusion of any dependence (Alonso Olea, Manual, De la servidumbre al contrato de trabajo, Madrid: Editorial Tecnos 1979, p. 123).

[17] See Olea, op. cit., p. 124.

2.2.2.1 Distinct or identical parties?

On the one hand, one may argue that the cooperative principle of identity, i.e. the members are the co-owners, co-managers, co-controllers, and co-customers of their cooperative entailing the possibility of a member working for his cooperative to be elected to the board or the supervisory council, might preclude the condition of two distinct parties necessary for a labour contract. On the other hand, one may argue that in most modern cooperatives the principle of identity is blurred to the effect that cooperatives are hardly distinguishable from companies as far as managerial patterns are concerned.

Preference given to either one of these arguments might be decisive for the assessment of a work relationship in a cooperative as employment governed by labour law or as membership governed by cooperative principles and cooperative law. The arguments differ depending on whether we stay within the ambit of legal theory or whether we turn to theories of labour relations.[18]

Parties to a contract in the legal sense may only be legal entities, i.e. natural or legal persons distinct and independent from each other in the formal and in the material sense. In the formal sense cooperatives, by being legal persons, are distinct from their members. Are they also independent from their members in the material sense? If the work relationship of a member with his cooperative were to be qualified as employment, the cooperative principle of identity in the form of self-management would cause a conflict of interest for that member. At the same time, opposing interests of "employers" and of "employees", which is another essential feature of any contract, could not emerge.

The principle of identity is not applied in the same form and with the same vigour in all cooperatives. Competition by other forms of business organizations, technological changes, specialization with subsequent division of labour and hierarchies, structural constraints linked to the size of the membership, financing requirements, non-member business and investment have led to what one may call an identity crisis of cooperatives[19]. This is marked by a growing independence and professionalization of the management, whose members in some countries do not have to be members of the cooperative, on the one side, and ever less active participation of the members in the self-management and control of their cooperative, reducing their relationship with the cooperative to that of a pure client relationship, on the other.

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[18] Defined in: The impact of labour law, op. cit., Part II.

[19] Münkner, Hans-H., Background paper no. 3a: Western Europe, in: Structural changes in cooperative movements and consequences for cooperative legislation in different regions of the world, Geneva, ILO 1993, pp. 57 seq.

Based on theories of industrial/labour relations it is argued that the management pattern of many a modern cooperative (e.g. market linkage, integrated or worker cooperative), which is hardly distinguishable from the pattern in other business organizations, would establish a labour relationship between the management and the member working for his cooperative. The question is whether the management of a cooperative is, in the last resort, empowered to make management interests prevail over the unity of interest between the cooperative and its members so as to create a difference of interest which could be regulated by a contract.

However distant the management may be from the members in some cooperatives, i.e. however close its pattern comes to that of other forms of business organizations, the cooperative management is legally, not in a position to destroy the bridge that links the interests of the members to those of the cooperative itself. The management has to carry out the mandate expressed in the objective of any cooperative, which is to primarily serve the economic interests of the members. Where a cooperative is in a position which allows it to neglect this mandate, the entity may not be called cooperative.

Indeed, the traditional cooperative where even the day-to-day management is based on members' decisions is, today, rather the exception than the rule in the countries under review. In defining the work relationship of a member with his cooperative, the lawyer must, therefore, consider these sociological facts. Theories on labour relations are an indispensable tool in determining where and when these sociological facts must lead to an adaptation of the law, or (what law-makers around the world have been neglecting for decades), where and when these facts must lead to the re-establishment of original cooperative principles in the law, in legal, administrative, political and other practices. Law is of secondary importance in human relations, especially in industrial relations[20] but industrial relations may not pre-empt the wider gamut of choices a political society might want to offer to its citizens.

It is not clear, however, how a changed management pattern could be used as an argument to establish a contractual labour relationship between the management and a member working for his cooperative. Depending on the legal conception[21] the management is either acting on behalf of the cooperative members or on behalf of the cooperative which, by being a legal person, needs organs through which it acts. However independent the management may be, the legal effects of its acts exclusively bind the cooperative as such, not the management itself. The management may, therefore, not be party to a labour contract with the cooperative member. This result becomes even clearer in a conflict situation. Parties to a law suit arising out of such a labour contract would be the cooperative and the member concerned. If the conflict is based on alleged acts by the management, the management would even be excluded from representing the cooperative members in the case.

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[20] Kahn-Freund, Labour and the Law, 2nd ed. 1977, p. 2.

[21] Especially differing between Great Britain and Continental Europe.

Similar management patterns in cooperatives and other types of business organizations do not, therefore, affect the principle of identity in cooperatives in a way that would create the necessary distance between the cooperative and the members in order for them to become opposite parties in a labour contract.

Furthermore, self-management is only one part of the principle of identity. Even where the self-management of a particular cooperative is only a theoretical concept the other elements of the principle of identity would not be affected.

Rather than being distorted by new management patterns alone, the principle of identity may be transformed by non-member investments and by a dependence on non-member business or even on business with non-members holding a (quasi) monopsonistic or monopolistic position so as to allow for the existence of distinct potential parties to a labour contract. These kinds of non-cooperative links may create a situation where the legal principle of identity is overturned by facts. These facts would have to be strong enough to exclude the members' privilege of freely deciding by virtue of their being the co-owners of the cooperative. Here, again, the first question to be asked is whether in such a situation the cooperative would not have to be transformed into a company, for the sake of clarity and the protection of the members and third parties.

Against this intermediate conclusion that, because of the principle of identity a labour contract may not be concluded between a member and his cooperative, one could argue that if the legal personality of cooperatives is to make any sense, it is to at least fictitiously introduce a distinction between the cooperative and its members. This distinction must not be revoked by using the argument of the principle of identity.

2.2.2.2 Distinct object?

In general the principle of identity does not exclude the possibility of concluding a labour contract between a cooperative and its member. An exception might be the case where the object of such a contract were partly or wholly identical with the object of the membership agreement. Besides distinct parties, a labour contract, like any contract, must therefore have an object of its own. Thus the question is whether a labour contract between a cooperative and its members would have an object distinct from the one of the membership agreement so as to allow for two separate contracts to be concluded.

So far the arguments for or against defining work relationships in cooperatives as employment relationships to which labour law applies, could be put forward independently of the type of cooperative. Since the object of the membership agreement not only determines the type of cooperative, but also the type of work relationship between the cooperative and its member, a distinction has to be made now.

The object of a labour contract is the work of the employee. The object of a membership agreement varies with the type of cooperative. With the exception of worker cooperatives, the object of all types of cooperatives is apparently distinct from the object of a work relationship between a cooperative and its member. In service cooperatives, having a large number of employees who might be members of that cooperative at the same time, e.g. cooperative banks or consumer cooperatives, the objects of the membership agreement and that of the work relationship is not identical. And even in integrated cooperatives (the cooperative form closest to that of worker cooperatives), the object of the membership agreement is not the work of the members, but the management of the members' enterprises. Thus the critical case is worker cooperatives. In order to understand why this is so, one must investigate the very substance of work relationships.

As a basic rule, the general civil law of the countries under review confers an exclusive title over the result of the work upon the one who performed it.[22] This legal situation did not suit the modern organization of work as it developed during the 19th century. Attempts to develop contractual labour law on the basis of the then already known service contracts could not explain how this title could be reserved for the capital holder. The solution was to define the producer so as to include the one on behalf and account of which somebody works (the employer) and to exclude the worker (employee). The legal idea comprises in an anticipated transfer of title over the results of the work from the employee to the employer. The instrument used is the labour contract.

In worker cooperatives the membership agreement has as its object the "cooperativization" of the members' work. The result of that work belongs to the cooperative in virtue of the membership agreement. Therefore, contrary to those who argue that at least in worker cooperatives labour law must apply, it is concluded here that worker cooperatives are the model case where there is no room for a labour contract in addition to the membership agreement. The membership agreement consumes the potential object of a labour contract and regulates the conditions for the performance of the work according to cooperative principles. The statutes of worker cooperatives may, of course, include aspects borrowed from labour law.

Why does the membership agreement consume the object of a potential labour contract and not the other way round?

First of all, the declared will of the parties has to be considered - and respected. Furthermore, the choice to go the cooperative way, does not only imply a specific organizational framework, an enterprise the cooperative members want to own, run, control and use themselves, but also a specific type of personal relationship between themselves and with the

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[22] Cf., for example, art. 565 seq. code civil français, §§ 946 seq. (German) Bürgerliches Gesetzbuch.

cooperative. This personal relationship consumes the object of a potential labour contract, i.e. it leaves no room and no need for a labour contract in addition.

2.2.3 Labour law and cooperatives

As mentioned earlier, the legal history of labour law casts doubts as to its uncritical application to work relationships in cooperatives. The, albeit summary, analysis of the question whether labour law applies in cooperatives suggests that labour law was developed to fit a work relationship marked by a separation between the capital holder/employer and the worker. This separation is typical of all business organizations except cooperatives. The ultimate aim of labour law which has evolved on the basis of this separation is incompatible with that of cooperative law. The dynamics behind the evolution of labour law is the intention to attenuate the consequences of the contradiction between capital and labour in modern production processes. The intention is to attenuate these consequences but not to abolish the contradiction itself. The side effect of this evolution are gains produced by the conflict of interests between the capital holder and the workers in enterprises. In a worker cooperative where the member, in addition to being a member, is also an employee these conflicting interests do not exist. Cooperative principles provide a specific organizational framework which excludes contradictions between capital holder and members. The gains derived from opposing interests of employers and employees in other forms of business organizations must be sought through other means. These other means are the cooperative principles ensured by and producing the required motivation to rely on the efforts of the members.

2.3 Summary of chapter 2

Before entering into a short discussion on the possible future relationship of cooperatives and labour law, the findings of the present analysis are summarized as follows:

- Labour law is applicable to a work relationship between a cooperative and a non-member.
- Whether work relationships *in* cooperatives may be defined as employment to which labour law applies depends on the question of whether the cooperative principle of identity does or does not allow for the conclusion of a labour contract between a member and the cooperative.
- Management patterns similar to those in other types of business organizations do not abrogate the principle of identity since self-management is only one element of this principle.

- Labour law may be applicable in cases where, in addition to changed management patterns, non-member business and investment defigurates the principle of identity beyond recognition.

- In these cases labour law is applicable if the object of the labour contract is distinct from the object of the membership agreement. This might be the case in any cooperative with the exception of worker cooperatives.

- In other than worker cooperatives, and if the principle of identity is put aside, the member working for his or her cooperative may have the double status of member and of employee, as far as the work relationship is concerned. Conflicts of the corresponding branches of law are inevitable.[23] Are the two contracts legally independent, linked to each other, reciprocally conditional? Does one of the contracts take precedent over the other? As a general guideline one might assume that the labour contract is central to the interest of the employee. Somebody working for a consumer cooperative, for instance, probably has no intention of changing his employee status by joining the cooperative as a member. In the case of conflict, the labour law should therefore prevail if it is to the advantage of the employee.

  This double status may also create conflicts at the enterprise level. Member-employees, by being more active than other members (although probably in a minority position), could use the general assembly to make their interests as employees prevail over the interests of the members. This danger is, however, rather theoretical since these member-employees will realize that short-term gains might endanger their own position as employees. The problem on the enterprise level is rather the possibility of non-members being granted the right by co-determination laws to sit on the board of directors or in the supervisory council.

- Labour law does not apply in worker cooperatives. Where compatible, labour law elements may be included in the statutes of these cooperatives.

- The intention to extend social security benefits, workers and workplace safety regulations to as many working people as possible, is not to be realized through a definition of employment disregarding the specifics of cooperatives.

- The objectives of these rules may *and must* be reached through other means, e.g. an obligatory insurance system. Where a society has the obligation to collectively share personal risks, it must have the right to stipulate social security rules and regulations. The conditions of such regulations must help to prevent "lex-shopping".

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[23] Cf. country report France.

It must be emphasized again that these findings are the result of just one way of thinking. The country reports present partly similar, partly different solutions. The choice is, after all, not a legal but a political one in which legal traditions play just one, albeit an important role. To illustrate the point one might compare the attitudes in France and in Germany towards worker cooperatives. It might well be that worker cooperatives are relatively more successful in France than in Germany because they have a function which is partly taken care of in Germany by the laws on work councils and on co-determination.[24]

One of the leading ideas of this analysis, which some might judge as being overly restrictive, is to preserve as much as possible the cooperative principles in their tested form of relating personal relationships to capital interests, and thus as a possible source for the development of labour law

3. Cooperatives and labour law

To conclude this analysis the approach to the subject is reversed by briefly asking to what extent cooperative principles may be used in rethinking labour law.

Labour law needs rethinking. So does cooperative law.

The economic and social situation of those working on behalf and account of another person varies between and within the different countries:

- In some countries the labour movement has seen most of its claims satisfied and is, in fact, faced with an identification problem. Social security systems have turned their traditional membership into defenders of their affluence without regard to the question of whether the system is sustainable. Signs are that it is not.
- In some countries a social class of unemployed who are by no means solely workers, emerged and replaced the labour class as a social class.
- In many countries the social and economic status of a great number of migrant workers resembles much more that of slavery and servitude than that of labour. The Vietnamese cigarette vendor in the streets of Berlin and the Russian maid in a Western European country envy the worker in a Malagasy sugar cane plantation protected by his trade union. The Villistas in Southern Mexico are longing for labour contracts by claiming traditional rights over the land owned by coffee finqueros.
- In many a country, labour law hardly exists.

[24] Stimulating in this respect: Hunout, Patrick, L'entreprise et le droit du travail. Une comparaison franco-allemande, Paris, Centre d'information et de recherche sur l'Allemagne contemporaine 1993.

A rapidly evolving feature in all countries is that in the absence of states' initiatives and possibilities to solve the problems relating to these phenomena, self-help initiatives outside state legislation, are on the rise. The reasons for this development are far too numerous to even be listed here.

It might sound awkward but the key issue in this development seems to be a search for risk. The more a society transforms personal social and economic risks into collective risks through labour law and social security law, the more it must build into the system mechanisms to reduce the expenditures caused by bearing these collective risks. This, in turn, requires an ever increased degree of intervention into the labour market, into ways of practising self-responsibility and, eventually, into the ability to seek self-organized means to solve problems.

Individual risk, beyond a basic protection through social security, is a constituent of freedom, a basic element of democracy.

Labour law and social security law are needed to overcome the political paralysis of the masses caused by their misery. Co-determination is a further step towards balancing the power difference between capital and labour. These are necessary, indispensable compensatory measures by the state. Beyond a certain point these compensatory measures create, however, a dependency on the state as the sole guarantor of this compensation. The turning point is reached when the protective measures by the state start to suffocate the ability to organize self-initiated risk prevention and compensation.

To overcome this dependence requires the step from participation to emancipation in labour law. If we want democracy, we must want this liberation. If we want this liberation, we must give and accept risk. If we want to give risk we must deprive capital of its power generating function.

Partant tells us where to start: "La démocratie commence dans l'entreprise et n'existe pas si elle n'est pas organisée, d'abord sur les lieux de travail. Lorsqu'on cherche les moyens d'un développement on oublie trop souvent que les masses populaires sont le seul moyen vraisemblable d´une évolution. Mais il faut alors admettre qu'elles doivent aussi en être les seules bénéficiaires. Comment pourrait-on les mobiliser en vue de leur développement si on hésite à leur donner des pouvoirs à la mesure de leurs responsabilités."[25]

This kind of organized democracy at the enterprise level with profits produced and shared by those who take the risk by owning the enterprise they are working for and by so doing secure their freedom, cannot be the result of measures aimed at compensating the difference between labour and capital, however perfect they might be. This kind of democracy can only be

[25] Partant, François, La guerilla économique. Les conditions du développement, Paris, Seuil 1976, p. 155.

achieved through a merger of capital and labour in one and the same person thus neutralizing the role of capital in a way to avoid its tendency towards creating dependencies.

This is what cooperatives are about. This is how cooperative principles may be used in rethinking labour law.

Any such rethinking presupposes the political will to reverse the trend by which cooperatives have been assimilated with other forms of business organizations through legal, administrative and other means including the application of labour law to (work relationships in) cooperatives. It is difficult to conceive what in cooperatives could inspire the rethinking of labour law if cooperative principles are blended beyond recognition with laws and practices relating to non-cooperative forms of business organizations. As may be seen from the rapid development of a so-called informal self-help sector in all countries there is not only a need to enable, through all kinds of legislative measures, existing cooperatives to stand competition, but there is also a need for the legal recognition of genuine self-help efforts. This, of course, presupposes genuine cooperative legislation.

For those who built their world-view around the dichotomy of capital and labour a lot is at stake. After all, dependence and independence are elements of power. The cooperative idea was never very popular on the political scene. But the question is not to choose between labour law and cooperative law. The question is whether we can imagine labour law to evolve towards cooperative labour law.

Part II

Country Reports

L'application du droit du travail aux sociétés coopératives en France

Y. Régis and P. Le Vey[26]

Remarques préliminaires

Le droit du travail est la branche du droit qui régit les rapports entre employeurs et salariés au sein de l'entreprise

Le droit du travail est essentiellement un droit d'ordre public particulier puisqu'il est affirmé qu'en cas de conflit de sources de droit ou d'institutions applicables c'est la source ou l'institution la plus favorable au salarié qui s'applique.

Le droit du travail est donc, du fait de son caractère d'ordre public intégralement applicable dès que les parties décident de passer un contrat qu'on peut qualifier du fait de ses éléments constitutifs comme un contrat de travail, et ce bien entendu en cas d'ambiguïté quelle que soit la volonté des parties.

Le droit des sociétés a une toute autre vocation. Il régit les rapports entre associés d'une même société et les obligations (et droits) de la société en tant que personne morale vis-à-vis des tiers. C'est également un droit d'ordre public dans ses dispositions principales. Il ressortit du droit commercial. En droit français, la société est définie comme un contrat par lequel deux ou plusieurs personnes mettent quelque chose en commun en vue de partager les bénéfices ou de profiter de l'économie qu'il pourra en résulter. Certes, la réalité est infiniment plus nuancée mais on peut affirmer que:

- le contrat de société regroupe deux ou plusieurs personnes qui veulent ensemble tenter une aventure industrielle;
- le contrat de travail met, moyennant une somme forfaitaire, généralement mensuelle, dénommée salaire, une personne physique au service d'une autre personne physique ou morale;

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[26] An English version of the paper was published in the ILO/ Enterprise and Cooperative Development Department Working Paper *The Relationship between the State and Cooperatives in Cooperative Legislation. Report of a Colloquium held at Geneva, 14-15 December 1993* (Geneva, 1994), pp. 121-138.

- le rapport de travail qui était au 19ème siècle conçu sur le plan juridique comme un rapport égalitaire a vu le législateur du 20ème siècle reconnaître de plus en plus son caractère inégalitaire.

Le mouvement coopératif est à la fois unique et très divers -

- unique car les mêmes principes et la même filiation idéologique régissent les coopératives quelle que soit la famille à laquelle elles appartiennent;
- divers, car, mis à part certains principes de base, les lois qui régissent les différentes familles sont différentes.

Le droit du travail s'applique aux coopératives comme aux autres acteurs de l'économie.

Il n'y a pas de difficulté particulière lorsque les principes coopératifs n'associent pas le personnel au fonctionnement de la société coopérative; autrement dit, lorsque le principe de double qualité ne fait pas participer les salariés au sociétariat, c'est le cas, par exemple, des coopératives de consommation; le droit du travail s'applique alors purement et simplement. Il y a, par contre, certaines interférences entre le droit des sociétés coopératives et le droit du travail lorsque la coopérative est fondée sur le principe de double qualité: associé salarié. La fusion dans les personnes du contrat de société et du contrat de travail entraîne un certain nombre de difficultés, de contradictions, que la règle de droit écrite ne prend que partiellement en compte.

Seules donc dans l'éventail coopératif français les SCOP vont faire l'objet de la présente étude car seules elles sont basées sur le principe de double qualité suivant: tout salarié est, ou a vocation à devenir, associé

Deux parties seront nécessaires pour mener à bien (ou plutôt pour introduire sérieusement) l'étude du sujet.

Dans une première partie, nous examinerons la disposition législative propre aux SCOP. Dans une seconde partie, les conséquences du principes de double qualité sur l'utilisation du droit du travail seront abordées, mais seulement de façon générale.

1. Les dispositions législatives propres aux sociétés coopératives

La situation du travailleur associé est, sur le plan juridique, relativement ambiguë. La doctrine juridique, faute de temps ou d'intérêt, n'a pas encore construit une théorie acceptable rendant compte et dépassant les contradictions d'un salarié partie prenante du contrat de société, donc

de l'aventure industrielle, et d'un associé lié à la société par un contrat de travail et à ce titre protégé par le droit du travail. La loi elle-même a hésité:

- la loi du 18/12/1915 (première loi sur les SCOP en France) a été par la suite intégrée au Code du Travail. La SCOP était considérée comme constituée par des travailleurs; le contrat de travail l'emportait sur le contrat de société;
- l'article 242 du Code de la Sécurité Sociale hésitait à qualifier les coopérateurs de travailleurs. En effet, il est dit à l'article 241 que les travailleurs bénéficient du régime de la sécurité sociale, puis l'article 242 fait bénéficier de la même protection un certain nombre de catégories de personnes dont les PDG de sociétés, les gérants minoritaires de SARL, et ... "les membres des SCOP";
- la loi du 19/07/1978 (loi actuelle sur les SCOP) classe nettement les SCOP parmi les sociétés commerciales. Le contrat de société l'emporte sur le contrat de travail même si la loi du 19/07/1978 définit la SCOP comme un regroupement de travailleurs exerçant en commun leur profession au sein d'une entreprise.

Malgré ces limites, la loi du 19/07/1978 a fait un effort considérable pour tenter de résoudre les difficultés les plus courantes issues du conflit entre le droit des sociétés et le droit du travail. Un certain nombre d'articles concernent -

- le statut du travailleur associé;
- le statut des dirigeants;
- la répartition des résultats.

1.1 Le statut du travailleur associé

La loi consacre trois articles aux liens qui existent dans les SCOP entre le contrat de travail et le contrat de société: articles 9, 10, 11.

1.1.1 La candidature obligatoire

1.1.1.1 Les conditions de la loi

L'article 9 de la loi prévoit une procédure originale qui n'existe, sauf erreur, que dans les SCOP. Il est possible lors de l'embauche d'exiger du salarié qu'il pose sa candidature. Cette obligation est exorbitante du droit commun. La loi a donc pris certaines précautions:

- la possibilité d'avoir recours à la candidature obligatoire doit être prévue dans les statuts qui doivent également en organiser la procédure;
- l'obligation doit être prévue dans le contrat de travail. Autrement dit, si le contrat de travail est muet, il n'existe aucun moyen de pression (juridique sinon moral) sur le salarié pour l'inciter à poser sa candidature. Il ne peut y avoir de rétroactivité de l'obligation. Les salariés dont le contrat de travail est antérieur à cette obligation statutaire ne peuvent se voir imposer cette candidature. Par contre, rien n'interdît d'insérer systématiquement cette clause pour les nouveaux embauchés.

1.1.1.2 La situation du salarié

(1) Le système prévu par l'article 9

Si le salarié n'a pas posé sa candidature à l'issu du délai prévu par les statuts et par le contrat de travail, il est réputé démissionnaire. La sanction est si grave qu'il convient en pratique que la SCOP lui rappelle l'existence de cette obligation dont il aura pu ne pas mesurer toute la portée.

Le contrat de travail est considéré comme achevé le jour de l'expiration du délai. Il n'y a pas de préavis.

Exemple: une société prévoit que tout salarié doit poser sa candidature au bout de 6 mois d'ancienneté; un salarié est embauché le 13 mars, il doit donc poser sa candidature avant le 12 septembre à minuit selon la procédure décrite dans les statuts. A défaut, le 13 septembre, au matin, la SCOP constate l'expiration de son contrat de travail, liquide le compte salarié et lui fait signer pour solde de tout compte. Étant considéré comme démissionnaire, le salarié n'a pas droit aux aides réservées aux personnes licenciées: chômage, etc.

(2) Les atténuations prévues par les statuts-types

Les statuts types de la Confédération ont atténué les rigueurs de la loi puisqu'il est prévu qu'à l'issue du délai, le CA (le directoire, le gérant) doit mettre en demeure le salarié d'avoir à exécuter son obligation. C'est seulement trois mois après la mise en demeure si celle-ci est restée infructueuse, que le contrat se termine.

Pour bien mesurer la différence, reprenons le même exemple que ci-dessus: le 13 septembre le président constate que le salarié n'a pas encore posé sa candidature. Il décide alors de convoquer son CA (directoire) pour en débattre. Le CA se réunit le 25 septembre et charge son PDG d'adresser une mise en demeure. Celui-ci envoie la lettre, nécessairement recommandée, le 26 septembre. Le délai de trois mois supplémentaire commence à la date de

la réception, soit le 27 septembre. Le contrat se termine le 28 décembre au matin.

1.1.2 La perte de la qualité d'associé et ses conséquences sur le contrat de travail

1.1.2.1 Le lien entre le contrat de travail et le contrat de société

Le travailleur associé est, certes, un travailleur comme un autre. A ce titre, il est soumis au Code du Travail, à la convention collective. Ses rapports avec l'entreprise s'analysent comme un contrat de travail.

En conséquence, il perçoir un salaire, est inscrit à la Sécurité Sociale des salariés, bénéficie de la retraite des travailleurs. Mais le travailleur est également un associé. A ce titre il participe dans les assemblées aux décisions relatives à la société, peut se faire élire membre du CA, voire PDG.

Exemples de difficultés pratiques:

- un PDG contesté par un administrateur peut-il le licencier en tant que travailleur pour le mettre à l'écart?
- peut-il licencier un associé en tant que travailleur sans faire procéder à son exclusion préalable par l'AG?

Dans la pratique il a été toujours considéré qu'il y avait une indépendance absolue entre le contrat de société et le contrat de travail. Cette attitude était la seule possible car, répétons-le, sauf à inventer un droit entièrement nouveau, il est impossible dans l'état actuel du droit d'ériger le travailleur coopérateur en catégorie particulière.

Cependant, il arrive que la loi elle-même établisse un rapport étroit entre le contrat de travail et le contrat de société.

1.1.2.2 La démission du sociétariat

(1) Nature juridique

C'est une manifestation unilatérale de volonté de l'associé. La manifestation de volonté doit être claire et viser la qualité d'associé. Ce droit de se retirer est une conséquence du principe coopératif dit "libre entrée, libre sortie". Sur le plan juridique, il est prévu par l'alinéa 1 de l'article 52 de la loi du 24/07/1867: "Chaque associé pourra se retirer de la société lorsqu'il le jugera convenable à moins de conventions contraires".

L'article 10 de la loi du 19/07/1978 alinéa 3 reconnaît également la possibilité de renoncer volontairement à sa qualité d'associé.

La démission traduit le lien qui rattachait l'associé au contrat de société.

La loi ne dit pas quand doit avoir lieu la perte de la qualité d'associé.

L'effet de la démission peut être immédiat, c'est l'option retenue actuellement par les statuts type. Il peut être prévu une période de préavis.

(2) Effet sur le contrat de travail

L'article 10 de la loi prévoit que "sauf stipulations contraires des statuts, la renonciation volontaire à la qualité d'associé entraîne la rupture du contrat de travail". Il y a donc une option importante offerte sur laquelle chaque coopérative doit réfléchir.

La société peut soit organiser l'indépendance entre le contrat de société et le contrat de travail en prévoyant que la démission du sociétariat n'entraîne pas la rupture du contrat de travail. Elle peut lier les deux. Dans ce cas, la démission du sociétariat entraîne la rupture du contrat de travail. Cette option doit être prise dans les statuts. En cas de silence, la démission entraîne la rupture du contrat de travail.

Cette disposition de la loi coopérative par son caractère exorbitant suscite de nombreuses questions.

La première est de savoir si cet article est compatible avec le Code du Travail. La réponse ne fait aucun doute. Bien que non intégrée dans le Code du Travail, cette disposition l'emporte sur celui-ci puisqu'elle organise un régime dérogatoire propre aux travailleurs coopérateurs.

La deuxième question est de savoir quelle est la signification de l'expression "rupture du contrat de travail".

S'agit-il d'une rupture à l'initiative su salarié associé, autrement dit d'une démission, ou bien la loi accorde-t-elle à la société le droit de licencier le sociétaire démissionnaire? Dans ce cas, peut-on dire qu'il y a licenciement pour cause réelle et sérieuse? Les questions sont nombreuses et les tribunaux ne se sont jamais, à notre connaissance, prononcés.

Il convient donc de prendre position à partir du seul texte de la loi.

Il est clair que le législateur a considéré que la rupture du contrat de travail était une conséquence de la renonciation volontaire à la qualité d'associé, donc que l'associé par sa décision renoncait spontanément à la fois à être associé et travailleur de l'entreprise. Bref, compte-tenu du lien intime que la loi a voulu organiser, entre le contrat de société et le contrat de travail, il y a renonciation spontanée à l'un et l'autre donc rupture du contrat de travail à

l'initiative du salarié. Une preuve formelle supplémentaire est apportée par la réciproque puisque la loi prévoit que la démission du contrat de travail entraîne la perte de la qualité d'associé.

1.1.2.3 La démission du contrat de travail

Elle entraîne la perte de la qualité d'associé dès la manifestation de volonté puisque, rappelons-le, la loi a voulu organiser un lien entre les deux.

Ici également une coopérative peut opter pour l'indépendance entre le contrat de société et le contrat de travail en précisant que la démission du contrat de travail n'entraîne pas la perte de la qualité d'associé.

1.1.2.4 Le licenciement pour cause réelle et sérieuse

La loi de 1978 ne définit pas cette procédure. Elle renvoie implicitement au Code du Travail. Elle se borne à indiquer que si la cause du licenciement est réelle et sérieuse il y a perte de la qualité d'associé. Une telle formulation est susceptible d'entraîner en pratique des difficultés (nous disons susceptible, car à notre connaissance, les tribunaux n'ont jamais examiné le cas).

(1) Notion de cause réelle et sérieuse

Le licenciement doit avoir une cause réelle et sérieuse. Une cause réelle: le motif existe, il n'est pas imaginaire. Il ne doit pas être fluctuant, changer au cours de la procédure. Une cause sérieuse: le motif doit revêtir une certaine gravité. Il doit être indépendant de la bonne ou de la mauvaise humeur de l'employeur. Il doit être objectif et rendre impossible la continuation du travail.

Ces motifs sont au départ appréciés par l'entreprise et par les tribunaux en cas de litige.

(2) Date de la perte de la qualité d'associé

(a) En cas d'absence de litige:

La perte de la qualité d'associé intervient à la fin du contrat de travail.

(b) En cas de litige:

La perte de la qualité d'associé intervient lors de la décision du tribunal.

Remarque: on aboutit alors à une situation absurde, possible en théorie, mais insupportable en pratique: si la procédure dure deux ans, l'associé garde cette qualité deux ans. Il est très facile de régler cette situation paradoxale en pratique. Le travailleur associé devient un associé extérieur dès la fin du contrat de travail. Il faut dès cet instant le rembourser pour lui faire perdre cette qualité.

1.1.3 Les obligations des associés travailleurs

Comme l'indique le titre du paragraphe, seules les obligations des associés travailleurs seront abordées et plus particulièrement l'obligation statutaire de contribuer à l'augmentation du capital.

1.1.3.1 Les possibilités de la loi

Pour mesurer le caractère particulier de la loi du 19/07/1978 dans ce domaine, il faut rappeler les dispositions de la loi sur les sociétés.

(1) Loi sur les sociétés (24/07/1966)

La loi sur les sociétés interdit d'augmenter par une simple décision de l'assemblée générale les engagements des associés. Cette interdiction est fixée:

- dans l'article 60 pour les SARL: "Toutefois, en aucun cas, la majorité ne peut obliger un associé à augmenter son engagement social";
- dans l'article 153 pour les SA: "L'assemblée générale extraordinaire ne peut toutefois augmenter les engagements des actionnaires, sous réserve des opérations résultant d'un regroupement d'actions régulièrement effectué".

En conséquence, l'augmentation de l'engagement d'un associé ne peut venir que de son propre consentement.

(2) L'exception prévue par l'article 6 de la loi du 19/07/1978

Le principe de la non-augmentation des engagements des associés est applicable aux SCOP sauf en ce qui concerne la participation aux augmentations de capital.

— Analyse de l'obligation.

L'obligation doit être prévue dans les statuts. Notons que ceux-ci constituent la loi des parties, et que toute modification des statuts instituant ou augmentant l'obligation s'impose à tous les associés y compris à ceux qui l'étaient antérieurement.

L'obligation contenue dans les statuts doit déterminer de façon précise le nombre de parts sociales qui doivent être souscrites chaque année ou le montant de la souscription.

Les conditions et la périodique de la souscription doivent également être déterminées, sous réserve de respecter le plafond ci-dessous, l'obligation peut être organisée assez librement.

— Plafond de l'obligation.

L'obligation de souscription ou d'acquissions ne peut être supérieure à 10% du salaire brut perçu de la coopérative (la loi fait référence à l'article 144-2 du Code du Travail relatif à la compensation entre les avances faites par l'employeur et le salaire exigible).

La notion de salaire est à la fois évidente et difficile à définir. Constitue un salaire toute somme percue par une personne liée à un employeur par un contrat de travail en contrepartie du travail fourni.

Pratiquement, entrent dans la catégorie du salaire:

- le salaire proprement dit;
- les pourboires;
- les primes et gratifications;
- les congés payés;
- les avantages en nature;
- la part de travail distribuée directement (c'est-à-dire quand elle n'est pas distribuée dans le cadre d'un accord de participation).

Par contre, ne constituent pas un salaire:

- les sommes dues aux travailleurs au titre de la participation;
- les abonnements versés dans le cadre du plan d'épargne et de l'émission de parts sociales réservées aux salariés;
- les remboursements de frais.

1.1.3.2 L'option retenue par les statuts type

Sous réserve de respecter le plafond ci-dessus, les statuts des sociétés peuvent organiser comme ils l'entendent l'obligation des associés travailleurs. L'expérience montre que dans ce domaine chaque coopérative a sa propre pratique.

Seule l'option retenue dans les modèles de la Confédération sera considérée.

— Montant de l'engagement.

Tout associé travailleur ou mandataire s'engage à souscrire et libère des parts pour un montant égal à 5% de la rémunération brute percue par la coopérative au cours de l'exercice.

