

# Co-operatives: Between State Control and the Collaborative Economy

Francisco Torres Pérez

This paper (presented at ICA Research International Conference, Almería, May 2016) is focused on two perceived threats to the co-operative movement: excessively detailed rules that question the desirable “autonomy” of co-operative societies, and the rise of spontaneous and unregulated forms of collaboration. On the one hand, there is violation of the co-operative principle of autonomy and independence that should govern this type of business. On the other, an indirect effect that this excess of discipline entails is the replacement of traditional co-operatives by the so-called “collaborative economy” model that operates in many economic sectors and under various forms of self-management. The conclusion is that the “special nature” of co-operatives must prevail over saturated regulation and the self-regulatory power — via bylaws or internal regulations. The legal advantages of a correct interaction between the co-operativism and unregulated forms of collaboration are also presented.

## Introduction

This paper is divided into sections. In the first section overregulation and the perceived breach of the principle of autonomy and independence are discussed. The second section — Co-operative Movement and Collaborative Economy: Threat or Opportunity — is oriented to analyse one of the indirect effects that over-regulation has: the rise of spontaneous and unregulated forms of collaboration between private individuals. The final section contains the conclusions of this work.

## Overregulation: Breach of the Principle of Autonomy and Independence

The 1995 International Co-operative Alliance (ICA) *Statement on the Co-operative Identity* interprets the autonomy and independence principle (Principle 4), and contains two premises that have special relevance for this paper. The first is that “co-operatives in every part of world are highly affected by their relations with the state”. Then a second set under which:

Governments determine the legislative framework within which co-operatives may function. In their taxation, economic and social policies, governments may be helpful or harmful in how they relate to co-operatives.

For these reasons “All co-operatives must be vigilant in developing open, clear relationships with governments” (International Co-operative Alliance, 1995: 58-59).

The clear orientation of the Principle is to avoid an excessive institutional control of co-operatives, but has also become the focus in other circumstances, specifically in relation to economic participation of members (Principle 3) and democratic control of the co-operative (Principle 2). In situations where non-user investor members can provide capital, while not participating in the co-operative business, Principle 4 helps to establish the necessary safeguards so that these kinds of members do not hold control of the society and, in this way, the principle of autonomy is respected (Fici, 2012: 13).

In the same way that the regeneration of social justice, threatened by phenomena such as globalisation, depends on the ability of the state to encourage legal forms of democratic participation, we can also say that the co-operative identity is based on the preservation of the distinctive characteristics of this social type. For this reason, co-operative legislation must be aimed at such preservation, particularly regarding the function or ‘social dimension’ (Cracogna, 2013: 209), which results from the typical organisational structure and purpose of co-operatives. Legislation and administrative regulations need to take account of the social role

of co-operatives “to allow full development of their potential” (Cracogna, 2013: 226). Where the co-operatives are legally defined then this together with the co-operative identity based on principles, values and social function, gives this legal form greater rigidity with distinguishing features and, in some instances, a comparative advantage to other forms (Fici, 2013: 18).

It has been affirmed that the co-operative business model offers “a happy medium between public regulation and private power” (Mooney, 2004: 87). Co-operatives have been classified as intermediate business forms which balance the excesses of capitalist enterprises — guided by a criterion of profit maximisation — and state companies which sometimes prioritise political objectives against the effective administration and the interests of citizens (Cracogna, 2013: 225). In these circumstances, many co-operatives face what has been termed the “co-operative trilemma” (Develtere and Raymaekers, (2005) cited in Gijssels and Develtere, 2008: 16): managing economic and social dimensions in relation to competitive markets; stakeholder relationships (members and civil society); and relations with the state. Faced with such complexities, many co-operatives have undergone renewal processes (Gijssels and Develtere, 2008) which have led to a reformulation of their relations with the State, civil society and the market, and strengthening of their co-operative identity and mission. At the same time, Münkner (2015) suggests that the revision of co-operative laws in Europe have had the following effects: from clear and simple rules to complex and complicated, detailed sets of regulations. The trouble is that such excess of regulation has not mitigated against the loss of mutuality of certain co-operatives in efforts to compete in a capitalist market. The Study Group on European Co-operative Law (SGECOL, 2015: 15), for example, reports that “co-operative practices, as well as some legislations did weaken the differences between co-operatives and companies”. Therefore, at this point, the key question is whether overregulation of co-operative societies may violate the principle of autonomy. For example, in Spain there is one state law on co-operatives and 16 regional laws, with accompanying rules and regulations, and multiple registers of co-operatives at central and regional government levels.

