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The International Journal of Cooperative Law (IJCL) is a peer-reviewed, open access online journal, founded by Ius Cooperativum in 2018. It is the first international journal in the field of cooperative law. It aspires to become a venue for lawyers, legal scholars and other persons interested in the topics and challenges that the discipline of cooperative law faces.

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NOTE BY THE EDITORS/PUBLISHERS
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This is the first issue of the International Journal of Cooperative Law (IJCL). In fact, it is the first time an international journal on cooperative law is being published.The reasons for the publication of such a journal are complex. No answer would be exhaustive.

Why an international journal of cooperative law?

Ever more policy makers and legislators at the local (municipalities, counties and provinces), national, regional and international level rediscover the potential of cooperatives. They raise questions concerning the application of existing law or its adaptation to new circumstances. Cooperative practitioners have concrete legal questions relating to the purpose or objective of their cooperative and the best way to pursue it. For example: should a consumer cooperative welcome its employees as members? Should cooperatives reject government support - of all kinds? - in order to ensure their autonomy? Should they support financially a political organization or may they express religious preferences and disrespect the political and religious neutrality principle? Should a cooperative acquire or set up a company or pay dividends in order to attract investors and facilitate its development?

Often even academics do not have answers to these questions. Cooperative law, be it statutes, case law or any other source of law, is little developed. Soft law in the form of statements by regional organizations or the cooperative movement itself and guidelines by international organizations is insufficient, not the least when cooperatives deviate through their byelaws from the set law or court decisions.

One of the missing tools to find answers is a scientific journal to which, necessarily, authors representing the variety of legal traditions contribute. Such knowledge creation is a source for the advancement of cooperative law, eventually for the elaboration of a theory of cooperative law. It will be all the more effective, if lawyers take the roughly 200 years of "cooperative thinking" into account. Cooperative law, in turn, will enrich this thinking. This will contribute to finding solutions to major economic, social, societal and political problems...unless cooperatives, and with them cooperative law, were a thing of the past or had no identity that sets them apart from other enterprise forms.

The raison d´être of cooperative law: the identity of cooperatives

The classical signs in academia signal that cooperative law might indeed be a thing of the past. The number of articles and books on cooperative law is relatively small, so is the number of references to cooperative law in publications on related subjects. The lack of research and knowledge translates into the quasi absence of the subject from the education curricula;hence the lack of interest in the subject by the legal community.

The reasons for this disinterest need researching. Their understanding might help to assess whether or not this disinterest is justified.The financialization of the economies as of the early 1970ies might be one reason. Its conceptualization excludes enterprise types with other purposes than producing high financial

returns on financial investments, and who are not controlled by the stock market, from the spectrum of efficient enterprise forms. Another reason might be the following phenomenon: Instead of applying Heraclites' description of the world as a moving thing to cooperative enterprises, the prevailing attitude of cooperative organisations over the past half century has been to see cooperatives as we imagine them to have been in the past. Cooperative organizations might not be the only ones to blame for this way of seeing. However, again and again, they have celebrated their original mid-nineteenth century European model as a measure of authenticity, if not as the essence of the cooperative idea. No surprise then that we started assuming that cooperatives have remained the same since that origin. If assumed right, then cooperatives would indeed be a thing of the past, as obviously the world has changed since then. If assumed wrong, then cooperatives might have betrayed their origin.

In order to find out what is the case, we need to differentiate between the model and the idea behind it. The original model of cooperatives, portrayed by the Rochdale Society of Equitable Pioneers, was a self-help response to the social questions of industrialization. Its members were at the same time the producers and providers of goods and services they themselves determined and the users of these goods and services. The idea behind the model had two aspects, a self-help approach and a logic to put it into practice which differed from the logic of the capital versus labour, conflict-driven mode of production and distribution of the produced wealth by avoiding this conflict. This made for a clear identity.

But things have changed since. The model and its idea underwent numerous changes and adaptations in space and over time. The changes and adaptations in space meant that the idea became a ubiquitous one. The changes and adaptations over time were driven by a mix of (geo)political, economic and cultural factors. Colonialism and decolonization, migrations from Europe to the Americas, the integration of cooperatives into state-led economies, the transformation of these economies into market economies, sophisticated adaptations of the model in China, Japan and Korea, the emergence of the welfare state, including labour law, as well as social and consumer protection laws, and today´s multi-facetted, world-wide circulation of the cooperative idea have left specific marks on it without, however, altering it fundamentally. In many instances, state interventions and/or the influence of so-called donors and of non-governmental organisations, or the effects of the welfare state weakened the self-help character of cooperatives or their capacity to address besides the economic also other needs of their members. This reflects in a diversity of national, regional and international cooperative laws, less however of their texts than of the interpretation/implementation of these texts.

Despite these marks and diversity, the international community agreed in 2002 on what it sees as the identity of cooperatives to be institutionalized through law. It agreed on a definition of cooperatives and on a set of cooperative values and principles and laid them down in the International Labour Organisation Recommendation No. 193 concerning the promotion of cooperatives (ILO Recommendation). The definition and the cooperative values and principles are almost word by word copies from the text of the 1995 International Cooperative Alliance (ICA) Statement on the cooperative identity. The ICA represents many, though not all cooperative organisations. This is a unique case where a text of an NGO became part of the text of an international and transnational organization and it might be considered as an innovative way of making (soft) law.

The definition reads: "[…] the term "cooperative" means an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly

owned and democratically controlled enterprise." This definition sets cooperatives apart from other enterprise types in three respects: Firstly, it specifies the purpose of cooperatives. As such, this is not noteworthy, as enterprise types distinguish by their specific purpose. Noteworthy is however the indivisibility of the three aspects of this purpose, namely the satisfaction of the economic, social and cultural needs and aspirations of the members. Secondly, the definition specifies the structural duality of cooperatives. They are associations of persons cum enterprises. Thirdly, the definition specifies the convergence of the members and the cooperative. The wording of this part of the definition – "persons [...] satisfy their common [...] needs [...]" – is as clear as its meaning is difficult to accept. It designates the members as the actors. Put simply, the cooperative does not do anything for the members; the members do together for themselves through a specific enterprise. This corresponds with the original idea of self-help, the kernel of the cooperative idea. This convergence of the members and the cooperative raises questions in terms of the legal personality of the cooperative, in terms of the attribution of liabilities, the application of labour law and competition law, the definition of an appropriate tax regime and accounting standards. Legislators answer them in divergent ways, if at all.

Based on the cooperative values, the cooperative principles guide the legislator as to the form of cooperatives. However, this guidance is not straight-forward. These principles and the way they have been integrated into the ILO Recommendation need harmonizing with the notions of "value" and "principle" in ethics and philosophy and they need translating into legal principles before they can be translated into law.

The agreement by the international community on a common definition and a common set of cooperative values and principles came in recognition of the (potential) role of cooperatives the world over. Besides serving their members and their activities having wider positive economic, social and societal effects, cooperatives were forerunners as concerns consumer protection standards; they have played a key role in the transfer of technological know-how to their members; they bring banking and insurance services to people who have no other access to these services; some have become leaders in their sector, for example in the banking and insurance sector, and in retail; in some countries cooperatives are the biggest employer, not to speak of the direct or indirect income effects they have in many places; cooperatives have been providing affordable housing in many instances. From the Rochdale Society of Equitable Pioneers, a cooperative that regrouped few persons of the same social class and with similar basic needs, the cooperative model has diversified and its structure has become more complex. Today, cooperatives may be found in virtually all sectors, including the production and supply of energy and other utilities,as agro-ecological food chains, in urban horticulture and farming, in education, health and care services and data protection, as well as as all youth cooperatives. Cooperatives with a high number of members (such as in modern consumer and bank cooperatives), cooperatives which are active in several sectors, whose membership is heterogeneous by interest, social background or profession, which do not only serve their members, but also, or exclusively, non-members, the community or even the public at large (public interest cooperatives), or which take other stakeholders´ (legal) interests into account (for example those of investor (members)) or which count among their membership not only private law persons, but also public law entities (as, for example, in health and care, as well as in utility cooperatives), make for more complex structures than the original model. Things are further complicated by all enterprises, including cooperative enterprises, integrating ever more into horizontal and vertical, operationally and organizationally linked chains that create wealth out of data where connectiveness is more relevant than

collectiveness. At the same time, the positions of producers and consumers merge ever more.The cooperative principle of autonomy might be at stake in such value chains; responsibilities and liabilities might have to be adapted in hitherto unknown ways, not to speak of possibly necessary adaptations of labour law, warranty law, competition law etc..

Not the least these new-type cooperatives attest to the fact that cooperatives are not a thing of the past. But, do these variations of the original model betray its origin? Essentialists claim that they do and that this were the main reason for the disinterest of the legal community in cooperative law. Others see in the adaptability of the model signs of cooperatives being a suitable enterprise form also, if not especially, for the future. Arbitration between the two positions is to take the following into account: Unless we were to limit the function of law to providing public rules by which potential members regulate their relationships and those with third parties or solve conflicts, we need to understand the conditions under which enterprises operate today and we need to apprehend the challenges they will face in the future.

As enterprises, cooperatives experience the same tensions as other types of enterprises do. This has led to two phenomena, which make it difficult to identify the identity of cooperatives. These phenomena are a "companization" of cooperatives and a convergence of enterprise forms. Competing ever more on the market, and thus pressured to perform well in financial terms, cooperatives also react by diminishing staff costs and by lobbying for and benefitting from social costs and tax dumping measures. They partly ask for, partly they are submitted to an institutional isomorphization through law with stock companies as models. Signs of this "companization" are, among others, the possibility to use nearly all financial instruments stock companies do; the acquisition or establishment of subsidiariesin the form of stock companies without effective safeguards as to the control of these subsidiaries by the members; the recruitment of managers trained in business schools and also otherwise without cooperative experience, instead of elected cooperative members; the partial apportionment of voting rights and surpluses in proportion to capital contributions, instead of transactions; the application of law which is tailored on other forms of enterprises to cooperatives, such as for example the general labour law, competition law, taxation, accounting and auditing rules, without taking the specifics of cooperatives into account. This jeopardizes the rights and obligations of the members to control their enterprise; it leads to cooperatives not being able to pursue their wide purpose; and it exacerbates in many instances the cooperative specific control risks. On the other hand, and not the least through the recognition of sustainable development as a concept of (public international) law, the social responsibility of all enterprises (CSR) is being extended to comprise societal aspects and it is juridifying. This might eventually ease the pressure to have financial performance as the sole success indicator for enterprises. At the same time, the debate on the CSR shifts its focus from results to the governance of enterprises. This shift leads to a convergence of the features of the governance structures of all enterprise types.

This double approximation of the enterprise forms through law – companization and convergence – and relatively recent phenomena, such as social enterprises, shared economy arrangements, community interest companies, have two effects. Firstly, they lead to dysfunctions and inefficiencies as they happen without regard to the functional relationship between the form and the purpose of enterprises. Secondly, they make it more difficult to distinguish cooperatives from other enterprise forms. Hence, it becomes more difficult to justify the need for a journal specialized in cooperative law.

The germ for the justification of this need lies in the paradox borne by the convergence. The paradox is this: The reason for the convergence, which is a greater social and societal responsibility of enterprises, also calls for the preservation of a diversity of enterprise types. Diversity in its two aspects, biological and cultural, including a diversity of enterprise types, is the only known source of the possibility to develop which, in turn, is a precondition of sustainable development. The central aspect of sustainable development, on which the other aspects, namely political stability, economic security and ecological balances depend, is social justice. Social justice needs regenerating.

This is where cooperatives must continue making a difference of such quality that it adds to the vital diversity of enterprise types. This does not mean a return to the original model of cooperatives, but rather a return to the raison d´être of cooperatives at their origin. As mentioned, traditionally cooperative enterprises have given a specific answer to the social questions of their time and place, The challenge consists in understanding the social question of our time and in adapting that mechanism which regenerates social justice, namely democratic participation in the decisions on what and how to produce and how to distribute the produced wealth, in a way which continues distinguishing cooperatives from other types of enterprises and which capacitates them to help filling the gap the welfare state and the labour ´market partners are increasingly leaving in terms of social justice. By their very purpose, other types of enterprises cannot organize democratic participation. The welfare state and the labour market partners find it increasingly difficult to cater for social justice as their capacity to organize democratic participation diminishes inasmuch as the unity of political and economic orders dissolves and as the conflict between capital and labour does not yield the positive result in terms of social justice as it has over the past many decades. The unity of political and economic orders dissolves and the labour market partners fail in terms of social justice as knowledge becomes the main product and its main means of production and as it may be transmitted and used digitalized and quasi instantaneously, hence independently of time and space constraints (globalization). If social justice cannot be reproduced, political stability is at stake and with it economic security. In such circumstances, the necessary consensus on concern for the indivisible global biosphere cannot be had.

Beyond their specific purpose, the distinguishing feature of cooperatives, their identity, must express through their cooperative social responsibility. It has two components: their legal structural elements link functionally to the aspects of sustainable development and democratic participation permeates all organizational and operational aspects. Given the mentioned diversity of cooperatives and their structural complexities, the accommodation by law of this identity is a challenging task indeed.

So, cooperatives are not a thing of the past. They are distinct from other enterprise types. This distinction may be and must be supported by (a specific theory of) law. But, does this require a specialized journal? We think it does. The IJCL is to promote cooperative law, so that the lively debate on “business law” may embrace the need for diversity, so that the debate on enterprises as a common and on forms of common property may include tested models, such as cooperatives. A specialized journal, not excluding the wish for a large presence of cooperative law also in other (law) journals, might be more effective in this sense.

What do we mean by cooperative law and by theory of cooperative law?

Cooperative law and theory of cooperative law

The editors/publishers understand cooperative law in its widest sense. By associating persons and by their very purpose, cooperatives are closely interwoven into socio-political and socio-economic structures of their respective societies or countries. Cooperative law has to take account of this. By "cooperative law", we understand all those legal rules - laws, administrative acts, court decisions, jurisprudence, cooperative bylaws or any other source of law, which regulate the structure and/or the operations of cooperatives. This notion of cooperative law comprises, hence, not only the cooperative law proper (law on cooperatives), but also all other law, which shapes this institution and regulates its operations. The following areas, which are most likely to have this quality in any legal system, need mentioning: constitutional law, labor law, competition law, taxation, (international) accounting/prudential standards, bookkeeping rules, audit and bankruptcy rules. The notion is to be complemented by considering implementation rules and praxes, for example prudential mechanisms, audit, and registration procedures and mechanisms. It also includes law making procedures and mechanisms, as well as legal policy issues. Furthermore, national cooperative laws are part of intertwined layers of regional and international cooperative law. The dynamics of these layers play out in a special way as through regional and international law the afore-mentioned so-called cooperative values and principles become relevant.

By "theory of cooperative law", we understand a canon of mutually referential principles, notions, rules and praxes which institutionalize the idea of cooperatives and constitute an autonomous field of law cultivated by a sufficient number of specialists. Principles, rules, notions do exist. But they do not constitute a theory, neither at the international level, nor at the national levels where we find cooperative law on a wide spectrum from the recognition of cooperatives by the constitution to seeing it as a part of civil or commercial law.

A theory of cooperative law is to help avoiding a repeat of the history of cooperative law. This history is marked by unsuccessful attempts to emancipate cooperative law from its two roots, namely from the law on associations and the law on capitalistic companies. Most jurisdictions try to translate the identity of cooperatives into derogations from stock company law. This technique barely hides its insufficiencies as, at the basis, cooperatives are associations of persons, and it must necessarily lead to contradictions between the cooperative law and other branches of law, such as competition law, labour law, taxation etc., if these branches of law are – and, as mentioned, in general they are - tailored on companies. On the other hand, in an increasing number of countries, cooperatives are part of the social or solidarity economy. That brings them closer to associations or mutual and this leads to other configuration of the various branches of law.

A theory of cooperative law cannot be elaborated without implicating the cooperative praxis. Indeed, rarely have theory and praxis been as intertwined as in "cooperative thinking". "Cooperative thinking" is thinking in action. Many of the cooperative thinkers in the 19th century were practitioners at the same time. When academia lost interest, they carried on and further developed this thinking. They best demonstrated this by continuously reworking the mentioned set of cooperative values and principles. Not all cooperatives might share them (all). However, few cooperators would not recognize them as guides. Furthermore, since the beginning of legislation on cooperatives in the mid-nineteenth century, cooperative law and its implementation anywhere has been, directly or indirectly, influenced by these values and principles and assessed accordingly.

This reciprocal link between cooperative law and "cooperative thinking", as well as the social and societal ramifications of cooperatives, makes cooperative law also interesting for other disciplines. This is not only true for research on social enterprises and non-profit organisations. Here, the proximity to cooperative enterprises might explain the interest. But it is true for other disciplines as well, not the least for the theory of knowledge, epistemology, for which the relationship between theory and praxis has always been a bone of contention.

The reasons for the companization of cooperatives and the convergence of enterprise forms through law may not only be found in the mentioned market pressures. They also point to an epistemological problem in research. That has usually compared enterprise types on the characteristic features of stock companiesand limited the comparison to the forms of enterprises, without taking into account the functional link between the form and the specific purposes by which enterprise types distinguish. This violates basic rules of comparing.

The character of the IJCL: scientific, international, published electronically and in English

The IJCL is conceived as a scientific international journal. What do we mean by this? The past or current affiliation of the editors/publishers is no guarantee for these qualities. Nor is its publication in English a sign of its having these qualities. As for the qualifier "scientific", we hold the creation of knowledge through authors and advisory board members from different legal traditions as a precondition. If, in addition, we can attract the interest of readers from all over the world, then we will be another step closer to this quality. We also hold that being scientific requires to be independent. Whilst considering the views of interest groups, the editors/publishers intend to create knowledge of law *on* cooperative organisations, not of law *for* cooperative organisations. We do not disregard their views, but we want to confront these views critically with other views, with legal concepts as they apply to other types of enterprises and with the views other disciplines have of cooperative law. In the same sense we intend to not solely advocate the advantages of cooperatives. The IJCL is to also demonstrate that law cannot do away with the possible competitive disadvantages of cooperatives.

Therefore, cooperative law is the object of the journal. But contributions do not have to focus necessarily on it, as long as they enrich the creation of knowledge of cooperative law.

The IJCL is international, but its object is not international law, even if articles may contribute to the consolidation of international cooperative law. Nor is it a comparative law journal, although we hope that its analyses concerning various jurisdictions will be a precious source for comparatists. For the rest, we wish that papers coming from any country will be fruitful to readers from all countries. After all, they will highlight questions and problems that, by all experience, most lawyers, no matter where, experience and the reported solutions will help them in their work.

The decision about English as the language of the journal was particularly difficult to take. The diversity of jurisdictions and legal traditions is a wealth. Its components can only be described, studied and understood in their respective languages. For obvious reasons the submission of articles in any language would overburden the editors. Quality checks would be even more flawed than they might be already. Moreover, journals of cooperative law do exist in other languages, especially in Spanish. But, because of the language, their wealth remains inaccessible for many and therefore under-used. The IJCL is to

stimulate the communication beyond the existing law communities. So, when we decided that we would work with one language only, English became the obvious choice. We hope that our published policy on the language requirement is a compromise which potential authors will accept also in the future and that potential readers will find a way to overcome language barriers where they should exist

The IJCL is published electronically for several reasons. This form is not judged anymore as a sign of being "non-scientific"; it facilitates worldwide access and dissemination. But, we confess that the absence of external financial support was also decisive. A paper publication is far more expensive. We endeavour, however, to offer both an electronic and a paper version in the future.

Readership and structure of the IJCL

The readership of the IJCL is defined to a large extent by the nature of the journal as an international and scientific journal. As for the first characteristic, only experience will tell. As for the second characteristic, this does not and must not exclude non-academic readers. The editors/publishers hope to attract a wide audience also by having a practitioners´corner, through which the mentioned "cooperative thinking" will continue to be part of cooperative law. So, this corner must not be construed as a relegation to a less important part of the journal. For the rest, the IJCL is structured in the classical way.

Presentation of this first issue of the IJCL

This first issue of the IJCL does not meet the targets we are setting ourselves in all respects. It falls short of representing in a balanced manner the various legal traditions. This concerns both the contributions and the composition of the advisory board. Some might look for a thematic red thread, which this issue does not have. We hope to compensate by an overview of the variety of subjects combined under the term "cooperative law". The authors were free to use their own national reference style. Some readers will find this a minus, not to speak of language issues.
The readers will judge. We welcome, even ask for, criticism without which we may not progress.

Finally, we invite submissions for the next issue of the IJCL. It will also contain a selection of the contributions to the 2nd International Forum of Cooperative Law which is to take place at Athens 26-28 September, 2018.

Athens, Almería, Kauniainen, Luxembourg and Leicester, June 2018

Ifigeneia Douvitsa, Cynthia Giagnocavo, Hagen Henrÿ, David Hiez and Ian Snaith

Articles

THE MOST RELEVANT TREND LINES OF COOPERATIVE SHARE CAPITAL REGIME IN THE NEW PORTUGUESE COOPERATIVE CODE

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Abstract: This study analyses the most relevant trend lines of the cooperative share capital regime in the new Portuguese Cooperative Code. In order to ensure the sustainability of the cooperative, providing it with appropriate mechanisms to be efficient on the market, the new code introduced investor members, reduced the amount of the minimum share capital, clarified the legal regime of cooperators' contributions to share capital and extended the list of statutory limits as to the exercise of the right to reimbursement. In the modernization of the cooperative share capital regime the legislator did not abdicate from the preservation of the cooperative identity, continuing to recognize the variability of the share capital.

Key words: cooperative, share capital, reserves, cooperator, variability, investor member.

INTRODUCTION

The entry into force of the Law No 119/2005, 31th August 2015, which approved the new Portuguese Cooperative Code (*PCC*),[1] reveals trends in seemingly opposite directions regarding the evolution of the cooperative share capital regime.[2]

In fact, when trying to reduce transaction costs for the establishment of cooperatives and trying to prevent their escape to corporate forms with more favourable regimes, as to minimum share capital, the legislator reduced the minimum amount of share capital. Due to the application of International Accounting

[1] - The first Portuguese cooperative law was the '*Lei Basilar do Cooperativismo*' (02.07.1867). In 1888, cooperatives came to be governed by the VeigaBeirão Commercial Code. In 1980, the first Cooperative Code (Decree-Law no. 454/80 of 09.10.1980) came into effect, followed by a new Cooperative Code in 1997 (Law no. 51/96), which was, however, amended by Decree-Law no. 343/98 of 06.11.1998; Decree-Law no. 131/99 of 21.04.1999; Decree-Law no. 108/2001 of 06.04.2001; Decree-Law no. 204/2004 of 09.08.2004; and Decree-Law no. 76-A/2006 of 29.03.2006. The current Code (the *PCC*) came into effect in 2015.

[2] - On the role of cooperative law for the development of cooperatives, see: H. HENRŸ, *Guidelines for Cooperative Legislation*, International Labour Office, Genebra, 2012, *passim*; A. FICI, 'The essential role of cooperative law', *The Dovenschmidt Quarterly, International Review on Transitions in Corporate Life, Law and Governance*, 2014, 4, pp. 147-158; and Study Group on European Cooperative Law (SGECOL), *Draft Principles of European Cooperative Law* (draft PECOL), May 2015, available at: http://www.euricse.eu/wp-content/uploads/2015/04/PECOL-May-2015.pdf.

Standards (IAS) to cooperatives, the legislator has been hosting solutions that extend the limits of the right to reimbursement, in order to impart greater stability to the share capital. Recognizing that the cooperative lacks financial resources to ensure its sustainability, the legislator clarified the legal regime of cooperators' contributions to share capital and, in one of the most risky innovations of recent times, opened the cooperative share capital to outside investors to a limited extent.

Before looking at the central issues of the legal regime of cooperative share capital which were the object of reform, it should be noted that this legal regime presents many specific features, which are present in the very definition of cooperative contained in Article 2.1 of the *PCC*, that the reform maintained unchanged, and under which the cooperative is defined as an "*autonomous association of persons, united voluntarily, of variable composition and capital, which, through cooperation and mutual assistance on the part of its members and in accordance with cooperative principles, aims not at profit but at satisfying the economic, social, or cultural needs and aspirations of said members*."

This definition is based on four distinctive features of this type of legal entity, the first two of which — variability of share capital and variability of the shareholding structure — are formal in nature and the other two — the *social object* of the cooperative (satisfaction of the economic, social, or cultural needs of members while remaining a non-profit entity) and the management methods of the cooperative (compliance with cooperative principles and cooperation and mutual assistance on the part of members) — are substantive.

It is worth noting that as cooperatives are defined, compliance with cooperative principles is mandatory under Portuguese legislation. These principles are embodied in Article 3 of the *PCC*: voluntary and open membership; democratic member control; economic participation by members; autonomy and independence; education, training, and information; cooperation among cooperatives; and concern for the community.[3]

The cooperative principles are thus mandatory in the Portuguese legal system, and are even enshrined in the text of the Constitution. Article 61.2 of the *Constitution of the Portuguese Republic* (*'Constituição da República Portuguesa' – CRP*) states that "*Everyone is accorded the right to freely form cooperatives, subject to compliance with cooperative principles.*" Article 82.4.a) of the *CRP* states that the cooperative sub-sector covers "*means of production that cooperatives possess and manage in accordance with cooperative principles*." Hence, a disregard for cooperative principles in business operations is a cause for dissolution (Article 112.1.h) of the *PCC*).[4]

This study will therefore take into account that the legal regime of cooperative share capital is based on a particular logic resulting not only from the specific characteristics of the cooperative objective, but also from the necessary obedience to cooperative principles.

[3] - See R. NAMORADO, 'A identidade cooperativa na ordem jurídica portuguesa', *Oficina do Centro de Estudos Sociais*, 2001, 157.

[4] - See D. A. MEIRA, 'O quadro jurídico-constitucional do cooperativismo em Portugal', *Cooperativismo e Economia Social*, 2011, 33, pp. 31-46.

A MANDATORY COOPERATIVE SHARE CAPITAL DESPITE ITS NON-ESSENTIAL NATURE

In the Portuguese Cooperative Code, it remains impossible to create a cooperative without share capital.

Hence, the initial share capital must be determined in the cooperative's statutes (Article 16.1.f) of the *PCC*). Moreover, a cooperator is only considered to be a member after he or she has contributed to the share capital (Article 83 of the *PCC*).

So, contributions to share capital are an obligation to be met by members (Article 83 of the *PCC*). They are a necessary condition for becoming a member, although they may not be enough, since cooperators must also take part in the cooperative's activities (Article 22.2.c) of the *PCC*). In fact, the cooperative operates with its members, who participate in the activity carried out by the cooperative (cooperative transactions).[5]

In the case of investor members (Article 20 of the *PCC*), a member acquires membership by contributing to the share capital, but does not participate in cooperative activities, which means that, for these investor members, a subscription of share capital is enough to become a member.

Contributions to capital are, however, a mere instrument for the development of cooperatives' activity, and do not contribute towards determining the rights and duties of their co-operators.

In fact, in cooperatives, the participation of cooperators in share capital merely influences their right to compensation for capital contributions and their liability for the cooperative's debts (Article 23 of the *PCC*).

One of the peculiarities of the share capital of cooperatives is the possibility of compensation for cooperative shares referred to in Article 88 of the *PCC*, which translates into the possibility that members may obtain net compensation based on the capital underwritten as a condition of membership. The purpose of this compensation is to reward cooperators for the efforts that the shares represent, thereby simultaneously constituting an incentive for cooperators to invest more significant capital.[6]

Regarding the liability of cooperators for the debts of the cooperative, Article 23 of the PCC establishes that liability "is limited to the amount of the subscribed capital, notwithstanding the fact that the statutes of the cooperative may state that the liability of cooperators is unlimited, or limited for some and unlimited for others." It thus follows that the liability of cooperators will be limited to the amount of capital subscribed, so that only the assets of the cooperative will answer for its debts. Once the subscribed capital has been fully paid up, no other liability may be required of the cooperators by lenders to the cooperative. The law accepts, however, that the statutes of each cooperative may decide that the liability of cooperators, or some of them, is unlimited, and unlimited liability of cooperators will constitute an additional guarantee for non-members who contract with the cooperative, thereby increasing the means of safeguarding the creditors of the cooperative. This unlimited liability for the debts of the cooperative will

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5 - About the concept of cooperative transactions, see Chapter 1 - Section 1.4, *Draft Principles of European Cooperative Law*, cit., p. 34 et seq.

6 - See D. A. MEIRA, 'O regime de distribuição de resultados nas cooperativas de crédito em Portugal. Uma análise crítica', *Boletín de la Asociación Internacional de Derecho cooperativo*, 2015, 49, pp. 106-109.

only exist if provided in the statutes. If the cooperators' liability for the debts of the cooperative is provided for in the statutes, this liability will be subsidiary to that of the cooperative and joint and several among the liable cooperators.

In all other cases, there is no relationship between economic rights and the amount of contributions to share capital; financial rights are determined by the quantity and quality of the cooperator's participation in the cooperative's transactions.

The organizational structure of cooperatives is established by taking into consideration the majority of members, and not the majority of the share capital: members of cooperative bodies are elected from among their cooperators (Article 29 of the *PCC*).

Furthermore, in the General Meeting, which is the highest-ranking body of cooperatives and is attended by all cooperators in full enjoyment of their rights (Article 33 of the *PCC*), share capital is not a quorum or majority requirement. Resolutions of the General Meeting are passed with the number of cooperators as a determining criterion, regardless of the capital that they represent (Article 40 of the *PCC*).

Even when a plural vote is given to cooperators in the statutes in accordance with Article 41, this will always be attributed on the basis of the cooperator's participation in the cooperative's transactions (Article 41.2 of the *PCC*).

Also in second-tier cooperatives (cooperative unions, federations, and confederations) a plural vote is defined by an 'objective criterion' and in accordance with the above-mentioned democratic principle (Article 83 of the *PCC*). Accordingly, plural voting in second-tier cooperatives is proportional to the number of members of each participating entity or to the volume of the cooperative's activity carried out with the cooperative, thus also signifying that share capital is still not a relevant factor.

In cooperatives, participation in surpluses is assessed in relation to members' participation in the cooperative's transactions. Surpluses are distributed to cooperators in the form of a cooperative refund and in proportion to the transactions that each member carries out with the cooperative in a given financial year, and not proportionately to the member's contributions to the share capital (Article 100.1 of the *PCC*).

Another fundamental right of cooperators is the right to participate in the cooperative's transactions, as provided for in the statutes. This participation is, however, carried out in consideration of the cooperator's economic capacity or needs rather than the cooperator's participation in the cooperative's share capital.

It should be added that the role of the cooperative's share capital as a guarantee is irrelevant when considered from the point of view of static information to non-members, because due to the *principle of voluntary and open membership*, this information is only accurate as regards the statutory minimum capital, and as we have noted below, minimum share capital is not properly protected under Portuguese law. Conversely, when considered from a dynamic point of view, it is our understanding that share capital (understood here as the amount held at a certain moment rather than the statutory minimum) has a role of guarantee. This is the case first of all because cooperators' capital contributions are not totally redeemed.

The share of capital of a cooperator who wishes to leave a cooperative is paid after settlement of the losses that appear "*in the balance sheet of the financial year in which the right of redemption originated*" (Article 89.2 of the *PCC*). Furthermore, in cooperatives, it is not possible to distribute refunds in a financial year that closes with losses. Article 100.2 of the *PCC* does not allow a distribution of surpluses among cooperators until losses from previous financial years have been compensated. In the same way, a surplus cannot be distributed if the legal reserve has been used to compensate for losses and is not yet "*at the level prior to its use*". Furthermore, in cooperatives in which cooperators' liability is unlimited, non-members are guaranteed not only by the assets of the cooperative, but also by the assets of those cooperators (Articles 23 and 80 of the *PCC*).

THE LEGAL MINIMUM COOPERATIVE SHARE CAPITAL: THE CLARIFICATION OF ITS REGIME VERSUS THE REDUCTION OF ITS AMOUNT

The minimum share capital principle is explicitly established in the Portuguese Cooperative Code. Accordingly, under Article 81.2 of the *PCC*, the statutes must establish the cooperative's minimum share capital, which may not be less than 1,500 EUR, although the complementary legislation regulating each branch may impose a different minimum.

The minimum share capital of a cooperative must be included in its statutes and operate as the minimum limit for the variability of share capital in order to avoid under-capitalization, thus representing a minimum guarantee of creditors' interests. Pursuant to Article 16.1.f) of the *PCC*, this is a mandatory provision in the statutes.

While the accounting or actual share capital of cooperatives is variable, the minimum share capital is stable, because it is public knowledge, as it is registered at the *Commercial Registry*. Cooperatives therefore guarantee to non-members that the share capital will always be at least equal or superior to that recorded at the *Commercial Registry*, regardless of the current level.

In this context, redemption of contributions cannot affect the minimum share capital. Accordingly, Article 89.3 of the *PCC* states that the statutes may provide that, when in any financial year the amount of shares to be repaid exceeds a certain percentage of the amount of share capital established in the statutes, redemption will be subject to a resolution by the Board of Directors. Reasons must be provided for a suspension of reimbursement, if any, and it is subject to ratification by the General Meeting (Article 89.4 of the *PCC*).

However, for the minimum share capital to have an adequate guarantee function, it is necessary to attribute a different legal regime to it based on the following assumptions.

First, a reduction of the share capital to an amount below the minimum share capital will lead to the cooperative's being wound up and subsequently dissolved. The *PCC* does not expressly provide for this type of winding up.[7]

Second, the Portuguese legal system does not establish the possibility for creditors of a cooperative to file a legal objection to a reduction of share capital to an amount lower than the minimum share capital based on the losses arising out of it when claiming their rights, provided that they have requested that cooperative pay their credits or an appropriate guarantee and their request has not been granted.[8]

In order to promote cooperative entrepreneurship, there is a trend towards reduction in the value of the minimum share capital. In the new Portuguese Cooperative Code, the legislator reduced the minimum share capital to 1.500 EUR. This way, under Article 81.2 *PCC*, the statutes will establish the minimum share capital of the cooperative, which may not be less than 1.500 EUR, although complementary legislation regulating each branch may set a different minimum.[9]

THE CLARIFICATION OF THE LEGAL REGIME OF COOPERATORS' CONTRIBUTIONS TO SHARE CAPITAL

As we have seen, in the Portuguese legal system, it is not possible to set up a cooperative without compulsory contributions by members

The new Portuguese Cooperative Code continues to establish that, as a rule, minimum contributions to capital, to which each cooperator subscribes, are defined in the complementary legislation applicable to the various cooperative types of the cooperative sector or in the statutes. In any case, they can never be below the equivalent to three shares (Article 83 *PCC*).

Share capital is divided in securities whose value cannot be below 5 EUR each (Article 80.1 *PCC*), and each cooperator shall have a minimum contribution of three shares.

Portuguese cooperative law does not set any maximum limit to the number of shares held by each cooperator, an omission that might be understood as a way to make the financing of cooperatives easier. Such omission, however, setting no maximum limit to the cooperator participation, carries the risk of allowing a cooperator with an excessive participating interest in the cooperative share capital to condition, not legally but actually, the decisions of the cooperative.

Cooperators' contributions to share capital may be in cash or in kind (Article 84.1 of the *PCC*).

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7 - See Chapter 3 - Section 3.2, *Draft Principles of European Cooperative Law*, cit., p. 66 et seq.

8 - See M. A. MARTÍN REYES and E. OLMEDO PERALTA, 'El capital social. Concepto y funciones', in T. Vásquez Ruano (ed), *Tratado de Derecho de Cooperativas*, Tomo I, , Tirant Lo Blanch, Valencia, 2013, pp. 540-550.

9 - On this issue, see D. A. MEIRA, 'Contributos legislativos para a criação de empresas cooperativas: a livre fixação do capital social', *CIRIEC- Revista Jurídica*, 2015, 26, pp. 27-52.

Under the terms of Article 84.4 of the *PCC*, contributions in kind are assessed by the General Meeting of Incorporators or the General Meeting following a proposal by the Board of Directors. If the value of these entries is higher than 7,000 EUR per member or 35,000 EUR in total contributions, it must be assessed by a Statutory Auditor (or by the Auditing Firm) pursuant to the terms of Article 28 of the *CSC*.

In the new Portuguese Cooperative Code, contributions in services are not permitted as contributions to share capital (Article 85 of the *PCC*). The reason for excluding them is that '*labour*' is not a quantifiable amount that can easily be expressed as a money value, and therefore does not perform the guarantee role that capital does. Nevertheless — and even though contributions in services cannot be understood as a contribution to share capital — this does not mean they have no value as a contribution to the cooperative. We would therefore say that they are contributions in labour, with special characteristics, but not share capital.

With regard to honouring the duty to make contributions to capital, the law lays down that 10% of capital in cash must be paid up upon subscription (Article 84.2 of the *PCC*). Deferrals of contributions to capital in cash are admitted as long as payment is completed within a maximum of five years (Article 84.3 of the *PCC*). This possibility to defer contributions is limited to contributions in cash, and does not apply to investor members (Article 84.5 of the *PCC*).

Contributions in kind must be made at the time of the incorporation, and may not be deferred beyond that date.

Although the *PCC* is not explicit on this issue, it is our understanding that a deferral of this kind is only possible if the face value of the contributions in cash and kind initially made by the cooperators is at least equivalent to the legal minimum capital.

The percentage of contributions in cash that may be deferred is calculated in relation to each contribution and not to the total of contributions that can be deferred. This means that until the date of incorporation, each cooperator must contribute at least 10% of his or her contribution in cash.

Ownership of shares ("*títulos de capital*") is not separable from the status as a cooperator. This explains why in cooperatives, restrictions on the free transfer of shares to persons outside the cooperative are the rule and not the exception.

Article 86 of the PCC provides that shares are only transferable with the permission of the Board of Directors or, if the cooperative's statutes so require, of the General Meeting, provided that the acquirer or successor is already a cooperator or has requested admission by satisfying the required conditions.

In this way, the legislator has made the transfer of shares, whether *inter vivos* or *mortis causa*, dependent on the fulfillment of two conditions: prior authorization from the cooperative board, which is a condition of the effectiveness of the transfer; and that the acquirer must be a member of the cooperative or, if he or she is not, must request admission.

In the latter case, an application for admission may only be made if the prospective cooperator meets the conditions required for this case, which will vary according to the type of cooperative in question.

Authorization for a transfer will be given as a rule by the Board of Directors, although it will be a power of the General Meeting if the statutes so state. Purchasers who are not yet cooperators will need to request admission explicitly.[10]

If the transfer of the shares is requested by a cooperator, the cooperative's bodies (the Board of Directors or the General Meeting, as provided in the statutes) must act to grant or refuse authorization within 60 days, after which time the transfer is deemed to be valid and effective (Article 86.2 of the *PCC*). A refusal of consent must be substantiated, first to avoid setting an absolute rule that binds the shareholder to his or her shares and, second to understand the procedure followed by the cooperative's bodies in the exercise of control of the compliance of the transfer with the interests of the cooperative.

A transfer of shares *mortis causa* poses a number of complex problems in the case of cooperatives. With cooperatives that are structured according to contributions of labour, it is necessary for the heir or group of heirs to acquire the objective requirements for being members of the cooperative. There is a true subjective right on the part of the heirs to be shareholders and to be automatically granted the position occupied by the deceased in the cooperative. If the capacity of a cooperator cannot be attained by the heirs, one proceeds with the liquidation of the entry, under the terms of Article 89 of the *PCC*, of who takes the place of the deceased cooperator (Article 86.5 of the *PCC*).

As regards the *modus operandi* of a transfer, Article 86 of the *PCC* distinguishes between transfers *inter vivos* and *mortis causa* and, within the transfer, between titled shares and non-titled shares (shares in dematerialized format).

An *inter vivos* transfer of titled shares will operate by endorsement of the title to be conveyed signed by the transferor and the acquirer, which binds the cooperative and is recorded in the *Registry Book*. As for the transfer of non-titled shares, the transfer system of book entry securities provided for in the *Portuguese Securities Code* ('*Código dos ValoresMobiliários*') is followed, *mutatis mutandis*, operating through registration on the acquirer's account as recorded in the *Registry*.

In turn, *mortis causa* transfers proceed with the submission of documentary evidence of the capacity of the heir or legatee and are recorded in the *Registry Book* in the name of the holder. With regard to the transfer of titled shares and non-titled shares the legal regime provided for *inter vivos* transfers applies, with some adjustments.

The new Code does not deal with the transfer of shares of the investor members, an omission that is open to criticism. We consider that such transfer is not free, depending on the authorization of the Board of Directors or, if the statutes of the cooperative so require, of the General Meeting.[11]

In the Portuguese legal system, cooperatives can only acquire their own shares free of charge (Article 87 of the *PCC*).

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[10] - See A. S. MARTINS, 'Ser (cooperador) ou não ser: eis a questão! Comentário ao Acórdão do Tribunal da Relação de Coimbra de 10 de setembro de 2013', *Cooperativismo e Economía Social*, 2014, 36, pp. 133-147.

[11] - See, in this sense, Chapter 3 - Section 3.3, *Draft Principles of European Cooperative Law*, cit., p. 74 et seq.

The *PCC* does not address the issue of the destination of shares acquired by a cooperative for free, but it is our opinion that in the absence of provisions in the statutes defining the final destination of these shares, there are several possibilities open to the cooperative: withdrawal, with the subsequent reduction of share capital by the nominal value of the shares acquired; disposal to cooperators or others; or retention in the hands of the cooperative.

It should be noted, finally, that the existence of shares must be properly communicated and publicized, and that the Board of Directors of the cooperative must register the following in the relevant annual report: a) the number of shares purchased during the financial year and the reasons for the acquisitions (provided that they must be acquisitions without consideration); b) the number of shares sold during the financial year and the reasons for the sales made; and c) the number of shares of the cooperative held by it at the end of the financial year [12].

Finally, the new Portuguese Cooperative Code now expressly prohibits, in Article 86.7, a co-operator's private creditor from executing the debtor's cooperative shares. He cannot pledge, to the satisfaction of his claims, the shares that the cooperator holds. The reason for the prohibition of pledging shares arises, at the outset, from the strictly personal character of the cooperator's participation in the cooperative. Consequently, it is necessary to avoid the possibility that, by virtue of an executive action, persons without the requirements demanded by law or by the statutes may become members of the cooperative. Furthermore, this prevents the cooperative from being placed in a position of economic hardship by the intervention of the private creditors of cooperators. That could happen if those creditors had the right to demand the liquidation of the capital contributions of the cooperator debtor and the prompt payment of the value to the creditors. However, the interest of the co-operator's private creditor can be met in part by his claim to the cooperative refunds, to the compensation of shares, to the liquidation value of the capital contributions in case of reimbursement of the same (due to the withdrawal of the cooperator or due to the winding-up or liquidation of the cooperative) or to the assets that comprise the bulk of economic management corresponding to the cooperator (unless the statutes of cooperative dispose in a different direction).

THE EXPRESS RECOGNITION OF THE VARIABILITY OF THE SHARE CAPITAL AND THE INTRODUCTION OF ATTENUATION MECHANISMS OF ITS EFFECTS.

In the new Portuguese Cooperative Code, the variability of the share capital continues to be explicitly recognized as an essential feature of the cooperative identity and it is included in the definition of a cooperative (Article 2.1 of the *PCC*).

Recognizing the cooperators' real right to resign, a consequence of the principle of voluntary and open membership (Article 3 *PCC*), the result will be the repayment of their capital contribution.

[12] - See D. A. MEIRA, 'O regime de transmissão dos títulos de capital na cooperativa', *Cooperativismo e Economía Social*, 2011, 33, pp. 283-290.

Cooperators are granted the right to withdraw, as laid down in Article 24.1 *PCC*;[13]a right that is reflected in the consequent redemption of the member's contributions to capital. As a matter of fact, Article 89.1 *PCC* states that "*the cooperator that withdraws is entitled to a refund [...] in the amount of the member contribution to share capital, on the face value of shares*."

The cooperative is thus characterized by structural variability with regard to both cooperators and share capital (Article 81.1 *PCC*), without the need to change the cooperative's statutes. The main consequence of this variability is the reduction of the financial qualities of share capital, namely of economic and social security that share capital represents for creditors, thus eventually causing difficulties in raising external financing of cooperatives and, on occasion, leading to undercapitalisation.