Cette obligation commence dès l'admission de l'intéressé au sociétariat. Souscrire et libérer signifie que l'associé s'engage non seulement à participer à l'augmentation du capital mais verse au cours de l'exercice les fonds nécessaires à la réalisation de l'engagement. Les statuts type prévoient, en effet, que la libération même dans le cas des SA doit être égale immédiatement à 100%.

5% constituent un engagement élevé car l'expérience montre que des jeunes coopératives ont intérêt à augmenter rapidement le capital initial. Si ce n'était pas le cas, ou si les 5% étaient psychologiquement ou financièrement insupportables, le CA au début de l'exercice aurait la possibilité de réduire par décision motivée l'engagement des associés. L'expression "au début de l'exercice" signifie que le CA doit renouveler sa décision chaque année. Il est clair que les motifs d'une telle décision doivent figurer dans le rapport de gestion présenté chaque année à l'AG.

Dans les SARL où il n'existe pas de CA, la décision est prise par l'assemblée elle-même réunie spécialement pour la circonstance. L'obligation de contribuer au capital cesse:

- en cas de perte de la qualité d'associé à la date de la perte de la qualité d'associé;
- en cas de liquidation amiable à la date de l'assemblée de dissolution;
- en cas de dépôt de bilan à la date du jugement de redressement judiciaire.

— L'exécution des engagements.

C'est le plus simple des systèmes qui a été retenu dans les statuts-type. Il est chaque mois (ou chaque fois que le salarié perçoir une rémunération) prélevé de 5% (ou moins si le CA a réduit l'engagement).

Le montant prélevé est inscrit au compte courant de l'associé car c'est seulement en fin d'année qu'il doit souscrire des parts, c'est-à-dire se libérer de son engagement.

La transformation du compte courant en parts de capital nécessite un acte de volonté de la part de l'associé, même si cet acte de volonté n'est que le résultat d'une obligation mise à la charge de l'associé par les statuts. C'est seulement lorsque cet acte de volonté a été accompli que la somme peut être inscrite au capital.

— Sanctions en cas de non-exécution.

Deux hypothèses sont imaginables:

- l'associé a accepté les prélèvements sur ces rémunérations mais refuse de signer le bulletin de souscription en fin d'année. Il a alors, 12 mois de retard;
- l'associé a refusé les prélèvements sur ses rémunérations pendant six mois.

Dans les deux cas, le gérant, dans les SARL, ou le PDG dans les SA (directoire), invite l'associé défaillant à se mettre en règle.

Si l'associé ne régularise pas dans les trois mois le CA (le directoire, le gérant dans les SARL) a la possibilité de considérer l'intéressé comme démissionnaire au sociétariat. Si les statuts le prévoient, le sociétaire est considéré également comme démissionnaire du contrat de travail.

1.2 Les statuts des dirigeants

En droit français,les dirigeants des sociétés ne sont pas considérés comme des salariés. Certes, tant les PDG que les gérants minoritaires des SARL bénéficient du régime de la sécurité sociale mais, sauf dans des conditions très strictes, ils ne sont pas titulaires de contrats de travail.

Les SCOP de ce point de vue se voient appliquer une réglementation tout à fait dérogatoire.

Disons pour simplifier que les dirigeants de SCOP sont assimilés juridiquement à des travailleurs.

Il ne sera examiné ici que la situation du dirigeant qui soit titulaire d'un contrat de travail, soit perçoir une rémunération au titre de ses fonctions; le cas du dirigeant qui exerce seulement un mandat social à titre gratuit ne sera pas examiné.

1.2.1 Le dirigeant titulaire d'un contrat de travail

Le dirigeant (gérant dans les SARL, PDG et DG dans les SA) exerce normalement son mandat social. Parallèlement, il est titulaire d'un contrat de travail.

La jurisprudence admet difficilement un tel cumul et de ce point de vue les SCOP sont dans la même situation que les autres sociétés.

Tout au plus la loi sur les SCOP prévoit elle:

- que les 2/3 des administrateurs dans les SA doivent être des salariés dans l'entreprise (application de la règle de la double qualité);
- qu'il est possible à tout instant à un salarié de devenir administrateur sans avoir deux ans d'ancienneté comme dans les autres sociétés.

1.2.2 Le dirigeant n'est pas titulaire d'un contrat de travail

Le gérant dans les SARL, le PDG, le DG dans les SA exerce le seul mandat de dirigeant à l'exception de tout contrat de travail.

Les dirigeants de SCOP sont régis dans ce cas par un droit totalement dérogatoire qui est sans équivalent pour les autres types de sociétés.

Les dirigeants sont assimilés à des salariés. Ils bénéficient de l'application de la législation sociale dans son intégralité:

- attribution en cas de révocation ou de non réélection des indemnités de rupture prévues par la convention collective en cas de licenciement d'un salarié;
- droit au chômage en cas de révocation ou non réélection;
- droit sur les répartitions attribuées aux salariés sur les résultats de l'exercice (intéressement, participation des salariés aux fruits de l'expansion, ristourne aux salariés).

L'assimilation n'est pas totale et la loi n'a pas pour effet d'accorder aux dirigeants un contrat de travail qui relève de la seule volonté des parties.

C'est ainsi que les augmentations de rémunération ne relèvent pas de la convention collective mais de la décision du CA pour le PDG et le DG et de l'assemblée des associés pour les SARL.

Il s'agit là d'une question extrêmement "sensible" en pratique. Aussi le mouvement coopératif recommande-t-il de fixer la rémunération des dirigeants ainsi que les augmentations

successives par référence au salaire défini pour un cadre supérieur (ou pour un employé selon la taille de l'entreprise) dont le statut est prévu par la convention collective applicable à l'entreprise.

Sur le plan psychologique, l'expérience quotidienne montre que ces subtilités échappent à la plupart des dirigeants de SCOP et que ceux-ci se considèrent comme des travailleurs. Plusieurs litiges récents opposant des coopératives à d'anciens dirigeants ont montré que la découverte par les dirigeants de leur statut relativement précaire était vécu comme un véritable drame.

1.3 La répartition des résultats

La répartition des résultats dans les SCOP obéit à des règles strictes.

La loi oblige:

- à doter la réserve légale à hauteur minimale de 15%;
- à doter une réserve statutaire dite fonds de développement, mais la loi ici ne fixe pas de pourcentage.
- à attribuer aux salariés sous forme de ristourne un minimum de 25% des excédents nets de gestion, mais la loi permet d'aller jusqu'à 84%.

L'observation de la pratique des SCOP montre que la ristourne aux travailleurs varie entre 40 et 60%, la plupart des SCOP distribuant 50%.

L'originalité de cette ristourne, et de ce point de vue elle est au coeur de notre propos, est qu'elle prend en compte non pas l'associé mais le travailleur.

Elle est attribuée à tous les travailleurs qu'ils soient ou non associés et qui comptent au cours de l'exercice soit trois mois de présence, soit six mois d'ancienneté.

Ainsi un salarié lié par un contrat de travail à durée déterminée d'une durée de trois mois et qui n'a aucune vocation à devenir coopérateur bénéficiera de la ristourne.

Cette ristourne est répartie entre les intéressés:

- soit égalitairement (cas très rare en pratique);
- soit en fonction du temps de travail fourni;
- soit en fonction des salaires perçus.

Cette ristourne est juridiquement considérée comme un salaire. Elle subit à ce titre les charges sociales et doit être déclarée par les bénéficiaires au titre de l'impôt sur le revenu.

Généralement, les SCOP attribuent cette ristourne par l'intermédiaire d'un accord de participation. Ce mécanisme permet d'éviter de payer des charges sociales. Par ailleurs, le montant attribué à chacun des intéressés n'est considéré comme un revenu au sens fiscal du terme. Les sommes doivent être bloquées cinq ans au sein de la coopérative, ce qui procure à la SCOP un moyen considérable d'autofinancement.

L'utilisation systématique depuis les années 1970 des accords de participation et la possibilité corrélative de constituer une provision spéciale, dénommée provision pour investissement, a permis un renforcement considérable des capitaux propres dans les SCOP.

2. Les conséquences du principe de double qualité sur l'application du droit du travail

Rappelons un principe bien connu de tous: les coopératives sont en général fondées sur le principe de double qualité. L'application au sein des SCOP du principe de double qualité signifie que tout salarié est ou a vocation à devenir associé.

En tant qu'associé, le coopérateur participe au profit économique; en tant que salarié il est régi par le droit du travail et bénéficie de sa protection.

Il y a là, si l'on peut dire, un conflit de rôles au sens anthropologique du terme.

Si l'on fait une analyse strictement juridique, il est clair que mis à part les règles particulières exposées dans la première partie, tout le droit du travail s'applique aux SCOP. Rappelons par ailleurs qu'il s'agit d'un droit d'ordre public et qu'en cas de conflit de sources, c'est la plus favorable aux salariés qui l'emporte.

Il nous faut dans cette seconde partie prendre autant le point de vue du praticien voire du sociologue que le point de vue du juriste.

Il est impossible de faire un inventaire exhaustif de toutes les institutions du droit du travail. Nous examinerons l'influence de la forme coopérative sur le fonctionnement de trois institutions importantes:

- le contrat de travail;
- les institutions représentatives du personnel;
- la participation financière.

2.1 L'application du contrat de travail

2.1.1 L'embauche du salarié

L'embauche fait naître le contrat de travail. Les SCOP sont de ce point de vue dans une situation de droit commun. Elle doivent notamment appliquer le salaire minimum fixé par la convention collective. Cependant, indépendamment du contrat qui contient généralement une clause d'obligation de candidature au sociétaire, il est remis au salarié un livret d'accueil expliquant le fonctionnement des sociétés coopératives et détaillant les droits et les devoirs des coopérateurs.

Par ailleurs, bien que cette pratique ne soit pas prévue par la loi, le prélèvement sur les salaires pour constituer le capital du futur coopérateur commence dès l'embauche. Enfin, en liaison avec les institutions du mouvement, la coopérative fait suivre à tous les nouveaux embauchés un stage intitulé "comment devenir coopérateur"?

2.1.2 Vie du contrat de travail

La coopérative doit normalement appliquer le contrat dans son intégralité et, si elle existe, la convention collective.

Toute clause, dans une société en difficultés, par laquelle les salariés coopérateurs accepteraient des salaires inférieurs aux minima de la convention collective serait nulle. La jurisprudence refuse dans les litiges passés de tenir compte dans ce cas de la spécificité des SCOP.

En marge de la loi, il existe de nombreuses situations où les impératifs du droit du travail sont atténués:

- heures supplémentaires non payées;
- congés abandonnés;
- renonciation au salaire pendant un mois, par exemple.

2.1.3 La rupture du contrat de travail

Ici également, les coopératives sont régis par le droit commun. Sur un point cependant, les tribunaux (mais non pas la cour supérieure car les litiges n'ont pas été portés devant elle) ont tenu de la spécificité coopérative. Ils ont considéré que l'exclusion d'un associé par les autres associés permet au chef d'entreprise de licencier l'associé pour cause réelle et sérieuse.

L'exclusion de l'associé par le groupe à la majorité requise pour la modification des statuts est normalement une procédure relevant strictement du contrat de société. Qu'un tribunal ait tiré de cette procédure la possibilité d'une rupture de contrat de travail à l'iniative de l'entreprise est une avancée importante dans la recherche d'un statut particulier du travailleur associé. Malheureusement, faute de temps ou d'intérêt, aucune doctrine n'a été bâtie en s'appuyant sur les quelques décisions qui existent.

2.2 Les institutions représentatives du personnel

Le droit français prévoit selon la taille de l'entreprise une représentation différenciée et plus ou moins élaborée du personnel de l'entreprise.

Il y a trois institutions prévues par la loi:

- les délégués du personnel élus par les salariés; leur présence est obligatoire dans tous les établissements où sont occupés au moins 11 salariés;
- le comité d'entreprise; il est obligatoirement constitué dans les entreprises employant au moins 50 salariés;
- les délégués dont la désignation est laissée à l'initiative des organisations syndicales; la désignation de délégués est prévue dans les entreprises de plus de 50 salariés.

Normalement, toutes ces institutions s'appliquent aux SCOP.

Cependant, le principe de double qualité (salarié, associé) entraîne certaines difficultés d'application:

- les administrateurs salariés ne peuvent être ni membres du comité d'entreprise, ni délégués du personnel:
- dans les rares SCOP où les institutions de représentation du personnel existent, on peut noter une confusion des rôles: de nombreux administrateurs se conduisent comme des représentants du personnel ou mieux comme des représentants de leur secteur d'activité ou de leur service;
- plus rarement, des réunions communes peuvent se tenir ou bien les mêmes questions sont portées à l'ordre du jour du CA et du comité d'entreprise.

De façon générale, il y a statistiquement moins à taille comparable de SCOP ayant des représentations du personnel que d'entreprises n'ayant pas la forme coopérative. Le principe de double qualité atténue en effet considérablement dans les coopératives les contradictions entre le facteur travail et le facteur capital.

2.3 La participation financière

La première partie nous a montré que la loi imposait de réserver aux salariés une partie des excédents de gestion. Nous avons vu que le pourcentage pouvait varier entre 25% et 84% des excédents nets de gestion. Egalement, il a été dit que cette ristourne aux travailleurs était attribuée par l'intermédiaire d'un accord de participation.

Il existe d'autres moyens de faire participer les salariés sur le plan financier qui sont très utilisés.

Cependant, l'application du principe de double qualité peut entraîner un risque financier qu'il n'y avait pas s'il était un simple salarié.

2.3.1 Les institutions spécialisées

(a) L'accord de participation

Il permet:

- de ne payer de charges sociales ni d'impôt sur les sommes attribuées aux salariés dans la limite de la moitié du plafond de la sécurité sociale;
- de conserver les sommes cinq ans à la disposition de l'entreprise.

Les coopérateurs sont incités à employer les sommes attribuées au titre de la réserve spéciale de participation en parts de capital afin de conforter les fonds propres de l'entreprise.

(b) Le plan d'épargne

C'est une institution réservée aux sociétés anonymes. Chaque salarié peut y attribuer en versant une somme destinée à être transformée en parts de capital. L'entreprise a la possibilité de compléter les versements des salariés par un abonnements qui ne peut dépasser par an 1500 francs ou 300% du versement effectué par le salarié.

L'abondement est déductible fiscalement pour la SCOP. Il n'est pas considéré comme un revenu pour le salarié. Il ne subit donc ni les charges sociales ni l'impôt sur le revenu.

Il est également transformé en parts de capital.

2.3.2 Les risques du capital

La transformation en parts de capital par application du principe de double qualité entraîne des risques supplémentaires pour les intéressés.

Pour bien mesurer ces risques, il faut savoir que dans les entreprises non coopératives:

- les sommes attribuées au titre de la réserve spéciale de participation sont soit placées en compte courant dans l'entreprise, soit placées à l'extérieur;
- les sommes attribuées au titre du plan d'épargne sont placées systématiquement à l'extérieur.

Dans les entreprises coopératives, ces sommes placées en capital:

- reçoivent une rémunération aléatoire (dividende);
- courent le risque du capital en cas de perte comptable;
- ne sont pas garanties en cas de dépôt de bilan.

On peut dire en forcant un peu le trait que ces institutions sont dans les entreprises classiques des instruments de participation et que dans les coopératives il s'agit d'instruments de capitalisation.

3. Conclusion

Après avoir flotté pendant longtemps, la doctrine juridique puis la loi ont considéré que l'associé travailleur était lié à la coopérative par un double contrat: le contrat de société et le contrat de travail.

La doctrine et la pratique juridique ont donc analysé chacun des contrats indépendamment de l'autre. Cette position méthodologique a été renforcée par le principe dit de l'autonomie des droits: chaque catégorie particulière du droit doit être interprétée indépendamment des autres branches du droit, doit dégager ses propres définitions, voire même ses propres méthodes d'analyse.

La situation du travailleur coopérateur est cependant irréductible à ces catégories qu'elle dépasse. Elle nécessite une approche, des textes particuliers.

Dans son essence même, on peut raisonnablement douter que le travailleur coopérateur relève du salariat. Ne s'agit-il pas plutôt d'une entreprise réalisée en commun par des travailleurs qui renoncent par avance à l'application du droit du travail, donc du salariat.

La loi de 1978, qui traduisait l'esprit de l'époque, même si elle établissait un lien entre le contrat de travail et le contrat de société, affirmait que les coopératives de production étaient fondées sur le salariat.

L'évolution historique nous permet de penser qu'il est temps d'explorer d'autres pistes.

Labour law and cooperatives in Israel

A. Spinrad

1. Introduction

1.1 The special nature of cooperatives

There are two different basic forms of Cooperative Association under the Israeli law: the Limited Company and the Cooperative Association. The difference between these two entities highlights the special nature of the Cooperative Association in Israeli law.

1.1.1 Goals of association

In a joint stock company, individuals join together for purposes of profit and profit alone. The sole purpose of the company, as the Israeli courts set out in the Kosoi case, is the shareholders' welfare. The limited share company has no social interests and no other groups, such as workers or creditors, are to be taken into account in determining the company's policy (Article 96(27), Companies Ordinance). It is within this context that the company is free to adopt any purposes within the limits of the law.

On the other hand, the Israeli Cooperatives Societies Ordinance (legislation which dates back to the period of the British Mandate!) restricts the purposes of a Cooperative Association, as set out in article 4:

"The Society's purposes are to provide for savings, self-help and mutual help among persons of common economic interests, in order to improve their conditions of living, business and manufacturing methods ..."

1.1.2 Constitution and by laws

There is a formal legal distinction between the constituting documents of a limited company and those of a cooperative: The memorandum of association is the company's constitution and can be amended only according to the Companies Ordinance.

In a cooperative, on the other hand, the constituting document are the articles of association. These articles define the society's nature, purposes and its regulations.

1.1.3 Personal liability

The personal liability of cooperative members can be limited or unlimited according to its own regulations. A shareholder in a company, on the other hand, (as one might expect from the definition of a "limited" company!) is liable for the nominal value of his shares.

1.1.4 Restrictions on leaving

A member can leave the cooperative at any time, and the cooperative must redeem his share in the society's capital; in addition, the member continues to be liable for debts for two years after he left. A shareholder in a company, on the other hand, has no liability whatsoever after selling his shares.

1.1.5 Restrictions on holding stock capital

A company shareholder can own any amount of stock capital or control shares, without restriction, whereas a member in a Cooperative Association may not hold more than 20% of the stock capital. In addition, in a Cooperative Association there can be only one class of shares, with equal voting and capital rights; and these cannot be transferred to any other organ of the cooperative.

1.1.6 Liquidation

A company can be liquidated by its shareholders, as a result of insolvency (on the request of creditors) or by way of Court supervision. A Cooperative Association, on the other hand, may be liquidated only on its own request. The jurisdiction for such liquidation, is vested exclusively in the Registrar of Cooperative Associations, rather than in the Courts.

1.1.7 General meetings

The general meeting is the highest body in the structural hierarchy of both the company and the Cooperative Association.

1.2 Forms of cooperatives

According to the Cooperative Association regulations regarding membership which were set out by the Minister of Labour in 1973, there are several forms of Cooperative Associations:

(1) Kibbutz - A Cooperative Association which is a separate Community in which members live in cooperative society, based on the ideals of collective ownership of property. Its purposes are labour, equality and cooperation in manufacturing, consumption and education.

(2) Kibbutz Movement - A central association whose members are the Kibbutzim themselves. Its aims are to establish Kibbutz settlements, ideological guidance and guidance in the forms of modes of individual and collective life of the kibbutzim.

(3) Moshav Ov'dim (Smallholders' cooperative settlements) - An agricultural association which is a separate community. Its purposes are to organize its members in these settlements and to cooperate in supply, marketing and mutual help. Each member can work by himself on his property, if the constituting documents allow it.

(4) Tnu'a Moshavim Settlement Movement (The smallholders' cooperative) - A central association whose members are the Moshavim themselves. Its aim is to establish moshavim, to help them and provide guidance through cooperation and mutual help.

(5) Moshav Shitufi (Cooperative Community) - An agricultural association that is a separate community. The association owns the means of production and public property. Its members cooperate in manufacturing, marketing, education and maintain equality in consumption. A member can own private property and receive his means of consumption communally, or work in his property by himself.

(6) K'far Shitufi (Cooperative village) - An agricultural association in a rural settlement. Its aim is to organize its members as farmers who own private property and cooperate in supply, marketing and other agricultural services.

1.3 The legal basis of cooperative membership vis-a-vis "employment"

1.3.1 Salaried employees

A salaried employee in a company has four main duties to his employer: to work for his employer, to obey the employer's orders, to exercise caution and to be loyal and bona-fide. The employee fulfils his duties by fulfilling his employer's instructions; and in the absence of such instruction merely by being available to the employer. Most of the collective agreements

and collective arrangements - and indeed most individual employment contracts -contain specific provisions which set out the employee's obligations.

The employer has the prerogative to run the company and as long as his directions are lawful and reasonable they must be obeyed by the worker. The worker must be loyal to his employer, and take reasonable care regarding property and life. Apart from these inherent duties, (which exist ipso facto in every work contract according to Israeli Supreme Court decision) workers may be subject to duties under personal or collective labour contracts.

1.3.2 Cooperative membership

In the Cooperative association, the relationship between the society and its members is regulated by the Cooperative's regulations, thus forming a contract between the society and its members. The parties, however, are not free to agree to the terms of the contract. The "contract" (i.e. the cooperative's regulations) is subject to the Cooperative Association Ordinance and the Ordinance's regulations. Thus, the Cooperative Association Registrar has broad supervisory powers, and is authorized to invalidate the Articles of Association or the regulations. The Cooperative Association Registrar has full discretion, even to the point of disqualifying a cooperative on the grounds of contradiction between the cooperative's internal regulations and its Articles of Association.

The mutual legal relationship between the cooperative and its members means that the member's performance of his duties is a necessary precondition for enjoying his rights. The "mutual help" between members and the cooperative (Coop. Ass. Ordinance, Art. 4) is an axiom in cooperative societies. This mutual help is not merely declarative; it constitutes the very basis - ideological, legal and practical - of everyday work. Therefore the whole idea of an employer-employee relationship between the member and the cooperative contradicts the basic idea of the cooperative society, whereby the members of the cooperative society work collectively for the benefit of all.

1.3.3 Cooperative membership and employment

The traditional attitude regarding collective societies is that cooperative members do not see themselves as salaried employees of their cooperative association.

A cooperative association is also a productive society. For example, in Kibbutz, labour and membership are inseparable. In some cooperatives (not in Kibbutzim), a member who has lost his capacity for work can no longer be a member of the cooperative society and is entitled to a sum of money in return for his share in the cooperative.

A cooperative cannot "discharge" a member, and a member in the cooperative cannot resign without giving up membership. The member's duty to work derives from his status as a member, and therefore, members must fulfil this obligation equally, generally and permanently. Each member receives the same compensation regardless of his occupation or "status". The compensation may be by way of money, services or simply by receiving the rights of membership. Differential reward for different kinds of work is a characteristic of labour relationships but is not to be found in a cooperative association. There is no hierarchy of labour in the cooperative, and therefore the members are not subject to "supervisors". Such hierarchial relationship would contradict the cooperative idea which is based on mutual help between persons of common economic interest.

1.4 Conclusion

The Israeli legal system makes a clear-cut distinction between classical contractual rights - both in the area of ownership and in employment - and special rights in cooperative associations, in which by definition the labour and other relationships are governed by the cooperative's regulations, and which must be based on the principles of democracy and mutual help.

2. The status of the cooperative member: can he be subject to labour law?

2.1 The importance of determining the members' status

The question of a cooperative member's status as an employee has arisen in the Israeli Labour Courts in several cases. Specific cases dealt with questions of social rights which belong to all salaried workers.

The consistent response of the labour courts so far has been that the cooperative member is not a "salaried worker" by definition and therefore labour laws and social rights are not applicable to him.

Thus, the cooperative member's status has far-reaching consequences for social rights; the proper legal forum for hearing the disputes regarding such social rights and for damages which he can claim.

2.2 Determining the cooperative member's status

There are three possible ways to determine the status of a cooperative member who works for the cooperative:

(1) By using the traditional tests under Israeli Labour Law to determine whether there is an employment relationship according to Israeli Labour Law (especially those which can be applied to a cooperative member).

(2) By using analogies to a shareholder's ownership status in a limited company, a situation for which we already have clear court judgements regarding shareholders' status.

(3) By looking at specific legislative references to cooperative members in labour laws, and attempting to infer a general conclusion as to their status.

2.2.1 Using labour courts' criteria

The first - and perhaps the most appropriate - way of examining cooperative members' labour status is by applying the specific tests developed by the Israeli Labour Courts to determine the existence of an employer-employee relationship.

Four tests have been used for this purpose in the most recent judgements. It should be emphasized that these tests are not mutually exclusive: i.e. one test could be used for labour law and another could be used for other purposes, for example, cooperative law (or taxes, or tort law). This is not to say that the meaning of "employment" is fundamentally different in the various areas of the law; it is, rather, an expression of the fact that the employment relationship has a wider or narrower parameter, according to the purposes of each area of law.

(1) "The Control Test" - was first established in the *Agoshevitz v. Futerma case* in 1948. According to this test, a "worker" is one who is subject to another's authority and supervision, receives orders from him or is obliged by a contract to obey such orders. This test combines the principles of subordination and of supervision. The Continental law has developed the principle of subordination while Common Law emphasized the concept of supervision. The Israeli test seems to be a combination of both attitudes.

Today, the labour courts judgements tend to neglect this test and use it only as a part of the "integration test". Nevertheless, when there is no way to apply the integration test, the relationship will be examined according to "the control test".

(2) "The Personal Contract Test" - was first established by the Labour Court in the *Ron* case. According to this test, an "employee" is one who is obliged to carry out his work personally; it expresses both duty to personal work and the principle of personal connection. However, having a personal relationship does not necessarily infer that there is a labour relationship. This is, therefore, a negative test which limits its effectiveness. It is not applicable to the problem of collective membership for it can indicate only that no labour relationship whatsoever exists (whether or not it is an employment relationship cannot be determined by using this test).

(3) " The Integration Test" - is the leading test today. According to this case, a "worker" is one who is integrated in the enterprise and does not give independent services to the factory. Its positive side is that the worker must be integrated into the enterprise, whose ongoing activity is dependant on the employee's work. The negative side is that the worker may not be an owner of a business giving external services to the factory. The integration has to take place in a legal contractual context; the contract between the parties must define the work as the main purpose of the contract, and not as a secondary result of the contractual purpose, Thus, the employee gives the employer his labour-power, and not the means of production or other assets. Worker's subordination to his inspector is an element of this test (as well as of the control test).

However, this test, although the most popular in the judgements today, is not appropriate for determining collective members' status. One can be completely integrated in a factory and yet not be treated as a "salaried employee". Not only collective members fall into this *sui generis* category for which the integration test is not applicable. There are a number of special categories for which the "integration test" does not apply: One can be "employed" as a result of one's special legal status and not as a result of a labour contract. For example, soldiers, judges or elected officials do "work", are an integral part of the "enterprise", and do not have an independent business - but nevertheless they will not be considered "employees".

Similarly, there are special categories of "workers" - e.g. apprentices, prisoners etc. - whose "work" is performed in the context of special legislation and therefore are not employees.

Members of cooperatives are the prime example of such a category: they are fully integrated into the "enterprise" (the cooperative) and yet they are not employees. The source of their work relationship is not a labour contract but rather the cooperative bylaws and regulations. Therefore, no employment relationship exits.

Therefore, the Israeli labour courts have stated that the general rule is that a cooperative is not an employer of its members unless explicitly agreed otherwise.

Although the member's labour power belongs to the cooperative, and the member is subject to the cooperative's discipline and the decisions of its authorities, these duties arise as a result of his membership in the cooperative and not out of a contractual labour relationship with the cooperative. The Integration Test, which is the most prevalent in today's judgements in Israel, is therefore probably not applicable to cooperative members.

This test was rejected by Justice Zusmann in the "Beth She'an" Bakery case: there, the question was whether a deceased member of a bakery cooperative was its salaried employee for the purposes of entitlement to severance pay under the Severance Pay Law.

According to the Cooperative's bylaws, all members were paid equally regardless of their position. The deceased's son and widow claimed that they were entitled to severance pay, as surviving relatives of a deceased employee under the Severance Pay Law - (in addition to the sum they received from the cooperative's trust for its members). The Court rejected this claim, stating that the very idea of an employer-employee relationship between the cooperative and its members contradicts the idea of cooperative life: Par. 4 of the Cooperative Association Ordinance emphasizes "mutual help between people of *common* economic interest": common economic interests, as *opposed* to separate economic interests of an employer and employee by nature. The cooperative member works because he is a member, and he is a member because he works.

Legal scholars in Israel are divided as to the question of a labour relationship between cooperatives and their members. Prof. Otolengi is one of the scholars who believe that today. law and the courts should revise their treatment of cooperative members. She believes that cooperative members' special legal status deprives them of rights they deserve, especially in the event of the cooperative's liquidation: if a cooperative is liquidated because of insolvency. it cannot redeem its members' shares and they are left completely destitute. Thus, people who dedicated their lives to the cooperative (financially and physically) are left with nothing. She believes that this problem can be solved in two ways:

(a) By defining precisely the problematic areas as regards cooperative members' status (e.g., liquidation, social rights) and dealing with them by specific legislation.

(b) Treating members as salaried workers generally, so that protective labour legislation in its entirety is applied to them.

However, the National Labour Court's attitude has been much more conservative: In the *Bahagan v. Ha'mahapah Association* case the Court stated that there is no need for a change in the law regarding cooperative members' status since the Legislature is fully aware of the special status of the cooperative member, and wherever the Knesset thought it necessary to

define the members' status as that of employees, it did so specifically. For example, in the *Baruchim v. Insurance and Pension Trust of Builders* case, the National Labour Court refused to hear the case on jurisdictional grounds, stating that members of a cooperative are not employees.

Similarly, the Labour Courts have consistently refused to take up cases regarding cooperative members, on the grounds that they are not workers and therefore are not within their jurisdiction.

2.2.2 Analysing the cooperative members' status by analogy to shareholders and owners

Both a Ltd. Company and a Cooperative Association are voluntary associations. Since both forms of associations are similar in their limited liability and organizational structure, courts in their judgements tend to compare Cooperative Law to Companies laws already discussed.

Since the Israeli Companies Ordinance is based on the Mandatory Ordinance, the case law regarding it developed from Queen's Bench decision. For example: In the case of *Lee v. Lee's Ait Farming Ltd.* [1961] A.C. 12, Q.B. the Court ruled that one can be a salaried worker of a company and its only shareholder both of the same time.

This question was discussed in Israel in 1986 in the *Danenberg* case, where there was an agreement between some of the shareholders to pay salaries to themselves. The question was whether those salaried shareholders who owned the controlling shares were also "employees" of the company.

The High Court discussed first whether this income was salary or dividends. Justice Bach said the distinction between a member of a company (a shareholder/owner) and a salaried employee who is also a shareholder in a company is sometimes flexible. The questions to be answered are: What was the parties' intent when they signed the contract? Is the worker under the employer's control? Is his salary proportionate to his job and its value on the labour market?

Justice Bach held that a shareholder in a company is not a salaried worker and in order to claim otherwise, special circumstances must be proven. Lack of proportion between the real value of the shareholder's work and his income supports the conclusion that a stockholder is not to be regarded as salaried worker.

Earlier, in 1964, in the *Resnik* case, Justice Vitkon said that when all the workers in a business are compensated equally, regardless of the real value of their work, an employer-employee relationship cannot be said to exist.

However, the analogy between a cooperative member and a company shareholder is not complete: the relationship that each of them has with their respective association is, as we have seen above, of a different nature: a company shareholder is thought to be more of an *investor* whereas the cooperative member is an *active participant* in his own business.

Thus, even if a company shareholder could, under special circumstances, be considered a salaried employee, a cooperative member should not be seen as such.

2.2.3 Specific references to cooperative members in labour legislation

By examining the situation of a cooperative member as specifically set forth in protective labour legislation one may reach a general conclusion as to his labour status. When there is no specific reference to cooperative members, one can reach two possible conclusions:

(a) When there is no explicit rule regarding the status of cooperative members, they are not to be considered as employees.

(b) By analogy: since both situations are similar we can infer that similar principles apply to cooperative members, even though the law is, strictly speaking, limited to salaried employees.

In protective labour legislation there are a few provisions which specifically relate to cooperative members. However, these laws often demonstrate the Legislature's confusion, since different laws have different approaches. For example, several laws apply to all cooperatives whereas others refer only to specific kinds of cooperatives.

This is probably the result of what preceded the legislation "behind the scenes", or whose initiative these laws were. When legislation followed specific court decision, it was tailored to the specific situation; but when it was the outcome of an independent legislative initiative, the issue was settled broadly. Legislation is, as well, always a product of political struggles, and therefore the differences in the laws themselves may well reflect a specific "balance of forces" rather than a well thought-out legal philosophy.

2.3 The laws which apply to cooperative association members specifically

2.3.1 Work and Rest Hours Law

Par. 2 (a):" the working day shall not exceed eight hours of work." The expression "working hours" is defined as "the time during which the employee is available for work"... (Par. 1)

The law does not apply to an owner of a business and cooperative members may well have thought it did not apply to them, as they too work in their own association. Therefore, 18 years later, art. 9B was added:

(b): On the said days of rest a member of a cooperative society shall not work in a work shop or industrial enterprise of the society; a member of an agricultural cooperative society shall not work in a work shop or industrial enterprise of the society unless the work is connected with services necessary for its farm."

This law does not say that the cooperative's member is to be viewed as a worker in all social protection laws, but applies to this specific social right only. This addition of 9B article does not indicate that the Legislature sees the society's member as its employee but rather that this law applies to him although he is not a salaried worker.

2.3.2 Night Baking (Prohibition) Law

This law prohibits night baking and punishes severely an employer who does so (art. 8). Since the prohibition refers to the *employer* and not to a work relationship, theoretically it would apply to members of a cooperative. Art. 10 specifically applies to cooperative societies: "For the purposes of section 8, a Cooperative society shall, in relation to its members, be treated like an employer in relation to his employees."

In the *"Beth She'an" Bakery case*, Justice Zusmann said that Art. 10 indicates that the Legislature was fully aware of the unique situation of Cooperative members. Nevertheless, in the same decision he said that this penal article shows that the Legislature does not see members of a cooperative as employees.

