

## The formation and technical elaboration of the bylaws of a cooperative in the light of Law 5.764/71

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### ABSTRACT

This article offers a detailed analysis of the legal and technical aspects in the creation of a charter for cooperatives in Brazil, according to Law 5.764/71. It essentially uses the law of reference and makes a descriptive and exploratory critical analysis and also based on personal experience, as well as using bibliographic procedures. The drafting of a bylaw involves considering several essential components to ensure the proper functioning of the cooperative. The main chapters include the definition of the general meeting, boards of directors and fiscal council, share capital, administrative structure, balance sheet and general and transitional provisions. Each chapter addresses essential aspects such as the area of operation, duration, fiscal year, members and object of the cooperative. The article also highlights the importance of following a logical and hierarchical sequence in the drafting of the bylaws, according to legal guidelines established by Complementary Law No. 95/1998. In addition, it emphasizes the need for the statute to respect the principles of full defense and adversarial proceedings, especially in the processes of elimination and exclusion of members. Drafting a bylaw requires thorough technical work and must be carried out by professionals with legal knowledge and experience in the area. The main objective is to ensure that all legal aspects are contemplated to avoid future litigation and ensure the proper functioning of the cooperative. At the end, there is an overview of the critical aspects in the drafting of bylaws for cooperatives, highlighting the importance of strictly following the legal and technical requirements to ensure the effective and democratic functioning of a cooperative.

**Keywords:** Bylaws, Elaboration, Legislative technique, Technical structure.

### INTRODUCTION

In Brazil, the legal regime of cooperative societies has been regulated in a specific way since 1971, from the enactment of Law No. 5,764, which defined the National Policy of Cooperativism.<sup>2</sup>

Considered as a worldwide movement, with the advent of the 1988 Federal Constitution, cooperativism also obtained constitutional *status*, being established in article 174, § 2 that "*the law shall support and encourage cooperativism and other forms of associativism*".

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<sup>2</sup> BRAZIL. Law No. 5,764, of December 16, 1971. 1971. Available at: [http://www.planalto.gov.br/ccivil\\_03/LEIS/L5764.htm](http://www.planalto.gov.br/ccivil_03/LEIS/L5764.htm) . Accessed on: 03 June 2024.

For a cooperative society to be legally constituted, regardless of its branch or activity, several requirements and formalities that are presented in Law No. 5,764/71 must be observed.

Among the provisions that guide and regulate these aspects, articles 14 and 15 of Law No. 5,764/71 are indicated. The first determines the constitution of the cooperative society by means of a resolution of the General Meeting of the founders, contained in the minutes or in the public instrument. The second, on the other hand, establishes which aspects must be declared in the respective constitutive act:

Article 14. The cooperative society is constituted by resolution of the General Assembly of the founders, contained in the respective minutes or by public instrument.

Article 15. The constitutive act, under penalty of nullity, must declare:

I - the name of the entity, headquarters and object of operation;

II - the name, nationality, age, marital status, profession and residence of the members, founders who signed it, as well as the value and number of the share of each one;

**III - approval of the company's bylaws;**

IV – the name, nationality, marital status, profession and residence of the members elected to the administrative, supervisory and other bodies. (emphasis added)<sup>3</sup>

It can be seen that the approval of the Bylaws is one of the indispensable requirements for the cooperative's constitutive act (art. 15, item III).

Using the characteristics presented by *Von Thur*<sup>4</sup>, it is indicated that the Statutes "*contain the fundamental rules on the organization, the activity of the organs and the rights and duties of the members vis-à-vis the association. [...]*".

In this sense, having a general and abstract character, the statutes are responsible for governing the behavior of their members in a regulatory or institutional way:

It is precisely this characteristic of the statute – that of a general and abstract rule that, like the Constitution that regulates the life of the State, governs the behavior of personified companies – is what lends to the relations of the legal entity with its members a nature, which is not contractual, but regulatory or institutional.<sup>5</sup>

Performing the analysis based on these attributes, it is clear that the Bylaws are one of the most important elements in a cooperative, as it is in it that all administrative, structural, financial, organizational and functional aspects of the society are established.

It is on these components that the present work will be concerned, seeking to present, in general terms, what are the essential points for the formation and technical elaboration of the Bylaws.

<sup>3</sup> \_\_\_\_\_ . Accessed on: 03 June 2024.

<sup>4</sup> THUR, Von. apud. FRANKE, Walmor. **Cooperative society law: cooperative law.** São Paulo: Saraiva. – University of São Paulo. 1973. p.53.

<sup>5</sup> FRANKE, Walmor. **Cooperative society law: cooperative law.** São Paulo: Saraiva. – University of São Paulo. 1973. p. 53.

## TECHNICAL ELABORATION OF THE STATUTE – ESSENTIAL REQUIREMENTS

García Müller<sup>6</sup> indicates as fundamental points that must be addressed in the statute:

- the express option of the type of cooperative class, within those allowed by law;
- the attributes of the legal personality and the basic characteristics of the company;
- the identification of the founders of the cooperative society, whether an individual or a legal entity;
- indication of the capital or percentage paid by the founders, in the case of the need for minimum capital;
- the appointment of the first members who will be part of the Councils, as well as those responsible for registering the statute with the competent bodies.

Taking these aspects into account, it should be noted that, first, the Statute must comply with the provisions of article 4 of Law No. 5,764/71, which establishes:

- Membership in the cooperative must be voluntary, with no limit on the number of members, except when due to technical impossibility of providing services;
- the cooperative's share capital must be variable and represented by shares;
- Each member must have a limit of shares, and the adoption of proportionality criteria for their division is allowed.
- the shares cannot be assigned to non-cooperative third parties;
- the vote is singular, and may be opted for the proportionality criterion when in central cooperatives, federations and confederations of cooperatives, except those that carry out credit activity;
- the quorum for the operation and deliberation of the general meeting is based on the number of members and not on the capital;
- the net surpluses of the year must be returned to the cooperative member in proportion to the operations carried out by it, unless otherwise resolved at the general meeting;
- the reserve funds and educational and social technical assistance must be indivisible;
- the cooperative must be politically neutral and not practice any act of religious, racial and social discrimination;
- the cooperative must provide assistance to members and, when provided for in the statutes, to employees and cooperatives and;

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<sup>6</sup> MÜLLER, Alberto García. **Cooperative Law and the Social and Solidarity Economy**: Module 6 Life Cycle of the Solidarity Enterprise. Mérida: Associação Iberoamericana de Derecho Cooperativo, Mutual y de la Economía Social y Solidaria. 2016. p. 138.

