# *Articles*

## VOLUNTARY MEMBERSHIP: UP TO WHICH POINT DO COOPERATIVES SUPPORT LIBERALISM?

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### 1. Introduction

In 1950, the most significant French legal thinker in cooperative law of the 20th century (Coutant 1950, p. 199) wrote about voluntary membership (« LIBRE ADHÊSION »):

« Ce principe a une portée très large, puisque par ses deux aspects essentiels - liberté d'adhérer et liberté de ne pas adhérer il différencie la Société Coopérative à la fois de la Société de droit commun basée sur le profit et de l'entreprise étatique d'un régime d'économie collective. Cette double distinction […]ne nous intéressera que dans son premier aspect […] puisque l'état de droit actuel ne justifie une différenciation, sur le plan juridique, qu'à l'égard des institutions soumises au même régime de base, c'est-à-dire des Sociétés Civiles et Commerciales, de Personnes et de Capitaux »[1].

In other words, cooperatives are opposed to profit-oriented companies because of their open membership, and to public enterprises in collective economies because of their freedom of association, and it is more important to focus on the first aspect of the principle, since the risk of confusion is lower with public enterprises in our societies. If we look at the literature in cooperative law, its advice seems to have been perfectly heard: more or less, one can find nearly nothing about voluntary membership, apart from the recurrent tune of cooperative autonomy[2](ICA, 2015).

Nevertheless, in 2015, the European Court of Human Rights condemned Greece (ECHR, 3rd of December 2015, MYTILINAIOS ET KOSTAKIS V. GREECE) for a provision regulating a mandatory cooperative, arguing of its contradiction with the freedom of association (European Convention on Human Rights, Article 11). No one, at least in the academic area, would contest the majesty of the freedom of association, even in its negative side, that is increasingly considered. However, when one looks at the various cases in which the freedom not to associate has been stated, they often feel a discomfort, since the

[1][This principle has a very large scope, because by its two essential aspects - freedom to adhere and freedom not to adhere, it differentiates the cooperative society from both the company under ordinary law and based on profit, and the State enterprise under a collective economy regime. This double distinction (…) will be of interest only in its first aspect (…) since the current state of law justifies a legal distinction only with regard to institutions subjected to the same basic legal regime, i.e. civil and commercial, private and public companies.] Translated by myself.
[2] Namely the first principle.

goat of the free rider is never far. Therefore, contrary to common opinion, it is not useless to scrutinize the meaning and strength of voluntary membership, in order to discuss its limits and its compatibility with the freedom of association.

To achieve that inquiry, we will demonstrate first the ambivalence of voluntary membership in cooperative thinking (Section 2), related to the complexity of voluntary membership in cooperative practice (3); then, we will explain the development of the freedom to associate and its connection with voluntary membership (4); finally, in order to draw some conclusions, we will make a first assessment of the arguments for and against voluntary membership nowadays (5).

## 2. Voluntary Membership in Cooperative Thinking

We do not claim to make an exhaustive overview of cooperative doctrine about voluntary membership, but we will try to show that it has never been as obvious as it appears today. And to do so, we will refer both to the academic writings as well as the publications of the cooperative organizations, notably the International Cooperative Alliance (hereafter "the ICA").

The fathers of cooperative thinking do not seem to have paid attention to that question, probably because it was not thinkable that people could be forced to join cooperatives in a time when it was a dream that they even wish to do it. The question arose progressively, partly through practice but also with the development of scientific works especially dedicated to cooperatives.

The first effort was made to identify what a cooperative is. In that respect, it seemed that the question of voluntary membership may appear with various features depending on the political structure of the global society. Fauquet gives a very good example of such an unexpected configuration: he opposes the agricultural cooperatives created in the second half of the 19th century in western France, fully complying with cooperative principles and notably voluntary membership, and the so-called « fruitières », agricultural societies emerging in the middle ages for the production of cheese, in which membership could be compulsory by virtue of custom (Fauquet, 1935, nos. 40 et sec.). The same criterion was used to distinguish cooperatives from corporations in medieval ages (Mladenatz 1933, p. 12). Therefore, voluntary membership was considered as a key point to characterizing cooperatives. Mandatory collective organizations were numerous before modernity, or at least before the 19th century, but they were inserted into special political and cultural systems, distinct from the one in which cooperatives developed. However, surprisingly, we cannot state that cooperative thinking established that feature as a mandatory principle.