2.3.3 National Insurance Law and regulations

This was one of the first laws that specifically granted cooperative members social benefits that are generally given to salaried employees. Par. 2 states: "For the purposes of this law, a member of a cooperative society who works in an undertaking of or on behalf of the society is regarded as an employee and the society is regarded as his employer; however, a member of a cooperative society which is a Kibbutz (communal settlement) or "Moshav Shitufi" (social individualistic but economically collectivistic settlement) is regarded as an employee, and the Kibbutz or Moshav Shitufi is regarded as his employer, if he carries on his job within the framework of the duty roster and not on the basis of a personal contractual relationship between his and another employer - even if such job is not performed in an undertaking of or on behalf of the society."

This is the most explicit law creating a fiction of an employer-employee relationship between a cooperative and its members.

The first case that discussed this provision was that of a society's member injured while digging a grave for another member, in *Azani v. The National Security Institution.* The question in dispute was whether this activity should be viewed as work or as a social activity of the society. The member's claim to be treated as a worker was accepted by the High Court.

2.3.4 Employment of Women Law, 1954

Par. 18 states: "For the purposes of sections 1, 6 and 7 a cooperative society is deemed the employer of its members." Par. 1 specifies a list of prohibited and restricted works for women; Par. 6 deals with maternity leave; Par. 7 deals with the right to be absent from work for reasons relating to pregnancy and fertility. Since the list of issues Par. 18 applies to is limited, it is clear that the Legislature did not intend that this law be applied generally to women in Cooperative Associations.

Actually, this limited list of issues means that the main purpose of this law, which is prohibition of night work for women (Par. 2) does not apply to a cooperative woman member.

Prof. Otolengi criticizes this law and says that its purpose is protection of women and that, therefore its application to cooperative members should have been set generally rather than specifically phrased; it should protect women in general, women-members in cooperatives, as well as salaried women workers. For example, Article 9 of the same law, which prohibits termination of women workers contracts during maternity leave - was not specifically mentioned in Article 18 and therefore does not apply to cooperative members. Is it just to give such members the right to maternity leave, but deprive them of protection from termination of their contract during such leave?

2.3.5 Employment Service Law

Par. 32 (a) prohibits engagement of an employee in the branches of work, trades and occupations specified, or recruiting an employee to work for an employer unless the employee was sent by the Labour exchange, with written confirmation.

Theoretically, as a result of this article, cooperative factories could not use the services of the society's members as arranged in the society's work assignments. Therefore specific regulations of Employment Service were needed in order to exempt members of Cooperatives of a "Kibbutz" or "Moshav" from their connection to the employment service. According to

these regulations, Par. 32 (a) does not apply to workers who are members of a Kibbutz or a Moshav.

The question is why does this regulation apply to members of a "Kibbutz" or "Moshav" only and not generally to all members of cooperatives? In any case, members of a Kibbutz are not "workers", so that the law does not apply to them and they do not really need this exemption. Further, if they are to be seen as workers here why are they the only cooperative members who get the exemption?

2.3.6 Work Safety Ordinance (New Version)

The definition of "Employer" includes "any body of persons corporate or unincorporate and the legal personal representative of a deceased employer, in relation to a person who is a member of a registered cooperative society, and engaged in work carried out by that cooperative society the cooperative society shall for the purposes of this ordinance be deemed to be the employer by the cooperative society, notwithstanding that he is remunerated in whole or in part by shares in the profits or gross earnings of the cooperative society."

Thus, the Legislature protects the worker from accidents regardless of him being a member in a cooperative. The legislation emphasizes the element of *remuneration* in order to remove any shadow of a doubt, since the member's participation in the cooperative's profits may indicate that the member's status is not that of a salaried worker.

This ordinance sets out explicitly that even though a member enjoys the association's profits it does not mean he cannot be treated as a salaried worker for this purpose.

In order to grant the cooperative member social protection, all the laws mentioned above presume that a member in a cooperative is also its employee. The problem facing our courts is how to grant cooperative members social rights and protection granted to every other worker. However, they do not create a clear attitude towards the member's status as an employee in situations other than those referred to in legislation.

2.4 A "Dual Status" for cooperative members

While the general notion is that a labour contract contradicts the cooperative idea, exceptions to this clear distinction are to be found in several Supreme Court's decisions.

The question of the dual status of a Cooperative Association's member - as a society's worker and member - was first raised in *Ein vered v. Louis* case. A member claimed severance pay

after he had been working as an accountant and receiving a monthly "salary" for 24 years - and then was fired.

The Supreme Court rejected the cooperative's claim that since the accountant had also been a member of the society he was not entitled to severance pay. Justice Vitkon said that there is no reason for a member of society not to be able to work for the same society in a "double status", as a salaried worker, so as to be entitled to all the social rights attached to this status. He relied on the Social Insurance Law and Night Bakery (Prohibition) Law in order to show that the Israeli Law recognizes a situation where a cooperative member and a cooperative employee are one and the same person. On the other hand, this does not mean that if the law is silent in this matter, a member of the cooperative will not be granted other social rights. Justice Kister agreed with Justice Vitkon, but limited its effect by adding that only where there is no alternative source for his social rights he will be entitled to it as a cooperative member.

The rule today is Justice Vitkon's opinion combined with Justice Kister's exception. Justice Kister's opinion was reinforced in a later decision known as the *"Beth Sh'an" Bakery* case. Here, the Supreme Court emphasized that not every worker in a cooperative business is to be treated as its employee. However, since the cooperative is capable of contracting, there is no reason for it not to be able to hire workers, and such a salaried worker can be a member of the society as well.

3. Cooperatives and outside business: Implications for labour law

A unique situation in cooperatives, particularly acute when speaking of Kibbutzim, is when its members are assigned to work in an enterprise owned fully or partly by the cooperative. In this case, the question is whether any employer-employee relationship exists between the cooperative member entitled to all the social rights granted to other salaried workers?

This relationship can be analysed by three models:

(1) By using classic criteria for determining whether an employment relationship exists.

(2) By analysing the question in view of "ownership"-i.e., cooperative members as the enterprise's owners - the cooperative member as an inseparable part of the Kibbutz and the Kibbutz as one of the corporation's owners.

(3) By defining the cooperative worker as a "borrowed" worker in the enterprise.

3.1 Kibbutz members and employer-employee relationship

Generally, as we have seen above, Kibbutz members are in a special position as cooperative members because there is no employer-employee relationship between the Kibbutz and its members. However, the situation is different when a factory which is a separate corporation employs the cooperative members. On the one hand, the member shares in the ownership of the enterprise; but on the other hand the enterprise employs him similarly to a salaried worker.

Naturally, we would expect the worker and the factory which benefits from his work to be parties to a contractual labour relationship. However in this case there is a third party involved - the cooperative - which can claim that there are *two* separate relationships: the relationship between the cooperative and the worker, on the one hand, and a separate relationship between the cooperative and the employing enterprise on the other. Therefore the factory is not a party to a direct contractual labour relationship with the Kibbutz member.

Is this model actually relevant?

This model actually speaks of competition between the Kibbutz and the enterprise over who is the member's "employer". The courts have used several tests for deciding as to the cooperative member's status in such situations.

3.1.1 The preliminary test: Is there a contractual relationship at all?

The preliminary question is whether a contractual relationship to give salaried work exists at all. Only if the answer to this question is positive the question of employer's identity will be examined. Generally, it appears that this preliminary question should be answered in the negative - i.e., there is no intention to create a *separate* contractual relationship, and therefore it would appear that the cooperative member cannot be considered an employee of the enterprise.

The contractual relationship exists between the Kibbutz and its members and between the Kibbutz and the enterprise but there is absolutely no contractual relationship between the enterprise and Kibbutz members. Thus, the preliminary condition for a contract to exist between the enterprise and Kibbutz members does not exist, so the corporation certainly does not employ Kibbutz members.

3.1.2 Even if there is an employment, who is the employer?

If one goes further, and asks, even if there is an employment relationship, who is the "employer" - the Kibbutz or the enterprise - the answer will probably be that the member is "employed" by the Kibbutz. This conclusion can be reached by using the tests set forth in Israeli labour precedent for deciding which of several possible companies is the employer. The leading case in this matter is the Kfar Ruth case. There, the National Labour Court set out a number of criteria for determining the employer's identity. The basic idea behind most of these tests is that the Court must infer the true intent of the parties to the contractual relationship. Each criterion is not decisive in itself, but together, the Court said, they can indicate the true identity of the employer.

(a) How did parties themselves define their relationship?

(b) Who has the power to fire the worker, and who has the power to accept his resignation?

(c) Who accepted the worker to work? Who arranged his working conditions? Who assigns his job in the factory and who changes it?

(d) Who fixes the worker's salary and benefits?

(e) Who has the legal (and not technical) obligation to pay the worker's salary?

(f) Who approves the worker's vacations?

(g) How was this relationship reported to the authorities (for tax purposes etc.) insomuch as a declaration regarding who is the employer is required?

(h) Relations and obligations of the relevant parties to the employment arrangement (who supervises the work, to whom is his work reported, who gives him instructions).

(i) Who owns the equipment?

(j) Is the work performed by the worker within the factory's main field of work, or is he hired to do a project which requires skills other than those required in the usual work?

(k) The continuity and duration of the labour relationship (a marginal test which is used only in questionable cases).

(l) Does the third party have a business of his own of which the worker is a part although he gives his services to the corporation?

Applying these tests, one must conclude that Kibbutz members do not occupy the status of an employee - neither in the Kibbutz (which is the cooperative in which they are members and owners) nor in the outside enterprise (to which they are assigned by the Kibbutz).

(a) Members of the Kibbutz do not see the corporation as their employer. The rights and duties are settled entirely by the Kibbutz and its members.

(b) The Kibbutz assigns and terminates job assignments. The contracts between the enterprise and members of Kibbutz are by way of the Kibbutz (here, by the way, there is something of a "grey area": the Kibbutz assigns its members to the job assignment in the factory; but generally, the specific job assignment within the factory is made by the factory itself).

(c) Starting and ending a job is not voluntary. The Kibbutz member is placed in the factory as a part of the Kibbutz' work assignments. When he is done with the work in the enterprise he returns to the Kibbutz to receive his new work assignment.

(d) Members of Kibbutz do not generally receive salary of any kind from the enterprise. Their work is equally valued and paid, regardless the kind of job they do, by the Kibbutz itself and not by the enterprise, as if they worked for the Kibbutz and not for the enterprise. The enterprise does not pay them salary in any form and does not grant them any other social benefits.

(e) The Kibbutz is the organ legally responsible for all the social payments to its members, including those paid for their work in the enterprise.

(f) The Kibbutz approves vacations.

(g) The Kibbutz and *not* the enterprise reports to the authorities regarding members' work in the enterprise and is taxed accordingly. (The enterprise reports only salaried workers who are not Kibbutz members).

(h) The Kibbutz supervises its members' work in the enterprise (according to the Kibbutz regulations).

(i) The equipment belongs to the enterprise but the Kibbutz owns it partly, as it is one of the enterprise's owners.

(j) The worker is sent to the enterprise by the Kibbutz even though he does work outside of the cooperative.

(k) The work in the enterprise is not continuous since work assignments in the Kibbutz change according to the Kibbutz's needs.

(l) The Kibbutz has a business of its own in which its members integrate.

Thus, most of the indications are that the enterprise does not employ the Kibbutz members who work for it.

3.2 Is the Kibbutz regarded as a "co-employer"?

Can the Kibbutz and its enterprise be regarded as co-employers of the Kibbutz member? The answer seems to be negative because they do not fulfil the definition of "co-employers". They are not two different employers connected as one party (the employer) to a labour contract with each one of the Kibbutz members. Kibbutz members are obligated *only* to their Kibbutz.

According to the Kibbutz regulations their entire working ability is subject to the Kibbutz's needs and they can work only according to its instructions. The enterprise as a separate legal entity is never a party to such contract.

Similarly, the enterprise and the Kibbutz cannot be considered co-employers since all Kibbutz members work for one organ only, and the only labour contract relationship which exists is the one between the enterprise and the Kibbutz.

3.3 Kibbutz members - owners or managers?

According to this model the Kibbutz member is an inseparable part of the Kibbutz and the Kibbutz is one of the enterprise's owners. Thus, the situation of the Kibbutz member is analogous to that of the owners of an enterprise, who, as we have seen above, is *not* considered an employee.

In many Labour Court cases, the question arose as to whether, in addition to his duty to work as part of the status of shareholding or management in a company - there is also a duty to work as a part of another relationship. In the *Katz v. Ltd "Ketsef" Co.* it was said that only when a specific labour contract exists can a manager be treated as a salaried worker.

One can argue that a Kibbutz member works by virtue of the Kibbutz regulations so that the Kibbutz is one of the corporation's owners and the member does not have to do any work beyond what is needed for the fulfilment of his duties to the Kibbutz.

However the Kibbutz member is not actually an owner or a manager but belongs to a *cooperative* that partly owns the enterprise - and thus the "ownership" of the Kibbutz member is totally abstract; the ownership argument is not actually a direct ownership and this model is rather weak.

3.4 Kibbutz Members as "borrowed" workers

The member's work can be seen as being "loaned" from the Kibbutz to the corporation which borrows it, and therefore no employer-employee relationship is created between the member

and the corporation, but his entire work and activity are done within the context of his membership in the Kibbutz.

It should be pointed out that the Israeli law is not unfamiliar with a situation of "loaning" and "borrowing" workers (workers' status as "borrowed" even when the state is their employer was accepted in the National Labour Court).

Most of Kibbutz cooperatives classify their members' work in the enterprise as if this model is how they really want their relationship to be classified.

A case which deals with the most similar situation to our question is Strule Eidel v. Roseman. The plaintiff, a working manager and usher by profession, was a partner in a limited transport company with two other men. His partners previously had a company and in the partnership agreement they agreed that the partnership would operate their work through the new company. Since the new company was never active, the work was performed by the previous company, owned by the two other partners. The plaintiff worked in the company offices and claimed Severance Pay when he finished working. The National Labour Court rejected his claim and said that the plaintiff's work was performed only as a result of his duties as a partner. The partner had to work by virtue of his partnership in the business. Since he claimed that in addition to his being a partner he was also a salaried worker the court said that he had the burden of proof that there was a separate employer-employee relationship between him and the old company owned by the two partners (one of the ways to prove this is to show that the plaintiff has performed jobs for the company which are not inherent to his duty as a partner). Since the plaintiff did not meet his burden of proof, no employer-employee relationship existed.

In our situation, no separation can be claimed between a Kibbutz member's work in an enterprise, and his obligation towards the Kibbutz to give to it all his labour capacity as a Kibbutz member. However, judgements in this question have been changing slowly.

Under this model, the Kfar Ruth test requires assurance that the "borrowed worker"'s social rights are guaranteed and that there is no danger of damage to salaried workers in that corporation. It seems that Kibbutz members' rights are not in danger even though the corporation is not their employer. Their rights are guaranteed by virtue of their membership in the Kibbutz which assures them their social rights and welfare.

3.5 Summary

In summary, it would appear that under almost any analysis, Kibbutz members are not "employees" of outside enterprises in which they work. However, it should be noted that there is a tendency in recent years to employ Kibbutz members in a manner which shows more and

more signs of "employment" - even to the point of reporting their work to the National Social Security and giving them personal pay slips! Similarly, more and more Kibbutzims allow their members to work in outside enterprises without any ownership or relationship to the Kibbutz or to the Kibbutz movement. As such relationships increase, the time may well be approaching when the courts may begin treating such Kibbutz members as salaried employees of the enterprise, who simply pay their salary into the Kibbutz (like other salaried employees pay into the bank). It should be noted that Paragraph 6 of the Wage Protection Law already makes provision for such an arrangement, and thus may in the future pave the way for recognition of such Kibbutz members' status as "employees".

4. Relationships between salaried employees of a cooperative association and the cooperative

4.1 Generally

The cooperative association's aim and essence negates the notion of its members having the status of "salaried workers". However, it does not negate the cooperative's legal competence to contract with salaried employees as an employer in a labour contract. In the Beth She'an case Justice Vitkon said that since the cooperative has the legal capacity to enter into contracts, there is no reason for it not to hire salaried workers. Par. 21 of the Cooperative Association Ordinance states that the Cooperative Association is a legal entity, separate from its members. Therefore, the Cooperative Association can be an employer of salaried workers. Labour laws are fully applicable to such employees, granting them all social rights given to salaried workers under Israeli protective labour laws, not related in any way to the social protection of its members.

4.2 Personal work contracts and "collective arrangements"

A cooperative society can contract with each one of its salaried workers in personal labour contracts, or it can contract with all its salaried workers in collective agreements. Personal contracts are subject to the Law of Contracts, and not subject to collective labour law. Since cooperative associations are based, after all, on socialist ideology, until recent years they tended to contract with their salaried workers in Collective Arrangements - informal collective agreements which subjected them the Histadrut - trade union - pressures. Recently, however, there is a tendency, similar to that of the general Israeli economy, to abandon collective agreements and arrangements, and to contract in individual work agreements.

4.3 Collective bargaining and collective agreements

To the extent that the cooperative engages in collective bargaining with its workers, there are two different kinds of collective agreements, depending on whether the cooperative is a member of an employers' association. Most of the Kibbutz industry, for example, specifically agreed, when they joined the Industrialists' Association, that the labour relations of the Association would not apply to them. Thus, they are formally exempt from the application of general industrial collective agreements (which can be entered into only by employers' associations).

When the cooperative employs a group of salaried workers as an employee by itself, it will contract in a Special Collective Agreement which determines salaried workers' labour conditions in one working place. The parties to this contract are the employer and the representative of the employee's organization of the employee to whom the agreement is to apply - usually the Histadrut (Collective Agreements Law, par. 2(1)).

When the cooperative is a member in the Industrialists organization, in an Agricultural organization or another employers' organization, the labour contract is a General Collective Agreement. The parties to this contract are always organizations - representative employers' organizations and the representative employees' organization in the branch of employment or area concerned (Collective Agreements Law, par. 2(2)).

The cooperative contracts in a Plural Collective Agreement when the cooperative is not the only employer to sign. In a plural collective agreement there is a connection between all the agreements signed on the presumption that other employers grant identical social benefits. According to Collective Agreements Law, par. 1, both sides have to intend to create obliging contractual relationships, and not necessarily a collective agreement. Since a collective agreement has a special nature, the Collective Agreements Law's provisions are applied to it, and only when the agreement cannot be defined as a collective agreement according to law, general contract law will be applied. According to the Collective Agreements Law, (par. 21), a collective agreement can add to, but cannot derogate from rights of an employee set down by law.

4.4 Differential work conditions

If the cooperative association has different groups, there are three ways to grant a specific group different social benefits than those settled in the collective agreement:

(1) Within the collective agreement, the employer is authorized to give personal additional benefits in an individual contract (art. 22 to the Collective Agreement Law).

(2) Removing from the terms of the collective agreement specific categories of workers. In this case, such workers must negotiate individually their labour conditions.

(3) Using a third party - a manpower company. Employees who are sent by the manpower company are its employees, and not the cooperative's, and therefore may have different work conditions.

4.5 Extension orders

According to par. 25 of the Collective Agreements Law: "The Minister of Labour and Social Welfare may, on his own motion or upon application by a party to a general collective agreement, extend by order the scope of effect of any provision in a general collective agreement if, in his opinion, it is right to do so..."

The extension order does not have to be a result of his initiative. The parties' motive to request extension of collective agreements, both by management and by labour, is usually prevention of competition.

The considerations for granting extension orders are, according to par. 25:

(a) conditions in the labour market (in order to reach unification of work conditions and to prevent competition in labour market by different salaries).

(b) the employer-employee arrangement.

According to par. 28(a): "An extension order shall be published... and it shall indicate the provisions extended, and the categories of employees and employers to whom it applies". Thus, the extension order can apply to all cooperatives' employees in every job, or to employees who work on a specific product of the cooperative's enterprise that was defined in the Collective Agreement.

Thus, by way of Extension Order, almost every employee in the cooperative - like every other worker in Israel - will be subject to the provisions of the general collective agreements which apply to all workers, such as those having to do with the cost-of-living adjustments and recreation pay.

5. Conclusion

The Cooperative movements in Israel have developed under several contradictory conditions: The cooperative is built on the basis of ideological tradition but it has to operate in changing world conditions.

This explains the necessity of constant adjustment while preserving ideological norms which are "sine qua non" for its unique existence. The cooperative society was meant to built a socio-economic order different from the capitalistic order, but had to survive in a capitalistic environment. It rebelled against the system by idealizing the voluntary nature of work and other social principles but could not escape becoming part of the establishment.

In Israel there has been constant state intervention in the cooperative movements' autonomous life, often under the pretext of preserving their ideological way of life. Cooperative legislation, which is one of the ways governments interfere (another way is financial support) aims at maintaining the individual's status in the cooperative so that there is less danger of discrimination against him vis-a-vis the salaried worker in his position.

Thus, state interference in the cooperative society is often a result of a sincere good will to assure the cooperative's special status.

There is no guarantee that cooperative legislation in and of itself can continue to guarantee the unique status of Kibbutz members forever. The only way to assure continuation of cooperative norms and ideas is by education and structural adaptation to the changing reality.

The Kibbutz idea was influenced at the outset by socialist and anarchist theories but developed mostly due to the changing social economic conditions in Israel since 1910. The separation between social services and consumption, on the one hand, and differential work, on the other hand, was of course directly influenced by socialist theory, but also had a practical purpose of settling destitute but ideologically motivated immigrants. However, this principle of separation between work and supply creates a fundamental dilemma. The main question is what will motivate people to work as hard as they can when there is no financial reward? The original perception was that in a Kibbutz, labour is not only an economic need but also a moral duty. These values are today under almost constant attack.

Today, empirical research shows that interest in work is the major motivating factor in work. Kibbutz members who are sent to more interesting jobs are ready to work more hours and more efficiently then others.

Yet the options to satisfactory jobs on Kibbutzim are limited since they deal mostly with agriculture, industrial production, and in education and other services to meet the needs of members and children. Thus, there is often a gap between Kibbutz need for workers for a specific job and members' readiness to work.

One answer to this dilemma is the creation of a new status in the Kibbutz: salaried workers who are also residents, as distinguished from the original identity between working membership and residence in the Kibbutz. Another possible solution is to move in the other direction, and to treat members as "employees", even paying them differential wages, etc. Interesting enough, the Registrar of Cooperative Associations has already indicated to

Kibbutzim which have tried to institute "salaries" etc. that if they do so they will lose their Cooperative/ Kibbutz status under law.

Similarly, there are economic changes that cannot be ignored that have far reaching implications for cooperative members and employees: Computerization and robots have changed the concept of a working place under manager's supervision etc. There is a development of the "cottage industries", where every family works at home on its computer and there is no need of a social model as the cooperative suggests. Many Kibbutz members today work in such cottage industries at home, or for outside enterprises although they retain their membership status.

One of the arguments explaining the weakening of cooperatives over the last 20-30 years is that they are no longer appropriate to the modern industry that requires hierarchic structure. Yet these new technologies can actually bring the cooperative society back to being a producing cooperative on an even higher level, as highly skilled workers tend to equality in work, and prefer less hierarchic structure.

Another factor in this change in the labour relationship of cooperatives is a result of changes in character of members/employees. The Israeli cooperative member today is not similar to the Kibbutz member we knew decades ago. The number of highly educated cooperative members has risen dramatically and the demand for "interesting" and "respectable" jobs has risen accordingly.

The ideal of common property is one of the most crucial problems in cooperatives today. Members no longer wish to live without private property and without compensation for work. Individualism has not escaped Kibbutz members who no longer agree to sleep separated from their children and who insist being able to give them the best education possible.

The issue therefore, boils down to the question of which "model" will dominate labour relations of cooperative members and within cooperatives: the "employer-employee" model or the "collective/cooperative" model. As we have seen, this struggle is being fought on many fronts: on the question of cooperative members' status inside the Kibbutz; over the question of their status when they work for outside enterprises; and in the cooperatives' dealing with outside salaried employees. In the long run, this struggle will probably be decided by the objective material conditions, some of which we have discussed above.

In the meantime, however, the legal battles over status and social rights remain an interesting and important reflection of the more fundamental undercurrents affecting cooperatives' future.[27]

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[27] Special thanks in preparing this paper go to Aya Deutscher, law student at Tel Aviv University, and to Advocate Susan Kahanovitz.

Worker cooperatives and cooperative law in Italy

R. Dabormida

1. Introduction

The legal discipline relating to cooperative societies is contained in the civil code and is applicable to every cooperative, irrespectively of the branch of activity.

A group of articles, from art. 2511 to art. 2545, were expressly framed for cooperatives.

Thus under the Italian legal system you cannot find a legislative corpus which applies only to worker cooperatives. This does not mean that only civil code rules are to be applied. In fact, cooperative law is completed by other special laws, the most significant of which is the fundamental law on cooperation, the so-called Basevi Law which was enacted in 1947 (decree 15th December, 1947, No.1577). This occurs especially in worker sector where, very recently, certain laws conceived to facilitate employment or to foster specific sub-sectors of activities came into force. So, to a certain extent, the Italian situation of the law related to worker cooperatives is rather complicated but at same time quite developed, compared to other sectors.

2. Legal definition of cooperative society and constitutional principle on cooperation (art. 45 of the Italian Constitution)

In our legal system we cannot find a legal definition of cooperative societies. According to the preliminary report to the civil code, which is not a law even if it can help in interpreting work, cooperatives are societies that give their members goods, services or working opportunities directly to them, in a cheaper or more remunerative way than what they can obtain on the market.

Even the 1948 Constitution does not contain more specific indications. Art. 45 states that: "The Republic recognizes the social function of cooperation based on mutuality (or self-help) principle and without any lucrative aims. The law fosters and facilitates its development through the most suitable means in order to assure, thanks to proper controls, its characteristics and goals".

The term *cooperation* is obviously wider than a potential definition of cooperative societies because it refers to every cooperative organization which is connected to the movement while code legal discipline tends to define only the legal structure of the societies which have mutualistic aims.

From another point of view, art.45 does answer the question of what is the relationship between mutuality and cooperation. According to the more traditional opinion the first word represents the genus while the second one indicates the species[1], taking into account that other mutualistic organizations are foreseen and legislatively regulated by lawmakers. In more recent times, writers tend to invert the relationship as the concept of cooperation laid down by constitutional lawmaker should have a much wider significance than the code one so that the dualism in centred on "mutualistic economic organizations on one side and lucrative economic organizations on the other side"[2]

As a matter of fact constitutional mutuality has to be read not to create a duplication of interpreting criteria but rather to furnish adequate principles to cooperative movement in order to preserve its pureness against possible misusing or distorting use by lawmakers[3]. So that only cooperation based on the self-help principle may be recognized to have the social function as stipulated in art. 45.

As far as worker cooperatives are concerned, alongside the mutualistic relationship another relationship comes out which is close to the master/servant relationship. That causes a number of interpreting problems which are connected to the constitutional principle of cooperation[4]. However the authors think that the mutualistic aim cannot be endangered by labour relationship; it has to be noted that there is a certain resemblance of situations that causes, only when provided by lawmakers, the applicability of the rules contained from art. 2239 onwards of the civil code[5].

Others think that art. 36, 37 and 38 of the Constitution have to be applied even to worker cooperatives because they are principles which protect workers as such: the same authors think that the obligation to give work to the society is ingrained in the participation in the capital because strictly connected to the society's objects[6].

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[1]P. Verrucoli, La società cooperativa, Milano, 1962, 283.

[2]G. Oppo, L'essenza della società cooperativa e gli studi recenti, in Riv. dir. civ., 1959, I, 402-403

[3]A. Nigro, Rapporti economici, in Commentario alla Costituzione a cura di G. Branca, Bologna, 1982, 5.

[4]U. Romagnoli, Costituzione economica e cooperative di lavoro, Bologna, passim.

[5]V. Romboli, Problemi costituzionali della cooperazione, in Riv. trim. dir. pubbl., 1977, I, 146.

[6]P. Verrucoli, op. cit., 271.

3. The status of a cooperative society which complies with the constitutional principle of cooperation

If cooperative societies operate inside these constitutional boundaries they can gain a special status which enables them to obtain tax and credit advantages; on the other side, in order to assure that the societies do actually observe these principles, cooperatives have to submit themselves to administrative control that the Government delegates to cooperative apex organizations if the societies are affiliated to.

4. The clauses contained in the Basevi Law (decree No. 1477 of 1947)

The constitutional view on cooperation was enhanced by the so-called Basevi Law (degree No. 1477 of 1947) where the clauses which the societies have to obey in order to maintain their special status are specified.

The clauses which are to be integrated into the rules are:

(a) prohibition to share dividends higher than the official interest rate compared to the paid-up capital;

(b) prohibition to distribute reserves among members while the cooperative society is still operating;

(c) devolution of net assets after liquidation, to mutualistic aims, in case of winding-up.

In addition to these clauses, the Basevi Law, besides the group of sections dedicated to administrative controls, provides some precepts which, according to the leading opinions, apply to every cooperative society, be it protected or not. This concerns the minimum number of members, their belonging to the same sociological and economic group, the limited presence of people who may bring their specific administrative or technological experiences without belonging to the same above said category and others of less importance.

5. The organizational structure of the cooperative society as provided in the civil code

The organizational structure of a cooperative society which is contained in the civil code can be summed up as follows.

As to the observance of cooperative principles we can note:

(a) the capital and the number of members is variable (that does not involve any alterations of the rules)[7];

(b) generally speaking every member has one vote, irrespective of the share of paid-up capital[8];

(c) destination of a percentage of surplus to mutualistic aims[9];

(d) limited interest on capital fixed by the statutes[10].

No more indications are given as to the principle of "open door", to democratic control and to the destination of net assets after liquidation.

The code legislator provides also some exceptions as to voting rights (if a legal entity takes part in the cooperative, the rules may grant to it up to five votes in proportion to the amount of shares or to its total amount of members).

Finally, art. 2516 states that at any rate certain provisions contained in the chapter dedicated to companies (as relating to contributions, general meeting, committee of management, internal auditing, corporate books, balance sheet and winding-up) are applied to cooperative societies since they are consistent with the law laid down for cooperatives. This testifies the tight link between corporate and cooperative law in the Italian legal system and, consequently, the percentage of non cooperative rate of certain subjects.

6. Worker sector and its special laws

Despite of the absence of specific references to worker sector in the civil code discipline on cooperative societies, we can find several derogations in some special laws.

So art. 23 of the above mentioned Basevi Law prescribes that a member of a worker cooperative must be worker and has to practise the trade or job corresponding to the specialities of the cooperative society they take part in. Subsection 2 of the same article adds that the one who carries on an enterprise of the same or similar kind as the cooperative one cannot become a member of the society. However, the entrance of people with specific

[7]Art. 2520.

[8]Art. 2532.

[9]Art. 2536.

[10]Art. 2518 C. 9.

technical or administrative experiences, provided that they are strictly necessary to the good running of the business, is allowed.

Art. 3 of the Law No. 59 of 1992 raises the maximum share which the member may hold up to 120 million lire (less than 100.000 DM).

Besides, Law No. 49 of 1985 introduces certain provisions for cooperatives, founded by workers who are admitted to Cassa integrazione guadagni, that is who are entitled to receive special remunerations by social insurance after being dismissed by their undertaking[11].

This Act derogates to a certain extent the general law:

(a) the cooperative founded by that kind of workers can associate other workers, who are regulated in the same way, and even people endowed with technical and administrative experiences up to 25% of the total amount of members and even legal entities which can pay up no more than 25% of the capital[12];

(b) hired workers are obliged to contribute at least four million lire, even by transferring totally or partly their indemnity credit their previous undertaking has to liquidate[13];

(c) notwithstanding the existing provisions of the law, holding companies whose share capital is held, for at least 80% of it, by this kind of worker cooperative may take part in it[14].

Finally, Law No. 786 of 1985 introduced other derogations for cooperatives which intend to enjoy some tax and credit facilities provided for. Briefly:

(a) these cooperatives must be predominantly founded by people between 18 and 29 years of age: in this case the majority of the share capital has to be held by them; otherwise they must be exclusively founded by people between 18 and 29 years of age[15];

(b) the provisions laid down by art. 26 of the Basevi Law must be contained in the rules and observed in practice[16];

[11]For a comment of the law, see AA.VV. in Nuove leggi civ. comm., 1986, 490 ff.

[12]Art. 14 c. 3.

[13]Art. 15 c. 1 and 2.

[14]Art. 16.

[15]Art. 1 c. 1.

[16]Added by art. 1 of law No. 275 of 1991.

(c) the transfers of the shares property from members who belong to that range of age to third parties who are lacking the requirements are void if they occur less than ten years after depositing the application to the facilities[17].

Finally, we have to mention two ancient statutes, still in force, the law 25 June 1909, No. 422 and the royal decree 12 February 1911, No. 278[18]. They trace a regulation which allows cooperatives societies and their secondary organizations to participate in public contracts. They define, among others, the patronage refunds, the destination of net assets after liquidation to cooperative purposes and, above all, the open door principle.

7. Worker cooperative society and the relationship between members and the society

The worker sector, together with the consumer and agricultural ones, makes up one of the fundamental pillars of the entire Italian cooperative movement.

Worker cooperatives can easily be found in all regions. As to their dimension they run from large building cooperatives (some of them count thousands of members) to small manufacturing enterprises of different economic origin.

Worker cooperatives are societies the objects of which is to place their members' work at the most remunerative conditions and to offer to members, through its activities, direct and immediate advantages to their individual economies[19] (to this extent a clause contained in the rules which allows to set aside 50% of profits produced by members in proportion to the quantity of work given by everyone is deemed to be valid)[20]. Every member has to give his society not only his share of capital but even, and above all, his manual or intellectual work in order to fulfil the objects of the society. Taking into account that, nevertheless, we cannot speak, neither in law nor in fact, of a member's right to work[21].

Inside worker cooperatives the conflict between the interest of the member to gain the best remuneration possible and the society's interest to strengthen the cooperative as an enterprise comes out dramatically. In other words, the fact that every single member can play at the

[17]Art. 1 c. 1-quater as amended by art. 1 law No. 275 1991.

[18]G. Bonfante, La legislazione cooperativa. Evoluzione e problemi, Milano, 1984, 79 ff. See also A. Bassi, Delle imprese cooperative e delle mutue assicuratrici, in Il Codice civile Commentario, diretto da P. Schlesinger, Milano, 1988, 588-589.

[19]Cass. 22.8.1966, n. 2269, in Giur. it., 1967, I, 1, 166.

