

THE NEW HYPO-SUFFICIENCY AND THE RELATIONS BETWEEN COOPERATIVES AND THEIR MEMBERS

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ABSTRACT

This study aims to analyze the characteristics of the relationship between cooperatives and their associates. Cooperatives are societies that exist for solidarity and equality among their members. For that reason, “cooperative action” demands those characteristics and excludes any lucrative purpose, in addition to preventing decisions that are not made through deliberation and permitting the use of the services in conformity with the general decisions. Thus, associates enjoy a dual quality, which is acting as users and managers of the business. Also, in light of the autonomy of the members and the non-existence of inequality, the principles of vulnerability and hypo-sufficiency should not be applied. Therefore, it is necessary that the analysis of the new concept of hypo sufficiency, values the will according to the dignity of the human person, allows an individualized treatment and also guarantees the continuity of the society and the income of the members. Otherwise, there will be an excess of protection without observing the particular characteristics of cooperativism.

KEYWORDS: Cooperative law. Cooperatives. Associates. Vulnerability. New hypo-sufficiency.

RESUMEN

El presente estudio busca analizar las características del relacionamiento trabado entre las cooperativas y sus asociados. Las cooperativas son sociedades que priman por la solidaridad e igualdad entre sus miembros, por esa razón, el acto cooperativo demanda esas características y excluye cualquier intuito lucrativo, además de impedir decisiones que no sean admitidas mediante deliberación, permitiendo la utilización de los servicios en conformidad con las decisiones generales. Así, los asociados gozan de una dupla calidad, o sea, son usuarios y gestores del negocio y delante a la autonomía de los miembros y de la inexistencia de desigualdad, los principios de la vulnerabilidad y de la hipo suficiencia no deben ser aplicados. Es necesario, así, que el análisis del nuevo concepto de hipo suficiencia, que valora la voluntad según la dignidad de la persona humana, permita un tratamiento individualizado y que garantice la continuidad de la sociedad y de la renta de los miembros, pues, de lo contrario, habrá un exceso de protección sin observar las características particulares del cooperativismo.

PALABRAS LLAVE: Derecho cooperativo. Cooperativas. Asociados. Vulnerabilidad. Neo Hipo-suficiencia.

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INTRODUCTION

In a relationship among parts, it is usual to protect the one with less knowledge, less information or economic disadvantage, through the principles of vulnerability or hypo-sufficiency.

However, when the relationship is between a cooperative and its members, there is no vulnerability or hypo-sufficiency, because associates, in addition to being users, are managers of the enterprise. This double condition transforms the relationship into a unique legal situation that needs to be faced according to the cooperative principles and the law.

This relation is called as the “cooperative act”, which is a juridical expression of solidarity, of self-effort and mutual help, combining general and individual interests of their members, observing equality among them.

For this reason, the members' wishes and good faith should be appreciated, so as to preserve the cooperative's objective, which is to provide a better labor ambience, a better socio-economic condition, access to members' aspirations, such as those for cultural and social responsibilities, through a democratically-controlled society.

Therefore, it is necessary, in such cases, that the concept of the new hypo-sufficiency must be observed, since it sheds light on decision making compatible with the dignity of the human person and proposes an individualized treatment, and the excessive protection currently applied without observing the cooperatives particularly conditions could jeopardize the continuity of the cooperative society and the income and labor conditions of the members.

1 THE COOPERATIVE ESSENCE

Cooperativism emerged during the 19th Century as an alternative to the abuses of Industrial Revolution. As one aspect of the social and solidarity economy, cooperatives propose different form of economic organization based on their own values and principles which aim for greater justice and equality among their members, rather than of profit.

Cooperative principles bring the essence of the cooperative identity, reflecting their specificity. The International Cooperative Alliance (ICA) defines the cooperative society as an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly owned and democratically-controlled enterprise².

Cooperative societies do not exist to provide services in their own interests, but to provide the services to and for their members. That shows a socio-economic ideal called solidarity, which is capable

² ICA. *What is a co-operative?*. Available at: <https://ica.coop/en/what-co-operative>. Access: 08/28/2017.

of giving people independence and freedom through collective working and distinguishes cooperatives from other economic orientations^{3 4}.

To make this possible, it is necessary to have the active participation of the members in three different ways: i) being an associate and a provider of goods or services to the cooperative enterprise; ii) being an associate and a worker at the cooperative enterprise and iii) being an associate and a client of the cooperative enterprise⁵. This duality is what makes the relations between cooperatives and their associates unique.