On the contrary, both writers and organizations were very hesitant. It appeared notably through the first ICA principles. The strength of that voluntary membership principle is already indirectly evident in the by-laws of the Rochdale Pioneers[3] and their application, since they claim for no support from the State (Lambert 1967, esp. p. 255). It remains one of the four mandatory principles (among seven) stated by the

[3] The experience of Rochdale has played such an important role on the establishment of ICA principles that they won the intellectual primacy, beyond their practical dimension.

ICA in its Paris Congress in 1937[4] (ICA, 1937) in which it is formulated as free membership. But here is the core of the ambiguity, since free membership is not synonymous with voluntary membership. If the voluntary requirement refers explicitly to the freedom to join or not, the free membership refers as well, and maybe mainly, to the right to join, against the temptation in some cooperatives to close the cooperative to the benefit of its founders.

And the debates about cooperative principles for the ICA Congress of 1966 in Liège reminded that voluntary membership had not been explicitly stated (Kerinec 1966, esp. p. 40). The report on the Congress by Georges Lasserre did not propose the inclusion of voluntary membership as a mandatory principle, even after the debates (Lasserre 1966, p. 345). However, finally, the Congress agreed to the adoption of a principle of voluntary membership (Lambert 1966, p. 475). The principle is also adopted by the Commission on cooperative principles in Vienna in 1966 (Draperi 2012, pp. 176-177). And we know that the final stone on the way has been the adoption of the first cooperative principle in 1995: voluntary and open membership.

At that time, writers were not clearer. For example, Lambert focuses on voluntary membership, to distinguish it from free joint, as opposed to closed, cooperatives (Lambert 1967, p. 259). He pleads for the autonomy principle and voluntary membership, but nuances it a little bit. According to him, a cooperative may be established by the majority of a group, so that it is established willingly, but membership may be imposed on people from the minority: for example, from a joint to a federation if some cooperators disagree, or if the majority of a community decides to establish a cooperative for the draining of the zone (Lambert 1967, p. 259). Fauquet goes further and considers that the question of mandatory membership is not essential; he points out that it may occur if a consumer cooperative remains the only store in a place, or when the state makes membership compulsory to organize and regulate a production (Fauquet 1935, pp. 79 et seq.).

In the '60s, as the final conclusions of both the scientific conference of Liège and the institutional Commission for cooperative principles of the ICA show, the voluntary membership principle had acquired its certainty for the majority (Ibid., p.241)[5], and was on the way to become a major and uncontested feature. But the debates have been deep, and many people remained cautious. Convincingly, it has been claimed that this voluntary membership would not be a specific cooperative principle, contrary to the open-door principle (Vargas 2015). Actually, mandatory membership does not differ from mandatory incorporation into a company.

Nevertheless, the first ICA principle established in 1995 perfectly illustrates the ambiguity of voluntary membership (Vargas 2015). Actually, the voluntary feature of cooperatives is included in the question of membership, besides the open-door principle. However, that first principle specifies that cooperatives are

[4] In 1937 the ICA distinguished between four imperative and three auxiliary principles. The four imperative ones were namely: 1. Open membership, 2. Democratic member control (one member, one vote), 3. Distribution of surplus in proportion to trade and 4. Payment of limited interest on capital; the three auxiliary ones were: 5. Political and religious neutrality, 6. Cash trading (no credit extended) and 7. Promotion of education.

[5] It is remarkable that the report for the Soviet Union insisted on the compliance with that principle: membership in consumer cooperatives had been mandatory at the beginning of the Bolshevik revolution (1919-1923), as well as in Kolkhozes, but this is considered as derogation and the Party struggled with it.

voluntary organizations. Indeed, the voluntary feature may be connected to the organization itself instead of membership. It must be noted, about it, that the fourth principle is related to a close question: autonomy. The cooperative must be autonomous, both from public and private entities, and that autonomy is explicitly connected to self-help and democratic control, that is to say, again, to membership. In other words, cooperative principles are inter-connected, they all constitute a bundle, and the insistence on one or the other is strongly dependent on the major trends of the society. Therefore, the increasing attention paid to voluntary membership could be the consequence of the development of the individual freedom to associate. Conceptually, voluntariness and autonomy may be distinguished, since a voluntary organization can be dependent on another organization, so that its autonomy is broken. But a compulsory organization cannot be really autonomous.