- The area of admission of members must be limited to the possibilities of meeting, control, operations and provision of services.

As Carradore emphasizes<sup>7</sup>, what is established in the aforementioned article "portrays in the Law the principles that have been enshrined since Rochdale<sup>8</sup> and perfected by the doctrine and congresses of the ICA-International Cooperative Alliance". This makes clear its relevance and its obligation to comply with the document.

## WHAT A STATUTE SHOULD CONTAIN

According to article 21 of Law No. 5,764/71, the statute must be divided into chapters and in order to obey a logical and didactic sequence. There are also those who preach the replacement of the expression "CHAPTER" by "TITLE", the subdivision into Sections and subsections. However, we must bear in mind that the bylaws are an internal law, that is, limited to the scope of the cooperative and in it we must obey minimum standards of organization and technical sequence. It is unnecessary, and even inadvisable, to make many divisions and subdivisions, considering that almost all the cooperative members do not understand and do not know how to distinguish. The structure can be simple while still being organized and technical, in such a way as to ensure a legal understanding as observed in a civil law.

### a) In the first chapter, or, CHAPTER I

#### ✓ Denomination

The denomination is the name itself that is given to the cooperative society, corresponding to the first article in a Bylaws.

The importance of the denomination, according to Cuesta<sup>9</sup>, is in the sense that the law aims to make clear the nature of the entity and the scope of the responsibility of its members. The name, therefore, should reflect the purpose for which the cooperative society is being made:

The law tends to make the nature of the entity and the scope of the responsibility of its members clearly established in a public manner. [...] In this way, a cooperative for the transformation and sale of products will require its members to be producers, otherwise the services that the cooperative provides would not be useful, and this circumstance must be reflected in the name.

<sup>7</sup> CARRADORE, Enir Antonio. **Cooperative societies and income tax**. Florianópolis: OAB/SC, 2005. p. 51.

<sup>8</sup> Rochdale – reference to the Rochdale Pioneers Society, considered the first cooperative, founded in 1844 by 28 workers in England.

<sup>9</sup> CUESTA, Elsa. **Manual of cooperative law**: theoretical and practical treatment, updated with the new legal norms. Buenos Aires: Ábaco, 2000. p. 55.

As established in article 5 of Law No. 5,764/71, the use of the expression "cooperative" is required in its name. Therefore, it is necessary to have this expression, either at the beginning or at the end of the name/denomination. Even though it is the activity in the credit business, as well as, in this particular case, the use of the expression "bank" is prohibited.

Thus, being the main element of identification, according to Mendes<sup>10</sup>, "the company must be formed by acronym, initials, fantasy expression, composition or names and include expression or expressions that allow knowing the corporate purpose".

### ✓ **Thirst**

Item I, of article 21, of Law No. 5,764/71, also provides that in addition to the name, the bylaws must indicate the headquarters of the cooperative society. The headquarters is nothing more than the place where territorially and geographically the general administration of the cooperative is established.

The headquarters can also be indicated as the legal domicile (city, state), the place where the assemblies are held, the obligations are fulfilled, the rights and duties of the members are exercised, as well as the judicial forum of the cooperative is established.

It is important to note that the change of headquarters within the same locality gives rise to the modification of the bylaws, with the updating of its domicile. This fact does not occur, however, when the cooperative creates a branch or branch in other regions or cities, since, in this case, the headquarters will remain the same<sup>11</sup>.

Furthermore, considering the provisions of article 75, item IV, of the Civil Code of 2002<sup>12</sup>, even if the statute does not deal with the legal domicile of the cooperative, "the place where the respective boards and administrations operate" will remain valid.

Regarding this aspect, Cuesta encourages that "*the domicile is not coercive, but once fixed it is definitively linked to the jurisdiction, as long as the statute is not modified*".<sup>13</sup>

### ✓ **Area of expertise**

The area of activity also indicated in item I, of article 21, in addition to translating into the

<sup>10</sup> MENDES, Victor. **How to create a cooperative**. Porto: Legis, 2006. p. 25.

<sup>11</sup> CUESTA, Elsa. **Manual of cooperative law: theoretical and practical treatment, updated with the new legal norms**. Buenos Aires: Ábaco, 2000. p. 55.

<sup>12</sup> Article 75. As for legal entities, the domicile is: [...] IV - of other legal entities, the place where the respective boards and administrations operate, or where they elect a special domicile in their bylaws or articles of incorporation. § 1 - If the legal entity has several establishments in different places, each of them shall be considered domicile for the acts performed therein.

<sup>13</sup> CUESTA, Elsa. **Manual of cooperative law: theoretical and practical treatment, updated with the new legal norms**. Buenos Aires: Ábaco, 2000. p. 55.

geographical limits of the cooperative's operation, is where it is stated which activity or service the cooperative will be linked to.

It is common, in this sense, for the Statute to bring within its First Chapter, in which branch of economic activity the cooperative will be connected, in which cities the cooperative will provide services and from which locations new members may be admitted.<sup>14</sup>

#### ✓ **Term of duration and fiscal year**

Still in the first chapter, the Statute must present the duration of the cooperative.

Usually there is no deadline for the development of the activity or provision of services, which is why it is indicated as indeterminate.

However, in some cases, the cooperative may indicate that its existence will be subject to a future and certain event or to a determined event, which when it occurs will lead to its dissolution. This is the example of Housing Cooperatives, which are created to construct buildings, houses, housing complexes, and are later dissolved. In these cases, therefore, the cooperative will have a fixed term.<sup>15</sup>

As for the fiscal year, it corresponds to the period in which the cooperative carries out its activities and performs its accountability or balance sheet.

The choice of the date of the beginning of the fiscal year can be at any time of the year, however, the interval of 12 (twelve) months between one fiscal year and another must be observed. In this way, it can correspond to the calendar year, or another period that depends on the seasonality of the cooperative.