2 THE RELATION BETWEEN THE COOPERATIVE ENTERPRISE AND THEIR MEMBERS: THE COOPERATIVE ACT

When a member enters a relationship with the cooperative, they do it through a cooperative society contract. That generates a cooperative act which does not involve a market operation. It can be seen as being neither a contract of sale nor a contract of purchase because no profit-making purpose is attached to the act which emerges from the members' deliberation.

According to Pastorino, the cooperative act is a juridical expression of solidarity, of own effort and mutual help, combining the general and individual interests of their members. Additionally, it does not provide for uncanscionable clauses due to the essential equality among the cooperative's members. For this reason, there is no trespass on other's juridical sphere, much less a wish to overwhelm the other as is inherent in arms length business transactions. No third person is forced to submit to another's will without participation. There is no arbitrariness⁶.

Therefore, the nature of the bond is clearly associative, established by the law that governs cooperativism, applicable to all branches of cooperatives. This association is the main reason to explain and justify the use of the term associate with all the recipient of services that bring together a triple condition, which are:

- The members are the cooperative owners, because the associates have brought the necessary capital to the society constitution;
- The members are the cooperative managers, governing, administering and controlling the society according to governance skills;

³ FRANKE, Walmor. *Direito das Sociedades Cooperativas: direito cooperativo*. São Paulo: Saraiva, 1973, p. 7.

⁴ MIRANDA, José Eduardo de; SOUZA, Leonardo Rafael. Entre el adecuado tratamiento fiscal y el tratamiento fiscal privilegiado: una propuesta de inmunidad tributaria a las cooperativas en razón de la causa del cooperativismo. In: *Boletín de la Asociación Internacional de Derecho Cooperativo*, n. 50, 2016, p. 161-176 (165).

⁵ MEIRA, Deolinda Aparício. *O Regime Económico das Cooperativas no Direito Português: o capital social*. Porto: Vida Económica, 2009, p. 44-45.

⁶ PASTORINO, Roberto Jorge. *Teoría General del Acto Cooperativo*. Buenos Aires: INTERCOOP Editora Cooperativa, 1993, p. 34 and 42.

- The members are the services' beneficiaries, since they have created cooperatives to provide service without needing someone than the society⁷.

That particular relation established between the cooperative and their members shows the lack of vulnerability or hypo-sufficiency of the associates, because they are able to manage their own business.

3 THE VULNERABILITY AND THE HYPO-SUFFICIENCY CONCEPTS

The concepts of vulnerability and hypo-sufficiency are applied to labor and consumer relations. They provide the understanding that in those cases one party is weaker than the other, or has less knowledge about the situation they are in.

Vulnerability is the cornerstone of consumer protection and demonstrates consumers' fragility in the consumer relationship which is unbalanced because of economic or educational issues⁸ and it can be divided in four different types, which are technical, juridical, factual and informational.

Technical vulnerability is presumed in the case of non-professional consumers, but in certain cases it could also be applied to professionals who do not have sufficient knowledge about the services and products to be acquired⁹. In turn, juridical (or scientific) vulnerability is found when there is a lack of specific knowledge on, for example, accounting, legal or economic matters.

On the other hand, factual, or socio-economic, vulnerability occurs when one party, e.g. the supplier, enjoys superior economic strength. The last vulnerability, the informational, derives from the technical, but it must be individualized in light of the power-information binomial, since it is common to see manipulated, controlled or unnecessary information, used to bring a greater imbalance factor to the relationship¹⁰.

As a matter of course, they stem from a contract in which the clauses were unilaterally established or have been approved by the authority of the product or service supplier, without permitting the consumer to discuss or modify their content. That situation maintains the asymmetry of forces before negotiation, preventing proper communication among parties and the consequent possibility of changing clauses¹¹. For this reason, clause interpretation occurs in favor of the consumer¹².

⁷ CRACOGNA, Dante. ¿Asociados, usuarios, clientes?. In: *Identidad Cooperativa*, año XVII, n. 94, mayo/junio 2017. Buenos Aires: FEDECOBA, p. 12-13 (12).

⁸ TEIXEIRA, Marianna Ferraz. *A inaplicabilidade do Código de Defesa do Consumidor às Cooperativas de Crédito: uma abordagem da jurisprudência do STJ e do TJDFT à luz do princípio da igualdade e das regras de interpretação normativa*. Brasília: Vincere Associados, 2016, p. 48-49.

⁹ MARQUES, Claudia Lima. *Contratos no Código de Defesa do Consumidor*. 3. ed. revista, atualizada e ampliada. São Paulo: Editora Revista dos Tribunais, 1999, p. 147-148.

¹⁰ OLIVEIRA, Andressa Jarletti Gonçalves de. *Defesa Judicial do Consumidor Bancário*. Curitiba: Rede do Consumidor, 2014, p. 54.