All this is made worse since the legislator continues to allow cooperators to defer part of their contributions. In fact, with regard to honouring the duty of contributions to capital, the law lays down that 10% of the capital in cash must be paid up upon subscription (Article 84.2 *PCC*). In this way, deferral of contributions to capital in cash is admitted, as long as they are completed within a maximum period of five years (Article 84.3 *PCC*).

This possibility to defer contributions is, therefore, limited to contributions in cash, not applying to investor members (Article 84.5 *PCC*). So, cooperatives can begin their business with many credit claims upon the cooperators, but without the monetary resources that effectively enable them to exercise their activity.

As a consequence, the *PCC* established a group of mechanisms to lessen the effects of the cooperators' resignation as concerns the redemption of member contributions, namely:

a) The possibility of deferred redemption for a period of time provided for in the statutes, or additionally, of not more than one year (Article 89.1);

b) The possibility of making deductions from the right to redemption (Article 89.2), by applying deductions to the face value of the member's shares, whenever losses are attributable to the cooperator member within the financial year in which the right to redemption originated;

c) Statutory minimum periods of membership and rules fixing due notice periods needed for withdrawal (Article 24.1); in this way, cooperators may ask to terminate their membership under the conditions established in the statutes or, when otherwise not expressly stated, at the end of a financial year by giving 30-days notice, provided that any debts and liabilities of the member are met; failure to comply with minimum periods of membership or notice periods may lead to indemnity for losses and damages;

d) The possibility that the statutes may provide that, when in a financial year the amount of shares to be repaid exceeds a certain percentage of the amount of share capital established in the statutes, redemption will be subject to a resolution of the Board of Directors. The suspension of reimbursement, if any, must be reasoned and subject to ratification by the General Meeting (Article 89, Nos. 3 and 4, *PCC*).

[13] - Article 24.1 of the PCC states that "cooperators may ask to terminate their membership under the conditions established in the statutes or, where not expressly stated otherwise, by giving thirty (30) days' notice, provided that any debts and liabilities of the member are satisfied."

However, in Portugal, the prohibition on the use of these mechanisms to suppress the right to withdraw remains (Article 24.3 *PCC*), given the need to respect the cooperative principle of open membership.[14]

This legislative choice raises a problem which relates to the fact that, in the Portuguese legal system, there is no specific or differential accounting treatment of cooperatives compared to commercial companies. In fact, the *Accounting Normalization System* (‘*Sistema de NormalizaçãoContabilística*’ – *SNC*)[15] applies to cooperatives (Article 3.1 of the *SNC*), which has led to a critical reaction in the legal literature, since the *SNC* was conceived as specifically for conventional capital-based companies, and therefore not taking into account the specific features of cooperatives.

So cooperatives are subject to the International Accounting Standards (IAS), namely the IAS 32, with the risk of share capital being qualified, for accounting purposes, as an outside resource and not a resource in itself, because it is refundable in case of cooperator resignation. That could lead us to ask ourselves if the Portuguese legislator reflected sufficiently on the consequences of his choice. In fact, this impediment to the right to withdraw and the consequent reimbursement right rejects the solution adopted in Spanish law to prevent the classification of share capital as a liability, which encourages the introduction, by statutory clause of a duality in cooperatives’ share capital, which is represented by reimbursable contributions or contributions whose repayment may be refused unconditionally by the cooperatives’ management board in case of resignation of cooperators.[16]

The new Cooperative Code seems to have adopted the understanding that the cooperative share capital is equity (funds provided by members in exchange for membership). So, it is the property of the cooperative and not a sum borrowed from member.

The question of the accounting qualification of cooperative share capital, as a debt capital or equity, remains open in the Portuguese legal system.

THE OPENING OF COOPERATIVE SHARE CAPITAL TO INVESTOR MEMBERS

One of the most important innovations in the Portuguese legal system, due to the Cooperative Code review, was the opening of cooperative share capital to outside investors. Thus, in addition to cooperative members ―cooperators― the *PCC* includes the possibility of statutes admitting investor members (Article 16.1.g) *PCC*). These investor members shall not participate in the cooperative transactions, limiting themselves to contribute financially to the cooperative.

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[14] - On this issue, see, D. A. MEIRA, ‘As insuficiências do regime legal do capital social e das reservas na cooperativa’ in *I Congresso Direito das Sociedades em Revista*, Almedina, May 2011, pp. 129-155.

[15] - Approved by Decree-Law no. 158/2009 of 13.07.2009.

[16] - On this issue, see D. A. MEIRA and A. M. BANDEIRA, ‘A IAS 32 e os novos critérios de contabilização das entradas para o capital social das cooperativas. Uma análise contabilística e jurídica’, *Revista de Ciências Empresariais e Jurídicas*, 2010, 16, pp. 145-164; and C. VARGAS VASSEROT, ‘Aportaciones exigibles o no exigibles: ésa es la cuestión’, *CIRIEC-España, Revista Jurídica de Economía Social y Cooperativa*, 2011, 22, pp. 75-119.

These investor members may provide the cooperative with finance on better terms than those offered by the market, if the resources brought by the cooperator members are not sufficient.[17]

In the name of preserving the *cooperative principles*, with particular emphasis on the *principle of democratic member control*and the *principle of autonomy and independence*, the legislator has subjected this new figure to tight mandatory limits.

In this sense, the Portuguese Cooperative Code establishes that when *investor members* are admitted to the cooperative, their admission and remuneration shall be decided by cooperator members and, if they participate in the governing bodies, the control of those bodies must be held by cooperator members.

The admission of investor members is subject to statutory provision (Articles 16.1.g); 20.1; and 41.1, *PCC*) and must be approved by the general meeting, being mandatorily proposed by the Board of Directors (Article 20.3 and 20.4, *PCC*).

Article 41.5 *PCC* requires that the statutes identify the "*conditions and criteria*" on which depends the award of the plural vote to investor members. However, there are restrictions that are mandatorily imposed: (i) no investor member can have more than 10% of the votes corresponding to the votes of cooperators and (ii) the investor members may not, in total, have voting rights greater than 30% of the total votes of the cooperators (Article 41.7 *PCC*).

It is assumed that investor members may join the board but cannot "*represent more than 25% of the number of effective elements that make up the body for which they are elected*" (Article 29.8 *PCC*). This means that 75% of the total number of members of each of the cooperative bodies must be necessarily cooperators. Thus, if the cooperative is managed by a sole Director (Articles 28.2; 45.2; and 62.2; *PCC*), he cannot, under any circumstances, be an investor member. The same is true when the supervisory body is composed of a single member (Article 51.1.a) *PCC*).[18]

CONCLUSION

This study has highlighted the role of the share capital in cooperatives in the context of the new Portuguese Cooperative Code.

It has emphasized a seemingly contradictory legislative tendency: to reduce minimum share capital on the one hand; and to strengthen and clarify its legal regime on the other hand.

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[17] - See M. L. LLOBREGAT HURTADO, 'Régimen económico de las sociedades cooperativas en el marco de la nueva Ley General de Cooperativas de 16 de julio de 1999 (BOE de 17 de julio) ', *RdS*, 1999, 13, p. 228; G. CAPO, 'Le società cooperative e lo scopo mutualistico', in A. BASSI (ed.): *Società Cooperative e Mutue Assicuratrici*, UTET, Torino, pp. 37-38.

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[18] - On this issue, see D. A. MEIRA and M. E. RAMOS, 'Os princípios cooperativos no contexto da reforma do Código Cooperativo português', *CIRIEC - Revista Jurídica de Economía Social y Cooperativa,*Monograph, 2015, 77, pp. 416-422.

In the Portuguese legal system, the requirement of a minimum share capital remains mandatory despite the minor importance of cooperative share capital. Hence there is an obligation to specify the share capital in the statutes.

The contributions of cooperator members to the share capital are mere instruments for the development of cooperative transactions, and they do not contribute to determining the rights and duties of cooperator members.

The minimum share capital operates as a limit on the variability of share capital.

Under the Portuguese Cooperative Code, the variability of capital is an essential feature of cooperatives. The main consequence of this variability is the reduced financial quality of the share capital, which explains why the new law contains measures intended to ensure that cooperative share capital has a minimum of stability.

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SPECIAL CAPITALIZATION INSTRUMENTS IN THE URUGUAYAN COOPERATIVE LAW

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Summary: This article refers to the capitalization instruments (of financing in a broad sense) provided in the General Cooperatives Law of Uruguay of 2008: the so-called Subordinated Participations and Interested Participations. We introduce the capitalization theory of cooperatives in general, and then describe and analyze some points of said Act: (i) emission requirements, (ii) legislation application on the stock market; (iii) possible categorization as securities; (iv) impact that the Income Tax may have on its viability; and (v) legal nature of the assets.

Resumen: Este artículo refiere a los instrumentos de capitalización (de financiación en sentido amplio) previstos en la ley general de cooperativas de URUGUAY del año 2008: las denominadas Participaciones Subordinadas y Participaciones con Interés. Se hace una introducción a la temática de la capitalización de las cooperativas en general, y luego se describe y analizan algunos puntos de dicho instituto jurídico: (i) los requisitos de emisión, (ii) la aplicación de la legislación sobre mercado de valores; (iii) la posible categorización como títulos valores; (iv) la incidencia que puede tener el Impuesto a las Rentas en su viabilidad; y (v) la naturaleza jurídica patrimonial.

1. Cooperatives: Financing problems and capitalization instruments under the General Law of Cooperatives (LGC) of Uruguay: Participations

In cooperatives, capital has an instrumental character, that is, there is no element of power or profitability, but a necessary instrument for the fulfillment of the corporate purpose. However, as Cracogna says, *"the need to have an imperative of all productive economic activity"*, and in that sense *"cooperatives experience the same requirements as any other company."*[1]

This need for capitalization (or financing, in a broad sense) has been a historical and constant concern of cooperativism, both globally and nationally. For example, in 1862, said Holyoake[2], the historian of the Rochdale Pioneers Cooperative: *"Many cooperative experiments have failed because of a lack of capital. Its members considered it immoral to gain interest and, however, lacked sufficient mysticism to lend their money without interest. Others had moral objections to pay interest and, since money is not made without it, those virtuous people did nothing, they were too moral to be useful"*.

In Uruguay, Rippe already pointed out in 1987, as one of the problems of cooperatives: *"the financial issue is one of the largest and most widespread problems of cooperatives, traditionally attributed -among*

[1] Cracogna, Dante, "Separata de la Revista del Derecho Comercial y de las Obligaciones", N° 154/156, 1993, Bs. As., Ediciones Depalma.

[2] Holyoake, George Jacob, "La Historia de los Pioneros de Rochdale", 1989, Bs. As., Intercoop.

other causes- to insufficient capitalization"[3]; On the other hand, Reyes Lavega *et al.* collected the expressions contained in a CUDECOOP document from the time prior to the General Law of Cooperatives of Uruguay 18407 (hereinafter referred to as LGC for its initials in Spanish) approved in 2008, which read: *"The limitations in the Cooperatives financing is a difficulty that the cooperative movement has been facing for a long time."*[4]

However, as Henry[5] points out, the point is that *"the social contributions of the associates do not constitute an attractive investment"*, and they only remain while the people remain as associates. Therefore, the key to the issue, as explained by Celaya[6], is *"to have an incentivized capitalization vehicle"*, at the same time to affirm that the capitalization of resources through reserve funds, the form through which they are capitalized mainly cooperatives, is a capitalization "discouraged" because they are not distributable.For Celaya, the objectives of a legal regulation of capital must meet two objectives: (i) be an effective instrument for the stable and incentivized capitalization of the cooperative, and (ii) be definable with market criteria.

Certainly, the term by which the instruments for raising capital remain linked to the cooperative is very important. To a large extent, this term will determine the strength as a financial guarantee by the contracting third parties with the cooperative (probably, the highest valuation will be given when the capital is invested in the cooperative until the eventual liquidation of the same). In that sense there are legislations that have established minimum terms; for example, it is the case of "special participations" of the Basque law 1/2000 (article 64.1), which established that investments must remain at least for a period of 5 years.

However, in this article the topic of financing in general will not be discussed, but only some preliminary considerations will be raised about the new capitalization instruments of the cooperatives contained in articles 64 to 67 of the LGC, that is, the Subordinated Participations (hereinafter the SPs) and the Participations with Interest (hereinafter the PIs, and collectively, hereinafter referred to as the Participations). In short, the intention is simply to open the way for the dissemination, analysis and debate in the legal field of this new legal institute of Uruguayan Cooperative Law.

2. Cooperatives particularities

The Participations have similarities with some forms of capitalization of the commercial companies (limited company, limited partnership, limited liability company, etc.), but it is pertinent to remember the

[3] Rippe, Siegbert, "Los problemas jurídicos de las cooperativas", 1987, Montevideo, FCU.

[4] Reyes Lavega, Sergio; Lamenza, Alfredo; Gutiérrez, Danilo; Machado, Jorge; "Derecho Cooperativo Uruguayo", 2011, Montevideo, FCU.

[5] Henry, Hagen, "Orientaciones para la legislación cooperativa", segunda edición, 2013, Ginebra, OIT.

[6] Celaya, Adrián, "Criterios básicos para una regulación legal del capital en las sociedades cooperativas", en Boletín de la AIDC, "El capital de las cooperativas", 2001, Bilbao, Universidad de Deusto.

special characteristics of cooperatives, since they lead to some particularities of the regulation of the LGC.

It is known that cooperatives were born at the time of the first industrial revolution, in the search for alternatives to the social conditions generated by nascent industrial capitalism. Also, it is known that the *"Rochdale Society of Equitable Pioneers"* formed in 1844, is accepted as the first cooperative of the modern era. That status arose, mostly, from the need that those entrepreneurs felt to gather and make explicit a set of rules -developed later in the cooperative principles- that allowed them to delineate clearly the cooperative form of production, distribution and consumption of goods and services.

In the Statement of Motives of the LGC of Uruguay, the particularities should be used as follows: *"the cooperative socioeconomic phenomenon is a special form of organization for the production and distribution of goods and services" ...* (and its actions) *"are guided by a set of doctrines, values, rules and principles that, since the first cooperatives, have helped with its validation and have found in the International Co-operative Alliance (ICA) the scope for its discussion, updating and reformulation"*stresses that the International Labour Organization (ILO), in its Recommendation 193/2002, has recognized *"the importance of cooperatives for the creation of jobs, the mobilization of resources and the generation of investments, as well as their contribution to the economy"*, as well as ways that *"promote the fullest participation of the entire population in economic and social development"*, for which reasons it recommends encouraging *"the development and strengthening of the identity of cooperatives, based on cooperative values and principles"*.

It is also known that in commercial societies the end is profit and in cooperatives the goal is service. Precisely, art. 1 ° of the law of commercial companies of Uruguay 16060 establishes that: *"There will be a commercial partnership when two or more persons, physical or legal, are obliged to make contributions to apply them to the exercise of a commercial activity organized in order to participate in the profits and endure the losses that it produces."* On the other hand, art. 4 of the LGC states that *"Cooperatives are autonomous associations of people who join voluntarily on the basis of self-help and mutual aid, to meet their common economic, social and cultural needs, through a jointly owned company and democratically managed."*

Likewise, it is noteworthy that the LGC collects (in its article 7), in full, the universal cooperative principles.

Finally, at this point, should be noted that the evolution of cooperative legislation in Uruguay has led some legal theorists to argue that the legal nature of cooperatives has evolved, since it was considered a commercial type of business (as it was qualified by the first law of cooperatives, 10008 of 1941) until reaffirming itself as a genre of its own.[7]

[7] Ver: Faedo, Alvaro; Cazéres, José Luis; Medero, Héctor; González Chiappara, Miguel; Raffo, Alberto; "Digesto Cooperativo", 1992, FCU; y Reyes Lavega *et al*. ob. cit.

3. The various forms of financing of cooperatives at an international level

To give a better framework to the PARTICIPATIONS of the Uruguayan Cooperative Law, and following Cracogna[8], it is important to remember that *"the necessary investments are financed with own resources (capital and reserves) or those of third parties (indebtedness) under different species, each one of which has a specific legal and economic nature"*, which can be summarized in the following modalities: a) capital, b) reserves, and c) debts. The first two make up the social assets and the third is a liability.

Also, the prestigious author lists the variants that exist within these modalities, based on the legislation of several countries. In the following text, we are going to take that enumeration and consider, in a concise way, how it relates to the alternatives provided in the legal framework of Uruguay.

(Capital)

Minimum capital: it is not established in the law, but a minimum amount of capital must be determined in the Social Statute (social contract) of each cooperative (in general, very low figures are established, for some classes of cooperatives the regulatory norms of the type of activity they practice requires minimum capital, for example, savings and credit and insurance);

obligatory minimum contributions and voluntary contributions: the former must be established in the Social Statute as a condition to be a member (in general, very low figures are established), and the latter is also admitted if the Social Statute so establishes and the General Assembly of the cooperative so resolves it;

mandatory capital increases: the General Assembly will be able to determine them (and a member who does not contribute to them will be regarded as in breach of her obligations and/or will have the right to resign);

rotating capital: it is not specifically established, but, in my opinion, it can be included within the special figure provided by the LGC as *"special patrimonial funds"*;

proportional capital: it is contemplated especially in the LGC, and to be used it must be provided in the Social Statute of the cooperative;

different types of partners: the LGC does not establish this. In the Act Project that originated the LGC the figure of the "collaborating partner" was provided, but it was suppressed in the parliamentary discussion process;

investor partners (Cracogna cites the Italian case): it is not provided by our law (the figure of the "collaborating partner" was very similar);

[8] Cracogna, Dante, ob. cit.

social parties with particular advantages (Cracogna cites the French case): it is not provided by the LGC;

social parties without the right to vote: it is not established in the LGC, but it closely resembles the figure of the Participations exposed in this article;

greater return on capital: it is not provided by the LGC;

revaluation of social quotas: it is specifically established by the LGC;

capitalization of interest and returns: it is established in the LGC as an attribution of the General Assembly.

(Reserves)

Special reserves: the following reserve funds are defined in the LGC: (a) *"legal reserve"* (15% of surpluses until equal to the capital and then 10% up to tripling the capital), (b) the *"reserve for operations with non-members"* (10% of surpluses), and a reserve called *"cooperative education and training fund"* (5% of surpluses) is also planned, strictly speaking it is not a patrimonial reserve, but rather it is resources to cover expenses of training activities; the constitution of other *"special voluntary reserves"* (resolved by the General Assembly) is also possible in our country;

reserves of high or variable percentages: it is not provided by the LGC;

incorporation (of reserves) into the capital (Cracogna cites the French case): it is not provided in the LGC, but it is established that the reserves may *"only be affected to absorb losses"*.

(Indebtedness)

Revolving funds (they are different from revolving or rotating capital, they are compulsory loans of interests and returns that correspond to the partners at the end of each exercise and are returned after a certain period) (Cracogna cites the Canadian, Peruvian and Brazilian case): they are not provided for in the LGC;

cooperative investment certificates (the French and Portuguese cases are cited): they are not provided by our LGC;

special Participations: they are not provided in our law; they have some similarity with the Participations that this work deals with, but they differ in that in case of liquidation they would be paid before the social parts of the partners, but, in the Uruguayan case, Participations are on equal terms with the partners;

other forms of liability: it is expressly established in the LGC that *"cooperatives may assume all forms of liabilities and issue bonds to be subscribed by partners or third parties"*; they may be, for example, bank or commercial loans, negotiable obligations, etc.

4. The forecast of the capitalization instruments (the PARTICIPATIONS) in the Uruguayan LGC

Participations are instruments through which cooperatives can raise capital, both from members and from non-members, for the development of their activities.

It is a novel instrument in the Uruguayan Cooperative Law and is regulated in general for all classes of cooperatives. The only national antecedents were the so-called "actions with interest", figure that was contained in a decree of the Executive Power of the year 1948 - but that presented many limitations - and the same instrument regulated more precisely in art. 12 of Law 17613, but exclusively for credit unions that practiced financial intermediation.

It is almost obvious to say that when these types of instruments are established in the legal system of any country, care must be taken, fundamentally, not to contradict cooperative principles. And especially to ensure that they do not imply, for the cooperatives, the loss of control and democratic management, or their independence and autonomy. Therefore, one of the most sensitive and debatable aspects of this topic refers to the concession or not of political (or para-political) rights, and if they are granted, of their scope[9].

In the Uruguayan regulation, the main characteristics of the Participations are the following:

- nominative;
- transferable, with prior authorization of the Board of Directors and if the Statute of the cooperative had established it;
- they do not grant political or social rights to their holders (as such, therefore, they have no right to participate in the General Assembly, nor to integrate the Board of Directors, nor the Electoral Commission, nor the Commission of Education, Training and Cooperative Integration, nor other Auxiliary Commissions), but they can have the right to integrate the Fiscal Commission (internal control body) if the Statute of the issuing cooperative establishes it;
- they have a ceiling for their issuance of up to 50% of the cooperative's assets;
- the possibility of its issuance must be established in the Statute;

[9] For example, in Argentina, in the 1990s, a reform of the cooperative law 20337 was proposed, which, among other aspects, provided that cooperatives could issue an optional capital (additional to that of the user members) including the granting of participation in the administrative bodies, not exceeding one third. This point divided the opinions and finally the project was not approved.

- the resolution on the issue and its conditions (term, interest rate, etc.) is approved by the General Assembly;
- they must contain a set of enunciations, for example: denomination, data of the cooperative, date of issuance and rescues, interest rate, etc. (all according to the detail of article 67 of the LGC);
- the issuing cooperative has the right to early redemption before expected due dates;
- in case of liquidation of the issuing cooperative, the holders of these instruments will concur to it on an equal conditions with the common partners for their social parts;
- The Statute of the cooperative may establish the possibility of limiting the reimbursement of the social parts and the PIs (as a whole), and in this case this must be defined in the respective certificates when issued (as stipulated in article 73 of the LGC).

It should be noted that the fundamental difference between the two classes of the new instrument is that, although both are *"subject to management risk"*, the payment of interest in the Subordinated Participations (SPs) depends on *"the existence of net surpluses of management of the cooperative"*, with the advantage that if the surpluses are positive they are in the first place of their distribution (article 70 LGC); while Participations with Interests (PIs) will receive *"remuneration regardless of the existence or not of net management surpluses"*.

5. The application to the Participations of other legal norms, beyond the Cooperative Law: the laws of the stock market and of securities

(about the stock market regulations)

The penultimate paragraph of art. 67 of the LGC establishes that the PARTICIPATIONS, in addition to complying with the formalities indicated therein (mentioned in the preceding section), *"may establish in their representative titles other conditions that in the opinion of the cooperative are deemed necessary, in accordance with the legal provisions and regulations in force relating to this type of security"*. From now it is appreciated that this rule involves an interpretative task: to define what "type of values" are the Participations, and in this way to determine what other legal and regulatory provisions could be applicable to them.

And in the same direction it is pertinent to remember that not only the aforementioned article contains a norm that links the Cooperative Law with other branches of the legal system. For example, art. 3 of the LGC establishes that the cooperatives *"will be ruled supplementarily by the provisions of the law of commercial companies in the absence of any cooperative law provision and if such laws are compatible"*, and art. 9 that: *"In all matters not provided for in cooperative laws, the general principles regarding legal business in general and contracts in particular, as compatible and as applicable or pertinent, shall apply to the cooperative act."*

As we know, it is impossible to think of an isolated "cooperative system" that is completely independent of the rest of society, that is, of the socio-economic and legal context that surrounds it, and even that context claims the need to define a regulatory framework the most complete, clear and safe possible, with the understanding that this is fundamental for the effective use of the new instruments.

However, in Uruguay everything related to the stock market is regulated by Law No. 18627, and this contains, in its art. 13, the following definition of values: *"transferable assets or rights, whether or not incorporated into a document, that meet the requirements established by the regulations in force. Included in this concept are shares, negotiable obligations, futures markets, options, investment fund shares, securities and, in general, any right of credit or investment."*

It is clear that the aforementioned law contains the general legal framework in this area, therefore, there is no doubt that, without prejudice to what is established in the LGC, its application corresponds to the Participations. However, a precision must be made: Articles 1 and 2 of Law 18.627 establish that the scope or scope of the same refers to the *"stock market, all the agents that participate in it, the stock exchanges and other markets for the negotiation of public offering issues"*, these being the ones that are made *"to the general public or to certain sectors or specific groups of the latter, in order to acquire, sell or exchange said securities."*, and then adds: Private issues are excluded from a large part of their dispositions.

Therefore, issues of Share made through public offer will be subject to the law of the stock market in everything related to the state registration, authorization, negotiation form, etc., without prejudice to the provisions of the Law Cooperative. On the contrary, they will not be regulated by said law, in such aspects, in the case of private issues; in such case, *"it should be expressly stated that it is private, only individuals or legal entities can be placed directly and can not be quoted on the stock exchange or advertise their placement"*, and it should also be expressly stated that said issues have not been registered in the Superintendence of Financial Services.

(about value titles regulations)

On the other hand, in Uruguay, everything related to securities is regulated by Decree-Law 14701.[10]

Following the definition of Sánchez Calero*et al.* the value title is *"the document essentially transmissible necessary to exercise the literal and autonomous right mentioned therein"*[11]. On the other hand, Rippe *et al.* express that in our Law the expression value is used (which in Comparative Law is also known as "titles of credit") *"to designate certain documents whose value is represented by the right to which the document refers and is inseparable of the title itself "*.[12]

[10] In Uruguay, all laws issued between June 27, 1973 and March 1, 1985 are called decree-laws, because they have been approved by a dictatorial government.

[11] Sánchez Calero, Fernando; Sánchez-Calero Guilarte, Juan; "Instituciones de Derecho Mercantil", Vol. II, 2005, Madrid, Thomson-Aranzadi.

[12] Rippe, Siegbert; Bugallo, Beatriz; Longone, María Rosa, Miller, John; "Instituciones de Derecho Comercial Uruguayo", 1996, Montevideo, FCU.

Meanwhile, the figure of the Participations has some points of contact with the aforementioned definition, and with the concepts contained in the Securities Act No. 14,701. For example art. 1 °, which defines the value title (*"The securities are the necessary documents to exercise the literal and autonomous right that is recorded in them."*), and art. 3 °, which establishes the requirements to be considered such, it arises that they are documents in which a right and a correlative obligation to pay a sum of money, created by the unilateral will of the debtor, aspects that in principle they can coincide with the essential notes of the Participations.

Also a first glance leads one to think that this figure of Cooperative Law finds other similarities with some characters of the value titles, namely:

(i) in relation to the document: the necessity (the document is indispensable to exercise the right contained in it), the time of constitution of the right (the right consigned in the title is born with it) and the solemnity (the document to be valid and effective must meet certain legal requirements);

(ii) regarding the right: by literalness, the autonomy of law and abstraction; and

(iii) regarding the obligation: unilaterality and the autonomy of the obligation.

Finally, it is estimated that some peculiarities of the Participations (subject to the management risk of the issuing cooperative, its patrimonial nature), do not prevent that in the absence of any more precise regulation in the Cooperative Law, it may be applied, by analogy, some aspects of the regulations corresponding to value titles (for example, in legal procedural aspects).

6. The tax treatment of the Participations, in particular in relation to the income tax for individuals (IRPF by its initials in Spanish)

With the understanding that the Participations constitute a good attempt to resolve the question of the financing of the cooperatives, it would be important to find elements that encourage people to invest their savings in them, or at least, that they do not hinder them, but it is not what happens with the tax treatment in relation to the tax that levies the income obtained by the natural persons.

Law 18083, which contains the tax system of Uruguay, created, among other taxes, income tax (modified in relation to cooperatives by article 315 of law 18,172 and by article 807 of law 18,719). The point is that none of these rules expressly establishes to which regime the remunerations obtained by the individuals are subject, by means of the figure of the Participations.

There is no doubt that the remunerations (the interests) that individuals obtain from the investments made through these instruments are included in the income taxable event as any other capital income and are taxed as such (it is concluded that they have the same income treatment that generated by the investment in any other type of company).

Perhaps a doubt could be generated as to whether the funds returned from the capital invested in the time periods agreed upon remain or are not included in the IRPF. But, although the regulations are not clear, it

can be concluded that these funds should not be taxed. On the one hand, the tax law (18083) could not envisage the Participations because they were created by a later (Law 18407), and added to it the simple reason that if taxed on those funds the instrument would lose its purpose, since no-one person would invest in a cooperative if, later, when he redeems his capital, he must give part of it as a tribute.

7. The patrimonial nature of the Participations and their legal-accounting treatment

The art. 52 of the LGC contains a clear description of the resources of patrimonial nature of the cooperatives, and among them are *"The resources that are derived from the other capitalization instruments"*. In turn, the "Other capitalization instruments" are, precisely, the Participations (Articles 64 to 67 of the LGC).

Moreover, in the arts. 65 and 66 it is clearly established that the Participations *"are incorporated into the assets of the cooperative"*.

And in the case of saving and credit cooperatives in particular, article 164 of the LGC adds that *"subordinated participations and interests with interest will be part of the essential and accounting assets of the cooperative"*. As you can see, this article is clearly in line with what is established in the aforementioned articles of the general part, but reinforces those concepts with terms that come from the central bank regulation ("essential equity") and accounting science ("accounting equity").

The previously mentioned determines, undoubtedly, the way in which the resources coming from such Participations must be accounted for and exposed. About this point, Reyes Lavega *et al.* (cited above) say that such standards *"should adjust the accounting standards and the formulation of the corresponding financial statements, and must abide to the control organisms"*, and meanwhile, Amorin and Algorta express that, in the case Uruguayan, must *"be computed as a patrimonial item"*.[13]

It is also opportune to reiterate that, without prejudice to the term established for the return of the capital in the conditions of each issue, by express provision of the law, the Participations are subject to *"management risk"* (articles 65 and 66), and , in turn, in the event of liquidation of the issuing cooperative, they will not have the preference of a foreign liability, but will share the fate of their own liabilities or social capital (risk) that the members have contributed (in social parts) insofar as *"they shall concur to it on an equal conditions with the common partners"* (Article 67, final paragraph).

At this point corresponds, once again, the task of integrating the law, particularly in relation to the legal-accounting aspect, so it is added next.

First of all, it is pertinent to recall the supplementary application to the cooperatives of the law of commercial companies, and, in turn, to bring up the definition of Cooperative Law that contains the LGC: *"Cooperative law is the set of special rules, jurisprudence, doctrine and practices based on the principles*

[13] Amorin, Marcelo; Algorta, Paula; "Sociedades Cooperativas. Sistema y Derecho Cooperativo", 2010, Montevideo, La Ley.

that determine and regulate the performance of cooperative organizations and the subjects that participate in them" (both are contained in article 3).

Additionally, it should be noted that the law of commercial companies No. 16060 (Article 91) establishes that: *"Regulations shall establish the appropriate accounting standards to which the financial statements of the commercial companies shall adjust."*; This is how the so-called International Accounting Standards (IAS) come into play, since, according to what is established in the regulatory decree 266/07, these are the accounting guidelines that companies must follow, and, by this chain of forwarding, they result applicable to cooperatives.[14]

However, because of what was said earlier about the specificity of cooperatives and what is established in the LGC, it is clear that in the event of any contradictions between the IAS and the Cooperative Law regulations, what is most important is the latter, for which reason there is no doubts that the Participations in the Uruguayan Cooperative Law are an item of patrimonial character.[15]

Beyond its proclaimed patrimonial nature, it can not be ignored that the conditions in which they are issued, especially regarding the deadline, will be key elements for consideration by third parties in practice (shall they be state agencies, audits, etc.).

8. Conclusions

With all into account, these reflections on the Participations in the Uruguayan Cooperative Law, lead to the conclusion that:

- This is an attempt by the legislator to provide cooperatives with a tool that, while being compatible with cooperative principles, helps them to solve the problem of insufficient capitalization.
- The law established in a very detailed manner the characteristics and requirements that must be fulfilled for its issuance (formal, enunciative, statutory, procedural, etc.).
- To a large extent, it is up to the legal operators to define which other rules -in addition to the Cooperative Law- correspond to apply to the Participations. And in this sense, the general regulatory framework of the securities market and, in some aspects, value titles legislation is applicable.
- For greater security of the instrument, a greater regulatory precision would be pertinent in relation to the tax aspect, especially the Income Tax for Individuals (IRPF).
- According to the legal regulations, the resources obtained by the shares are of a patrimonial nature, and as such they must be registered and exhibited in the financial statements of the

[14] It should be remembered that IAS 32 and Interpretation IFRIC 2 call into question the nature of the social capital of cooperatives, between equity and liabilities, especially due to the fact that cooperative members can withdraw from the cooperative. and demand the return of the capital they have integrated.

[15] And this goes beyond some of the characteristics of these instruments, as well as some limitation that the statutes of the cooperatives can incorporate in relation to the return of the social shares and participations.

cooperatives; without prejudice to this, the extension of the term for which they were issued will be a very important element for those who operate with the cooperatives taking into account this financing.

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DOCUMENTARY ANALYSIS ON THE STATUTORY FUNDS OF COOPERATIVES IN THE CORDILLERA ADMINISTRATIVE REGION, PHILIPPINES

Lotes P. Lab-oyan

Brief Background of the Philippine Cooperative Code (RA 9520)

The Philippine Cooperative Code of 2008 (Republic Act 9520) was an amended version of the Cooperative Code of the Philippines. Originally referred to as Cooperative Code of the Philippines, it was enacted by the House of Representatives and Senate of the Philippines and was approved on March 10, 1990. It covers all types and categories of cooperatives like primary, secondary, and tertiary. It provides the general framework on the rules and regulations in the registration, operations and management of cooperatives entire the Philippines.

Designed to encompass all aspects related to cooperatives, the Philippine Cooperative Code is a comprehensive reference for all cooperators and stakeholders in acquiring legal personality for cooperatives under Philippine laws. As a law that was enacted under the New Philippines Constitution of 1987, it consolidated all the different laws previously issued by different administrations.

Implementation of the provisions of the Code is done by the Cooperative Development Authority (CDA) that was created by virtue of Republic Act 6939 which was enacted as a twin law with the Cooperative Code of the Philippines in 1990. As an agency tasked to oversee the implementation of the Cooperative Code, CDA publishes supplemental circulars and office memoranda that clarify the broad scope of provisions of the Code.

In line with the provisions of the Code, the study was conducted to look into the compliance of cooperatives with certain provisions of the Cooperative Code and CDA publications related to statutory funds. It was intended to determine actual practices of cooperatives as compared to the provisions of their respective by-laws that were prepared based on the provisions of the Cooperative Code.

Having this in mind, the consistency of cooperative compliance with the provisions of the Cooperative Code as reflected in their by-laws and reports was evaluated. On the part of the CDA as the implementing agency, the method of implementation of the provisions of the cooperative Code is partly evaluated.

While the main objective of the study was for completion of academic requirements, the results of the study served as inputs in the effort to monitor the performance of cooperatives as regards statutory funds at the Cordillera Administrative Region. It is gratifying to note that the awareness level of both the CDA and cooperative stakeholders were partly addressed as the study provided information that answered some undocumented observations.

The provisions of the Cooperative Code being the main reference of most cooperatives and stakeholders served its purpose as an enacted law when its provisions are properly considered and

implemented. This study might not have comprehensively dealt with the Cooperative Code but the results discussed in the following Chapters of this paper are encouraging.

Abstract

The study evaluated cooperatives' compliance based on the provisions of the Philippine Cooperative Code and cooperative by-laws on order of distribution, allocation and utilization of their statutory funds [general reserve fund {GRF}, cooperative education and training fund {CETF}, optional fund {OF}, and community development fund {CDF}]. Fifty (50) cooperatives in Baguio and Benguet served as participants. Ninety-eight percent (98%) up to 100% percent complied with the order on distribution of statutory funds in their respective by-laws consistent with the Philippine Cooperative Code. Based on records and interviews, one cooperative sourced the GRF from credit and consumer operations and not from the consolidated financial operations, thus the rate used was lower. From the Audited Financial Statement and other reports submitted to CDA, compliance with funding statutory funds is about 78%-98% with GRF (98%) as the most funded followed by CDF (92%); OF (84%) and CETF (78%) respectively. From interviews, key informants reveal that they directly charge training fees to operational expenses, hence reducing the allocation in the by-laws as observed in the data with only 26 participants that used the 10% maximum provision in their by-laws. Utilization of statutory funds was between fourteen and eighty-two percent (14%-82%) with CETF (82%) as the most utilized and GRF (14%) as the least utilized. The low utilization of the GRF shows compliance with legal provisions of law making it a restricted fund to cover operational losses. There was significant difference on the utilization of statutory funds but not on the order of distribution and funding. Based on interviews, medium and large cooperatives allocate lower rates in their CETF; cooperatives use their OF to acquire real estate properties; other cooperatives deposit their statutory funds in banks and other high yielding investments; for others, they do not know how to treat their optional fund. For the community development fund of three percent, 92 percent of participants complied with the provision of their by-laws and only about 72 percent utilized their community development fund. As explained by key informants, changes in the composition of officers along with background and work experiences affected the full utilization of the community development fund.

Keywords: Compliance, allocation, funding, utilization

Introduction

The 1987 Philippine Constitution particularly Section 15, Article XII mandates that "Congress shall create an agency to promote the viability and growth of cooperatives as instruments for social justice and economic development". Promulgated on March 10, 1990 was Republic Act (RA) 6939 or Cooperative Development Authority (CDA) with the power to register and regulate cooperatives and to adopt and implement national development plans for the cooperative movement; and Republic Act (RA) 6938 "Cooperative Code of the Philippines" as amended by Republic Act (RA) 9520 or Philippine Cooperative Code of 2008.

Mendoza (1997) claimed that since 1853, almost 5,000 pieces of legislation on cooperation have been promulgated in different countries of the world. Understandably, the cooperative statutory provisions vary from one country to another. This is because the cooperative law necessarily has to be attuned to a number of factors or conditions in a particular country. The most pertinent of these factors are the type of government, customs, traditions, history and culture, kind and level of economy, cooperative goals of development, stage of cooperatives development, and the degree of understanding of and belief in cooperation by policy makers.

Further, Article 4 of the Philippine Cooperative Code states that "every cooperative shall conduct its affairs in accordance with Filipino culture, good values and experience and the universally accepted principles of cooperation which include, but are not limited to the following: 1. Voluntary and Open Membership; 2. Democratic Member Control; 3. Member Economic Participation; 4. Autonomy and Independence; 5. Education, Training and Information; 6. Cooperation among Cooperatives. 7. Concern for Community.

Based on personal observations on the development of cooperatives in the Cordillera Administrative Region (CAR) not all cooperatives comply with the provisions of their respective by-laws. Some cooperatives submit incomplete returns and do not conform to standards set by law and CDA issuances. The non-compliance of cooperatives to the provisions of their by-laws and the Code affects the authority in coming up with good reports on the performance of cooperatives in the region. CDA personnel issue notice of non-compliance to erring cooperatives that compel them to submit the required reports but beyond the required 120 days after close of Calendar Year.

Since the passage of the Cooperative Code that took effect on March 22, 2009, there had been no studies conducted to specifically look into the compliance of cooperatives in terms of the allocation and distribution of net surplus, funding and utilization of statutory funds in relation to cooperative by-laws, audited financial statements and the Code.

This study was guided by Article 86 of the Philippine Cooperative Code that provides for the order of distribution and states "The net surplus of every cooperative shall be distributed as follows: 1. An amount for the general reserve fund which shall be at least ten percentum (10%) of net surplus: Provided, that in the first five (5) years of operation after registration, this amount shall not be less than fifty percentum (50%) of the net surplus; 2. An amount for the education and training fund shall not be more than ten percentum (10%) of the net surplus. The by-laws may provide that certain fees or a portion thereof be credited to such fund. The fund shall provide for the training, development and similar other cooperative activities geared towards the growth of the cooperative movement. Half of the amount transferred to education and training fund annually under the subsection shall be spent by the cooperative for education and training purposes; while the other half may be remitted to a union or federation chosen by the cooperative or of which it is a member. The amount for the community development fund shall not be less than three percentum (3%) of the net surplus. The community development fund shall be used for projects or activities that will benefit the community where it operates. 4. The optional fund, a land and building and any other necessary funds shall not exceed seven percentum (7%). The remaining net

surplus shall be made available to the members in the form of interest on share capital not to exceed the normal rate of return on investments and patronage refunds. Provided, that any amount remaining after the allowable interest and the patronage refund have been deducted shall be credited to the reserve fund."

The study was conducted to evaluate the compliance of cooperatives in Baguio City and Benguet Province in relation to the provisions of the participants' cooperative by-laws; content of Audited Financial Statements and Philippine Cooperative Code on the order of distribution, funding, and utilization of statutory funds. The study sought to answer the following questions:

a. What is the extent of compliance of cooperatives to Philippine Cooperative Code with the order of distribution, funding and utilization of statutory funds?

b. What is the extent of compliance of cooperatives with their by-laws provision on the allocation of the statutory funds as reflected in the participants audited financial statements?

c. What is the extent of compliance on the utilization of the cooperatives statutory funds based on the audited financial statements?

d. Are there differences on the compliance of the cooperatives in the order of distribution; funding; and utilization of statutory funds?

This tested the hypothesis that there are significant differences in the compliance of the cooperatives on the order of distribution, funding and utilization of statutory funds for cooperatives that operated for more than one year.

The research intended to greatly benefit the Cooperative Development Authority officials and personnel and other regulatory agencies; Cooperatives and shareholders; Community; Academe/Schools; Researcher and future researchers in the planning implementation, monitoring and policy-making as regards statutory funds.

Design and Methodology

The study made use of qualitative and quantitative methods. Content analysis, interviews, observations and focus group discussions were utilized. Records of the participant cooperatives submitted to the Cooperative Development Authority were individually examined to come up with the required data that were presented, analyzed and interpreted using appropriate statistical tools. Below is the list of top 50 cooperatives based on assets with principal offices located in Baguio City and Benguet Province that served as participants.

Table 1. List of participant cooperatives

City/Province/Name of Cooperative
A. Baguio City
1. Baguio Benguet Community Credit Cooperative
2. Texins Multipurpose Cooperative
3. Mothers and Family Multipurpose Cooperative
4. The Moog Credit Cooperative
5. Baguio Vegetable Retailers Savings and Credit Cooperative
6. Baguio General Hospital and Medical Center Employees Multipurpose Cooperative
7. SLU-SVP Housing Cooperative
8. Baguio Market Vendors Multipurpose Cooperative
9. Baguio Entrepreneurs Credit Cooperative
10.BAMAPCOM Entrepreneurs Multipurpose Cooperative
11.Baguio City School Teachers and Employees MPC
12.San Vicente Savings and Credit Cooperative
13.DENR-CAR Employees Multipurpose Cooperative
14.Taloy Norte Farmers Multipurpose Cooperative
15.Baguio Colleges Foundation Credit Cooperative
16.BARP Multipurpose Cooperative
17.Baguio City National High School MPC
18.Timber and Lime Multipurpose Cooperative
19.Baguio Maharlika Multipurpose Cooperative

20.Cordillera Overseas Contract Workers and Families Multipurpose Cooperative

21.Marie Eugenie Cooperative Development Center

22.United Natonin Credit Cooperative

23.RHO-CAR Employees Multipurpose Cooperative

24.Bagong Pag-asa Entrepreneurs Savings and Credit Cooperative

25.Pines City National High School Teachers and

Employees Multipurpose Cooperative

Sub-total: 25

City/Province/Name of Cooperative

B. Benguet Province

1. Benguet State University Multipurpose Cooperative

2. Philex Community Credit Cooperative

3. La Trinidad Vegetable Trading Post MPC

4. Bad-ayan Buguias Development MPC

5. Benguet Provincial Government Employees MPC

6. Kabayan Multipurpose Cooperative

7. Philex Mines Community Consumers Cooperative

8. BATJODA Multipurpose Cooperative

9. Thanksgiving Multipurpose Cooperative

10.Multipurpose Cooperative of COA CAR Employees

11.Benguet Operators and Drivers MPC

12.Taba-ao Cuba Multipurpose Cooperative

13.Universal Multipurpose Cooperative

14.Hydro Group Employees Multipurpose Cooperative

15.Seeds and Fruits Multipurpose Cooperative

16.CBB Employees and Friends Multipurpose Cooperative

17.La Trinidad Municipal Employees MPC

18.Trinidad Based Agawa Multipurpose Cooperative

19.Mabuhay Multipurpose Cooperative

20.Bahong Multipurpose Cooperative

21.Kibungan Employees Multipurpose Cooperative

22.Drivers Operators Employees Residents and Other Sectors Multipurpose Cooperative

23.Benguet Traders Multipurpose Cooperative

24.La Trinidad Strawberry Multipurpose Cooperative

25.Tomay Credit Cooperative

Sub-total: 25

Grand Total: 50

CDA records that contained information on total assets of cooperatives, order of distribution and amount of allocation of net surplus, funding and utilization of statutory funds were thoroughly examined and supplemented by interviews with key informants from the participant cooperatives, unions and federations to whom they are affiliated with. Information on the actual provisions on statutory funds derived from the by-laws of the participant cooperatives and compared to the order of distribution of the net surplus. Actual data on General Reserve Fund, Education and Training Fund, Community Development Fund and Optional Fund were obtained from the Audited Financial Statements, Cooperative Annual Progress Report, Social Audit Report and Performance Report of each participant cooperative. Descriptive and inferential statistics were used to describe prevailing conditions as needed based on the specific problems. Statistical tools used were frequency count, ranking, percentage and chi-square test. Megastat 10.1, an adds-in feature of MS Excel was used to test the validity of the data. The Input-Process-Output-Outcome (IPOO) Model guided the study.