[20]Cass. 14.5.1992, n. 5735, in Giur. comm., 1993, II, 461.

[21]Trib. Bologna 28.7.1958, in Giur. it., 1959, I, 2, 318.

same time a double role inside his economic organization (without any significant difference as to the objects) proves the peculiar characteristics which have excited discussions among the authors.

According to the Italian cooperative law the most debated theme on worker cooperative is related to the question of which is the nature of the relationship between the society and its member. What is the legal qualification of their relationship?

The Supreme Court has always concluded on the associative nature of the link whenever a member's work is given according to the cooperative's object[22]. When the relationship between the cooperative and its member is provided and regulated by the rules and members operate within these rules, the legal source is there. So this relationship is not, in principle, a labour one.

The real reason of this approach is that a master/servant relationship implies the existence of two different and potentially contrasting interests. This does not occur in a worker cooperative where cooperators are at the same time worker and entrepreneur. Thus, case law also denies that cooperative/member relationship may be assimilated according to art. 409 No. 3 of the civil procedure code to the so-called quasi-subordination, that is a labour law figure that includes some kinds of close collaborations which can be assimilated to that between employer and employee.

Except the work which the member is obliged to give according to the society's objects, any other activity which goes any further may not be included in the associative link so that, in so far, the member can claim his rights as an employee. This is a legal consequence of the associative approach as clearly stated by the judges.

Another consequence of this approach is that only ordinary judges can hear a case which springs up between the cooperative society and its member while every case related to a conflict between employer and his employee can be exclusively discussed before a labour judge and according to labour law and precedents. So, any dispute concerning the exclusion or expulsion of the member by his cooperative (and related subjects, like compensation for damages and liquidation of the share the member holds) are to be treated and settled by the law courts as any other case related to companies or partnerships[23].

8. Legal consequences of the non-labour approach

As to other legal consequences of this approach we can mention:

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[22]Cass. 11.5.1991, No. 5291, in Dir. prat. lav., 1991, 1887 and Corte Cost. 2.4.1992, in le Società, 1992, 924.

[23]G. Bonfante, Lavoro in cooperativa e diritto, in Riv. coop., 1987, No. 21, 273.

(1) The termination of membership due to the will of the cooperative society is regarded as an exclusion and not as dismissal. Moreover, judges have stated that the termination of the labour relationship does not modify the automatic failing of membership if specific clauses contained in the rules concerning qualification for and loss of membership on effective member's work inside the cooperative are provided[24]. Again, it is to be stressed a recent case law according to which either the coexistence of the capacity of member and employee or, consequently, the dismissal, regulated as such according to the Employee Statute (law No. 300 of 1970)[25] is admissible. This principle is of great importance if connected with another leading case where it was declared that a worker cooperative, which replaces another cooperative as a result of the award of a cleaning contract is not compelled to hire the employees of the other society although an industrial agreement so provides because a cooperative society in order to fulfil its objects can avail itself of members' work and cannot employ ordinary workers[26].

(2) A cooperative society, if possible, has to employ the members for its activities; doing so, it does settle work shift so as to ensure an equal distribution of work among members. If the cooperative society does not comply with this provision, a member can sue his cooperative society for damages[27].

(3) The percentage of disabled people a cooperative, as any other undertaking, is obliged to hire is calculated with regard to non member workers; doing so, no account is to be taken of who is at the same time member and worker[28].

(4) As to the limits to dismissals, members who are at the same time workers must be taken apart in the total amount of employees[29].

(5) Art. 39 of the Constitution (which recognizes the freedom for workers to organize trade unions) does not apply to worker cooperatives[30].

(6) Due to the absence of assimilability of the cooperative work to the ordinary one, the applicability of employment regulations are excluded for worker members; the

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[24]Cass. 22.7.1980, n. 4785, in Giur. comm., 1980, II, 816; Cass. 9.10.1979, n. 5214, in Foro it., Rep. 1979, voce Lavoro (rapporto), n. 308 and Cass. 26.10.1977, No. 4611, in Foro it., 1978, I, 414.

[25]Cass. 14.3.1992, n. 3146, in Foro it. Mass., 1992.

[26]Pret. Torino, 16.3.1990, in Riv. it. dir. lav., 1991, II, 354.

[27]App. Bologna, 13.4.1961, in Riv. dir. lav., 1962, II, 67.

[28]Cass. 29.4.1965, no. 765, in Foro it., 1965, I, 2023.

[29]Cass. 4.5.1983, n. 3068, in Dir. fall., 1983, II, 620.

[30]Cass. 18.11.1972, n. 3426, in Dir. fall., 1973, II, 424.

exclusion does not concern the auxiliary workers who have to be appointed by the employment registry office[31].

(7) In worker cooperatives the right to strike is not recognized to members. Neither judges nor the cooperative movement agree with this approach. One can say that worker members cannot refuse to work and that industrial claims are finally addressed to themselves. Actually this statement is abstract.

First of all, the Constitutional Court has acknowledged that the strike is referred to every kind of work which means that, if necessary, the Court can apply its reasoning to cooperative societies.

Secondly, we have to stress that when we talk about strike we have to separate small societies' position from the large societies' one. If in small cooperatives members refuse to work they contravene the contractual obligations they undertook when admitted to the cooperative. In large cooperatives, where economists single out a clear separation of the members on one side and the management on the other, participation may grow loose. In this circumstance the industrial action moved by worker members is directed against the management[32] whenever they tend to place the interests of the enterprise before that of the members.

9. How the law tends to equalize members' position to that of ordinary employees

However we have to point out that sometimes and for specific reasons lawmakers or judges tend to equalize members' position to that of ordinary workers. More specifically:

(1) Members have the right to obtain, conditions being equal, the same remuneration which ordinary employees can get; at any rate their remuneration has to be lined up with the constitutional provision laid down in art. 36 (according to which the worker has the right to get a remuneration proportional to the quantity and quality of his work; at any rate the remuneration has to be enough to ensure to him and to his family a free and decorous life)[33].

(2) Worker members have the right to obtain protection against labour accident[34]. Recently the Supreme Court has stated that tort disputes promoted by the one who suffers from

[31]M. Biagi, Cooperative e rapporti di lavoro, Milano, 1983, 157 ff.

[32]M. Biagi, op. cit., 314.

[33]Cass. 9.1.1987, n. 85, in Giur. it., 1987, I, 1, 1769.

[34]Cass. 17.12.1984, n. 7457, in Foro it., 1984, I, 732.

an accident (a non-employee worker and member, at the same time) against the principal for violation of neminem laedere principle are not of a social insurance nature so that they cannot be settled by labour judges[35].

(3) Cooperative societies have to see to book-keeping related to workers and to take care of every records concerning worker members: to this purpose the legal nature of members' work is not significant[36].

(4) The law on social insurance is normally applicable not only to ordinary employees but even to worker cooperatives. Thus it has been provided the admissibility to Integration of Earnings Fund of "members and non-members of worker cooperative societies who carry out working activities similar to those of workers in manufacturer undertakings"[37]. However such protection does not concern some professional categories (e.g. porters and railway porters) and port cooperatives which are regulated by special provisions[38]. Even on working hours and days-off, protection of women at work, sanitary regulations of jobs[39] and prohibition of the interposition of labour[40], ordinary law applicable to employees is granted.

(5) The applicability of the Employees Statute to worker cooperatives is still debated. More recently judges start their reasoning on this matter from the special non labour relationship that exists between the member and his society and conclude by saying that the Statute is not applicable to worker cooperatives[41].

(6) In large worker cooperatives we can observe that, in default of specific legislative provisions, collective bargaining agreements are applied both to members and to non-member workers. This occurs for several reasons, non of them properly related to cooperative grounds but to convenience reasons. However these practices have no direct influence on the legal qualification of the member/cooperative relationship.

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[35]Cass. 10.6.1991, n. 6556, in Foro it. Rep., 1991, voce Infortuni sul lavoro, n. 161.

[36]Pret. Milano, 27.6.1986, in Riv. dir. lav., 1987, I, 29.

[37]Art. 5 No. 2 D.1.C.p.S. 12 agosto 1947, No. 869.

[38]Art. 3, D.1.C.p.S. 12 agosto 1947, cit.

[39]D.P.R. 19 marzo 1956, n. 303.

[40]L. 23 ottobre 1960, n. 1369.

[41]Cass. 9.10.1979, n. 5214, in Giur. comm., 1980, II, 815.

10. The exclusion of the member from worker cooperative societies

As to member's exclusion, we can find a large number of court decisions. As previously said, whenever a member's work is directed to allow the cooperative society to reach its objectives, his activity is offered complying with the cooperative contract laid down by the rules: thus no kind of master/servant relationship occurs. It follows that a member's exclusion cannot be interpreted as a dismissal and for this reason cannot be subject to labour law and to the legal discipline on unfair dismissals. More specifically judges stated that art. 18 of the so-called Employee Statute (I am referring to the law No. 300 of 1970 where the rule ordering the reinstating of the worker in his post in case of unfair dismissal is provided) is not applicable to the exclusion of a member[42].

As a member's exclusion is the result of the deliberation of general meeting, this measure has to be contested before the court unless special clauses on arbitration are provided for by the rules.

For example the deliberation on the exclusion of a worker member who refused to give his service assigned by the committee of management was considered void[43]. Likewise the general meeting deliberation concerning the exclusion of a member because, being sixty years old, he was not considered able to share in the society's objects was judged as void[44]. In principle we can say that every deliberation on a member's exclusion must be supplied by fair grounds in order to permit any kind of contesting by the member. Otherwise it should be judged illegal.

Generally speaking, authors agree to consider necessary that the rules have to define precisely, among possible grounds for exclusion, non-complying with the rules through remarkable breach of cooperative contract or violations which do not allow to carry on, even temporarily, the member/society relationship[45].

Because of the special relationship that ties up the member with his society, severance payment, which are typical of industrial law, are not paid. To this extent reference to collective bargaining agreement is regarded as a reference and nothing else[46].

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[42]Cass. 26.10.1977, n. 4611, in Giur. comm., 1978, II, 508.

[43]Trib. Milano, 18.6.1988, in le Società, 1988, 1155.

[44]Trib. Catania, 26.4.1984, in Dir. fall., 1985, II, 638.

[45]App. Bologna, 20.6.1980, in Giur. comm., 1980, II, 820.

[46]Cass. 16.12.1991, n. 13553, in Corr. giur., 1992, 139.

Las cooperativas y el derecho laboral en América Latina

D. Cracogna

1. Introducción

El presente estudio está referido, básicamente, a tres países pertenecientes a las diferentes subregiones del continente latinoamericano, a saber: Costa Rica (Centroamérica), Perú (Zona Andina) y Argentina (Cono Sur). Estas subregiones, a su vez, coinciden con las áreas de integración económica: Mercado Común Centroamericano, Pacto Andino y Mercado Común del Sur (Mercosur).

Si bien los países escogidos pueden considerarse, en general, representativos del conjunto en cuanto a la materia tratada, se hace también referencia a los demás países del Continente como asimismo al Proyecto de Ley Marco para las Cooperativas de América Latina elaborado por la Organización de las Cooperativas de América (OCA).[1]

2. El derecho laboral. Alcances de su regulación. El caso de las cooperativas

En términos generales, las disposiciones del Derecho Laboral rigen las relaciones de trabajo que se establecen entre los trabajadores dependientes y sus respectivos empleadores sin tener en cuenta la naturaleza jurídica de estos últimos. Vale decir que el Derecho Laboral se aplica a todos los contratos de trabajo que celebren personas físicas que se obligan a prestar su trabajo a otra persona física o jurídica bajo la dependencia de ésta y mediante el pago de una remuneración.[2]

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[1]El Proyecto de Ley Marco para las Cooperativas de América Latina fue preparado por un grupo de expertos de diferentes países y, luego de un amplio proceso de consulta, fue aprobado por el Congreso Continental de OCA realizado en Bogotá en diciembre de 1988. Se halla publicado por OCA como Documento Especial N° 3, Bogotá, noviembre de 1988. Una sucinta explicación y antecedentes pueden consultarse en Dante Cracogna, *Un intento de armonización de la legislación cooperativa: el Proyecto de Ley Marco para las Cooperativas de América Latina*, en "Anuario de Estudios Cooperativos", Universidad de Deusto (Bilbao), 1989, p.129 y ss. Para una exposición más amplia, ver José María Montolío, *Legislación cooperativa en América Latina. Situación, Derecho Comparado y Proyecto de Armonización*, Ministerio de Trabajo y Seguridad Social, Madrid, 1990, Caps. VI y VII.

[2]Es universal la tipificación del contrato de trabajo, pudiendo citarse a título de ejemplo la caracterización que efectúa la Ley argentina de Contrato de Trabajo: "Habrá contrato de trabajo, cualquiera sea su forma o denominación, siempre que una persona física se obligue a realizar actos, ejecutar obras o prestar servicios en favor de otra y bajo la

Dentro de ese amplio campo entran también las cooperativas de cualquier clase en su condición de empleadoras, con la excepción de las cooperativas de trabajo que se analizarán más adelante. De manera que la relación de las cooperativas con sus trabajadores se rige por el Derecho Laboral en igualdad de condiciones con el resto de los empleadores. Lo mismo vale para las normas de Seguridad Social: pensiones, salud, accidentes de trabajo y enfermedades profesionales. Así lo prescribe expresamente la Ley General de Cooperativas del Perú (art. 9°, inc. 1).

A su vez, el Proyecto de Ley Marco dice expresamente que los vínculos de las cooperativas con sus trabajadores dependientes se rigen por la legislación laboral (art. 7°). La Ley General de Sociedades Cooperativas de Bolivia dispone que las relaciones con los asalariados se regirán por la legislación general del trabajo (art. 11). Igual norma contiene la Ley de Cooperativas colombiana para todas las cooperativas que no sean de trabajo (art. 59). Por su parte, la Ley brasileña de Cooperativas establece que las cooperativas tienen el mismo tratamiento que las demás empresas en cuanto a la relación con sus empleados en materia laboral y de previsión social (art. 91) y aclara que, cualquiera sea el tipo de cooperativa, no existe vínculo laboral entre ella y sus socios (art. 90). Conforme la Ley ecuatoriana de Cooperativas, todas las personas que prestan servicios en las cooperativas están amparadas por las leyes laborales y del Seguro Social (art. 136). De igual manera sucede en Honduras (Ley de Cooperativas, art. 55), Panamá (Ley de Asociaciones Cooperativas, art. 12) y Paraguay (Ley de Cooperativas, art. 8°).

Es del caso señalar que la legislación laboral de los distintos países de la región, en general, no contiene disposiciones específicamente dirigidas a las cooperativas, toda vez que las considera en igualdad de condiciones con los demás empleadores. A su vez, las leyes de cooperativas tampoco contienen normas de índole laboral.

2.1 Coparticipación de los trabajadores en la propiedad, la gestión y los resultados de la empresa

Los países de la región prácticamente no contemplan la participación de los trabajadores en la empresa, aunque en algunos casos existen normas sobre el tema. En el caso argentino, pese a que la Constitución establece la "participación en las ganancias de las empresas, con control de la producción y colaboración en la dirección" (art. 14 bis, Constitución Argentina), no se han sancionado leyes que la pongan en vigencia. En Perú, la participación de los trabajadores en la utilidad, gestión y propiedad de las empresas industriales y comerciales se halla establecida con carácter general por el Decreto Legislativo N° 677 de 1991 para todas las

dependencia de ésta, durante un período determinado o indeterminado de tiempo, mediante el pago de una remuneración" (art. 21, ley 20.744).

empresas que cuenten con más de veinte trabajadores. No obstante, dicha norma establece que las cooperativas se encuentran excluidas de este régimen.

La Ley argentina prescribe que el cinco por ciento de los excedentes repartibles anuales de las cooperativas debe destinarse a acción asistencial y laboral o a estímulo de personal (art. 42, inc. 2°). Generalmente dicho importe se distribuye entre los empleados. Cabe notar que no existe disposición legal similar para otro tipo de empresas.

En suma, puede afirmarse que en muy pocos casos la legislación establece la participación de los trabajadores en la gestión de las empresas, sean éstas cooperativas o de otro carácter. Tampoco se prevé la participación de representantes de las organizaciones de trabajadores.

3. Las cooperativas de trabajo

Prácticamente en todos los países del Continente existen cooperativas de trabajo o producción[3], si bien su desarrollo es muy diferente. Las legislaciones suelen contemplar de manera especial a esta clase de cooperativas, lo cual no es sorprendente habida cuenta de sus peculiares características que las distinguen del resto. Por lo común, la misma y única ley general de cooperativas de cada país contiene algunas normas específicas para estas cooperativas, con excepción de Uruguay que cuenta con varias leyes sobre cooperativas, dos de las cuales se refieren a las cooperativas de trabajo (Ley N° 10.761 de 1946 y Ley N° 13.481 de 1966). Existen, sin embargo, algunos países cuyas leyes generales de cooperativas no contemplan este tipo especial de cooperativas, como sucede en Guatemala.

3.1 Legislación aplicable

Según determina la Ley de Asociaciones Cooperativas costarricense, es aplicable a las cooperativas de trabajo la legislación laboral en materia de contrato de trabajo, pero sin que los trabajadores pierdan la condición jurídica de socios (art. 17). Cabe recordar que antes de la sanción de la actual ley de cooperativas, la legislación cooperativa de Costa Rica formaba parte del Código del Trabajo.

Por su parte, la Ley peruana de cooperativas no determina cuál es la situación laboral de los socios de las cooperativas de trabajo sino que encarga a un reglamento especial establecer el régimen respectivo (art. 9°, inc. 2). Dicho reglamento fue dictado mediante Decreto Supremo

[3]La denominación más común de estas cooperativas es la indicada en el texto: cooperativas "de producción" o "de trabajo", aunque también se las suele llamar "de trabajadores". En cambio, es muy poco usado el nombre de cooperativas "de trabajo asociado" con que se las conoce en España.

N° 34-83-TR, el cual prescribe que las relaciones laborales de los socios y sus cooperativas de trabajo se regirán por las normas que apruebe la respectiva asamblea general. Este mismo decreto establece que los beneficios laborales que la asamblea apruebe no pueden ser inferiores a los que otorgue la legislación laboral común a los trabajadores de la actividad privada, excepto pronunciamiento expreso de las dos terceras partes de una asamblea especialmente convocada a ese fin. En caso de que no existiera resolución de asamblea al respecto rigen los mismos beneficios que fija la legislación laboral común.

En Argentina no existen disposiciones expresas sobre esta materia, por lo que hay controversia acerca de si se aplica el Derecho Laboral o la legislación cooperativa exclusivamente. Obviamente, esta última rige en todos los aspectos de constitución, organización y funcionamiento de las cooperativas de trabajo, pero la cuestión se plantea en cuanto a la naturaleza jurídica de la relación con los socios. Sobre este punto la legislación laboral dispone que los socios integrantes de sociedades a las que prestan su actividad principal en forma personal y habitual, serán considerados como trabajadores dependientes de la sociedad (art. 27, ley 20.744). Con fundamento en dicha norma algunos tribunales han entendido que los socios de las cooperativas de trabajo son empleados de éstas y se hallan, por lo tanto, sujetos a la legislación laboral. No obstante, la jurisprudencia prevaleciente se inclina a considerar que el vínculo es de carácter asociativo y no laboral. Para sostener esta posición se afirma en la teoría del "acto cooperativo" que consagra la Ley de Cooperativas (art. 4°)[4]

En Colombia la Ley de Cooperativas dispone que la relación entre estas cooperativas y sus socios se rige por los estatutos y reglamentos, excluyendo la legislación laboral aplicable a los trabajadores dependientes (art. 59). La Ley General de Cooperativas de Chile dice expresamente que las relaciones de los socios con la cooperativa no se regirán por las normas contenidas en el Código del Trabajo sino por las de la Ley General de Cooperativas, su reglamento, el respectivo estatuto y los reglamentos internos (art. 77). De manera semejante, la Ley del Ecuador dice que los socios-trabajadores no se encuentran protegidos por la ley laboral (art. 137). La ley panameña, por su parte, establece que las relaciones de trabajo entre la cooperativa y sus socios-trabajadores se regirán por el estatuto especial que al efecto se acuerde (art. 12). La Ley paraguaya excluye la relación de dependencia cuando se trata de los socios-trabajadores (art. 8°).

[4]El "acto cooperativo" constituye una noción extendida en el Derecho Cooperativo latinoamericano. Se trata de la relación establecida entre el socio y la cooperativa con motivo de la prestación del servicio que ésta le brinda, a la cual se le adjudica una naturaleza jurídica peculiar y se la somete a las normas de la legislación cooperativa y de los respectivos estatutos y reglamentos de la cooperativa. Ver: Dante Cracogna, *Estudios de Derecho Cooperativo*, Cap. I - Teoría del acto cooperativo, Intercoop, Buenos Aires, 1986, p. 13 y ss. El tema ha sido tratado en los distintos Congresos Continentales de Derecho Cooperativo, convocados por la Organización de las Cooperativas de América (OCA).

El caso del Uruguay es singular en esta materia puesto que declara aplicables a los socios-trabajadores las normas de protección de la legislación laboral, con excepción de las normas de indemnización por despido (art. 4°, Ley 13.481).[5]

3.1.1 Clasificación

En general, las leyes de la región suelen establecer clasificaciones de las cooperativas conforme con diferentes criterios, excepto en el caso argentino en el que no se formula clasificación alguna. En la mayoría de los casos, las cooperativas de trabajo aparecen incluidas como una clase o tipo especial. La Ley costarricense, por su parte, realiza una subclasificación de las cooperativas de producción, distinguiendo entre cooperativas de autogestión y de cogestión. Las primeras son aquéllas en las cuales la propiedad, los excedentes y la gestión están íntegramente en manos de los socios-trabajadores (art. 99). Las segundas son aquéllas en las que la propiedad, la gestión y los excedentes son compartidos entre los trabajadores y los productores de materia prima; entre los trabajadores y el Estado o entre los trabajadores, los productores de materia prima y el Estado (art. 120).[6]

El Reglamento de la Ley de Fomento del Empleo del Perú (D.S. 04-93-TR) establece dos modalidades de cooperativas de trabajo: a) las que producen bienes o prestan servicios a favor de terceros en sus establecimientos o en los establecimientos de las empresas usuarias; y b) aquéllas que se constituyen específicamente para cumplir el objeto de las empresas de servicios temporales. Estas últimas no podrán destacar socios trabajadores que superen el 20% del total de los trabajadores de la empresa usuaria. Estas últimas cooperativas constituyen una modalidad singular puesto que su actividad consiste en brindar trabajadores a terceros, de allí que la legislación les imponga una serie de exigencias destinadas a asegurar que no se conviertan en un mecanismo para que los empleadores violen la legislación laboral.

En Bolivia, la Ley llama industriales y mineras a las cooperativas de trabajo (art. 22), en tanto que la Ley General de Asociaciones Cooperativas de El Salvador y su respectivo Reglamento las denominan cooperativas de producción. En ambos casos las subclasifican en una serie de diferentes especies (artesanales, industriales, agropecuarias, etc.). La Ley colombiana las designa como cooperativas de trabajo asociado por cuanto vinculan el trabajo de sus socios para la producción de bienes o la prestación de servicios (art. 70).

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[5] Esta disposición legal ha dado lugar a alguna confusión acerca de la naturaleza del vínculo entre la cooperativa y los socios-trabajadores. La doctrina sostiene que existe una relación asociativa, admitiendo solamente la aplicación de las normas laborales como medida de protección para los trabajadores (José Luis Cázeres, *Manual de Derecho Cooperativo*, Universidad de la República, Montevideo, 1994, p. 63).

[6] Un estudio del régimen legal de estas cooperativas puede verse en Luis Fernando Mayorga Acuña y Ligia Roxana Sánchez Boza, *Análisis de la Legislación Actual sobre Asociaciones Cooperativas*, en "Cooperativismo Costarricense", T. II, Vol. 1, Instituto de Investigaciones Sociales, Universidad de Costa Rica, San José, 1988, Caps. XI y XII.

La Ley General de Cooperativas de Nicaragua contempla las cooperativas que llama de producción y trabajo (art. 11). A su vez, la Ley de Cooperativas Agropecuarias de ese país clasifica como un tipo especial a las cooperativas de producción constituidas por pequeños y medianos productores que unen sus medios de producción, su fuerza de trabajo y los medios cedidos por el Estado (art. 3°).

En general, los restantes países designan a estas cooperativas como de producción (Chile, Ecuador, Honduras, Paraguay, Venezuela, etc.). El Proyecto de Ley Marco las llama cooperativas de trabajadores (art. 8°).

3.1.2 Remuneración mínima

Varias legislaciones determinan la remuneración mínima que deben pagar las cooperativas de trabajo a sus socios. Tal el caso de Costa Rica que prescribe que los socios de las cooperativas autogestionarias deben recibir una remuneración no inferior al salario mínimo fijado para las distintas actividades que rigen para las empresas privadas. Asimismo establece que la relación entre la remuneración máxima y la mínima no puede ser superior a diez y que la fijación anual de las remuneraciones debe ser resuelta por la asamblea y remitida a la Comisión Permanente de Cooperativas de Autogestión para su aprobación final (art. 108).

Asimismo en Perú la remuneración mínima no puede ser inferior a la que otorgue la legislación laboral común, salvo expreso acuerdo en contrario de asamblea convocada al efecto (art. 2°, D.S. 34-83-TR).

Sobre este asunto nada establece la legislación argentina. Sin embargo, la práctica corriente consiste en que los socios-trabajadores perciben normalmente una remuneración no inferior a la mínima establecida por el convenio colectivo de la respectiva actividad, la cual es complementada con el retorno que se distribuye al final del ejercicio, tal como también ocurre en los demás países.

La Ley ecuatoriana de cooperativas prescribe que en ningún caso el pago que la asamblea establezca con carácter de anticipo del excedente puede ser inferior al salario mínimo fijado para tal actividad (art. 137). Similar disposición contiene la legislación uruguaya (art. 3°, Ley N° 13.481).

3.1.3 Normas de seguridad e higiene

En general, las cooperativas de trabajo se hallan sujetas a las mismas disposiciones que rigen para las demás empresas en materia de seguridad e higiene del trabajo, no existiendo para

ellas disposiciones de carácter especial. No obstante, cabe señalar que el control del cumplimiento de tales normas es, por lo común, poco efectivo en toda clase de empresas.

En algunos casos, como sucede en Argentina, se establece expresamente que las cooperativas deben adoptar reglamentos relativos al trabajo de mujeres y menores cuyas condiciones aseguren -como mínimo- igual protección que la establecida por las leyes aplicables a los trabajadores de la misma actividad (Resolución INAC N° 183/92).

3.1.4 Identidad de socios y trabajadores

Es generalmente reconocido que en las cooperativas de trabajo debe existir identidad entre socios y trabajadores, es decir que todos los socios deben trabajar en la cooperativa y que todos los que trabajan en ella deben ser socios. Ello así en razón de que -como dice la ley peruana- "el objeto de estas cooperativas es ser fuente de trabajo para quienes al mismo tiempo sean sus socios y trabajadores." (art. 7°).

Consiguientemente, sólo por vía de excepción se admite que personas no asociadas trabajen en estas cooperativas. En todos los casos, las relaciones de las cooperativas con tales trabajadores se rige enteramente por el Derecho Laboral.

En Argentina, la Ley dispone que las cooperativas sólo pueden prestar servicios a no socios en las condiciones que determine el Instituto Nacional de Acción Cooperativa -INAC- (art. 2°, inc. 10). Conforme con dicha disposición legal, el INAC estableció que las cooperativas de trabajo solamente podrán ocupar personal en relación de dependencia (no socios) en los siguientes casos: por sobrecarga circunstancial de tareas o trabajos estacionales por un lapso no mayor de tres meses; para tareas técnicas o especializadas, hasta seis meses y por un período de prueba no mayor de seis meses antes de ingresar como socio (Resolución INAC 360/75).

La Ley de Costa Rica autoriza que excepcionalmente estas cooperativas puedan emplear personas no socias hasta un máximo del 30% del número de socios. Ello puede ocurrir en los siguientes supuestos: circunstancias extraordinarias o imprevistas; obras determinadas y por tiempo fijo o trabajos eventuales distintos del objeto de la cooperativa. En todos los casos, esa contratación de terceros debe obedecer a falta de número o de idoneidad de los socios (art. 17). Con respecto a las cooperativas de autogestión se admite contratar como asalariados al gerente y personal especializado cuando los socios no estuvieran en condiciones de desempeñar esas funciones y si aquéllos no quisieran asociarse; al personal temporario imprescindible en períodos de alta ocupación y a los candidatos a asociarse, en este caso por un lapso no mayor de tres meses (art. 104, inc. a).

En Perú, la Ley dispone que sólo excepcionalmente las cooperativas de trabajadores pueden contratar a personas no socias (art. 9°, inc. 1.2). También lo dicen la Ley hondureña (art. 52), la Ley General de Sociedades Cooperativas de México (art. 10) y la Ley General de Asociaciones Cooperativas de Venezuela (art. 53). De igual manera, la Ley colombiana establece que en estas cooperativas el trabajo estará preferentemente a cargo de los socios (art. 57) y sólo en forma excepcional y debidamente justificada podrán contratar trabajadores no socios (art. 59). La Ley chilena acuerda a las personas que hubieran trabajado más de seis meses en la cooperativa el derecho de exigir su ingreso como socios (art. 77). En Ecuador la Ley prescribe que el número de trabajadores no socios no puede exceder del 30% de los socios (art. 138), en tanto que en Uruguay no pueden superar el 25% durante los cinco primeros años de la cooperativa y el 20% en los siguientes (art. 1°, Ley 13.481).

3.2 Naturaleza del vínculo socio-cooperativa

La cuestión de mayor trascendencia en cuanto a las cooperativas de trabajo consiste en la naturaleza jurídica del vínculo con sus socios-trabajadores: relación asociativa (o "acto cooperativo", como lo caracterizan varias leyes y numerosos autores de la región) o relación de trabajo. La importancia del asunto es significativa puesto que, según cuál sea la posición que se adopte, resultará aplicable la legislación del trabajo o no, con todas las consecuencias del caso.

El argumento central que se esgrime para sostener la primera posición consiste en sostener que se trata de un grupo de trabajadores que deciden libremente organizarse bajo la forma cooperativa para asegurarse su fuente de ocupación y repartirse entre ellos el resultado económico de su actividad. No existe, por lo tanto, empleador alguno al que se hallen sujetos sino que son los mismos trabajadores asociados los que organizan las tareas y eligen a quiénes habrán de dirigir la empresa común. Resulta obvio que, aceptando esta posición, no existe relación de dependencia y, por ende, no es aplicable el Derecho Laboral.[7]

La otra posición se funda en el carácter tutelar que asume el Derecho Laboral y en la necesidad de asegurar al trabajador una protección adecuada con prescindencia de la forma jurídica que se adopte. También se sostiene que mediante la aplicación de la legislación laboral se previene el fraude laboral que podría consumarse en perjuicio de los trabajadores utilizando la figura cooperativa.[8]

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[7]Esta tesis se halla ampliamente desarrollada en Alonso Morales Acosta y Carlos Torres Acosta, *Cooperativas de trabajadores*, Lima 1993, Cap. I, pág. 15 y ss.

[8]Cfr. Dante Cracogna, *La reforma de la legislación laboral y las cooperativas de trabajo*, en "Doctrina Laboral", N° 100, Buenos Aires, 1993, p. 1049/1050; Gustavo Raúl Meilij, *Las cooperativas de trabajo y el Derecho Laboral*, en "Régimen Jurídico de las cooperativas", Federación Argentina de Colegios de Abogados, Buenos Aires, 1990, p.

Si bien no existe coincidencia entre los diferentes países de la región - y aún dentro de cada uno de ellos- hay una consideración bastante extendida de que se trata de una relación de carácter asociativo, es decir una asociación de trabajadores independientes para trabajar en común. Ello sin perjuicio de que les sean aplicables algunas normas del Derecho Laboral, tales como las relativas a remuneraciones mínimas y condiciones de seguridad e higiene.

En Argentina, si bien ni la Ley de Cooperativas ni la de contrato de trabajo se refieren expresamente a esta cuestión, los tribunales se han ido inclinando a reconocer que no existe relación de empleo, lo cual es también crecientemente sostenido por la doctrina de autores. Se hace especial hincapié en la referida noción del "acto cooperativo" que la Ley define como la relación entre la cooperativa y sus asociados con motivo del cumplimiento del objeto social (art. 4°), la cual resulta incompatible con la relación de dependencia propia del contrato de trabajo. No obstante, algunos tribunales aún sostienen la existencia de relación de dependencia.[9]

En el caso peruano, la propia legislación determina que la relación de las cooperativas de trabajo con sus socios se rige por las normas que apruebe la asamblea general (art. 1°, D.S. 34-83-TR), con lo cual queda claro que se trata de una relación asociativa, diferente de la que regula el Derecho Laboral. La jurisprudencia de los tribunales viene confirmando regularmente esta posición al sostener que no existe relación de empleo entre la cooperativa y sus socios-trabajadores.

En Costa Rica la situación es un poco ambigua, puesto que la Ley de cooperativas determina que en los asuntos contractuales de trabajo estas cooperativas se regirán por las disposiciones de la legislación laboral pero agrega que "para los efectos de la relación jurídica del asociado con la cooperativa, debe interpretarse que su status económico social ha de ser el de socio-trabajador, como una sola persona física..." (art. 17). En suma, en este caso se desdobla la situación jurídica del socio, aplicándose la legislación laboral en cuanto atañe a su relación de trabajo con la cooperativa. Sin embargo, los autores se están inclinando a sostener la existencia exclusiva del vínculo asociativo.

La Ley colombiana prescribe que no hay relación de dependencia entre el socio-trabajador y la cooperativa (art. 59). Por otra parte, esta Ley consagra una disposición singular: autoriza que en las etapas iniciales de la cooperativa o en períodos de graves dificultades, los socios puedan prestar su trabajo personal en forma gratuita o convencionalmente retribuido, a modo de colaboración solidaria (art. 58). Ello excluye, obviamente, la aplicación del régimen laboral. También la Ley hondureña exceptúa de la legislación laboral a la relación de la cooperativa con sus socios-trabajadores (art. 55).

186/187.

[9]Dante Cracogna, *Las cooperativas de trabajo*, en "Legislación del Trabajo", T. XXI, Buenos Aires, septiembre de 1973 y jurisprudencia allí citada.