### 3. The Complexity of Voluntary Membership in Cooperative Practice

As the principle of voluntary membership appeared ambiguous at a theoretical level, we will try to determine if that ambiguity is as well present in practice. It seems that the first cooperatives were created by voluntary members, and their will was even very strong to overcome the difficulties they met. In some cases, a very large community could be a member of the cooperative, for example in Raiffeisen cooperatives in some German villages (Mladenatz 1933, pp. 60 et seq.), but one cannot equate an attractive cooperative with a mandatory one. The question could have arisen when the State asked the cooperatives to fill missions of general interest, notably the distribution of food during the First World War; but it does not seem that this implied mandatory membership for the consumers (Draperi 2012, pp. 95 et seq.). At that time, the closest phenomenon to a mandatory cooperative was the link sometimes established between membership in a cooperative and in a religious or political group (mainly Christian or socialist). But that question was not themed as a question of obligation but rather of neutrality. However, all the cooperatives did not comply with this principle, and for many years it was not considered as a compulsory principle.

With the Russian revolution appeared a new relationship between the State and the cooperatives, since the former considered that it could use cooperatives to achieve its public policies, not only by delegation, but by making the cooperatives part of the political system (Mauss 1997, pp. 290 et seq.). In spite of the opposition of the cooperative organizations, well installed in Russia, the Bolsheviks contrived mandatory membership for some social groups and attributed to the cooperatives an institutional role with the Soviets (Draperi 2012). The economic weaknesses of the Soviet Union and the strength of cooperative organizations obliged Lenin to give up that hold on cooperatives, and in 1923-1924, cooperatives recovered their free organization. During that period, the ICA never excluded Russian cooperatives and national cooperatives maintained, or tried to maintain, economic relationships with them. Surely, the entanglement of Russian cooperatives into the Soviet system was considered problematic, but people did not deem it enough to disqualify their cooperative nature, and some authors wondered if it was not a new experience for cooperative organizations, from which they could learn.

Indeed, during the inter-war period, many countries experienced new relationships between cooperatives and political power. V. Tanner, president of the ICA, distinguished liberal economy regimes (France, UK before the first world war), regulated economy or partially command economy regimes (after the first

world war), capitalist dictatorial command economy regimes (Italy, Germany, Austria), socialist dictatorial economy regimes (USSR), and socialist democratic regimes (that have not been established so far). (Tanner 1937, p.159). Of course, this is true for Italy with the development of fascism, but that was comparable with the Soviet situation. Germany also tried to launch new social policies, as did the United Kingdom earlier, and France after the Second World War. This did not entail directly institutional relationships with the cooperative organizations, but it multiplied hybrid enterprises and mixed economy phenomena (Belly 1988), and rendered less clear the distinction between mandatory and voluntary. At that time topics like collective economy (Milhaud, 1950), *régies coopératives* (Lavergne 1937, pp.177-210), delegation to cooperatives of public interest missions (Fauquet 1935, no. 51), or municipalism and local development (Belly 1988, pp. 71 et sec.) emerged. Surely, cooperatives are not necessarily pure, they can be mixed with other models, as it is nowadays considered with the phenomenon of companization. But other mixes are possible with the public sector: forms favoring the transfer from public to cooperative sector, such as *régies coopératives*, public missions filled by delegation to cooperatives, or public control to challenge the capitalist economy (Fauquet 1935, nos. 50 et seq.).

Another trend for cooperatives came with decolonization. Most colonies had a cooperative legislation, installed by the colonial States. With independence, the new States had to decide if they kept or removed ancient regulations. All the States did not choose the same way, but many came through collective experiences, and in that path they often mixed traditional community organizations and the cooperative shape (Münkner 2015, p. 37; Develtere 1998), so that the cooperatives met again mandatory membership as well as the presence of civil servants on their boards. Depending on the countries, the phenomenon lasted more or less a long time, but many countries went the same way until the neo-liberal orientation of international organizations in the 1990s, and the last legislations contrary to voluntary membership were still in force in the 2000s (Larue et al. 2014). Again, that situation was considered as problematic, but did not entail expulsion from the ICA.