RESULTS AND DISCUSSIONS

Compliance on Order of Distribution of Statutory Funds

Cooperatives are required to distribute net surplus every year based on the provisions of approved by-laws that must be in consonance with the provisions of the Philippine Cooperative Code.

In the distribution also called allocation, there are provisions of the Code pertaining to the minimum and maximum amount to be followed. Often, the order of distribution in the cooperative by-laws are patterned or copied from the Cooperative Code. Provision for general reserve fund shall not be less than 10% for old cooperatives but 50% for the first five years of operation for newly registered cooperatives; cooperative education training fund shall not be more than 10%; community development fund shall not be less than 3% and optional fund shall not exceed 7%.

General Reserve Fund

The provisions on general reserve fund in the by-laws of the fifty (50) participants were compared to the provisions in the Philippine Cooperative Code. Forty-six (46) participants used the ten percent(10%)minimum provision; one cooperative used 15%; one cooperative, 20%; one cooperative, 25% and one newly registered cooperative, 50% respectively.

The contents of the by-laws of the participants on reserve fund were compared to the provisions in the Code to assess how many of them complied as to order of distribution of general reserve fund. It was revealed that all the participants complied with the provisions of Philippine Cooperative Code.

About 46 cooperatives or 92% conformed to the minimum 10% provision for general reserve fund as mandated under Article 86 of the Philippine Cooperative Code. Of the four cooperatives that used higher rate of allocation, one cooperative provided the fifty (50)% rate since it is a newly registered cooperative. The other cooperatives used 15% followed by 20% and 25% respectively but they are still within the acceptable provisions consistent with the Philippine Cooperative Code. The varying rates used by the different cooperatives can be attributed to the provision of RA 9520 that provided leeway as it did not set an absolute rate to be used but instead provided the minimum rate of fifty (50)% for newly registered cooperative for the first five years of operation upon registration and 10% for those that had been previously registered under previous law like Presidential Decree 175 issued on April 14, 1973, RA 6938 of 1990 and RA 9520 of February 22, 2009. Such provisions provide flexibility on the part of cooperatives to use different rates of allocation on the condition that they are congruent with existing provisions of the Code. Data on the fifty (50) participants indicate that these cooperatives located in Baguio City and Benguet Province have high regard on the provisions of the Code given the favorable level of compliance to allocate reserve fund that is required under Article 86 of RA 9520. The four cooperatives with high rates for general reserve fund based in Baguio City belong to large (with assets of Php 100 million or more) and medium (with assets of Php 15,000,001 to Php 100 million) cooperatives. One of the possible reasons is the stiff competition among financial players wherein the possibility of

high delinquency and losses can affect operations and the need to strengthen institutional capital is a necessity. Also, cooperatives understood the importance of securing funds through accumulation of buffer funds to cover potential losses that may occur in their respective cooperatives. This is due to the fact that no other means of security to protect the funds are in place except those covered by insurance companies and accounts deposited in banks covered by the Philippine Deposit Insurance Corporation (PDIC). Moreover, cooperatives have limited options when they experience illiquidity especially when banks or financial institutions consider them as non-bankable. The option is for them to have sufficient fund to cover unforeseen problems that can affect the business enterprise of the cooperative. The experiences of some cooperatives in Baguio City and Benguet Province related to huge business losses had served as eye opener for some of these cooperatives to fund their respective general reserve fund.

Cooperative Education Training Fund

Results on the provisions on cooperative education training fund (CETF) in the by-laws of the fifty (50) participants were compared with the 10% maximum provision on CETF under Article 86 of the Philippine Cooperative Codereveal that thirty-two (32) participants adopted the 10% maximum rate; About 18 cooperatives used 8%(1);7%(2);6%(2);5% (8);(1)3%; (2) 2%; (1) 1.5% and (1) 1% respectively.

Assessment of records indicated that all the participants provided CETF provisions that are consistent with the provisions of RA 9520. 32 or 64% of the cooperatives adopted the 10% maximum rate for cooperative education and training fund. Eigtheen cooperatives constituting 36% used lower rates but were still within the range provided for in the law.

The conduct of Pre-Membership Education Seminar (PMES) before registration of a cooperative, the status or category of the cooperative having attained medium or large status, and differing interpretations on the provisions of the law are some of the factors that will explain the different rates of allocation implemented by cooperatives for their cooperative education and training fund. Interview with participants revealed that some cooperatives directly charge training and allocations to operational expenses. This leads some cooperatives to reduce provisions in their respective by-laws.

Cooperatives cannot be blamed for such practices as the Code provided flexibility in the rates to be used provided it is not higher than 10%. Although there are differing rates of allocation used by the participants, the result of the study showed that they conformed to the provisions of Article 86 of RA 9520 that provides 10% as the maximum amount of provisions for cooperative education and training fund. The favorable allocation of provisions for CETF by participants attest to the level of understanding of cooperatives on the importance of allocating funds for cooperative education and training fund that supports Principle No. 5 of the universally accepted principles of cooperative.

In 1995, the International Cooperative Alliance (ICA) adopted the principle that “cooperatives shall provide education and training for their members, elected and appointed representatives, managers and employees so that they can contribute effectively and efficiently to the development of their cooperatives” putting emphasis on the importance of education, training and information. It is also

important that members, officers and staff of cooperatives are enlightened on their respective roles in the organization so they can discharge their functions accordingly.

Optional Fund (OF)

The provisions on optional fund in the by-laws of the fifty (50) participants were compared to the seven (7%) maximum provision in the Philippine Cooperative Code. Results show that thirty-nine (39) cooperatives adopted the 7% maximum provision on optional fund. About 11 participants provided lower rates 5% (6); 4% (1); 3%(1) and 2%(3) in their by-laws provisions.

The optional fund provisions in the by-laws of the fifty (50) cooperatives as compared to the rates provided in the Philippine Cooperative Code shows that all participants followed the required provisions of the Code on optional fund provisions as gleaned in their respective by-laws. Out of the fifty (50) by-laws evaluated, 39 cooperatives constituting 78% of the study's cooperatives adopted the 7% maximum provision on optional fund. While about 11 cooperatives or 22% provided lower rates in their by-laws, they are still within the realm of the law on statutory funds. The varying rates used by the eleven cooperatives can be attributed to the different categories of the participants: small, medium and large cooperatives. Usually medium and large cooperatives allocate lower rates when they acquired real estate properties like land and buildings and they perceive allocating a lesser amount is enough.

When income of cooperatives reach millions, having huge allocation for institutional capital like optional fund results to higher amount deducted from the net surplus. Another reason is that these cooperatives know the advantages of investing in real estates that can sustain the operations when properly managed.

Moreover, the positive results on the order of distribution of optional fund in the by-laws of the different cooperatives shows high level of understanding of cooperatives in Cordillera Region on optional fund. The data manifest the ability of the participants to comply with the provisions of the Code and their respective by-laws.

Community Development Fund (CDF)

Review of the participant cooperatives' by-laws show that except for one cooperative that used 10% allocation the 49 participants adopted the 3% provisions of Philippine Cooperative Code on community development fund in their respective by-laws.

Review of the cooperative by-laws of the fifty (50) participants showed that 49 (98%) of the participants adopted provisions of RA 9520 on community development fund. One cooperative used 10% provision in its by-laws that is higher than the minimum required provision on CDF in the Code. Interview with a key informant from the said cooperative showed that they were unaware of such provision and were not notified until it was pointed out by the researcher. Amendment to the by-laws of the cooperative was proposed with General Assembly approval.

While there is no issuance that sets the maximum limit on provisions for CDF, discussions with persons involved in the crafting of the implementing rules and regulations of the Philippine Cooperative Code indicated that the CDF originally belongs to the optional fund that was pegged at 10% under RA 6938. However, under RA 9520, the provision for optional fund was divided and a separate provision for community development fund was created. As a result, cooperative experts argued that when the provisions for CDF and optional fund are added, it must not exceed 10% as originally stated under the original provisions of RA 6938.

Since the 10% order of distribution for community development fund of one cooperative when combined to its optional fund provision of 7% exceeds the 10% limit, it can be considered that the cooperative is not compliant on the order of distribution on community development fund. Community development fund is intended to meet the social responsibility of the cooperative within the community where it operates. The cooperative needs to demonstrate how it addresses concerns within and outside its membership while sustaining its commitment to meet organizational goals.

The projects and activities funded by the community development fund is geared toward assisting community residents especially non-members to feel the real meaning of cooperative. Having projects that address the felt needs and touch the lives of people within the community increases awareness level that promotes solidarity based on organized action.

Support for advocacy for community development by government, non-government organizations, academe and other stakeholders can be realized through partnership or joint undertakings using the community development fund of cooperatives when pooled together. Results of the study reveal the strong determination of the cooperative sector to contribute to positive changes in the community in their respective areas of operation by allocating funds for such purpose. This can be attested by the practices of two large cooperatives in Benguet Province. These two cooperatives partner with the local government unit in funding some projects that are identified by the cooperative and implemented in coordination with local officials and community residents. Another large cooperative in Benguet Province set aside a yearly allocation to be given to two requesting barangays. This had been a tradition that started twenty 20 years ago. The granting of request occurs in a cycle among the fourteen barangays of the municipality where each barangay has the chance to be given financial assistance for any projects that can benefit the community residents.

The established tradition of cooperatives to help communities in various ways indicates high compliance of cooperatives to Principle No. 6 on “Concern for the Community of the ICA Cooperative Principles.”

Likewise, allocating funds for the community development funds shows the willingness of cooperatives to abide with the by-laws and directives of the Cooperative Development Authority in managing their community development fund.

Compliance on Extent of Funding of Statutory Funds

General Reserve Fund

Except for one cooperative that used 9.42% allocation of General Reserve Fund in its Audited Financial Statement, all the forty-nine (49) participants adopted in the allocation of funds the 10% provision for general reserve fund as provided in their by-laws.

Based on the 2014 Audited Financial Statement (AFS) of the fifty (50) participants, the said cooperatives allocated reserve fund based on their by-laws. The study revealed that 98% or 49 participants complied with the allocation of funds for general reserve fund. One cooperative allocated 9.42% which is below the minimum rate.

An interview with a key informant from the concerned cooperative revealed that the cooperative took its general reserve fund from its credit and consumers operation only and not on the consolidated financial operations. The cooperative has other services like transport service, rice mill, tram line and tractor operations but no amount for general reserve fund are taken from these operations. This explains why the amount of allocation is below the 10% provision in its by-laws. However, such explanation cannot be accepted by regulators on the premise that it is a violation of the provisions of its by-laws and the Code.

Two cooperatives allocated higher amounts that correspondingly violated the rate that was provided for general reserve fund in their by-laws leading to higher amount of allocation. However, this was attributed to the co-operative incurring losses in previous years' operations that led to the utilization of allocated reserve funds to cover operational losses.

The situation of the two cooperatives is an exception to the rule as these cooperatives followed the provisions of CDA Memorandum Circular 2000-08. Item 3 of CDA M.C. 2000-08 states "Since the Reserve Fund account is intended, among others to meet operational losses, all losses incurred by the cooperatives in their business operations shall therefore be charged against this fund". Further, item 4 of the same circular provides "Consistent with the accounting principles of conservatism and the going concern, all charges against the Reserve Fund shall subsequently be offset by the following modified allocation and distribution of net surplus until such time that the debit balance of the Reserve Fund account shall have been fully offset, viz: (a) Reserve Fund – not more than sixty-five percentum (65%) of the net surplus;. . .".

Cooperative Education Training Fund

The allocation on cooperative education and training fund of the fifty participants in the by-laws were compared to the rate of allocation used in the Audited Financial Statements. Results indicate that thirty-nine (39) participants adopted the 10% provisions on cooperative education and training fund as provided in their respective by-laws. Eleven (11) participants used lower rates like 8%(1); 7%(1); 6%(1); 5.40%(1); 5%(11); 3%(2);2.5%(1);2%(2);1.5%(1) and 1%(3) on education and training fund as provided in their by-laws.

Financial records indicated that eleven (11) cooperatives constituting 22% of the participants deviated from the provisions on education and training fund as provided in their by-laws.

It was noted that the eleven participants used different rates in the allocation of net surplus that led to reduction in the amount intended for the education and training fund.

The variance in the amount allocated for cooperative education and training fund can be attributed to several factors that affected the cooperatives. Such observations on non-conformity with the provision of the by-laws of some participants contradicts internal and external rule in funding education and training fund that is stipulated in the by-laws of each cooperative.

The results showed some violations incurred by eleven cooperatives, however, a greater number of the participants followed the provisions of their by-laws so indicating a higher compliance rate in the funding of cooperative education and training fund.

Some factors that could have affected the provisioning is the desire of some officers and management staff to project a higher amount for interest on share capital and patronage refund on the assumption that they can allocate within the range of 10% and below as the provision of the law is not absolute. The absence of education training plan, lack of appreciation on the importance of training, the orientation or misconception of some members, officers and management staff who give more importance to financial satisfaction rather than funding statutory funds are some of the possible reasons why lower rates are allocated for CETF.

Optional Fund

The provisions on optional fund of the fifty participants in the by-laws were compared to the rate of allocation used in the Audited Financial Statements. Data reveal that 42 participants funded their optional fund using the 7% provisions of their respective by-laws. But eight cooperatives used lesser or greater rates (12% (1); 10% (1);9%(1); 6%(1); 5%(5); 4% (1); 3% (2); 2% (2) and 1%) (1).

The amount of funds allocated for optional fund in the financial statements of the fifty (50) cooperatives was analyzed by looking into the net surplus and its order of distribution. Data revealed that 42 participants constituting 84% funded their optional fund in consonance to the provisions of their respective by-laws while eight cooperatives or 16% deviated and used lesser or higher rates in the allocation of net surplus.

Of the eight non-compliant cooperatives, four cooperatives used lower rates while the other four applied higher rates than were provided in their respective by-laws. It was found out that one of the participants used 10% in the allocation instead of 7%. The other cooperative allocated 3% as shown in its Audited Financial Statement instead of 7% provision of its by-laws on optional fund. The highest amount allocated for optional fund was 12% that exceeded the maximum rate required in the by-laws of one cooperative.

The optional fund represents institutional capital intended for land, building, and acquisition of equipment, members' benefits and other purposes based on the Code and Standard Chart of Accounts for Cooperatives. The practices of some participants confirmed the findings of Lamen (1991). According to her study, she found that the policies adopted by cooperatives with regard to their idle funds are deposited in banks and invested in stocks. Idle funds are deposited in banks so that they will earn interest during the time when these funds are not utilized.

Interviews with participants reveal that they deposit their statutory funds in the banks and some claimed they invested in high yielding investments. However, only few cooperatives have separate accounts for each of the required statutory funds as most often it is included in the cash in bank that becomes part of the operating capital. Such practice often results to the difficulty of monitoring fund balances especially when ledgers are not periodically updated showing how funds are used.

Community Development Fund

The provisions on community development fund of the fifty participants in the by-laws were compared to the rate of allocation used in the Audited Financial Statements. Data reveal that 46 participants funded their community fund using the 3% provisions of their respective by-laws. But four cooperatives used lesser and greater rates such as 7% (1);3%(1); 2%(1); 0%(1).

Further, records of the fifty (50) participants indicated that forty-six (46) cooperatives or 92% complied with the funding of community development fund that conforms with the provisions of their by-laws. One cooperative failed to fund its CDF. Another cooperative provided below the required provision. One cooperative also exceeded the provision stated in its by-laws by using 7% instead of 3% as stated in its by-laws and one cooperative opted to use the 3% minimum instead of the 10% provision of its by-laws. In the case of the cooperative that provided 3% provision in its by-laws, it used 7% provision in the allocation. It was found later that in the preparation of financial statements, the provisions for CDF and optional fund were interchanged when the computation was done. However, this indicates some gaps on the part of management and the external auditor on the basis of the computation of statutory funds that was not verified in the by-laws of the cooperative. In the case of the participant cooperative that failed to allocate funds for its community development fund, it was noticed that it has provided 10% optional fund in its by-laws and funded such as observed in its financial statement. Its funding can be justified but the cooperative erred in terms of consistently following the provisions of its by-laws and the Code when it failed to segregate the allocated funds as observed in the AFS presentation.

In addition, the cooperative practice contradicts the provisions of the Memorandum Circular on Standard Chart of Accounts when it apportioned funds that are inconsistent with the by-laws. Provisions of the by-laws are approved by the General Assembly and cannot just be altered by any officer or staff considering that it requires approval of 2/3 vote of all members with voting rights based on the provisions of the Cooperative Code.

Compliance on the Extent of Utilization of Statutory Funds

General Reserve Fund

Data reveal that seven participants utilized their allocated reserve fund but (forty-three) 43 cooperatives did not use the allocated provisions on general reserve fund as provided in financial records of their cooperatives.

The Audited Financial Statement of the fifty (50) participants was analyzed together with the Cooperative Annual Progress Report (CAPR) to know whether they have used their reserve fund. It was found that 14% or seven participants utilized their allocated reserve fund. 86% or 43 cooperatives complied with the provisions of their by-laws and the Code. These cooperatives did not use their reserve fund that are intended as buffer funds and can only be used by the cooperative when it incurs operational losses.

The extent of utilization was based on records of participants only and no further inquiry on the details of how the funds were utilized by the seven cooperatives was conducted as the study only focused on the documents available related to the use of the funds.

Records also indicated that few participants utilized their reserve fund showing the ability of cooperatives to comply with the provisions of their respective by-laws and that of the Code. The results confirmed the observation of Biety (2003) as cited by Gatawa (2015) that liquidity management means maintaining the ability of the institution to meet future demands for funds. It means ensuring that the institution maintain sufficient cash and liquid assets to satisfy client demand for loans, savings withdrawal, and institution's expenses. It involves the daily analysis and detailed estimation of the size and timing of cash inflows and outflows over the coming days and weeks to minimize the risk that future disbursements will incur. The above illustration shows the importance of cash and liquid assets. It is a clear demonstration on the need for cooperatives to have a reserve fund for future expenses. It can be said that Baguio City and Benguet Province cooperatives are aware of the importance of maintaining cash balance and that out of the fifty (50) participants, only seven cooperatives or 14% utilized their reserve fund. It might be premature to conclude but further studies on general reserve funds may be undertaken to ascertain preparedness of cooperatives on future cash shortages as limited literature was noted along this interest.

Cooperative Education Training Fund

Data generated from the AFS indicate that forty-one (41) participants utilized their education and training fund while nine (9) cooperatives did not use their allocated education and training fund.

Data generated from the AFS indicated that forty-one (41) participants or 82% utilized its education and training fund while nine cooperatives or 18% did not use its allocated education and training fund. One of the possible reasons in the high utilization of cooperative education and training fund is the provision of Rule 7 of the Implementing Rules and Regulations of RA 9520 that required all cooperatives to undergo mandatory training. The compliance of participants to the provisions of RA 9520

and its IRR has affected the spending of cooperatives. Further, the issuance of CDA Memorandum Circular Number 2011-27 entitled "Implementation of Training Requirements for Cooperative Officers" that reiterated the provisions of Article 44 of RA 9520 and Rule 7 of the Implementing Rules and Regulations triggered the use of funds that compelled officers of cooperatives to undergo trainings in order for them to be elected as officers of their respective cooperative. In addition, the accreditation of different training providers that catered to the needs of the cooperatives facilitated the use of cooperative education and training fund.

Optional Fund

Data reveal that 22 participants used the allocated amount for optional fund while 28 cooperatives did not use its allocated optional fund.

Utilization of the optional fund was analyzed by looking into the Audited Financial Statement and CAPR of the cooperatives. Data revealed that twenty-two (22) participants constituting 44% used the allocated amount for optional fund while twenty-eight (28) cooperatives or 56% did not use its allocated optional fund. The utilization and non-utilization can be attributed to the fact that cooperatives cannot simultaneously spend their resources as anchored on the principle of conservatism.

Results of interviews also show that most participants relied on policies regarding optional fund provided in their by-laws and the Code. Only few participants have specific guidelines on how to utilize such funds.

One of the participant cooperative interviewed shared their experience on the difficulty of how to treat the optional fund in its book of accounts. As a result, they did not use it to purchase land for the cooperative. While cooperatives can spend their optional fund, the possibility that these funds are plowed back as operating capital cannot be discounted given the absence of clear cut policies governing the use of optional funds except that of the use stipulated under the by-laws and the Philippine Cooperative Code.

Community Development Fund

Results show that 36 participants utilized allocation for community development fund while about 14 participants did not utilize their community development fund.

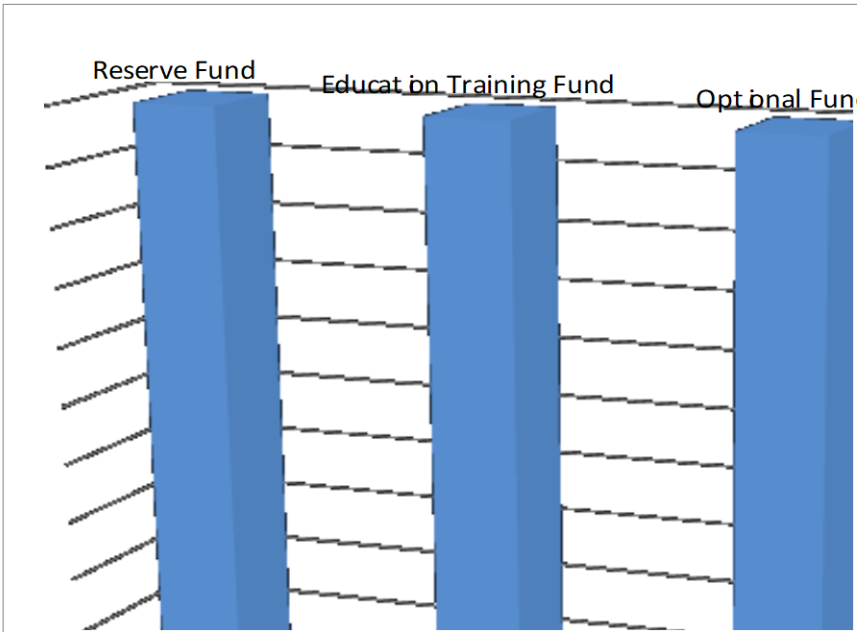
Results show that thirty-six (36) participating cooperatives or 72% utilized allocation for community development fund. Fourteen (14) participants or 28% failed to utilize their community development fund. The higher percentage of utilization of funds is an indication that cooperatives are aware of their social responsibility to the community and its members. Results of interview among key informants of the participants indicated that some cooperatives have projects related to health, education, environment, children's welfare, senior citizens and mutual aid to members and community residents. Support to schools, church and its workers, barangay infrastructure projects and footpaths are among other projects or activities funded through community development fund. However, results of interviews

revealed that some of the participants have no clearly stated guidelines on how to utilize their community development fund except those provided under the Cooperative Code that were adopted in their by-laws. The varying projects implemented by the participants can bolster the observation on the absence of a uniform policy on the utilization of funds. However, utilization depends on the priority projects identified by cooperative officers and employees incorporated in their respective development plans. Changes in the composition of officers along with their background or work experiences may have an effect in the utilization of funds and some policies. Take for example one of the participants with Board of Directors composed mostly of teachers. In the determination of projects, their focus was on support to school-related programs or activities. This observation jibes with the observations of Lamen (1991) when she recommended that policies regarding terms of office of elected officers should consider training taken by incumbent officers so that frequent turnover will be minimized.

Differences on the Order of Distribution, Funding and Utilization of Statutory Funds

Order of Distribution

Generally, all the participants complied with the order of distribution of statutory funds like general reserve fund, education and training fund, optional fund and community development fund as gleaned in their by-laws. Except for one cooperative that provided 10% provision for its community development fund, all 49 cooperatives followed the required order of distribution of community development fund in their by-laws wherein 7% is the maximum amount to be provided.



Chi-square value=0.75 df=3 p value = 0.8605 *not significant

Figure 2. Statutory Funds and the Extent of Compliance in the Order of Distribution

The provision might had been overlooked as piles of documents were submitted for evaluation and limited persons were involved in the process of evaluating voluminous documents on amendments.

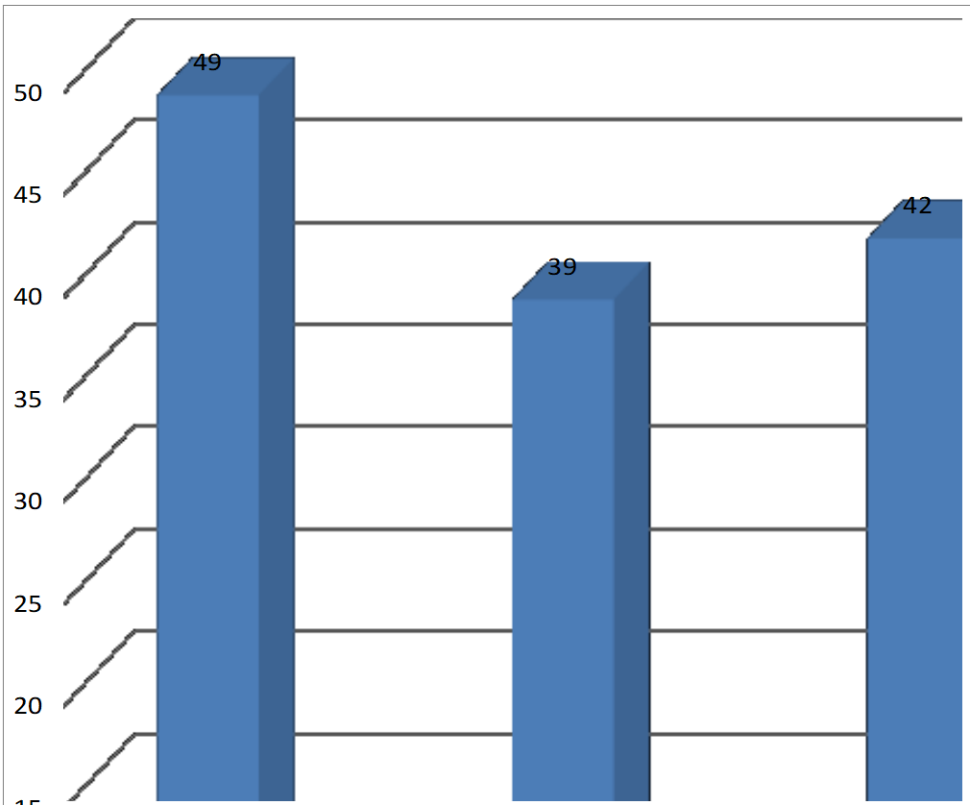
Statistical analysis reveals that there is no significant difference on the statutory funds and level of compliance on the order of distribution because the p-value of .8605 is greater than 0.05 level of significance (Appendix B).

The statistical result proves that cooperatives are compliant in terms of following standard formats or templates in the registration of cooperative documents including amendments thereof.

Given the minimal difference on the number of non-compliant cooperatives and the not significant difference, Baguio City and Benguet Province cooperatives subscribe to established rules and regulations especially those in the order of distribution as required under RA 9520.

Funding of Statutory Funds

Forty-nine (49) or 98% of the participants funded their general reserve fund following the provisions of their by-laws (Figure 3). One cooperative provided 9.42% in its audited financial statement that is lower amount than therate provided in its by-laws. Cooperatives funded community development fund wherein 46 cooperatives applied the provisions of their by-laws. Four cooperatives provided lesser and greater allocation than the by-laws provision. About forty-two (42) cooperatives applied the provision of optional fund as provided in their by-laws while eight cooperatives used amounts lesser than what should have been allocated. Thirty-nine (39) participants funded their CETF in accordance with their by-laws provision while 11 cooperatives used different rates that is lesser or greater than their by-laws provision.



Chi-square value=2.07 df value=3 p-value=.5576 *not significant

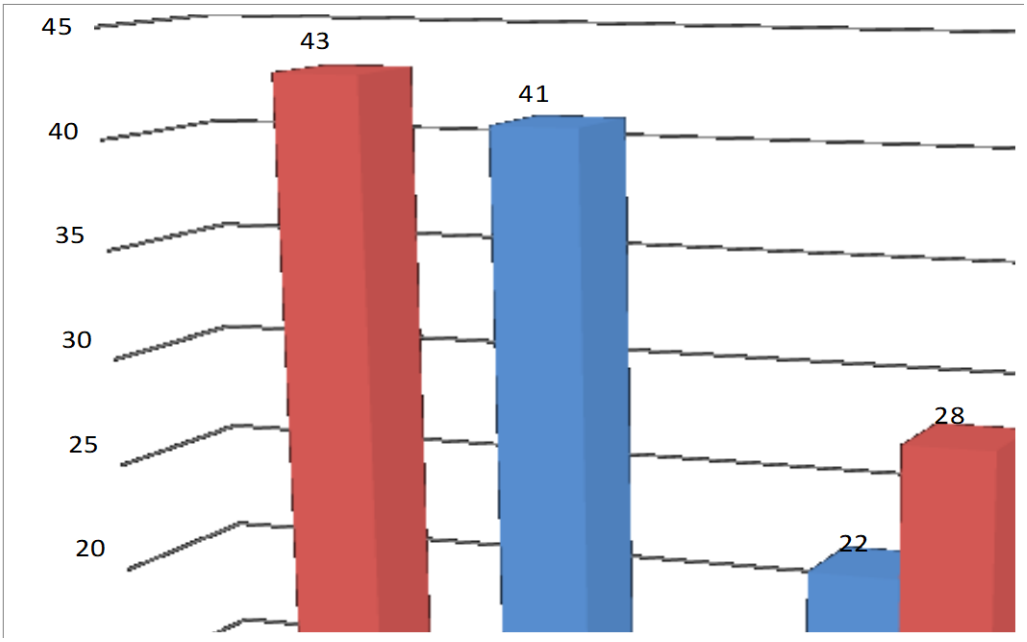
Figure 3. Statutory Funds and the Extent of Compliance on Funding

Furthermore, 39 participants funded its CETF in accordance with the provision of its by-laws while 11 cooperatives failed to comply according to by-laws provision. The non-compliant cooperatives deviated from the provisions in their respective by-laws and used lower rates. No significant differences were observed in the funding of statutory funds (Appendix B).

Utilization of Funds

Figure 4 shows that Cooperative Education Training Fund (CETF) is the fund that is most utilized by the 41 participants as observed in their audited financial statements. This was followed by community development fund wherein 36 participants used their funds for projects and activities that benefited the members and communities where they operate. **A**bout 22 cooperatives used their optional fund that is intended for land, building and other necessary fund while 7 participants utilized their allocated general reserve fund.

The result corroborates the findings of Lumbag (2000) showing that continuing education as well as other trainings for incumbent members, staff and officers is being implemented by cooperatives.



Chi-square value=14.07 df value= 3 p-value=.0028 * significant

Figure 4. Statutory Funds and the Extent of Compliance on Utilization**.**

Community development fund followed wherein 36 participants used their funds for projects and activities that benefitted the members and communities where they operate. Utilization of community development funds that finance various projects like scholarship programs, support to school improvement, infrastructure projects, clean and green programs, medical and dental missions, and tree planting manifest commitment of cooperatives to sustain the 7th Cooperative Principle which is "Concern for the Community."

Also, about twenty-two (22) cooperatives used their optional fund that is intended for land, building and other necessary fund while 28 participants had not utilized their allocated optional fund. The above observation corroborates the findings of Lumbag (2000) showing that continuing education as well as other trainings for incumbent members, staff and officers is being implemented by cooperatives but contradicted Torres' (1984) claim stipulating that financing is the most acute problem of cooperatives.

Of the fifty (50) participants only seven cooperatives used their reserve fund that is intended for operational losses. The low utilization of reserve fund conforms to the intention of the law on the Order of Distribution of Net Surplus by putting up buffer funds for operational losses.

While all the funds were utilized at varying levels, utilization of the reserve fund, education and training fund, optional fund, and community development fund depends on the decision of officers and management staff that proposes projects and activities related to such fund.

Statistical analysis reveal that there is a significant difference on the statutory funds and level of utilization because the p-value of 0.0028 is lesser than .05 level of significance.

Fund utilization depends on implementation of identified activities embodied in annual, medium and long term-plans. In the case of the fifty(50) participants, the level of utilization comes at various intensities.

Among the possible activities that triggered the significant differences in the utilization of statutory funds may include the following factors:

a) Innovations in policy issuances related to cooperatives both at the local and international level led to higher awareness level on cooperative development. Given advance infrastructure technology, cooperatives nowadays can access information from different parts of the world. The changes introduced at the local and international settings have direct and indirect effect in the performance of cooperatives. An accurate example is the treatment of cooperatives as business enterprises. Unlike in the early parts of the 1990's, cooperatives were portrayed as "not for profit but for service". In 2012, the United Nations declared it as International Year of Cooperatives with the theme "Cooperative enterprises build a better world". Having several activities that motivated participation of cooperative members, leaders and staff to various activities brought in positive changes on the perception of stakeholders giving heightened expending of resources that includes statutory funds;

b) Crafting of new report forms and enhanced standard reports like Social Audit Report, Performance Audit Report, Report on List of Officers and Trainings Attended, Mediation and Conciliation Report, Cooperative Annual Progress Report, and Audited Financial Statements that must be SCA compliant and be audited by duly accredited External Auditors. These reports introduced to the cooperative created awareness that may have influenced the utilization of idle funds of the cooperatives as they need to perform activities that require funding;

c) CDA requires different plans like Annual Plan and Budget, Medium and Long Term Development Plans, Social Development Plan, Education Training Plan or Program, Succession Plan, etc. These are required when CDA personnel conduct inspection or visits to cooperatives as embodied under CDA issuances based on RA 9520 and 6939 or the CDA Law. When these plans are implemented the statutory funds applicable to the said specific plans are utilized especially the education and training, community development and possibly the optional fund;

d) Accreditation of Cooperative External Auditors that look into the financial records of cooperatives. Employment of the services of external auditors requires funding and some of the cooperatives charged professional fees against optional fund under other services;

e) Accreditation of Training Providers by CDA. The issuance of CDA Memorandum Circular No. 2011-01 on the accreditation of cooperative training providers paved the way for the increase in number of institutions engaged in training. These included federations, unions, cooperative development officers of local government units, non-government organizations, State Universities and Colleges, foundations and other institutions with cooperative programs helped in the conduct of various trainings based on the

CDA prescribed curricula. Use of cooperative education and training funds to pay the services of trainers' or seminar fees increased as the participants attended the offered trainings by these providers;

f) Issuance of different circulars related to the strengthening of cooperative operations, compliance to government social and legislative laws, rules and regulations. The series of issuances for the past five years since the approval of RA 9520 and its implementing rules and regulations had brought in positive changes in the utilization of funds. The issuance of CDA Memorandum Circular No. 2011-14 that prescribed the Standard Training Curricula and CDA M.C. 2011-27 entitled "Implementation of Training Requirements for Cooperative Officers" facilitated the realization of the provisions of the Cooperative Code on training requirements and education and training funds were used by officers in attending to the required trainings;

g) Active partnerships among CDA and other line agencies, local government units, academe, and non-government organizations in the promotion, organization and implementation of cooperative plans and programs. Cooperatives utilized their community development funds to conduct projects and activities jointly with other institutions. As partnerships were established, resources of cooperatives along statutory funds are utilized to attain established goals;

h) Creation of plantilla positions, appointment and designation of cooperative development officers by different provincial and municipal government units. The appointment and designation of cooperative officers by some heads of local government units helped primary cooperatives as link between the cooperative sector and the government. It facilitated the attendance of cooperatives situated in far flung areas to trainings, conferences, congress and summits;

i) Allocation of funds for cooperative trainings and activities by local government units. The allocation of funds by local government units intended for cooperatives based in Baguio City and Benguet Province could have facilitated the utilization of education and training fund. Allowances and miscellaneous expenses of cooperative officers and personnel are charged under education and training fund when they attend such activities; and

j) Conduct of monitoring and inspection of cooperatives by CDA personnel. The annual inspection of cooperatives using carefully designed inspection instruments provide recommendations to officers and management staff to comply with their deficiencies among which include the funding of statutory funds and the use of funds to support the implementation of plans. Compliance to such issuances encourages the cooperative officers and staff to charge funds against the CETF, optional fund, and community development fund where applicable activities were undertaken.

Finally, the results on the utilization of funds were based primarily on cooperative records especially Audited Financial Statements. Focus group discussions and inputs from persons knowledgeable on cooperatives were solicited that formed part of the study.

SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

The following are the major findings of the study:

1. On the compliance of the fifty 50) participants to the order of distribution of statutory funds, 100% compliance to the order of distribution of general reserve fund; education and training fund; optional fund and 98% of participants complied with the provision on community development fund.

2. On the extent of funding of statutory funds, forty-nine (49) participants complied with provisions on general reserve fund; forty-six (46) or 92% cooperatives complied with community development fund allocation; forty-two (42) or 84% of the participants complied with optional fund allocation, and thirty-nine (39) or 78% of the participants complied with cooperative education and training fund allocation.

3. On the extent of utilization of statutory funds, 82%) of the fifty (50) participants utilized their cooperative education and training fund, 36 (72%) cooperatives utilized their community development fund, 22 (44%) cooperatives utilized their optional fund, and only seven (14%) cooperatives utilized their general reserve fund.

4. As to differences on the order of distribution, funding and utilization of statutory funds, there were differences noted on the order of distribution and funding as regard general reserve fund, cooperative education and training fund, optional fund, and community and development fund but the differences are not significant. As to utilization of statutory funds, significant differences exist on the utilization of the general reserve fund, cooperative education and training fund, optional fund, and community and development fund.

Cooperatives in Baguio City and Benguet Province are compliant on the order of distribution of statutory funds based on by-laws provision and Philippine Cooperative Code; compliant on funding statutory funds as gathered from audited financial statements; but not fully compliant in the utilization of statutory funds as reflected in financial reports and interview with key informants. No significant differences were noted in terms of order of distribution and funding but significant differences were observed in the utilization of funds.

Recommendations

1. In the order of distribution of statutory funds in the cooperative by-laws, cooperatives need to sustain their full compliance in consonance with the provisions of the Philippine Cooperative Code.

2. Cooperatives to sustain best practices and strictly adhere to the provisions in the allocation and funding of statutory funds based on their respective by-laws, CDA issuances; and the Cooperative Code and reflect them in their annual financial reports.

3. For cooperatives to fully allocate and utilize their statutory funds in conformity with the provisions of their respective by-laws; CDA issuances and Republic Act 9520.

4. Cooperatives to craft policy guidelines to supplement provisions of the Code at the cooperative level or on a national scale. Attached is a proposed guideline for consideration by the cooperatives and CDA officials (Appendix C).

5. Cooperative Development Authority, Cooperative federations, unions, accredited training providers, academe, cooperative external auditors and other stakeholders to sustain the conduct of technical assistance through trainings, coaching, and mentoring to the different cooperatives and come up with appropriate tools that will help in the monitoring of performance of cooperatives in relation to compliance on statutory funds.

6. An in-depth study on the allocation and utilization of cooperative education training fund; community development fund; and optional fund to help attain genuine socio-economic development through cooperative undertakings is also recommended.

7. CDA should establish a data bank on the order of distribution, funding and utilization of statutory funds of all registered cooperatives that is readily accessible as basis in monitoring and evaluating compliance of cooperatives to their by-laws provisions.

8. Local government units, community and other civic organizations should tap the existing resources and services of cooperatives to augment existing resources especially in the delivery of basic services in rural areas.

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APPLYING PECOL IN THE CURRENT BRAZILIAN REGULATION OF FINANCIAL COOPERATIVES - CHALLENGES OF THE EQUALIZATION BETWEEN EFFICIENCY AND IDENTITY[1]

Ronaldo Gaudio[2]

Summary: Introduction. 1. Brief considerations on the regulatory environment of financial cooperatives in Brazil. 2. Applying PECOL in the current Brazilian regulation of financial cooperatives. 2.1. The specific legal framework of financial cooperatives. 2.2. Cooperative audit - Resolution CMN n° 4.454/2016.2.3. About Resolution CMN n° 4.538/2016 – Succession policy. 2.4. Some innovations from Resolution CMN n° 4.434/2015. 3. The structuring tendencies of the national cooperative credit system between efficiency and cooperative identity. 4. Final considerations. 5. Bibliography.

Abstract: With the objective of investigating the risks of possible imbalances between the requirements of economic efficiency and preservation of identity, the article analyzes aspects of the normative regulation of financial cooperatives specifically from the perspective of the "Principles of European Cooperative Law (PECOL)" as a strategy against the phenomenon of the "companisation" of financial cooperatives.

Key words: Cooperative identity. Financial cooperatives.Regulation.Principles of European Cooperative Law.

Introduction

Based on the "Principles of European Cooperative Law (PECOL)"[3], the overall purpose of this research is to conduct a critical analysis of financial cooperative structuring trends from the Brazilian regulatory framework of 2009 to the normative acts of 2017. As specific objectives, it is intended to highlight current practices and regulatory standards that challenge or conform to the application of the

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[3] Study Group on European Cooperative Law (SGECOL), Draft Principles of European Cooperative Law (draft PECOL), May 2015. Available at http://www.euricse.eu/wp-content/uploads/2015/04/PECOL-May-2015.pdf. Accessed onJune 5, 2017.

PECOL to protect the cooperative identity without compromising the socioeconomic efficiency and competitiveness of these enterprises.

The research considers that the PECOL are related to the establishment of an adequate legal regime that preserves the cooperative identity, but that they should not be confused with the structural elements of the typical model that they intend to protect. The research proposes that these elements belong to the world of facts, therefore, instead of being stated, they must be verified in the cooperative historicity, avoiding idealizations. The abstractions would serve to correlate these elements with the principles that govern them and, thus, eventually, contribute to the formulation of a regulation adjustment method. It will also be fundamental to consider that efficiency in cooperatives does not entail segregating its economic and social dimensions.

When we use the expression regulation, we are not referring to norms or legislation in general, but to the exercise of the state function of intervention in the economy through regulation. On the normative level, regulation innovates Law on economic agents in different market sectors through acts carried out by the Public Administration, without the legislative process. In fact, the regulatory function is exercised, besides the acts of normative regulation, through acts of judicial and executive regulation.

The demonstrations will be done through the deductive method and the bibliographic research.

1. Brief considerations on the regulatory environment of financial cooperatives in Brazil

Since 2009, the sectorial regulation of the financial market has entered a new phase.There are several innovations to be analyzed. The scope of the activity of credit cooperatives in general begins to be expanded, so that they have greater participation in the Brazilian financial market.

Naturally, regulation should consider the right of consumers of financial services to form their cooperatives. However, regulatory innovations have been justified by broader socioeconomic interests. Among these reasons is the search for greater economic efficiency, greater scale of operations, reduction of costs of financial intermediation. We also highlight the justification for greater access of financial services to the Brazilian population, socio-environmental sustainability, the ability of cooperatives to promote local development and reduce inequalities. These justifications for altering the regulatory policy were expressly stated, for example, by the Director of Standards and Organization of the Financial System of the Central Bank of Brazil, who later became president of the institution. In addition, the new regulation aims to avoid the misuse of cooperative purposes, damage to the reputation of the cooperative model and setbacks in its regulation (MELO SOBRINHO; TOMBINI, 2010, p. 244-249).These three objectives may highlight an awareness of the regulator regarding the need to preserve the identity of cooperatives.

In order to fulfill the objective of this article, we have selected, up to the date of its elaboration, only the rules that seem to have a substantial impact on cooperative identity as related to the objective of this article: to correlate Brazilian regulation with PECOL. We limit the analysis to the following normative set.