Aparte del caso de las cooperativas de producción no existen otras en las que se plantee la posible relación de dependencia laboral con los socios.

3.2.1 Jurisdicción

Consecuencia de lo dicho en el párrafo anterior es el fuero judicial al que deben someterse las disputas entre las cooperativas y sus socios. En efecto, prácticamente en todos los países existen tribunales del trabajo que tienen competencia para resolver los conflictos de índole laboral, ante los cuales deben recurrir las cooperativas y sus socios en los casos en que se considera que existe entre ellos un vínculo laboral. Por el contrario, cuando la relación se reputa asociativa, son competentes los tribunales ordinarios; si bien en algunos casos tales conflictos son sometidos igualmente a la justicia del trabajo.

La Ley de cooperativas de Costa Rica dispone que, salvo los casos expresamente determinados, los tribunales de trabajo tendrán competencia para resolver las cuestiones derivadas de dicha ley (art. 133). Esta disposición es de carácter general y comprende a toda clase de cooperativas, no sólo a las de trabajo.

En Perú -conforme con el D.S. 34-83-TR- las reclamaciones de los socios trabajadores que hubiese sido separados de sus respectivas cooperativas, serán resueltas por el Tribunal de Arbitraje Cooperativo establecido por la Ley de cooperativas. Sin embargo, como dicho Tribunal no ha sido creado, el Fuero del Trabajo de ese país ha declarado que es competente para conocer y resolver las acciones de carácter laboral planteadas por los socios-trabajadores que hayan disuelto su vínculo laboral (Directiva Jurisdiccional N° 01-87-SP).

En Argentina no existen normas legales específicas sobre el tema. La solución varía según se considere que existe o no vínculo laboral entre la cooperativa de trabajo y el socio. En caso afirmativo se sostiene la competencia del fuero laboral; y en caso negativo se sostiene que es competente el fuero ordinario civil o comercial.

En términos generales, en todos los países se exige que se agoten las instancias internas de la cooperativa (consejo de administración y asamblea) para la solución de los conflictos con sus socios antes de recurrir a la vía judicial.

3.2.2 Sindicalización

Otro aspecto relacionado con la naturaleza jurídica del vínculo existente entre la cooperativa de trabajo y sus socios es si éstos pueden pertenecer a organizaciones sindicales de trabajadores. La respuesta parece obviamente afirmativa cuando se sostiene la existencia de relación laboral dependiente, puesto que la cooperativa es sólo un empleador más.

Por el contrario, cuando se afirma que la relación es asociativa cambia por completo el enfoque, puesto que si los socios-trabajadores son sus propios empresarios no tendría sentido su afiliación al sindicato que nuclea a los dependientes. No obstante -aún reconocido el vínculo asociativo- se suele encontrar el caso de cooperativas constituidas por trabajadores pertenecientes a un sindicato quiénes, por razón de lealtad, simple costumbre o falta de adecuada información sobre el carácter de la cooperativa, desean continuar perteneciendo a aquél. También se da el caso de sindicatos que ayudan a formar cooperativas y pretenden que sus integrantes sigan afiliados. En este último sentido cabe señalar que la Ley argentina de asociaciones profesionales de trabajadores prevé que los sindicatos fomenten la formación de cooperativas.

En Argentina y Perú no existen normas específicas referidas a si los socios pueden formar parte de sindicatos, en tanto que en Costa Rica la Ley autoriza que los trabajadores, sean o no asociados, puedan sindicalizarse. Empero, no resulta claro si esta disposición alcanza también a las cooperativas de producción puesto que la Ley establece, con carácter general, que los socios no pueden sindicalizarse para defender sus derechos ante la cooperativa ya que tienen derecho a hacerlo directamente en las asambleas (art. 61).

En Uruguay es frecuente que los socios trabajadores pertenezcan al mismo tiempo al sindicato que agrupa a los trabajadores dependientes de la misma actividad. Esto conduce a que las cooperativas de trabajo (de transporte, por ejemplo) también participen de las huelgas que declaran los empleados de las demás empresas.

3.3 Régimen de seguridad social

Por lo común, la aplicación de la legislación de seguridad social va estrechamente ligada con la legislación laboral, de la que suele considerarse complementaria. Sin embargo, existen algunas situaciones en las que, pese a no aplicarse el Derecho Laboral, se aplican disposiciones de la seguridad social. Esto a fin de prevenir y solucionar las contingencias que la seguridad social contempla y que tienen vigencia aún en los casos en que no se apliquen las normas laborales.[10]

3.3.1 Pensiones, salud y accidentes de trabajo

No existen pautas comunes en los distintos países con relación a la cobertura de las contingencias de muerte, invalidez, enfermedad y accidentes laborales para los socios de las cooperativas de trabajo. Sin embargo, es notable una tendencia hacia la protección general de

[10]Dante Cracogna, *Las cooperativas de trabajo*, cit., p. 167.

esos riesgos por parte de los sistemas estatales vigentes con el correlativo aporte económico de las cooperativas y sus socios. La corriente privatizadora de los regímenes de seguridad social que se está desarrollando en el Continente no ha introducido variantes en la situación descrita.

En materia de jubilaciones y pensiones los regímenes legales de los diferentes países suelen establecer una cobertura amplia para los trabajadores de distintas clases, lo cual exige que todos ellos paguen los aportes y contribuciones establecidos al efecto. Eso significa que los socios de las cooperativas de trabajo se encuentran comprendidos dentro del régimen previsional, sea que se los considere trabajadores en relación de dependencia o independientes.

La situación de seguridad social en Perú se halla reglada por el D.S. 30-91-TR, el cual establece que, por acuerdo de la asamblea, los socios-trabajadores podrán excluirse del Sistema Nacional de Pensiones, del Régimen de Prestaciones de Salud y del Régimen de Accidentes de Trabajo y de Enfermedades Profesionales. Dicha decisión debe ser comunicada al Instituto Peruano de Seguridad Social (IPSS) por escrito dentro de un plazo determinado, vencido el cual sin haberse hecho la comunicación se considera que los socios-trabajadores se encuentran automáticamente afiliados a los regímenes que administra el IPSS en calidad de trabajadores independientes. Vale decir que los socios pueden optar voluntariamente por su incorporación o no a los regímenes del IPSS. En el supuesto de que la mayoría de la asamblea decidiera no afiliarse, los socios disidentes que lo deseen pueden, no obstante, ingresar a aquéllos. El citado D.S. exige que las cooperativas que se excluyan del sistema del IPSS creen sus propios organismos mutuales de seguros y contraten prestaciones que cubran a sus socios en iguales o mejores condiciones que aquél.

La Ley costarricense de cooperativas prescribe que los asociados de las cooperativas de autogestión tendrán derecho, para sí y sus familiares, de gozar de protección en caso de incapacidad, vejez o muerte (art. 108, inc. d). Consecuentemente, en virtud de un convenio celebrado en 1985 entre la Caja Costarricense de Seguro Social y la Comisión Permanente de Cooperativas de Autogestión, los socios de estas cooperativas se hallan alcanzados por los beneficios del seguro de enfermedad y maternidad e invalidez, vejez y muerte, bajo la forma de cotización colectiva.

En Argentina la materia está regida por la Res. 183/92 del INAC. En virtud de ella se establece que las cooperativas de trabajo deben realizar los aportes correspondientes al sistema previsional de los trabajadores autónomos o de otro régimen que se halle legalmente habilitado. De manera que se brinda a las cooperativas la opción de incluir a sus socios en el régimen de trabajadores independientes o en el de dependientes, pero en todo caso deben incorporarlos obligatoriamente a uno de ellos. La mencionada resolución exige asimismo que las cooperativas aseguren a sus socios y familiares las prestaciones de salud mediante contrato con instituciones públicas o privadas especializadas. Por fin, en materia de accidentes de trabajo y enfermedades profesionales prescribe que las cooperativas deben garantizar a sus

socios-trabajadores las mismas prestaciones e indemnizaciones que establezcan las leyes aplicables a los trabajadores de la actividad.

La Ley boliviana prescribe que las cooperativas en general están obligadas al cumplimiento de las leyes sociales vigentes (art. 12), en tanto que la Ley colombiana establece que el régimen de seguridad social será reglado por los respectivos estatutos y reglamentos (art. 59). A su vez, la Ley chilena dispone que para la aplicación de las normas previsionales y de seguridad social se consideran como remuneraciones las sumas que perciban los socios de estas cooperativas con cargo al excedente (art. 80). La Ley ecuatoriana exige que los socios-trabajadores estén afiliados al Seguro Social, debiendo constar la cooperativa como patrono a esos fines (art. 137). La Ley del Uruguay dispone que las normas de previsión social se aplican a los socios-trabajadores pero exonera a la cooperativa del aporte patronal (art. 4° y 5°, Ley 13.481).

4. Conclusiones

De lo expuesto surgen las siguientes conclusiones generales:

(a) La legislación laboral es aplicable a los trabajadores de toda clase de cooperativas en igualdad de condiciones con los trabajadores de las demás empresas;

(b) No se prevé la participación de los trabajadores o de representantes de sus organizaciones en la conducción de las cooperativas;

(c) No existen disposiciones especiales en las leyes de cooperativas relativas a aspectos laborales ni tampoco en la legislación laboral acerca de las cooperativas en particular;

(d) Con excepción de algunos países, se considera que la relación entre las cooperativas de trabajo y sus socios-trabajadores no es de índole laboral sino asociativa. Ello no obsta a que se les apliquen determinadas disposiciones del Derecho Laboral, especialmente en materia de remuneraciones mínimas;

(e) En general, las legislaciones de los distintos países prevén que los socios-trabajadores gocen de la protección de la seguridad social;

(f) Si bien en varios países se halla en trámite o en estudio la reforma de la legislación cooperativa (Colombia, Uruguay, Chile, Brasil, Argentina, países de Centroamérica, etc.), no se advierte que vayan a producirse cambios sustanciales en esta materia;

(g) El proyecto de Ley Marco para las Cooperativas de América Latina -documento orientador de la legislación específica en el Continente- mantiene los mismos lineamientos antes señalados.

Leyes de cooperativas referidas en el texto

Argentina:	Ley de Cooperativas N° 20.337 de 1973
Bolivia:	Ley General de Sociedades Cooperativas de 1958
Brasil:	Ley de Cooperativas N° 5764 de 1971
Colombia:	Ley de Cooperativas N° 79/88
Costa Rica:	Ley de Asociaciones Cooperativas y creación del Instituto Nacional de Fomento Cooperativo N° 4179 de 1968, con las actualizaciones hasta 1986
Chile:	Texto refundido de la Ley General de Cooperativas de 1978, actualizado a 1983
Ecuador:	Ley de Cooperativas de 1966
El Salvador:	Ley General de Asociaciones Cooperativas de 1986
Guatemala:	Ley General de Cooperativas, Decreto Ley N° 82/78
Honduras:	Ley de Cooperativas, Decreto Legislativo N° 65/78
México:	Ley General de Sociedades Cooperativas de 1938
Nicaragua:	Ley General de Cooperativas de 1971; Ley de Cooperativas Agropecuarias de 1981
Panamá:	Régimen Legal de las Asociaciones Cooperativas, Ley N° 38 de 1980
Paraguay:	Ley de Cooperativas N° 438 de 1994
Perú:	Ley General de Cooperativas, Decreto Legislativo N° 85 de 1981
República Dominicana:	Ley de Asociaciones Cooperativas, N° 127 de 1964
Uruguay:	Ley de Sociedades Cooperativas N° 10.761 de 1946; Ley de Cooperativas de Producción N° 13.481 de 1966
Venezuela:	Ley General de Asociaciones Cooperativas de 1975

Derecho del trabajo y cooperativas en España

J. Mª Montolío

1. Perspectiva general

Atisbos de "actividades en comunidad", sobre todo en el medio rural, pueden encontrarse en España desde tiempos bien remotos. Es de tener en cuenta que, institucional-y jurídicamente, ha tenido una innegable presencia el concepto de la propiedad germana ("Gesamte Hand"), los bienes en mano común o sin atribución de cuotas. Es cierto que aquel régimen de uso habrá de convivir con el concepto individualista de la propiedad romana y, del mismo modo, que ambos lo harán con otras influencias con presencia de lo común y lo mutual.

Lo cierto es que aquel sistema de propiedad sin atribución de cuotas, y el resto de influencias en que prima lo común, se dejan sentir con una fuerza especial en el sector agrario -vg.: "Bienes comunales" (no de uno o de otro, sino del común de vecinos de un municipio), "Comunidades de pastos o de ganados" (aprovechamientos comunes), "Comunidades de regantes" (equitativa distribución de las siempre escasas aguas de riego)-, "Pósitos" (siguiendo la tradición de los graneros comunales)- adquiriendo a partir de un núcleo común diversas manifestaciones en consonancia con las peculiaridades regionales.

A aquellos y otros varios ejemplos en el resto de áreas y sectores -vg.: "Cofradías de pescadores" (una primera vocación de socorro mutuo y, tras ello, una cierta ordenación de la actividad) en las zonas costeras, "Hermandades", "Gremios", etc... en otros sectores de actividad- se acude normalmente para señalar precedentes con el perfil de actividades "en voluntariedad, solidaridad y cooperación"[1]

En cualquier caso y de forma del todo análoga a lo que sucedió en la generalidad del conjunto europeo, el cooperativismo en nuestro país sólo tomó carta de naturaleza en la segunda mitad del siglo XIX. Alrededor de este momento histórico, la desaparición de anteriores estructuras y los nuevos condicionantes de todo orden afectan con dureza -sobre todo a la clase trabajadora- y reclaman soluciones nuevas, entre ellas el asociacionismo obrero.

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[1]Para referencias históricas más detalladas, vd.: REVENTOS CARNER, J.: **"El movimiento cooperativo en España"**, Ariel, Barcelona 1960. Una perspectiva de conjunto, más sucinta aunque con actualización de datos, en MONTOLIO, JMª.: **"Las cooperativas en España: evolución y perspectivas"**, en Anuario de Estudios Cooperativos (1992) del Instituto de Estudios Cooperativos de la Universidad de Deusto, p. 31 y ss. y, también, en **"Legislación cooperativa en la Comunidad Europea"**, Infes, Madrid 1993, p. 115 y ss.

Pues bien, por mucho que España se asomara algo tardíamente al proceso industrial y a las nuevas situaciones del mismo derivadas,[2] lo cierto es que -aún fuere en régimen de mera tolerancia e incluso en la clandestinidad- al filo de la mitad de siglo empiezan a despuntar manifestaciones asociativas de los trabajadores. Paralelamente, las primeras experiencias cooperativas. Todas ellas encontrarán ocasión de asentarse a resultas de la "Gloriosa" Revolución liberal de 1868 y sus inmediatas consecuencias políticas y legislativas.

Un dato significativo a nuestros efectos viene constituido, sin duda, por el hecho de que las primeras cooperativas en sentido moderno van a constituirse no en torno al consumo (como sucediera, por ejemplo en el Reino Unido) o al crédito (aquí la experiencia alemana) sino vinculadas al trabajo. De esta manera las hilaturas, la imprenta y los sectores de artesanía y oficios manuales van a ofrecernos las primeras realizaciones cooperativas. Así se fundan la "Compañía Fabril de Tejedores de Algodón" (Barcelona, 1842); "La Obrera" (Mataró, 1856); la "Asociación general del Arte de Imprimir" (Madrid, 1871); y un largo etcétera.

En este punto, la proximidad con el pensamiento -bien fourierista o social católico (Buchez, Blanc)- y con las experiencias francesas (vg.: la "Association Chrétienne des Bijoutiers en Doré", París 1834 y los distintos "Ateliers Nationales", 1848) son evidentes y ponen de manifiesto el verdadero origen del cooperativismo español. Otra cosa será su evolución.

2. Legislación laboral y legislación cooperativa: paralelismo

En nuestro país, el inicio de la legislación laboral -bien es cierto que de forma fragmentaria- y el de la legislación cooperativa -análogamente también asistemática- se remonta a la misma época y su evolución es paralela.[3]

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[2]Vd.: BAYON CHACON, G. y PEREZ BOTIJA, E.: "**Manual de Derecho del Trabajo**", Pons, Madrid 1967-8, vol. I, p. 74 y ss.

[3]La expresión "Derecho del Trabajo"/"Derecho laboral" o "Derecho ... Civil ... Administrativo ..." pretende conceptuar una parte integrada y autónoma (institucional, científica, docente) del Ordenamiento. La expresión "Legislación ..." no llegaría a alcanzar tal grado de integración y significación: haría referencia a un conjunto de normas jurídicas no necesariamente dotadas de aquel grado de integración y autonomía, incluso dispersas, si bien reconducibles a un núcleo institucional común.
Por lo general, cualquier rama del Ordenamiento da comienzo en la atención jurídica de unos hechos sociales ("ius oritur facto") mediante una legislación fragmentaria. Por esta vía, en ocasiones, se acota plenamente un contenido y contornos propios (especificidad y sustantividad). Si así sucediera, estaríamos ante un "Derecho ..."; en otro caso ante una "Legislación ...".
Es claro también que en todo ello media una cuestión de opinión. En efecto, así como difícil sería hoy cuestionar en nuestro entorno jurídico la plena autonomía y sustantividad del "Derecho del Trabajo", difícil habría de resultar defender algo análogo en muchos otros supuestos que actualmente proliferan. Por ejemplo, quizá resulte excesivo referirse a un "Derecho minero" o un "Derecho farmacéutico" -capítulos al fin y al de un único "Derecho

Así, en lo laboral, la Ley de 24 julio 1873 -reputada primera medida en la materia- reguló tuitivamente el trabajo de los menores; en 1878 se prohibieron determinados trabajos (peligrosos) para los menores de 16 años; en 1908 se creó el INP (primer instrumento de ordenación pública de la previsión social);[4] en 1912 se prohibió el trabajo nocturno de la mujer; desde 1883 empezará a funcionar una "Comisión" que a la postre desembocará en el conocido Instituto de Reformas Sociales; en 1920 se creó el Ministerio de Trabajo y al poco comenzó la ratificación de importantes Convenios (vg.: OIT núms. 2 y 3, en 1922).

De la misma manera, en lo cooperativo, las primeras experiencias se remontan a la mitad del s. XIX (Compañía de Tejedores de Algodón, citada poco más arriba junto con su indiscutible analogía con la francesa de los Ateliers Nationales) precisamente en la producción obrera (artesanía, hilaturas) y se normalizará jurídicamente[5] a partir de la Constitución de 1869, Código de Comercio de 1885 y Ley de Asociaciones de 1887. En 1906 se dicta una Ley (Sindicatos Agrícolas) tenida con frecuencia como primera norma propiamente en materia cooperativa. Creado el Ministerio de Trabajo, al mismo se encomendará la tutela del cooperativismo.

Las relaciones sociales entre lo "laboral" y lo "cooperativo" fueron inicialmente de total normalidad, complementarias o consustanciales. Tal es así que el I Congreso Obrero Español (1870) calificó al cooperativismo como "instrumento útil" para, al menos, aliviar la situación de las clases trabajadoras.

La evolución legislativa confirmará el anunciado paralelismo y también un cierto distanciamiento entre lo laboral-sindical (reivindicativo) y lo cooperativo (integrador).

Tras el específico reconocimiento de los trabajadores y de las cooperativas en la legislación de la II República (1931) y cerrado el conflicto civil (1936/39), el "Nuevo Estado" reguló en 1942 las cooperativas y en 1944 (Ley de Contrato de Trabajo) las relaciones laborales, obviamente conforme a los principios autoritarios a que respondía. En 1974 se promulgó una

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Administrativo"- aunque con frecuencia se empleen sin mayor pretensión que la de mera orientación práctica. A este respecto es de acotar que, en nuestra doctrina, la expresión "Derecho cooperativo" no se acepta por lo común con pleno significado técnico jurídico, vd.: PAZ CANALEJO, N.: "**Armonización del Derecho Cooperativo Europeo**", Rev. de Estudios Cooperativos nº 59 (1991) p. 61.
Es cierto, finalmente, que con frecuencia, el empleo de una u otra de aquellas expresiones -por ejemplo "Derecho del Trabajo"/"Derecho laboral"/(a veces, incluso) "Ordenamiento laboral" y "Legislación laboral" (la forma "Legislación de Trabajo" no es usual)- no encierra una significación distinta en sí misma.

[4]El Instituto Nacional de Previsión (INP) tenía la consideración de entidad pública, si bien autónoma del Estado, y su objetivo fundacional era la promoción de la "previsión popular", especialmente en lo que se refiriera a "pensiones de retiro", y administrar, en las condiciones más beneficiosas, la "mutualidad de asociados" que voluntariamente se constituyera.

[5]Como se ha señalado, este relativo retraso legislativo en la materia no es determinante del tardío desarrollo del cooperativismo sino consecuencia de éste. Vd.: VALDES DAL RE, F.: "**Las cooperativas de producción**", Montecorvo, Madrid 1975, p. 43 y ss.

nueva Ley de cooperativas y en 1976, por su parte, una nueva Ley de Relaciones Laborales, ambas, sin perjuicio de la continuidad de los presupuestos previos, significaban pasos de actualización y modernización.

Recobrado el régimen de libertades y la normalización jurídico-política a raíz de la vigente Constitución de 1978 -texto que además otorga una especial tutela al trabajo[6] y al cooperativismo[7] - en 1980 se promulgó la nueva ordenación laboral básica (Estatuto de los Trabajadores) y en 1987 la nueva Ley General de Cooperativas de ámbito estatal.[8]

En la actualidad, a la par que nada ha cambiado sustancialmente en la práctica respecto del aludido paralelismo normativo, se pulsa una corriente doctrinal de favorabilidad a integrar la regulación de las cooperativas en el ámbito mercantil y, cuando poco, aceptar bastantes de los mecanismos propios de las sociedades comerciales (vg.: Registro mercantil, auditoría externa, publicidad y depósito de cuentas, etc...).

3. Sinopsis normativa

Sin ánimo de exhaustividad, se pretende seguidamente ofrecer un sucinto esquema de las principales normas que sustentan dentro del Ordenamiento jurídico español tanto el Derecho del Trabajo como la regulación de las cooperativas. Antes de nada ha de tenerse en cuenta que la nueva estructuración jurídico-política y administrativa de España (Título VIII de la Constitución de 1978) organiza territorialmente el Estado en Municipios, Provincias y Comunidades Autónomas. A nuestros efectos, éstas últimas y el propio poder central se distribuyen las potestades normativas. En determinadas materias, la competencia será

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[6]El art. 35 conceptúa el trabajo como derecho y deber de todos, garantiza la libre elección de profesión y prevé la regulación de las relaciones de trabajo mediante Ley Orgánica.
Las referencias indirectas o colaterales serían más numerosas: vg.: art. 14, principio de igualdad ante y en la aplicación de las leyes; art. 28, libertad de sindicación y derecho de huelga; art. 37 reconocimiento de la negociación colectiva; art. 41, mantenimiento de un régimen público de Seguridad Social; art. 42, protección de los trabajadores migrantes; art. 43 derecho a la salud; etc... Por esta vía habríamos de llegar, a su vez, a los Tratados internacionales en la materia incorporados al Ordenamiento interno y que gozan de la especial protección que les otorga el propio texto constitucional.

[7]El art. 129.2° encomienda a los poderes públicos "promover" las cooperativas mediante una legislación adecuada y, como acertadamente a nuestro entender se ha señalado (vd.: VICENT CHULIA, F.: **"Situación actual de las cooperativas en el marco constitucional español: legalidad autonómica y fiscal"**, Rev. Ciriec-España núm. ex. fiscalidad (1987), p. 32 y ss.) el término "promover" -incorporado al texto constitucional durante su tramitación en el Senado- tiene un inexcusable significado de favorabilidad.

[8]Como se dará cuenta, cinco Comunidades Autónomas (Regiones) disponen de legislación cooperativa propia y es de señalar que, en la actualidad, otras están avanzando anteproyectos ya que por Ley Orgánica 9/1992, de 23 de diciembre, se han ampliado las competencias legislativas en materia cooperativa de la práctica totalidad de las restantes Comunidades Autónomas.

exclusiva (y excluyente) bien del poder central, bien de las Comunidades Autónomas (o de alguna de ellas: habrá de estarse a su Estatuto de Autonomía); en otras, la competencia será compartida o concurrente.[9] En una primera aproximación al texto constitucional, el art. 148 lista las competencias que pueden asumir las Comunidades Autónomas y el art. 149 las que, en principio, son competencia exclusiva del Estado central.

Pues bien, dentro de esta sistemática, la legislación laboral es competencia exclusiva del Estado (art. 149.1.7ª Constitución) mientras que la legislación en materia cooperativa puede -y de hecho se atribuye- a las Comunidades Autónomas. A que así resulte ayuda no poco el que nuestro Ordenamiento no naturalice como "mercantiles" a las cooperativas ya que, si sucediese de otro modo, la competencia sería estatal y no autonómica (art. 149.1.6ª Constitución).[10]

3.1 Legislación laboral básica

Las referencias normativas que siguen se circunscriben a "lo laboral". La materia es competencia exclusiva del Estado y la normativa laboral se aplica a "todas" las relaciones de trabajo. Por ello alcanza a las existentes en el seno de las cooperativas. Ahora bien, habrá de tenerse muy presente qué entiende el Ordenamiento español por "relación de trabajo".[11]

— **Constitución:** art. 35.[12]

El trabajo se conceptúa como derecho y como deber de todos los españoles;[13] libre elección de profesión y previsión de regulación de la materia mediante un Estatuto con rango de Ley (parlamentaria).

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[9]Esta materia no es, en lo absoluto, ni fácil ni transparente. El hecho es que al no quedar previstas listas cerradas de competencias y sí franjas de concurrencia (vg.: legislación básica central y desarrollo autonómico), numerosos son los conflictos de constitucionalidad que se han suscitado, de ellos alguno en materia cooperativa.

[10]Desde la práctica cooperativa señalamos que tanto el Tribunal Constitucional (Sentencia 72/1983, de 29 de julio) como el Tribunal Supremo (Sala 3ª, Sentencia de 25 de marzo de 1991) han insistido en la no mercantilidad de dichas sociedades por varias razones pero, expresamente también, en atención a la distribución constitucional de competencias entre el Estado y las Comunidades Autónomas (Regiones).

[11]Vd.: infra IV, especialmente epígrafe 4.1.

[12]Vd.: supra nota 6.

[13]Dentro del marco de prestación voluntaria en un régimen de libertades: Constitución española (arts. 1, 17, 25) y Convenios internacionales ratificados por España, vg.: art. 4 del "Convenio (1950) para la protección de los derechos humanos y de las libertades fundamentales", ratificado en 1979, y art. 8 del "Pacto (1966) internacional de derechos civiles y políticos", ratificado en 1977.

— **Estatuto de los Trabajadores**: Ley 8/1980, de 10 de marzo.

Consecuencia directa de la previsión constitucional que acaba de exponerse, codifica la regulación básica de las relaciones de trabajo. Así (Tit. I): cuanto hace al contrato de trabajo, derechos y deberes de empresarios y trabajadores, etc...; (Tit. II) la regulación de la representación de los trabajadores en el seno de la empresa[14] y (Tit. III): cuanto se refiere a la negociación colectiva -sindicatos/patronal- de las condiciones de trabajo.

— **Seguridad Social**: Texto refundido aprobado por Real Decreto legislativo 1/1994, de 20 de junio.

Contiene la regulación general del régimen público de Seguridad Social (previsión social de carácter obligatorio): enfermedad y asistencia médico-farmacéutica; cobertura de los accidentes de trabajo y de las incapacidades laborales; prestaciones en favor de familiares; pensiones de jubilación; etc...)[15]

— **Protección del desempleo**: Ley 31/1984, de 2 de agosto.

Regula los niveles y grados de prestación de producirse tal contingencia.

— **Seguridad e Higiene en el trabajo**: Ordenanza General aprobada por Orden de 9 de marzo de 1971.

Dispone las medidas generales de seguridad y condiciones de salubridad en la prestación de trabajo, si bien en la actualidad se ve profusamente completada tanto por Reglamentos administrativos como por Convenios colectivos.

— **Infracciones y sanciones laborales**: Ley 8/1988, de 7 de abril.

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[14]Habrán de tenerse en cuenta las previsiones de la Ley Orgánica 11/1985, de 2 de agosto, de Libertad Sindical que regula y tutela el ejercicio de este derecho constitucional.

[15]El sistema se sustenta en la cotización obligatoria de trabajadores y empresarios, más dotaciones de presupuestos del Estado. Dicho "sistema" integra varios "regímenes", el general y más extendido y los especiales (vg.: trabajadores autónomos -autoempleo-; sector agrario; servicio doméstico; etc...) que entrañan determinadas particularidades en razón de la actividad.

Contiene el régimen de depurar en sede administrativa las responsabilidades, dentro del conjunto de las relaciones de trabajo, que no alcanzan la gravedad del ilícito criminal de carácter social.[16]

— **Procedimiento laboral**: Texto refundido aprobado por Real Decreto legislativo 521/1990, de 27 de abril.

Regula las normas procedimentales de la Jurisdicción especial en materia laboral.

3.2 Legislación cooperativa básica

Siguiendo la sistemática precedente, se relacionan a continuación las principales normas que regulan directamente las cooperativas. Ha de tenerse presente en esta ocasión que las competencias en la materia pertenecen en buena medida a las Comunidades Autónomas (Regiones).

— **Constitución**: art. 129.2.[17]

Sin perjuicio de que pudieran traerse a colación otros, este precepto ordena a los poderes públicos "promover"[18] las cooperativas mediante una legislación adecuada. Esta perspectiva impregna el resto de la legislación.

— **Legislación ordinaria de cobertura estatal**:

Ley 3/1987, de 2 de abril, General de Cooperativas (en lo sucesivo LGC).

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[16]El Código penal en diferentes artículos tipifica y pena delitos en este orden, vg.: 177.bis en relación con los atentados que pudieran sufrir los derechos de libertad sindical y huelga; los arts. 348.bis y 427 en lo que se refiere a la salud e integridad física de los trabajadores; los arts. 499.bis y 348.bis a) en lo que hace a los delitos contra la libertad y estabilidad en el empleo. En suma, la infracción de los valores laborales considerados de mayor transcendencia gozan de protección penal además de la protección administrativa a que la norma acotada se concreta.

[17]En la actualidad España es, cronologicamente, el tercero de los paises del ámbito comunitario europeo -tras Italia (art. 45 de la Constitución de 1947) y Portugal (hoy arts. 61, 80, 86 y otros, ya de caracter sectorial, de la Constitución de 1976)- cuya norma fundamental otorga una especial tutela a las cooperativas.

[18]El término "promover" -incorporado al texto constitucional durante su tramitación en el Senado- tiene un inexcusable significado de favorabilidad. Vd.: VICENT CHULIA, F.: **"Situación actual de las cooperativas en el marco constitucional español: legalidad autonómica y fiscal"**, Rev. Ciriec-España núm. ex. fiscalidad (1987), p. 32 y ss.

Se trata de un texto amplio, en ocasiones tachado de excesivamente reglamentista,[19] que codifica la regulación general de las cooperativas y aquellas peculiaridades de sus distintas "clases".

Resulta de aplicación a aquellas cooperativas que no reguladas por norma autonómica (regional), bien porque no exista, bien por que escape a su ámbito (vg.: por tratarse de una cooperativa de ámbito supraregional).

Ley 13/1989, de 26 de mayo, de Cooperativas de Crédito.

Con el mismo carácter que la anterior, establece la regulación de la "clase" de las cooperativas de crédito.

Ley 20/1990, de 19 de diciembre, de Régimen fiscal de las cooperativas.

Materializa, dentro de la previsión constitucional de favorabilidad, el tratamiento tributario de las sociedades cooperativas.[20]

— **Legislación ordinaria de cobertura regional:**[21]

ANDALUCIA: Ley 2/1985, de 2 de mayo, de sociedades cooperativas andaluzas (en lo sucesivo LA).

CATALUÑA: Texto Refundido de la Ley de cooperativas de Cataluña, aprobado por Decreto legislativo 1/1992, de 10 de febrero (en lo sucesivo LC).

COMUNIDAD VALENCIANA: Ley 11/1985, de 25 de octubre de cooperativas de la Comunidad Valenciana (en lo sucesivo LV).

EUSKADI (País Vasco): Ley 4/1993, de 24 de junio, de cooperativas de Euskadi (en lo sucesivo LE).

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[19]Ha de señalarse que, desde 1931, es la primera ocasión en nuestra historia jurídico-legislativa en que la Ley de cooperativas no ha sido objeto de desarrollo reglamentario.

[20]Un estudio sistemático en MONTOLIO, JMª et alii: **"El nuevo régimen fiscal de las cooperativas"**, Fundescoop, Madrid 1991. España, por otra parte, no es el único pais europeo que acoge una técnica análoga de protección, sobre todo en lo que atañe al impuesto sobre rendimientos de las personas jurídicas. De forma análoga se actúa, por ejemplo en Bélgica, en relación con las cooperativas reconocidas ante el CNC ("Conseil National de la Coopération"); en Italia para las cooperativas inscritas en el correspondiente Registro prefectoral, si cumplen los requisitos del Decreto 1577/47, de 14 de diciembre ("Ley Basevi"); en Grecia por las expresas previsiones de la normativa reguladora del tributo; etc...

[21]Las Leyes regionales que seguidamente se relacionan vienen a constituir en cada caso la "ley general regional" pero la legislación autonómica no se agota en ellas.

NAVARRA: Ley 12/1989, de 3 de julio, de cooperativas de Navarra (en lo sucesivo LN).

4. Trabajo y cooperativas

Nuestro Ordenamiento, en lo que al trabajo se refiere, se ha hecho tradicionalmente eco de una consideración muy especial atendiendo a fundamentos ético-religiosos, a la dignidad de la persona e, incluso, a la constitucionalización del derecho a su ejercicio. Ahora bien, el "trabajo" y el "contrato de trabajo" a efectos jurídico-laborales alcanza dogmáticamente[22] un concepto propio, aunque no unitario. Quiere ello decir, primero, que no todo el trabajo humano entraña la consideración jurídico-laboral de "trabajo" (vg.: trabajos a título de amistad o buena vecindad) y, segundo, que no todos los "contratos de trabajo" son susceptibles de reducción a un solo tipo o régimen (vg.: las relaciones laborales de carácter especial a que se refiere el art. 2 del Estatuto de los Trabajadores).