Besides these exceptions, we would like to mention the special physiognomy of mandatory membership in second degree cooperatives, i.e. inter-cooperation. In order to structure the cooperative sector, it may be useful to make the participation in a federation or a union mandatory. This is the case in France for agricultural cooperatives, which have to join a federation competent to conduct a compulsory cooperative audit (French Rural Code, art. L.527-1). This is also true in Germany for all cooperatives (Münkner 2013, pp. 413 et seq.). However, in these cases, the obligation is limited, firstly because no one is obliged to join a cooperative; secondly because the cooperative itself, even if it has to join a federation, keeps the possibility to choose the federation. Other countries stated a general obligation for every cooperative to join a federation, for example Mexico, but that provision was changed in 1994 (Rojas Herrera 2013, p. 525).

One can find other examples of mandatory cooperatives when the cooperative has been used by the State as a legal form to achieve a public policy. Such is the case for the development of wine-growers' cooperatives in Greece, as in the case before the ECHR, but the phenomenon is also present in Italy for the production and transformation of polyethylene (WRITTEN QUESTION E-2362/01 to the Commission). These last examples may be surprising, because they cannot be considered exotic, either old or distant And they could appear as remains of ancient practice, not because they do not comply with

the first cooperative principle in force since 1995, but because they contradict a more general right, internationally recognized: the right not to associate.

## 4. The Development of the Freedom to Associate

Cooperators remember, even if it was long ago, that their first relationship with the right to associate has been to claim it. Indeed, the first cooperatives often faced the reluctance, if not the opposition, of the State, which saw in the cooperatives dangerous collective organizations, able to destabilize its power, since, as community-based, cooperatives are associations. With the growth of their economic power, cooperatives became stronger, and their political subversion decreased, so that the State was more and more supportive of them. Therefore, in general, they did not profit directly from the development of the freedom of association, even if they supported it because it met the interests of their members.

Freedom of association was first stated in the Universal Declaration of Human Rights in 1948: "(1) Everyone has the right to freedom of peaceful assembly and association; (2) No one may be compelled to belong to an association" (Universal Declaration of Human Rights, art. 20). But the weakness of this declaration consists in its lack of sanction, contrary to the subsequent European Convention on Human Rights, established in 1950. Its article 11 stated:

*"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests ; 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."(*ECHR, art. 11)[6]

That freedom of association seems nowadays so obvious that one may wonder if it is still useful, but it remains lively (Verlhac 2012), as recent examples show: condemnation of France because of the too rigorous restrictions for soldiers to associate (ADEFDROMIL V. FRANCE and MATELLY v. FRANCE) and the consequent legalization of military trade unions in French legislation (LOI No. 2015-917 du 28 juillet 2015, art. 11).

But the voluntary membership principle is more connected to the negative side of the freedom of association: the freedom not to associate. That solution has been established for the first time by the ECHR in 1993 (ECHR, 30th of June 1993, SIGURDUR A. SIGURJONSSON V. ICELAND, ECHR, 1st of July 1997, GUSTAFSON V. SWEDEN) in a case about people claiming against the obligation to enter hunting societies for landlords, relying on their ecological convictions. The interest of the case is that it provides some criteria to assess the validity of the restrictions on the freedom not to associate. Taking for granted that there is an infringement of the liberty not to associate, "Such interference breaches Article 11

[6] The article was supposed to contain a paragraph, formulated as *"No one may be compelled to an association"*, but due to the existence at the time of closed-shop systems, the provision was adopted in the form that we still have today. In this sense see *Preparatory Work on Article 11 of the European Convention on Human Rights*.

unless it is “prescribed by law”, is directed towards one or more of the legitimate aims set out in paragraph 2 and is “necessary in a democratic society” for the achievement of that aim or aims” (ECHR, 29th of April 1999, CHASSAGNOU AND OTHERS V. FRANCE, no.104). The touchy point is, surely, to decide if the infringement is necessary, which requires determining if it is proportionate to the legitimate purpose that is pursued. Apart from the rigor of the term "necessity", the Court states that “Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.” (CHASSAGNOU AND OTHERS V. FRANCE, no. 112). The Court added that, when the rights invoked to justify the infringement was not stated by the Convention itself, the appreciation has to be more rigorous (CHASSAGNOU AND OTHERS V. FRANCE, no.113).