It is important to note that, in the event that the period is not the same as the calendar year, the workload of accounting work may be greater. In this sense, Kruger and Branco de Miranda elucidate.<sup>16</sup>

The divergence between the date chosen for the fiscal year and the calendar year may lead to the occurrence of more accounting work, since, generally, tax laws obey the calendar year. Therefore, if the month of July is chosen to close, the cooperative must, in the following three months, render accounts at the General Meeting. At the end of the year, this cooperative must prepare a new balance sheet for tax purposes

Therefore, the pertinence of choosing a fiscal year that differs from the calendar year should be carefully evaluated due to such issues.

<sup>14</sup> ORGANIZATION OF COOPERATIVES OF THE STATE OF PARANÁ. Legal Department. **Suggestion of bylaws for agricultural cooperatives in Paraná.** Curitiba, 1992. p. 3.

<sup>15</sup> KRUEGER, Guilherme; MIRANDA, André Branco. (Coord.). **Comments on the legislation of cooperative societies: Volume I.** Belo Horizonte: Commandments, 2007. p. 88.

<sup>16</sup> KRUEGER, Guilherme; MIRANDA, André Branco. (Coord.). **Comments on the legislation of cooperative societies: Volume I.** Belo Horizonte: Commandments, 2007. p. 89.

## b) In the second chapter, or, CHAPTER II

### ✓ Object and corporate purpose

The first part of article 5 of Law No. 5,764/71 provides that "cooperative societies may adopt as their object any type of service, operation or activity, ensuring them the exclusive right".

In this way, according to the profile of the members and the purpose that is sought, it is possible to have a cooperative with agricultural, consumer, housing, work, production, credit, educational, service, health or special purpose purposes, such as cooperatives of indigenous people or people with special needs.<sup>17</sup>

The objectives and the social purpose can be one or several, as long as they are not incompatible with each other and with the branch of the cooperative.

On this point, Cuesta<sup>18</sup> makes an important statement in the sense that the mention of the object must be exhaustive, since the law does not authorize a merely enunciative description:

[...] the mention of the object in the statute must be exhaustive; This is required by the enforcement authority, for which an illustrative list is not admissible, such as the mention at the end of the list "and any other service linked to its purposes", "and any other related activity", or "any other activity linked to its object".

It is also worth noting that the Federal Constitution of 1988, in its article 5, item XVIII, guarantees the free creation and operation of cooperatives, without any dependence, conditioning or authorization from the State. In this way, there is no need to recognize or formalize the branches chosen by the cooperative.<sup>19</sup> What must always be observed, however, are good morals, a lawful and possible object.

This is indicated by IN DREI 10/2013<sup>20</sup>:

1.4.3 - CORPORATE PURPOSE The cooperative must clearly and precisely delimit its objective, that is, what direct services will be provided to the members, as well as the operating and operational objects, carried out with the purpose of achieving the outlined objective, informing the gender and type of the activities developed. (art. 4, 5 and 7 of Law No. 5,764/71). The objective of every Cooperative Society will always be the direct provision of services to members, in accordance with article 7 of Law No. 5,764/71. The objects (CNAE's) are the activities that society will develop to achieve its goal.

Taking into account such aspects, in the field related to the object and corporate purpose, therefore, it is necessary to inform what type of activity will be developed in the market, in a specific and detailed way.

<sup>17</sup> PANZUTTI, Ralph et al. (Org.). **Cooperative**: a participatory company. São Paulo: OCESP, 2000. p. 11-12.

<sup>18</sup> CUESTA, Elsa. **Manual of cooperative law**: theoretical and practical treatment, updated with the new legal norms. Buenos Aires: Ábaco, 2000. p. 56.

<sup>19</sup> CAMPOS, Armando. **Normative plexus of credit unions**. Brasília: OAB, 2003. p. 54.

<sup>20</sup> DEPARTMENT OF BUSINESS REGISTRATION AND INTEGRATION. DREI. **DREI Normative Instruction No. 10, of December 5, 2013**. 2013. p. 12.

### c) In the third chapter, or, CHAPTER III

#### ✓ Associated with

Considering that the cooperative society has no limit on the maximum number of members (according to the current legislation the minimum is 20 people, except for work cooperatives where the minimum is seven) and that entry is free (article 29, *caput*, of Law No. 5,674/71), any person who wants to use its services and who meets the conditions established in the Bylaws can become a cooperative.

This "any person", of course, is relative. This does not mean that anyone can apply and cannot be denied entry into the cooperative. Although a generic and broad expression, the cooperative will delimit in its bylaws the characteristics and documentary, technical, operational and financial requirements for the entry of a new member.

The candidate must, however, agree with the objective and social purpose of the cooperative. The technical impossibility of providing services, as established in item I of article 4 of Law 5,764/71 may be the great barrier to entry, which, in this case, must be demonstrated.

Krueger and Branco de Miranda<sup>21</sup> also indicate that becoming a cooperative does not translate into profit. The intention of the members of the cooperative is to use the services of the society, in order to raise their *economic status*, in an active, egalitarian and free collaboration:

The intention of the associates when defining the cooperative pact and what unites them (*affectio societatis*) consists of the will of the parties (individuals) for active, egalitarian and free collaboration. The intention of the partners is not to aim at profits. Cooperatives, historically, were born to combat profits in the distribution of goods, putting them at a fair price. The partner enters with the exclusive not to obtain a maximum dividend from his invested capital, but to use the services of the company, with the intention of raising his *economic status*.

It is worth noting that the Civil Code of 2002, article 1,094, item II<sup>22</sup>, defines as one of the characteristics of the cooperative society, a minimum number of members. It does not define how much this minimum is, however, it should not be forgotten what is defined in the previous article (art. 1.093<sup>23</sup>). Thus, it refers us to item I of article 6 of Law No. 5,764/71<sup>24</sup>.

<sup>21</sup> KRUEGER, Guilherme; MIRANDA, André Branco. (Coord.). **Comments on the legislation of cooperative societies: Volume I.** Belo Horizonte: Commandments, 2007. p. 33.