Brazil is among the countries that have a constitutional foundation for cooperativism, especially since the democratic environment reestablished in 1988. The Federal Constitution promulgated at that

time affirms parameters that bind the State to a public policy which is quite clear, but still little respected. It is possible to identify the strong relation between these constitutional vectors and fundamental rights.

Article 5, XVIII states, under the economic perspective, the freedom of constitution and operation of cooperatives and prohibits, in the form of the law, state interference. A very traditional publication of Brazilian Economic Law, authored by a former Federal Supreme Court (STF) Minister, affirms the "free cooperative initiative" as one of the different manifestations of the Free Initiative. Therefore, this form of economic activity must be subject to the same regime of freedom recognized to other forms of insertion in the market, such as capitalist enterprise (GRAU, 2015, P. 199-201). It is originally the right of individuals, as workers or consumers, to fulfill their aspirations in the field of work and consumption, through a company of their own.

Article 146, III, "c" recognizes that the taxation of cooperatives must be compatible with the way in which they carry on economic activity. In recognizing the need for an adapted tax regime, the Constitution of the Federative Republic of Brazil (CF), shows that the State is obliged to exercise an isonomic treatment for cooperatives. That means, of course, that they will have a legal regime compatible with their intrinsic differences and will have indistinct treatment in what equates with capitalist enterprise or other forms. We are in the field of the fundamental right of equality. Rather than representing a violation of equal treatment, it is a guideline of respect for the proper form of cooperatives that rightly respects the fundamental right to equality (TORRES, 2013, p. 1603).

The Constitution also imposes on the legislator, in article 174, §2, a positive induction. This parameter is observed in different constitutional texts of different countries. Considering the vocation of cooperatives to produce better levels of sustainable socioeconomic development, it should be in the interest of the State to foster cooperative activity. This order of support and encouragement to cooperatives is justified by the alignment between the purpose of the cooperatives, the objectives of the Brazilian constitutional economic order and the objectives and foundations of the Republic itself (GAUDIO, 2016, p. 519-544).

These three rules seem to be the constitutional vectors of Brazilian cooperativism that establish the parameters within which the regulation of this model of activity must be established. They bind the state to a regulatory treatment that ensures freedom, isonomic (congruent) treatment and incentive to cooperatives (MEINEN; GAUDIO, 2015, p. 140-146).

Besides these main parameters, the constitution also has other guidelines to the cooperative activity. We should highlight the one that concerns financial cooperatives. Article 192 expressly recognizes that cooperatives are part of the national financial system. The new wording was given to the article in 2003, following a constitutional amendment. Of course, such recognition is linked to the general parameters explained above, but it shows its specific application to financial cooperatives. If cooperatives should have free access to any market, it may seem obvious that they can and should integrate Brazil's financial system. However, this norm has an important pedagogical role for the regulatory authority, because even after 1988, when the current Constitution was enacted, the regulation exerted a strong and unconstitutional restriction on the creation and operation of cooperatives in that market.

These are the Brazilian constitutional parameters for the regulation of credit cooperatives. We indicate below the infra-constitutional structure of this market for cooperatives today.

The main laws that affect cooperatives in this sector are the Federal Laws No. 4.595 of 1964 (establishes the National Financial System), No. 5.764 of 1971 (General Law on Cooperatives) and Complementary Law No. 130 of 2009 (establishing the system of national credit cooperatives).

In addition to these laws in the strict sense, derived from the ordinary legislative process, the regulation is carried out in a more dynamic, fast and impactful way through acts of normative regulation, produced by the state authority of the National Financial System (CMN).

The following CMN Resolutions will be analyzed from the PECOL perspective (CMN, 2017):

- n° 4.434/2015 – Criteria for authorization and operation of credit cooperatives;

- n° 4.454/2016 – Cooperative audit;

- n° 4.538/2016 – Succession policy for administrators of financial institutions.

This normative framework allows us to put forward some general considerations about the regulatory environment for these cooperatives.

Even after the parameters established by the Federal Constitution, enacted in 1988, credit cooperatives went through a substantial period of unconstitutional treatment. Instead of allowing cooperatives to operate in any location and for any membership base, it is considered that from 1960 to 1992, that the existence of financial cooperatives was greatly discouraged by Brazilian regulation (MEINEN, 2014, p. 117).

The Complementary Law 130, published on April 17 2009, that regulates the National Cooperative Credit System, is considered a new regulatory framework for financial cooperatives. Finally, the Brazilian legal system and the regulatory action of the State related to cooperative activity begin to be compatible with the guidelines of the 1988 Constitutionof the Federative Republic of Brazil regarding cooperative activity, especially about freedom of association and promotion of cooperatives. (PINHO; PALHARES, 2010, p. 33).

It took more than twenty years of validity of Brazilian constitution for the free cooperative initiative to affect the regulation of the financial market. Before that, in general terms, only cooperatives open to the public could be run, limited to small localities, providing financial services to populations and markets that are less attractive to banks.In municipalities with more inhabitants, cooperatives of class groups or industries should be formed.

Particularly from 2015, with the advent of Resolution 4.434 of CMN it became possible to create so-called free-admission credit cooperatives, open to the general public, regardless of the number of inhabitants in the region.The criteria of classification and regulation of financial cooperatives operations no longer concerns the profile of their membership. It now adopts the type of operations they undertake as a parameter for their regulation, operation and supervision. The level of requirements, guarantees and controls is increased according to the type of financial service offered, its complexity, volume and risks.

At this point, the freedom to engage in any economic activity, also prescribed by the very first PECOL (1.1.1), seems to have finally been approved by Brazilian regulation. However, there are indications of possible new contradictions between the current regulatory trend and the PECOL, which could move financial cooperatives away from cooperative identity and bring them closer to companies.

In fact, the new regulatory environment aims to strengthen cooperatives in this market, opening the field so that they can operate where any bank can operate. There is much less restriction of activity by the corporative model. However, when the necessary opening to growth and free competition is initiated, the pressures for the “companization” of cooperative enterprise increases.

We have selected some reflections among the several others that are certainly possible on the current regulatory environment of financial cooperatives. These issues are related to the old and recurrent

dilemma that presents itself when cooperatives are stimulated or intended to grow: the problem of identity preservation, the cyclical focus of ICA's (International Co-operative Alliance) concern and of numerous authors in cooperative doctrine.

2. Applying the PECOL in the current Brazilian regulation of financial cooperatives

According to PECOL 1.2.3, cooperative legislation and the social statutes of cooperatives are a primary source of the legal regime of cooperatives and may be supplemented by generic legislation as long as it is not in conflict with the nature of cooperatives. What is perceived nowadays is the regulatory authority's aim to produce sectorized rules of the financial market already adapted and directed specifically to the cooperative activity. These are cooperative legislation at the infra-legal level, produced through administrative acts of normative sectoral cooperative regulation.

2.1 The specific legal framework of financial cooperatives

The new environment in which the current sectoral regulation of cooperative financial activity is established is especially made possible by Complementary Law 130 of 2009 (LC 130), considered as the legal framework of credit cooperatives. Among other innovations, the main changes in the regulation of cooperative financial institutions since this law are related to a greater openness to the market. This law and CMN resolutions specifically addressed to cooperatives show normative adaptations to protect in a compatible manner the very way in which cooperatives carry out the financial activity.

Co-operatives have been able to admit the majority of types of legal entities into their membership. Companies whose activities compete with cooperatives are excluded from this possibility, for example. In any case, this allowed expansion to the public of membershipby a cooperative’s statute still depends on the approval of the Central Bank of Brazil. There has been an alignment between the Brazilian law and the main criterion established by PECOL 1.3.2 and 1.3.3 for admission of the members of the cooperatives: that they are interested in the pursuit of the cooperative's objectives, even if they do not participate in direct execution of the corporate purpose of the society in the simultaneous condition of owners and consumers, suppliers or workers.

This law also establishes the possibility for boards of directors to hire executive boards - market professionals, not elected by the assembly. The Board of Directors remains with its deliberative and strategic functions. The Executive Board with executive functions, reporting to the board. Section 2.5 of the PECOL recognizes that the expansion of the complexity of the cooperative enterprise structure is favored by the segregation between the functions of representation and supervision of executive functions. Contrary to violating any precept of democratic control, such structuring facilitates the organization of the cooperative, in addition to producing greater possibilities for professionalization, good governance, development and sustainability (SERVIÇO NACIONAL DE APRENDIZAGEM DO COOPERATIVISMO, 2016, p. 84-100).

The law states that surpluses cannot be distributed in proportion to the share capital, but only in proportion to the financial transactions of the members. In this regard, the 2009 law is also in line with the PECOL (Section 3.6).

However, in financial cooperatives capital represents an important element to counteract the operations of cooperatives, causing their payment to be fomented in different ways, varying according to different operational strategies. This means that the contribution of shareholders to social capital is not

usually equitable. Although PECOL 3.3.2 foresees a differentiated contribution by the members, the particularity of these cooperatives justifies a mitigation of PECOL 3.3.7, since it authorizes the partial withdrawal of capital without the member withdrawing from the cooperative.

In any case, even for the safety of operations, the rule established in the general cooperatives law of 1971, which limits the concentration of capital by the shareholder to 1/3, is preserved. PECOL 3.3.4 is therefore observed which limits that a member has a percentage of capital higher than the maximum established by the statutes or the law.

Under the 2009 law of financial cooperatives access to the data of the singular cooperatives by central or confederations, among other entities of the segment, are expressly allowed. The objective is to make possible the supervision, audit, control and execution of operational functions of credit cooperatives through cooperative credit systems. The law expressly states that the sharing of financial information with second and third degree cooperatives does not constitute a breach of the duty of secrecy on the operations of members of the first degree cooperative.

The general Brazilian cooperative law of 1971 already provided for the possibility of vertical and horizontal integration of cooperatives into systems (or networks), which include cooperatives of first (singular), second (central or federation) and third (confederation) degree. This same law allows cooperatives to have corporate participation and control over other kinds of societies to better fulfill their objectives. Considering this purpose, which should guide these shareholdings, there is no harm to the cooperative identity. In fact, PECOL 1.1.3 also provides for this.

The 2009 law, in establishing the structure of the national cooperative credit system, formally affirms that horizontally and vertically integrated cooperatives form part of this system, as well as cooperative banks, which are joint-stock companies controlled by cooperatives. This framework law also reinforces the important role of cooperative centers and confederations in the organization, in common agreement and on a larger scale, of economic and assistance services of interest to affiliates, integrating and guiding their activities, as well as facilitating the reciprocal utilization of services.

In addition to this law, the specialized audit in financial cooperatives is the subject of a specific regulatory act that we will analyze.

2.2 Cooperative audit - Resolution CMN n° 4.454/2016

In 2016, regulation began to require that a specialized audit on credit cooperatives operations is carried out at least annually. It is required that the auditing entity is previously accredited by the Central Bank of Brazil. The measure corresponds to Chapter IV of the PECOL. However, Brazilian regulation is still mainly associated with the analysis of operations, under a performance and risk approach of the financial activity itself (article 3° of the Resolution). The focus is on the economic and financial security of the activity. Aspects of regularity of corporate relations, preservation of identity, recommended by PECOL4.1.2 and 4.1.2.4, or fulfillment of the purpose of cooperatives, one of the most important parameters to ensure the identity of cooperatives required by PECOL 1.1.1 and 1.1.2 are not addressed. This is not an audit with the scope of PECOL 4.2.1.

If, as we have seen, the regulatory authority declares the objective of preserving the characteristics of cooperatives, supervising the fulfillment of its purpose, and other elements that distinguish them from capitalist enterprises is essential.

Providing services to members through the exercise of an economic activity to improve their social and economic conditions vis-à-vis consumers or market workers is to say ontologically what the

purpose of cooperatives is (FRANK, 1973, p. 15-17). The problem is that the purpose of cooperatives is rarely known by non-cooperative sectors. It is more common for these sectors to recognize easily what is not the purpose of these societies: the production and distribution of profits. This means a limited understanding that makes it difficult to perceive that cooperatives can be audited by verifying the achievement of the socioeconomic results that they must produce for their members. A good cooperative is one that is economically efficient for its members as consumers, suppliers or workers, according to PECOL 1.1.1.

In cooperatives, the search for economic efficiency is fundamental, but it is not a value in itself, especially if it is not recognized that it has an instrumental character to reach the socioeconomic result for the members and not for the cooperative itself. The fulfillment of the purpose of the cooperatives is the most tangible element of the identity, since it is related to the externalities that they must produce. By mere perception of third parties, it is not possible to identify that the consumer of a cooperative is also the owner of it. Other internal and intrinsic characteristics of cooperative identity are not perceived by others: existence of educational, technical and social assistance funds, democratic control, capital contributions, etc. For the different social sectors, the fulfillment of the purpose constitutes the external and perceptible face of the cooperative identity. When it is perceivable that the member of the cooperative is materially in a position of economic and social superiority in relation to the simple consumer of the market, the distinctive character of cooperatives is perceived by society.

The difficulty of distinguishing concretely and materially the cooperative consumer from the ordinary consumer is perhaps the greatest indication of cooperative "companisation". The State, considering its declared objectives for the sector, must permanently improve the guarantees of efficient fulfillment of the purpose of financial cooperatives through regulation.

In this sense, the audit of financial cooperatives should contemplate the verification of the fulfillment of the purpose of the cooperatives, in addition to other structural elements[4].

2.3 About Resolution CMN n° 4.538/2016– Succession policy

Since 2016 Resolution 4.538, which applies to financial institutions in general,now also applies to financial cooperatives. There are requirements of greater guarantees of technical training for senior management, as well as a succession policy that involves the preparation of successors and that has to be approved at a general meeting by the members. In this way, there will also be objectivity and transparency about the rules for competitors to elective positions.

The requirements of good governance are important for the good reputation and sustainability of cooperatives. Especially in segmented cooperatives, there is a greater risk of bad political influence in the life of the cooperative. Normally, segmented cooperatives are made up of groups from the same company or from some institution. These cooperatives tend to suffer greater political influence from companies,

[4] In our preliminary researches, corroborated in anunsystematized way by the economic and legal doctrine of cooperativism, we identify three structuring facts of cooperative identity (GAUDIO, 2016. p 532-539). Principles derive from the observed facts of experience to establish a pattern of behavior consistent with these typical structures (MÜNKNER, 2015, p.1). So, cooperative principles integrate the normative dimension of cooperative identity (FICI, 2012, p. 8) and do not constitute the concrete facts characterizing the empirical type. Whether or not they are introduced into the positive law of different countries, whether or not they have a rule of law, are related to the observance of certain rules that preserve the elements what characterizes the model, whether they are the self-imposed principles by the members of the cooperative (Rochdale Pioneers, HOLYOAKE, 1933), whether they are the revisited Principles advocated by ICA, the PECOL or principles envisaged by law, they are part of the cooperative identity in its normative dimension.

class organs, and local politicians. Often, these cooperatives depend on the good relationship and the politics of the organs or municipalities in which their membership is linked. This influence is often reflected in the choice of less skilled managers, in the occupation of the cooperative as a political trench, in the increase or decrease of support to the cooperative, in the pressures on the credit criteria. All this puts at risk the activity of the cooperative. Therefore, the requirements of training, qualification and succession serve to increase sustainability, the guarantees of professional management, the continuity of cooperatives, but also to mitigate the negative effects of political influences. Although it is an element of good governance, it means increased costs for any financial cooperatives, including segmented and small ones.

Thus, a balanced degree of governance requirements, while representing some increase in the costs of the operation, tend to produce more benefits than problems, as well as avoiding criticism of lack of organization or amateurism against cooperatives.

By requiring succession policy to be approved, publicized and planned in cooperatives and its members to be qualified for succession, the standard reinforces the membership rights provided for in Section 2.3 of the PECOL. In addition, it extends the requirement for access to information and transparency always recommended in the PECOL, such as items Sections 2.3.4.a, d; 2.3.5.a; 2.5.7.e; 2.6.1; 2.6.3.

2.4 Some innovations from Resolution CMN n° 4.434/2015

Currently, the main regulatory norm of Complementary Law 130/2009 is Resolution 4.434/2015. Some new points seem more relevant to the present study:

- The increased general requirements for constitution and authorization of operation of cooperatives;
- the new classification criterion for cooperatives about their operation and regulation (innovation commented on in item 1);
- the increase in transaction costs and entry barriers of new cooperatives in the market - through new limits of equity and capital; of controls, reserves and provisions, of more sophisticated governance;
- the improvement of the rules of governance, by increasing the requirements of professionalization of administration and segregation between deliberative bodies and executive bodies;
- the discouragement of the continuity of cooperatives not affiliated to cooperative credit systems and the strengthening of the importance of affiliation to these systems.

For the constitution of a new financial cooperative a high number of requirements must be satisfied (Article 6). However, if the cooperative under constitution previously opts to join a system, it will be exempt from such obligations.

Among other requirements, a comprehensive and detailed business plan, including:

(a) a financial plan that demonstrates feasibility (economic and project premises, projections of activities, etc.).

(b) a marketing plan with numerous elements to be demonstrated, such as strategic objectives, intended area of action, strategies for effective membership, main products and services, etc.

(c) a detailed operational plan, which includes the physical structure, governance, organization, profile of members, technologies, internal control structure, supervision, internal and external audit, risk management structure, demand estimation, etc.

The group of founders should decide whether or not the new cooperative intends to join a central cooperative of a cooperative credit system. There are greater guarantees against the insolvency and liquidation of a cooperative that is affiliated with a system. Central cooperatives monitor the activity of singles, facilitating the supervision by the Central Bank, as well as providing specific funds to guarantee operations, rationalize costs and increase revenue opportunities. The existing structure in the central cooperatives also presupposes and exempts that the new cooperative also presents a technical person who demonstrates effective knowledge about the business and the market where it will be inserted (Article 4).

In addition, the central cooperatives and confederations will carry out the monitoring and supervision of the first-degree cooperatives, rationalizing state supervision through central control. These factors, among others, make the regulatory authority prefer and encourage cooperatives to be part of systems.

In fact, there are several facilities and cost reductions for entry into the market for groups wishing to form cooperatives already linked to a system. One of these advantages is the exemption from prior inspection of the existence of the entire complex organizational structure provided for in the business plan.

All this analysis will be done by the regulatory authority of the Central Bank of Brazil before the formalization of the constitutive acts of the new cooperativeswill be authorized.

As observed, the initial requirements and costs tend to constitute an effective barrier to entry for cooperatives, even for those that wish to serve small groups or localities and that offer fewer risks to the financial market or to consumers.

An important point for the analysis should be the above-mentioned change of classification and regulation criteria. From this resolution, the rules of operation and supervision of cooperatives of first degree will not use as a criterion the segment of people who will participate in its membership. In principle, any public could be admitted as a member of the cooperatives. The by-laws should establish the criteria for membership. The business plan must be compatible with this option.

The new criterion classifies credit cooperatives according to their operations, as (a) capital and loan, (b) classic, and (c) full cooperatives.

The first type will carry out the smallest scope of financial operations, of lower risk and complexity. “Full” cooperatives will be able to carry out a greater number of different operations. The broader the spectrum of operations, the greater the risks and so the requirements on business structure, controls, guarantees, provisions, professionalization, corporate management segregation.

From that resolution of 2015, as mentioned, the constitutional parameter of freedom of association and constitution of cooperatives scheduled since 1988 seems finally to be fulfilled. The State no longer classifies, limits and regulates cooperatives by restricting the public that may become a member.

Considering this, the established standards based on the new criteria will regulate: (a) any existing credit cooperatives and those that will be created, (b) all credit cooperatives that are open to the public, as well as those which remain segmented, (c) all cooperatives affiliated or not affiliated to a cooperative credit system.

Regardless of the class, cooperatives have begun to be submitted to a higher level of requirements. Each of the three resolutions selected for analysis in this article increases the transaction costs of cooperatives.

However, for cooperatives that are accepted at a central cooperative and become part of a cooperative credit system, these transaction costs are rather diluted.

These systems focus on a number of services for cooperatives, such as human resources, accounting, auditing, marketing, technical advice, brand sharing, know-how, data processing and technology platforms that integrate product and service management, internet banking, automated risk management, among others.

In addition to cost rationalization, one of the main advantages is access to a broad portfolio of products and services to be offered to members of cooperatives, which can generate numerous revenues in addition to those arising from loans and financial investments.

On the one hand, regulation has greatly aggravated the costs and operating requirements of cooperatives, but, on the other hand, the admission of cooperatives into cooperative credit systems has leveraged their activities in economic efficiency and competitiveness.

Central cooperatives gain a lot of power in new regulation, because they decide whether or not to join a cooperative that is unique to the cooperative credit system that provides so many advantages in terms of economic efficiency, business structure, products, services and revenues. They are also the ones who, in practice, decide whether or not a new cooperative will be constituted, since entry barriers for non-systemic cooperatives are aggressively greater.

Regardinggovernance rules, the Central Bank of Brazil began to enforce the setting of proper remuneration for members of a statutory body. The idea is to foster professionalization and dedication of leaders. The Resolution is more explicit regarding the competences of organs, avoiding reasons for the omission of liability.

Minimum requirements for structure and organization are extended. The possibility of management segregation between strategic-deliberative body (board of directors) and executive body (executive board) is provided. However, full segregation is mandatory in “full cooperatives”, as well as in “classic cooperatives” that own more than R$ 50 million on average total assets.

The absence of affiliation must be justified and it must be demonstrated that it will be possible to act without membership in a central body. For these cooperatives, among the requirements for constitution is the presentation to the Central Bank of an executive summary of the business plan, as well as technical interviews with future leaders. If this preliminary phase is exceeded, only then will they begin to prepare the constitution process to submit to the body, with an extensive number of requirements. It includes a meticulous business plan (financial, marketing and operational plan), in addition to the minutes of constitutive acts. In short, the cooperative would have to demonstrate how it would function without centralizing services offered from central cooperatives (auditing, accounting, ombudsman, internet banking, bank account management systems, human resources, etc). If the cooperative is not affiliated with a central cooperative, the minimum capital and shareholders' equity limits are substantially higher.

At the same time that the costs of joining new cooperatives have been greatly increased, the supervisory authority has no interest in increasing the number of entities to be audited in that market. Given the possibility of creating cooperatives open to the public, central cooperatives tend to have an interest in keeping a smaller number of cooperatives to be served, since they would not need a larger number of cooperatives to increase the volume of operations. Segmented cooperatives became less interesting. In addition, the smaller number of affiliates makes it easier to maintain established power

structures and translates into a smaller number of cooperatives to be served by the services to be provided. They have fewer affiliates to audit, less accounting and bookkeeping to perform, fewer political actors needing contingencies provisions, etc. On the other hand, with fewer affiliates, each cooperative tends to assume a higher apportionment of the operation costs of the central. This represents less economic efficiency.

The problem worsens as with transaction costs, operational requirements and higher entry barriers it is increasingly important that cooperatives, segmented or not, can join the central, rationalizing costs and gaining service capacity. Central cooperatives gain the power to make smaller cooperatives unfeasible or to seek incorporations by other cooperatives, especially by open-source cooperatives.

In the context of freedom of constitution and freedom to organize and carry out any economic activity a rigid clause of the Brazilian Constitution (Article 5, XVIII) also evident in PECOL 1.1.1. deserves a closer analysis, given the new regulatory dynamics.

The same constitutional vector for cooperativism also prevents the State from interfering in the functioning of cooperatives in an inadequate manner, creating unjustified or artificial limitations that restrict the freedom of action. Certainly, justifications for the good technique of sectorial regulation can always be invoked as a legal argument for imposing restrictions. However, one of the possible criteria for benchmarking when operating interference is unconstitutional may be to verify whether there is a similar constraint on capitalist competitors.

This brief digression seems timely because of the possible barrier of entry that may be forming through the relationship between single cooperatives (not affiliated with a cooperative credit system) and central cooperatives. It so happens that these second-degree cooperatives are being absolutely strengthened by regulation.

If they are managed by managers of other cooperatives that already have cooperative credit systems, it is very probable that a conflict of interests will be established. It occurs that systemic cooperatives tend not to be interested in new cooperatives being formed or joining the system. If the current rule allows cooperatives to have any member of the public in their membership, for those who adopt the open cooperative model, the others will tend to be perceived as competing cooperatives. These leaders will have an interest in incorporating segmented cooperatives rather than allowing them to choose whether or not to join the system. More subtly than this, if such incorporationis not possible, they will prefer that these cooperatives be extinguished rather than admit them as competitors strengthened by the structure of cooperative credit systems.

Even a viable cooperative with great potential could be artificially prevented from joining a cooperative credit system. Certainly, if such conduits are supported by regulation, flagrantly unconstitutional state interference will be practiced indirectly by central cooperatives, which act in a mchallenge the pursuit of some illicit practice in the field of Antitrust Law, such as some of the categories of compulsory negotiation (SALOMÃO FILHO, 2013, p. 500-518).

The importance of cooperative credit systems, in return for the risks stemming from the power conferred on central cooperatives, reinforces the necessity of the implementation of some PECOLs - especially regarding the criteria for admission of first-degree cooperatives in the social context of second-degree cooperatives.

The normative content of the principle of free and voluntary admission is of strategic importance in the current regulatory context. Through it, it is possible to prevent cooperatives that already participate in cooperative credit systems from creating artificial entry barriers or

using anti-competitive practices to prevent single cooperatives from being able to join central cooperatives.

Resolution No. 4,435 / 2015 refers only to the admission of members of first-degree cooperatives. It requires that the conditions of admission are laid down in the statutes, as well as the area of operation of the cooperative. Although Chapter VIII of this resolution is specifically aimed at central and confederation activities, the issue is not addressed. The framework law of credit cooperatives (2009) does not address the issue either. Thus, the primary source remains the general law of cooperatives (1971).

However, the resolution, on the other hand, allows the central or confederations to establish rules so that the requirements of efficiency, economy, utility, and cooperative principles are observed.It also requires that the central cooperative inform the Central Bank of the criteria adopted when it admits or refuses to admit first-level cooperatives to membership.

As noted, although the resolution does not establish the criteria, it expressly recognizes that cooperative credit systems must respect cooperative principles. Applying the PECOL, these rules of affiliation established by the cooperative systems must observe the following parameters.

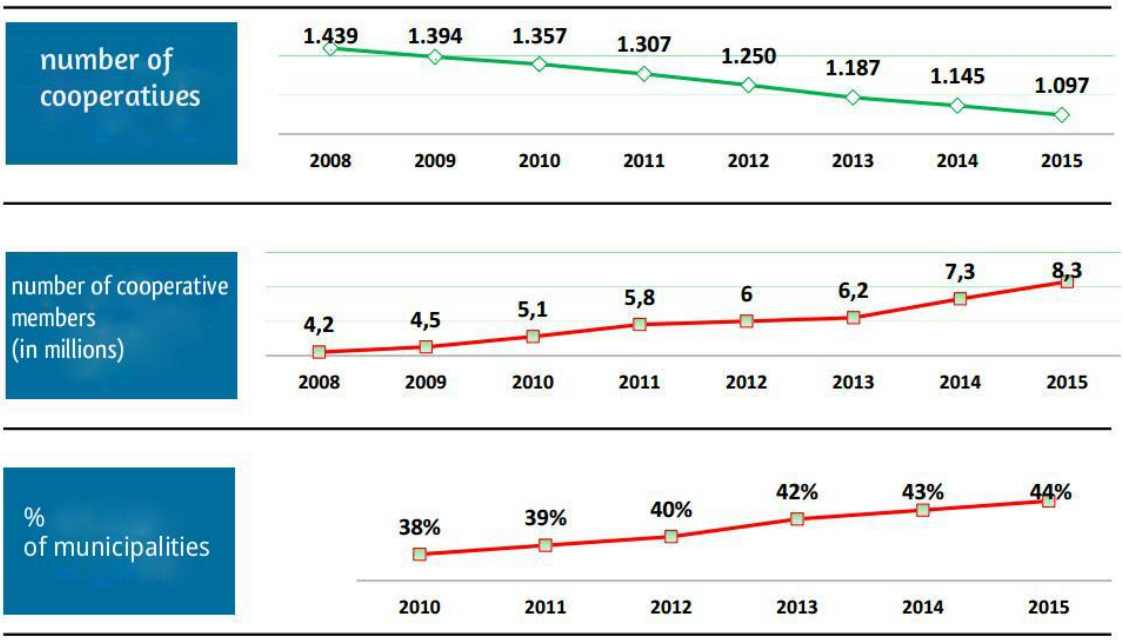
In dealing with admission in general, the PECOL reinforces the tradition of the cooperative principle of free and voluntary membership. On general membership, PECOL states that admission is conditional on the commitment of the member to participation in the cooperative activity. In addition, it requires that membership requirements be reasonable, compatible with the cooperative segment and its objectives and, above all, should not constitute artificial restraints (1.3.2, 1.3.6). On the contrary, it emphasizes that, as a rule, the membership must be open to anyone who is able to participate in the activity and who assumes the risks of the enterprise. It requires that the rules of admission be formally decided by a competent organ of the cooperative, that the denial of membership is justified, that the interested party can appeal against the unfavorable decision and that he has a right to be heard (2.2.1 to 2.2.3).

The PECOL are more detailed about the procedure and criteria of membership and expand the requirements of objectivity and transparency of these decisions. In fact, they present more guarantees than the general law of cooperatives of Brazil in this matter. Their application would be an important reference to fill the existing gap in the regulation of financial cooperatives. Especially at the present time, these parameters are important to prevent the anti-competitive use of cooperative credit systems against cooperatives that do not participate. PECOL also enhance the valorization of the right to information and transparency in cooperatives (Section 2.6).

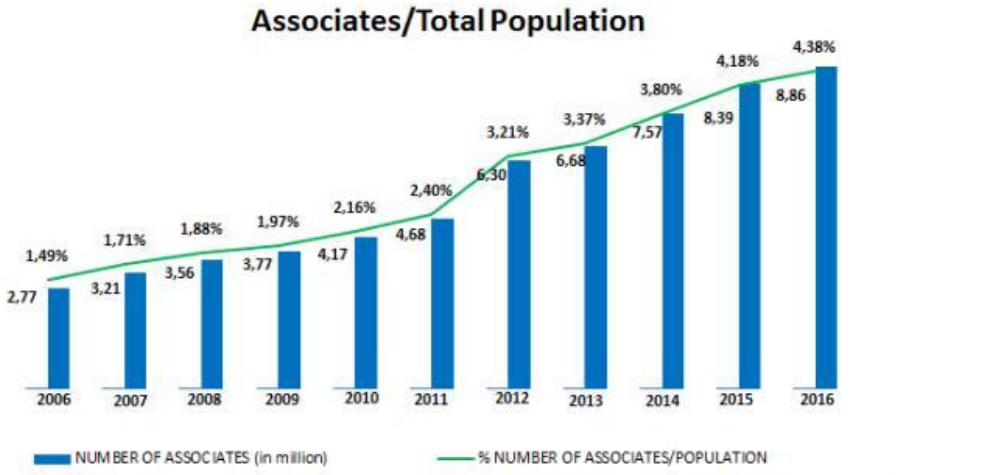
The theme still includes an important perspective related to the cooperative identity and its protection by the principles: the cooperation among cooperatives. It is this element that justifies the horizontal and vertical integration of cooperatives into systems. The values of solidarity and equality permeate this principle in PECOL 5.1. The breakdown of cooperation between systemic and non-systemic cooperatives challenges the preservation of identity, still supposedly justified by economic efficiency.

3. The structuring tendencies of the national cooperative credit system between efficiency and cooperative identity

Analyzing official data, it is possible to observe the tendency of concentration of cooperatives through incorporations, to counter the increase in the number of associated individuals and municipalities covered.



source: Central Bank of Brazil (BCB)– may/2016



Sources: OCB (Number of associates: until December 2015), FGCoop (Number of associates: December 2016, with answers from 96.95% of cooperatives), IBGE (total population).

Along the same trend line, the number of segregated cooperatives that have their membership in each category by professional category or group of companies has declined each year. The number of cooperatives open to any public has increased.

TABLE 1.1 – NUMBER OF SINGULAR CREDIT COOPERATIVES - DECEMBER 2016

SEGMENTATION BY TYPE	Dec/15	Dec/16	Annual Change
Professional Activity	103	91	-12
Mixed Membership Criteria - Businessmen	28	29	1
Mixed Membership Criteria - Others	39	44	5
Employees or Servers	366	352	-14
Businessmen	10	30	20
Free Admission	319	338	19
Associative Nature or Business Chain		4	4
Rural Producer	211	153	-58
TOTAL	1.076	1.041	-35

Source: BCB

This creates the risk of a great paradox. Although regulation has moved towards freedom of action and openness for cooperatives, they are increasingly constrained to adopt the membership model open to any member of the public and to be incorporated by other cooperatives. Such information is provided, for example, in the 2016 annual report of the FGCOOP - Cooperative Credit Guarantor Fund.[5]

However, some risks not covered by the statistics may also be occurring.

Faced with the new regulatory conformation, centrals tend to accept only those compatible with their pre-established regional action plans. There is also the risk that cooperatives affiliated to central cooperatives act in their own interest as competitors to cooperatives that are still outside the system. This can happen not only with fragile cooperatives with less potential for growth, but even in the face of viable cooperatives or with great potential, but which depend on participation in these systems in order to develop. Under the auspices of the regulation, central cooperatives gain the power to make the functioning and creation of cooperatives unfeasible by refusing to admit individual cooperatives.

The regulation displays its inspiration in the German model of financial cooperativism. This system is structured in cooperatives functioning as cooperative banks, open to any member of the public, without segmentation and obligatorily linked to a cooperative credit system. The model also underwent a strong movement of mergers and incorporations, which were justified by the achievement of scale and efficiency. The National Cooperativism Learning Service in Brazil confirms that the current Brazilian regulation is inspired by the German model, seeking to reduce the number of business structures and geographically increase the presence of cooperatives (SESCOOP, 2016, p. 62-65).

Notably, the German cooperative banking model diverges from the capitalist banks on a more subtle level and presents more challenges to the disclosure of cooperative identity. Even the distribution of executives based on social capital is allowed and is used as a strategy to stimulate capitalization. The legal regime of cooperatives is practically analogous to that of banks in general, especially in activities with non-members.

In Brazil, a possible approximation of cooperatives with the open public profile that characterizes the banks market has already inspired a tax equalization of the tax on financial transactions.

Of course, reducing the number of supervised economic agents facilitates the work of the state regulatory authority. However, the freedom of operation of cooperatives also has as its content the

[5] http://www.fgcoop.coop.br/documents/19/43822/RELAT%C3%93RIO+ANUAL+2016+3.pdf/1e84926c-963a-4909-95fc-60f4ba847968, accessed on June 5, 2017.

possibility of choosing a model that, although it seeks efficiency, can choose to have a greater identity among its members. This criterion of a bond between members can be either based on particularities of locality or a segment of activity or companies. This model also has advantages, such as the development of financial products and services more adapted to the specific demands and particularities of its members. In addition, cooperatives with an indefinite public and broad area of action present greater challenges to ensure democratic participation. One of the elements that identify credit cooperatives is the participation of consumers of financial services also as owners. This second condition is materialized especially by the effective right of democratic participation.

A broad membership base requires strategies to ensure participation and the technique of holding delegate assemblies is not properly a strategy to ensure effective participation. PECOL 2.4 affirms the importance of sectorial assemblies in cooperatives with a wide and dispersed set of members, but is concerned, especially in these cases, with identifying strategies to increase the guarantees of participation and control by members (2.4.14). Expanding these guarantees should be a concern of this type of cooperatives of general public and wide area of activity. Technologies and local action groups are possible strategies beyond delegates. In the future, PECOL could contemplate other contemporary instruments and methods to protect the interest of participation and democratic control.

Alternative models, such as the Canadian cooperativism, show that it is possible to preserve this freedom of organization and still produce efficiency and scale of operations. Despite the freedom given to cooperatives to operate in any geographical area and to have any audience as a member, the artificial imposition of a single model may represent a different way of restricting the freedom of cooperatives and threatening their identity.

Concerning again the purpose of cooperatives (PECOL 1.1.1), one of the structural elements of these societies, some risks of this new development should be highlighted.

The hegemonic economic model is characterized by standardization, while cooperatives are distinguished by local solutions, tailored to local conditions which are given priority over the volume of turnover. In addition, a large or economically strong cooperative is not necessarily indicative of a successful cooperative. Often, they are the ones who fail to fulfill their purpose, turning toward themselves instead of their members. The economic efficiency of the cooperatives must not contradict the economic and social efficiency directed to its members.

The cooperatives´ own method of activity usually limits the basis of admission of members territorially to allow democratic control. This dynamic also allows local development and, moreover, it allows the cooperatives to know the socio-economic needs and particularities of the people and localities that they serve. This effect is manifested in a more natural way in segmented cooperatives, which know the profile, particularities and needs of their public better.

Cooperatives open to the general public, which are subject to the rules of credit established by the regulatory system, may not always serve the public contemplated by the segment they are established to serve, because financial services tend to be more standardized.

With the increase in scale and the reduction of the bond between members, services tend to level and differentiate through prices rather than through the ability to meet the common characteristics of the needs of the group. The needs of families in the interior of the country are not the same as those of residents in the capitals or urban centers.Many characteristics distinguish, for example, the financial needs of teachers, civil servants, professionals, entrepreneurs or farmers from each other.

A standardized cooperative has more difficulty in establishing the specific profile of its members and is less likely to know the details of its members'reputations and their level of economic

understanding. Although the co-operative knows the profile and the particularities of its members, it can be forced by the standard rules not to grant credit and so has less capacity to provide local and individual attention. Knowing and designing services to meet the specific needs of the segment or local particularities of its members concerns the quality of services and satisfaction of the interests of the members. This usually distinguishes cooperatives from capitalist competitors beyond economic efficiency.

For example, a member who has a good reputation and who in the rural area used to offer an animal as collateral may, in the name of the standardization and safety of operations, no longer receive the service he or she regularly received from the cooperative. The members who previously fully honored their financial commitments might no longer have a profile that is accepted by uniform credit granting rules.

By opening admission to any member of the public and/or operating in a very large area, the cooperative will be more vulnerable to the entry of malicious people, because it will meet fewer people who make up the target audience. It will tend to increase other costs, such as risk control, among others, and so lose efficiency.

Although regulation improves the freedom of cooperative activity, it mitigates the freedom of cooperatives to adopt a model different from that chosen by reference to regulatory authority - even if the State does not understand the most important dimensions of cooperative identity and is not fully interested in it. On the other hand, while the membership of cooperatives in cooperative credit systems tends to be strategically interesting and important, admission criteria must be transparent, harmonious and consider aspects of technical feasibility, without adopting an unreasonable anti-competitive stance.

It is possible that, at this moment of the financial market, the regulator is indifferent to the kind of membership a cooperative has. The pressure to open the cooperatives to the general public and to extinguish the smaller and segmented ones even if they are working effectively, has led to an emphasis on the importance of scaling up operations and expanding the number of consumers included in cooperative credit systems. In fact, there is an indirect interest ensuing cooperatives to influence the reduction of financial intermediation costs imposed by the capitalist sector, especially in an excessively concentrated market such as the Brazilian one[6].

It is important to reinforce that being large or having a scale of operations is not necessarily a natural requirement for cooperatives because they can have all of this and do not fulfill their purpose - under PECOL 1.1.1, meeting the needs of their members. Size and scale are not values in themselves for cooperatives, unless they constitute a means to better serve the purpose of the consumer, supplier or worker.

If regulation previously has interfered by limiting the admission of members and requiring association conditions by determining groups of people by categories, industries or localities, today it pushes cooperatives to broaden their membership base to a wider public that does not have so much in common - only the generic condition of using consumer financial services. The two forms may represent an inappropriate interference with the freedom of organization of the cooperative enterprise. The recent form, however, is more subtle.

Although more companies in the same market serve, as a rule, to increase competition and generate economic advantages, the proliferation of cooperative financial institutions to be supervised does

6 About the high concentration of Brazilian financial market, see SILVA, 2014.

not tend to interest the Brazilian Central Bank. It is more interested in indirect and centralized oversight through central cooperatives.

The current regulatory pressure seeks to limit financial cooperatives to the model of cooperatives open to any member of the public and any area of action, to strengthen central cooperatives and foster incorporations. In addition to the analyzed points, other specific challenges of this tendency of the financial cooperative market are evident and need to be treated in a particular way:

1) Need to objectify the admission criteria in central cooperatives;
2) Challenges to the fulfillment of the purpose of cooperatives, considering the
    a. Homogenization of credit granting rules;
    b. Stratification of products;
    c. Less knowledge of the public, especially in their personal profile;
3) Expansion of membership territory and challenges to maintain the democratic participation of members;
4) Increase in average activity costs:
5) Risk of inadequate legal treatment due to the increase in similarities between bank and cooperative operations (consumer, labor, tax, etc).

Because refinement of regulation is a necessary and constant process in the markets, it is likely that the behavior of cooperatives and capitalist competitors will influence new changes in the regulatory structure.

4. Final considerations

It was possible from the outset to recognize that PECOL 1.1.1, which deals with the freedom to exercise any economic activity by cooperatives, finally finds correspondence in the Brazilian financial market regulation. However, confronting current regulation with other principles of the PECOL it is possible to identify some characteristics of the phenomenon of "companisation" of cooperatives in the legal framework of the Brazilian financial cooperatives.

It is necessary to conclude that the freedom of cooperative initiative, as a fundamental right of consumers of financial services, also involves the possibility of such companies to freely choose to operate in ways other than a single imposed model, which may jeopardize formal and material aspects that the cooperatives distinguishes from capitalist enterprises, albeit in the name of economic efficiency. There is a strong tendency to approximate the structure of financial cooperatives to foreign models that have already lost much of their identity vis-à-vis banks.

In several others respects, the alignment between the PECOL and the current regulation is identified. The professionalization and modernization of governance according to the complexity of the business structure of the cooperatives is one of them.

In order to broaden participation guarantees and supervise members, PECOL may, in addition to sectorial assemblies, advocate for contemporary methods of broader and more effective participation. These alternatives are especially important regarding the trend of dilution of the identity of members in non-segmented cooperatives, as well as on the expansion of the territorial base of action of these cooperatives.

However, many shortcomings of the current regulation can be met by the PECOL, providing greater guarantees against the "companisation" of credit cooperatives. Perhaps the most important of these contributions is the need for specialized audits carried out independently by third parties to contemplate the analysis of the structure and activity of the cooperative as compatible with the identity that characterizes a cooperative as a cooperative (PECOL 4.1.2). Among these aspects of identity, strengthening the fulfillment of the purpose of cooperatives deserves to be highlighted as a pressing requirement, due to pressures of scale and efficiency, which can lead to a loss of reference to the fact that cooperatives have no interest of their own but to better serve interests of its members.

The PECOL also complements and reinforces the guarantees of free and voluntary adhesion against the use of artificial barriers to entry of new cooperatives or the permanence and sustainability of cooperatives in the market. This is of vital importance in the current regulatory context, where cooperatives are strongly encouraged to participate in cooperative credit systems, from affiliation to central cooperatives. In addition to the traditional requirements, also provided for in Brazilian legislation, the normative element of reasonableness, the requirement to state reasons for the denial of membership and the right of appeal of the rejected candidate constitute important advances in the moralization of this dissenting element of cooperatives in relation to non-cooperative companies.

In addition to these aspects, the numerous contributions of PECOL translate into important mechanisms to balance the efficiency and identity of cooperatives.

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

Marianna Ferraz Teixeira[1]

ABSTRACT

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

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

RESUMEN

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

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

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INTRODUCTION

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

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

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

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

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

1 THE COOPERATIVE ESSENCE

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

Cooperative principles bring the essence of the cooperative identity, reflecting their specificity. The International Cooperative Alliance (ICA) defines the cooperative society as an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly owned and democratically-controlled enterprise[2].

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

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

of giving people independence and freedom through collective working and distinguishes cooperatives from other economic orientations[3] [4].

To make this possible, it is necessary to have the active participation of the members in three different ways: i) being an associate and a provider of goods or services to the cooperative enterprise; ii) being an associate and a worker at the cooperative enterprise and iii) being an associate and a client of the cooperative enterprise[5]. This duality is what makes the relations between cooperatives and their associates unique.

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

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

According to Pastorino, the cooperative act is a juridical expression of solidarity, of own effort and mutual help, combining the general and individual interests of their members. Additionally, it does not provide for uncanscionable clauses due to the essential equality among the cooperative's members. For this reason, there is no trespass on other's juridical sphere, much less a wish to overwhelm the other as is inherent in arms length business transactions. No third person is forced to submit to another's will without participation. There is no arbitrariness[6].