In the MYTILINAIOS AND KOSTAKIS v. GREECE case (ECHR, 3rd of December 2015, MYTILINAIOS AND KOSTAKIS V. GREECE), a mandatory cooperative was precisely considered as an infringement of the freedom not to associate. Apparently, the ECHR has adopted a solution perfectly complying with the cooperative principles. We may even wonder if the fundamental rights have not been, in that case, a better protection of cooperative identity than cooperative law itself, since the European Convention on Human Rights has ensured the freedom of cooperators better than Greek cooperative law. To answer this question, it is necessary to go back to the facts of the case. In Samos Island, the development of winegrowing has been stimulated and protected through the obligation for winegrowers to join a cooperative (Greek law no 6085/1934). The story has been a success and the wine of Samos has become better and its trading far easier. Unsurprisingly, some cooperative members wished to leave the cooperative and trade their wine themselves and, after the refusal of several Greek courts, they were successful before the ECHR. To state if the final solution must be approved from the point of view of cooperative law, it is necessary to detail the way cooperatives are included in the category of association in the context of the European Convention on Human Rights.

Since cooperatives are considered as associations for the application of article 11 of the ECHR, to assess the consequence of the freedom not to associate on the cooperative and the connection with mandatory membership, it is required to apply the criterion of the ECHR to the cooperatives. Two points must be distinguished at that stage: the qualification as an association, and the assessment of the infringement of the freedom not to associate.

Indeed, if the cooperative is to be regarded as an association, the Court of Strasbourg has admitted that some organizations, close to associations but characterized by their public feature, are not subject to article 11; therefore, it is necessary to check whether the cooperatives that we consider are public entities, which could be possible since they are mandatory. The European case law requires three criteria to be met in order to qualify an association as a public entity: they must be established by law and not by individual will; the association is integrated into the structure of the State; and exceptional powers are attributed to the association (Verlhac 2012, note 163). It is difficult to answer abstractly to the question, but some observations are possible. First of all, in the recent case against Greece, the wine-growing cooperatives have not been considered as public law associations, since they had not been established by a law, nor were they integrated into the structure of the State. That example is interesting, for it reminds that it is not sufficient to oblige individuals to join a cooperative; the cooperative itself must be created by the law. If

one adds the condition of State integration, very few cooperatives, even mandatory, are likely to be qualified as public law associations and avoid the application of article 11. However, no requirement of case law is in explicit contradiction with the cooperative definition.

All the cooperatives which are not considered public law associations are submitted to article 11, so that their members are protected by the freedom not to associate. Concerning the restrictions to that right, notably mandatory membership, the second paragraph of article 11 lays down three conditions for their validity: they must be provided by the law; they must be necessary in a democratic society; and they must be established in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. Do the cooperatives with mandatory membership meet these three conditions? Again, it is difficult to answer generally to the question, and again we will start from the example of the Greek case.

The Court observes that the restriction is grounded in a national law (L. 6085/1934) and admitted easily that the mandatory membership aimed at protecting the rights and freedoms of others by protecting the quality of the Samos Muscat wine and the income of the winegrowers. Therefore, the first and the third conditions were fulfilled. But the second condition, i.e. the necessity in a democratic world, has been considered as lacking. The judges made a concrete assessment, taking into consideration many arguments from both parties, and they concluded that the necessity that could exist when the law was adopted is no longer established nowadays, as the wine is well exported and the mandatory membership does not look necessary to ensuring the quality of the wine and, therefore, good trading for winegrowers. Indeed, the question is not only to decide if the mandatory membership produces positive effects; as there is an infringement of an individual right, it must be more than useful, it must be necessary. And the judges said, in this case, that it is not. However, it does not mean that it cannot be; it becomes a case by case test. And an author has numbered four different hypotheses of mandatory membership: contract-based membership, *de facto* membership, automatic membership, and automatic and compulsory membership (Muukkonen 2007). Surely, that variety pleads in favor of a case by case approach. However, one cannot ignore that the judgment of the Court contradicts that of Greek courts.