<sup>22</sup> Article 1,094. The characteristics of the cooperative society are: [...] II - concurrence of partners in the minimum number necessary to compose the company's management, with no limitation on the maximum number;

<sup>23</sup> Article 1.93. The cooperative society shall be governed by the provisions of this chapter, except for special legislation.

<sup>24</sup> Article 6. Cooperative societies are considered:

I – singular, those constituted by a minimum number of twenty (20) individuals, and the admission of legal entities that have as their object the same or correlated economic activities of individuals or non-profit entities is exceptionally allowed.

A parenthesis is made here due to the exceptionality imposed by Law No. 12,690/2012, where in its article 6 it defines that for work cooperatives the minimum number for their constitution will be 7 (seven) members.

In reinforcement of the aforementioned legal diploma (Law No. 5,764/71), the Cooperative Registration Manual<sup>25</sup>, approved by Normative Instruction DREI 10/2013<sup>26</sup>, establishes the following rules for the minimum number of members:

1.2.3 - MINIMUM NUMBER OF MEMBERS For the constitution of a single cooperative, the participation of members, individuals, in the minimum number of twenty (20) members to compose the company's management, management body and fiscal council (item II of article 1,094 of the CC), taking into account the need for renewal; 3 (three) singular cooperatives to form a central cooperative or federation; and at least three central cooperatives or cooperative federation to form a confederation of cooperatives (items I, II, and III of article 6 of Law No. 5,764/71). In the case of labor cooperatives, the minimum number necessary for their constitution will be 7 (seven) members. (art. 6 of Law No. 12,690/12).

It also repeats what is already expressed in the law regarding legal entities, as long as they meet the following criteria:

- a) Legal entities must have as their object the same or related economic activities of individuals; or
- b) Legal entities must be non-profit. The legal entities that are admitted must be headquartered in the respective area of operations of the Cooperative Society. Legal entities that operate in the same economic field as the Cooperative Society may not be admitted.<sup>27</sup>

Being an individual, even those who do not have civil capacity can be associated. However, under the terms of article 1,690 of the Civil Code,<sup>28</sup> it is up to the parents and, in the absence of one of them, the other, exclusively, to represent the member under 16 (sixteen) years of age, as well as to assist him until he reaches the age of majority:

When the member is represented or assisted, their condition and qualification must be indicated, following the qualification of the member, including: civil name, nationality, marital status, profession, RG number and issuing body, CPF number and full address (item "d" of item III of article 53 of Decree No. 1,800, January 30, 1996).<sup>29</sup>

<sup>25</sup> REGISTRATION MANUAL – cooperative. Presidency of the Republic. Secretariat of Micro and Small Enterprises. Brasília -DF, 2014.

<sup>26</sup> DEPARTMENT OF BUSINESS REGISTRATION AND INTEGRATION. DREI. DREI Normative Instruction No. 10, of December 5, 2013. 2013. p. 8.

<sup>27</sup> DEPARTMENT OF BUSINESS REGISTRATION AND INTEGRATION. DREI. **DREI Normative Instruction No. 10, of December 5, 2013.** 2013. p. 8.

<sup>28</sup> Article 1,690. It is the parents' responsibility, and in the absence of one of them the other, exclusively, to represent children under sixteen years of age, as well as to assist them until they reach the age of majority or are emancipated. Sole Paragraph. Parents must decide jointly on issues relating to children and their property; If there is a disagreement, any of them may appeal to the judge for the necessary solution.

<sup>29</sup> DEPARTMENT OF BUSINESS REGISTRATION AND INTEGRATION. DREI. **DREI Normative Instruction No. 10, of December 5, 2013.** 2013. p. 9.

Therefore, except for the work cooperatives referred to in Law No. 12,690/2012, we will find the rules for all other branches of activity, in Chapter VIII, arts. 29 to 37 of Law No. 5,764/71.

### ✓ **Rights and Duties**

As with all the elements that are part of the Bylaws, the rights and duties of the members must strictly observe the cooperative principles listed in article 4 of Law No. 5,674/71.

Krueger and Branco de Miranda<sup>30</sup> indicate some examples of rights and duties of members that may be listed in the bylaws, which are:

#### Rights

- free membership;
- the right to information;
- the right to participate in the meetings;
- unity of votes;
- quorums based on the number of cooperative members and not on the share capital.

#### Duties

- payment of the apportionment in expenses;
- respect for the rights of other cooperative members;
- active participation in the cooperative's business;
- compliance with cooperative principles and values;

The list indicated is merely illustrative, since in a general meeting the cooperative members have the freedom to create or suppress rights and duties, as long as there is no violation of the legal system. This is what is provided for in article 38 of Law No. 5,764/71:

Article 38. The General Assembly of the members is the supreme body of the company, within the legal and statutory limits, having powers to decide the business related to the object of the company and to make the appropriate resolutions for its development and defense, and its resolutions are binding on all, even if absent or disagreeing.

### ✓ **Dismissal, Deletion and Deletion**

In cooperative societies, the principle of free membership prevails. Therefore, the freedom to disconnect, regardless of the reason, must also prevail.

Thus, *a priori*, at any time the member may leave the cooperative, without this affecting the

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<sup>30</sup> KRUEGER, Guilherme; MIRANDA, André Branco. (Coord.). **Comments on the legislation of cooperative societies:** Volume I. Belo Horizonte: Commandments, 2007. p. 89.

existence of the company, which configures the hypothesis of dismissal<sup>31</sup>, in accordance with the provisions of article 32 of Law No. 5,674/71.

The form of request and processing of the dismissal must be indicated in the Bylaws. And the request must be filed with the cooperative and always be in written form, given that this is the legal means of documented evidence and that it rules out any future allegation.

Considering that it is the member's free choice, the request cannot be denied and must be recorded in the Enrollment Book.<sup>32</sup>

With regard to **elimination**, Articles 33 and 34 of the same law indicate as follows:

Article 33. The elimination of the member is applied by virtue of a legal or statutory infraction, or by a special fact provided for in the bylaws, by means of a term signed by the person entitled to it in the Enrollment Book, with the reasons that determined it.

Article 34. The cooperative's board of directors has a period of 30 (thirty) days to notify the interested party of its elimination.

Sole Paragraph. An appeal may be made against the elimination, with suspensive effect to the first General Assembly.