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

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

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

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

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

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

- The members are the services' beneficiaries, since they have created cooperatives to provide service without needing someone than the society[7].

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

3 THE VULNERABILITY AND THE HYPO-SUFFICIENCY CONCEPTS

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

Vulnerability is the cornerstone of consumer protection and demonstrates consumers' fragility in the consumer relationship which is unbalanced because of economic or educational issues[8] and it can be divided in four different types, which are technical, juridical, factual and informational.

Technical vulnerability is presumed in the case of non-professional consumers, but in certain cases it could also be applied to professionals who do not have sufficient knowledge about the services and products to be acquired[9]. In turn, juridical (or scientific) vulnerability is found when there is a lack of specific knowledge on, for example, accounting, legal or economic matters.

On the other hand, factual, or socio-economic, vulnerability occurs when one party, e.g. the supplier, enjoys superior economic strength. The last vulnerability, the informational, derives from the technical, but it must be individualized in light of the power-information binomial, since it is common to see manipulated, controlled or unnecessary information, used to bring a greater imbalance factor to the relationship[10].

As a matter of course, they stem from a contract in which the clauses were unilaterally established or have been approved by the authority of the product or service supplier, without permitting the consumer to discuss or modify their content. That situation maintains the asymmetry of forces before negotiation, preventing proper communication among parties and the consequent possibility of changing clauses[11]. For this reason, clause interpretation occurs in favor of the consumer[12].

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

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

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

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

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

Conjointly, vulnerability reflects on hypo-sufficiency in the original meaning of the term: incapacity or economic disadvantages. However, the most important aspect of the hypo-sufficiency principle is the absence of information[13], being mainly dealt with at the pre-contract or procedural stage to avoid abuses both in labor law and in consumer law.

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

The new hypo-sufficiency tries to bring more equality to the contracting parties, generating a more equitable treatment because its axis is no longer economic, but flexible and emphasizes wishes compatible with the dignity of the human person. In this way, it presupposes an individualized treatment, according to each party's reality, and no longer uses rigid parameters[14].

The dignity of the human person is the basis of freedom, justice and peace[15]. It is an ethical rationale for policies, insofar as rationalizations of humans' coexistence will only be accepted if they are founded on human beings' dignity in society because people do not have *a priori* ontological differences that make their inequality possible and prevent their self-determination in the world. That dignity of the human person is manifested in the equality principle which prevents individuals from being subjected to any discriminatory treatment and enables them to have equal rights[16].

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

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

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

[13] NUNES, Luiz AntonioRizzatto. Curso de Direito do Consumidor. 2. ed. rev., modif. E atual. São Paulo: Saraiva, 2005, p. 578.

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

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

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

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

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

5 CONCLUSION

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

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

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

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

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THE GENERAL INTEREST COOPERATIVES: A CHALLENGE FOR COOPERATIVE LAW

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This article elaborates the concept of a general interest cooperative and considers the issues that relate to establishing a suitable regulatory framework to accommodate this cooperative. The principles of autonomy and self-help means that cooperatives usually develop in a different way than other non-capitalist organizations, such as philanthropic ones. However, in the past few decades, many countries have experienced the development of a new kind of cooperative, targeted at general interest or community needs. These cooperatives are usually subject to special regulations, even if the general cooperative law is also applicable to them. However, their nature remains unclear, and is somewhat controversial, since they challenge the conception of a cooperative as an organisation built around its members. The recent focus on social enterprise and its attention to social purpose, risks distancing policymakers from cooperatives. This makes it necessary to elaborate the legal nature of general interest cooperatives. The intention is to ensure that regulation is suitable for this type of cooperative and to allow cooperatives to remain an umbrella vehicle for most social enterprises. To achieve this goal this paper will consider the general definition of cooperatives, and more specifically the definition of general interest cooperatives, and the way that membership, democratic governance and economic participation apply to them.

1. Introduction

The legal recognition of cooperatives began in the 19th century and developed in the beginning of the 20th century. Cooperators in most countries struggled to get legal status for cooperatives, not because they were keen to be regulated, but so that they were able to obtain public support. International organisations have since recognised that cooperative law is the basic ingredient needed to build cooperative friendly policies.[1] With the evolution of sources of law, including international law, the development of regional institutions and worldwide academic collaborations, there has been a trend; particularly in Europe towards

[1] ILO recommendation no193, 2002, Promotion of cooperatives.

elaborating legislation using a principles based approach.[2] In this context, the scientific group on European cooperative law (SGECOL) was established in 2011 to draft the principles of European cooperative law (PECOL).[3] The methodology used by the group to develop the principles is described elsewhere.[4] However, the purpose of PECOL was to propose a common cooperative identity, and describe its main legal consequences. The PECOL comprises five chapters, dedicated to cooperative identity, governance, financial aspects, auditing and grouping. While they may look like legislative provisions, they do not claim to be law. Commentary accompanies each principle explaining its origin and meaning when applied in each of the considered jurisdictions. In this domain, PECOL is the only supra-national instrument that can be relied on to foster legal thinking on cooperatives. Therefore, it will be the starting point for this analysis, but there will also be consideration of cooperative laws from some national jurisdictions.

The general interest cooperative was focus of most of the debates during the elaboration of PECOL.[5] Although the debate is not new (as we will see below), no clear terminology had been fixed, and the concept of 'general interest' cooperative was settled upon by SGECOL to describe this cooperative type. The reality that was recognised was the emergence of cooperatives aimed at satisfying the needs of the community. There have been strong disagreements among scholars about the validity of extending the scope of cooperation to include this new phenomenon. The solution that was incorporated into PECOL by consensus, after many amendments, was to recognise the general interest cooperative as a special and singular cooperative, apart from the traditional cooperative. Among the members, I was personally (although not alone) in favour of taking the initiative further, to elaborate a more inclusive definition of a cooperative. This paper will explain my reasons for promoting this controversial solution.

I will argue that it is necessary to accommodate these general interest cooperatives in cooperative law. Firstly, because of the emergence of new kinds of cooperatives and secondly, because of the increasing focus on social enterprise. I will then propose a way to integrate these cooperatives in cooperative law, and this refers to the definition of a cooperative, as well as some analysis of their legal regime. In defining a co-operative, the clash between members' interest and the general interest is considered and this will lead to the need to discuss whether cooperatives are procedural or substantive in nature. It is possible to link the new kind of cooperative with its predecessors, but the devil is always in details. The main difficulty is to find a suitable regulatory framework inside cooperative law. Three of the cornerstones of cooperative principles present difficulties in this respect: cooperative autonomy, their democratic control, and the economic participation of members. This will lead to the drawing of some conclusions.

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[2] The elaboration of European principles has become a major activity for law scholars in Europe, especially in private law, in order to impulse approximation of national legislations through soft law. The first and most famous topic is contract law, that remains the model for any other academic research.

[3] The author of this article was a member of the group. Therefore, the first person will be used when it will be necessary to make transparent the opinion of the author into the group, which sometimes differs from others.

[4] G. Fajardo, A. Fici, H. Henry, D. Hiez, H.-H. Münkner, I. Snaith, 'New study group on european cooperative law: "principles" project', EURICSE working paper n 024/12. G. Fajardo, A. Fici, H. Henry, D. Hiez, H.-H. Münkner, I. Snaith (Ed.),*Principles of European Cooperative Law*, Intersentia, 2017.

[5] For the relevant PECOL provisions, see the annex.

2. The emergence of new kinds of cooperatives

In spite of the diversity of contexts, all continents have experienced the development of cooperatives targeted mainly or exclusively at the pursuit of the interest of the community. It is helpful to give some examples in order to grasp the core features of these cooperatives. These examples are not only European, since the phenomenon arises worldwide.

Social cooperatives in Italy. These social enterprises are expressly recognised as cooperatives by the Italian law.[6]. The ICA also considers them as one way that cooperatives comply with the seventh principle, concern for community[7].

Solidarity cooperatives in Québec. The solidarity cooperatives are cooperatives that comprise user members as well as employees and other stakeholders. As with Italian cooperatives, their object is to meet the interests of the community through any activity, but they usually include more than one category of member: users, employees, or other stakeholders who wish to support the cooperative's object. They appear to be very successful, with reports that more than nine out of ten new cooperatives in Québec are solidarity cooperatives.[8]

Solidarity economy in Latin America. Latin America relies on a significant number of cooperatives in many sectors. During the last few decades, social movements have played a significant role in political and economic changes. Cooperatives have evolved. In many countries, traditional cooperatives have been challenged by new ones, the former being accused of complicity with previous non-democratic political institutions. These new cooperatives do not necessarily benefit from special regulations, but they are characterised by common features, added to the traditional ones, such as strong integration into local communities, and emphasis on social, cultural and political emancipation. [9]

Asian cooperatives. A similar evolution for cooperatives has occurred in Asia, especially in Japan, where cooperatives have a longer tradition.[10] Since the 1980s, new types of cooperatives have emerged, delivering social services.[11] These are sometimes referred to as 'non-profit co-operative' enterprise.[12]. There are also representative types of workers' collectives providing social personal services, such as

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[6] Italian Law n 381-91. R. Lolli, Social cooperatives in the context of recent Italian regulation, in D. Hiez (Ed.), *Droit comparé des coopératives européennes*, Larcier, 2009, p.73. A. Thomas, 'The rise of social cooperatives in Italy', Voluntas (International Journal of Voluntary and Nonprofit Organizations), 2004, vol. 15, no.3. J. Defourny & Nissens M., 'Social co-operative, when social enterprises meet co-operative tradition', Journal of Entrepreneurial and Organizational Diversity, 2013, vol. 2, issue 2, 11-33.

[7] International Cooperative Alliance, 'Guidance notes to the co-operative principles', 2015, p. 87: https://ica.coop/en/blueprint-themes/identity/guidancenotes.

[8] See further at http://p2pfoundation.net/Solidarity_Cooperatives.

[9] P. Guerra & S. Reyes, *Economia Solidaria, Cooperativismo y Relaciones Laborales*, 2014, Fundacion de Cultura Universitaria, Montevideo.

[10] A. Kurimoto, 'Japan', in D. Cracogna, A. Fici & H. Henry (Ed.), *International handbook of cooperative law*, Springer, 2013, p.503.

[11] M. Sakurai & S. Hashimoto, 'Exploring the distinctive features of social enterprise in Japan', EMES Conference selected papers series, ECSP-T09-14

[12]. Ibid.

child-care and comprehensive care services for the elderly and disabled. These organisations do not have a specific legal structure, even if they are close in form to cooperatives.

These examples are superficial and provide an illustration of a general evolution. The development of these new cooperative types runs parallel to another recent evolution: the generalisation of a new concept, if not a new reality, the 'social enterprise'. These two phenomenons are both close and conflicting, so that it is necessary for me to explain the concept of social enterprise in this context.

3. The focus on social enterprises

It might be surprising to find some consideration of social enterprise in a paper dedicated to general interest cooperatives, since the two notions differ and do not refer to the same reality in the various continents. However, some connections are obvious. For example in Italy, social cooperatives are one of the first expressions of social enterprises in Europe. Because of the possibility for misunderstanding, it is important to explain some points about social enterprise that might be helpful when considering the analysis of general interest cooperatives.

To speak of 'social enterprise' is confusing, since the word refers to various traditions and realities all over the world.[13] However, the terminology is increasingly popular, especially in the European Union.[14] The concern is that it might be treated as a competing notion to cooperatives, in public policies as well as in law. For this reason it is important to consider this trend, and if possible, to establish bridges between social enterprises and cooperatives to avoid the former superseding the latter.

The notion of 'social enterprise' was created in the United States in the 80's.[15]. It covered different realities and meanings, however all were related to philanthropic institutions in the market, either promoting new forms of action, or using private funds to compensate for the reduction of public funding under the influence of neo-liberalism. The concept was later transferred to Europe, and Asia.[16]. The emergence of the notion of 'social enterprise' in Europe is interesting, as it has produced strong institutional, political and academic debates. The concept of social enterprise is contested in countries that are already based on the social economy tradition. In these countries, the social economy is designated as

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[13] A. Mystica, 'A comparative look at international approaches to social enterprise: public policy, investment structure, and tax incentives', William Mary Policy Review (2016), volume 7:2. G. Galera & C. Borzaga, 'Social enterprise: an international overview of its conceptual evolution and legal implementation'. Social Enterprise Journal, November 2009.

[14] C. Borzaga & J. Defourny (Eds.), *The emergence of social enterprise*, Routledge, 2001. (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds.

[15] M. F. Doeringer, 'Fostering social entreprise: a historical and international analyses.' Duke Journal of Comparative International Law, 2010, vol. 20, p.291.J. Defourny & M. Nyssens, 'Approches européennes et américaines de l'entreprises sociale: une perspective comparative', Revue internationale d'économie sociale (RECMA), 2011, n319.

[16] I will not deal with the Asian context, due to a lack of direct knowledge. I mention it only since it is an important stream in academic research. It seems that Asia is influenced both by the two other traditions or, at least, has provided enterprises comparable to the American and European ones, with their own specificities. For some legal considerations, see for example: Z. G. Cao Fan, 'The practical foundations and methods of transformation from non-profit organizations to social enterprises in China.', China Legal Science, 2017, volume 2. For India, N. Vinod Moses, 'Wondering which legal structure to choose for your social enterprise.', 2014, https://yourstory.com/2014/02/egal-structure-choose-social-entreprise/

the third sector, alongside the public and market economies. Because social enterprise claims to use traditional business tools to achieve social goals, they are suspected to be an instrument for commercial enterprises to pervert the social economy.[17]. This suspicion has made it difficult for diverse enterprises to engage in any dialogue and cooperation. [18],.
The merit of the concept of social enterprise should not be underestimated when elaborating a common terminology for these diverse European traditions.[19]. If cooperatives are present in most countries, the scope of enterprises with which they share common values and, therefore, collaborate is variable. In this context, 'social enterprise' may provide for a common notion requiring European institutions to respond with new regulations. If cooperatives wish to challenge the concept of the social enterprise and its legal institutionalisation, it is necessary to have a clear understanding of the differences and similarities between them.

The major difference between a cooperative and a social enterprise is the social focus of social enterprises. Social enterprises are businesses with primarily social objectives whose surpluses are reinvested for that purpose in the business or in the community, rather than being driven by the need to maximise profits for shareholders and owners.[20] This is the reason why it requires attention in this reflection on general interest cooperatives. Social purpose does not place social enterprises and cooperatives in opposition, since cooperatives also claim to pursue that aim. Cooperatives run their activities to satisfy their members' economic, but also their social and cultural needs. Therefore, social enterprises could be considered to be 'special cooperatives'. In that respect, it is meaningful that EMES presents Italian social cooperatives as the main example of social enterprises in Europe.[21].

However, this should not obscure the specific differences between the social enterprise and the cooperative. Social purpose tends to be the single characteristic of the social enterprise. In order for an enterprise to be classified as social, it needs to prove it pursues a social objective.[22]. Regardless of whether the legal form of the enterprise is a collective or an individual enterprise, it is required and sufficient if the enterprise aims to meet a social need. The allocation of profits and the governance of the enterprise will not have any bearing on the qualification of the organisation to be a social enterprise. On the one hand, this is a strength, since it extends the scope of enterprises that may bring a benefit to the community. On the other hand, it puts aside the role of stakeholder/beneficiaries in cooperatives as well as its endogenous development and the fair allocation of its profits. In cooperative thinking, these features

[17] J.-F. Draperi, 'Economie sociale et entrepreneuriat social.' Revue Internationale d'économie Sociale (RECMA, http://www.recma.org/edito/economie-sociale-et-entrepreneuriat-social.

[18] Some opinions of American scholars may, surprisingly, confirm the European critics addressed to social enterprise. Indeed, they would fit better with the market context than corporate social responsibility, since their proponents are libertarian in their orientation, while corporate social responsibility leans toward the left liberal side of the political spectrum: A. Page & R. A. Katz, 'Is social enterprise the new corporate social responsibility?, Seattle University Law Review, 2011, volume 34, particularly pp.1379 f.

[19] D. Hiez, 'Le cadre juridique de l'entreprise non capitaliste: clef de distinction entre l'entreprise sociale et l'entreprise d'économie sociale et solidaire.I, Revue internationale d'économie Sociale (RECMA), 2013, n°327, p.95.

[20] https://centreforsocialenterprise.com/what-is-social-enterprise/ .

[21] EMES is a European network of researchers working on social enterprise; its name comes from its first research project on 'L'émergence des entreprises sociales en Europe.'

[22] (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds, art. 3.

cannot be separated from the organisation, since democratic governance and economic participation represent the way in which the social objective can be reached. In other words, the main criticism of the social enterprise is that its first focus is not its members. One view is that social enterprises are a poorer instrument and the focus of European institutions on them is an attack on the cooperative specificities.

This point is important, but there are other points to consider that nuance the opposition. Importantly, social enterprise is not a legal notion, and it often remains outside the legal domain. There is considerable academic research on the best legal form to use to create a social enterprise. A recent report on the legal shape of social enterprise in Europe does not claim a European legal structure. [23]. It recognises that social enterprise is not a regulatory concept but a notion that is aimed at public policies. Therefore, a social enterprise often includes enterprises that comply with most of the cooperative principles, and, sometimes adopts the legal form of a cooperative. The diversity of traditions makes the word 'social enterprise' polysemic and provides a wonderful opportunity to distort reality and play a confusing game. The reluctance of cooperative organisations to have regard to the notion of social enterprise reinforces the gap between them and deprives cooperatives of the opportunity to influence policy on this development. If cooperatives wish to be involved and accept that they are unable to stop this development, the only possible way for them to proceed is to present the cooperative as a friendly model.

One difficult question remains, is this possible? Is *genus cooperatis* compatible with the social enterprise? This requires a discussion of the legal definition and regime of cooperatives.

4. The general definition of the cooperative and general interest cooperatives

The main argument against the inclusion of the notion of general interest cooperatives in the definition of a cooperative is their absence of any focus on the members' interest. The members' interest lies at the core of the definition of a cooperative provided in the ICA statement on the cooperative identity: 'an association of persons united mainly to meet their common economic social and cultural needs.'[24] It is also enshrined in national legal definitions. In Spain, for instance, the definition expressly refers to the objective of the cooperative: 'to satisfy its members' economic and social needs and aspirations by conducting business activities'.[25] Definitions of the concept in laws of various jurisdictions also frequently mention that these activities are carried out jointly by the members or with the members' participating as workers, consumers or providers of goods or services. The Italian definition is less explicit, but has the same meaning when stating the mutual purpose as one of its two main characteristics.[26]. The same observation can be made about German law,[27] or French law.[28]. The EU

[23] Developing Legal Systems which support Social Enterprise growth', report established by the European social enterprise law association (ESELA) in November 2015. http://www.esela.eu. The same observation can be made about the last study requested by the European Parliament Committee on Legal Affairs: A. Fici, 'A European Statute for Social Solidarity-based Enterprise.'

[24] https://ica.coop/en/what-co-operative

[25] Ley 27/1999, 16th July 1999, De Cooperativas, art. 1 1.

[26] Italian Civil Code, art. 2511.

[27] German Cooperative Societies Act, art. 1 (1).

[28] French Law n 47)1775, 10th of September 1947, art. 1.

regulation provides that the main object of the SCE is 'the satisfaction of its members' needs and/or the development of their economic and social activities'[29] Some national regulations play less attention to members' interests. Apart from the new Finish law, whose purpose is difficult to seize, the provisions in the Luxembourg,[30] and Belgian law,[31] provide examples. In both of these laws, the cooperative is defined as a company with variable capital and members. Apparently, this is flexible enough to accommodate both general interest and member-centered cooperatives. If this neutrality is accepted, such an assessment neglects the empirical tradition, which is that most cooperative law complies with the ICA definition.[32]

Despite the definition, general interest cooperatives appear in most jurisdictions and are often included in regulations. However, the provisions dealing with these new cooperatives are distinct from the general definition. Social cooperatives in Italy, for instance, are dedicated to: 'the human promotion and social integration of citizens through: *a*) the management of social-health and educational services; *b*) the carrying out of various activities – agricultural, industrial, commercial, or service – for the work integration of disadvantaged people.'[33] The lack of reference to the members in this definition clearly distinguishes it from the general one. Article 1522 of the Italian Civil Code allows special cooperatives to provide for services to non-members and function as non-mutual cooperatives. In other words, such cooperatives require a special regulation in order to be valid, since they derogate from the general definition. In French law, the community interest cooperative (*société coopérative d'intérêt collectif*, SCIC) pursues a similar aim. This regulation has been introduced in the general cooperative law[34]. Nevertheless, the same opposition with the general definition appears, even if it has only received indirect attention from scholars.[35]. The public interest cooperative in Portugal does not expressly require a specific objective but it allows public persons to participate in its membership, and the allusion to its purpose apparently does not derogate from the general definition.[36]. However, its legal regime deviates in many ways from the general rules as well as from ICA principles (see below).

When the general interest cooperative is included in the general cooperative law and does not derogate from its definition, it is because its social object is not achieved through services to non-members. This is the case for the solidarity cooperative in Québec, which is characterised by its multi-membership.[37] The law makes required adaptations for the distribution of cooperative refunds,[38] notably the exclusion of

[29]Council Regulation (EC) no 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), Art. 1 (3).

[30]Law of the 10th of August 1915 on Commercial Companies, art. 113.

[31] Belgian Company Code, art. 350.

[32] In Belgium, for instance, a distinction is made between the so-called "true" and "false" cooperatives, and only the first ones may profit from provisions reserved for cooperatives.

[33]Italian Law, 8 November 1991, n. 381 on Social Cooperative, art. 1).

[34]French Law n 47-1775, 10th of September 1947, art. 19 quinquies-19 sexdecies A.

[35]D. Plantamp, 'La Société Coopérative d'Intérêt Collectif et les principes généraux du droit coopératif', Revue trimestrielle de droit commercial, 2005, 465. For some more details, D. Hiez, 'Sociétés coopératives d'intérêt collectif', Encyclopédie Dalloz, Répertoire Sociétés, forthcoming, n 108.

[36] Article 6 of the Cooperative Code, and more precisely the Decree-Law 31/84, 21 January 1984.

[37] Art.226-1.

[38] Art 226-8.

refunds for support members. A similar observation is made in relation to Spanish cooperative law. Article 106.1 of the *LeiCooperativa* acknowledges the social initiative cooperative, and describes its proper features: no profit orientation, and the specific object to provide care services or the integration of fragile employees.[39] Here, the cooperative is accommodated within general definition, and the objective is conciliated with the co-operative's member-orientation. In brief, these cooperatives do not deviate from the general tradition and, as such, do not challenge the definition of the cooperative.

Therefore, there are significant differences between jurisdictions and the major distinction is whether the law integrates the general interest cooperative into the scope of the general definition of cooperatives. The jurisdictions in which general interest cooperatives expressly deviate from the general definition of cooperatives arguably offer a more friendly position vis-à-vis social enterprises than those jurisdictions that place general interest cooperatives within the general scope and offer a more traditional approach. However, no legal system has taken advantage of the emergence of new kinds of cooperatives to renew their general definition of cooperatives.

It is interesting to look at the approach adopted by PECOL, since they claimed to elaborate principles that are common to the various European jurisdictions and are suitable for contemporary cooperatives. After some debate and different versions,[40] PECOL tried to find a nuanced and prudent solution. To achieve this end, PECOL introduced the concept of the 'general interest' cooperative. The initial debate concerned the best way to describe the social objective of such cooperatives: was it general interest, community or social utility? All terms have connotations and all have advantages and disadvantages. 'Community' was a choice because one of the main features of these cooperatives is local development. Moreover, 'community' highlights the link between the seventh ICA principle (concern for community) and these new kinds of cooperatives. Some scholars argued that community was too narrow, and that social cooperatives have a wider scope. More technically, they argued that the community was not a legal concept and that it would be difficult to determine the circle of the persons whose needs fell under the social objectives of the cooperative. 'General interest' is in that respect a better choice and is legally consistent. I was among those that preferred the vagueness of 'community' as a descriptor, because of its flexibility.

The acknowledgement of the general interest cooperative by PECOL is an innovation, since it provides a uniform concept. It could be understood as a doctrinal assessment, even if the elaboration of PECOL is not a legislative project. The general characteristics of the category of the general interest cooperative were distilled as common features from the various national cooperatives rather than being the result of a purely theoretical position. The concept is useful as a basis to conceptualise the relationship between it and the general definition. However, PECOL does not go further. The general interest cooperative remains a special kind of cooperative, with some special provisions. Neither its definition, nor these special provisions are connected with the general definition, so that it can only be analysed as a derogation from the traditional cooperative.

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[39] Ley 27/1999, 16TH July 1999, De Cooperativas, art. 106.

[40] The draft version of PECOL, presented to the public in June 2015 in Brussel ('Cooperative law: the importance of a regulatory framework at the EU level.', 9th June 2015, Brussel) contained a more innovative proposal, placing at the same level member-centered cooperatives and general interest cooperatives. The proposal received strong criticism and the draft was subsequently amended.

The other obstacle to the recognition of the general interest cooperative flows from the seventh principle of the ICA statement on the cooperative identity: 'concern for the community'. The argument is that cooperatives already target the community's interests.[41] The purpose is indirect, since the *genus cooperatis* is focused on the members' interest, but the way these interests are met implies consistency with the interest of the community.[42] Through its characteristics, including the embeddedness of members, the open door principle, the education principle and disinterested liquidation; cooperatives cannot be selfish and will meet the needs of the community. The argument is that there is no room left for general interest cooperatives, to admit them would mean that traditional cooperatives do not achieve the same purpose. One response is that they can be accommodated, i.e. there is no gap between mutual and general interest cooperatives, but instead there is a continuum. The opposing view is that the direct focus of general interest cooperatives on the community makes them different.

A solution is to seize a common definition to embrace all of these cooperatives: '*the cooperative is a society constituted by several persons, united voluntarily to meet its members' and its community's economic and social interests, by the common effort of its members and the establishment of appropriate means.*'[43] The structure of this definition is traditional, but it tries to integrate the general interest dimension inside the core of the general definition. On this basis, the general interest cooperative is not a derogation, but is a kind of cooperative, whose specificity does not rely on the nature of its members, but rather on the place attributed to non-members. It insists on a continuous thread among all cooperatives, with the use of the word 'and' between members' needs and community needs being understood as both cumulative and alternative. In other words, a cooperative may pursue both members' and community interest, and may focus on one or both of these needs. Conversely, no cooperative may fully exclude one of these two dimensions. The exclusion of the community interest would violate the concern for community principle. The exclusion of members' interest would remove the gap between cooperatives and charities.

5. The nature of cooperatives: a procedural framework or a targeted organisation?

It can be argued that the co-operative is focused on the way it runs its activity, while the social enterprise only pays attention to its purpose. Therefore, the possibility for a cooperative to pursue a general interest as its primary goal will depend upon the compatibility of its procedural features (governance and profit distribution) with the identified general interest. In other words, attention must be paid to the extent to which the cooperative's procedural organisation is linked with the pursuit of its members' needs.

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[41] For an excellent discussion of that question, notably in a historical perspective: I. Macpherson, 'Concern for the community: from members towards local communities' interests.', Euricse working paper series, 2281-8235. It is noted that the author does not deal with the debate that is under discussion here.

[42] W. Majee & A. Hoyt, 'Cooperatives and Community Development: a perspective on the use of cooperatives in development.', Journal of Community Practice, 2011, 19:1, 48-61. M.Vieta & D. Lionais, 'The cooperative advantage for community development.', Journal of Entrepreneurial and Organizational Diversity, 2015, vol. 4, issue 1, 1-10.

[43] This definition is influenced by the French cooperative definition, but its structure could be the basis for the renewal of any cooperative definition. It is the fruit of ongoing research on the drafting of an innovative cooperative law in France, under the supervision of the author, but all the members of the group have a share in it.

At a first glance, the answer seems obvious: there is a link between the social objective of the cooperative (to meet its members' needs) and its procedural regulation. The ICA definition of cooperatives requires that the objective be pursued 'through' a jointly owned and democratically controlled enterprise. In other words, conduct of the enterprise is the process by which the object is achieved. Therefore, it is not possible to separate the process from the object so that the cooperative cannot be conducted primarily to serve a general interest.[44]

However, the reality is more complex. The satisfaction of members' needs does not necessarily dominate the conduct of the enterprise in many cooperatives. Consumer cooperatives, such as banking cooperatives, usually run their activities with non-members without any limitation, or with very light ones. The justification for the deviation is that a critical mass of customers is the best way to meet the members' needs. This is an economic rather than a legal justification and you can also find consumer cooperatives who only transact with members. However, in those cooperatives transacting with non-members, there is often a focus on its democratic organisation. Therefore, it is possible to mitigate the traditional social objective, and to keep the same procedural regulations with some adaptations. This leads to a more radical question: is the cooperative, at the end of the day, more about the procedural organisation of the enterprise rather than the achievement of a specific objective? If so, the incorporation of general interest cooperative among other cooperatives should not be problematic.

This conclusion is tempting, since it would facilitate the recognition of general interest cooperatives. However, there are several reasons for avoiding this line of reasoning. Firstly, if the cooperative is an organisation that does not rely on serving a particular objective, it will appear to be simply an ideological choice and, therefore, it will be more fragile. If the procedural regulation of the cooperative is designed to achieve social objectives, the strength of the organisation derives, at least partly, from its ability to achieve that goal. If the goal vanishes, the procedure becomes an end in itself. Secondly, if the cooperative procedures are autonomous, they could easily be applied to companies, with some adaptations. Although this does occur, it can only happen when the company does not aim to maximise its profit for the benefit of its investors.

Consequently, it is not possible to deviate from the traditional definition of cooperative: it is targeted at a specific purpose, characterised by its attempt to meet specific needs, in opposition to the company's purpose. The specific purpose of the cooperative is to meet its members' and their community's needs. It has not always been necessary to articulate the communities need as part of the cooperative purpose. There was a time when individuals (the members) were not clearly distinct from their community, so that their needs and aspirations were the same.[45]. With the rise in individualism and the dilution of traditional communities, it has become necessary to make it more explicit that cooperatives are anchored in their community (local or wider depending on the cooperative), so that its purposes are also targeted to include this community.

[44] Hans-H. Münkner, *Co-operative principles and Co-operative law*, 2nd revised edition, Zweigniederlassung(Zürich), 2015, notably pp. 30-31.

[45] Looking at the first cooperatives, or reading the first thinkers, we don't find that opposition.

Despite this, the difficulty acknowledging general interest cooperatives remains. The door may be open but this possibility will only be realised if cooperative regulation accommodates the special situation of these new enterprises. The definition may include both enterprises, but is the legal regime as flexible?

6. Autonomy and cooperation with public bodies

The autonomy of cooperatives is a very old principle, and it has been strong enough to exclude many cooperatives from the ICA. It recognises that it is necessary for members to control the cooperative, and the main threat is control by the state or external investors. Apparently, the same concern does not apply to investors in general interest cooperatives. The distinction comes from the place of members and non-members inside the general interest cooperative. When the cooperative's interest is its members, they must fully control the cooperative. When the cooperative's interest belongs to the community, this raises the question of how it is to be controlled by that community. One way is to ensure its representation places some control in the hands of the state. Indeed, the state is there to safeguard the communities' general interest. But how is state control to be reconciled with the principle of cooperative autonomy?

Apart from those jurisdictions in which the state controls all cooperatives, cooperative law in some jurisdictions e.g. France and Portugal, recognises the representation of public persons in general interest cooperatives. In France, while public persons require a special authorisation to subscribe to a certain amount of capital in a company, the law allows them to do so in the community interest cooperatives.[46] In the first regulation, the maximum subscription was 20%. This limit has since been increased to 50%.[47] The amendment has been justified by the need, revealed in practice, to make these cooperatives more stable by allowing a higher participation of public persons, notably local authorities. In Portugal, public interest cooperatives (*régies cooperatives*)[48] are connected to the municipal tradition,[49] and are submitted to special provisions that derogate from some cooperative principles,[50] notably democratic governance through the attribution of rights to public persons.

In this context, it is worth mentioning régies', referred to in the writings of Bernard Lavergne, [51] which have partly inspired Portuguese public interest cooperatives. These 'régies' have many similarities with general interest cooperatives. Lavergne describes the criterion to distinguish them from other public entities: creation by public bodies, autonomous management, disinterested organisation only aimed at

[46] French law L. no 47-1775, 10th of September 1947, art. 19 septies.

[47] French law L. no 47-1775, 20th of September 1947, art. 19 septies alinéa 4, since the law no 2014-856, 31st of July 2014, art. 33.

[48] Established by article 6 of the Cooperative Code, and more precisely regulated by the Decree-Law 31/84, 21 January 1984

[49] J. Leite, 'Municipalities and social economy. Lessons from Portugal.', CIRIEC, 2015/14.

[50] The constitutional court of Portugal even stated that some provisions of the derree violate the constitution: see J. Leite, 'Cooperativas de interesse public em Portugal.', http://www.cases.pt/0_content/actividades/doutrina/cooperativas_de_interesse_publico__em_portugal.pdf

[51]Notably: B. Lavergne, « Le rapide essor des régies coopératives anglaises », revue des études coopératives, n°63, 1937, Paris, Presses Universitaires de France, ps. 177-210.

selling at cost, fixed statutory interest to the share capital (if any capital), designation of board members by public bodies or consumers.[52] There are similarities with general interest cooperatives, such as the limited return on capital, or the absence of any cooperative refund. However, some of their features are incompatible with cooperatives, especially influence of public bodies. If board members, or at least some of them, are to be selected by public bodies, their creation by a public Act makes them fundamentally different to a cooperative.

The derogations for general interest cooperatives cannot be understood without paying due attention to the special objective of these cooperatives. Indeed, when a cooperative intends to meet the community's needs and aspirations, the compliance with cooperative principles requires them to state what place is to be given to this community. A community is not a legal person, so it cannot be a member, nor can it designate who are to be its representatives. However, as cooperatives are also based on the principle of self-help, it would not be appropriate to disallow the integration of non-members users. This is probably the main reason why cooperative organisations seem to be reluctant regarding the integration of general interest cooperatives. The diverse legal innovations in national cooperative laws are oriented to multi-membership. The integration of public bodies into the cooperative should be given consideration as one way to tackle this problem. In other words, the involvement of public bodies should not be seen as a violation of cooperative autonomy, but an acknowledgement that the community is represented, or that the general interest is voiced by them. Another view is that general interest is no longer only expressed through the state, since many groups are involved in its determination. This corresponds to the increasing place given to civil society. Therefore, the state is not the only possible representative of the general interest for the local communities. Local public bodies are concerned, as are other organisations. They cannot be defined a priori, so they are abstractly designated through the category of 'persons interested in the social objectives of the cooperative'.[53] The category is wide enough to welcome many legal and even natural persons. It is up to the founders of the cooperative, as well as to the community, to decide who the appropriate representatives are in each general interest cooperative.

The traditional cooperative members are not outside this scope. Firstly, they are part of the community and may claim an equal ability to represent it. Secondly, they are involved in the enterprise and so are entitled to be members. If we agree that the cooperative cannot be solely targeted at the community, without any concern for its members, some of its representatives must also be cooperators. This reasoning leads to the conclusion that the general interest cooperative does not face intractable difficulties integrating the community into its membership. A similar conclusion may also be drawn about democratic governance.

[52] B. Lavergne, ibid., p. 108.

[53] You will find such a formula ('les personnes physiques ou morales intéressées à l'objet des sociétés coopératives artisanales') about craft cooperatives: French Law L. n 83-657, 20th of July 1983, art. 6 4°. Another formula refers to the persons who intend to take part to the achievement of the cooperative object (personnes qui entendent contribuer à la réalisation de l'objet de la cooperative': French law L. n 47-1775, 10th of September 1947, art. 3 bis. Note, that for collective interest cooperatives, the legislator does not refer anymore to a specific category but provides for a general definition. I.e. any natural or legal person who contributes by any means to the activity of the cooperative ('toute personne pysique ou morale qui contribue par tout moyen à l'activité de la cooperative'). French law L. n 47-1775, 10th of September 1947, art. 19 septies.

7. Democratic governance and multi-membership

Democratic governance is a pillar of cooperative principles and the general interest cooperative may only be considered to be a cooperative if it is compliant. However, it is not so difficult to demonstrate that they do comply, even if there are some adaptations. The democratic governance principle comprises many aspects, and it is not possible to discuss all of them here. The structure of the cooperative does not differ if it is a general interest cooperative, so that the main concern is about the 'one member/one vote' requirement.

If this is a universal requirement, there are also some derogations. It is traditional for secondary cooperatives to be an exception, but it is also true in other cases. In French agricultural cooperatives according to the French law, with some limitations, voting rights may be proportionate to the number of transactions the member has with the cooperative.[54] More generally, PECOL states that when a cooperative welcomes non-cooperator members, they may have plural voting rights according to their capital.[55] Therefore, the incorporation of special provisions for general interest cooperatives is not idiosyncratic. The key issue is to determine what kind of derogations should apply to them. Two different questions arise: the accommodation of multi-membership, and the weight of control rights to be given to public persons.

The question of multi-membership does not only concern general interest cooperatives so it should not be a serious issue. When cooperative law does allow a cooperative to have multi-membership, it usually also allows them to have different classes of members with different voting rights. In Spain, for instance, in cooperatives with different classes of members (ones with employee members,[56] investor members,[57] or integral,[58] or mixed cooperatives,[59] plural or fractional votes may be assigned to maintain each class of members' proportional rights at the general meeting in accordance with the relevant statute. The rule is similar in French collective interest cooperatives. If the principle remains one member/one vote, it is up to the statutes to provide for different voting rights for the classes of members, each member having equal voting rights in its own class.[60]

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[54] French Rural Code, art. L.524-4.

[55] Section 2.4 (10).

[56] Cooperatives other than workers' cooperatives may have employee members. Spanish law LC (article 13.4) states that if the cooperative's statutes allow this class of members, they must establish criteria that will ensure these members a fair, weighted participation in the rights and obligations, both financial and corporate [information, voting, eligibility for office]. The same rules apply to these members as to the worker members of worker cooperatives.

[57] All types of cooperatives may have investor members who do not participate directly in the cooperative activity but contribute to achieving it and may be allowed voting rights. Spanish law LC (article 14) states that the combined votes of this membership class may not exceed 30% of the votes in the organs of the cooperative.

[58] Integral cooperatives are those that fulfil the typical purposes of different classes of cooperatives within a single cooperative, as established in their statutes. The different activities of the cooperative must always be represented in its decision-making bodies (Spanish law LC article 105)

[59] Mixed cooperatives, as mentioned in Spanish law LC (article 107), are those that have members whose voting rights in the general meeting may be decided exclusively or preferentially by the capital they contribute. These members may cast up to 40% of the votes and their shares may be freely negotiable. The sum of the votes of these members and any investor members may not exceed 49% of the total votes in the cooperative.

[60] French law L. no 47-1775, 10th of September 1947, art; 19 octies.

The situation is more complex in relation to public bodies. Here, Portugal offers an example of derogations. In the case of public interest cooperatives, mentioned above, the participation of public entities in governing bodies is proportionate to the weight of their contribution to the cooperative's share capital.[61] This is a where the legislation is difficult to reconcile with cooperatives. The presence of public bodies in this example is an exception as it is connected to the concept of *régies*, and does not fit exactly with the notion of general interest cooperatives as it is understood in this paper. Indeed, if a public person is authorised to hold plural voting rights, it is argued that it is not because it is public, but because it represents the community. The community is the target of the cooperative and must be given sufficient representation in the cooperative's decision-making organs. However, as a member of a cooperative, the public body must respect the cooperative principles to the extent that this is possible. Therefore, the reasons why the public body must hold voting rights that are proportionate to its capital contribution are not clear. It is difficult for the law to determine what should an appropriate allocation of voting rights, since each cooperative transaction may have different implications for the community. The best solution is to define the general framework in the legislation and to refer to the statutes for the determination of details.

The justification of plural voting rights for pub lic bodies in general interest cooperatives leads to another observation. Since it is based on adequate representation of the community, it may equally apply to any community representative (not including. cooperators, even though they partially represent the community as their members). It may concern persons who are interested in the achievement of the social objective, such as a philanthropist or charitable organisation. This will depend on the way the community is targeted and how many representatives are cooperative members. Still, it may justify a derogation to the 'one person/one vote' principle. Given the diversity of possible scenarios, just like in the case of public persons, the law should refer to the statutes for guidance and thresholds.

In summary, the issues generated by governance of the general interest cooperative are not very difficult. It does require some adaptations to the traditional approach, but the derogations are no more serious than the ones that are already present in many cooperative laws. However, the economic dimension does raise more difficulties, since it requires a conceptual adaptation.

8. Cooperative transactions and the cooperative refund

The cooperative transaction is the transaction that the cooperative performs to achieve its social objective. Some jurisdictions do not expressly include this concept in their cooperative laws. However, even when the relevant cooperative law does not specifically refer to the concept is does include rules that implement the requirement to some extent. This is the basis for the principle of member economic participation or exclusivity. It requires that the cooperative perform transactions only, or at least mainly, with its members. In this context, transactions are those cooperative transactions that connect to its core objective. The cooperative is not prevented from engaging in ancillary transactions with non-members. For example, an agricultural cooperative does not infringe the exclusivity principle when it buys a computer from a non-member.

[61] Portuguese Decree-Law no 31/84, art. 8.1.

The notion of the cooperative transaction is an issue when identifying the services to be provided to the community and it is a barrier when trying to justify their status as a cooperative. As discussed earlier, the 'community' cannot be a cooperative member as it is not a legal person. Therefore, even if the social objective is to meet the community's needs, the community is not a party to the transactions performed to achieve that goal. For a range of reasons, it is not possible to welcome the individual beneficiaries of those transactions as members of the cooperative. For example, the beneficiaries might be individuals who do not have legal capacity. The real difficulty in this area is that from the notion of the cooperative transaction, flow concepts such as surplus and key mechanisms like the cooperative refund.

Some cooperative laws provide a solution by specifically removing these notions and mechanisms in case of general interest cooperatives. For example, the French cooperative law prevents the collective interest cooperative from distributing any cooperative refund.[62] The Italian law is less explicit, but the stronger conceptualisation of Italian doctrine elaborates consistent solutions: as cooperatives, social cooperatives comply with the general regulation of surpluses distribution.[63] However, if the cooperative is oriented to the general interest,[64] the cooperative refund is considered incompatible.[65]. As Antonio Fici suggests, the solution has to be related to the regulation on social enterprise that forbids any member of the enterprise from being enriched by the activities carried on by the enterprise, so as not to deprive the general interest from any resource.[66] However, the solution is arguably more flexible and perhaps more consistent in Italian law than in French law, since it would not prohibit the distribution of a cooperative refund when the beneficiaries of the social cooperative are also its members.[67]

In the end, inspiration may come from laws accommodating multi-membership cooperatives. In their case, it is not enough to distinguish between the financial flow coming from cooperative transactions with members and those with non-members. Rather, it is necessary to separate surpluses related to cooperative transactions carried on with the different categories of members, so that the cooperative refunds are proportionate not only to the quantity of cooperative transactions, but also to its kind. This applies to the Spanish cooperatives, the closest to general interest cooperatives. A difficulty remains in applying this approach to general interest cooperative when the community is considered as a distinct class of member. If so, arguably its cooperative transactions should be treated as cooperative transactions with non-members, with its special accounting and its exclusion of cooperative refunds. Consistently, the persons who represent the community should be treated as part of the community and should also be excluded from cooperative refunds. This solution allows coherence in the application of cooperative principles, and limits their adaptation to the areas in which it is strictly necessary.

We could go a step further, and consider the case of a general interest cooperative that has few members apart from the community and its representatives. In such a case, cooperative refunds are not meaningful

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[62] French law L. no 47-1775, 10th of September 1947, art. 19 nonies alinéa 4.

[63] Italian Law n. 381/1991 on social cooperatives, art. 3.

[64] Ibid, art. 1.

[65] A. Fici, 'Italian report', inG. Fajardo, A. Fici, H. Henry, D. Hiez, H.-H. Münkner, I. Snaith (Ed.),*Principles of european cooperative law*, section 3.11.

[66] Ibid.

[67] Ibid.

as cooperative transactions will generate very little surplus and the calculation of cooperative refunds might be more expensive than their value. One solution is to make provision in the statutes to exclude distributions where surplus is beneath a certain threshold.