The starting point is that the solution is in contradiction with the Greek constitution, or other provisions alike (about the Finnish constitution and legislation, see Muukkonen 2007), that provided a ground for compulsory membership: "*establishment by law of compulsory cooperatives serving purposes of common benefit or public interest or common exploitation of farming areas or other wealth producing sources shall be permitted, on condition however that the equal treatment of all participants shall be assured" (*Greek Constitution, art. 12.5. Douvitsa 2018, pp.128 et seq.). This does not allow any compulsory membership, since it is conditioned by the equal treatment of the participants, which means all the potential members. Contrary to the European Court's reasoning, the Greek constitution relies on equality, not on freedom.

To assess the potential validity of impediments to freedom not to associate, we can take two examples. First, the hypothesis of production groupings in the agricultural area, where a country thinks that a mandatory grouping is necessary to organize a special sector. In that respect, the European Court has never denied the validity of such mandatory grouping, which can be a cooperative, and at least in France the Supreme Court stated its validity (C. Cass no. 11-24.568). Nevertheless, if the grouping is a

cooperative, mandatory membership is only limited to the organization of the sector, and not to other possible activities of the cooperative, since they are not considered necessary.

The merits of the second example concern a shopping center. All the shops of a single shopping center are not run by a unique person or company, and some services are, by nature, common to all the shop-owners: cleaning, security, advertising for the shopping center as such …. To organize this, the owner of the premises provides in the lease agreement with the shop-owners that they are obliged to join the association in charge of these common services. Of course, membership in the association implies the right to take part in the decisions, but also the obligation to pay the annual membership fees. Some shop-owners have claimed that it was an infringement of their right not to associate as provided by the ECHR, and they won before the French judges (C. Cass. no. 00-14.637. C. Cass. no. 02-10.778. C. Cass. no. 09-65.045. C. Cass. no. 10-23.928. C. Cass no. 11-17.587. Very recently: C. Cass. no. 17-23.211); the Strasbourg Court did not rule. Formally, the solution may be admitted, since the practice relies on no explicit provision, so that the first condition of article 11 paragraph 2 is not fulfilled. However, it creates a new problem: the services are provided to and benefit all the shop-owners, even the ones who chose not to be members. Therefore, it is necessary to evaluate the compensation that they must pay to the association, and judges admitted that it cannot be assimilated in the membership fee, whereas these fees are fixed in consideration of the cost of the services. The whole story could be understandable, but it creates complications and new costs to make the evaluation. And, finally, there is a doubt that the Supreme Court will accept any compensation, since it could refrain the effectiveness of the right to withdraw.

This last example is very interesting, since it shows the absurdity of a full application of the right not to associate. Again, a solution could be found if the legislature adopted a special provision to provide a ground for mandatory membership, but any lawyer knows how difficult it can be to go through a legislative process. This story is a perfect illustration of the conflict between individual and collective interests, and shows which one is considered more frequently.

Concretely, the example of the shopping center offers two different hypotheses: either the shop-owner refuses to perform his obligation and to join the association, or after a certain period he withdraws from the association, despite mandatory membership, arguing the same invalidity of the provision. Apparently, the two situations are similar, but the second one opens the question of the engagement for a certain period. If there is more or less a consensus to consider mandatory cooperatives as an exception to the core definition of an authentic cooperative, another mechanism is debated in relation to the same principle: the regulation of withdrawal. Logically, voluntary membership means freedom to join or not the cooperative, but also the possibility to leave it; this is the open-door principle (Vargas 2015). However, this is not so absolute, since it may be necessary for the collectivity of members to plan their investments, revenues, general costs, for the future, in order to adapt them to their number and share the burden. In that respect, it may be necessary to regulate the possibility for one or several members to withdraw at any time (Fici, 2013, pp.58 et seq.). That is the opinion of the ICA in its guidance note, ensuring the protection of the cooperative by the possibility for it to condition the reimbursement of capital. Many jurisdictions have had the debate and the solutions vary: Argentina (Cracogna 2013, p.176), SCE (Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE), art. 15),

OHADA (Hiez and Tadjudje 2013, pp. 95 et seq.), India (Veerakumaran 2013, pp. 457 et seq.) … We would like to take only one example, since it appears typical by its evolution.