4.1 Precisiones

A efectos jurídico-laborales, la "relación laboral" -y por tanto "trabajador" y demás conceptos vinculados- tiene en el Ordenamiento español (art. 1 del ET) un significado técnico-jurídico preciso e inequívoco, fruto de la citada dogmática y de toda una tradición jurídica, en el que sin perjuicio de las especialidades anunciadas se conjugan una serie de elementos que podrían resumirse en:

(a) voluntariedad: prestación personal y consensual (tiene un trasfondo netamente personal y ha de mediar voluntariedad).

(b) carácter sinalagmático, bilateral y oneroso (recíproco, entre partes -empleador y trabajador- y mediando una contraprestación).

(c) ajenidad (por el hecho del vínculo laboral el trabajador transfiere al empleador el resultado del trabajo)

(d) dependencia (asisten al empleador las facultades de dirección y organización)

Además de la flexibilización de alguno de dichos elementos en virtud de la constante tendencia expansiva del Derecho del Trabajo, la ordenación jurídico-laboral se proyecta, en abstracto, sobre todo tipo de empresas susceptibles de tener trabajadores. El concepto empresa tiene aquí el sentido más amplio posible: titularidad de personas físicas o jurídicas; de Derecho público

[22] ALONSO GARCIA, M.: **"Curso de Derecho del Trabajo"**, Ariel, Barcelona 1981 (7ª), p. 273 y ss.

o privado; mercantiles o no ... Por tanto, el Derecho del Trabajo enmarca también a las cooperativas. Ahora bien,en cualquier caso, el ámbito de su regulación no excederá de las "relaciones laborales" en el estricto sentido querido por el propio Ordenamiento.

Pues bien, cuando el Derecho del Trabajo se proyecta sobre el elemento humano de una sociedad cooperativa encontrará, necesariamente y antes que nada, "socios"[23] (elemento subjetivo inexcusable: sin ellos no cabe sociedad) y, en ocasiones también, "trabajadores" empleados por la cooperativa. Los primeros, en razón de su relación jurídico-societaria, participan en la actividad cooperativizada: se sirven de sus elementos, dirigen su actividad, participan en los resultados de aquella, etc... Los segundos, sin embargo, presentan un perfil bien distinto de aquellos: prestan su trabajo a la cooperativa y en su relación con la empresa se dan todos y cada uno de los elementos que configuran la relación jurídico-laboral. A ellos por consiguiente resultará de aplicación, con carácter inmediato y en toda su extensión el Derecho laboral[24] con independencia de la consideración subjetiva -en este caso cooperativa- del empleador.

Por ejemplo, el cajero de una "cooperativa de crédito", empleado por ésta para que preste sus servicios como tal, será sujeto de una relación laboral que se regulará por el repetido Estatuto de los Trabajadores, Convenio colectivo de Banca, etc ...; sin embargo, el socio de la misma cooperativa que realiza operaciones de activo o pasivo con ella será, en tanto que tal, ajeno por completo a una relación laboral y su relación societaria se regirá por la Ley de Cooperativas, los Estatutos de la entidad, etc...

Análogamente sucederá con el enólogo de una "cooperativa agraria" (vitícola) o con el encargado de una sección dentro de una "cooperativa de servicios" si se compara su respectivo régimen jurídico con el del socio viticultor que aporta su producción -al objeto de que sea procesada y comercializada en común- o con el socio comerciante detallista que, junto con

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[23]Acotamos aquí la referencia al "socio usuario" (vg.: el socio consumidor, en una cooperativa de consumo; el socio que gestiona su vivienda a través de la cooperativa en una cooperativa de viviendas; el socio trabajador, en una cooperativa de trabajo asociado; etc...) y excluimos a los "socios no usuarios" o socios inversionistas cuya aceptación empieza a generalizarse en muchas de las legislaciones europeas sobre cooperativas, vg.: "socii sovventori" en la reforma italiana operada por Ley 59, de 31 de enero de 1992; socios aportantes de capital de acuerdo con la Ley francesa 92-643, de 13 de julio de 1992, de modernización de las empresas cooperativas; socios inversores en el proyecto de Reglamento (CEE) del Estatuto de la Sociedad Cooperativa Europea (DOCE C-236, de 31 de agosto de 1993).
Del mismo modo, del concepto de "socio usuario", se excluye ahora a los "socios de trabajo" -categoría especial de entre los socios, que incluso pueden ser a la vez socios usuarios- que nuestra legislación admite en todas las cooperativas excepto en las de trabajo asociado y explotación comunitaria de la tierra. Sobre ellos volveremos apuntando ahora que el régimen de estos "socios de trabajo" se asemeja al dispuesto para los "socios trabajadores" de las cooperativas de trabajo asociado.

[24]Desde luego las grandes Leyes internas (vg.: Estatuto de los Trabajadores, cit; Ley de Seguridad Social; Ley de Procedimiento Laboral; Ley Orgánica de Libertad Sindical; Ordenanza General de Seguridad e Higiene; etc ...), los Convenios internacionales en la materia; los acuerdos derivados de la negociación sindical (Convenios colectivos) y, con carácter general, todo el sistema de fuentes propio de este Ordenamiento en el concreto sector concernido.

otros colegas, se provee de la cooperativa que entre todos formaron con el fin de abaratar costes en los artículos que luego pondrá a la venta en su respectivo establecimiento.

Adviértase que, en los tres casos referidos lo que se cooperativiza es -por este orden- el servicio de "crédito", el servicio "agrario" propio del cultivo dicho y el "servicio" de aprovisionamiento de los empresarios asociados, no el "trabajo". El trabajo que pueda precisar cualquiera de dichas cooperativas será el de terceros (ajenos). De ahí su distinto régimen jurídico.

4.2 La ocasión de conflicto

Con criterios nominalistas, la posibilidad de conflicto ni siquiera sería planteable entre Derecho laboral y Derecho cooperativo pues, como se ha visto, uno y otro regulan relaciones jurídicas distintas. Cuestión distinta es que quizá cupiera entre principios o valores de uno y otro bloque normativo.

Estando, no obstante, a consideraciones sustantivas, parece inevitable que las aludidas ocasiones de conflicto puedan plantearse en aquellas cooperativas cuyo objeto cooperativizado es precisamente el trabajo. Es decir, donde el "trabajador" es a la vez "socio" y en tanto que tal socio integra -junto con otros- la condición de "empleador". El supuesto típico por excelencia va a venir dado, como es natural, por la sociedad cooperativa "de trabajo asociado"[25] -"ouvrière de production" (Scoop) en la terminología francesa más usual, de "producâo operária" en la legislación portuguesa, y demás comparables-.

Así las cosas, lo cierto es que el Ordenamiento jurídico español, sin perjuicio de la especial consideración que dispensa al trabajo a la que ya se ha hecho referencia, para delimitar el ámbito del Derecho del Trabajo se sirve del concepto técnico jurídico de "relación jurídico-laboral" (ajenidad, dependencia ...). Pues bien, a este concepto no es reconducible el "autoempleo" en el seno de una empresa autogestionada cual la cooperativa. En relación con estas especiales sociedades ha primado el principio de la "doble condición" (trabajador y empleador se hacen uno) pero el asociado es ante todo y sobre todo socio: prevalece la consideración del vínculo societario frente al vínculo de dependencia laboral. Consecuentemente, distinta ha de ser, por tanto, la condición jurídica del socio respecto a la de un trabajador dependiente.

Ahora bien, aún así, quiérase o no, pueden suscitarse inevitables puntos difíciles: vg.: criterios salariales aplicables a los socios trabajadores; regulación de la jornada laboral; sistema de previsión social obligatoria; etc ... y, de su mano, la necesidad de aportar

[25]El Derecho español ofrece también otros ejemplos, de régimen análogo, que se expondrán en su momento.

soluciones. A este respecto y desde el punto de vista de la técnica jurídica, nuestra legislación se ha servido de una peculiar sistemática de combinar, en un solo contexto, las categorías "lex generalis"/"lex specialis", y salvar por vía de ésta última las peculiaridades que ha entendido del caso. Es decir, se ha establecido un régimen general para todas las cooperativas y, dentro de la unidad formal del mismo, ha regulado específicamente determinados extremos, siguiendo una técnica ya tradicional en el Ordenamiento español.[26]

En suma, la regulación sustantiva de las cooperativas se confía a un sólo texto legal que da cobertura a todas las cooperativas -hasta aquí, por ejemplo, como sucede en Alemania-, pero reservando dentro del mismo secciones específicas llamadas a regular aspectos particulares de cada una de las denominadas "clases" de cooperativas -los "ramos" del Código portugués-.[27] Es decir, la sociedad cooperativa como institución es una y única y se regirá por "la" Ley de cooperativas; ahora bien, su actividad[28] ("clase") conducirá de ordinario a que, por encima de la ordenación general de las cooperativas en dicho texto legal ("lex specialis derogat generalem" y, en puridad quizá, ni siquiera ésto por cuanto la regulación especial se contienen dentro del mismo cuerpo normativo), haya de aplicarse el específico previsto para la "clase" de que se trate. De esta manera se integra en un mismo y único cuerpo legal un núcleo común de regulación y las especialidades que requieren tratamiento propio.

De esta manera, la legislación cooperativa española predispone un sistema para solucionar -regulaciones particularizadas- posibles conflictos o colisiones entre las reglas propias de las relaciones societarias y de la autonomía cooperativa con principios irrenunciables de otras ramas del Ordenamiento, en nuestro caso los debidos al Derecho laboral.

5. El trabajo cooperativizado

De entre las distintas clases de cooperativas, un primer criterio de sistematización -al menos en lo conceptual, sabemos que el Derecho positivo se hace luego mucho más casuístico- vendrá constituido por la naturaleza de la actividad cooperativizada. Esta, como se han hecho

[26]Esta técnica se mantiene ininterrumpidamente desde la Ley republicana de 1931, por encima, incluso, de la cambiante orientación política del legislador. Hoy en día es de señalar que, sin perjuicio de diferencias puntuales, a la misma técnica se acogen tanto la Ley general como las Leyes autonómicas existentes.

[27]La técnica en Portugal es, sin embargo, la de acudir a múltiples cuerpos normativos: un Código general y otros textos -del mismo rango, especiales y posteriores- para cada uno de los "ramos" que se reconocen. En este punto, la legislación portuguesa se asemeja más a las legislaciones francesa o italiana: un "estatuto general" y toda una serie de normas particularizadas a distintos sectores de actividad. Por contra, estas últimas no llegan a aislar con el carácter que aquí se destaca los distintos "ramos" o "clases".

[28]En ocasiones también el nivel o grado de integración, vg.: cooperativas de segundo o ulterior grado.

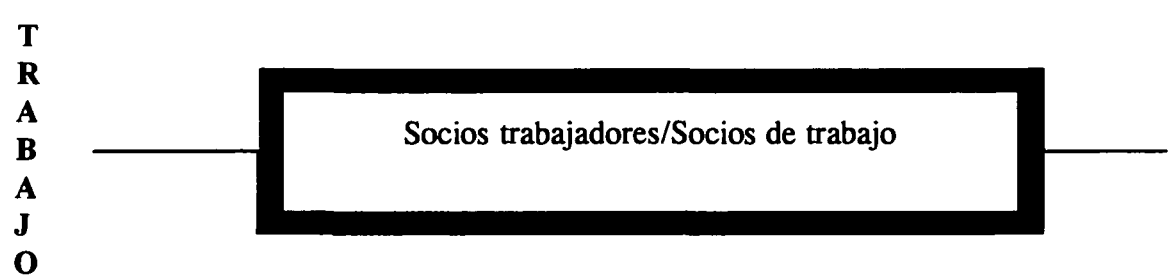
eco modernos proyectos legislativos,[29] admite sólo dos posibilidades o a lo sumo tres. En efecto, lo que se cooperativiza es, bien, el trabajo, o, bien, un servicio (vg.: el crédito, los suministros, la transformación y comercialización ...). La tercera posibilidad vendría constituida por el carácter "mixto" dentro de una misma entidad de las actividades cooperativizadas.

Siendo así y sabido que las relaciones jurídico-laborales dentro de la cooperativa se rigen directamente por el Derecho laboral, con independencia de la condición subjetiva del empleador, donde únicamente cabría riesgo de colisión entre legislación laboral y estatuto jurídico cooperativo habría de ser en aquellas cooperativas cuya esencialidad viniese marcada por cifrar su objeto en cooperativizar el trabajo o que, sin tener tal objeto como principal, otorgaren la condición de socio a quienes tuviesen como relación societaria precisamente la prestación de trabajo.

Nuestra atención habrá de dirigirse, por tanto, a las "**socios trabajadores**", esto es, los socios de las cooperativas de trabajo asociado" (CTA) -las que se identifican por tener como objeto el trabajo cooperativizado- y paralelamente las demás clases (o subclases) cuyo régimen se asimile al de aquellas. A renglón seguido será inexcusable una referencia siquiera a los "**socios de trabajo**" -socios cuya peculiaridad radica integrar su relación societaria en la prestación de trabajo a cooperativas que no son de trabajo.

Núcleo común, paralelismo y zona de influencia

(D° del Trabajo - D° cooperativo)



[29]En este sentido y con los precedentes que constan, el art. 8 de la "Ley Marco para el Cooperativismo en América Latina". En general y en este concreto extremo, puede verse MONTOLIO, JM[a].: "**Legislación cooperativa en América Latina: Situación, Derecho comparado y proceso de armonización**", Ministerio de Trabajo y Seguridad Social, Madrid 1990.

En suma, el interés ha de dirigirse a relaciones societarias en las que el elemento "trabajo" -aunque no relación laboral- impregna de forma indeleble el vínculo societario. Sistemáticamente estaremos para ello, separadamente, a las legislaciones estatal y autonómica.

5.1 Ley General de Cooperativas (LGC)

Convendrá distinguir entre "sociedades", cuyo objeto sea precisamente el trabajo, y "socios" cuya relación societaria consista en la prestación de trabajo a una cooperativa cuya actividad cooperativizada -la más propia o principal, dicho quede con todas las reservas del caso- no sea el trabajo.

5.1.1 Cooperativas de trabajo

La LGC (arts. 116 a 147) reconoce una larga serie de "clases" y "subclases" de cooperativas de base o primer grado[30] que pueden sistematizarse así:

1. **De trabajo asociado** -en adelante CTA- (*)

   Asocian a personas físicas con el fin prioritario de su autoempleo mediante una empresa en común.

2. **De consumidores y usuarios**

   Responden a su concepto y admiten como subclases:

   2.1 De suministro doméstico

   2.2 De servicios diversos

   2.3 De suministros especiales

   2.4 De ahorro por el consumo

   2.5 Culturales

3. **De viviendas**

   Asocian a personas físicas (y en ocasiones jurídicas) y tiene como fin primero procurar alojamiento a sus socios, si bien caben otros complementarios a aquel.

[30]Las integradas por cooperativas y otras personas jurídicas (Cooperativas de segundo o ulterior grado, arts. 148 y 149 LGC) no requieren nuestra atención pues, entre personas jurídicas, no caben relaciones laborales.

4. **Agrarias**

Asocian a titulares de explotaciones agrarias con el propósito de prestarles suministros y servicios en sentido amplio.

5. **De explotación comunitaria de la tierra (*)**

Asocian a dos tipos de socios, quienes aportan las tierras de cultivo y quienes las cultivan (pueden coincidir en todo o en parte). A éstos segundos les es de aplicación el régimen de las CTA.

6. **De servicios**

Asocian a industriales y profesionales autónomos con el fin primordial de prestarles servicios en sentido amplio.

7. **Del mar**[31]

Asocian a pescadores, armadores y demás profesionales de la pesca y cultivos marinos con el propósito de prestarles suministros y servicios en sentido amplio.

8. **De transportistas**

Asocian a industriales del transporte y profesionales autónomos con el fin primordial de prestarles servicios en sentido amplio.

9. **De seguros**

Con sujeción a la ordenación legal de los seguros privados, estas cooperativas cubren los riesgos de sus socios de una manera próxima a la mutualidad, bien mediante derramas cuando es llegado el caso (9.1) bien con cargo a una prima fija pagadera al comienzo del riesgo (9.2). Ahora bien, caben (9.3) cooperativas de seguros formadas únicamente por personas físicas que aportan su personal trabajo a la actividad aseguradora. A estas últimas será de aplicación el régimen de las CTA.

De acuerdo con ello admiten como subclases:

9.1 Cooperativas de seguros a prima variable

9.2 Cooperativas de seguros a prima fija

9.3 Cooperativas de seguros de trabajo asociado (*)

[31] A pesar de la estricta denominación "mar" la LGC expresamente comprende dentro de ellas a las actividades de pesca y demás comparables o consecuentes (aprovechamientos, actividades de transformación, etc...) que de forma análoga se lleven a cabo en aguas interiores.

10. **Sanitarias**

Se trata, en definitiva, de cooperativas de seguros en relación con la salud. El término "ordinarias" que sigue (10.1) no responde al texto legal y sólo pretende hacer referencia a que se trata de cooperativas de seguros del "riesgo salud" para contraponerlas a las que aquí denominamos (10.2) "De trabajo asociado". Estas últimas asocian a personal sanitario y no sanitario que ponen en común su actividad profesional y por ello les es de aplicación el régimen de las CTA.

De acuerdo con ello admiten como subclases:

10.1 "Ordinarias"

10.2 "De trabajo asociado" (*)

11. **De enseñanza**

Análogamente al supuesto anterior, se califican aquí como "Ordinarias" (11.1.) a las que agrupan a padres de alumnos y otros demandantes de los servicios de enseñanza en el más amplio sentido y "De trabajo asociado" (11.2) a las que asocian a profesionales, docentes y no docentes, de la enseñanza con fines de autoempleo en este sector. A éstas últimas resulta de aplicación el régimen de las CTA.

De acuerdo con ello admiten como subclases:

11.1 "Ordinarias"

11.2 "De trabajo asociado" (*)

12. **Educacionales**

Se trata de cooperativas de escolares con el fin primordial de contribuir a la formación cooperativa, permitiendo suministros de material didáctico y servicios vinculados al estudio.

13. **De crédito**

Responden a su enunciado y cuando tienen por objeto prioritario prestar servicios al medio rural se denominan Cajas Rurales. Su régimen goza de legislación propia según se ha indicado con anterioridad.

14. **De integración**[32]

Tienen como finalidad agrupar, coordinar y fomentar las actividades de las entidades cooperativas o de economía social o pública que asocien.

De lo expuesto cabe inferir que, salvo los casos que se han remarcado con un asterisco (*) -en los que la actividad cooperativizada es precisamente el trabajo-, en los demás lo que se cooperativiza es la prestación de servicios o suministros y a tal concepto puede reconducirse la extensa multiplicidad de que se ha dado cuenta. De ahí que las eventuales ocasiones de conflicto -Derecho laboral, Derecho cooperativo- únicamente puedan plantearse en las cooperativas:

- De **trabajo asociado** (arts. 118 y ss. LGC).
- De **explotación comunitaria** de la tierra, en cuanto a los socios trabajadores (art. 136.3 LGC).
- De **seguros**, si bien sólo las de trabajo asociado (art. 143.3 LGC).
- **Sanitarias**, del mismo modo sólo las de trabajo asociado (art. 144.3).
- De **enseñanza**, así mismo en su vertiente de trabajo asociado (art. 145.3 LGC).

Indudablemente en todas ellas -directamente en las CTA, indirectamente en las demás acotadas- la característica que prima sobre cualquier otra es el factor trabajo. La prestación de trabajo como directo objeto cooperativizado, o el carácter sustancial del trabajo en orden a la consecución del objeto cooperativizado, identifican a estas cooperativas. El régimen de todas ellas se reconduce al establecido para las CTA.

5.1.2 Socios de trabajo

La LGC permite (art. 30) a todas las cooperativas -excepción hecha de las CTA y de las de Explotación comunitaria de la Tierra- que, mediando previsión estatutaria, puedan admitir "socios de trabajo". Se trata, decididamente, de socios si bien su actividad en cuanto tales no va a ser la que podría tenerse por la "más propia" de la cooperativa, sino la prestación a la misma de su personal trabajo. Su régimen se asimila sustancialmente al propio de los socios de las CTA.

[32]Las posibles clases de cooperativas no constituyen en nuestra legislación un "numerus clausus" (Disp. Final 2ª LGC). En concreto esta clase de cooperativas de integración ha sido creadas por (Disp. Adicional 3ª) Real Decreto 84/1993, de 22 de enero, mediante el cual se reglamentó la Ley 13/1989, de 26 de mayo, de cooperativas de crédito.

5.2 Legislación autonómica

Las distintas legislaciones autonómicas[33] no significan divergencias reseñables con la LGC. De su regulación cabe el siguiente resumen:

(a) Todas las Leyes regionales reconocen las CTA e incorporan a su regulación la referida técnica de asumir al establecer el régimen de los "socios trabajadores" principios propios del Derecho laboral sin demérito de reconocer que prima la condición societaria. La regulación regional de las CTA no difiere de la LGC.

(b) Con independencia de tal reconocimiento y aunque cambie la nomenclatura, todas las Leyes regionales admiten que sus respectivas clasificaciones se reduzcan en buena medida a un gran bloque de cooperativas "de servicios" y una sola variante que cooperativiza el "trabajo".

(c) Cuando las Leyes regionales se encuentran con "clases" o "subclases" de cooperativas en las que lo que se cooperativiza es precisamente el trabajo adoptan la misma sistemática que la LGC, es decir, remitir el régimen de las mismas (o de los socios que corresponda) a lo previsto para las CTA.

Así sucede en cuanto al régimen previsto para los socios trabajadores en las "cooperativas de explotación comunitaria de la tierra" (LA art. 95.4; LC art. 84.2; LE art. 112.2); en cuanto a las "cooperativas de trabajo asociado de enseñanza" (LV art. 79.2) o su equivalente "de enseñanza de trabajo asociado" (LE art. 106.3 y LN art. 68.2); también en las "cooperativas de trabajo asociado de producción de seguros" (LV art. 77.2.a); en las "cooperativas de trabajo asociado de integración social" que vienen a encauzar la dedicación profesional de personas con minusvalías (LE art. 127.2) o su análoga "de servicios sociales" (LV art. 82.1); del mismo modo en las "cooperativas de asistencia sanitaria de trabajo asociado" (LE art. 121.3).

En suma, en todas estas manifestaciones y demás en las que lo que realmente se cooperativiza es el trabajo la solución de las Leyes regionales en su conjunto es coincidente con la adoptada por la LGC: remitir su régimen al establecido en la propia norma regional para las CTA.[34] Las diferencias pueden ser de matiz, estilo o meramente semánticas pero el fondo sustantivo no deja de ser el constatado. Con carácter general puede decirse que las Leyes autonómicas sobre

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[33]Las distintas Leyes se identificarán como LA (Ley 2/1985, de 2 de mayo, de sociedades cooperativas andaluzas; LC (Texto refundido de la Ley de cooperativas de Cataluña, aprobado por Decreto legislativo 1/1992, de 10 de febrero); LV (Ley 11/1985, de 25 de octubre, de cooperativas de la Comunidad Valenciana); LE (Ley 4/1993, de 24 de junio, de cooperativas de Euskadi) y LN (Ley 12/1989, de 3 de julio, de cooperativas de Navarra).

[34]En otros casos, a reputarse excepcionales -vg.: LC (art. 62) en cuanto al régimen de los socios trabajadores en las "cooperativas de explotación comunitaria de la tierra"- se opta por remitir su condición a la propia de los "socios de trabajo" a los que seguidamente nos referiremos y que, en definitiva, produce análogos resultados.

cooperativas no entrañan una conceptuación distinta o divergente de la "clase" de cooperativas de trabajo asociado -supuesto por excelencia donde podría plantearse conflicto entre uno y otro Derecho-, en relación con la regulación contenida en la LGC. A la misma conclusión cabría llegar en relación con el resto de "clases" o casos en que cabría ver reeditada la ocasión de conflicto.

Por lo que a los socios de trabajo se refiere, la regulación de las Leyes regionales resulta del todo comparable con la LGC.

6. El específico régimen de los "socios trabajadores" (CTA) y el de los "socios de trabajo" (otras cooperativas)

Sabiendo que, como regla general, dentro de las cooperativas el Derecho laboral:

(a) no es aplicable a los "socios",

(b) sí lo es a los "trabajadores", y que

(c) existe una situación intermedia en cuanto a los "socios trabajadores" de la clase de cooperativas de trabajo asociado (y comparables) y en cuanto a los "socios de trabajo" que son posibles en cualquier otra clase de cooperativas salvo en la concreta clase citada,

nuestra atención habrá de dirigirse, precisamente, a analizar cómo se concilian las exigencias "laborales" (inspiradas en el Derecho del Trabajo) con las situaciones "societarias" (derivadas de la legislación cooperativa) cuando lo que precisamente se cooperativiza es el trabajo. De ahí el enfoque inmediato a las cooperativas de trabajo asociado (CTA) y a sus "socios trabajadores", para, a continuación, establecer las debidas precisiones en cuanto a los "socios de trabajo" (en aquellas otras cooperativas donde se admiten).

6.1 Régimen de los "socios trabajadores" (CTA)

De acuerdo con la sistemática de las "clases" de cooperativas aceptada por el común de las leyes españolas en la materia y la plasmación de regímenes particularizados -en aquellos extremos que se consideran del caso- en secciones o capítulos específicos dentro del texto normativo, la LGT destina los arts. 118 a 126 (Secc. 2ª del Cap. XII del Tit. I) a regular las peculiaridades del régimen de las CTA.

Las CTA se definen como aquellas que asocian a personas físicas capaces de prestar su trabajo en forma cooperativa y establece como su objeto prioritario precisamente el de proporcionar a los socios los respectivos puestos de trabajo. Sus socios son, de este modo, "socios trabajadores". A partir de esta conceptuación, se van desgranando las particularidades del régimen de estas cooperativas, ciertamente que con una evidente inspiración en el Derecho laboral. Así:

(a) **Edad mínima para ser socio**

Se establece (art. 118.2 LGC) la de 16 años de forma correlativa con la edad mínima para ser admitido al trabajo (art. 6.1 del Estatuto de los Trabajadores, citado, en lo sucesivo ET).

(b) **Especial consideración de la edad entre 16 y 18 años**

Siguiendo al ET (art. 6) la LGC (art. 118.6) prohíbe que los socios de edades comprendidas entre las señaladas realicen trabajos nocturnos o los que se declaren por el Gobierno como insalubres, nocivos o peligrosos tanto para la salud como para su formación personal y humana. Median además otras cautelas.

(c) **Período de prueba**

De forma paralela a la previsión contenida en el art. 14 ET, la LGC (art. 119) limita a seis meses la duración máxima del período de prueba que pudiera venir previsto en los Estatutos y contingenta -para evitar fraudes- su posible reiteración.

(d) **Retribución**

Se reconoce a los socios trabajadores de las CTA (art. 118.4 LGC) el derecho a percibir, en plazos nunca superiores a un mes, "anticipos laborales" en cuantía similar a los "salarios"[35] de la zona para trabajos de análoga categoría.

[35]La LGC, en cuanto a los "socios trabajadores" -algo similar ocurre en la regulación de los "socios de trabajo"- huye en este punto del término "salario" que es propio de la relación de trabajo en sentido técnico. Sin embargo el sentido de la regulación es, como se ve, del todo comparable.

(e) Jornada y demás condiciones de la prestación del trabajo

La LGC confía en primer término su regulación a los Estatutos de la entidad. Ahora bien, obliga a respetar unos mínimos (art. 121). Así:

- Separación de 12 horas entre el final de una jornada y el comienzo de la siguiente.
- Limitación a 40 horas/semana la dedicación de los socios menores de 18 años.[36]
- Respeto para estos jóvenes y para los mayores de 60 años de un período vocacional anual de un mes, además de los días feriados que con carácter general se garantizan a todos.
- Garantía de determinadas licencias por razones personales, de carácter público o de representación cooperativa (vg.: 15 días por razón de matrimonio, el tiempo inexcusable para el cumplimiento de deberes públicos -por ejemplo, votar- o para desempeñar funciones de representación en el seno del movimiento cooperativo).[37]
- Garantía de suspensión temporal de la prestación de trabajo cooperativizada (art. 122 LGC) ante supuestos que guardan una total relación con la ordenación laboral (vg.: art. 45 ET). Así en los casos de incapacidad laboral, maternidad de la esposa, cumplimiento del servicio militar, excedencia forzosa por causas tecnológicas etc... recobrando el socio trabajador su puesto una vez que han cesado las razones que motivaron la suspensión.

(f) Seguridad e higiene

La LGC (art. 118.5) hace una directa remisión a las normas generales en la materia.

(g) Régimen de ordenación interna y de disciplina

La LGC (art. 120) autoriza a que puedan establecerse internamente las medidas oportunas de control y disciplina de la actividad y que los socios puedan ser sancionados por faltas producidas en su prestación.

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[36]Es sabido (art. 34 ET) que esta es la jornada máxima legal con carácter general para los trabajadores. La salvaguardia que aquí establece la LGC lo es sólo para los menores: el resto de socios trabajadores podrá, quizá, tener una jornada superior siempre que se respete el mínimo de doce horas entre jornadas a que se ha hecho referencia.

[37]Claro trasunto, éste último, de las licencias por razón de representación o función sindical.

Puede llegarse incluso (arts. 37 y 38 LGC) a la suspensión de derechos del socio y a su expulsión. Cabe al socio reclamar internamente en vía societaria (ante la Asamblea General o, de existir, su órgano delegado en la materia: el Comité de Recursos) y posteriormente en sede jurisdiccional.

(h) Régimen de previsión social

La LGC permite (Disp. Adicional 4ª) que las CTA en sus Estatutos opten por acogerse al Régimen general o especial que pudiera corresponder por razón de la actividad, incluido el de los trabajadores autónomos.[38]

(i) Inspección administrativa

La inspección cooperativa se confía al mismo servicio estatal competente en materia laboral (art. 153 LGC) y su especialización en esta materia garantiza precisamente la observancia del particular régimen de las CTA.

(j) Procedimiento jurisdiccional

La LGC (arts, 125 y 126) confía a la Jurisdicción social (Juzgados provinciales y Tribunales de lo social).[39]

Se advierte de este modo que la asunción por parte de la regulación de las CTA de presupuestos del Derecho laboral es manifiesta en consonancia con el específico tratamiento del factor trabajo en nuestro Ordenamiento.[40] El Ordenamiento cooperativo y la institución

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[38]Vd.: supra nota 14. Este régimen de opción ha sido reglamentado por Real Decreto 225/1989, de 3 de marzo, y cuanto se refiere a la protección del desempleo en estas cooperativas ha sido, a su vez, reglamentado por Real Decreto 1043/1985, de 19 de junio. Puede resumirse la especialidad de una y otra reglamentación en el sentido de que, la posibilidad de opción, es una condición favorable para las CTA -el Régimen general de la Seguridad Social es, sin duda, el más completo en cuanto a prestaciones pero, del mismo modo, el más costoso en cuanto a contribuciones- que de esta manera pueden ajustar su opción de acuerdo con una planificación; por el contrario, la protección del desempleo resulta más restrictiva para los socios trabajadores de una CTA que para los trabajadores propiamente dichos.

[39]Los mismos que conocen de las controversias que se suscitan en las relaciones de trabajo propiamente dichas. Hay en este punto una evidente "vis atractiva" por razones de gratuidad, celeridad y minoración de exigencias formales.

[40]Esta consideración se manifestará también en las medidas de fomento, incluso empresarial. Vg.: cuando la LGC (art. 156) concede a las CTA prioridad, en caso de igualdad de ofertas, a efectos de la adjudicación de contratos públicos. Así sucede también en otros países de nuestro entorno, vg.: Francia (arts. 62 y ss. y 260 y ss. del "Code des Marchés Publics") y a este sistema de fomento respondió a comienzos de siglo la legislación italiana para

cooperativa no pueden renunciar a la autonomía que le es propia y cuya tutela encomienda la propia LGC (en especial, arts. 2 y 150) a los poderes públicos. Determinados valores y adquisiciones del Derecho laboral son, a su vez, indisponibles e irrenunciables. La solución adoptada, como se aprecia una vez más, es la de que la legislación cooperativa asume, incorpora y hace suyas aquellas premisas del derecho laboral allí donde lo que en realidad se pone en común y se cooperativiza es la actividad humana de trabajo.

6.2 Régimen de los "socios de trabajo" (otras cooperativas)

Para acotar la materia conviene ahora ocuparse del segundo elemento integrante de aquella zona intermedia entre lo laboral y lo cooperativo y que podría facilitar el conflicto entre ambos Ordenamientos. Se trata de la especial situación de los "socios de trabajo".

Por encima de la mayor actualidad en materia cooperativa de la confrontación entre socios usuarios y socios que no lo son, a la cual se ha hecho referencia,[41] se acude someramente a este particular desde la perspectiva laboral que ofrecen los denominados "socios de trabajo".

El art. 30 LGC permite a todas las cooperativas -excepción hecha de las CTA y las de Explotación Comunitaria de la Tierra- que, si sus Estatutos lo prevén, puedan admitir "socios de trabajo". La actividad de estos socios es la prestación de su trabajo en el seno, precisamente, de una serie de cooperativas cuya actividad cooperativizada es otra que el trabajo.

El citado precepto remite en cuanto al régimen de estos socios al establecido para los socios trabajadores de las CTA con las salvedades de que:

(a) Ha de garantizarse a los mismos -además de cuanto pudiera corresponder como socio- una compensación económica mensual equivalente, como mínimo, al 70% de las retribuciones satisfechas en la zona para igual trabajo y, en todo caso, nunca inferior al salario mínimo interprofesional.

(b) No podrán ser mayoría en el órgano de administración (Consejo rector).

(c) Se limita el período de prueba, caso de que se hubiera previsto, y si durante el mismo se desistiera de la relación como "socio de trabajo" y el interesado viniese siendo "trabajador" de la cooperativa, se reanuda automáticamente esta condición.

La regulación de las Leyes regionales resulta del todo comparable con la de la LGC que acaba de acotarse. Así LA art. 17, LC art. 17; LE art. 21; LN art. 21 y LV art. 16.

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admitir consorcios cooperativos en los "appalti publici".

[41] Vd.: supra nota 23.

Como puede apreciarse, la legislación cooperativa asume en este caso también valores consolidados en el Derecho laboral (vg.: además de todos los expuestos al referirnos a los "socios trabajadores" de las CTA, los de retribución, período de prueba, mantenimiento y estabilidad en el empleo) que adecua a la especial cualidad de socios que representan los "socios de trabajo" que ahora nos ocupan.