As can be seen, unlike dismissal, the elimination of the member occurs at the initiative of the cooperative and when there is a violation of the law or the bylaws. In this regard, the bylaws must, in this case, indicate the specific hypotheses that will give rise to the elimination, as well as the procedure for this to happen, and the period of thirty (30) days for communication to the member and the right to appeal to the first general meeting that may take place must also be observed.

The general meeting is usually in the form of an extraordinary call, since the ordinary one is limited to the rendering of accounts and regular elections (fulfillment of mandate). However, I understand that nothing prevents it from also being done in the annual (ordinary) convocation, as long as it is expressly provided for in the Bylaws.

The member who is eliminated and with an appeal filed at the general meeting, must be formally notified of the date and time and the time that is guaranteed for his defense, either by himself or by means of a lawyer. This ensures the full defense of the member before the last administrative instance.

It should also be noted that the fact that the meeting confirms the decision of the Board of Directors regarding the elimination, nothing prevents the discussion of the facts in court in view of the constitutional principle inserted in article 5, item XXXV<sup>33</sup> of the Federal Constitution.

<sup>31</sup> It is important to make it clear that the term dismissal in the cooperative sphere is not related to the one used in the labor sphere. This is because the members do not have any employment relationship with the cooperative.

<sup>32</sup> KRUEGER, Guilherme; MIRANDA, André Branco. (Coord.). **Comments on the legislation of cooperative societies:** Volume I. Belo Horizonte: Commandments, 2007. p. 135.

<sup>33</sup> **Article 5** - All are equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property, in the following terms: **XXXV** – the law shall not exclude from the consideration of the Judiciary any injury or threat to a right;

Commenting on this point of the forced departure from the cooperative, Rodrigues<sup>34</sup> asserts:

The exclusion must be based on a serious and culpable violation of the Cooperative Code, the complementary legislation applicable to the various branches of the cooperative sector or the statutes of the cooperative and preceded by a written process, which includes the indication of the absences, their qualification, the evidence produced, the defendant's defence and the proposal to apply the exclusion measure.

Here this author sins by using the expression "exclusion" to say that the member, in order to be expelled, must, first of all, have guaranteed him the right to a full defense and contradictory, when, in fact, the correct thing is elimination. Exclusion is another definition as will be seen below.

In this circumstance – elimination – there must be a broad discussion through a formal administrative process, with documentary evidence and the possibility of hearing witnesses, when appropriate. The simple elimination without the right to a full defense is certainly a preponderant factor for an injunction in the judicial process, determining the readmission.

The third hypothesis of dismissal of the member is by the form of **exclusion**, provided for in article 35 of the so-called Law:

Article 35. The exclusion of the member will be made:  
 I - by dissolution of the legal entity;  
 II - due to the death of the individual;  
 III - due to civil incapacity not supplied;  
 IV - for failing to meet the statutory requirements for joining or remaining in the cooperative

The first two items of the provision refer to reasons of force majeure, that is, that are independent of the will of the member, because in these cases, the company or the member simply ceases to exist.

Exclusion by dissolution is the consequence arising from the desire of all cooperative members to extinguish the cooperative. Usually it occurs by resolution at the General Assembly. From this decision, there will be a liquidation process, and the cooperative will cease to exist with the registration of this act registered with the Board of Trade.

It is also mentioned that the dissolution can occur through the courts, without a deliberation by the cooperative members. In these cases, as the cooperative is dissolved by a judicial act, the members must be excluded: "in both situations, extinction of the cooperative or death of the member, the associative relationship is extinguished by the absence of one of the parties."<sup>35</sup>

Item III of this article presents the hypothesis of exclusion of the member who does not make

<sup>34</sup> RODRIGUES, José A. apud. KRUEGER, Guilherme; MIRANDA, André Branco. (Coord.). **Comments on the legislation of cooperative societies**: Volume I. Belo Horizonte: Commandments, 2007. p. 136.

<sup>35</sup> KRUEGER, Guilherme; MIRANDA, André Branco. (Coord.). **Comments on the legislation of cooperative societies**: Volume I. Belo Horizonte: Commandments, 2007. p. 140.

up for civil incapacity. It has already been indicated that the incapacitated person may be a member as long as they are duly represented by their parents or legal representative (guardian or curator). However, when there is no proper representation, the incapacitated person must be excluded from the cooperative.

Item IV establishes the exclusion when the member does not meet the requirements established in the bylaws. A clear example that characterizes this type of exclusion occurs in cooperatives formed exclusively by a certain profession, such as a cooperative of doctors, dentists, engineers, etc. When the professional registration is revoked, he will automatically lose the right to remain as a member of the cooperative, for not meeting one of the basic requirements for participation.

#### **d) In the fourth chapter, or, CHAPTER IV**

##### **✓ Capital social**

The statutory document must also contain provisions regarding the cooperative's share capital. It corresponds to the amount that is collected from the cooperative members to sustain the financial life of the cooperative and the development of the activities contained in its corporate purpose.

However, it is worth noting that article 1,094, item I<sup>36</sup>, of the Civil Code brought an innovation to cooperative societies, regarding the share capital. In it there is the possibility of dismissal. Campos<sup>37</sup>, analyzing this aspect, reflects that:

By instituting the figure of the cooperative without social capital, the new Civil Code establishes the fundamental difference between mercantile societies (business companies), based on the capital structure, for profit, and cooperative societies, of a civil nature, based on the union of people.

The waiver of capital is therefore aimed at cooperative societies that do not depend on financial resources, that is, to gather money from their members so that they can operate. An example of this are labor cooperatives, specialized service cooperatives, labor hiring cooperatives, among others, whose activity is limited to the intermediation of services or activities.

However, it is minimal, it will always be recommended that members are financially linked to the Cooperative, contributing capital that binds them.