In French law, the open-door principle is implicitly stated through the variable capital mechanism (Commercial Code (FR), art. L.231-1), but the general cooperative law refers to by-laws to regulate its modalities (Law bill (FR) no. 47-1775, art. 7). Therefore, the by-laws may establish some conditions to withdrawal, such as a notice period, or a minimum period for membership. However, the authors agree that the provisions of by-laws could not actually forbid any withdrawal. The question occurred especially for agricultural cooperatives, the legal provisions concerning them being more detailed, and in which the importance of investments require a higher protection for the collectivity of members. Fifty years ago, the by-laws stated a minimum period for membership of approximately 50 years, which in practice rendered withdrawal impossible. The courts decided that the provision was not valid since the period was longer than a professional life (Hiez 2018, nos. 251.66 and 251-67). Nowadays, most by-laws provide for a period of ten years, and the legislature allowed anticipated withdrawal in case of *force majeure* or, exceptionally, for legitimate reason, subject to the authorization of the board (Rural Code (FR), art. R.522-4). Actually, some proposals are made to remove any minimum period.

That evolution is very significant. Of course, the question has not been discussed in the same way in all the cooperative families, since it has not the same impact in all of them, for example in consumer cooperatives. And agricultural cooperatives have developed in a somewhat corporatist sector (Veillon 2017, étude 23), in which a lifetime membership did not appear so strange[7] (Raymond, 1966, pp.48-49). But individualism has progressed, and the weight of collective organizations had to be balanced with individual freedom. Nowadays, some agricultural cooperatives have become very big and are considered as organizations autonomous from their members, so that some people, among which some cooperators, think that the cooperator must be protected against the cooperative itself, as against any firm with which they do business. The cooperative organizations consider that the repeal of the minimum period for membership would be an attack on the identity of agricultural cooperatives. Clearly, that would be a challenge for them and would considerably weaken their business model. Meanwhile, the regulation of withdrawal exists more or less everywhere, but it is not always achieved in the same way; for example, some legislation admits a fully free withdrawal, with only the possibility for the cooperative to delay the reimbursement of shares (Cracogna 2013, p. 196. For a more general overview and a critical appraisal: Pönkä 2018, pp. 45 et seq.).

## 5. Voluntary membership: for and against

For sure, voluntary membership is a cooperative principle and we do not think that it should be challenged as a principle. However, the fundamental rights reasoning introduced by the ECHR attributes to this principle an absolute feature that it never had in cooperative law. Therefore, the purpose of that paragraph is to question that absolute feature by considering the reasons *pro* and *contra* voluntary

[7] In the discussion about the open-door principle during the Congress of Liège in 1966, P. Raymond, who speaks for French agricultural cooperatives, did not even mention that point: Raymond, 1966, p. 49.

membership or, in other words, for and against the compatibility of mandatory cooperatives with cooperative law.

The first reason to adopt a vigorous conception of voluntary membership is the attachment of cooperative thinking to individual freedom. The guidance note on the cooperative principles is very clear about it: "The importance of voluntary and open membership is shown by the global co-operative movements accepting this as the first cooperative principle in the alliance {…}. This first principle is an expression of the right to freedom of association" (ICA, 2015, pp. 5 et seq.). And the guidance note refers explicitly to the Universal Declaration of Human Rights. However, we must notice that, after these strong general words, the comments do not go back to it anymore, and focus on the prohibition of arbitrary conditions to membership and free withdrawal. However, this does not weaken the principle itself, and no doubt the claim for democracy is another sign of the attachment of the cooperative movement to liberalism.

The second reason to defend voluntary membership is its integration with the other cooperative principles. We already referred to the democratic feature of cooperatives (second principle), but we could connect it with any of the seven principles. The most relevant one is probably the fourth one: autonomy and independence. We realized that both principles were sometimes mixed up, since mandatory membership means also involvement of the State into the cooperative's life. But autonomy is firstly the autonomy of each member, and the fourth principle states it clearly: cooperatives are autonomous, … and the cooperative values mention self-help as well. If the cooperative aims at the satisfaction of its members, it is not only to provide them with goods or services, it is also to help them not to depend on charity or State support. The satisfaction of its aspirations goes first to its emancipation. The same thing could be said about the democratic functioning of the cooperative, which develops the ability of all individuals to express their wishes, ideas, and stimulates them to take part in the elaboration and adoption of collective decisions. This is the meaning of the freedom promoted by cooperatives, far from the tokenistic conception of liberty.