La legislación cooperativa hace suyas estas conquistas del Derecho laboral de forma que -sin menoscabar la prevalencia de la condición societaria y la autonomía de las cooperativas- asegura la eficacia, cuando poco, de unos estándares laborales mínimos.

7. Conclusiones

Es indiscutible que, en nuestro Ordenamiento, tanto el Derecho laboral como el Derecho cooperativo surgen de un núcleo común -el factor trabajo-, investido de una muy especial relevancia jurídica. Del mismo modo no cabe duda de que la evolución de uno y otro conjunto normativo corre paralela para centrarse finalmente en dos ámbitos propios y distintos: la relación jurídico-laboral y la relación jurídico-societaria, en este caso cooperativa.

La legislación cooperativa es consciente de la posibilidad de conflicto -si no directamente entre normas, dado el diferente objeto y ámbito, sí entre principios sustantivos e irrenunciables- con previsiones del Derecho del Trabajo.

Como ha quedado expuesto, la coherencia del Ordenamiento se muestra mediante la peculiar técnica -que hemos denominado "incorporación"- consistente en hacer suyas, como propias, previsiones laborales sustanciales y disponerlas en aquellas relaciones societarias de carácter cooperativo pero que resultan inexorablemente vinculadas con el elemento trabajo: "socios trabajadores" en las CTA y "socios de trabajo" en aquellas otras cooperativas que los admiten. De esta forma se supera la ocasión de conflicto entre unos valores laborales irrenunciables y la autonomía cooperativa.

A este fin y a otros comparables, la legislación cooperativa predispuso el sistema de texto único, si bien con secciones específicas por "clases". Seguidamente, se ocupó de que la concreta regulación de aquellas cooperativas que quedaban identificadas por su nexo con el elemento trabajo -con independencia ya de que dicho elemento constituyera "relación jurídico-laboral" en sentido estricto- asumiera como propias sustanciosas previsiones del Derecho laboral.

7.1 Previsiones de la legislación laboral en torno a las cooperativas y sus trabajadores

Por "trabajadores" se tiene a los efectos del presente a aquellos que reúnan las condiciones técnico-jurídicas de la prestación laboral por cuenta ajena (vd.: supra 4.1). Este concepto no se corresponde con el de "socio" en cualquiera de sus manifestaciones (vd.: supra nota 23).

Como regla general, la legislación laboral (jornada, retribución, descanso, seguridad e higiene, representatividad, jurisdicción, previsión social ...) se aplica a los trabajadores de las cooperativas sin especificidad alguna y sin consideración al sector de la actividad cooperativizada de que se trate. Es cierto que la concreta actividad productiva traerá normalmente consigo una regulación particular por razón de aquella (vg.: Normativa específica de seguridad e higiene en el trabajo para las actividades pesqueras, concreto Convenio colectivo para el sector de la enseñanza o de mensajería urgente, etc...) pero no por razón de que el empleador revista o no la condición cooperativa.

Las particularidades principales en razón del sector de actividad pueden derivarse de los distintos regímenes de protección social (vg.: la actividad de producción agraria o de la minería nos conduciría a un específico Régimen de Seguridad Social según ya se ha indicado). Ahora bien, esta especificidad no es exclusiva de las cooperativas sino, por el contrario, general pues depende del concreto sector de actividad. En suma, es indiferente que el dador de trabajo sea una persona física, una sociedad anónima o una cooperativa.

Sobre lo dicho cabe agregar en materia de representatividad de los trabajadores (información, participación en las decisiones societarias, etc...)[42] que la LGC (art. 55) determina que si la cooperativa tiene más de cincuenta trabajadores o si, cualquiera que fuere el número, así lo prevén los Estatutos, un representante de aquellos formará parte del órgano de administración (Consejo rector). La elección de este representante corresponde a los propios trabajadores, así como su remoción, la duración de su mandato es igual que la dispuesta estatutariamente para el resto de miembros de dicho órgano.

[42]Esta materia como el resto de las de naturaleza laboral tiene carácter general, es decir, es independiente de la condición cooperativa o no del empleador. Se regula en el ET (vd.: supra 2.1) y puede resumirse (Cap. I del Tit. II) en que la representación de los trabajadores en la empresa se articula a través de Delegados de personal, si la empresa tiene más de 10 pero menos de 50 trabajadores, o de Comités si se supera la segunda de dichas cifras. A esta representación corresponden las funciones que son usuales: recibir información y pronunciarse sobre reestructuraciones de plantillas, jornada y organización del trabajo, formación profesional, sanciones impuestas, medidas de seguridad e higiene, proyectos de fusión o escisión de la empresa, etc...

7.2 Previsiones de la legislación laboral en torno a las cooperativas y sus socios

Salvo lo ya indicado (valores y condiciones incorporadas desde la legislación laboral) la regla general es que los socios se rigen por la legislación cooperativa, tanto la que les viene impuesta por las leyes (normativa heterónoma) como la que se deriva de la regulación estatutaria y demás reglas internas (normativa autónoma). Entre el socio y la cooperativa no media "relación laboral" sino "relación societaria" y, por ende, la legislación laboral les resulta ajena.

Prima ante todo la condición societaria y el principio de autonomía y autonormación de las cooperativas -conclusión ésta también predicable para las CTA sin perjuicio de su especial consideración y concretas previsiones de Derecho necesario y así se ha pronunciado repetidamente la jurisprudencia. De esta manera, por ejemplo:

- STS[43] de 14 octubre 1981 que afianza la relación societaria entre la cooperativa y sus socios -se trataba de la impugnación de un acuerdo social- en el carácter propiamente societario de la cooperativa y en la supletoriedad de la Ley de Sociedades Anónimas.
- STS 19 noviembre 1986 que considera -se litigaba por prestación por desempleo a favor de un socio trabajador de una CTA- que es "obligada separación entre los trabajadores por cuenta ajena ... y los trabajadores adscritos a un régimen comunitario cooperativo"

En el mismo sentido STS 30 abril 1982 y 25 junio 1991; en sentido contrario, es decir, considerar de la misma naturaleza a los "socios trabajadores" de una CTA que a los "trabajadores" -bien es cierto que a efectos de retenciones fiscales por el Impuesto de Renta- STS 31 julio 1989.

- STS 10 noviembre 1981 que reconoce -se trataba de una sanción- que el socio puede pactar con la entidad un compromiso de permanencia mínima, incompatible por ejemplo con la facultad de dimisión de los trabajadores.
- STS 3 febrero 1986 que estima -estaban en discusión determinadas obligaciones exigidas al socio- netamente societarias las relaciones internas entre la cooperativa y el socio.

En el mismo sentido STS 12 noviembre 1990 y STSJ de Cataluña de 29 de julio de 1991

[43]STS/SSTS: sentencia o sentencias, según proceda, del Tribunal Supremo (competencia sobre todo el territorio estatal). STSJ/SSTSJ: sentencia o sentencias, según proceda, de Tribunal Superior de Justicia (competencia sobre el territorio de una Comunidad Autónoma).

- Ya en un concreto supuesto de CTA, la STS de 22 de abril de 1993 establece (FJ 2°, c) que "... entre los socios trabajadores de cooperativas de trabajo asociado y los trabajadores por cuenta ajena existen factores diferenciales que justifican distinto tratamiento legal"

En suma, que por encima de debates doctrinales y jurisprudenciales (así STS de 15 de junio de 1992) el "contrato cooperativo" (STS de 10 de noviembre de 1981) y la propia relación jurídico-societaria constituye objeto propio y separado del Derecho cooperativo con relación al Derecho del Trabajo. Cuestión bien distinta es que el valor irrenunciable de previsiones propias de éste último hagan que prospere su incorporación a las determinaciones del primero.

Es cierto, sin duda, que en todas las cooperativas que admitan la especial categoría de "socios de trabajo" se advertirá a la hora de establecer el régimen jurídico de éstos una notable influencia de instituciones propias del Derecho del trabajo (vd.: supra 6.2). Ahora bien, ésto es así formalmente porque la legislación cooperativa ha incorporado a sus reglas aquellas propias del Derecho laboral, no por directa aplicación de éste.

7.3 Previsiones de la legislación laboral que rijan las CTA

Ha de reiterarse aquí la prevalencia de la condición societaria del "socio trabajador" de las CTA sobre cualquier tentación jurídica de laboralidad. No obstante y como se ha expuesto al tratar de los "socios de trabajo", el régimen cooperativo particularizado de los "socios trabajadores" de CTA está muy inspirado en las reglas laborales de carácter general (vd.: supra 6.1).

7.4 Relaciones entre la legislación cooperativa y la legislación laboral

En general se mantienen paralelismo y separación antedichos. Las colisiones que pudieran suscitarse han de tenerse por lo general como de carácter menor, en virtud de la aproximación que ha efectuado la legislación cooperativa a la de carácter laboral incorporando precisamente desde ésta previsiones sustanciales a fin de regular aquellos extremos más proclives al conflicto.

Labour law and cooperatives in Turkey

C. Geray

Introduction

There has always been a close relationship between cooperative movements and trade unions. Historically, they both emerged in England after the Industrial Revolution in an effort to solve the problems faced by workers through self-help organizations. Cooperatives and trade unions became implements of social policies and both have caused the development of labour law to regulate the relationship between employer and employee to protect workers' rights. Cooperatives play a role of economic solidarity as well as being an instrument to meet the basic needs of workers. They add something invisible and complementary to the gains realized by trade unions. Being self-help organizations of workers, cooperatives and trade unions must work hand in hand for the betterment of living and working conditions of workers.

Labour law covers all aspects of the relationship between workers and employers. Cooperative organizations established by workers can in many cases raise certain issues to be tackled by labour law since cooperatives employ workers who are members or non-members. On the other hand, the labour law has to regulate the relations between trade unions and cooperatives when the latter have been established by workers who are also trade union members.

In this study, a chapter is included on legislative framework to explain how the relations between these two worker organizations have been regulated, and to find out how these movements support each other, including types of cooperatives supported by trade unions and others which may have nothing to do with trade unions. The second chapter is devoted to the applicability of labour law to worker cooperatives includes two case studies, which illustrate how worker cooperatives can be developed by using the experiences gained from successful small-scale industrial and artisan cooperatives. The third chapter reports on a pilot study carried out through a questionnaire to 33 leaders of consumer cooperatives on the applicability of the Collective Agreements Act to cooperatives established by workers and the relationship of cooperatives with trade unions. Added are examples from collective agreements where trade unions concluded certain clauses to enable employers to support housing and consumer cooperatives.

1. Legislative framework concerning cooperatives and trade unions

1.1 Constitutional framework

1.1.1 The Constitution and trade unions

The national Constitution which went into effect in 1982 has very detailed Articles (48, 49, 50) concerning not only freedom of association, collective bargaining and contract, but also the right and obligation to work, the conditions of work and the right to leisure time. The right of collective bargaining and establishing fair wages as well as the right to strike and lockout have been incorporated into Articles 53 to 55. Article 48, that deals with the right to work and to collectively bargain, stipulates that the State shall take necessary measures to ensure the functioning of private enterprises in accordance with the requirements and social aims of the national economy, national security and stability.

Article 51 allows workers and employers (without prior permission), to form trade unions and employers' associations in order to safeguard and advance the economic and social rights and interests of their members in industrial relations. The same Article also states that joining a trade union or withdrawing from membership are voluntary and, consequently, no one shall be forced to become a member, to remain a member or to resign from membership. Article 52, in addition to other general provisions on fundamental human rights, declares that trade unions "shall not advance a political cause, engage in politics, receive support from political parties or give support to them, and shall not act jointly for these purposes with associations, public professional bodies and foundations". The ban over politics and other restrictions hinderrd free trade unionism and was lifted on 23 July 1995 when the Turkish National Assembly approved a series of constitutional amendments. While that Article did not made any direct reference to joint actions among trade unions and cooperatives, Article 171 of the Constitution contained a provision that forbids cooperatives to engage in politics or to cooperate with political parties, however, this also has been repealed by a constitutional amendment.

1.1.2 Constitution and cooperatives

Article 171 on the Promotion of Cooperatives originally reads as follows: "The State, bearing in mind the interests of the national economy, shall take measures to promote the development of cooperatives which give priority to increasing production and consumer protection. Cooperatives shall be subject to control and supervision by the State and they shall not engage in politics or cooperate with political parties.

It is obvious that the Turkish Constitution made the State responsible for the promotion of cooperatives. The Constitution also laid down certain priorities such as raising industrial production and the protection of consumers. In other words, the State gave first priority to producer and consumer cooperatives. That did not mean that the State shall not support other cooperatives dealing with other economic activities.

Since cooperatives set up by workers are mostly concerned with consumers and production, the trade unions and workers' organizations act as pressure groups to push the State to take necessary steps in light of the above-mentioned Article of the Constitution, in order to support and encourage consumer and production cooperatives in the country.

Generally speaking, the previous Constitution of 1961 had more general and flexible wording in its Article on cooperatives by stating that it is the duty of the State to take any measures necessary to develop cooperatives. It is also a fact that the 1982 Constitution has strengthened state-driven cooperatives by imposing prohibitions on political activities on them which has since been repealed by the Turkish National Assembly.

1.2 Legislation concerning the relationship between cooperatives and trade unions

1.2.1 Cooperative Act No. 1163 (effective since 1969, as amended in 1988 by Act No. 3476)

Article 1 of the Cooperative Act, which contains the definition of a cooperative, makes no direct reference to, or mention of, trade unions or institutions like local Government units, state economic enterprises and voluntary associations. Article 9 of the same law concerning the membership of juristic personalities (or corporate entities) stipulates that provincial local administrations (Il Özel Idaresi), municipalities and village administrations as well as state economic enterprises and associations, may assist or give guidance in the establishment of cooperatives for their members, and may become a member of such cooperatives in which they are interested. Lawyers, who look at the wording of these two articles of the Cooperative Act, point out that trade unions can neither work nor assist in the setting up of cooperatives, nor can they become a member since trade unions are not mentioned among the juridical personalities entitled to establish cooperatives or to become a member. However, other lawyers argue the opposite pointing out that trade unions are also entitled to assist in setting up cooperatives and/or to become members for the benefit of their members, because the Act does not forbid trade unions to do so. Had the legislative body intended not to permit trade unions to support or assist in establishing and/or becoming a member of cooperatives, it is likely that clauses would have been added in a clear wording which restrict or forbid them to do so.

Reference is also being made to the wording of the above-mentioned Articles (1 and 9) of the Cooperative Act where two Turkish words, cemiyet and dernek (the former old Turkish and the latter new Turkish for association), are used together in these Articles in referring to associations among juristic personalities who are entitled to establish or to become members of cooperatives. It is also mentioned that during the period prior to 1969 when the Cooperative Act was enacted, the word of cemiyet was used in the Turkish legislation instead of the word sendika (which means trade union or syndicate).

It is argued that the Act on Trade Unions (No. 274), the very specific legislation concerning workers' organizations, was put into effect in 1963, about six years before 1969 when the Cooperative Act went into force. Two years after the promulgation of that law, some amendments were introduced to the Trade Unions Act. These amendments reconfirmed and reinforced the roles of trade unions in supporting the establishment of cooperatives for their members and becoming a member or founder of such cooperatives. Therefore, the legislative body did not have the intention to prohibit trade unions from assisting and establishing cooperatives. It is also a fact that even the first law concerning trade unions (No. 5018 of 1947) was laid down during the 1924 Constitution where no reference was made to trade unions but to associations. In other words, the first law concerning labour unions was prepared in accordance with the Articles of the 1924 Constitution concerning associations.

1.2.2 Trade unions and cooperatives

The role of trade unions in supporting cooperation among their members may be classified as:

(1) to encourage and guide members to form cooperatives and to assist them in the preparation stage;

(2) to establish cooperatives for members by being a founding member;

(3) to become a member of the cooperatives which have been set up by their members;

(4) in addition to paying the share capital of the cooperative, to provide:

- financial aid as subsidy,
- cash credits (for short and long terms, requiring no or very low interest rates)
- other aids in kind (providing premises, personnel, transportation and communication facilities etc.)
- raising money for industrial and economic enterprises including cooperatives.

Legislation concerning trade unions in Turkey, covered many items of the above-mentioned assistance modalities.

The first legislation concerning trade unions, the Act on Workers' and Employers' Syndicates and their Unions (No. 5018, adopted in 1947) furnished trade unions with the power of taking the initiative and assisting in establishment of production, credit, housing and consumer cooperatives by supplying loans (items a and d.2).

The Act on Trade Unions (No. 274), in effect since 1963, extended the sphere of competence of trade unions to get engaged in economic activities and enterprises. Article 33, paragraph j of the law, stipulated that trade unions shall assist their members in initiatives aimed at the establishment of cooperatives, or by directly forming such cooperatives (item a, b and c). Provision was also made for trade unions to invest up to 30 per cent of their revenues in economic undertakings (item d.4).

In 1983, another law on trade unions (No. 2821), which was put into effect by the then ruling military regime, made some important changes to the relationship between trade unions and cooperatives. Article 33 para. 5 of this law restricted the ability of trade unions to deal with industrial and economic enterprises as well as with cooperatives.

It reads:

> "5. On the condition that no donation be given, to assist in the formation of cooperatives, and to provide loans to cooperatives, on the condition that the amount shall not exceed 10% of their revenues." (Items a and d.2, only)

This law provides that trade unions may give credit to industrial and economic enterprises other than cooperatives up to 20 per cent of the union's revenues. This is at least twice more credit than the law provides for cooperatives. The Trade Unions Act, (No. 2821), which is still in force, regulates the relationship of labour unions with cooperatives in the following way:

- Trade unions shall support their members to form cooperatives. No reference is made clearly in the article concerned, to directly forming cooperatives or to become a member of a cooperative set up by their members.
- According to Article 33 para. 7 of the law, trade unions can invest in economic and industrial enterprises. I think that cooperative societies must be considered among the "economic and industrial enterprises" in which trade unions can make investments.

In the implementation of the law, the Ministry of Industry and Trade does not approve the cooperative bye-laws stating that the trade union is a founder, or can become a member.

This application of the ministry has been criticized by lawyers and jurists who defend the view that the law made no clear-cut reference as to forbidding trade unions to be founder and to become member of cooperatives, and to exclude cooperatives among industrial and economic enterprises where trade unions can make investments. According to defenders of this view,

cooperatives are the most proper ones among economic and commercial organizations, corporations or companies, since the law enabled the trade unions to make investments in the field of economy and industry without making any reference to the status or to the form of organization.

1.2.3 Act on collective bargaining and cooperatives

No provision has been made as regards cooperatives by the Collective Bargaining Act No.282 (adopted in 1983 and amended by acts No.3299 in 1986 and No. 3451 in 1988). Since the right of collective bargaining is ensured by the Constitution for workers and employers in order to regulate their economic and social positions and since a cooperative is considered as a place of work, it has been within the framework of the law concerning collective bargaining. As regards worker cooperatives, different situations should be taken into consideration separately. These cooperatives have been studied under a specific section of this report.

First, there may be worker cooperatives where the cooperative acts as a contractor who finalizes agreements with firms pledging to deliver certain services or produce certain commodities by their members who are employed by their cooperatives. In this case, the cooperative is acting as the employer of their members who are also the owners, and their own employers. It is obvious that, in such a case, a collective contract is neither necessary, nor practical, since both sides of the contract are the same persons.

Secondly, if a worker cooperative employs non-member workers, the collective bargaining law is applicable to guarantee the rights of these non-member workers, if they themselves or the trade union to which they have been affiliated demands it or the cooperative initiates the necessary steps as an employer.

Another important issue which should be taken into consideration in relation to the content of collective contracts is that it is possible to put certain contributions by the employer to support worker cooperatives by supplying certain facilities to assist the operation of the cooperative or by giving financial support? There are special sections concerning this subject with examples from existing collective agreements and the opinions of cooperative leaders.

1.2.4 Labour act and cooperatives

The Labour Act (No. 1475, adopted in 1971 and as amended at least ten times in different years, mostly after 1980) has been the basic law concerning the conditions of work. It stipulates that canteens be opened in the work places which sell basic consumption goods if deemed necessary by the regional director of the Labour Ministry. It is understood that these canteens can be established by the employer or workers, or by both. Although there are no

references made to cooperatives, in the light of Article 22 of the Labour Act, it may be said that the employer is obliged to give support to such enterprises, whether it be a cooperative or not. In many cases, clauses incorporated into the collective contracts, contain pledges from employers regarding such support to cooperatives.

1.3 Types of cooperatives established by workers and their relations with trade unions in Turkey

There are different models of cooperatives established by workers in Turkey depending on their relation with trade unions and their economic functions in general. There are, for example, cooperatives which have been initiated and supported by trade unions and others which have nothing to do with trade unions, such as small artisans' and industrial cooperatives. As regards the principal economic function and the area of operation, cooperatives supported by trade unions can be classified as consumer and housing cooperatives. And those which have no direct relation with trade unions can be classified as handicraft and small industry cooperatives. For the purpose of this report, reviewed are both categories of cooperatives established by workers by taking into account their relationship with trade unions.

1.4 Cooperatives in close relationship with trade unions

In Turkey, TÜRK-IS, HAK-IS and DISK are the main three federations of trade unions having different approaches and applications in the field of cooperatives.

1.4.1 TÜRK-IS and cooperatives

TÜRK-IS (founded in 1952) adopted 24 fundamental principles, one of them concerning the promotion of cooperatives among workers. From its early years until 1964 TÜRK-IS supported housing cooperatives initiated by the affiliated trade unions. Then TÜRK-IS started a housing cooperative which constructed a residential area of 2,566 housing units in Ankara. In 1973, the 8th General Assembly of TÜRK-IS adopted a resolution concerning housing problems in the country and recommendations aimed at solving the problem. The resolution emphasized the need to mass produce houses and provide tax privileges for social housing. In cooperation with AAFLI, in 1974, TÜRK-IS started a training project for the development of cooperatives. The same year, TÜRK-IS, together with the ILO, organized a joint seminar to develop a close relationship between trade unions and cooperatives. To develop working principles for the cooperative development, TÜRK-IS implemented a questionnaire among

trade union leaders. The main feature of TÜRK-IS's approach to the promotion of cooperatives has been to support democracy through educational and organizational activities which means leaving cooperative leaders free in their decisions and not to encourage interference by trade union leaders in the management of cooperatives.

In 1975, it was decided that regional cooperative unions would be established in 17 provincial centres. Several seminars were organized for training cooperative personnel. To improve communication with the cooperatives, TÜRK-IS also issued a bulletin. At the 10th General Assembly of TÜRK-IS in 1976, the TÜRK-IS Fund for Cooperatives was set up to support cooperatives and upper-level cooperative unions. The fund, to be fed by contributions from trade unions and their federations as well as other donations from national and international organizations, was also aimed at establishing a more effective relationship between trade unions and cooperatives.

TÜRK-IS, within the framework of a TÜRK-IS and AFFLI joint project, established the TÜRK-IS Office of Cooperatives in 1980. This office organized educational programmes for leaders of cooperatives as well as trade unions and separate training courses for managers of cooperatives. Research was also carried out by this office to identify problems encountered by consumer cooperatives and to suggest possible solutions. The office published books, leaflets and other material useful for those who are interested in cooperation. In 1985, the name of the office was changed to TÜRK-IS Information Office for Cooperatives and Consumers , so as to cover the problems of consumers. The office also initiated activities to support the green movement among consumers and cooperators. Recently, this office has been closed and attached to the office of the Secretary of the TÜRK-IS Central Governing Board.

1.4.1.1 Features of the TÜRK-IS pattern of consumer cooperatives

As regards organizing cooperative unions, two different patterns have been developed within the TÜRK-IS community. The first pattern, which is more common, has been a union of consumer cooperatives on a regional basis (the horizontal pattern). The second one. YOL-KOOP is a unique example. YOL-KOOP is a union of consumer cooperatives set up by workers affiliated to a certain trade union (for instance YOL-IS) which come together at the centre of the trade union and form their union (the vertical pattern).

(a) Union of cooperatives at regional level (horizontal pattern)

Consumer cooperatives set up by workers affiliated to different trade unions come together and set up a union of consumer cooperatives in the centre of the region or in the province where more than seven cooperatives exist. In the beginning, such unions were set up in Ankara, Izmir, Izmit, Eskisehir, Tokat. Later on, two other unions were formed in Samsun

and Rize. The one in Ankara has not been active so far. Others perform their functions, so that one of them (KÖRFEZBIRLIK, Izmit) played an important role in forming the National Union of Turkish Cooperatives. KÖRFEZBIRLIK has played a leadership role in establishing the Central Union of Consumer Cooperatives which acquired its legal status in November 1994 and has started activities.

(b) Union of cooperatives set up by members of the same trade union (vertical pattern)

YOL-KOOP (The Union of Consumer Cooperatives of Workers affiliated to YOL-IS trade union) which has been a unique pattern of unity as opposed to the horizontal pattern, incorporated the cooperatives set up by workers who were the members of the same trade union in 1979. This union paid attention to international relations and became a member of the ICA. YOL-KOOP preferred mainly to buy commodities from producer cooperatives and to distribute them to member cooperatives spread throughout the country with a view to forming a channel between producers and consumers. The main feature of YOL-KOOP type of unity has been not only its highly centralized management structure, but also its very close relationship with the trade union and its leaders. It is a fact that for a long period, the president and members of the governing body of the trade union were elected as the president and members of the governing board of the cooperative union too. The same observation was also relevant for the governing body of member cooperatives.

In my opinion one of the most important differences between these two patterns is the financial support from the trade unions concerned. In other words, in the case of YOL-KOOP, the financial aid from the trade union was substantial and this created dependence on the trade union and its leaders. During the military regime from 12 September 1980, the YOL-IS ceased to provide financial support. This created serious problems for the YOL-KOOP management. On the other hand, the member cooperatives were used to buying commodities from the union on credit basis. By 1983, the union was in serious financial problems, since the member cooperatives did not sufficiently repay their obligations to the union. YOL-KOOP is today struggling to be revived and survive.

1.4.1.2 Housing cooperatives within TÜRK-IS system

No upper-level cooperative unions were developed by TÜRK-IS and the member trade unions for housing cooperatives. There are many housing cooperatives initiated by TÜRK-IS as well as by the member trade unions. As mentioned, TÜRK-IS started its own housing cooperative in Ankara in 1974. It is a fact that member trade unions undertook such projects earlier than TÜRK-IS by using credit provided by the law from the Social Security Agency (*Sosyal*

Sigortalar Kurumu, S.S.K.). After the establishment of the Mass Housing Fund (*Toplu Konut Fonu*), SSK ceased to supply credit for housing in 1986, on the grounds that the Mass Housing Fund credit could not be used with any other credit from public funds. In many cases, instead of creating their own unions, housing cooperatives supported by TÜRK-IS and affiliated trade unions, have preferred to join other housing cooperatives in order to set up unions at the upper-level within a mass housing project. For instance, KENT-KOOP, the biggest union of housing cooperatives in Turkey, has undertaken a project in cooperation with the municipality, to build 55,000 housing units and to create a satellite in Ankara. It was founded in 1979 by 13 housing cooperatives out of which 8 were worker cooperatives affiliated to trade unions such as HARB-IS, GENEL-IS, YOL-IS, DYF-IS, OLEY-IS, BASIN-IS, TEZBÜRO-IS, AGAÇ-IS.

1.4.2 DISK and cooperatives

DISK (*Devrimci Işçi Sendikalari Konfederasyonu*) developed a project called DISK-CITY in 1974, but due to certain problems caused by housing legislation policy, the project was never materialized. At the 6th General Assembly of DISK in 1977, a Resolution (No. 25) was adopted on the activities of the DISK Confederation concerning cooperatives. Reasoning that the State was responsible according to the 1961 Constitution for taking any measures necessary to develop cooperatives, and observing the fact that activities and legislation in the field of cooperatives were insufficient, the General Assembly decided to work more effectively for the amendment of the legislation concerned, so as to develop and spread cooperatives for the betterment of workers. In their by-laws, DISK and affiliated trade unions have confirmed their faith in the merits of cooperatives.

DISK put a lot of effort into uniting cooperatives established by workers and supported by member trade unions at an upper-level, but failed, since its activities were suspended for a long period by the military regime. After a long period, DISK came to life again and has confirmed its support to cooperatives i.e. mainly housing cooperatives.

1.4.3 HAK-IS and cooperatives

The president of HAK-IS Confederation has confirmed his faith in cooperation at different meetings and at their general assemblies. In a seminar organized by TÜRKKENT (Central Union of Urban Cooperatives of Turkey), the president of HAK-IS proposed that the Government, trade unions and other related institutions must come together to design policies and targets to solve housing problems through cooperatives in accordance with the principle of the Social Welfare State. In the reports of activities submitted to the 6th and 7th general

assemblies of HAK-IS, these opinions have been explained in detail. ÖZÇELIK-IS and TEZ GIDA-IS have established cooperatives in some workplaces.

1.5 Cooperatives having no direct relations with trade unions

In Turkey, worker cooperatives of production and industry have not spread. However, there are some examples of cooperatives formed by small artisans which are worth mentioning here. According to statistics prepared for me by the Ministry of Industry and Trade which is responsible for urban cooperatives, as of 15 September 1994, there were 59,899 cooperatives out of which only 389 (0.65%) were small artisanal cooperatives. Of a total of 4,062,921 cooperative members in Turkey, 14,476 members of small artisan cooperatives represents only 3.56 per cent. According to the same official source, only 128 out of these 389 artisan cooperatives have been viable (only 32.9%) in terms of fulfilling legal procedures and requirements. For the purposes of this study, Reference is made to one successful (HUGLU small artisan cooperative) and one unsuccessful cooperative namely EMEKKOOP, a member of KENTKOOP. In another section of this report, efforts have been made to study to what extent legislation concerning work conditions, collective bargaining, social security and cooperatives have been implemented by these self-help organizations of small artisans and workers.

2. Labour law and worker cooperatives

2.1 Definition of worker cooperatives

Neither in the Cooperative Act nor in the Labour Act has a definition of worker cooperatives been given. For the purpose of this study, worker cooperatives are referred to as self-help organizations established by workers, who carry out their profession jointly within an economic enterprise[44].

In Turkey the current legislation on cooperatives has not laid down any rule on worker cooperatives. Nor does the labour law. In order to answer the question on whether labour law applies to worker cooperatives, one has to identify what type of a cooperative society one is dealing with.

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[44]Y. Régis and P. Le Vey, Cooperative legislation and labour law - the application of labour law to cooperative societies, in: The relationship between the state and cooperatives, Report of a Colloquium, ILO, Geneva, 1993. (French version included in this working paper.)

For this purpose, the unique characteristic of a worker cooperative is, theoretically, the members' possession of a second identity as employee of the cooperative society. As regards the applicability of Labour Law to workplaces owned and managed by the worker cooperatives, the following different cases are to be taken into consideration:

(1) Worker cooperatives where the members(owners) are workers in their workplaces.

(2) Worker cooperatives employing workers who are not members of the cooperative.

(3) Worker cooperatives employing non-member workers as well as their members.

(4) Cooperatives employing only non-members in their workplace and ordering their members to manufacture certain goods, or some parts of it, at home.

(5) Cooperatives which do not have a workplace, but supply inputs, technical, financial aid to members and/or non-member workers who manufacture certain goods or parts of them, and distribute and sell them in the market.

There may be other prototypes, but these are the most common.

2.2 Applicability of labour law to worker cooperatives

The Labour Act No. 1475, the main law governing the relationship between a worker and employer has been based on individual work contracts signed by both parties. Such an agreement, signed individually or collectively by an employer and employee covers the rules concerning working conditions, wages, working hours, health and social security of the worker, inspection and control of workplaces and sanctions to be imposed etc. upon the employer.

According to Article 2 of this Act, which delineates the scope and jurisdiction of the law, the law applies to both workers and employers in all places of work without paying any consideration to the nature of work. Certain exceptions are provided by Article 5 of this law, for such workplaces like at sea, airline companies, in agriculture, cottage industries etc., but no reference is made to workplaces owned by the workers of a cooperative.

Since worker cooperatives are not mentioned among the exceptions listed in the above-mentioned Article 5 of the law, and also the scope of the law has been delineated by Article 2, it has been so inclusive and general in its nature, that in principle, worker cooperatives have not been excluded from the labour law since they are not mentioned among the exceptions listed in the specific Article of the law. In other words, labour law should be applied to cooperatives like any other economic enterprise. For instance, in a consumer or housing cooperative where people are employed, the labour law should be applied.

Therefore, as a rule, worker cooperatives must obey the rules of labour law in theory. But in practice, there are different situations to be considered, since cooperative members are the employees and owners of the workplace or workshops.

2.3 Worker cooperatives where members are the owners and users of the cooperative

In this case, the member is subject to two agreements. The first one is a kind of association agreement. To fulfil their joint aims, they come together to form a cooperative society or participate in an already established one in accordance with the cooperative law. The second one is a labour contract with the cooperative which must be made according to the Labour Act. Since the aim of the Labour Act is to maintain public order in regulating the relationship between employer and employees in general terms, there is a need for a special written labour contract between the worker and the cooperative covering the benefits favourable for him.

In principle, as a member/employee of a cooperative, one has the same status as other employees and can consequently receive a salary and be registered in the Social Security Institution (*Sosyal Sigortalar Kurumu*, in Turkey, known as SSK elsewhere), and receive a pension when retiring. As regards the applicability of the Trade Unions Act and the Collective Bargaining Agreement Act, the Labour Act has been hesitant because of the fact that no reference has been made to the status of the members/employees of a worker cooperative nor to the cooperative itself. No provision has been made to prohibit workers, who have the dual status of member/employee of a worker cooperative, from organizing or joining a trade union, and demanding collective bargaining agreement with the employer.

2.4 Trial periods for cooperative membership and employment candidacy

Article 12 of the Labour Act provides a trial period of a maximum of one month for employees who are hired by the employer for the first time. This trial period could be extended up to three months through collective agreements.

Can this trial period be considered as a period of candidacy for becoming a member of those cooperatives which employ their members only? Since the legislation is silent in this area, It would be better before a cooperative enters labour contract with anyone, that it lays down a condition in its by-laws to force the employee to declare his or her candidacy for membership. In other words, the conclusion of a labour contract and the association contract should be linked to each other.