9. Conclusions

The general interest cooperative may appear to some cooperators or scholars to be an oxymoron. Indeed, it does not fit properly with the traditional definition of the cooperative that is found in legislation and in the ICA statement. Regardless of criticism, the general interest cooperative already exists. The issue facing the cooperative sector is the inconsistency of cooperative laws that have not yet adapted their definition to this evolution. As a side issue, which might need revisiting, perhaps the expression 'general interest' cooperative is confusing, and the 'community interest' cooperative is a better fit.

More work needs to be done to elaborate an appropriate regulation. Some recent cooperative law reforms provide for promising provisions, but they remain disparate and require further analysis and systematisation. This paper has hopefully outlined the key issues and opened the legal debate. There is an urgent need to take this further and find solutions to ensure greater legal certainty to new cooperatives all over the world. Cooperatives claim to offer an alternative to capitalist enterprise and to oppressive public welfare. Some law reforms have adapted to the market and have not always avoided companization.[68]. More recently, different perspectives and contexts suggest that a cooperative renewal is on the way. To remain a strong model, consistent but also adapted to diverse circumstances, cooperative law must evolve, especially in the domain of cooperative principles. In many respects, cooperatives are the most powerful instruments outside of companies and the state. They can only remain attractive if they can find appropriate mechanisms to adapt and challenge the ongoing evolutions in enterprise. Some lobbyists, supported by some academics, propose to adapt the company form to include a social purpose. Some of these reforms have been achieved and may well be successful. If cooperatives think that they can do better, they must show they are community friendly. It is not enough to claim that they have always looked after the community and remain equipped to continue to do so. The diverse range of new legal models with social objectives tells a different story.

Finally, it remains crucial to establish continuity between general interest cooperatives and other cooperatives. There is a tendency to distinguish between cooperatives, depending on whether or not they pursue a social purpose. Significantly, the satisfaction of members' needs and aspirations is not treated as a social purpose. It follows that if the similarities of all cooperatives are not sufficiently emphasised, traditional cooperatives could find themselves excluded from public policies established to foster social enterprises. To avoid this misunderstanding, the right approach is not to focus on putting general interest cooperatives to one side as a distinct type of cooperative, but to demonstrate that most of their specificities are consistent with features present in any cooperative. This is why common provisions should be favoured.

[68] H. Henry, *Guidelines for cooperative legislation*, second, revised edition, International Labour Organization, 2005. H. Henry, 'Public international cooperative law', in in D. Cracogna, A. Fici & H. Henry (Ed.), *International handbook of cooperative law*, Springer, 2013, p. 65.

Annex: provisions of PECOL about general interest cooperatives

Section 1.2 Law applicable and cooperative statutes

1) Cooperatives regulated by special laws for their type of cooperative, including general interest cooperatives, are subject to the general cooperative law only to the extent that it is compatible with their particular nature.

Section 1.3 Membership requirements

(4) (…) A general interest cooperative shall always comprise no fewer than two members, regardless of whether they are cooperators or non-cooperators.

Section 1.4 Cooperative transactions

(1) Mutual cooperatives pursue their objective mainly through cooperative transactions with their cooperator members for the provision of goods, services or jobs. General interest cooperatives may also do so.

Section 1.5 Non-member cooperative transactions

(4) When mutual cooperatives carry out non-member cooperative transactions they shall keep a separate account of such transactions. General interest cooperatives may also do so.

Section 2.1 General principles on cooperative governance

(3) (…) In general interest cooperatives, they are structured to pursue such activities mainly in the general interest of the community.
(4) Cooperative governance structures may vary according to:
(…)(c) whether it is a mutual or a general interest cooperative.

Section 2.3 Members' obligations and rights

(3) The statutes of a general interest cooperative shall state the obligations and rights of cooperator and non-cooperator members, including the different roles of different groups in the pursuit of the general interest of the community.

Section 2.5 (Cooperative governance structures: management and internal control)
(5) Board composition, especially in general interest cooperatives, shall take into account the composition of the cooperative membership, including, for example, by geographical constituency or category of

member. Where substitutes have not been elected in advance, the board may have power to co-opt members to fill casual vacancies pending an election.
(6) In mutual cooperatives the majority of members of administrative and supervisory boards shall be cooperator members. The statutes of a general interest cooperative may also provide so.

Section 3.6 (Economic results from cooperative transactions with members)
(7) General interest cooperatives may not distribute cooperative surpluses to their members.

Section 4.2 Scope and forms of cooperative audit

(1) Cooperative audit includes, but is not limited to, the volume of cooperative transactions with members and with non-members; the use and results of subsidiaries; member participation in cooperative governance; member democratic control of the cooperative; the composition of assets; the origin and allocation of the economic results; the amount of the indivisible and divisible reserves; the economic sustainability of the enterprise; the existence of practices of cooperation among cooperatives and of cooperative social responsibility; the level of engagement in cooperative education and training; the manner in which the general interest has been pursued and the stakeholder involvement in general interest cooperatives.

Special Section: Cooperatives and other fields of law

PROPOSALS FOR BETTER GOVERNANCE IN WORKER COOPERATIVES

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ABSTRACT

The purpose of this paper is to make a few contributions to designing a more appropriate legal framework for worker cooperatives. *Cooperatives and Employment: a Global Report* published in 2014 by CICOPA and the Desjardins Group, provides the starting point for this article. I have analyzed from this study the characteristics of cooperative employment, their impact on the economic sustainability of cooperatives and the proposed recommendations. I consider the existence of a specific legal status for cooperative employment unfeasible. It is impossible to find unity in such different activities as salaried work and self-employed work, whether individual or collective. The idea that a worker member has the same status as a salaried worker cannot be accepted. We need to accept that a cooperative is a particular form of business organisation and that there are specific cooperative relationships which cannot be classified as work contracts, based precisely on the undertakings the worker enters into on becoming a member of the cooperative. Cooperatives should be governed by a specific and appropriate legal system that respects the cooperative principles and values and allows cooperatives to develop autonomously, always respecting the fundamental rights of the individual.

A suitable legal framework should encourage self-management but should also establish the red lines it should not cross, including: the limits marked by the type of company (the principles that shape the cooperative); the limits that the organic and financial structure of the cooperative requires in order to guarantee its effective management and democratic control and safeguard the legitimate financial interests of members and others; and the limits that are a consequence of the recognised rights of the members.

Measures that can help to improve the legal framework that applies to cooperatives are among others: legislators should regulate the activity that the cooperative conducts with its members in pursuit of its social objective, the main rights and duties of the members, and the management accountability; ensure sufficient reserves and demand prudence in remuneration (to be prudent in deciding the advances and to complement then only when there are sufficient surpluses), and promoting the training and education of members and workers, promoting member participation in the cooperative as an instrument to improve its control and efficiency.

[1] Results of the research project: *Social economy, self-management and employment*. (DER-2016-78732-R. Ministry of Economy and Competitiveness. Government of Spain).

1. Main contributions of the Global Report on Cooperatives and Employment

The *Cooperatives and Employment: a Global Report* published in 2014 by CICOPA and the Desjardins Group[2] (the *C-GD Report*) examines cooperative employment from a quantitative and qualitative point of view, with its evolution and main trends, and ends with some conclusions and recommendations that should be taken into account, developed and implemented.

Firstly, it highlights the concept of "cooperative employment", which it describes as "employment performed both in and within the scope of cooperatives", "comprising both *employees* and worker-members working in cooperatives, and self-employed producer-members producing within the scope of cooperatives (in terms of processing, commercialization and/or inputs), as well as the employees of these self-employed producer members".

This is evidently a broad concept of employment, covering any type of activity carried out within the scope of cooperatives by natural persons, whether worker-members, employees or associated self-employed persons, and even the employees of the latter. Consequently, it covers the work done by the worker members in worker cooperatives and other types of cooperative, that of those working as employees in cooperatives, the activities conducted on their own account by self-employed people, professionals and sole traders who are producer or service provider members of the cooperative, and also the work of the employees of the latter group.

Note that the term 'employment', with reference to cooperative employment, is used both in a broad sense, as we have just seen, and in a strict sense, referring to the salaried work of those who work in cooperatives but are not members. To avoid confusion, I will use the term 'salaried work' as equivalent to 'employment' in the strict sense and the terms 'worker member' and 'producer member' to distinguish between members who work in the cooperative and members who are self-employed, professionals or sole traders and are linked to the cooperative as suppliers of goods and services rather than as consumers or users.

Such a broad concept of 'cooperative employment' as that used in the C-GD Report would appear not to present any common features other than connection with the cooperative. It is an item of interest for quantitative analysis of the volume of work employed directly or indirectly by cooperatives, but otherwise it would seem difficult to find points of contact that might justify speaking of the qualitative characteristics of cooperative employment without limiting the scope of the concept. Not all this cooperative employment even takes place within the cooperative, as some occurs in companies of other types whose owners are cooperative members and market their products or services through a cooperative.

Nevertheless, the authors of the report conducted a qualititative analysis of *cooperative employment* in 10 regions, attempting to identify its defining characteristics. They did this by examining working conditions

[2] ROELANTS, HYUNGSIK y TERRASI (2014) *Cooperatives and Employment: a Global Report.* Ed. CICOPA and Grupo Desjardins

in cooperatives in these regions and the direct testimony of people whose work was directly linked to cooperatives.

From their examination of working conditions in the cooperatives included in the study, the authors did not find major differences compared to other non-cooperative types of company. The exception lay in their implementation, as in cooperatives they were not imposed unilaterally by the management. Nor did the authors find differences compared to other companies in the way in which members and workers are taken on, with the exception of worker cooperatives, where "*workers undergo a dual form of recruitment, as workers and as members (either at the same moment or later)*". We may therefore deduce that in these cooperatives, being a member is not sufficient in order to take part in the cooperative activity (by working), which is subject to a separate contract.

A challenge to the cooperative identity is found when recruiting experienced staff and professionals in high positions, partly because of the wage gap they experience and partly because of their usual ignorance of cooperative culture. However, their technical expertise is valued more highly than the risks they present.

Regarding wages and other types of compensation, the wage gap is usually narrower than in other kinds of company and in some cases the same salary system is applied across the board. However, these practices are not always satisfactory. One reason is that they make it difficult to recruit or retain highly qualified personnel and another is that employees tend to make less effort if the wages are fixed without regard to the difficulty of the work involved.

As regards employee remuneration, the report states that while employees are generally well paid, this is not the case during the start-up stage in worker cooperatives, or in cooperatives that are promoted as public policy instruments against poverty and unemployment or those that work in emerging sectors such as personal services. In the first case, start-up cooperatives go through similar difficulties to other types of company, where the founders cannot guarantee adequate remuneration for their work. In the second case, the level of remuneration is lower than in other companies in the same sectors and the authors doubt that the cooperative model is the solution in these situations.

However, the salary is not the only compensation that cooperative workers receive. Other non-material compensations are highlighted and viewed very positively, such as flexible working hours, less overtime, a horizontal and convivial workplace culture and democratic and participatory governance.

In terms of social protection and occupational safety, the general level of employee protection is similar or higher to that enjoyed in other companies but the same cannot be said for the worker members. The report highlights that in many countries, particularly in Latin America, "the fact that […] worker-members are classified as self-employed creates a major problem in terms of social protection," because "when workers transform an enterprise in crisis into a cooperative, they lose their previously acquired social protection". In contrast, other countries either apply the same social protection to all workers (United Kingdom and Germany) or set up systems that make it easy for worker members to enjoy as broad a social protection as employees (Spain and France).

Lastly, the report examines the relations between the workers and trades unions, highlighting that employees, worker members and producer members all find it difficult to understand the role that a trade union could play in negotiations and conflict resolution in their cooperative, given the direct relations between the workers and the managers or directors.

Among the characteristics of cooperative employment highlighted by those interviewed, the following should be mentioned:

- Greater participation and democratic control. Among the aspects highlighted are greater flows of information (a precondition and outcome of participation) and transparency (less opportunity for corruption). Worker members take part in deciding their working conditions, based on the recommendations or suggestions of the cooperative's boards or committees. The report also emphasises that participation requires responsibility, as worker members perform the functions of both employee and employer (decision-making and control), and are also affected by the consequences of these decisions (liabilities, losses, etc.).
- The feeling of belonging to the cooperative and working as a community. The workers are more involved in the company, they feel like entrepreneurs and their involvement does not finish at the end of the working day.
- Variable remuneration depending on business results makes it possible to pay higher, more stable, and more secure wages if the business is doing well and lower, less stable ones if this is not the case.
- Efficient decision-making. Worker cooperatives are more nimble, flexible and resilient than traditional companies because they do not have excessive layers of bureaucracy, and this seems to be a key factor for the new cooperative enterprises in the liberal professions and knowledge-based businesses, according to Westerdahl and Westlund. [3]
- Cooperative employment is more flexible. This flexibility could be perceived negatively (because it could imply a lack of social security and institutional protection), but in some cooperatives it is an important value because it allows the workers to balance their work and family lives. At all events, it is acknowledged that individual autonomy and freedom are increasingly important and that the new technologies and globalised economy encourage flexibility[4].
- Working in a cooperative fosters values that help those it employs to grow and develop integrally, because its objective is to meet the needs of its members and help to improve their environment more than to make a profit. Some of those interviewed even considered cooperatives as instruments for creating a more reliable and just economic system.

The report also studies what impact the specific characteristics of cooperative employment have on the economic sustainability of cooperatives, and vice versa, and highlights that:

- Since cooperatives have the objective of meeting the needs and aspirations of their members, their employment tends to be long-term, with slow but continuous renewal. However, job security is not absolute because it depends on the sustainability of the enterprise.

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[3] WESTERDAHL, S. y WESTLUND, H. (1998). "Social Economy and New Jobs: A Summary of Twuenty Case Studies in European Regions", Annals of Public and Cooperative Economics Vol. 69 nº. 2, 193-218.

[4] BOLTANSKI and CHIAPELLO (1999) *Le Nouvel Esprit du Capitalisme*, Paris. Gallimard.

- The fact of being a member and therefore an owner of the cooperative leads to greater involvement and participation by the members. The workers perceive that the cooperative's profitability is directly related to the work of each person, in the same way that the yields they receive are directly proportional to the company's results. Additionally, the members feel freer to organise their work to achieve the proposed target, which encourages personal initiative, productivity and innovation within the company. This greater involvement is also shown when debating and deciding adjustments in working conditions (reducing their advances, forgoing distribution of surpluses, reducing the share capital, sharing losses, or providing collateral). However, they also have this attitude because they trust in their cooperative's reliability and transparency. It is therefore necessary to generate trust among the members.
- The values of education and training are key components of the sustainability of the cooperative enterprise. If the cooperative wants to be sustainable and generate trust and loyalty among its members it needs to ensure these two components: professional competence and knowledge of the cooperative mode of functioning. It can demand these when recruiting staff or accepting new members, but above all it needs to invest in educating and training its members and employees.
- The importance of generating capital and reserves that will allow jobs to be kept in times of crisis.

Lastly, the report identifies various challenges to cooperative employment in view of today's globalisation. One of these, at a time of increasingly flexible and precarious employment, is to prevent the cooperative model being abused so that companies can avoid labour costs, or by engaging in subcontracts with no business autonomy. The report criticises the use of cooperatives as instruments to lay off, outsource and exploit workers and small producers. It also refers to a 'cooperativisation' of public and private sector activities in some countries that has led to a deterioration in working conditions, and mentions the creation of false or pseudo cooperatives, in other words, cooperatives that only act as labour intermediaries for other companies.

The report ends with a series of recommendations that largely coincide with ILO Promotion of Cooperatives Recommendation no. 193 of 2002[5]. I would like to draw attention to those concerning:

- Employment policy. These recommendations are addressed to the public authorities. Among other measures, they call for the establishment of a policy and legal framework that are supportive of cooperatives, consistent with their nature and function and guided by the cooperative values and principles (ILO R193, art. 6).
- Entrepreneurship. This comprises a series of recommendations addressed to cooperatives, cooperative organisations and public authorities. In particular, they include promotion of participation and involvement by cooperative personnel (of whatever type) and investment in employee training and education; and promotion of business transfers to employees, highlighting the importance of an appropriate regulatory framework and the necessary technical know-how that cooperative organisations, professionals and specialised entities should possess. The last recommendation I would highlight is the call for regulations and policies that promote constituting the necessary financial reserves in cooperatives, as well as other mutualised financial instruments.

[5] http://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R193

- Labour standards, transition towards the formal economy, social protection and the fight against pseudo cooperatives. The first of these recommendations is that employment in cooperatives (without distinction) should abide by the fundamental labour standards of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work "for all workers in cooperatives without distinction whatsoever" (ILO R193 art. 8.1.a). With regard to working conditions and social protection, the report recommends that cooperative organisations should dialogue with trades unions and public authorities on these issues, which should be integrated into collective bargaining processes. For "people with self-employed status working in or within the scope of cooperatives" (members), the report recommends that they should always enjoy a satisfactory level of social protection. To this end, cooperatives should work with public authorities to build an appropriate legal framework for their social protection and should develop complementary social protection systems. On the subject of formalisation of the economy, the report recommends recognising the cooperatives' potential for transition towards the formal economy and formal employment, transforming marginal survival activities (the informal economy) into legally protected work (ILO R193 art. 9). Lastly, it recommends fighting against pseudo cooperatives "by ensuring that labour legislation is applied in all enterprises" (ILO R193 art. 8.1.b).

2. The unfeasibility of a specific legal status for "cooperative employment".

The C-GD Report is very interesting because it contains information that contributes to a greater knowledge of the reality of what it calls cooperative employment and because its recommendations, if implemented, could contribute to improving the regulatory framework and functioning of the cooperatives.

As I feared from the start, however, it does not achieve a homogeneous view of this 'cooperative employment' that it attempts to present as a category with shared characteristics to which the same rules can be applied.

It is impossible to find unity in such different activities as salaried work and self-employed work, whether individual or collective ('associated work', as in worker cooperatives). Their objectives are not the same, nor are their areas of activity, nor, naturally, are their problems. This diversity can be seen in the report itself. The characteristics it records are not shared by all the subjects studied and the report finds itself obliged to specify their situation (employee, worker member, producer member). At other times this would have been desirable but the report does not make the distinction. For example, it declares that cooperative employment has been sustained thanks to job growth in worker cooperatives, social cooperatives and multi-stakeholder cooperatives, but have salaried work and the number of worker members grown at the same rate? Whatever the answer, its analysis would undoubtedly be interesting.

It might also be thought that there were no great differences between salaried workers and members (worker members or producer members) in the cooperatives studied. This might be the case where the salaried workers enjoy a high degree of political and economic rights in the cooperative, but in that case, why do not they not apply for membership? It could also be that the worker members of the cooperatives are equated with salaried workers, while other persons (members or otherwise) undertake the management and control of the cooperative, but in that case, is it a cooperative? There are also

(questionable) producer cooperatives with such limited autonomy compared to the power of another organisation (supplier, client, or owner of the means of production) that their de facto situation is equivalent to that of a salaried worker. The lack of differentiation between the different subjects examined also gives rise to many doubts about its cause.

While not agreeing that 'cooperative employment' can be considered a category from a qualitative point of view, I do agree that it is necessary to call for certain minimum fundamental rights to be recognised and applied to everybody, whether worker or not and whether self-employed or working for another. The human rights proclaimed by the General Assembly of the United Nations on 10 December 1948 are to be promoted and observed by progressive measures, national and international (Preamble to the Universal Declaration of Human Rights – UDHR). Consequently, it should be recognised that everyone has the right to work, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, and to just and favourable remuneration ensuring an existence worthy of human dignity and supplemented by other means of social protection. Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. Everyone has the right to an adequate standard of living for health, to medical care and necessary social services, to security in the event of unemployment, sickness, disability, widowhood and old age, and special care and assistance for motherhood, among others (UDHR, articles 23, 24 and 25). In accordance with this text, it is the public authorities' responsibility to provide the means whereby everyone may come to enjoy these rights.

As well as this responsibility of the public authorities, when a person works for another in a dependent relationship the standards protecting workers, known internationally as the ILO International Labour Standards, should also be applied.

The standards protecting workers should not be applicable, however, or at least not across the board, to self-employed people, professionals, sole traders, artisans or worker or producer members of cooperatives, in that they represent rights with regard to an employer. The reason is that these categories are not employees. Quite the opposite, in fact: what defines them is autonomy in their work and in deciding how to do their work. When various people unite to work together this autonomy is no longer exercised individually but collectively, through the bodies set up to express the will of the group or the societal will. As there is no bilateral contractual relationship in their endeavour, who is supposed to guarantee them these rights?[6]

People usually form companies and cooperatives in order to work together. They can organise their contribution in different ways, such as contributing in exchange for a share of the profits (members of general partnerships), as obligations ancillary to the capital contribution (capital-based companies), by entering a work contract as an employee (in exchange for a salary) with the company of which the person is a shareholder/member, or on a cooperative basis.

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[6] We share Hagen Henrÿ's opinion when he states that in worker cooperatives: "*The various aspects of labour law might need different treatment*", and "*Where the rules on social protection, workplace and product safety should apply in all cases, the rules of labour law in the narrow sense might required adaptation or not apply at all these relationships because the members freely consented to organize their work according to cooperative principles, instead of seeking to establish a work relationship*". HENRY, H. (2012), *Guidelines for Cooperative Legislation*. International Labour Office, 3rd ed. rev. Geneva, 78-79).

The member workers of a cooperative join together to work together. They commit themselves to this when they set up the cooperative or apply for membership of an existing cooperative. The right/duty to work is the object of the cooperative agreement.

Not all countries recognise the cooperative structure as a type of organisation in its own right. In some countries there is a special legal form for cooperatives (Germany, Austria, Portugal or Spain) or for some types of cooperative (in France, in relation to farmers' cooperatives), while other legal systems have no specific form for them. In these cases the founders have to adopt existing legal forms such as an association (Netherlands), or civil society or commercial company (Italy or France, for example in relation to *sociétés coopératives de production*), or the form that the founders consider best suits their interests (United Kingdom or Denmark)[7]. Nevertheless, the lack of a specifically cooperative legal form and the use of other existing forms is no impediment to recognising that in these cases the cooperative has a *sui generis* legal nature, distant from the for-profit cause of a partnership agreement or memorandum of association[8].

The association between the worker member and the cooperative is not identical in every country, either. In some, membership in itself gives the right to take part in the cooperative activity and exercise any other political or economic right in the cooperative (Spain, art. 16 of the 1999 Act). In others, in order to work in the cooperative the members must hire out their work to it.

The double nature principle – *doublé qualité* o *identitäts prinzip*, applied to worker cooperatives, means that only workers may be members of the cooperative and only members may be workers of the cooperative. This principle is commonly recognised in all legal systems and has been interpreted sometimes as meaning that two relationships are required in order to be a worker member of the cooperative: an associative contract (in this case, as a public limited company or limited liability company) and a work contract.[9] However, these two types of contract are linked, as resignation or dismissal owing to misconduct entail the loss of membership and loss of membership entails leaving the job. Also, the work contract can impose an obligation to apply for membership, in which case, if this application is not made it is understood that the person is giving up the job (France, Law 78-763, arts. 9 to 11).

It can be seen that the idea that a worker member has the same status as a salaried worker cannot be accepted. We need to accept that a cooperative is a particular form of business organisation and that there are specific cooperative relationships which cannot be classified as work contracts, based precisely on the undertakings the worker enters into on becoming a member of the cooperative.

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7 MUNKNER, H. (2015) "Revision of co-operative law as a reaction to the challenges of economic, social and technological change". *CIRIEC. Revista Jurídica*, nº 26.

8 ESPAGNE, F (2001) *Le statut legal des cooperatives ouvrieres de production (S.C.O.P.) en France*. Available at: http://www.les-scop.coop/export/sites/default/fr/_media/documents/statut-legal-scop.pdf

9 In this regard, the Italian law 142/2001 *Revisione della legislazione in materia cooperativistica, con particolare riferimento alla posizione del socio lavoratore*, states: "Il socio lavoratore di cooperativa stabilisce con la propria adesione o successivamente all'instaurazione del rapporto associativo un ulteriore e distinto rapporto di lavoro, in forma subordinata o autonoma o in qualsiasi altra forma, ivi compresi i rapporti di collaborazione coordinata non occasionale, con cui contribuisce comunque al raggiungimento degli scopi sociali" (art.1.3). See also FICI, A. (2013) "Italy", CRACOGNA, D; FICI, A.; HENRY, H. (editors) *International Handbook of Cooperative Law*. Springer, 486.

3. The appropriate legal framework for cooperatives and their worker members is not compatible with the application of the labour standards

An appropriate legal framework for cooperatives should include the specificities of this model of business organisation without having to borrow other legal institutions that are not entirely adequate for its functioning (the legal status of a public limited company or limited-liability company, work contracts or labour law).

This has been a constant demand of cooperatives and their representative organisations. Both the ICA and the ILO have called on countries to pass specific legislation and regulations for cooperatives, inspired by the cooperative values and principles[10].

The Framework Law for the Cooperatives in Latin America (ACI-Americas, 2009), which aims to provide cooperatives with a specific legal framework for their organisation, functioning and regulation, including the definition, principles and values proclaimed by the ICA and the ILO, is a major advance[11]. In this framework, the term 'cooperative acts' designates those performed between the cooperatives and their members in fulfilment of their purpose, which are subject to cooperative law (section 7), in other words, to the special laws and regulations governing the actions of cooperatives, *"excluding the application of other legal concepts or regulations which do not relate to the nature of cooperatives"*. Section 91 defines "cooperatives of associated work (workers' cooperatives)" and declares that these are not subject to labour law: *"Labor relations and compensation systems shall be governed by the bylaws or special regulations approved by the General Assemly [sic] and shall not be subject to labor laws applicable to salaried dependent workers. However, they shall observe the law on social security and the protection against labor hazards, thus guaranteeing the members a decent job."* The idea that the relationship between the member and the cooperative is special and that 'associated work' is not a labour relationship but a societal or associative one is present throughout Latin America[12] and in some European legal systems (Spain, Law 29/1999, art. 80.1 and 80.16, or the Basque Country regional law 4/1993, art. 101).

Returning to the C-GD Report, we may remember that it recommended that employment in cooperatives (without distinction) should comply with the fundamental labour standards of the ILO and the ILO declaration on fundamental principles and rights at work, and that labour law should apply to all

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[10] See section 6 b) of the Resolution submitted by the ICA Board to the General Assembly on "The ICA Statement on Co-operative Identity – The Declaration on Co-operatives Towards the 21st Century" (1996) or section 10.1 of the ILO Promotion of Cooperatives Recommendation (2002).

[11] Nevertheless it must be taken into account as Dante Cracogna says that this Framework Law "*should not be considered a last and final achievement, but rather an approach to a topic whose nature is complex and vulnerable to modifications*". CRACOGNA, D. (2013) "The Framework Law for the Cooperatives in Latin America", CRACOGNA, D; FICI, A.; HENRY, H. (editors) *International Handbook of Cooperative Law*. Springer, 168.

[12] Alberto García Müller quotes the cooperative laws of Bolivia (2013, arts. 9 and 10), Brazil (1971, art. 79), Argentina (1973, art. 4), Honduras (1987, art. 4), Colombia (1988, art. 7), Mexico (1994, art. 6), Paraguay (1994, art. 8), Puerto Rico (1994, art. 2.4), Costa Rica (1994, art. 2), Panama (1997, art. 3), Venezuela (2001, art. 7), Nicaragua (2004, art. 7), Uruguay (2008, art. 9), Peru (2010) and Ecuador (2011, art. 4). See GARCÍA MÜLLER, A (2014) "El acto cooperativo, construcción latinoamericana" in *Historia Social y Solidaria en la Historia de América Latina y el Caribe*, Vol. I. Mutuberria and Plotinsky (compilers). Ediciones Idelcoop, 241-242.

companies in order to combat pseudo-cooperatives. These recommendations also agree with those already made in arts. 6 and 8.1.b of ILO Recommendation no. 193.

The ILO Declaration on Fundamental Principles and Rights at Work (1998) calls for the elimination of forced labour, child labour and discrimination in respect of employment, and for freedom of association and the right to collective bargaining.

The former are demands based on fundamental rights and liberties, as we have seen previously, and can only be supported. However, the right to collective bargaining only applies to negotiations between an employer or group of employers, on the one hand, and one or more workers' organisations, on the other, for determining working conditions and terms of employment or regulating relations between employers and workers (art. 2, ILO Collective Bargaining Convention of 1981, no. 154). In a cooperative there is no employer or employee, only people who work together (co-operate) in a jointly-owned company and decide their working conditions by a majority resolution of their assembly. Equally, while trade union freedom cannot be denied, as the right people have to associate to defend their interests, I agree with those interviewed in the C-GD Report who do not understand what part trades unions have to play in a cooperative. Trades unions represent the workers' interests in relation to the employer who has hired them. In a cooperative, the members are not hired and do not need to be represented when taking decisions such as approving the conditions in which they are to work, as they all have the right to speak and vote and to be elected to management and administration positions in the cooperative.

In cooperatives with different classes of members (called multi-stakeholder cooperatives in the C-GD Report) where the worker members do not control the cooperative, the rules (cooperative statutes) must establish measures to favour the legitimate representation of these members on the governing bodies and ensure that their activity is not subordinated to the interests of other membership groups, or *vice versa*. Company law offers several instruments for meeting these objectives (sector meetings, joint committees, minority rights, etc.), so here too the presence of trade unions would seem unnecessary[13]. For instance, it could be established that resolutions which affect a group of members require the favourable vote not only of a majority of the members but also of a majority (qualified or otherwise) of the group affected.

For their part, the international labour standards are a global system of instruments (recommendations and conventions) regarding work and social policy, referring to subjects such as the right to organise, collective bargaining, forced labour, child labour, equal opportunities, equality at work, health and safety at work, labour relations, termination of employment, wage protection, minimum wages, working hours, weekly rest, paid holidays, social security, maternity protection, etc.

All these standards are normally reflected in the national labour legislation that applies to salaried workers, but can hardly be applied to other types of worker who have no dependent relationship with an employer.

In Spain, for example, different statutes with different rights and obligations apply, depending on the type of worker. Salaried workers are governed by the worker's statute (*Estatuto de los Trabajadores*,

[13] Another issue would be to consider what other functions trade unions might offer to workers who opt for self-management. But that debate does not correspond us at this moment.

Legislative Royal Decree 2/2015), which applies "to workers who voluntarily provide remunerated services as employees [*por cuenta ajena*, literally "for the account of another"] within the sphere of organisation and management of another person, natural or legal, termed the employer or entrepreneur [*empleador o empresario*]" (art. 1). The self-employed workers' statute (*Estatuto del Trabajo Autónomo*, Law 20/2007) applies to self-employed workers, defined as natural persons who habitually, personally, directly, for their own account [*por cuenta propia*] and outside the sphere of management and organisation of another person conduct an economic or professional activity for profit, whether or not they give employment to employed persons (art. 1). Lastly, the status of worker members of worker cooperatives is regulated by the cooperative legislation, comprising Spanish law 27/1999 and the cooperative laws of the autonomous communities (regions). This legislative framework recognises the right of the member to take part in the cooperativised activity (work), classifies the relationship between the member and the cooperative as societal and regulates aspects such as temporary suspension of the obligation to work, mandatory expulsion, the right to advance payments, to surpluses, to interest on capital, to updating, reimbursement and transfer of contributions to capital, etc. Regulation of the cooperativised activity (working conditions) is usually effected through the cooperative's statutes and internal regulations, but in the case of worker cooperatives the law has established a special system. In the different cooperatives acts in Spain, the following models may be distinguished:

- The cooperative statutes or the general assembly decide the working arrangements of the worker members. They "may" regulate matters such as the working day, weekly rest, holidays, leave, functional mobility, extended leave of absence, causes of temporary or definitive suspension from work and any other matter directly linked to the rights and obligations derived from the performance of work by the worker member[14].

- The model followed by the national legislators in Law 27/1999, which laid down how the members should regulate their work arrangements. It rules on aspects such as the length of the working day, what days may not be worked, what holidays they must have, the minimum number of days' leave for marriage, illness of family members, moving home, etc. In no other type of cooperative (consumer or producer) have the lawmakers found it necessary to regulate how the members should organise themselves[15].

- The third model, which is not incompatible with the first and, indeed, complements it, is that of the Catalan Cooperatives Act (art. 132, 1st to 4th). This states that the working arrangements must be set out in the cooperative's statutes and internal regulations and indicates which matters they may regulate and which they may not. The latter are considered matters of public policy and may not be altered without express legal authorisation. They regard the rules concerning night work, unhealthy, arduous, harmful or dangerous work, the Social Security system and risk prevention.

[14] This is the case in the laws of the Basque Country 4/1993 (art. 101), Galicia 5/1998 (art. 107.1), Madrid 4/1999 (art. 106.3), Castile-Leon 4/2002 (art. 103.1) and the Balearic Islands law 1/2003 (art. 104).

[15] The laws of La Rioja 4/2001 (art. 106) and the Valencia region 2/2015 (art. 89.3) contain similar provisions.

This last law provides a fairly satisfactory solution, in my opinion, because it distinguishes certain matters that are considered public policy and cannot be changed and leaves the rest to the members to decide freely.[16]

In conclusion, cooperatives should be governed by a specific and appropriate legal system that respects the cooperative principles and values and allows cooperatives to develop autonomously, always respecting the fundamental rights of the individual. What is not regulated in the cooperative statutes should be covered by the cooperative legislation or, failing that, by common law. The application of labour law by analogy should not be ruled out, either, if required by law or the judge considers it appropriate.

That the cooperative legislation allows the worker members to regulate their own working conditions constitutes one of the main advantages of cooperatives: their flexibility. The C-GD Report also highlights it on numerous occasions, such as when those interviewed stated that worker cooperatives are more nimble, flexible and resilient than traditional companies because they do not have excessive layers of bureaucracy, or when it notes that members feel freer to organise their own work and this encourages personal initiative, productivity and social innovation.

Indeed, flexibility is one of the main reasons why it has been possible for many cooperatives to keep going during the crisis, and is currently making it possible to create new cooperatives. A recent study on the behaviour of Spanish cooperatives during the economic crisis showed that they were holding up better than the rest of the business fabric and that the fundamental factors explaining this spring from their ownership structure, which gives them better mechanisms for adapting to market conditions. This study by Claudia Sánchez Bajo highlights their flexibility in deciding their organisation and working arrangements, accepting certain sacrifices if this makes it possible for the cooperative to continue; their ability to decide collectively to adapt their labour conditions to the circumstances of the market; and their flexible response to market conditions, which allows them to adjust their business model to market variations[17]. In addition, it emphasises the combination of flexibility and maintaining employment levels as a key factor in the cooperatives' resilience[18].

The flexibility of cooperatives is also proving crucial for the creation of new enterprises. So found Westerdahl and Westlund (1998) in relation to new cooperatives set up by liberal professionals and

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[16] However, the new catalan law on cooperatives 9/2015 introduces an important exception to this general rule in paragraphs 5th and 8th: In the case of worker cooperatives with more than twenty-five worker members whose main activity is the realization, through commercial subcontracting of works, supplies or services of all or part of the activity or principal activity of another company or companies or contracting business groups or carrying out a market economic activity for a client with a dependency of 75% or more of the annual turnover of the cooperative, the statutes or the internal rules must guarantee as a minimum, the following conditions: A) Working conditions, especially in terms of working time and remuneration; B) The social protection of the worker members. These conditions must be at least effectively equivalent to those recognized in collective agreements applicable to employed persons in the sector or work place of the main enterprise for which provide services. With regard to social protection, it must be equivalent to that of workers included in the general social security scheme.

[17] SABIN, F., FERNANDEZ, J.L. & BANDRÉS, I. (2013): "Factor C: Factores de resistencia de las microempresas cooperativas frente a la crisis y recomendaciones para un fortalecimiento cooperativo del sector de lo social", *Revista Vasca de Economía Social.* GEZKI, 9, 75-100.

[18] SANCHEZ BAJO, C. (2013) David and Goliath—Cooperatives and the Global Crisis. Available at: http://www.unrisd.org/unrisd/website/newsview.nsf/(httpNews)/8248A910D859F210C1257BAB002F52E2?OpenDocument

knowledge-based enterprises. French business and employment cooperatives (*coopérative d'activités et d'emploi*) come under this heading. They are worker cooperatives (SCOP) in form but original in their purpose, being made up of people who organise their professional activities freely and manage themselves autonomously but have contractual ties to the cooperative as salaried employees and members. Their development has required French labour law to become more flexible and their system still gives rise to legal queries. Their model is half-way between a worker cooperative and self-employed producers[19].

Another original model are the new Spanish entrepreneurship support cooperatives (*cooperativa de impulso empresarial*). These are worker cooperatives that have the objective of channelling the entrepreneurial initiatives of their members through professional guidance, providing the business skills they need to develop their ventures, tutoring them in the early years and providing certain shared services[20]. In these cooperatives, worker members who provide the services can coexist with professional members who benefit from them (Andalusia, Law 14/2011, art. 93, and Cantabrian Law 6/2013, art. 130).

In cases where the relations between the worker member and the cooperative are subject to labour law, cooperatives have had greater difficulties in overcoming the economic crisis and it is currently also more difficult to set up new cooperatives. Consequently, many projects that would otherwise have formed a cooperative have found themselves obliged to found associations, or have set up cooperatives but have been unable to meet the obligations the labour laws impose on them[21].

4. Measures that can help to improve the legal framework that applies to cooperatives

Firstly, as already mentioned, the law should provide a specific legal framework for cooperatives that not only promotes them but above all recognises their peculiarities, essentially based on their mutualist nature and on the cooperative principles and values.

A suitable legal framework should encourage self-management but should also establish the red lines it should not cross, including: the limits marked by the type of company (the principles that shape the cooperative); the limits that the organic and financial structure of the cooperative requires in order to

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19 HIEZ, D. (2013) *Coopératives*. Ed. Delmas, 62.

20 ALZOLA, I. "Las Cooperativas de Emprendedores" y SÁNCHEZ, G " Cooperativas de impulso empresarial: el caso concreto de Smart Ibérica de impulso empresarial S. Coop. And", Empresas *gestionadas por sus trabajadores. Problemática juridical y social*. FAJARDO, I.G. (coord), CIRIEC, 2015, 225 y ss.

21 As shown by the study in Brazil on the application of the Worker Cooperatives Act (Law 12690/2012), which was intended to ensure social rights for the worker members of cooperatives. This study found that worker cooperatives in the solidarity economy do not make employment precarious but do not currently possess the financial strength to guarantee their members these rights. The rights they should guarantee refer to minimum wages, maximum working periods of 8 hours a day and 44 hours a week, and work accident insurance. ANJOS, E. (2015) "Cooperativas de trabalho e trabalho precário: um longo percurso para constituir os direitos sociais". Paper presented at IX International Congress of the Red Rulescoop: *Respuesta de la Universidad a las necesidades de la economía social ante los desafíos del mercado*. Universidad de la Plata (Argentina), 2-4 September 2015).

guarantee its effective management and democratic control and safeguard the legitimate financial interests of members and others[22]; and the limits that are a consequence of the recognised rights of the members.

The legal framework must be suitable for its purpose. Capital-based companies are formed to engage in activities that generate profits which can be divided among the shareholders in proportion to the capital invested. In this case it is important to regulate the capital, the rights it confers, the making of profits and their distribution. In a cooperative, the objective is to meet the needs of the members, which in the case of worker cooperatives are mainly the need to work. Legislators should regulate the cooperativised activity (the activity the cooperative conducts with its members in pursuit of its social objective), the main rights and duties of the members, and management accountability.

Traditionally, legislators have not taken excessive pains to provide an appropriate legal framework for cooperatives. As we have seen, it is not unusual for cooperatives to have to take the legal form of other types of business organisation, and even when they have a framework of their own it is usually highly contaminated by the classic rules and institutions of capital-based societies, which are not compatible with its structure and purposes.

This is the context in which legislators need to establish the rights, obligations and responsibilities of cooperative members and the rules by which the cooperativised activity are to be governed. Texts such as the Framework Law for the Cooperatives in Latin America or the Guidelines for Cooperative Legislation (ILO, 2012), as well as other necessary reference works[23], are of great assistance in this task.

The rules governing the cooperativised activity (the provision of work) can be regulated in a number of ways, as we have seen, allowing the members more or less autonomy. A mixed system such as that provided for in Catalonia's Law 12/2015 (art. 132, 1st to 4th), would seem to strike the right balance.

One of the main problems that cooperatives encounter in their early days or in times of crisis is how to pay wages and social security contributions. If the cooperative does not obtain sufficient income and does not have reserves available for this purpose it can hardly meet its obligations, and doing so under these circumstances will probably lead to insolvency and closure. As the C-GD Report has highlighted, a prudent measure that has proved very useful in recent years is the existence of reserves, which have allowed cooperatives to continue in existence and to attend to their members' remuneration, however minimally. Consequently this is a good practice that cooperatives should not forget, as the cooperative principle of member economic participation clearly reminds us. It is also good practice to be prudent in deciding the advances (remuneration on account against surpluses) and to complement them only when there are sufficient surpluses[24]. When distributing surpluses, assignment to indivisible reserves and to share capital are both favourable for the cooperative, as they constitute equity. However, reserves contribute more effectively than capital to the long-term sustainability of the cooperative, since capital is

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23 Including MÜNKNER, H. (2015) *Co-operative Principles and Co-operative Law*, 2nd ed. Revised. LIT VERLAG, or FAJARDO, I.G; FICI, A.; HENRY, H., HIEZ, D.; MÜNKNER, H. and SNAITH, I. (2017), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*. Intersentia.

24 We share with Virginie Pérotin that "Employee control is thought to increase productivity, and in a labour-managed firm adjusting pay to preserve jobs makes sense for the employee-owners", PEROTIN, V. *What do we really know about worker co-operatives*? Co-operatives UK, 20.

variable and can be reduced at any time if a member leaves. Also, generating a large volume of share capital makes it difficult for new members to join if they are required to match the older members' contribution (Spain, Law 27/1999, art. 46.7).

The right to social security should be a universal right that guarantees adequate care and social benefits in situations of need. Every worker in Spain, whether self-employed, worker member or employee, is obliged to contribute to the Social Security, but through different systems. The protection provided by the general system, which applies to employees, is greater than that of the self-employed system, although the benefits are tending to converge even though the sums continue to differ. One rule that benefits cooperatives is that they can choose which system they wish to apply. In their cooperative statutes they can opt to contribute through the general system or through the self-employed system This choice can only be made through the statutes, for a minimum period of five years, and applies to all the worker members of the cooperative (Spain, Royal Decree 1278/2000). This is a highly suitable system for cooperatives, as during start-up and at critical moments they can opt for the cheaper system even though it provides less protection, and when the moment has passed they can change to the system that gives greater protection.

The C-GD Report also recommends adopting other measures – which should be shared – to improve the legal framework that applies to cooperatives and their worker members: promoting the training and education of members and workers, and promoting member participation in the cooperative as an instrument to improve its control and efficiency.

Indeed, a suitable legal framework should require cooperatives to draw up an annual cooperative education and training plan for their members, workers and directors, devote the necessary means to carrying it out and report on the resulting actions and achievements at the close of the year. At all events, the activities to be carried out should fit the needs of their beneficiaries and should be approved by the members at the assembly.

As regards information, while this is a right of the members of any type of company there is even more reason for the members of a cooperative to be informed of everything concerning the organisation, functioning and future prospects of their cooperative. The members' involvement in the cooperative is greater than in other companies because not only have they invested capital in it, they also cooperate directly in its economic, training and social activities and therefore need information on the cooperative in general and on the activities in which they participate. This information should be complete, clear and accessible to the members.

The cooperative needs its members' cooperation to pursue its objectives. The needs it has to attend to are those that its members decide, and it needs the cooperation of its members in order to meet these needs. Consequently, the members' participation in deciding the annual objectives, carrying them out and monitoring their fulfilment is an essential factor that should not be neglected. The members should have the right and the duty to participate in the cooperative through its management bodies, economic activities and activities of other types decided by the assembly.

The law therefore needs to establish mechanisms that make this participation possible and it is the task of the cooperative to promote it. As the C-GD Report emphasises, there is a close relationship between

information and participation, and the greater the transparency, the greater the trust and involvement of the worker members.