SGECOL (2015: 18) suggests that as autonomous organisations, co-operatives should be “regulated by special laws for their type of co-operative” and “subject to the general co-operative law only to the extent that it is compatible with their particular nature”. Second, that they have the freedom to govern and for self-regulation “within the limits of co-operative law” and that only in cases in which the co-operative law, statutes/bylaws or rules for the internal regulation of a co-operative do not apply to specific matters, can other standards and laws be applied (including those for corporations) (SGECOL 2015: 18-19; see also 31-32).

In short, self-regulation (through bylaws or internal regulations) must prevail over regulatory control to thereby respect the principle of autonomy and independence (and indirectly the democratic management) and to provide a competitive advantage to co-operatives. In this direction, it has been rightly noted that the idea of “self-organisation” is one of the many advantages of this social type that, when well used, makes co-operatives more agile than other social forms (Bérubé et al, 2012; Moss Kanter, 2012).

Based on these premises, the usual co-operative society process of constitution in Spain is reviewed to check whether, institutionally, such self-organisation is encouraged. In this process, there are broadly four steps:

- 1 Request for a certificate confirming availability of the corporate name that can be used before the registration of the co-operative concerned.
- 2 Holding the Constituent Assembly by the promoters of the co-operative.
- 3 Prequalification of the Statutes by Register.
- 4 Granting the certificate of incorporation and registration in the respective Register of Co-operatives.

The focus for the purposes of this part of the paper is on the second and third steps. One of the functions of the Constituent Assembly is precisely the adoption of the draft Statutes that

then may be subject to prequalification by the Register of Co-operatives. This qualification shall then be binding (Peinado Gracia, 2013: 164). With a practical view, usually, co-operatives often use Statutes that reproduce the literal content of many articles of the Law to thereby obtain a favorable rating. This 'state' intervention via prequalification has also been criticised as "reminiscent of the concession or authorisation system for the creation of the co-operative" (Paz Canalejo and Vicent Chuliá, 1989: 296). In short, although the co-operative norms are dispositive, the opportunity of self-regulation is lost in favour of a state "control".

This is more pronounced when, to accelerate the constitution process, online co-operative creation is allowed. This is similar to what has been established for capital-based companies, to promote access to business in compliance with European Union guidelines, in particular: Commission Recommendation (97/344/EC 22 April 1997) to improve and simplify the business environment for business start-ups; and the European Charter for Small and Medium Enterprises (called Feira Charter and adopted in 2000). It should be noted that through the implementation of these legislative innovations, many European States have tried to climb in the international rankings that measure the ease of access to business (for example, The World Bank's *Doing Business*: <http://www.doingbusiness.org>).

In the author's view, these processes further restrict the margin of autonomy and freedom of persons who want to start a business under the co-operative form. In many cases, they must opt for some 'type Statutes' to accelerate the process of constitution and in some instances, such Statutes are developed for other internal regulations.<sup>1</sup> A proposed solution to this, which will enable self-regulation, is a type of Statutes/Bylaws: the Internal Regulations Rules (hereinafter IRR). The IRR is an internal regulatory text of inferior legal hierarchy to the Statutes — which are recorded in the Co-operatives Register — and Law. However, under the principle of autonomy that applies on contracts, with its limits and respecting co-operative principles and values, there is nothing to prevent IRR regulating the issues not provided for in the statutes of the co-operative (Senent Vidal, 2005: 72-73). This is of specific relevance given the 'frugality' and lack of detail in the Statutes (and the legislative plurality of the autonomous regions). It would allow for specific governing rules, internal control procedures and regulation of conduct appropriate to co-operatives. For example:

- a Aspects of the legal regime for members of the co-operative: rules of social discipline, aspects related to the provision of work in the co-operative, the regime of partner people working or, in general, the professional status of the members; and,
- b The development of organic operation and of certain organs. However, besides these 'legal' provisions, the development of economic and financial aspects, measures of social responsibility in co-operatives (including positive actions in favour of real equality between women and men) could be accommodated in the IRR (Senent Vidal, 2011: 70-72).