2.5 Resignation or dismissal from work

An important issue in the case of resignation or dismissal from work, is how will this affect the status of a worker who is a member of a cooperative. As a general rule provided by the cooperative law, if any one of the conditions required by the law or the by-laws for becoming a member of a cooperative is lost, the membership is deemed to have terminated. In such cases it should be possible to maintain membership in the cooperative on the condition that the member fulfils the membership obligations, other than being an employee. In the case of termination of the membership, it is obvious that one has the right to apply for membership again if one wants to be employed by the cooperative.

2.6 Dismissal or withdrawal from cooperative membership

In the case of termination of membership upon dismissal or withdrawal, in accordance with the Cooperative Act or the by-laws, it should be considered that the work contract is deemed to have terminated too, under the condition that a provision was specifically made in the labour contract stating that the termination of cooperative membership entails cancellation of the labour contract. Withdrawal from cooperative membership is a right of the member, in the light of the cooperative principle known as open door , that is to say free entry to or free withdrawal from a cooperative. The Cooperative Act provides two restrictions on the right of withdrawal.

Firstly, it is possible to incorporate clause in the by-laws that a compensation can be requested if the withdrawal of the member threatens the viability of the cooperative (Art. 10). Secondly, Article 11 stipulates that using this right could be suspended up to 5 years, if it is written in the by-laws. It is also possible to include a clause stating that it is possible to withdraw if real and serious reasons emerge which justify this, on the part of the member. In principle, Art 11 considers null and void any clause in the by-laws forbidding the member to use the right of withdrawal. In the case when the board of directors denies a withdrawal, a member could, according to Article 12 of the Act, make an official declaration of his intention to withdraw by sending a notice through the notary. Since the declaration of intention to withdraw is a unilateral act, restrictions on using this personal right should be examined from the point of view of human rights.

2.7 Cancellation of the labour contract as a reason for dismissal from cooperative membership

In Turkey, the legislation effective today has not laid down any rule regarding the link between the association agreement and the labour contract. It may therefore be possible to regulate it through the by-laws. In fact, the model by-laws of small artisan cooperatives make no reference to the cancellation of a labour contract as one of the reasons for losing membership.

Since a worker loses many benefits as well as the right to work and the freedom of making contracts, all the procedures concerning the dismissal from membership must be legally and morally just. Dismissal should be based on real and serious reasons since it entails the loss of employment as well.

Procedures and conditions for the dismissal of a worker and the cancellation of a labour contract has been defined and prescribed in detail in the Labour Act (No. 2709) of 1982. Both the employer and the employee have the right to demand cancellation of the contract, by observing the procedures laid down in the law. The Cooperative Act has been silent on whether the membership would be lost or not. The model by-laws of small artisan cooperatives may be relevant in this case. Article 14 of these by-laws prescribes the reasons and conditions for dismissal. Some reasons for the dismissal of a member provided by these by-laws are very relevant to our subject. Art. 14 makes reference to Article 10 which states the qualifications for membership in a cooperative.

To become a member of a small industry cooperative, the applicant must among other qualifications:

- be professionally involved in the artisanship which is the main field of work of the cooperative, by working to manufacture certain goods in his own workplace or at the joint workshop of the cooperative,
- not be a merchant, having commercial activities with the same products that are manufactured by the cooperative.

Any member of a cooperative who leaves the profession or starts marketing the manufactured goods which are produced by the cooperative, is faced with serious grounds for dismissal.

2.8 Obligations of the members/employees

In addition to shares in the cooperative, the cooperative, employees/members might be asked to contribute a certain amount of money to the various funds, provided that the bye-laws make provision for this, in accordance with the Cooperative Act.

The Cooperative Act limits the maximum amount of shares to be pledged by any member for joining the capital of the cooperative. The number of shares to be subscribed by a member cannot exceed the amount shown in Art.19, i.e. 1000 shares, each of which has a value of 100,000 Turkish lira. In other words, participation of a member in the capital can not exceed 100 million Turkish liras. This amount cannot be increased unless Art. 21 of the Act is amended by the Government.

Article 31 of the Act stipulates that members provide additional payments only for the purpose of covering budget deficits in the cooperative.

Article 21 of the above-mentioned by-laws of small artisan cooperatives, provides that in addition to the payment of shares members/employees may be asked to pay a participation or development fee (for instance paid in monthly instalments), if decided by the general assembly of the cooperative. The general assembly, as a consequence of Art. 31 of the Act may decide to ask additional payments from members/employees for making up the deficit occurred during the year.

Since no ceiling has been prescribed in the by-laws, the amount of additional payments for the development and participation fees, is decided by the general assembly.

2.9 Responsibility of the member/employee towards third persons

According to the Cooperative Act (Art. 28) a cooperative is liable with its patrimony towards third persons for its obligations. In principle, members are not liable for the debts of their cooperative. But the law (Art. 29) provides, as an exemption, the possibility of inserting a clause into the by-laws to make the members liable personally with all their patrimony without limit towards third persons if the cooperative is unable to pay its debts. Another type of liability has been provided for by Art. 30. The by-laws may have a clause making the member individually liable in a limited way. In Turkey, cooperatives of limited liability are very common.

2.10 Distribution of surplus among cooperative members/employees

The Cooperative Act lays down how the surplus will be distributed. According to Art. 38, the whole surplus is in principle kept as a reserve fund if there is no other arrangement to distribute it. If there is a provision in the by-laws for the distribution of the surplus, this should be done in proportion to the contribution made towards the surplus. In a small industry cooperative, the contribution of the individual member can be calculated by either considering the hours or days of work or the amount of goods manufactured. The model by-laws of small

artisan cooperatives have not laid down any criteria for calculating refunds from the surplus.

The model by-laws mentioned above, do not permit small artisan cooperatives to have transactions with non-members. There is a contradiction here between the Act and the model by-laws as regards transactions with those who are not members of the cooperative. In contrast to the model by-laws, the Cooperatives Act(Art. 38) regulates how the surplus created through transactions with non-members may be distributed. That model by-laws may forbid certain actions which are permitted in the Act has been a matter of dispute. The approach of the above mentioned by-laws may be more realistic than an amendment of the Act on Cooperatives (Art. 38).

Among existing cooperatives in Turkey, some of the small artisan cooperatives are closest to the concept of worker cooperatives . In the following chapter will therefore be described the legal framework for these types of cooperatives and illustrate with two case studies.

3. Small artisan cooperatives

3.1 Legal framework of small artisan cooperatives

The main legal regulation for these cooperatives are the model by-laws laid down by the Ministry of Industry and Commerce. According to Art. 6, the aim of these cooperatives is to meet the needs of the members in carrying out their artisanal and professional activities. Although no reference is made in these by-laws to the aims of these cooperatives, to the terms of production and manufacturing. Members produce *de facto* certain manufactured goods. These by-laws contain the following functions and activities:

- to supply the members with raw materials and other inputs,
- to make arrangements for marketing of the goods manufactured by the members,
- to work for raising the quality and standardization of the products, improving techniques of packing and delivery, and seeking to minimize the cost of production,
- to establish workshops, factories and other necessary organizations ,
- to provide financial resources in order to meet the credit needs of the members by playing the role of intermediator,
- to intermediate for meeting their insurance needs.

3.1.1 Qualifications for membership

In addition to the other qualifications required by the Cooperative Act, the model by-laws require that, to become a founder or member of a small artisan cooperative, one should be actually engaged in that artisanship, at one's own workshop or at the joint workplace of the cooperative, and produce certain manufactured or semi-manufactured goods. Another qualification required by the model by-laws is that one must be engaged in or a partner of another tradesman engaged in marketing or distribution of any of the products manufactured by the cooperative and its members.

Another important rule, which differs from the others is that small artisan cooperatives are not permitted to have commercial transactions with non-members.

3.2 Case of the artisan cooperative of HUGLU

The first case studied is a cooperative, which was established in 1962 by artisans, who were specialized in manufacturing and repairing rifles in HUGLU, a small township in the province of Konya. The cooperative owns a factory where rifles for hunters are manufactured. HUGLU, in contrast to the nearby villages and small towns, has no unemployment problem, and also creates work opportunities for the people of these settlements. HUGLU cooperative has only 611 members, but employs 1,500 persons in the factory. This confirms an earlier observation. No governmental support has been given to the cooperative at all, except at the initial stage. This cooperative has been an interesting case of a worker cooperative. It has contributed to economic and social change in a rural community.

HUGLU is a rural community where nearly the whole population is engaged in manufacturing rifles for hunters.

3.2.1 Impact of HUGLU industrial cooperative upon the social and economic life of the community

The implications of HUGLU Cooperative on the economic and social development of the community, can be summarized as follows:

- There is no one in the community who is unemployed.
- Social security of the members and workers of the cooperative has been achieved.
- Employment opportunities have been created for the people living in the community and villages near by.

- The level of per capita income is higher than the average in rural areas.
- Three fourths of the cooperative members suggest that surplus in the balance sheet must not be distributed as a refund, but must be used for investment in the cooperative.
- Members consider that the cooperative has been successful (ESER, 1992) in:
  - protecting the value of their labour (35%),
  - promoting solidarity in the community (22%)
  - marketing the products more efficiently (21%),
  - obtaining cheaper input (16%).

In 1967, the cooperative started to import some parts from European countries. In 1971, HUGLU was connected to the national electricity network which raised production efficiency due to the replacement of hand power. Standardization of the products has been achieved, after the announcement of TS 870 in 1982. The cooperative allocates part of her surplus, accumulated at the end of the financial year, in the form of scholarships for the children of members who attend universities in the country.

3.2.2 Labour law and its implementation by HUGLU cooperative

There are different types of industrial relations within the cooperative:

- The cooperative offers employment opportunities for 1500 persons out of which only 611 are members.
- Those who are workers in the factory of the cooperative have been registered in the Social Security Administration (S.S.K.), but no individual, nor collective labour agreement was made.
- Member and non-member employees do not deem it necessary to organize themselves in accordance with the Act on Trade Unions.
- Most of the members and non-members working at home or at their workshops are paid according to the amount of products brought in individually. They are not considered workers as defined in the Labour Act. As they work at their workshops or at home, they are not registered in S.S.K., but in BAGKUR (social security administration of those who are self-employed).

- At the headquarters of the cooperative, there are bureau personnel who are not registered in S.S.K. and they have no labour contract with the employer (the cooperative in this case).

3.2.3 Organization of production of the cooperative

The cooperative has arranged its functions of production at different stages as follows:

(1) to procure inputs as semi-manufactured parts or finished products from domestic and foreign markets,

(2) to prepare the parts, ready to distribute among member and non-member artisans,

(3) to receive and check the quality of the parts prepared by those who work individually at home or at their workshop,

(4) to assemble and do the finishing of the rifles,

(5) to pack them and make them ready for delivery,

(6) to deal with all transactions during the marketing stage.

The HUGLU Cooperative, having the characteristics of an industrial as well as a small artisan cooperative, has been a successful model for worker cooperatives. But a more detailed study must be made for developing a model for such cooperatives in order to be able to make necessary amendments in the existing legislation concerning labour and cooperative laws. HUGLU cooperative has been a meaningful case regarding the objectives, principles and concepts laid down in ILO Recommendation No. 127, concerning the role of cooperatives in social and economic development of developing countries.

3.3 The Case of EMEKKOOP

Another case is a cooperative known as EMEKKOOP, set up in 1986 by construction workers within KENTKOOP, the Union of Housing Cooperatives, the initiator and organizer of a project targeting to build around 55,000 housing units in Ankara. In spite of the support given by KENTKOOP, this cooperative has failed.

Efforts were made to find out why this cooperative failed in spite of the initiation and the support of KENTKOOP, the biggest union of housing cooperatives. As EMEKKOOP has been dissolved and is in the stage of liquidation it was impossible to find and interview the worker members. However, several persons from KENTKOOP were interested in being interviewed.

In 1985, in order to find qualified construction workers, KENTKOOP, in cooperation with the Ministry of National Education, started a joint project on vocational training for construction workers in accordance with a protocol between them.

Those who received certificates were unable to find jobs even in Batikent, the project area of KENTKOOP, since the supply and demand for qualified labour were not met by individual and unorganized initiatives. The leaders of KENTKOOP thus deemed it necessary to organize the workers who had completed the courses. In other words, the initiative for establishing such a cooperative came from KENTKOOP, and these workers came together and decided to organize themselves in a labour contracting cooperative. With the technical guidance of KENTKOOP, they prepared by-laws which differed from the model by-laws of small artisan cooperatives. They were approved by the Ministry in 1987.

Among the 10 founders of this cooperative were the president of KENTKOOP, the head of the technical department and one cooperative leader. By forming such a cooperative, KENTKOOP was seeking an integrated training and work project aimed, not only at training, but at creating job opportunities for those trained within the project as well.

KENTKOOP laid down certain targets to be achieved through EMEKKOOP, among which were:

- to find jobs for those who completed these workmanship courses;
- to convert building activities in the construction sector from being seasonal into year round activities, in order to provide social security because employers and sometimes workers have been reluctant to become registered in the insurance scheme of the Social Security Administration due to certain financial burdens;
- to encourage workers to participate in the democratic process.
- to share the surplus they create themselves, instead of creating it for others, including employers.

3.3.1 The Cooperative as entrepreneur: contract with builders

EMEKKOOP was playing a kind of intermediary role between the employer and the employees who are its members, by making contracts with builders, a construction firm or a housing cooperative, to undertake a certain part of construction work within a certain period of time, by giving guarantees both of the quality of the product and of timely delivery. This contract would cover the amount of work as well as the payment to be made to the cooperative.

3.3.2 The Cooperative as employer: contracts with member/workers

Having acquired a contract for construction work, the cooperative distributes the work among its member/workers by concluding individual labour contracts. In this very short contract, the member/employee promises to complete a certain part of the construction within a certain number of work days, and the cooperative in return, pledges to pay a certain amount of wage, daily or monthly. The cooperative deducts a sum equivalent to 10 per cent of the wages or salaries and accumulates them in a fund in order to pay the S.S.K. premiums. The amount left, after S.S.K. premiums have been paid, is kept in this fund, in order to make monthly payments to the workers in the off season in addition to refunds from surplus created.

Apart from the first two years, EMEKKOOP had problems finding jobs for its member/ employees and ran into administrative difficulties which were not solved. Finally, the only solution was to dissolve the cooperative.

3.3.3 Reasons why EMEKKOOP failed

According to the opinions of the KENTKOOP leaders, the cooperative did not reach the targets laid down by the founders due to the following reasons:

(1) The governing board of the cooperative did not fulfil its functions to be active, influential and guiding in cooperative affairs.

(2) No professional managers were hired for carrying out non technical, financial and administrative works.

(3) KENTKOOP did not take the necessary steps to introduce EMEKKOOP to member cooperatives and entrepreneurs involved in construction so as to get support from them.

(4) No efficient control system was established by EMEKKOOP.

(5) Legal and administrative matters required by the law were not properly looked into.

(6) It was not possible to organize more work-groups composed of qualified workers.

(7) Lack of work planning and programming, and of the possibility of job creation caused those who attended and completed these courses not to become members of EMEKKOOP.

(8) The construction works undertaken by the cooperative were not completed in time nor up to the standard required in the contracts.

(9) EMEKKOOP failed to create a positive and confident image of a cooperative organization.

Most of these reasons are very much related to the management, administration and leadership of EMEKKOOP.

It would appear that EMEKKOOP had been initiated from the top and depended too much upon the support and leadership of KENTKOOP. In other words, it was not based on the initiative of those who felt a need for cooperation. No education on cooperatives was given but only training for workmanship. Those who were among the founders of the cooperative were too busy to spare time to run the cooperative. Their attention and enthusiasm faded as time went by. The members did not consider the cooperative as their self-help organization owing to their lack of involvement in the affairs of the cooperative. Lack of awareness and understanding of cooperative action were among the main reasons for failure.

4. A pilot study on the applicability of the Collective Bargaining Agreements Act to cooperatives established by workers

For the purpose of finding out the applicability of the Act on Collective Agreements to cooperatives established by workers, most of which are also members of labour unions, a pilot study and questionnaire were prepared for this report. At the end of the report, will be found Appendix A containing questions and frequency of the answers received from 33 leaders of consumer cooperatives established by workers who are also members of a trade union.

In general, cooperative leaders consider that legislation, including the Constitution and the Acts on Labour, Cooperatives, Trade Unions and Collective Bargaining and Agreements do not support good relationships between trade unions and cooperatives established by workers (Appendix A, Ques. 8).

Answers to question 9 show that respondents do not know that there are many examples that have been given in relevant section of this report. Out of 33, only one respondent answered "Yes" to the question about whether a fund can be created under the title of "Work Risk, Social Assistance and Savings" by collective agreement, 25 answered "No" and 7 did not reply. Out of 33 cooperative leaders, only 14 mentioned that there have been clauses by which employers promised, in collective agreements, support to cooperatives established by their employees, 15 replied "No", and 4 gave no reply. (Appendix A, Ques. 10).

According to respondents, employers accepted to give support to:

- consumer cooperatives as to provide a place for management and service, free supply of electricity, gas, water and assignment of some personnel, two days free leave for cooperative leaders
- housing cooperatives to supply building materials, site preparation, infrastructure, project design and credits
- both cooperatives to supply transportation, machinery, "check-off system".

Cooperative leaders were asked whether trade unions support the promotion of cooperatives (Appendix A, Ques. 11). The same distribution of answers were received to the question No. 10 concerning the pledges made by the employers in collective agreements. Again, the same 15 leaders replied "No", 4 of them did not reply, and 14 of them pointed out that their labour union provided support towards the promotion of cooperatives among its members.

Among the kinds of support they designated were the following:

—	becoming a member of the cooperative	(mentioned 13 times)
—	initiation and guiding the formation of cooperatives	(" 12 ")
—	establishing cooperatives	(" 9 ")
—	supplying credit	(" 8 ")
—	supplying cooperative education	(" 7 ")
—	assigning premises for market and management	(" 7 ")
—	reimbursing bureau expenditures	(" 4 ")
—	intermediary function between cooperative and employer	(" 2 ")

In spite of legal restrictions some of the trade unions give a great deal of support to promoting cooperatives among their members.

Also inquired were the opinions of cooperative leaders and reasons why the collaboration and solidarity between cooperatives and trade unions has not been as expected (Appendix A, Ques. 15). Of the two most frequently mentioned answers to the question on the good relations between cooperatives and trade unions the behaviour of union leaders was cited. Ten respondents referred to the reluctancy and disinterest on the part of trade unionists and 5 pointed out that the union leaders use cooperatives as a ladder to climb to higher positions. Deficiency in education has been referred to by 3 respondents. Two respondents referred to political conflicts among the leaders of two organizations, two others mentioned the restrictions imposed by the Trade Unions Act. Ten out of 33 did not reply to the question, the

reason for which is not known.

Cooperative leaders were also asked to make suggestions for maintaining better cooperation and solidarity between trade unions and cooperatives (Appendix A, Ques. 16). Respondents pointed out the need for joint education programmes (mentioned 7 times), mechanisms should be developed for joint actions, coordination and communication (9 times), trade unions should be allowed to become a member of cooperatives (5 times).

The cooperative leaders' opinions mainly concentrated on the need for cooperative education and sensibility for cooperation and coordination. It must be said that some cooperative leaders do not know about trade unions and are not well informed on which clauses are incorporated in collective agreements.

4.1 Examples from collective contracts and promotion of cooperatives

Examples have been collected from different collective agreements to give an idea on the fact that collective agreements can be used as a tool to cover deficits in the Acts on Labour, Trade Unions and Cooperatives.

4.2 YOL-IS Federation Case

4.2.1 The Fund for Work Risks, Social Assistance and Savings

Article 78 of the Collective Contract for the period covering 1 March 1982 to 28 February 1985 signed between YOL-IS Federation and the General Directorate of National Highways provided and approved by the Highest Board of Arbitrage that the Fund for Work Risks, Social Assistance and Savings be created, the aims of which are very much related to the promotion of cooperatives as follows:

(a) to meet the needs of workers, such as the school and pre-school education of their children, owning a house, in accordance with the principles of self-help and mutual solidarity;

(b) to encourage workers to get accustomed to saving and to use savings properly;

(c) to encourage organizations aimed at supplying basic primary commodities and services needed by the workers and their families, at the most convenient prices and conditions, with a view to strengthening the financial position of workers and to add these savings to their wages by managing (organizing) thrift and savings organizations.

According to the same Article of the Collective Contract, the employer will in addition to other payments contribute an amount of money equivalent to the total of 30 days net wages. The workers' contribution will be equivalent to 2 per cent of the total wages earned in that month. Along with the duration of the work contract, 90 per cent of the amount cut off from the monthly wages of the worker will be preserved in a special account. The money accumulated in the Fund will be used for covering the losses caused by the worker, and 10 per cent of the Fund will be kept in another account from which no payments can be made for any purpose other than the work risk. This Article No. 78 of the above-mentioned contract has not been renewed in the succeeding collective contracts by YOL-IS and the same employer.

4.2.2 Contribution of the employer to the housing cooperatives established by workers who are members of YOL-IS

According to the Collective Contract between YOL-IS and the General Directorate of National Highways, for the period between 1 March 1987 and February 1989, the employer promised to provide assistance to housing cooperatives formed by the members of YOL-IS, in the preparation of the construction sites and in building roads within the project area and in joining them to main streets or highways, by using the machinery, equipment and manpower within the limits of its capabilities. This contribution of the employer will be directed to those housing cooperatives under the condition that they will, by using housing credit, build at least 30 housing units that fit social housing standards, for the employees of the National Highways General Directorate. In order to start levelling off the site and constructing the roads, the cooperative must provide the land on which the houses will be built, and also furnish the necessary documents, such as building permits, title deed etc. required by law. The same provisions are made in the Collective Agreement made by YOL-IS with the same employer for the period covering 1 March 1991 to 28 February 1993.

4.2.3 Contribution of the employer to the consumer cooperatives established by workers who are members of YOL-IS

Pursuant to Article 22 of the Labour Act, and according to the by-laws concerning canteens to be set up in workplaces, the Collective Agreement No. 4 between YOL-IS and the General Directorate of National Highways, signed for the period between 1 March 1991 and 28 February 1993, the employer will assist consumer cooperatives established by workers through the initiative of the trade union. Under the condition that all employees will join and utilize equally goods and services supplied by the cooperative, the employer will provide manpower and a place for the cooperative within its limits.

4.3 Examples from other collective agreements

4.3.1 Genel Maden-IS (General Trade Union of Mine Workers)

The Collective Agreement (Article 93) between the General Trade Union of Mine Workers and the Ministry of Energy and Natural Resources, which covers a period of two years between 1 July 1990 and 30 June 1992 provided that the employer will assist (within the limits of the legislation) those cooperatives to be established by members of, and supported by the trade union, in order to meet their social and cultural needs.

4.3.2 TARIM-IS (Union of Agricultural Workers)

According to Article 44 of the Collective Agreement between TARIM-IS and the Ministry of Agriculture and Village Affairs, for the period of 1 January 1990 to 31 December 1991, the employer will assist (within the limits of legislation and the possibilities at its disposal) in establishing consumer cooperatives by the workers.

4.3.3 TES-IS (Union of Energy Workers)

In work places where there is no economat , the employer will provide a place, equipment, vehicles, transportation, and assign up to 3 persons to the cooperatives established by workers and members of the Trade Union, pursuant to Art. 17 of the Collective Agreement signed by TES-IS and the Energy Administration of Turkey, covering the period between 1 March 1991 and 18 February 1993.

4.3.4 TEKSIF (Union of Textile Workers of Turkey)

The Collective Agreement signed by TEKSIF and the Employers' Union of Textile Industrialists for the period between 1 January 1990 and 31 December 1992, stipulated in Art. 50, that the employer will pay half of the rent to be paid for the marketplace and will provide credit to the Association of Assistance from the fund accumulated for work risks under the auspices of the trade union.

4.3.5 ÖZIPLIK-IS (Union of Thread Spinning Workers)

The Collective Agreement between ÖZIPLIK-IS and the Employers' Union of Textile Industrialists (in effect from 1 September 1990 to 31 August 1992) stipulates that the

employer pay up to half of the rent for marketplace (Art. 50).

5. Conclusion

First of all, I would like to point out that no clear-cut rules have been laid down in Turkish law concerning labour, collective agreements, trade unions and cooperatives for specifically "worker cooperatives". The Act on Labour has never provided any rules about cooperative organizations employing workers, and no specific reference has been made to the different, rather unique characteristics of cooperative societies of which the members are both the users and owners. In worker cooperatives the members are employees of the cooperative which acts as the employer. In this case, there is no rule laid down for applying the labour law to these worker cooperatives.

The model by-laws for small artisan cooperatives represent the only legal base apart from the application of labour law and a few minor regulations which guide the relationship of members/employees with the cooperative they own but which acts as their employer. These model by-laws are based on the Cooperative Act which makes no reference to worker cooperatives, nor labour or industrial relations of cooperatives with member and non-member workers.

Trade unions have played a very important role in promoting the cooperative movement among working people in Turkey. Their relations with cooperatives were regulated by the Trade Unions Act laid down by the military regime in 1983. This Act introduced restrictions on trade unions in their support to cooperatives established by workers, most of which are also members of a trade union. In spite of these restrictions trade unions were engaged in providing education programmes for cooperatives and in providing guidance and other forms of assistance to their members to enable them to form cooperative organizations. These restrictions have since been repealed by amendments to the national Constitution in July 1995.

By using their power in collective bargaining agreements as an instrument through which certain contributions towards cooperatives from the employer are achieved, trade unions have so far maintained substantial support.

For the future development of cooperatives, substantial changes must be made in the legislation concerning labour law and cooperatives in order to make them more democratic and efficient structures in coping with the problems created by the changing economic environment in the country. Special legal regulations must also be made for worker cooperatives to solve the problems created by unemployment and privatization.

Here, I would like to summarize my findings, remarks and suggestions concerning the laws on labour and cooperatives:

(1) The Turkish Constitutional Law of 1982 was the main obstacle to the development of cooperatives and trade unions as well as in establishing relations between the two. Specifically, the prohibition of engagement in politics imposed on cooperatives and trade unions should be mentioned here. The clause incorporated into Article 171 of the Constitution, which stipulates that cooperatives are subject to control and supervision by the State was another obstruction in the development of democratic and voluntary cooperatives as self-help organizations.

(2) Legislation on cooperatives has created two general categories:

(i) Democratic cooperatives governed in accordance with the Cooperative Act (No. 1163), a general legislation.

(ii) There are three specific laws concerning agricultural cooperatives which are created State-driven (sometimes State-governed units), which are being used as semi-public enterprises of the State that function as a vehicle for implementing agricultural credit and marketing policies, etc. These organizations cannot be classified as cooperatives (although called cooperatives) in the light of the international principles of cooperatives of the ICA, or in the light of ILO Recommendation No. 127.

(3) The general Cooperative Act No. 1163, as amended in 1988, included some Articles which have been criticized for being contradictory to the cooperative principles of democrary, open membership, one vote, limited profit to the capital. In addition to the authority of inspection, the State has many powers concerning transactions related to all stages and aspects from the formation to the termination of cooperatives. Most of these powers must be transferred to the National Union of Turkish Cooperatives and other upper level unions in the light of the emerging principle of deregulation.

(4) By permitting only one union for any category of cooperatives in any region, the boundaries of which are being determined by the State, the Act on Cooperatives prevented cooperatives from forming apex organization freely, which is contrary to ILO Recommendation No. 127 (Article 13) as well as to the ICA principle of unity.

(5) The Act on Trade Unions Act, as amended in 1983, prohibited unions from setting up cooperatives and/or becoming members. This created another obstacle in the development of firm relationships between the trade unions and cooperatives as voluntary self-help organizations sharing the same aims.

Appendix A

A pilot inquiry about the applicability of the Act on Collective Agreements to cooperatives and their relations with trade unions[45]

(Frequency distribution of answers to specific questions of our pilot questionnaire)

Question 8. In your opinion, do the Constitution and other laws contain appropriate Articles to support good relationships between cooperatives and trade unions? If not, why?

8.1a. Constitution supports cooperation between trade unions and cooperatives 5
Constitution does not support such cooperation 27
No answer 1
Total 33

8.1b. **The Constitution does not support this cooperation, because:**
1. in its essence, the Constitution is prohibitive, and not permissive for such cooperation 9
2. there are many restrictions and controls of both of them 5
3. no answer 13
Total 27

8.2a. **Act on Cooperatives:**
1. Supports such cooperation between the two 2
2. Does not support it 28
3. No answer 3
Total 33

8.2b. **Act on Cooperatives does not support such cooperation, because:**
1. No provision has been made for trade unions to become members of cooperatives 5
2. No provision has been made for cooperative leaders to spend time to work for cooperatives on paid leave basis 4
3. Does not have any provision concerning cooperatives established by workers 5
4. No reply 14
Total 28

[45] This inquiry was carried out before the changes of the national Constitution took place.

8.3a. Act on Trade Unions:

1. Supports such cooperation between the two 0
2. Does not support it 29
3. No reply 4

Total 33

8.3b. Act on Trade Unions does not support such cooperation between the two, because:

1. It provides restrictions on the activities of unions in giving loans to, and making contributions to the capital of cooperatives 7
2. Permits the trade unions only to assist in organizing cooperatives, but does not permit them to become members 8
3. Trade unions have no sufficient financial resources to allocate to cooperatives 4
4. Trade unions have been limited, even in performing their functions . . . 5
5. Many restrictions and prohibitions on politics imposed upon the trade unions, do not play any role as a pressure group in political life 5

Total 29

8.4a. Labour Act:

1. Supports such cooperation between cooperatives and trade unions 0
2. Does not support it 26
3. No reply 7

Total 33

8.4b. Labour Act does not support such cooperation between the two, because:

1. Does not establish job security 9
2. Does not encourage the promotion of cooperatives by the employer . . . 5
3. No special provision made as regards the work conditions for those who work for cooperatives 1
4. No special provision made as regards cooperatives to be established by the workers in their workplace 7
5. No reply 4

Total 26

8.5a. Act on Collective Bargaining and Agreements:

1. Supports cooperation between trade unions and cooperatives 2
2. Does not support such cooperation between the two 2
3. No reply 4

Total 33

8.5b. **Act on Collective Bargaining and Agreements does not support cooperation between cooperatives and trade unions, because:**

1. The capacity and power of bargaining of the workers has been very weak within the framework laid down by the law 9
2. No provision made for inserting in collective contracts clauses concerning conditions and ways of support to the cooperatives established by workers 8
3. No provisions made as regards payments to be made to the cooperative on check-off basis 4
4. No reply 5

Total 26

9. **Has any fund, under the title of "Fund of Work Risk, Social Assistance and Savings", been created by collective agreement ?**

1. Yes 1
2. No 25
3. No reply 7

Total 33

10. **Have any kind of contributions been pledged by the employer to support cooperatives established by employees, in collective agreements?**

1. Yes 14
2. No 15
3. No reply 4

Total 33

10.1. **Kinds of contributions of the employers provided by collective agreements are as follows** (more than one alternative mentioned by the respondents):

Kinds of contributions by the employers	*Consumption Coop.*	*Housing Coop.*
1. Provision of place for management and service	9	-
2. Free supply of electricity, gas and water	5	-
3. Assignment of personnel for management	6	-
4. Transportation	5	1
5. Machinery	1	2
6. Paid leave for cooperative leaders	1	-
7. Provision of building materials	-	2
8. Credit supply	-	1
9. Site preparation	-	1

10. Infrastructure	-	1
11. Project design	-	1
12. Arrangement of the environment	-	1
13. Check off payments for cooperative member employees	1	1
Total	28	12

11a. If your trade union supports the promotion of cooperatives, what kind of assistance does it offer?

1. No support given to the promotion of cooperatives 15
2. Trade Union supports cooperatives 14
3. No reply 4

Total 33

11.b. Kinds of support provided by the Trade Union are as follows: (More than one alternative mentioned)

1. Provides education for cooperation 7
2. Plays a leading role and initiative to form cooperatives 12
3. Establishes cooperatives 9
4. Becomes a member of the cooperatives established by her members . . 13
5. Offers donations 1
6. Supplies credits 8
7. Provides market and management place 7
8. Reimburses the expenditures of management and stationary, postage etc. 4
9. Participates in meetings of the cooperative 2
10. Liaises between the cooperative and employer

12a. Have you ever received any credit from your trade union?

1. Yes 5
2. No 20
3. No reply 8

Total 33

12b. (If the answer is YES to question No. 12a), what is the rate of interest agreed upon?

1. No interest asked 3
2. Only 2 % 2

Total 5

13. **(If the answer is YES to question No. 12.a), have you repaid the amount your cooperative owes?**

1. Paid all 2
2. Not yet 3
Total 5

(The amount due varies between 6 million, 14. Tl, millions Tl. and 675 millions Tl.)

14. **(If the answer to the question No. 12 is YES), what is the reason for not having received credit from your trade union?**

1. We don't need credit, and we did not make any request 3
2. Trade union has been reluctant to offer credit 3
3. Financial power of the trade union has been very weak 3
4. We do not know that trade union has been entitled to give credit to the cooperatives established by her members 2
Total 11

15. **According to your opinion, what is the most important reason why the collaboration and solidarity between cooperatives and trade unions has not developed as expected?**

1. Union leaders incline to use cooperatives as a ladder to climb to higher positions 5
2. Leaders have not been interested in, and are reluctant towards cooperatives 10
3. Deficiency of cooperative education 3
4. Political and personal conflicts between the leaders of two organizations and intervention by syndicalists in the affairs of the cooperatives 3
5. The implementation and comprehension of the legislation concerned, as e.g. the law does not permit trade unions to be founder or/and become member of a cooperative, even if the cooperative is established by her members . . . . . -
6. No reply 10
Total 33

16. **What do you suggest to maintain better cooperation and solidarity between trade unions and cooperatives?**

In order to develop and maintain better cooperation and solidarity between the two organizations, leaders must:

1. Arrange joint educational programmes for leaders of both organizations 7
2. Trade unions must become a member of the cooperatives of their members, and must be represented in the governing and auditing boards of the cooperative 5
3. Mechanisms should be developed for coordination and joint action . . . 7

4. Better communication must be maintained between the two 2
5. Each organization must look after its affairs and fulfil its specific functions 3
6. Trade unions must support cooperatives by all means, legally and financially 2
7. Trade unions must seek clauses incorporated into collective agreements, which are favourable for the development of cooperatives . . . 1
8. Both sides must be politically neutral 1
9. Trade union leaders must leave their political affiliations and inclinations to use cooperatives as a ladder to climb for higher positions . . 1
10. No reply 4
Total 33

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