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NATIONAL CONSTITUTIONS AND COOPERATIVES: AN OVERVIEW

Ifigeneia Douvitsa

Abstract

The national constitutions as the supreme laws of countries are expected to influence the interpretation and application of ordinary laws to varying degrees. Moreover, they tend to be permeated with political considerations, ideas, ideals and ethics more than other legal texts. They have also the potential to enforce supranational norms in the domestic legal order. For these reasons, their study may reveal valuable information about the national legislator's stance and perception towards cooperatives. Thus, the present article undertakes a large-scale inquiry on the topic of constitutions and cooperatives. In particular, it examines which and how many countries have introduced in their constitutions cooperative-related provisions, under which content and whether any particular trends can be noted. With regard to the potential impact of such constitutional provisions on ordinary law, the case of Portugal and Italy is examined.

Due to the large-scale range of the study, its subject matter is limited to the constitutional texts that explicitly use the term cooperative or its derivative. Although the above term is not expected to have the same exact meaning in each country, it is assumed to have to a higher or lesser degree of relevance to the broadly accepted definition of a cooperative by the International Cooperative Alliance. The sources that were used in this study were various legal databases, a previous study of the ICA and existing literature on the Portuguese and the Italian constitution by national experts.

The study's findings indicated that one out of three constitutions has explicit provisions about cooperatives, which permeate all sectors of the constitution from governmental ruling, to allocation of powers and protection of rights. The constitutional acknowledgement of cooperatives has been an innovation of the Latin American region. The latter has also the highest rate of constitutions with cooperative provisions, whereas the European continent holds the lowest percentage. It was also found that in the Italian and Portuguese case the constitutional provisions on cooperatives affected the cooperative and tax law in a certain degree.

Based on this study, the constitutional text when acknowledging the cooperative identity or certain aspects of it, it can serve as a guide for the ordinary legislator when cooperative laws are enacted, but it may also encourage a different tax treatment from for-profit companies. In such cases, the 193/2002 Recommendation of the International Labor Organization, which prescribes for an enabling legal environment on cooperatives, is reflected at constitutional level and enforced by the national constitution of the country.

1. Introduction

The de jure or "big c" constitutions are the legal documents that are self-defined as the fundamental or the supreme laws of countries, regulating the state's structure and powers, as well as its relationship with the public and are usually harder to amend or repeal than other laws (Law, 2010). Evidence shows that such legal documents "proclaiming their higher status appear in 90% of the countries" (Elkins et al., 2009, p.49), making constitutions a global legal phenomenon that exceeds specific legal traditions and families in the current world. Apart from their superiority, the constitutions also tend to bear other features, such as being constitutive of a legal system, written, justiciable and expressing a common ideology (Raz, 1998). However, such features may not appear in all constitutions, due to the variety and pluralism of the constitutional universe. Even if "*constitutions are not textbooks on the governance of a particular country, it does not follow that such textbooks should, or even can – without peril – ignore the constitution of that country*" (Finer et al., 1995 p.2). In many cases, they are still at the centre of the political debate and considered to shed some light to the political scene and the country's historic, economic, and social particularities (Finer et al. 1995; Breslin, 2009). Furthermore, research findings indicate that the majority of constitutions not only claim to limit government power, but are reasonably or fully operative in practice (Breslin, 2009, p.29).

The current article focuses on a specific institution protected by the constitutions, that of cooperatives. A broadly accepted definition of cooperatives is the one included in the historic Statement on the Co-operative Identity in 1995, established by the International Cooperative Alliance (ICA), which is the representative organ of cooperatives worldwide (ICA, 1995). According to the latter, the cooperative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly owned and democratically-controlled enterprise (ICA, 1995). The ICA also prescribed a set of cooperative values (self-help, self responsibility, democracy, equality, equity and solidarity) and cooperative principles (voluntary and open membership, democratic member control, member economic participation, autonomy and independence, cooperation among co-operatives, concern for community) for all the cooperatives to follow (ICA, 1995).

Such cooperative values and principles have been incorporated in the 193/2002 "Promotion of Cooperatives" Recommendation of the International Labour Organization (ILO R. 193), which calls upon legislators to create an adequate legal environment "*consistent with the nature and function of cooperatives and guided by the cooperative values and principles*" (ILO R. 193, par. 6). The latter is considered to be the "*first and only instrument of universal applicability on cooperative law adopted by an international governmental organization*" (Henrÿ, 2013, page 66). There has been a growing agreement in literature and case law that the ILO R. 193 is legally binding, constituting the nucleus of public international cooperative (Henrÿ, 2013).

The growing literature on cooperatives has focused mainly on ordinary law, whereas there has been little investigation of where the national constitutions stand towards cooperatives. Therefore, the present study aspires to address that gap, undertaking an investigation of the national constitutions on a worldwide scale. Specifically, it will investigate which and how many countries have included cooperative-related provisions in their text. Furthermore, it will provide a classification of their content, noting also if there have been developed any trends. With regard to whether such constitutional articles have an impact in cooperative law or other fields of law that are applied to cooperatives, the case of

Portugal and Italy will be briefly viewed. The study's findings might offer a useful source of information for researchers interested in undertaking comparative constitutional inquiry on cooperatives.

2. Research methodology

In this research context, the legal texts that have been examined are the ones that are self-defined as constitutions and the supreme laws of the country, an approach that has been widely used in large scale inquiries (Law, 2010). According to previous research, the vast majority of countries have such texts (Elkins et al., 2009, p.49).

A first impediment that needs to be overcome is linguistic pluralism, especially since the present study extends across four continents. Thus, a variety of legal databases (World Constitutions Illustrated, Constitute Project, Faolex, Natlex and the Political Database of the Americas - PDBA) is consulted and referenced. In particular, for the historic overview of the constitutional texts of each country the World Constitutions Illustrated, as well as Faolex, Natlex provided adequate information. With regard to the examination of the constitutions in force, the World Constitutions Illustrated and Constitute Project have been the main source of information, whilst Faolex, Natlex were only used supplementarily, since in many cases they lacked recent updating.

The above search took place with the term "cooperative/co-operative" as the key word with its derivatives (e.g. cooperative ownership, cooperatives, cooperative enterprise, cooperativism). Thus, we are confronted with the homonym issue, according to which similar terms may have various meanings in different jurisdictions (Pieters, 2009). However, in the cooperatives' case there is a specific particularity that may justify the above assumption. Specifically, from 1995 onwards, the ICA has provided a specific definition that is broadly used and accepted in legal instruments (such as the ILO R. 193/2002).

The inquiry has also been based on a previous study of the ICA Legislative Working Group which took place in 2009 (ICA, 2009). Its findings have been updated and the number of constitutions that were studied has been broadened.

The present study includes also a brief analysis on the Portuguese and the Italian constitution, due to the fact that they acknowledge certain aspects of the cooperative identity (the cooperative principles under the Portuguese constitution and the mutual cooperative aim under the Italian constitution) and promote supportive measures for cooperatives. For this inquiry, the existing literature from native legal scholars has been reviewed in order to gain an inner perception of the interpretation and application of the relevant constitutional articles within each national legal system.

3. Main Findings

a) Constitutions with cooperative-related articles: An increased tendency

For the period from 1900 to 2016, in which new constitutions have emerged from new and old polities, the introduction of the term "*cooperative*" in the constitutional texts has increased (Figure 1). This highlights a growing interest in the cooperative institution by the national legislator who has been willing to introduce relevant articles to regulate it. The highest percentage of such constitutions is noted during the first half of the 20th century and the lowest in the 1990s, after which the total number of such constitutions reaches to a plateau (Figure 1). Based on the above, the cooperative related articles were introduced in the early constitutions of the century, especially during the post-war era, whereas it is rare for such inclusion to take place in the newest and recent contemporary constitutions of the late 20th and 21th century.

The earliest introduction of such provision took place in Mexico with the Constitution of 1917, which in ar. 123.30 among other provisions in favor of labor and social welfare; it acknowledged the form of cooperatives. On the other hand, the latest inclusion of cooperatives in a national constitutional text belongs to Morocco. In an attempt to enhance the powers of the parliament and limit those of the King, the Moroccan constitution of 1996 was amended in 2011 and in its ar. 71 it includes cooperatives to the list of subjects under the legislative powers of the Parliament.

b) The current constitutions

The study found that the countries that have introduced cooperative articles in their constitutions are in Africa : *Angola, Central Africa, Congo, Egypt, Equatorial Guinea, Ethiopia, Guinea-Bissau, Kenya, Morocco, Mozambique, Namibia, Nigeria, Sao Tome and Principe, Swaziland* (Table 1); in Asia: *Bangladesh, China, Cyprus, India, Iran, Korea (DPR), Kuwait, Malaysia, Myanmar, Nepal, Pakistan, Philippines, Sri Lanka, Taiwan, Tajikistan, Timor-Leste, Thailand, Turkey, Uzbekistan, Yemen* (Table 2); in the Americas: *Bolivia, Brazil, Colombia, Costa-Rica, Cuba, Dominican Republic, Ecuador , El Salvador, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, Venezuela* (Table 3) and in Europe: *Belarus, Bulgaria, Greece, Italy, Malta, Portugal, Serbia, Spain* (Table 4). Compared to Africa (14/54, 26%) and Asia (20/48, 41%), South America has the highest rate (20/35, 57%), whereas Europe the lowest (8/43, 19%).

c) Latin America: a region with an abundance of constitutions with cooperative provisions

Latin America is found to possess the highest percentage of countries with cooperative provisions at constitutional level, compared to the regions of Africa, Asia and Europe. Due to the particularity that the former presents, a further examination is needed.

Historically, the idea of the rochdalean cooperativism was brought to Latin America by European immigrants, in the late 19th century and early 20th centuries (Bialosgorski Neto, 2012). Since then, cooperativism has been acknowledged by cooperative laws and constitutional provisions. Specifically, the first constitution of the Latin American region that recognized the status of cooperatives was the Mexican Constitution of 1917, as a result of the 1910 revolution. Its content was radical for its time, due to the social and economic rights that it prescribed, which later constituted the essence of modern labor law

(Gargarella, 2014). Its main influence was the Spanish Constitution of Cadiz (Mirow, 2015), which however did not have any references to cooperatives. From the study's research, it was noted that the Mexican Constitution was also the first constitution of the world that acknowledged modern cooperativism. Under the domino effect most of the Mexican constitutional provisions influenced the rest of the countries that promulgated new constitutions at the time, such as Peru (1919), Hondurras (1924), Brazil (1937), Bolivia (1938), El Salvador (1939) (Carozza, 2003, Figueroa, 2011).

To better understand the constitutional history of the region, its division into three distinctive periods, which are the period of liberal-conservative constitutions (1850–1910), of social constitutionalism (1910–1950) and of multiculturalism and human rights (1950–2010) ihas proved useful (Gargarella, 2014). The first wave of the introduction of cooperative articles in Latin American constitutions took place during the period of social constitutionalism, "*in which they expressed, through the use of legal language, the main social change that had taken place in the region during the first half of the 20th century- namely the incorporation of the working class as a decisive political and economic actor*" (Gargarela, 2014, page 12-13). In the cooperatives' case, it even took the active form of participation in constitutional drafting, as in the case of the Brazilian constitution of 1988 (Cracogna, 2016).

A particular trait of the Latin American constitutionalism is constant reform or replacement of the constitution, aising the issue of their entrenchment (Eustace, 2014). Nevertheless, the constitutional protection of cooperatives does not seem to be affected by the phenomenon of fluid constitutionalism. In fact, unlike those in other regions, none of the Latin American constitutions currently in force have abolished the constitutional protection of cooperatives (Figure 2).

d) A taxonomy of constitutional provisions on cooperatives

The content of such constitutional provisions shows great variety and complexity, considerably hindering the task of their classification. Based on the perception of constitutions as the legal documents that prescribe rules on the government's powers, on the allocation of such powers to different organs, on the protection of individual and collective rights, and on state intervention on economy and its limits (Gavison, 2002; Negretto, 2008), a preliminary observation is that cooperative–related articles have permeated all of those aspects of constitutions.

Specifically, the constitutions under study specify the organs that produce the cooperative laws, as well as the ones that promote, supervise and control cooperatives (*e.g. ar. 66 of Constitution of Central Africa, ar. 189.24 of Constitution of Colombia, ar. 87.1 (h) of Constitution of Cyprus, ar. 165.1 (x) of Constitution of Portugal*). The above powers are distributed among the legislative and executive power (*e.g. ar. 71 of Constitution of Morocco*) as well as between the central government, the provincial and/or county governments (*e.g. ar. 28 of Constitution of Mexico, ar. 246(43) 7th Schedule of Constitution of India*). Some constitutions also prescribe cooperatives' participation and representation in state organs/bodies (*e.g. ar. 150.13 of Constitution of Nicaragua, ar. 289(9) of Constitution of Haiti, ar. 332(G:e), of Constitution of Uruguay*).

With regard to cooperatives and the rights that are protected by the constitution, the following remarks can be made. The constitutional legislator acknowledges the right to form, join and develop a cooperative (*e.g. ar. 38.2 of Constitution of Angola, ar. 19.1 (c) of Constitution of India, ar. 42 of*

Constitution of Thailand, ar. 61.2 of Constitution of Portugal), as well as the right of its members to access information (*e.g. ar. 243ZO Constitution of India*). Cooperatives have also the right for state support (*e.g. ar. ar. 92.3 of Constitution of Mozambique*) and for setting up an economic enterprise (*e.g. ar. 12, sec 6, of Constitution of Philippines*). In some cases, there is also the tendency to associate specific rights with cooperatives, which may facilitate their exercise, such as the right of education (*e.g. 79.3 of Constitution of Angola, ar.17 of Constitution of Peru*), of housing (*e.g. ar. 36 of Constitution of Tajikistan, ar. 65.2 (d) of Constitution of Portugal*) and that of property (*ar. 321 of Constitution of Ecuador, ar. 105 of the Constitution of El Salvador*).

Furthermore, cooperatives are not usually perceived separately but as a part of the national economy and a type of ownership or property that coexists with the public and private sector (*e.g. ar. 33 of Constitution of Egypt, ar. 306 Constitution Bolivia, ar. 283 of Constitution Ecuador, ar.99 of Constitution of Nicaragua, ar. 13 of Constitution of Bangladesh, ar. 51.1(d) of Constitution of Nepal, ar. 80.2 (b) Constitution of Portugal*).

A significant number of the constitutions under study introduce provisions on state protection, promotion and support of all kinds of cooperatives (*e.g. ar. 174(b) of Constitution of Brazil, ar. 145.2 of Constitution of Taiwan, ar. 45 of Constitution of Italy, ar. 13 of Constitution of Belarus*). On the other hand, some constitutions emphasize on the protection of specific cooperative types, such as farming cooperatives (*e.g. ar. 109 of Constitution of Nicaragua*), mining cooperatives (*e.g. ar. 370.2 of Constitution of Bolivia*) and housing cooperatives (*ar. 65.2 (d) Constitution of Portugal*). Preferential treatment towards cooperatives may take the form of providing various benefits in their favor, such as an adequate tax treatment (e.g. *ar. 146.3 (c) of Constitution of Brazil, ar. 14 sec.4(c) of Constitution of Philippines*) or credit and technical assistance (*e.g. ar. 67 of Constitution of Guatemala, ar. 174.4 of Constitution of Brazil*).

Cooperative promotion and support is often associated with broader goals, to which cooperatives may contribute, such as attaining full employment (*ar. 43.2 Constitution of Iran*), improving life conditions for workers (*ar. 64 of Constitution of Costa Rica*), increasing production, protection of customers (*ar. 171 Constitution of Turkey*), promoting local development (*ar. 148 of Constitution of Yemen*) or the development of the national economy towards socialism (*ar. 50.3 of Constitution of Nepal*).

The constitutional text may also introduce articles about the cooperatives' internal affairs. In this aspect, the Indian constitution is noted as the most detailed constitutional text, often resembling a cooperative ordinary law by the amount and content of regulations it introduces at constitutional level, such as for example the number and term of the Board of Directors of a cooperative, pursuant to ar. 243ZJ.

Safeguarding cooperative identity or certain aspects of it occurs in only a few constitutions. For instance, the ar. 55 of the Constitution of Bolivia stipulates that the cooperative sector is based on the principles of solidarity, equality, reciprocity, equity of distribution, social purpose, and the non-profit motive of its members. A similar provision can be found in ar. 113 of the Constitution of Paraguay, according to which the cooperative sector is based on solidarity and social profitability and according to the same provision the cooperative principles are to be disseminated through the education. The cooperative principles are mentioned in the Indian Constitution, as well. The ar. 243ZI of the latter states

that the cooperative law shall take into account the principles of voluntary formation, democratic member-control, member-economic participation and autonomous functioning. On the other hand, the Portuguese Constitution acknowledges and protects the cooperative principles in its articles (61.2, 82.4(a)), but it does not specify what they are. On a similar note, the Italian constitution mentions the social function and mutual non-speculative scope of cooperatives in ar. 45 without further specifications.

Apart from the provisions that regulate the state's intervention in cooperatives, in some cases limits are imposed, by prohibiting the state's inference to a cooperative's affairs (*e.g. ar. 5(18) of Constitution of Brazil*) or by guaranteeing the cooperatives' autonomy and self-governance (*ar. 113 Constitution of Paraguay, ar. 12.4 Constitution of Greece*).

In summary, the constitutions referring to cooperatives have grown in numbers over the years and in Latin America such constitutions appear to be the majority in the region. Regarding the content of the constitutions, overall, there is a great variety of provisions on cooperatives permeating all sectors of a constitution, from the rules on the government's powers to the protection of rights.

4. The impact of constitutional related provisions on legislation: the case of Portugal and Italy

Considering the aforementioned findings, the question of whether such references have an impact remains open. Although based on the theory of sources of law, the constitutions as supreme laws are guiding the ordinary laws' production and interpretation; there has been growing criticism of their effectiveness.

According to the study's findings, only a few of the domestic constitutions have articles that prescribe the cooperative principles and other aspects of the cooperative identity as crystallized by the ICA. In such cases, it would be interesting to examine if and to which degree such constitutional provisions affect both cooperative organizational law[1] and other fields of law that apply to cooperatives. For this reason, an analysis of the constitutions of Portugal and Italy follows. These countries have been chosen because they protect particular aspects of cooperative identity and preserve a preferential protection for cooperatives within the constitutional text. The aim of such analysis is not to extensively cover those topics, but to draft preliminary remarks to offer a reference point that could be examined and compared in other countries.

a) Portugal

Portugal presents a great case for study, since the country has been considered to have a "*truly cooperative constitution*" (Namorado, 2013). Cooperatives were acknowledged constitutionally in 1976 as an autonomous economic sector alongside the public and private ones. Such acknowledgement was later followed by the enactment of a separate code that regulates cooperatives as a whole, giving

[1] Organizational cooperative law consists of all the rules that regulate the operation of a cooperative, such as its definition, formation, capital structure, dissolution. Fici (2013).

cooperativism a relevant normative autonomy, contrary to the cooperatives' previous status as a special type of commercial company under the commercial code (Namorado, 2013).

The current Constitution of the Republic of Portugal (CPR), after the reviews of 1989 and 1997, places cooperatives within the sector of social economy (Namorado, 2013). Specifically, ar. 82 refers to the three sectors of ownership of means of production, which are the public, the private and the cooperative and social sector. Although not using the exact wording the latter ("cooperative and social sector") is an equivalent of the social economy and it further consists of the co-operative division (including the co-operative sub-sector) and the social division (including the worker collective, community and charity sub-sectors) (Meira, 2014).

In the constitutional text, there is a number of principles protecting cooperatives and the overall "*cooperative and social sector*". One of the most significant is the principle of conformity with the cooperative principles of the International Cooperative Alliance (Meira, 2014). Specifically, ar. 82.4 of the Constitution of the Portuguese Republic (CPR) states that "*the cooperative sector shall comprise of means of production that cooperatives possess and manage in accordance with cooperative principles, without prejudice to such specific provisions as the law may lay down for cooperatives in which the public sector holds a stake and are justified by the special nature thereof*". Therefore, with the sole exception of the cooperative "regies", which are the public interest cooperatives that due to their nature they may not comply with some of the principles, for the rest of cooperatives the commitment to the cooperative principles is mandatory by the constitution (Namorado, 2013). The latter is also confirmed in ar. 61.2 CPR which reads that "*everyone shall possess the right to freely form cooperatives, subject to compliance with cooperative principles*".

The strong constitutional commitment to the cooperative principles is further enhanced by the ordinary legislator in various articles of the Cooperative Code (CC), such as in the cooperative definition, of which cooperative principles are a fundamental part. Specifically, according to ar. 2.1 CC, cooperatives are considered to be autonomous collective persons, freely established and of variable share capital and composition, which, through mutual assistance and cooperation between their members, in compliance with the cooperative principles, aim to satisfy their economic, social and cultural needs without profit-making objectives. Such commitment to the cooperative principles is also reflected in ar. 3 CC which reads as follows: "*cooperatives, in their incorporation and functioning, obey the following cooperative principles, which form part of the declaration of cooperative identity adopted by the International Cooperative Alliance*", and then the provision integrates all of the ICA cooperative principles. Following the cooperative principles is also included in the list of member duties in ar. 22.1 CC and in case of their infringement, there is a legitimate reason for their dissolution (112.1(h) CC). Apart from the provisions that protect the cooperative principles as a whole, the CC introduces also articles with regard to specific principles, such as the 5th principle of cooperative education, which is enhanced by the mandatory formation of an educational and training fund (ar. 97 CC) or the 6th principle of cooperation among cooperatives, which is promoted by ar. 101 et seq. through the formation of upper level organizations under a cooperative structure.

Other constitutional principles are the protection of cooperatives on the basis of ar. 81(f) CPR and the support and stimulation of their creation and activities by the state according to ar. 85.1 CPR (Meira, 2014). In line with the above provisions is ar. 85.2 CPR according to which "*the law shall define*

the fiscal and financial benefits to be enjoyed by cooperatives, as well as preferential terms and conditions for obtaining credit and technical assistance". Thus, the ordinary legislator is able to define what kind of benefits will be granted to cooperatives but he is not constitutionally authorized to provide no benefits at all (Namorado, 2013; Meira, 2014). This is reflected in the 2011 reform of the cooperative taxation. Even though ar. 148 of law n. 64-B/2011 repealed the Cooperative Fiscal Statute, it preserved a few but significant benefits in ar. 66 of law n. 64-B/2011, such as the exemption from corporation tax and council tax (Namorado, 2013).

Considering the gamut of cooperative articles in the constitution of Portugal, several conclusions can be drawn. The strong commitment of the CPR to the cooperative principles has led the ordinary legislator to also follow such commitment by introducing various articles in the CC that are specifically based on the ICA identity statement and prevent their infringement. However, one may argue that the constitutional protection of the cooperative principles has no particular significance, since it lies upon the ordinary legislator to translate the cooperative principles into applicable legal norms. This argument may also be strengthened by the inclusion of plural voting rights and the introduction of investor members to cooperatives under the new CC (ar. 41.5), which may be viewed by some scholars as not fully in line with the letter or spirit of the cooperative principles (Namorado, 2013). Although under the CC the cooperative principles can be redefined, this should not lead to the conclusion that complete abolition or severe infringement of some or all of them would be consistent with the current CPR. Therefore, the constitutional commitment to the cooperative principles should not be viewed as a tool for their absolute and literal application, but as a normative directive for the cooperative legislator to guide him in any future attempts to pass a new law on cooperatives or to reform the existing framework. One other remark that should be noted about the CPR is the fact that it offers the foundation for the cooperatives' positive discrimination (Meira, 2014). The latter is not only constitutionally justifiable but mandatory to the point at which the CPR sets a threshold, permitting the diminution but not the total abolition of the beneficial treatment of cooperatives in various areas, such as in taxation (Meira, 2014).

To conclude, the CPR with its cooperative provisions has not only influenced the organizational cooperative law under the form of the CC, but also tax law, under which cooperatives enjoy favorable provisions compared to private corporations.

b) Italy

After the end of the World War II and the constitution of the Republic, the Italian government became in favor of cooperativism, which was expressed at constitutional level (Borzaga et al. 2010). Specifically, the Constitution of 1948 includes a direct reference to cooperativism[2], preserving its mutual scope and social function as well as promoting its growth. Its ar. 45 states specifically that "*the Republic recognises the social function of cooperation for mutual benefit free of private speculation*" and then it prescribes that "*the law shall assist and promote its development by the most suitable means and shall ensure, by means of appropriate controls, its nature and purposes*".

[2] Although the article refers to co-operation, it has been clarified that it is applied to cooperatives (Miribung, 2014).

As the Italian law evolved over the years to a cooperative–enhancing framework, it further developed the mutual purpose of cooperatives in a consistent manner (Fici, 2013). The mutual aim of cooperatives became a fundamental element that has defined and differentiated them from other types of companies (Fici, 2013). This can be viewed in the very definition of cooperatives by the ar. 2511 Civil Code (CC), according to which cooperatives are a distinctive type of society with a variable capital and a mutual purpose. Although such purpose is not defined in the CC, it has been interpreted by the Italian Supreme Court in line with the Ministerial Report on the CC, in n. 1025 (Fici, 2013). Based on the above, "*a prevalently mutual aim consists in providing goods and services and work opportunities directly to the members of the organization under more favorable conditions than those they would find on the market*".

Based on the above defined mutual scope, the cooperatives are divided in two categories: the prevalently mutual cooperatives (PMC) and the non-prevalently mutual or other cooperatives (OC). The former have to act prevalently with their members and are obligated to report on the volume of transactions with them, which needs to be higher than 50% of the total amount of transactions (ar. 2513cc). On the contrary, the non-prevalently mutual or other cooperatives are neither obliged to act or report as such (Fici, 2013). The latter are also free from any capital remuneration restraints, whereas the prevalently mutual cooperatives can remunerate the capital subscribed by the members but only within certain strict limits (ar. 2514 CC). Therefore, the prevalently mutual cooperatives are in line with the constitutional model of cooperativism and its two conditions of mutuality and absence of speculative purposes. On the other hand, the non-prevalently mutual or "other" cooperatives, which are free to transact with non-members and to remunerate capital without limits, seem to drift away from the constitutional cooperative model, and adopt, instead, a weak version of the cooperative identity (Fici, 2012).

Despite their differences, both cooperative models follow the same governance regulations (with the sole exception of conversion) (Fici, 2013). However, this is not the case with their tax treatment. The only ones eligible for tax benefits are the prevalently mutual cooperatives, whereas the other cooperatives are not eligible to such preferential tax treatment (although they can be recipients of other supportive measures). (Fici, 2013).

The issue of the cooperative tax exceptions and their compatibility with the European Union law and in particular with ar. 107.1EC (prohibited state aid) was raised before the European Court of Justice (ECJ) in a preliminary ruling[3]. The ECJ ruled that tax exceptions constitute state aid, in general. However, they are not considered to be prohibited when they are granted to cooperatives, as long as the particular traits, which were developed by the ECJ, are also reflected in the domestic legislation (Fici, 2013). The aforementioned tax exceptions also need to be justified "by the nature or general scheme of the tax system of which they form part"[4], in order to be compatible with the European Union law. Such justification can be offered by the various provisions of the Italian constitution and most importantly by the ar. 45 for the promotion of cooperatives by law with adequate measures, such as tax exceptions (Fici, 2011).

Based on the above, a liaison is noted between the constitution, the organizational cooperative law and tax law, rooted in ar. 45 of the Constitution. In particular, the mutual scope of ar. 45 of the Italian

[3] See Court of Justice of the European Union, 8 September 2011 (C-78/08 to C-80/08).

[4] See ECJ, 8 September 2011, cit. par. 75.

Constitution seems to be a focal point of the Italian legislature, affecting how cooperative law defines and categorizes cooperatives, having also an impact on tax law (Fici, 2011). On the other hand, the introduction of the "other" cooperatives seems to be a deviation from the constitutional cooperative model. The inclusion of the category of the "other" cooperatives in the legal text was mainly circumstantial, in order not to exclude large cooperatives from the cooperative sector at the time that used to operate with non-members without limits (Fici, 2010). Therefore, the above provision is not expected to change the Italian cooperative movement significantly, since new "other" cooperatives are highly unlikely to emerge, due to the fact that they are subjected to the same governance rules with the prevalently mutual cooperatives, but without the incentives of a preferential tax treatment. Moreover, the tax benefits that Italian law provides for the prevalently mutual cooperatives are not incompatible with the European Union law and can be justified by the Italian Constitution and its ar. 45, which not only authorizes but obliges the legislator to promote cooperatives with various measures (Fici, 2013).

c) Remarks

Both countries, which have been briefly studied in this investigation, acknowledge certain aspects of the cooperative identity at constitutional level. Specifically, the Portuguese constitution prescribes the cooperative principles and the Italian constitution provides for the mutual aim of cooperatives. This creates a compass for the ordinary legislator, who has further developed the above elements and enhanced their protection. Nevertheless, that did not prevent the legislator from drifting away, at times, from the cooperative identity of the ICA, such as with the plural voting rights and investor members in light of the new Portuguese Cooperative Code or by creating a category of cooperatives that might be non-prevalently mutual under the Italian Civil Code.

Moreover, a common denomination between the Portuguese and the Italian constitution is the special protection status and supportive measures attributed to cooperatives. Such provisions had an impact on the country's tax law, resulting in the cooperatives' favorable treatment, compared to for-profit companies.

Overall, the Portuguese and the Italian constitutional provisions on cooperatives have influenced the development of the cooperative law of each country to a certain degree. More importantly, based on such constitutional provisions, cooperatives are recipients of tax exceptions and benefits.

5. Conclusions

The present study focuses on the domestic constitutions of the world that introduce specific provisions about cooperatives, offering in that matter a general overview. This topic presents an interesting area for research in the field of cooperative law due to the constitutions' supremacy over ordinary laws, their potential to enforce supranational norms, as well as their embedding of political considerations, morals and ethics. Despite that, the topic has not attracted sufficient scientific interest. Thus, this study aspires to contribute to the gap in research by undertaking a study on constitutions and cooperatives in a worldwide scale.

Our findings show that one out of three constitutions in the world introduces cooperative-specific articles in their texts and the number of such constitutions increased from 1900 to 2016. The content of the cooperative-related provisions in the constitutional text varies from country to country, covering different chapters of the constitution from articles on governmental powers to the allocation of power and the protection of human rights.

The largest number of such supreme laws appears in the countries of Latin America and their promulgation may be traced to the period of social constitutionalism, in which the working class started to have a significant presence in the political and economic sphere. Despite Latin America's fluid constitutionalism, the acknowledgement of cooperatives has not been removed by any of the contemporary constitutions of the region. Latin America's strong commitment to the constitutional protection of cooperatives is also indicated by the fact that the Mexican Constitution of 1917 was the first constitutional text in the world to acknowledge cooperatives. Thus, the constitutional protection of cooperatives was a Latin American innovation, a fact that shows the richness and particularity of their constitutional history.

Furthermore, the impact of constitutions on ordinary law was examined in two cases: the Portuguese and Italian constitutions. The strong commitment to cooperative principles found in the Portuguese constitution and the protection of mutual purpose by the Italian constitution became central points of the cooperative law in each country, despite some noted deviations. The Italian and Portuguese supreme laws, to the extent that they offer constitutional protection of certain aspects of cooperative identity, can be considered as tools to realise of ILO Recommendation 193/2002's call on legislators to safeguard the cooperatives' particular traits.

One other effect of those constitutions is that they both justify and require cooperatives' preferential tax treatment compared to for-profit companies. When the tax exceptions and benefits for cooperatives have their basis in the constitution, measures abolishing them or subjecting cooperatives to the same regulations and criteria as for-profit companies could be deemed unconstitutional and invalid. Apart from the legal argument of unconstitutionality, the constitutional acknowledgement of cooperatives gives also more weight to any political argument promoting legislation ifavouring cooperatives. In Portugal, although the tax benefits enjoyed by cooperatives have been diminished over time, they were not completely repealed due to ar. 85.2 CPR. Therefore, the constitutional protection of cooperatives' distinctiveness and promotion of supportive legislation has the potential to fix a minimum threshold and prevent the legislator from subjecting cooperatives to the same conditions as for-profit companies.

Moreover, the compatibility of tax benefits with European Union law can be justified by the constitutional acknowledgement, protection and promotion of cooperatives. In that case the member state can show that the tax measure flows from the basic or guiding principles of its tax system, as they are embedded in the constitution. The above preliminary remarks on the impact of the constitutions may be used as a hypothesis to be tested in other countries; an open question to be addressed by future research.

Figure 1. Increase of constitutions with cooperative provisions from 1900 – 2016

A Number of countries with cooperative provisions in their constitutions in each region for 1900 - 2016

B Increase and total number of countries with cooperative provisions for 1900-2016

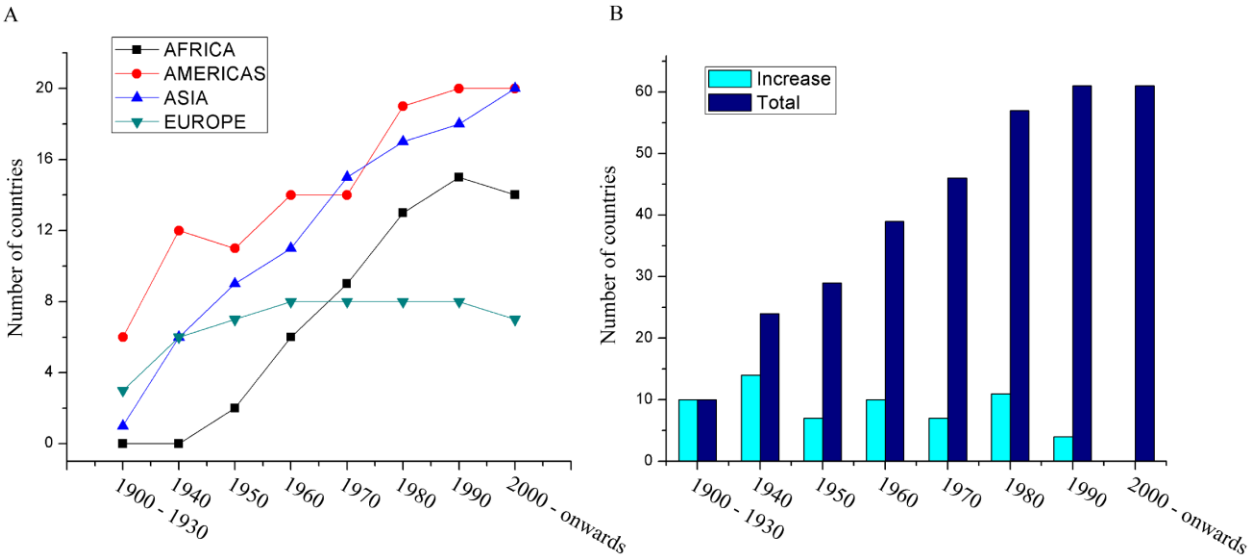


Table 1. The national constitutions of Africa in force with cooperative provisions

No	Countries of Africa	Constitutions in force
1	Angola	2010
2	Central Africa	2016
3	Congo	2006/11
4	Egypt	2014
5	Equatorial Guinea	1991/12
6	Ethiopia	1994
7	Guinea-Bissau	1984/96
8	Kenya	2010

9	Morocco	1996/2011
10	Mozambique	2004/07
11	Namibia	1990/10
12	Nigeria	1999/10
13	Sao Tome and Principe	1975/03
14	Swaziland	2005

Table 2. The national constitutions of Americas in force with cooperative provisions

No	**Countries of Americas**	**Constitutions in force**
1	Bolivia	2009
2	Brazil	1988/17
3	Colombia	1991/13
4	Costa-Rica	1949/11
5	Cuba	1976/02
6	Dominican Republic	2015
7	Ecuador	2008/15
8	El Salvador	1983/14
9	Guatemala	1985/93

10	Guyana	1980/09
11	Haiti	1987/12
12	Honduras	1982/13
13	Mexico	1917/17
14	Nicaragua	1987/14
15	Panama	1972/04
16	Paraguay	1992/11
17	Peru	1993/17
18	Suriname	1987/92
19	Uruguay	1967/04
20	Venezuela	1999/09

Table 3 The national constitutions of Asia in force with cooperative provisions

No	**Countries of Asia**	**Constitutions in force**
1	Bangladesh	1972/86/14
2	China	1982/04

3	Cyprus	1960/13
4	India	1949/15
5	Iran	1979/89
6	Korea (DPR)	1972/98
7	Kuwait	1962/92
8	Malaysia	1957/07
9	Myanmar	2008
10	Nepal	2015
11	Pakistan	1973/02/15
12	Philippines	1987
13	Sri Lanka	1978/15
14	Taiwan	1947/05
15	Tajikistan	1994/16
16	Timor-Leste	2002
17	Thailand	2017
18	Turkey	1982/17
19	Uzbekistan	1992/11

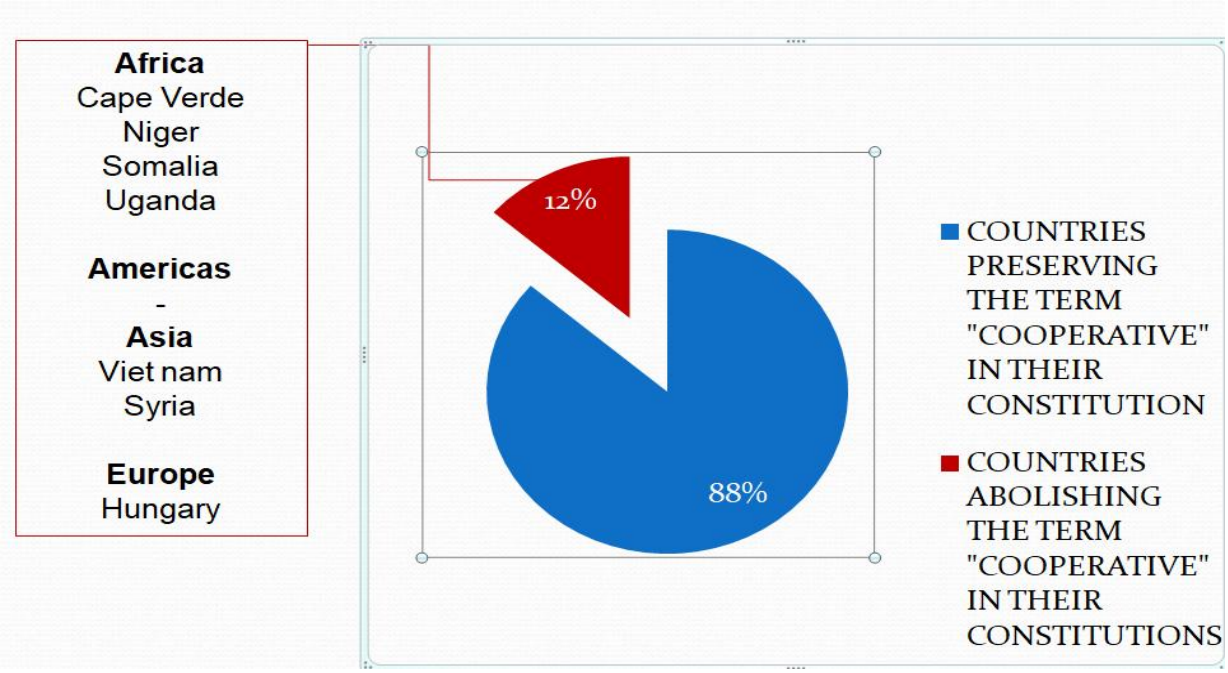
20	Yemen	1991/01

Table 4 The national constitutions of Europe in force with cooperative provisions

No	**Countries of Europe**	**Constitutions in force**
1	Belarus	1994/04
2	Bulgaria	1991/07
3	Greece	1975/08
4	Italy	1947/12
5	Malta	1964/14
6	Portugal	1976/05
7	Serbia	2006
8	Spain	1978/11

Figure 2 The vast majority of countries preserve the term "cooperative" in their current national constitutions

Percentage of countries that preserved the term "cooperative" in their constitutions (blue color) and countries that abolished it (red color)



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Legislation

THE EAST AFRICAN COMMUNITY'S COOPERATIVE REGULATION

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Abstract

Since 2014, a new legal framework governing cooperative societies has been in force within the East African Community. The Act was adopted through a concerted procedure involving all interested parties. The Act replaces national provisions of Partner States, except for complementary and non-contrary provisions. The aim of this analysis is to present the main articulations of this regulation.

I. Introduction

The East African Community (EAC) is a regional intergovernmental organisation of 6 Partner States[1]. The EAC was established by a Treaty which guides the work and the activities of the Community. The Treaty was signed on 30th November 1999 and entered into force on 7th July 2000 following its ratification by the original three Partner States[2]. The main Organs of the EAC are the Summit[3], the

[1] The Republic of Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and the Republic of Uganda. The headquarters are in Arusha,Tanzania.

[2] Kenya, Tanzania and Uganda. The Republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18th June 2007 and became full Members of the Community with effect from the 1st of July 2007. The Republic of South Sudan acceeded to the Treaty on 15th April 2016 and became a full Member on 15th August 2016.

[3] The Summit includes Heads of Government of Partner States. The Summit gives strategic direction towards the realisation of the goal and objectives of the Community.

Council of Ministers[4], the Co-ordinating Committee[5], the Sectoral Committees[6], the East African Court of Justice[7], the East African Legislative Assembly and the Secretariat[8].

The East African Legislative Assembly (EALA) is the Legislative Organ of the Community and has a cardinal function to further EAC objectives, through its legislative, representative and oversight mandate. It was established under article 9 of the Treaty. The Assembly has a membership comprising of 45 elected members (nine from each Partner State), and 7 *ex-officio* members consisting of the Minister or Cabinet Secretary responsible for EAC affairs from each Partner State, the Secretary-General and the Counsel to the Community totaling 52 members[9]. The Assembly draws the authority to establish its Standing Committees from its rules of procedure. It currently has 6 Standing Committees to execute its mandate[10].

The objective of the Community is to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs, for their mutual benefit (article 5 of the Treaty).One way of achieving these objectives is the production of appropriate and applicable legal standards.

According to article 62 of the Treaty (Acts of the Community),"1. The enactment of legislation of the Community shall be effected by means of Bills passed by the Assembly and assented to by the Heads of State, and every Bill that has been duly passed and assented to shall be styled an Act of the Community. 2. When a Bill has been duly passed by the Assembly, the Speaker of the Assembly shall submit the Bill to the Heads of State for assent. 3. Every Bill that is submitted to the Heads of State under paragraph 2 of this Article shall contain the following words of enactment: Enacted by the East African Community and assented to by the Heads of State"[11].

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[4] The Council of Ministers is the central decision-making and governing organ of the EAC. Its membership constitutes of Ministers or Cabinet Secretaries from the Partner States whose dockets are responsible for regional co-operation.

[5] Under the Council, the Co-ordinating Committee has the primary responsibility for regional co-operation and co-ordinates the activities of the Sectoral Committees. It also makes reccomendation to the Council about the establishment, composition and functions of such Sectoral Committees. It draws its membership from Secretaries responsible for regional co-operation from the Partner States.

[6] Sectoral Committees conceptualise programmes and monitor their implementation. The Council establishes such Sectoral Committees on recommendation of the Coordinating Committee.

[7] The East African Court of Justice is the principal judicial Organ of the Community and ensures adherence to the law in the interpretation and application of compliance with the EAC Treaty. It was established under article 9 of the Treaty.

[8] The Secretariat is the executive organ of the Community. As the guardian of the Treaty, it ensures that regulations and directives adopted by the Council are properly implemented.

[9] More details on the websilte of EALA: http://www.eala.org/

[10]Accounts Committee ; Committee on Legal, Rules, and Privileges; Committee on Agriculture, Tourism and Natural Resources; Committee on Regional Affairs and Conflict Resolution; Committee on Communication, Trade and Investment, and Committee on General Purpose.

[11] For more details about EAC, see Mathieson, C. (2016) : The political economy of regional integration in Africa, the East African Community, ECPDM : http://ecdpm.org/wp-content/uploads/ECDPM-2016-Political-Economy-Regional-Integration-Africa-EAC-Report.pdf

Following this procedure under article 62 of the Treaty, many Acts have become effective within the Community since its creation. One of these Acts is related to cooperative societies and will be the main subject of this article.

The purpose of this article is to present this legislation applicable to cooperatives in East Africa. We will not carry out an in-depth analysis involving a comparison with the national cooperative legislation of Partner States. The aim will be simply to highlight the main articulations of the text, while commenting on them in the light of internationally recognized cooperative ethics. The approach will be essentially analytical, with no ambition to account for the effectiveness of the law; which requires close proximity with the actors in the field.