More technically, one could argue that cooperatives are private persons, so that they cannot require people to join. We have seen that article 11 of the European Convention on Human Rights states three conditions to qualify an association as public, and one of them is the requirement of their creation by provisions of law. If the cooperative is an association of persons, it cannot be established by law. This is a truism, but it has the merit to go back to the very definition of cooperative. Voluntary membership would not be a feature of a cooperative, but one of its constitutive elements.

In spite of these strong arguments, some others have been pointed out to defend the interest of mandatory membership in certain circumstances. A danger that cooperatives face is the attribution of the burden of some activities on its members and the permission for third parties to enjoy their outcomes. In such cases, it may be profitable not to join the cooperative: that is the well-known problem of the free rider phenomenon. The free rider may corrupt the system through two strategies: profit from advantages related to membership without the corresponding duties, or a member who decides to withdraw temporarily for his selfish interest (Iliopoulos and Theodorakopoulou 2014, p. 666). In both hypotheses, mandatory membership appears a solution to prevent that temptation.

This is not a theoretical question for cooperatives, but concrete examples may be given, without going to the caricatural instance of demutualization. Concerning Mexican cooperative law, an author observes that the adoption of voluntary membership of cooperatives into unions or federations, to avoid corporatism attached to previous compulsory membership, implied "the reproduction of the "free-rider" phenomenon within the cooperative movement" (Rojas-Herrera 2013, p. 539). One may wonder if the claimants in Mythilinaios and Kostakis v. Greece are not such free riders as well: relying on the development achieved by the cooperative, some successful winegrowers wish to sell on their own in order to maximize their revenue. We do not know enough to make any certain statement, but this has surely been the perception of the cooperative Greek movement. To go on with the opinion of the same author, Iliopoulos considers that compulsory membership in the cooperative seems to have been important in the first stage in order to establish the cooperative and allow it to launch all the mechanisms that ensured its development and protection (Iliopoulos and Theodorakopoulou 2014, p. 667).

The last argument in favor of a friendly look at mandatory membership is the risk of a voluntary but tokenistic membership. And the most important, both for the member and for the cooperative, is the engagement in more than theoretical membership. Let's quote Albert Fauquet: "Neither the mere act of joint nor the essential act of will that the cooperative institution requires from its members, … Therefore, the core opposition is not between facultative joint and mandatory membership, but between the indifferent or fickle member and the active cooperator, involved towards its partners and the common enterprise, and who acts in consequence" (Fauquet 1935, pp. 81-82, translated by ourselves). That last quotation is enlightening, since it reminds that the question of voluntary membership is a point amongst other ones and that it must be balanced. This does not mean that mandatory cooperative is the best solution, surely it is not, but it may be useful in some circumstances. Indeed, specialists of participation have demonstrated that it could show various facets: voluntary participation, but also stimulated or provoked participation (Meister 1969).

In the end, we think that, even if cooperative thinking shares major grounds with liberalism, its position differs totally concerning the relationships between the individual and the grouping. Whereas individualism relies on fundamental rights to protect the individual from the State and other individuals, including collective bodies, the cooperative believes in the development of each individual thanks to groupings. Therefore, the approach of mandatory membership in a cooperative, i.e. a grouping, cannot be the same. Both cooperative doctrine and human rights reasoning condemn it as a principle, but cooperative thinking, built on the fruits of experimentation, is far more flexible. Moreover, considering the emancipation of each individual by a full membership in a cooperative, it may more easily accept mandatory membership since, when balanced with other considerations, this may not necessarily prevent the members from finding their place in the cooperative. A condition for that possible emancipation is the equal treatment in the cooperative (as in the Greek constitution), that ensures all members that they will be able to take part in the decisions, so that their mandatory membership is accompanied by their possible influence on the grouping itself.

Technically, another question arises about the conflict of sources. In the Mythilinaios and Kostakis case, the Strasbourg Court based its decision logically on the European Convention. Nonetheless, it must not be ignored that it contradicted not only a legal provision but also a constitutional one, so that an international norm surpassed a constitutional norm. This is not a surprise before an international court, but it could not

occur before a national one, except in some very few countries that admit the primacy of international law. However, to strengthen cooperative law, this reminds of the necessity to develop international cooperative law.

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