When, however, the activity carried out by the cooperative requires the constitution of capital, as in the case of agricultural, production, credit cooperatives, etc., it will be divided into fractions,

<sup>36</sup> **Art. 1.094.** The characteristics of the cooperative society are:

**I - variability, or waiver of capital stock;** (I bolded)

<sup>37</sup> CAMPOS, Armando. **Normative plexus of credit unions.** Brasília: OAB, 2003. p. 42.

called quota-partes (art. 24<sup>38</sup>, of Law 5.764/71) and in such a way that each member pays a minimum number as established in the bylaws

The bylaws must also provide for how the payment of this capital will take place. It must be clear whether it will be in installments, in cash, in goods or even proportionally. The unit value of the quotas, the minimum and maximum quotas that may be subscribed by the partners, as well as the interest on the capital that is not paid in within the established period, must also be established.

All these issues and variables must be expressed in the statutory document.

#### e) In the fifth chapter, or, CHAPTER V

##### ✓ Administrative structure

The cooperative society, like any legal entity, needs an administrative structure composed of a number of members who will be responsible for executing and deliberating administrative, structural and functional issues of the cooperative.

This is because the general assembly of members cannot, by itself, resolve all issues related to the cooperative. The greater the number of members, the more difficult it is for everyone to fully participate in the work that must be carried out.

Thus, it is common for the Bylaws to bring in its administrative structure the General Meeting, the Board of Directors, the Executive Board and the Fiscal Council, as bodies responsible for these functions:

General Assembly: the General Assembly is considered the largest body within a cooperative (article 38 of Law No. 5,764/71), with each member having the right to one vote, regardless of the capital they have subscribed.

This body is responsible for deciding the business related to the object of the company and any other issues related to the proper functioning of the cooperative, such as changes in the bylaws, deliberation on the exclusion of members, capital changes, changes in the physical structure, creation of new branches or branches, etc.

Franke<sup>39</sup>. indicates that in the congresses of the International Cooperative Alliance it was already possible to show that the formula proposed for cooperatives was to have a democratic constitution, where each member, regardless of his share and capital, has the same voting power, whether in the decisions of the assembly, or in the distribution of the surpluses of the year.

Articles 38 to 43 of Law No. 5,764/71 establish the acts necessary for the convocation of

<sup>38</sup> **Article 24.** The capital stock will be subdivided into shares, whose unit value may not exceed the highest minimum wage in force in the country.

<sup>39</sup> FRANKE, Walmor. **Cooperative society law: cooperative law.** São Paulo: Saraiva. – University of São Paulo. 1973. p. 70.

members, the quorum for installation, form of representation and the statute of limitations for annulling the resolutions made during the meeting.

As for the resolutions, as established in item 2.2.3 of the Cooperative's Registration Manual (IN DREI No. 10/2013):

The resolutions of the ordinary or extraordinary general meeting shall be provided for in the agenda of the call notice. In general matters, no type of deliberation will be accepted (caput of articles 44 and 45 of Law No. 5,764/71). The minutes of the Meeting must indicate the facts that occurred and the resolutions: The record of the facts that occurred, including dissent or protests, may be drawn up in the form of full content, summary or reduced, and the resolutions taken must be transcribed, expressing the modifications introduced.

The General Meeting may take place on an ordinary basis – AGM (art. 44, of Law No. 5,764/71), annually, as established by law, in the three months following the end of its fiscal year, so that the general balance sheet and accountability to the members and eventual election of councils or directors are made.

Extraordinarily, however, members may meet in General Meetings - EGM (article 45 of Law No. 5,764/71) to deliberate on any matter that is pertinent to the cooperative, provided that it is mentioned in the call notice.

The aforementioned Law, in its article 46, presents a list of matters that are the exclusive competence of the EGM: a) reform of the bylaws; b) merger, incorporation or dismemberment of the cooperative; c) change in the company's purpose; d) voluntary dissolution of the company and appointment of liquidators; e) accounts of the liquidator.

Therefore, when writing a bylaws, it is necessary to have the definition of what a general meeting is. Then, and in an exclusive section, the definition and competencies of the ordinary general meeting. Likewise, the definition and competencies of the extraordinary general meeting.

**Board of Directors:** the Board of Directors is a body composed, as a rule, exclusively of members elected by the General Meeting.

In order for the members of this Council not to be perpetuated in time, the Law establishes the obligation of a new election every four years, with the mandatory renewal of at least 1/3 of the members (art. 47).

It is important to emphasize that it is up to the General Assembly to decide whether or not to have Councils other than the management, depending on the corporate purpose and the needs of the cooperative, as prescribed in the first paragraph of article 47.

Depending on the branch and size of the cooperative, sometimes it is not even recommended to have a Board of Directors, especially those in which the new Civil Code abolished the minimum number in force for all cooperatives (article 6, I, of Law No. 5,764/71).

The law also authorizes (art. 48) that the management bodies maintain people hired as technical or commercial managers, who are not members of the cooperative. And more recently, in credit unions (Complementary Law No. 130/2009), it is already possible to appoint non-cooperative Directors<sup>40</sup>.

According to Cuesta<sup>41</sup>, the Conselho da Administração "*encompasses and summarizes all the executive powers of the cooperative, to such an extent that on the legal level the life of the institution in the internal and external order seems to be embodied by this body.*"

Thus, in this section of the bylaws, the chairmanship and composition of the Board of Directors (number), as well as the exclusive responsibility that falls to it, must be well defined.

**Executive Board:** although the law does not provide for the obligation of an executive board, certain Statutes also establish its existence. It is usually formed on an optional basis, to ensure the continuity of the ordinary management of the Council:

*This work team, which is optionally created, does not constitute an organ of the cooperative, and must, if so, be decided by the entity, appear in the statute or regulations, approved by the authority for the application of the legal regime of cooperatives. Its competence is limited to the management of routine matters, and the council may annul the decisions adopted by said committee or table, whatever their nature.*<sup>42</sup>

Thus, depending on the branch of the cooperative, if the creation of an Executive Board is pertinent, the bylaws may establish its composition and choice of its members, length of tenure of these directors and their competencies.

In Brazil, it is very common in cooperatives of all branches to have a board of directors and executive board. This is usually formed by the President of the Cooperative and two other directors (administrative and financial) and are also part of the board of directors on equal terms with the directors.

All these are details that when writing a statute it becomes mandatory to keep in mind the functioning of the cooperative, the political interest of the<sup>43</sup> group of members and, above all, the operational practicality.