If the IRR has a central role in the functioning of the co-operative then the idea of self-organisation is strengthened. At this time, the different co-operative laws in force in Spain do not include a list of matters that can be developed by the IRR. These laws are limited, first, to verify that the Statute may be developed by IRR and to be approved by the General Assembly. And, second, these Laws derive the regulation of certain matters directly to what is established in the IRR. In these circumstances, it is easy to deduce that the autonomy declared by the co-operative legislation and the incentive of the necessary self-organisation cited above, disappears when a very detailed legal framework combines with an excessive state intervention in the process of constitution of the co-operative society.

## **Co-operative Movement and Collaborative Economy: Threat or Opportunity?**

In 2014, the European Economic and Social Committee in its *Opinion on Collaborative or participatory consumption, a sustainability model for the 21st century* (DOUE 2014/C 177/01 de

11/06/2014), defined collaborative or participatory consumption as:

the traditional way of sharing, swapping, lending, renting and giving away, redefined through modern technology and communities (paragraph 3.1).

As this definition points out, we are faced with already known practices — ‘traditional’ ways to consume — enhanced by using new technologies to make this a more efficient service and to reach more people.

The *Opinion* indicates part of the ‘goodness’ of the collaborative economy is that it has emerged and has developed exponentially in response to crises of the capitalist system and values, and presents ‘resilient’ behaviour against the economic crisis. Finally, the *Opinion* indicates lines of action for orderly development of collaborative consumption, proposing (paragraph 5.2, i) that such action strategy is carried out specifically in the following fields: Educational; Associative consumption; Co-operatives; and Citizenship. Specifically, co-operatives are seen as potentially

*the main ally of collaborative or participatory consumption, because they combine and share principles and values.* The co-operative movement can therefore strengthen initiatives, both proactively and reactively, as well as accommodating collaborative or participatory consumption networks with similar aims (author italics).

However, the power of the facts overcomes the ‘naivety’ of the *Opinion* cited above. According to a report prepared by PricewaterhouseCoopers in 2015, the economic growth potential of “five key sharing sectors — travel, car sharing, finance, staffing, and music/video streaming — [has] the potential to increase global revenues” from around \$15 billion (€13 billion) at present to \$335 billion (€300 billion) in 2025 (PwC 2015: 14). These magnitudes, as well as the controversial modus operandi of some of the major players in the collaborative economy, suggest a change of perspective is needed on this phenomenon.

This change is evident in another *Opinion* this time in the EU Committee of the Regions Commission Meeting (December 2015) entitled *The local and regional dimension of the sharing economy*. Three issues are significant. The first is the objective to establish certain principles for the future development of a legislative initiative of the EU on the collaborative economy. Certain forms of collaborative economies, such as crowdfunding, have already been subject to regulation in Spain (Act 5/2015, 27 April, promotion business financing). This Act outlines in detail (arts 46-93) the legal status for participatory financing platforms in cases in which the investor hopes to receive a monetary remuneration for their participation.

A second issue arising from the Commission opinion declares that any initiative on this question should consider the ‘goodness’ but also the negative impact of this phenomenon. Due to its legal importance, the Committee warns that

it is important that services offered through SE [Sharing Economy] do not lead to tax avoidance, unfair competition or are in violation of local and regional regulation or national and European law (paragraph 13).

This issue is again emphasised in paragraph 18 of the *Opinion*, where it expressly maintains that:

... SE initiatives should not be entitled to use the sharing paradigm only to disrupt pre-existing markets by aiming at a cost-reduction strategy based on avoiding the regulatory costs applicable to those similar services and products which are not provided by means of platforms.

These sentiments are repeated in paragraphs 19 and 22. It also encouraged to the possibility of effective self-regulation by agents of the collaborative economy and the insurance coverage of activities (paragraph 15); and contains another important warning about the need to control the violation of labour legislation by collaborative platforms economy (paragraph 16).

Finally, it should be noted that the *Opinion* ‘encourages’ the Commission and member states to promote collaborative economy with the objective of applying the principles of social



economy, citing, in particular: the principles of solidarity, democracy and participation, as well as co-operation with the local community (paragraph 23). Given these conditions, which certainly would guide any legislative attempt in the future, it is useful to consider the relationship between co-operativism and collaborative economy.