¹¹ MARQUES, Claudia Lima. *Contratos no Código de Defesa do Consumidor: o novo regime das relações contratuais* [livro eletrônico]. São Paulo: Editora Revista dos Tribunais, 2016.

Conjointly, vulnerability reflects on hypo-sufficiency in the original meaning of the term: incapacity or economic disadvantages. However, the most important aspect of the hypo-sufficiency principle is the absence of information¹³, being mainly dealt with at the pre-contract or procedural stage to avoid abuses both in labor law and in consumer law.

4 THE NEW HYPO-SUFFICIENCY CONCEPT AND ITS APPLICATION TO THE COOPERATIVES

The new hypo-sufficiency tries to bring more equality to the contracting parties, generating a more equitable treatment because its axis is no longer economic, but flexible and emphasizes wishes compatible with the dignity of the human person. In this way, it presupposes an individualized treatment, according to each party's reality, and no longer uses rigid parameters¹⁴.

The dignity of the human person is the basis of freedom, justice and peace¹⁵. It is an ethical rationale for policies, insofar as rationalizations of humans' coexistence will only be accepted if they are founded on human beings' dignity in society because people do not have *a priori* ontological differences that make their inequality possible and prevent their self-determination in the world. That dignity of the human person is manifested in the equality principle which prevents individuals from being subjected to any discriminatory treatment and enables them to have equal rights¹⁶.

This concept could perfectly well be applied to the relations established between cooperatives and their associates because the cooperative society emerges from one group will and the necessity to provide solutions in which the members' interests prevail in accordance with equality. Members enjoy the service and manage the cooperative in the manner and the form determined by their assembly as a result of the double quality principle. That states that members need to be at the same time, associates and users.

For this reason, cooperatives are established on the basis of democratic management. Their operations must be approved by the members, who have voluntarily joined the cooperative society. To maintain the society, the associates and the employees at the cooperative need to be constantly trained in accordance with the cooperative principles. Those particularities demonstrate that the associates are equally treated and have knowledge about the business they manage and enjoy.

¹² EFING, Antônio Carlos. *Contratos e procedimentos bancários à luz do Código de Defesa do Consumidor* [livro eletrônico]. São Paulo: Editora Revista dos Tribunais, 2015.

¹³ NUNES, Luiz Antonio Rizzatto. *Curso de Direito do Consumidor*. 2. ed. rev., modif. E atual. São Paulo: Saraiva, 2005, p. 578.

¹⁴ MATTOS, Felipe Montenegro. A Neo-hipossuficiência do Trabalhador e a (In)disponibilidade de seus Direitos. In: MENDES, Gilmar Ferreira; MARTINS FILHO, Ives Gandra Martins. *1º Caderno de Pesquisas Trabalhistas*. Porto Alegre: Magister, 2017, p. 115-131 (116-117).

¹⁵ SILVA, José Afonso da. *Curso de Direito Constitucional Positivo*. 37. ed. revista e atualizada (até a Emenda Constitucional n. 76, de 28/11/2013). São Paulo: Malheiros Editores, 2014, -. 165.

¹⁶ CORRÊA. André L. Costa. Apontamentos sobre a Dignidade Humana enquanto Princípio Constitucional Fundamental. In: Velloso, Carlos Mário da Silva et al (coord.). *Princípios Constitucionais Fundamentais: estudos em homenagem ao professor Ives Gandra da Silva Martins*. São Paulo: Lex Editora, 2005, p. 115-123 (116).

If there were no inequality and members enjoyed the widest autonomy in the execution of service provision, there would be no need for protection because there would not be vulnerability or hypo-sufficiency.

Therefore, the concept of the new hypo-sufficiency must be observed when analysing questions that deal with relations between the cooperative and its associates - due to the prevalence of the parties' wishes and of the legal certainty created by the cooperative's statutes and the good faith of its members. Equally, excessive protection could jeopardize the continuity of the society and the income and labor conditions of the members.

5 CONCLUSION

Cooperatives are the kind of enterprise in which the associates are more important than the economic element. That is why they are distinguished from the other business structures. They need to follow values and principles that are the essence of their identity. For this reason, the associates need to participate in constant education and training since the movement proposes a system that confronts capitalism.

The members voluntarily join the cooperative, which means they are willing to take advantage of the services and accept the responsibilities of managing their own business. Each associate has an equal vote on decisions taken in the assembly. Therefore, the associates have extensive knowledge about management rules, which removes any type of vulnerability or hypo-sufficiency between the society's integral parts.

Thus, when analyzing conflicts between associates and the cooperative, it is necessary to consider the need expressed by the society's creation. Otherwise, its development and continuity will remain impaired and will jeopardise the members' labor conditions thus permitting the application of the new hypo-sufficiency concept.

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