**Fiscal Council:** Like the Board of Directors, the Fiscal Council is elected by the General Meeting and must be renewed periodically. Except for credit unions, all others are elected annually (article 56 of Law No. 5,764/71<sup>44</sup>). For credit unions, the term of office of fiscal

<sup>40</sup> Article 5- Credit unions with a board of directors may create an executive board subordinate to it, as a statutory body composed of individuals who are members or not, appointed by that board.

<sup>41</sup> CUESTA, Elsa. **Manual of cooperative law:** theoretical and practical treatment, updated with the new legal norms. Buenos Aires: Ábaco, 2000. p. 289.

<sup>42</sup> CUESTA, Elsa. **Manual of cooperative law:** theoretical and practical treatment, updated with the new legal norms. Buenos Aires: Ábaco, 2000. p. 312.

<sup>43</sup> "political interest" – in the sense of the cooperative's internal and external action.

<sup>44</sup> Article 56. The company's management will be inspected, assiduously and thoroughly, by a Fiscal Council, consisting of three (3) sitting members and three (3) alternates, all members elected annually by the General Meeting, and only one third (1/3) of its members will be allowed to be reelected.

councilor as of the aforementioned LC 130/2009, became up to 3 (three) years (article 6<sup>45</sup>), which means a possibility and not an obligation.

The main task of this body is to supervise the cooperative as a whole, aiming at compliance with the statute and specific legal provisions on the smooth running of the society.

There are no specific times indicated in the law when the Council meeting will take place, and it is up to the cooperative to establish the frequency in which the members will meet to deal with the inspection of the acts.

Therefore, the statute must, in addition to legal impositions, detail the burdens and rights that fall to it, recognizing its authority and autonomy in certain points.

#### **f) In the sixth chapter, or, CHAPTER VI**

##### **✓ Electoral process**

In the statutory document, in addition to the detailed indication of the bodies that make up the cooperative, the form of election of all those who are elected at the general meeting must be established. It is customary that the positions in direct election are: president, executive board, board members and fiscal councilors. Nothing prevents a certain position from also being elected at a general meeting, and for that, it must be detailed in the bylaws.

IN DREI No. 10/2013 also brings the importance of the qualification of those elected:

2.3.3.1 - Qualification of elected members. When there is an election of the management and supervisory bodies or others, it is necessary to fully nominate and qualify the elected members (name, nationality, marital status, identity document, their number and issuing agency, CPF number, profession, domicile and residence), as well as mention the duration of the term of office of the Directors or Board of Directors and the Fiscal Council.

In the bylaws, considering the provisions above, it must be indicated how the vote for the election of the Board Members will be; how the competing slates for the governing bodies will be formed; the deadline and form for registration of the slates or individual candidacies, as the case may be; mandatory presentation documents; among other requirements that may be provided for therein.

This point – electoral process, can also be taken to the internal regulations of the cooperative, or even, the bylaws may refer to a specific rule, such as "Election Regulations".

For reasons of practicality in handling the rules of the Cooperative, depending on the size, it will always be advisable to keep a chapter or even a section that deals with this point within the bylaws themselves.

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<sup>45</sup> Article 6º The term of office of the members of the fiscal council of credit unions shall last up to three (3) years, subject to the renewal of at least two (2) members at each election, one (1) effective and one (1) alternate.

### **g) In the seventh chapter, or, CHAPTER VII**

#### **✓ Balance Sheet and Books**

The cooperative society is a legally constituted legal entity and is obliged to keep its accounting up to date, in order to reflect the real operative picture, with documents, bank and financial records, invoices and receipts of all acts performed, for the purposes of general balance sheet and accountability to its members.

The balance sheet, according to Cuesta<sup>46</sup>, is nothing more than an inventory where changes in assets and liabilities and equity transactions carried out are reported. This information is useful and necessary for members not only because it is the basis for determining surpluses, but because knowledge of the patrimonial status facilitates the exercise of the right to participate in voting and deliberations.

Taking into account these aspects, it is of paramount importance that the bylaws establish the form of periodicity and continuity with which the trial balance will be made and presented to the members. In credit unions, the Central Bank has very clearly regulated this point.

This aspect also includes the mandatory existence of the books indicated in articles 22 and 23 of Law No. 5,764/71, which must be kept updated by the cooperative society, which are:

- enrollment of members (art. 22, item I);
- minutes of the General Meetings (art. 22, item II);
- minutes of the Management Body and others constituted (for each meeting of the directors) (article 22, item III);
- minutes of the Fiscal Council (for each meeting of the Fiscal Council) (art. 22, item IV);
- attendance of members at General Meetings (art. 22, item V).

The result of all this is the need to know the accounting operation in order to then dictate some rules in the bylaws.

### **h) In the eighth chapter, or, CHAPTER VIII**

#### **✓ Dissolution and liquidation**

The legal personality of the cooperative society normally exists for an indefinite period. This legal entity, however, is extinguished when, once the entity is dissolved, the liquidation process ends and the registration in the competent Registry is canceled.

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<sup>46</sup> CUESTA, Elsa. **Manual of cooperative law**: theoretical and practical treatment, updated with the new legal norms. Buenos Aires: Ábaco, 2000. p. 204.

Thus, in the Bylaws there must be a chapter reserved for indicating in which ways and for what reasons the cooperative society may be dissolved. It is important that at this point it is indicated what is the quorum necessary for voting, the minimum number of members for the meeting to be installed, among other related aspects.

Article 21, item VII of Law No. 5,764/71 establishes that it is mandatory to mention the cases of voluntary dissolution. The reasons for the dissolution may be described as provided for in article 63:

Article 63. Cooperative societies are dissolved by operation of law:  
 I - when the General Assembly so decides, provided that the members, totaling the minimum number required by this Law, are not willing to ensure its continuity;  
 II - by the expiration of the term of duration;  
 III - for the achievement of the predetermined objectives;  
 IV - due to the change in its legal form;  
 V - by reducing the minimum number of members or the minimum capital stock if, by the subsequent General Meeting, held within a period of not less than six (6) months, they are not reestablished;  
 VI - for the cancellation of the authorization to operate;  
 VII – for the stoppage of its activities for more than 120 (one hundred and twenty) days.