This relationship, already framed in the ICA *Blueprint 2020* (Mills and Davies, 2013), has already been the object of recent studies. The ICA *Blueprint* aims to strengthen the co-operative model and grow the global movement. Co-operatives are a vehicle of growth and development — a business model that allows people and communities to meet their needs and aspirations. In particular, one of the main objectives for the co-operative form of business — by 2020 — is to become: The model preferred by people.

This objective is divided into five pillars, of which two will be highlighted: the pillar of participation and the pillar on the legal framework. This will help to review the governance of these type of societies, the flexibility of the Co-operative Law, and if the co-operative model can be extrapolated to fit a model of collaborative economies.

The relationship between co-operativism and collaborative economies is looked at from several different perspectives. The first derives from a critical perspective of the co-operative sector.

In a study conducted by Conaty and Bollier it is suggested that: “many (large) co-operatives have simply adapted to the competitive practices and ethic of the capitalist” (2014: 1). The ‘background’ of this debate is clear: the co-operative values have been violated by some companies that, under the co-operative form, act as capitalist enterprises. For this reason, it is necessary to reformulate certain concepts. These authors talk about ‘open co-operativism’ as a regeneration of the ‘traditional’ co-operativism where there is confluence with the collaborative economy. The resulting synergy could generate “a new type of post-capitalist and ethical market-place” (Conaty and Bollier, 2014: 21), creating — in the words of Como and Batistoni (2015: 101) — “new forms of political and economic power external to the state-market duopoly”. From a legal point of view, one of the priorities associated with the ‘open co-operativism’ is the need “... to build and expand new regimes of Law, Governance and Management” (Conaty and Bollier, 2014: 23-24).

From another perspective, Scholz (2016), talks about the so-called “Platform co-operativism”. In this case, these authors start from the need to offer a real alternative — protected by co-operative values and principles — to certain platforms for participation that, under the umbrella of “collaborative economy”, act as “capitalist” platforms. The consequences of these capitalist platforms are clear benefits “for consumers, owners, and stockholders” but “the value added for vulnerable workers and the long-term value for consumers are unclear at best” (p5). Scholz (2016) provides strong criticism of these platforms in that they break the law — especially labour law; they only generate profits for a few; and they do not have a social vocation. As a solution, the concept of “Platform co-operativism” is offered, based on three pillars: the use of technological tools; solidarity articulated through the co-operative formula; and innovation and efficiency oriented to the common benefit.

Also, Scholz (2016), formulates ten principles applicable to such platforms. Key among them, from a legal point of view are: Principle 1: “Ownership” (taking account the different view of property — not physical possessions — and collective ownership of platform co-operatives); Principle 2: “Decent Pay and Income Security” (to users and workers); Principle 5: “Co-determined Work” (because labour platforms should involve workers from the moment of the programming of the platform and continue with their usage of it); Principle 6: “Protective Legal Framework” — platform co-operatives require legal help because they are deemed unusual; and, finally, Principle 8: “Protection Against Arbitrary Behaviour” — it is essential that workers establish their own, decentralised reputation and identity systems (Scholz, 2016: 18-21).

The interaction between collaborative economy and co-operativism has also been the subject of detailed study in Italy by the Fondazione Unipolis (Como et al, 2015). This report clarifies

several issues. For the purposes of this paper, the following are of note: a) the efforts to *clarify concepts, in particular collaborative economy* and its key features; b) analysis of the *common aspects and differences* between the two realities; and, above all, c) *situations arising from the interaction* between co-operativism and collaborative platform economies and its future perspective (author italics). Some ideas that are indicated throughout the report will be reviewed from a legal point of view. For this, the weaknesses of the legal structure of such platforms will be identified and, only then, indicate what the co-operative experience can contribute to solve them.

There are weakness regarding the governance of typical collaborative platforms. Although there are exceptions, the greater part operate in the form of capital companies with governance and decision-making structures in line with the social type chosen. Therefore, it is concluded “control is centralised and does not allow forms of redistribution or mutualism” (Como et al, 2015: 21).

As indicated in earlier discussion, there are concerns about the regulation of collaborative economy platforms. These specifically relate to deficiencies (and threats) presented in terms of tax and labour issues. The profound transformation of the organisation of production and work and the liability regime derived from such activities are highlighted and closely linked with insurance contracts. In addition, an issue cited but not properly developed, is the creation of any ‘monopolies’ both in relation to antitrust law, and acts of unfair competition. For these reasons the study rightly concludes that:

... the world of co-operation, given its carried values and its principles, may apply to be the leading force in this time of transition (Como et al, 2015: 43).

In relation to what co-operativism can do to address these deficiencies, the Unipolis report puts forward two premises. First that collaborative economics is a model, while the co-operative is a form of defined and regulated company; and second that “co-operative principles are translated into elements of governance and rules of operation characteristic of this legal form” (Como et al, 2015: 60). It is concluded, from the legal point of view, that classical co-operativism characterising elements (mutuality, community interest, governance and regulation) properly readapted, are more suited to the collaborative model economy than any other social form (Como et al, 2015: 82-83). In this way, the co-operative *know how*, provides undoubted advantages to the model of collaborative economy. These advantages translate mainly on a higher level of legal security especially in a period of ‘transition’ (Uber, Airbnb cases serve as examples).

What is required is both an adaptation of co-operativism and also a new approach to collaborative economy entrepreneurs because of its different approach to the ‘benefit’ with respect to co-operative entrepreneurs. As rightly pointed out,

... the motivation of co-operative entrepreneurs will be mainly to fulfil their social objective through the creation of a co-operative enterprise. Instead, for collaborative entrepreneurs the main motivation will be to obtain the maximum benefit through the exponential growth of the digital economy (Sunyer, 2016: para 7).

In this sense, the opinion of the founder of OuiShare, Antonin Léonard is that rather than centralised and traditional structures such as used by businesses and collaborative economy ‘capitalist’ platforms (Uber, Airbnb, etc), we should opt for solutions where the prime concern is a new concept of mutuality where the role ‘producer-consumer’ disappears (Climent, 2015). However, Bauwens (2014) considers that many co-operatives operate in capitalist markets and tend towards a competitive mentality and, where appropriate, they work for their own members, not the common good. Therefore, the said adaptation would go through a determined orientation of co-operatives towards the common good, governance models that include all interested parties (*multistakeholder co-operatives*) and a global political and social organisation together with local production (Bauwens, 2014; L’Apòstrof, 2016).

## Conclusions

Drawing the two parts of this paper together confirms that co-operative identity derives both from respect for the principles and values of the ICA and appropriate legal development. Upholding the principle of autonomy and independence can avoid an excessive institutional control of governments on the co-operative sector. Also, there is an evident connection with the democratic member control principle and prevention of people who provide only capital holding control of the co-operative.

Member states of the European Union must encourage legal forms that guarantee a democratic member control and participation to ensure the regeneration of social justice. Co-operative legislation must preserve the social function of these societies conforming to that dimension and legislation must respect the autoregulation and autonomy that characterise the co-operative. Self-regulation must be encouraged. This is possible due to the voluntary character of many matters regulated in co-operative laws, the principle of autonomy of will in contracts and the possible existence of internal operating rules. In this direction, an excessively complex or detailed legislation is harmful.

The capacity of co-operativism to adjust to new realities depends on the preservation of their identity combined with a flexible regulatory framework, adapted to any type of operator. Collaborative economy models have diffuse profiles: some operators who share the values and principles of co-operatives and others guided only by profit maximisation. This model has been in a time of transition. Any attempt to future regulation must counterbalance its deficiencies by its benefits. As the co-operative society is a defined and regulated legal form, and co-operativism provides security and knowhow, that could lessen the legal weaknesses of the 'model' of collaborative economies. However, co-operativism must readapt to the decentralised and horizontal structures of the new platforms of collaborative economy, to produce the necessary synergies. Such adaptation derives, in great measure, from a flexible interpretation of the principles of autonomy, democratic member control, and economic participation.

## The Author

Francisco Torres is Associate Professor at Vigo University. He defended his PhD Thesis in 2011 on the topic of the legal regime of contributions in co-operative societies (published in 2013 by Aranzadi Thomson-Reuters). Since 2014, he has taught a course on co-operative law and is secretary of the review *Cooperativismo e Economía Social* (Cooperativism and Social Economy) edited by the University of Vigo.

## Note

- 1 As a recent example of this online constitution process, see: <http://www.juntadeandalucia.es/organismos/empleoempresaycomercio/areas/emprendedores-cooperativas/cooperativas/paginas/constitucion-cooperativas.html>. Regulated by Order of 26 July, 2012.

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