The aforementioned article presents a merely illustrative list, and the cooperative may establish different hypotheses for the dissolution of the company.

Krueger<sup>47</sup> and Branco de Miranda, commenting on the law, also point out:

It is important to always keep in mind that the institute of "dissolution", in fact, refers to the manifestation of will in the sense that the company ceases its activities. The means by which the dissolution is carried out is through liquidation. Thus, we can define liquidation as the operational instrument used to execute the dissolution, which was defined and desired by the partners at the Extraordinary General Meeting.

The provision for the dissolution and consequent liquidation of the entity is provided for in articles 63 to 79 of Law No. 5,764/71. These provisions present the possibilities of dissolution of the cooperative, the procedures that must be adopted and the way in which the liquidation is processed. All these aspects must be included in the Statute.

### **i) In the ninth chapter, or, CHAPTER IX**

#### **✓ General provisions and transitional provisions**

In the general and transitory provisions of the Statute, it may address issues that were not brought up in the previous chapters.

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<sup>47</sup> KRUEGER, Guilherme; MIRANDA, André Branco. (Coord.). **Comments on the legislation of cooperative societies:** Volume I. Belo Horizonte: Commandments, 2007. p. 324.

It is worth defining here, for example, the calculation of votes for all bodies or meetings that take place. Almost all statutes define for voting, as "simple majority"<sup>48</sup> or "absolute majority",<sup>49</sup> without, however, complementing the definition. Or even, they define as a criterion for winning voting the "half plus one". This is more complex than the simplicity of these expressions. Hence the need to make it very clear how the result will be acclaimed. And in this circumstance, it is sufficient to warn in this last chapter by a simple article where he simply states:

Article ... - For any vote, whenever the quorum does not result in an integer, the unit immediately above shall be considered.

**Sole Paragraph** – The rule of the *caput* of this article also applies to any other delimitation of quantity provided for in these Bylaws.

At this time, it is also indicated how the cases omitted in the Statute will be resolved and when the document will come into force.

It may also be indicated, for example, on how the statutory reform is carried out, the extension of the term of office of the Councils until the Annual General Meeting is held, as allowed by article 44, item III of Law No. 5,764/71.

## THE STRUCTURE OF A BYLAWS

A social statute, to be considered good, in the technical and didactic sense, has to obey a logical hierarchical sequence. This requires teamwork, even though the writer is only one and preferably from the area of law and with good experience in this area.

There is no ready-made formula for structuring a bylaws. What it will contain depends on the understanding of the entity's board of directors, the complexity of its object and also the size that is intended to reach with the company

In any case, a structural scheme must be followed in the drafting of a bylaws.

In Brazil, there is its own legislation that guides the elaboration and drafting of laws and legal norms – Complementary Law No. 95, of February 26, 1998, amended in all its essence by Complementary Law No. 107, of April 26, 2001.

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<sup>48</sup> **Simple Majority:** It is the simplest to conceptualize, which does not exempt the doctrine from further comments on the matter. It is the one that comprises more than half of the voters present at the session, or, when there is a dispersion of votes, the one that represents the highest result of the vote, among those who participated. That is why, whenever the simple majority deliberation system is adopted, it must be clarified, precisely, which criterion to prevail. In principle, in cases of omission, a simple majority is considered to be required in relation to the number of those taking part in the vote. In: <http://www.ibrajus.org.br/revista/artigo.asp?idArtigo=325> . By Rosana Maier dos Santos. Accessed on 03 Jun. 2024.

<sup>49</sup> **Absolute Majority:** Celso Ribeiro Bastos, in the book "Comments on the Constitution of Brazil", 4th volume, volume I, ed. Saraiva, 1995, p.44, questions what the absolute majority consists of and in answering states that "*the absolute majority is the equivalent of more than half of the members of the body. This number will be equivalent to half of the members plus one when it comes to an even number. Otherwise, it is enough that it is the whole number immediately after the halving.*" In: <http://www.ibrajus.org.br/revista/artigo.asp?idArtigo=325> . By Rosana Maier dos Santos. Accessed on 03 Jun. 2024.

Article 10 of this LC is very precise and objective in guiding the structuring of a rule, serving such guidance perfectly to a bylaws, since it is also a law, even if it is only a corporate scope. See:

Article 10. The legal texts shall be articulated in compliance with the following principles:  
I - the basic unit of articulation shall be the article, indicated by the abbreviation "Art.", followed by ordinal numbering up to the ninth and cardinal numbering thereafter;  
II - the articles shall be divided into paragraphs or subparagraphs; paragraphs in subparagraphs, subparagraphs in subparagraphs and subparagraphs in items;  
III - the paragraphs shall be represented by the graphic sign "§", followed by ordinal numbering up to the ninth and cardinal numbering thereafter, using, when there is only one, the expression "sole paragraph" in full;  
IV - the items shall be represented by Roman numerals, the subparagraphs by lowercase letters and the items by Arabic numerals;  
V - the grouping of articles may constitute Subsections; the Subsections, the Section; the Sections, the Chapter; the chapter chapter, the title; the Titles, the Book and the Books, the Part;  
VI – the Chapters, Titles, Books and Parts shall be written in capital letters and identified by Roman numerals, the latter being able to unfold into General Parts and Special Parts, or be subdivided into parts expressed in ordinal numerals, in full;  
VII – the Subsections and Sections shall be identified in Roman numerals, written in lowercase letters and placed in bold or characters that highlight them;  
VIII - the composition provided for in item V may also include groupings in Preliminary, General, Final or Transitory Provisions, as necessary.

I believe that the rigor of the legislative technique is unnecessary for a small statute. We can simplify. But even if we have a small status, we must not distance ourselves from it.

A well-drafted statute reduces or eliminates conflicts. And for this, hiring a good professional to write, revise or even change it, may represent the harmony of the membership as to the rules of associative coexistence. Also, before taking the discussion by the membership, it is essential to review, pass on to the directors, to the teams of the various areas of the cooperative so that they can analyze, point out suggestions or criticisms. The final review with the acceptance of the directors, directors and managers will be the first step towards approval and the sign of success in its fulfillment. And, finally, deliver the final text to a good professional linked to the writing area. Then, corrected, only lead to the discussion of the social framework.

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