After an analysis of historical aspects, we will discuss the modalities of constitution, functioning and dissolution of cooperatives.

II. History and objectives

According to Valeria Galletti, Independent Consultant, we can identify four steps in the history of the EAC Cooperative Societies Bill, 2014[12].

First phase: mobilizing broad-based expertise to define a model legislation

In 2009: a comparative study on cooperatives. EAFF[13] commissions a comparative study of cooperative laws in Ethiopia, Uganda and Kenya. Best practices were identified and model legislation drafted serving as a very first draft of the Bill[14].

March 2010: validation of the study. The study report was validated during a workshop of EAFF members.

June 2010: sharing the draft with EALA members. EAFF convened a workshop in Nairobi to look at policy issues and process at the EAC.

June 2011: 1st think tank on cooperatives. EAFF convenes a think tank at the Cooperative College of Karen (Kenya) to further work on the draft.

Second phase: from a farmer proposal to a regional law

[12] Galletti, V. "Sucessful engagement of Farmers' Organisations in the policy arena: EAFF experience with the EAC Co-operative Societies Bill, 2014", http://www.sfoap.net/fileadmin/user_upload/sfoap/KB/docs/EAFF_EAC%20Coop%20Bill_Case%20study.pdf

[13] Eastern Africa Farmers' Federation.

[14] Nkandu, J. (2010) : "Analytical Study of the Co-operative Aacts of Estern Africa (Ethiopia, Kenya and Uganda)" Commissioned by the Eastern Africa Farmers' Federation (EAFF), Draft Report: http://www.sfoap.net/fileadmin/user_upload/sfoap/KB/docs/EAFF%20Cooperatives%20Study%20Report.pdf

March 2012: meeting at EAC and EALA. EAFF sends a delegation to meet the Speaker of EALA and the EAC Secretary General.

May 2012: 1st presentation to the Parliament. EAFF appears before the EALA Committee to present the Bill for the first time (Arusha, Tanzania).

April 2013: 2nd presentation to the Parliament. EAFF appears before the Committee for a second time during their session in Kigali, Rwanda.

August 2013: Side meeting during EAFF Congress. EAFF convenes a side meeting to discuss the Bill with their members during the 3rd EAFF Farmers' Congress in Burundi.

October2013: 2nd Co-operatives Think Tank. A 2nd think-tank with EAFF members and legal experts from the Kenyan Ministry in charge of Cooperatives and the Cooperative University College is organised to further critique the Bill.

October 2013: submission to EALA and Parliamentarian sponsorship. EAFF submits the revised Bill to EALA.

January 2014: the Bill is published. The Bill is published by the order of the EAC and is placed as a notice in the EAC Gazette No. 1 of 3rd January, 2014.

22 January 2014: 1st Reading of the Bill. The Bill is read for the first time during the EALA session in Kampala, Uganda. EAFF sends 22 representatives to witness the Reading. The motion is seconded and the Bill is forwarded to the Committee for further consultations, before the Bill is brought back to the Assembly for the 2nd Reading.

Third phase: back to the countries

January– July 2014: national and district consultations. EAFF organizes national and district consultations with members and stakeholders to ensure that the Bill is comprehensively critiqued, while preparing for EALA to convene Public Hearings in the Partner States. A report is further prepared and validated.

August – September 2014: Public hearings.

September – October 2014: preparation of the amended document. All stakeholders comments and submissions are compiled by the Principal Legal Draftsman of the EAC, the Clerk and Secretary of the EALA Committee and the EAFF Policy Officer. A report is subsequently drafted together with a proposed schedule of more than 60 amendments.

Fourth phase: the Bill becomes an Act of EALA

October 2014: back to EALA. The mover of the Bill and the Chair of the Committee table the report of the public hearings and the schedule of amendments before EALA for further reading.

22 January 2015: the 2nd reading. The Chairman of the Committee presents the Report to the Assembly gathered in Arusha (Tanzania). The Bill successfully goes through the 2nd reading.

27 January 2015: ***the 3rd reading***. The Bill is scrutinised clause by clause during a 3rd reading in Arusha, Tanzania.

28 January 2015: the Bill becomes an act of EALA.

Once ratified, the Bill will become law and take precedence over existing national laws.

Source: Galletti, V. "Successful engagement of Farmers' Organisations in the policy arena: EAFF experience with the EAC Co-operative Societies Bill, 2014", http://www.sfoap.net/fileadmin/user_upload/sfoap/KB/docs/EAFF_EAC%20Coop%20Bill_Case%20study.pdf

In accordance with the provisions of article 62 of the Treaty, the Bill went through the stages of the procedure described above, and the version currently available is an Act. Even if the main title is "The East African Community Cooperative Societies Bill"[15], such tittle is followed by this statement, "An Act to provide a legal framework for cooperative societies in the Community and to provide for other related matters - Enacted by the East African Community and assented to by the Heads of State". Also, article 1 of the Bill provides that "This Act may be cited as the East African Community Cooperative Societies Act, 2014".

The objective of the EAC cooperative societies Act is to provide a legal framework for cooperative societies in line with article 128 of the Treaty (strengthening the role of private sector as an effective force for developing economies)[16]. The Act intends to harmonise national cooperative laws in the EAC partner states. That is why article 54 of the Act provides that it shall prevail over the laws of the partner States in respect of any matter to which its provision relates. However, this presupposes that the national provisions which are not contrary to or complementary to the Act remain valid.

[15] The official version is available on the website of EALA : http://www.eala.org/uploads/EAC%20Cooperative%20Societies%20Bill.pdf

[16] Cooperatives play a significant role in the economies of East African countries. In 2013, Kenya, Tanzania and Uganda each reported at least 9,000 registered cooperative societies in their respective countries. Most of these are agriculture-related cooperatives. In Uganda Burundi and Rwanda, agriculture co-operatives account for over 50% of co-operatives in the country. Savings and credit co-operatives (SACCOs) are also becoming increasingly popular in the region. In Tanzania, SACCOS account for 56% of the registered co-operatives in the country. In 2013, the SACCOS had a total savings of USD 220 Million. Further, the African Business magazine (October 2011 edition) ranked the Cooperative Bank of Kenya the third biggest bank in the East African Community and 71st largest bank in Africa, in 2011. Source : Daily Nation, 31 mai 2014 : http://www.nation.co.ke/business/Bill-seeks-to-harmonise-rules-on-cooperatives/-/996/2333364/-/86juqoz/-/index.html

III. Constitution of cooperatives

Definition

Under the provisions of article 4 (2) of the Act, cooperative societies are voluntary organisations open to all persons able to utilise their services and willing to accept the responsibilities of membership without gender, social, racial, political or religious discrimination. Paragraphs 3 to 10 are about the cooperative principles, but take a very pedagogic approach:

- Cooperative societies are democratic organisations controlled by their members who actively participate in setting their policies and making decisions, and every member has equal voting rights.

- Members shall receive dividends from profit according to their shares and contribution after an amount necessary for reserve and social services has been deducted and set aside.

- Co-operative societies are autonomous self-help organisations controlled by their members, and if they enter into agreement with other organisations including governments or raise capital from external sources, shall do so on terms that ensure democratic control by their members and maintain their autonomy.

- Co-operative societies provide education and training for their members, elected representatives, managers and employees so as to enable them to contribute effectively to the development of their societies.

- Co-operative societies serve their members most effectively and strengthen the societies' movement by working together through local, national, regional and international structures.

- Co-operative societies work for the sustainable development of their communities through policies approved by their members.

- Cooperative societies and their businesses are owned by the members and the businesses are done for members and not with members, they do not trade or do business with members but rather for members, and do not buy from members but facilitate members to sell their goods without the societies taking ownership over the goods.

- The employees, management and staff of the cooperative societies play a facilitating role in the cooperative societies' businesses without taking ownership from the members.

Following this formulation, the drafters of the Act have translated the internationally recognized cooperative principles so as to make them intelligible to cooperative actors. This reading is therefore more pedagogical than a mere reproduction of internationally recognized cooperative principles.

The penultimate point is particularly full of teaching and reflects what a real relationship between a cooperative and its members should look like: Cooperative societies and their businesses are owned by the members and the businesses are done for members and not with members, they do not trade or do business with members but rather for members, and do not buy from members but facilitate members to sell their goods without the societies taking ownership over the goods.

Moreover, the Act (article 4 (1)) obliges cooperatives to adopt these cooperative principles in their bye-laws.

Article 3 of the Act refers to the objectives of cooperative societies. It is very important for cooperative members to know why they are gathered within the framework of a cooperative society.

Cooperative societies are established to solve problems collectively (which members cannot solve individually), and to coordinate the knowledge, skills, wealth and labour of the members for better results.

Cooperative societies are also established to promote self-reliance among members, to collectively protect, withstand and solve economic problems, and to improve the living standards of members (by reducing production and service costs, by providing input or service at a minimum cost or by finding a better price for their products or services).

Cooperatives are finally established to expand the mechanism by which technical knowledge could be put to practice, to develop and promote saving and credit services, to minimise and reduce the individual impact of risks and uncertainties, to develop the social and economic culture of the members (through education and training), and to empower the members to have ownership along commodity value chains by facilitating business development for the members.

Authorized activities

According to article 4 (1) of the Act, all cooperative societies have to abide by the guiding principles defined at article 4 (3 to 10). The expression "All cooperative societies" used at article 4 refers to cooperative societies involved in any kind of activity. It supposes that the Act has not placed any limit in the activities of cooperative societies even if the Bill was initiated and drafted according to the experience of agricultural cooperatives. Yet, in other systems, the legislator clearly states that cooperatives can engage in activities in all areas of human life. This is the case in the OHADA zone (Organization for the Harmonization of Business Law in Africa), by reference to article 5 of the Uniform Act related to cooperative societies[17].

In other contexts, the legislator goes further and defines special rules applicable to cooperatives depending on the activities. The OHADA and EAC legislators have not followed this option, perhaps because of the large number of countries they gather. But also, it might seem difficult to define such rules accurately, in a supranational context. On the contrary, the South African legislator has followed this path

[17] Hiez, D. & Tadjudje W. (2013) : "The OHADA Cooperative regulation", in Hagen Henry and al. (Editors), *International Handbook of cooperative law*, Springer, 89-113.

by laying down specific rules for cooperative housing, worker co-operatives, financial services co-operatives and agricultural cooperatives (South Africa Cooperatives Act, 2005)[18].

Forms and modes of establishment

Cooperative societies can be established at different levels. We will mention here the forms and mode of establishment of primary cooperatives and deal with apex organisations in another section.

A cooperative society cannot be created by one person. The first objective of a cooperative, as mentioned above, is to solve problems collectively which members cannot solve individually. It means that a cooperative, under this Act is not possible with a single member. In fact, the number of members in a primary society shall not be less than ten. The founders (at least ten members) must be people living in the same area. This is what is commonly called a common bond. But the Act allows an exception. In fact, a cooperative society may sell some of its shares to persons outside its area when the society faces shortage of capital. This must be the only reason why a cooperative society allows people outside its area to get membership (article 5 (5) of the Act).

When these two conditions are met, the founders should write their bye-laws according to article 9 of the Act[19]. The bye-laws represent the contract among the founders, on the one hand, and between the founders and their future cooperative. But the contract (bye-laws) is not enough to give the founders legal personality to operate. Article 7 of the Act provides that a cooperative society shall be registered by the appropriate authority in the Partner State.

The Act is not specific about the exact nature of such authority at national level. It is the duty of national authorities to determine the competent body[20]. To get the registration, the founders shall submit an application for registration to the appropriate authority together with the following particulars : minutes of the founders' meeting ; the bye-laws of the society[21]; names, addresses and signatures of the members; names, addresses and signatures of the members of the Board of Directors of the society; a detailed description which proves that the registered members of the society have met the requirements for membership; documents showing the amount of the capital of the society and that the capital has been collected and deposited in a bank account, and if there is no bank in the area, that it has been deposited in

[18] For more information about former national laws, see Theron, J. (2010) : "Cooperative policy and law in east and southern Africa: A review", CoopAFRICA Working Paper No.18, International Labor Organisation: http://ilo.org/public/english/employment/ent/coop/africa/download/wpno18cooperativepolicyandlaw.pdf

[19] Article 50 attaches particular importance to address and the initiators should take this into consideration even at the moment of their first reflection : every society should have an address registered in accordiance with article 7. To this effect, all service of process, notices and other communications to the society shall be sent to that address. To keep the address official, the cooperative society shall inform the appropriate authority of any change in such address within thirty days.

[20] Article 52 of the Act mentions that an agency shall be established by law, responsible for organising, registering, promoting or supporting cooperative societies and for rendering training, conducting research and other technical support to societies. The establishment of the agency shall be determined by the societies and documented by way of a resolution passed through the national apex co-operative organisation. Also, the Act requires that at least half of the members constituting the board of the agency shall be selected from the co-operative societies.

[21] The bye-laws must be written according to article 9 of the Act.

a place designated by the appropriate authority; and other particulars that may be specified in the regulations or directives issued for the implementation of the Act (article 7 (2) of the Act).

The appropriate authority registers a cooperative society and issues a certificate of registration within 15 days when it is satisfied that the application for submitted registration has fulfilled the requirements for registration. If the appropriate authority rejects the application for registration of a society, it has to give a written explanation to the representatives of the society within 15 days. The certificate of registration issued to a cooperative society is evidence that such society is registered (article 7 (3-6) of the Act). A cooperative society registered under the Act has juridical personality from the date of its registration and has limited liability (article 8 of the Act).

Apparently, the Act would allow the appropriate authority to issue a temporary registration certificate to a cooperative. That is what an analysis of article 7 (7) would reveal, even if the provision seems poorly worded: "When the appropriate authority is satisfied that the requirements under sub section (2) have been met, it shall grant a temporary certificate to the society which may serve not more than a year and the appropriate authority shall cause the rest of the requirements to be observed within a specified period of time". This could happen if the cooperative did not fulfill all the registration requirements, but at least the essential among them. In this case, the appropriate authority would give the cooperative time to observe the missing conditions since the temporary certificate is only valid for one year.

Registration is very important since its gives the right to the cooperative society to engage in any business as from the date of registration without the necessity of securing an additional trade licence.

A cooperative society can be suspended in the same way that it is registered. In practice, where a society is found operating outwith of the objectives for which it is established, it may be suspended by the appropriate authority from carrying out any activities permitted by the Act. Where a society is suspended, it has to submit a request to reverse the suspension. If the appropriate authority finds merit in the request, it may reverse the suspension. In case the authority does not reverse the suspension of a cooperative society, it has to give a written explanation to the General Assembly. The General Assembly may appeal to the High Court against any decision made by the appropriate authority.

IV. Functioning of cooperatives

Membership

Article 11 (1) of the Act defines four conditions that individuals must meet in order to become members of a cooperative. The first condition relates to the majority in age. Any individual may become a member of a society where such individual has attained the age of 18. The second condition concerns the financial capacity of the applicant. The individual should be able to pay the share capital and registration fee required by the society. The third condition refers to the commitment of the applicant to observe the terms of the contract that binds him/her to the cooperative. That is why the applicant has to be willing to implement his or her obligation and observe the objectives and bye-laws of the society. The fourth and last condition is more general and involves a commitment by the applicant to respect the applicable legal

and regulatory framework. For instance, he or she should be ready to fulfil other requirements which may be specified in the regulations and directives issued for the implementation of the Act[22].

The Act is not specific about the membership procedure. Article 9 of the Act provides that the requirements for accession to cooperative societies must be listed in bye-laws. This presupposes that it is within the competence of the initiators to decide, for example, whether the application will be made in writing or orally, or whether probity or professionalism are required. This seems to be justified because not all cooperatives are invested in the same activity and, depending on the context, the requirements may vary. The most important is that the requirements are accepted and respected by members, and also are consistent with cooperative law.

The Act does not strictly focus on the concept of common bond which, in principle, relates to some requirements for membership in cooperatives. The Act requires that cooperatives include, as members, only people living in the same area. But there is one exception: a society may sell some of its shares to persons outside its area when it faces shortage of capital (article 5 (5) of the Act).

On the other hand, Kenya's national law provided that a person (other than a cooperative society) cannot be qualified for membership of a cooperative society unless, among other requirements, his or her employment, occupation or profession falls within the category or description of those for which the cooperative society is formed, and he or she is resident within, or occupies land within the society's area of operation as described in the relevant bye-laws. This means that cooperative members must share either a community of occupation or activity, or a geographical proximity[23].

This requirement of Kenyan law is in line with the seventh cooperative principle, regarding commitment to the community, which also reflects the commitments of ecological development of cooperatives, because of their territorial anchorage.

Membership in cooperative societies creates rights and obligations for cooperators. A member of a society has the right to obtain services and benefits according to his or her participation in the society, to participate in the meetings of the society and to vote, to elect and to be elected, to withdraw from the society on request with payment of benefits.

In addition to the rights, these cooperator also has obligations. A member of a cooperative society is obliged to respect the bye-laws, directives and decisions of the society, and to perform those activities which ought to be performed in accordance with the bye-laws and directives of the society. He or she is also obliged to pay for a share of the capital and registration fee, to protect the common property of the society, to conserve the environment as mitigation against climate change, to promote gender equity in decision making, and to support youth participation in cooperative societies to ensure continuity (article 12 of the Act).

[22] A society other than a primary society may become a member of another society under this section if such society wishing for membership is registered with the appropriate authority.

[23] Article 14 of the Kenyan Cooperative societies Act, Revised Edition 2012 [2005].

Through the last three duties of cooperators, the legislator of East Africa shows a strong commitment to sustainable development, gender promotion, and intergenerational dialogue. This is particularly noteworthy and is not always reflected in other legislation.

Cooperators have to conserve the environment as mitigation against climate change. This assignment is also in line with the seventh cooperative principle (commitment towards the community). Cooperators have to promote gender equity in decision making. Classically, there are men and women's organizations in our communities. But a mix would reduce spending and promote economies of scale. But in this case, women should be sufficiently represented in decision-making processes, and not left behind, as is commonly the case. Cooperators have to support youth participation in cooperative societies to ensure continuity. But how can they do it? For example, by raising young people's awareness of the potential of cooperatives, by inviting them to become members, by involving them in decision-making processes, and so on. These are important values for the development of cooperatives.

Membership in a cooperative society is not final. A cooperator may decide to leave, or can be dismissed by the cooperative as the result of a punishment. According to article 13 of the Act, on the one hand, a member of a cooperative society may leave the society on his or her own initiative. On the other hand, a member may be expelled from the cooperative society by a decision of the General Assembly for failure to observe the regulation (the Act) or bye-laws. But in case of expulsion, the rights of an expelled member shall be respected in accordance with the bye-laws of the cooperative society. A person who is expelled may re-apply for membership, but the re-admission is only possible following an approval by the General Assembly (article 13 of the Act).

Financial aspects

The Act remains faithful to the internationally recognized cooperative principles, with regard to financial aspects. It specifies that at least part of the resources and funds of the cooperative constitute a common heritage that cannot be divided among the members of the cooperative. These resources include mainly the reserves.

The Act has not reserved a section to share capital as is the case in other laws. However, a combination of articles 7 and 14 makes it possible to draw the rules. The Act doesn’t require a minimum or maximum amount of share capital. Indeed, amongst other conditions of registration, the initiators must produce "documents showing the amount of the capital of the society and that the capital has been collected and deposited in a bank account, and if there is no bank in the area, that it has been deposited in a place designated by the appropriate authority" (article 7 (2-f) of the Act).

Similarly, the share capital is variable, to the extent that by decision of the General Assembly, it can be increased. This can be done on the occasion of the entry of new members, or by additional contributions of cooperators.The shares must be of the same par-value (article 14 (1 and 3) of the Act). Also, cooperatives may issue shares and sell them to non-members (investor-members) if they face a shortage of capital (article 14 (6) of the Act), having followed a membership procedure determined by the bye-laws of the society (article 14 (7) of the Act).

At the end of the financial year, cooperative societies have to deduct at least twenty percent of the net profit and allocate it for the reserve fund. The amount allocated for the reserve fund shall not exceed thirty percent of the capital of the society, and shall be deposited in the savings account of the society. The distribution of the remaining net profit shall be determined by the General Assembly, and when a member receives net profit, he or she may buy an additional share (article 31 of the Act).

The combination of these two paragraphs of section 31 of the Act makes it possible to identify a strategy to improve the finances of cooperative societies: the amount allocated for the reserve fund shall not exceed thirty percent of the capital of the society, and when a member receives net profit, he or she may buy an additional share (article 31 of the Act).

The amount of the reserve cannot exceed thirty percent of the value of the share capital. One might think that it is a stable value, depending on the number of cooperators. However, when a cooperator receives patronage refunds, he or she may subscribe for an additional share, which entails further increasing the value of the compulsory reserve.

Governance aspects

Every cooperative society must have a General Assembly, a Board of Directors and a Control Committee.

General Assembly

The supreme organ of any cooperative society shall be the General Assembly. The General Assembly is entitled to pass decisions after evaluating the general activities of the society, to approve and amend the bye-laws and internal regulations of the society, and to elect and dismiss the members of the General Assembly, control committee and when necessary members of other sub-committees.

The General Assembly is also entitled to determine the amount of shares of the society, to decide on how the annual net profit of the society is distributed, to make decisions on the audit report, and to receive work reports and give proper decision.

Finally, the General Assembly is entitled to decide upon merger and acquisition, to approve the annual work plan and budget, and to decide any issue submitted by the Board of Directors and other committees (articles 18 and 19 of the Act).

The General Assembly shall meet at least once in a year, and if the Board of Directors or one-third of the members of the General Assembly requires a meeting to be called, an emergency meeting may be held by giving 15 days prior notice. Where the Board of Directors fails to call an emergency assembly, such meeting shall be called by the appropriate authority and shall in such case be deemed to have been called by the Board of Directors (article 20 of the Act).

Board of Directors

Every cooperative society must have a Board of Directors accountable to the General Assembly. The modalities for the election of the members of the Board of Directors, including the number of members, are determined by the bye-laws. Meanwhile, there are some rules provided by the Act. First of all, the

members of the Board are elected for a term of office of three years. Secondly, members of the Board of Directors shall not be elected for more than two consecutive terms, and they may be dismissed at any time by the General Assembly. Thirdly, a member of the Board of Directors who vacates office for whatever reason shall submit for inspection, the activities the member performed during his or her term of office (article 21 of the Act).

All the same, the powers and duties of the Board of Directors shall also be determined by the bye- laws. Such power shall include some points, particularly the following : maintaining the minutes of the meetings of the society, maintaining the documents and books of accounts of the society, preparing the annual work programme and budget of the society, implementing the work programme upon approval, calling the General Assembly in accordance with the bye-laws of the society, and submitting reports to the General Assembly on the activities of the society; and (g) executing such other decisions made by the General Assembly (article 22 of the Act).

Control Committee

Every cooperative society must have a Control Committee accountable to the General Assembly. The bye-laws determine the number of members of the Control Committee. As with the Board of Directors, the term of office of the members of the Control Committee is three years, and no member of the Committee shall be elected for more than two consecutive terms (article 23 of the Act).

The Control Committee is intended to ensure that the Board of Directors carries out its responsibilities properly, to ensure that the funds and property of the society are properly utilised, to ensure that the various activities of the society are carried out pursuant to the bye-laws and the regulations of the society, and to perform other duties assigned by the General Assembly (article 24 of the Act).

Responsibility

According to article 9-2 of the Act, the powers, responsibilities and duties of management bodies have to be determined by the bye-laws. Unlike in the OHADA cooperative regulation, the legislator in the EAC has not provided a legal framework for the liability regime of cooperative leaders.

Cooperation among cooperatives

Article 5 of the Act provides that cooperative societies serve their members most effectively and strengthen the societies' movement by working together through local, national, regional and international structures. Also, a cooperative society may, according to its nature, be established at different levels as may be determined by the members.

A very interesting point is that the Act recommends that one national apex cooperative organisation is established in each Partner State. In the OHADA zone, there are usually several apex organizations in the counties, which is not likely to unify the cooperative movement. Requiring a single organization at the

national level will oblige the national actors to come and work together, especially since the cooperative movement is represented in the agency responsible for promotion and registration of cooperatives. The key roles of the national apex cooperative organisation include promoting cooperative societies, formulation and review of policy and legislation, and serving as a platform for cooperative societies at the national level.

Audit and control

Two types of audit can be distinguished: financial audit and cooperative or organizational audit.

Concerning the financial audit, the Act provides that the appropriate authority should at least once a year audit or cause to be audited by a person assigned by it, the accounts of any cooperative society. The financial audit includes the examination and verification of overdue debts if any, cash, balance, securities and assets and liabilities (article 35 of the Act).

As for the cooperative or organizational audit, it is also conducted by the appropriate authority or a person to be assigned by it. The cooperative or organizational audit concerns an inspection of the cooperative's organisation, work execution, documents and financial condition. Usually, a cooperative or organizational audit is required when a request for the inspection is made by a majority of the members of the Board of Directors, the Control Committee or General Assembly, or not less than one-third of the total number of members of the cooperative society (article 36 of the Act).

The Act requires at least a yearly financial audit but leaves the decision on a cooperative audit to members. The cooperative audit concerning the quality of management of cooperative societies cannot be deduced from the balance sheet alone (financial audit). In this way, the cooperative audit should be made mandatory for all cooperative societies, so that the appropriate authority can control their ability to respect cooperative principles.

The purpose of the audit, whether financial or organizational, is to identify managerial misconduct and provide sanctions. It may concern any person who is or was entrusted with the management of a cooperative, or who is or was an officer or an employee of a cooperative. In the course of the audit or inspection, the concerned persons can be sanctioned if they are found to have made any payment contrary to the regulations or bye-laws of the cooperative, to have caused any damage to the assets of the society by breach of trust, wilfully or negligently, or to have misappropriated the property of the cooperative society.

When someone is found responsible, the appropriate authority who receives the report must give the concerned person an opportunity to present his or her defence within fifteen days. Also, the appropriate authority shall ask the person who has been found responsible for misappropriation of the funds or property of a cooperative society to return the property or re-pay the funds with interest including compensation and damages, and where the person concerned is not willing to do so, the authority shall take the appropriate legal measures (article 37 of the Act).

The Act seems to be more focused on sanctions arising from a financial audit. With respect to the organizational audit, it could have been expected from article 38 to cite, as a cause of dissolution, non-compliance with the cooperative principles set out in the Act, or the bye-laws. Nevertheless, article 38

provides that the cooperative society may be dissolved following a court order. This presupposes that a failure to respect the cooperative principles or the bye-laws may result in a lawsuit and then provoke the dissolution of the cooperative.

Public policies and tax treatment

The main public policy concerns access to land resources for cooperatives. As mentioned above, the Act has been driven by agricultural cooperative organizations. It was the Eastern Africa Farmers' Federation (EAFF) which commissioned the study prior to the reflection on the establishment of the Act. It is therefore not surprising that agricultural cooperatives benefit from this public policy.

Article 29 of the Act provides that, without prejudice to any incentives permitted under land laws or investment laws in the Partner States, cooperative societies are entitled to access land from the Government, as an incentive for business expansion in accordance with the national policies and laws. To access land from the Government, cooperative societies shall meet some criteria. The first is related to registration and duration: the cooperative society must be registered for at least five years. Secondly, the society must have at least three years of accounts audited by an accredited audit company. Thirdly, the cooperative society must be engaged in an activity for which additional land will add value. Fourthly and finally, the cooperative society must demonstrate that it has paid patronage refunds to its members for the past three years.

As for tax treatment, the Act provides two main exemptions[24] for cooperative societies properly registered. One the one hand, there is an exemption from corporate tax, for cooperative societies whose annual income does not exceed US$ 500,000 (although individual members shall be liable to pay income tax). On the other hand, there is an exemption from value added tax, for societies whose annual income does not exceed US$ 1,000,000 (article 30 of the Act).

These tax benefits contrast with the provisions of other legislations, namely European ones[25]. Usually, tax exemptions are provided based on the cooperative's ability to respect cooperative principles, or to focus on services to its members. The Act does not rely on cooperative ethics considerations to grant exemptions, but only on annual income. Organizations could rely on this consideration to avoid paying taxes, even if they do not operate according to cooperative principles.

The cooperative audit should be strengthened to distinguish ethically responsible cooperatives and grant them tax exemptions.

Generally, taxation is a matter of sovereignty that should be the responsibility of the national authorities, with all the fluctuations that may occur, while Community law usually requires more stability. In the OHADA zone for example, the legislator has not considered the tax issue, which remains a matter for national authorities.

[24] In accordance with incentives permitted under investment laws or tax laws in the Partner States.

[25] See for example Karlshausen L. (2001) : « La fiscalité des coopératives au regard du droit européen, in Jérôme Blanc and al., *Les contributions des coopératives à une économie plurielle*, Les cahiers de l'économie sociale, 243-264.

Settlement of disputes

The Act gives priority to alternative dispute resolution. Thus, it provides for two main modes, conciliation and arbitration.

Within the framework of the conciliation, each party shall elect a reconciliation team, and the chairperson (of the reconciliation team) shall be elected in accordance with the agreement of the two parties[26]. If the parties reach agreement, then the dispute is settled. But if the dispute is not settled by conciliation, the parties shall be referred to arbitration. In fact, before going to arbitration, the parties must try to solve the dispute through conciliation (article 44 of the Act).

As for arbitration, it consists of three persons[27] of high reputation and impartiality. The arbitrators shall conduct their hearing and perform their duties in accordance with the Civil Procedure Code or similar law in the Partner State (article 45 of the Act).

The arbitrators have the power[28] to hear disputes not settled by conciliation regarding the organisation, management, or operations of the cooperative society which arise between : members or former members and members; members and representatives of former members or persons claiming in the name of the deceased members; members, former members or representatives of former members or heirs of deceased members and any officer, representative of the Board of Directors or employee of the society; the society or the Board of Directors and any former Board of Directors, any officer, agent, or employee or any former officer, agent or employee of the nominee heir, or representatives of deceased former members or employees; or the society and any other society.

V. Amalgamation, division and dissolution

Amalgamation and division

Through a special resolution, the General Assembly of a cooperative society can take the decision to form a new society. The formation of a new society, in this sense, can be done by dividing the cooperative society into two or more societies, by registering a new society, or by amalgamating itself with one or more societies.

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[26] If the two parties fail to reach agreement on election of a chairperson, the chairperson shall be elected by the appropriate authority.

[27] Each party of the dispute shall appoint one arbitrator, and the third arbitrator, who shall be the chairperson, shall be appointed by both parties. The appropriate authority shall appoint the chairperson, when the parties fail to appoint one under subsection (article 46 of the Act).

[28] The arbitrators have the same power, as a civil court, for summoning witnesses, for the production of evidence, issuing of orders or taking any legal measures. Appeals against the decisions of the arbitrators may, as the case may be, be instituted in the High Court, or court with similar powers accountable to the local government in the Partner State where the society is situated (articles 48 and 49 of the Act).

These transactions are in principle only possible between societies (cooperatives) and do not concern mutations to commercial companies. From this point of view, the Act protects the cooperative identity by respecting its peculiarities. Consequently, even if the Act does not say so, the conversion of a cooperative into a commercial company could only be effected by prior dissolution of the cooperative before the creation of the commercial company. Such an approach corresponds to the desire to preserve the specificities of cooperatives.

To become effective, the resolution on the amalgamation or division of the cooperative society has to be registered by the appropriate authority with some verification. The appropriate authority should make sure that the members and creditors that do not agree have been paid off or their payment is guaranteed. It should also make sure that the previous registration of the affected societies is cancelled as soon as the newly formed society by amalgamation or by division is registered. Finally, it should make sure that the rights and duties of the affected societies shall be transferred to the newly formed society, and that the rights and duties of a society which has lost its identity by division shall be transferred to the newly formed societies (article 10 of the Act).

Dissolution

The Act distinguishes between the causes and the procedure.

Concerning the causes, article 38 of the Act provides that a cooperative society can be dissolved where a special resolution for its dissolution is passed by the members, where the number of members of the primary society falls below ten, where a court of competent jurisdiction orders for its dissolution, or where an audit reveals that the society is bankrupt.

Whatever the cause, a cooperative society the dissolution of which is determined is supposed to notify the appropriate authority within seven days from the date of the decision for its dissolution.

With regard to the procedure, the first step is to assign a liquidator. Where the dissolution of a society is decided following one of the four above-mentioned causes, the appropriate authority may assign a liquidator, and if necessary determine that his or her remuneration be paid out of the accounts of the society. The liquidator receives records, documents and properties of the society as soon as he or she is assigned, and takes the necessary measures to protect them from damage (article 39 of the Act).

To fulfil his or her mandate, the liquidator performs a number of acts and must have powers in order to carry out his or her duties properly. For instance, the liquidator has all the necessary powers to complete the winding up proceedings especially to investigate all claims against the society and decide on the priority of payment among them, to collect the assets of the society, to distribute the assets in accordance with the plan of liquidation approved by the General Assembly of the society, to carry on the work and activities of the society in so far as may be necessary for the proper liquidation of the affairs of the society, to represent the society in legal proceedings, and to call meetings of the members as may be necessary for the proper conduct of the liquidation.

After carrying out the above-mentioned activities, the liquidator issues notices in the newspapers before the distribution of the property of the society takes place, and proceeds with the distribution where no

claim is presented within two months from the date of such notice[29]. Upon completion of the winding up of the proceedings, the liquidator prepares and submits a report to the appropriate authority, and deposits the records and documents of the cooperative society in such places as the appropriate authority may direct (article 40 of the Act).

Articles 41 and 42 of the Act explain how cooperative creditors will be notified of the dissolution proceedings and how they will be paid, and after the payment of claims has been completed or verified, that sufficient deposit for payment has been made, the liquidator may distribute the assets of the cooperative society among the members based on the amount due to each member[30]. This is the refund of shares. But the Act says nothing about the fate of cooperative funds, while article 31 states that such funds should not be distributed among members. In the OHADA law, the resource available after the reimbursement of shares is paid to another cooperative or to an entity promoting cooperative principles.

When the winding up proceedings are completed, the certificate of registration shall be returned to the appropriate authority who shall cancel the registration of the cooperative society. To this end, the cooperative society ceases to exist from the date of such cancellation (article 43 of the Act).

VI. Conclusion

At the end of this analysis of the East African Community Act governing cooperative societies, two major questions arise. The first relates to the adaptability of the Act to other forms of cooperatives, apart from agricultural cooperatives. For example, the only public policy envisaged concerns access to Government land, which is more favorable to agricultural cooperatives. The Bill was initiated by agricultural organizations, and the Act does not mention specific rules applicable to activities. Extensive research is needed to answer the question, unless the issue should be resolved by each Partner State.

The second is about the effectiveness of tax policy for cooperatives, while tax exemptions are not based on cooperatives' ability to respect cooperative principles. This should be monitored and evaluated in the medium term. Similarly, to make a connection with the first question, are the amounts indicated in the Act, for the exemption, valid for all forms of cooperatives? If so, in my view, there would be disproportionality in the sense that financial cooperatives, for example, seem more capitalized than agricultural cooperatives.

The East African community has developed an appropriate legal framework for cooperatives. The framework is appropriate insofar as the adoption procedure has taken into account, as far as possible, the opinions of all the actors concerned. The Act is modern and consistent with internationally recognized cooperative principles and values. Moreover, the context is supranational, and national authorities retain important prerogatives. National provisions not contrary to the Acts of the Community shall remain valid.

[29] To this end, no claimant shall have a right after the expiration of the two months limitation period.

[30] Indivisibility of the society's assets and funds: Except as otherwise prescribed under section 42, the society's assets and funds shall not be divided among members or among any other parties (article 32 of the Act). Article 42 deals with the payment of debts to the creditors.

Similarly, national parliamentarians are represented in the Community Parliament. The Act's entry into force appears to have been followed by awareness programs, which may lead to a favorable reception and enforceability.

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JAPANESE CO-OPERATIVE LEGISLATION: ITS CHARACTERISTICS AND THE IMPACT OF RECENT LEGAL REFORMS

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Introduction

Japan's co-operative economy has a sheer size: agricultural co-ops are the world-class organizations ranked as the largest ones in the World Cooperative Monitor while consumer co-ops have 27% of turnover and 71% of membership of their European counterparts affiliated with the EUROCOOP. But co-operatives are operating under fragmented co-operative legislation regulated by different competent ministries. There are more than 10 industry-specific co-operative laws regulated by different ministries. The competent government department's approval is required when co-operatives are incorporated, merged or liquidated. There are no legal instruments for workers' co-ops despite strong campaigning for decades. There is no common public policy and there are no official statistics on co-operatives and co-operatives have no super-structure among them. The evolution of co-operatives adapting to different socio-economic contexts and legal environments over 70 years has resulted in contrasting organizational cultures and political affiliations. The agricultural co-ops grew as the agency for implementing protectionist policy, heavily supported by the government while the consumer co-ops endured small retailers' anti-co-operative campaigns without any support from the government. The former co-operatives are top-down organizations and support the ruling conservative party while the latter societies are bottom-up organizations and often support the opposition camp. As a result, these co-operatives have little identity among them, nor recognition as a distinguished sector. The Consumer Co-operative Act was amended in a positive direction for the first time in 2007 while the Agricultural Co-operative Act was revised to dismantle their privileges in 2015. Do these legal reforms have an impact on co-operative activities and co-operative identity? This paper starts with a brief history of co-operative legislation. It will explain the institutional framework of agricultural co-operatives (Jas) and the reform of the Agricultural Co-operative Act in 2015. Then, it will do the same for consumer co-ops. Finally, it discusses the characteristics of Japanese co-operative laws in the light of the Principles of European Co-operative Law (PECOL).

1. Brief history of co-operative legislation

The Industrial Co-operative Act was enacted in 1900 by the strong initiatives of the state under the influence from German Law based on the Raiffeisen and Schulze model, although the indigenous mutual associations had already existed as the co-operative precursors in the Edo era and the first consumer co-ops were formed in Tokyo and Osaka in 1879 following the Rochdale model. Because Japan had built its legal system following the Prussian legislation based on the imperial sovereignty and the German legal advisors to the government such as Mr. Paul Mayet and Mr. Udo Eggert suggested creating Raiffeisen-style co-ops. In 1891 Mr. Yajiro Shinagawa, then Interior Minister, and Mr. Tosuke Hirata, then

Legislation Bureau chief, who both visited Germany to study the law, submitted a draft Credit Society Act but that was in vain due to the dissolution of parliament. Their continued efforts and the government's promotion resulted in the enactment of the Industrial Co-operative Act in 1900.

Therefore, the Act had paternalistic elements reflecting the top-down approach initiated by bureaucrats. The co-ops were placed under strong government control; the governor could give permission to the establishment of co-ops, order reporting at any time, make inspection, reverse the resolutions of general assemblies, order the re-election of office bearers, and suspend or dissolve societies. Accordingly, the Act had many common aspects with the Indian Co-operative Credit Societies Act of 1904 although there was major difference in that the former had not provided for the direct injection of share capital and management by the state.

The Act was the all-embracing law governing credit, marketing, supply and production (later replaced by service) co-ops. It mainly aimed to serve agricultural co-ops in rural areas but also covered credit and consumer co-ops in urban areas. During the World War II the agricultural sector was reorganized to the state body to strengthen the control of farmers aiming at increasing the food production due to deteriorating food supply. The rural industrial co-ops, farmers associations and other agricultural organizations (livestock, sericulture, and tea growers' co-ops) were integrated by the Agricultural Associations Law of 1943. With this, they became the wartime mobilization mechanism for controlling farmers with compulsory membership, losing the remnant co-operative character. On the other hand, the consumer sector was deprived of opportunities for trading basic food items such as rice by the Staple Food Control Act of 1942. The air raids on major cities had destroyed co-op facilities and driven them to the brink of collapse.

The end of the World WarII had opened a new way to the co-operative legislation; separate legislation was made under the American Occupation. This period spanned from the Japanese surrender in 1945 to the recovery of independence in 1951. In this period, the US military administration called the General Head Quarters of the Occupation Army (GHQ) ruled Japan aiming at demilitarizing Japan and transforming it to a democratic state in accordance with the Potsdam Declaration of 1945. In the political arena, it helped Japan to enact a new Constitution based on the principles of people's sovereignty, pacifism and basic human rights. The imperial system was maintained transforming from the almighty sovereign to the symbol of national unity. The Japanese army was dissolved while the bureaucracy remained untouched to ensure smooth ruling. In the economic arena, it introduced the key democratizing measures; dismantling of *Zaibatsu*[1] by the Anti-Monopoly Act of 1947, legitimating of the trade unions by the Trade Union Act of 1945 and the agrarian reform by the Land Reform Act of 1946. In the social arena, the revised Civil Code of 1947 gave the equal rights to women while family register and family-based systems in taxation and social policy were retained.

The process of co-operative legislation was a part of such overall transformation and heavily influenced by so-called New Dealers who were seeking to introduce economic democracy. The Anti-Monopoly Act (Article 24) exempted certain co-operatives from its application except for the restrictive

[1] *Zaibatsu* ("financial clique") is a Japanese term referring to industrial and financial business conglomerates in the Empire of Japan, whose influence and size allowed control over significant parts of the Japanese economy from the Meiji period until the end of World War II.

trade practices, following the example of the Capper-Volstead Act of 1922. Such co-ops should be established based on the legal provisions and meet four requirements; a) aiming at mutual benefits among small producers or consumers, b) voluntary and open membership, c) equal voting rights for each member, d) limited compensation when distributing surplus. Thus, the Anti-Monopoly Act defined the criteria for Ideal-types of co-operatives to be applied to all kinds of co-ops. The Corporation Income Tax Act of 1948 allowed all kinds of co-operatives to pay a lower tax rate although the difference of rate compared with conventional companies have been reduced from 12.3% to 4.4%.

The Agricultural Co-operative Act (ACA) was enacted in 1947 after the agrarian reform was introduced. As early as in December 1945 General MacArthur of the GHQ issued a Directive for Farmers Liberation to democratize the rural economy by liberating farmers from exploitation by landlords which had led the poverty-stricken villages to support Japan's militarism and expansionism. This objective was achieved by the drastic land reform and GHQ intended to dissolve the Agricultural Associations and establish agricultural co-ops anew based on democratic principles. The law was redrafted several times since there were the differing opinions between the GHQ and the Ministry of Agriculture and Forestry (MAF); the former insisted on separating the credit business from other businesses as in other industrialized countries while the latter persisted in maintaining the multi-purpose model. Finally, the GHQ made concession and the ACA was enacted. In the process of transformation in 1947-1948 the MAF took measures called comprehensive succession; the properties, the offices, the boards and employees of the Agricultural Associations were taken over by multi-purpose agricultural co-ops. Thus, the agricultural co-ops had inherited the basic character of the industrial co-ops as state agencies. This process resulted in farmers lacking the consciousness that they spontaneously set up their co-ops; for many of them the signboard was changed to the co-ops overnight. What is more, the MAFF continued to authorize only one multi-purpose co-op in one area on the ground the competition among many co-ops could weaken their financial basis. This measure has led to a territorial monopoly, depriving farmers of the choice. In 1948 the national federations for guidance, marketing and supply were formed and in 1954 the Central Union of Agricultural Co-ops (CUAC or *Zenchu*) was set up as the apex organization.

The Consumer Co-op Act (CCA) was enacted in 1948 when the improved food supply resulted in the collapse of so-called "food acquisition co-ops" which had been organized in the neighborhoods or workplaces to cope with the serious shortage of food just after the war. They had mushroomed culminating in more than 6,500 co-ops in 1947, out of which only one sixth could survive until 1950. The Co-operative League of Japan (CLJ) campaigned strenuously campaign for the enactment of a new law to facilitate business opportunities of rationing and wholesaling which had been severely limited to authorized enterprises under the controlled economy, consulting with the GHQ and all political parties. Dr. Grashdanchev of GHQ had given positive advice when the CLJ was drafting the law while 3 ruling parties proposed their own drafts. Finally, the Law drafted by the Ministry of Health and Welfare (MHW) was adopted at the Diet on July 5th, 1948 when a clause prohibiting the transaction with non-members was introduced by a conservative party backed by the small chemists. The CLJ was disappointed by the CCA, which had some impediments to co-operative development, and immediately started campaigning to revise theAct. The CCA abolished the Industrial Co-operative Act and prompted the reorganization of consumer co-ops. The Japanese Consumers' Co-operative Union (JCCU) was set up to succeed CLJ in 1951.

In this period, the other co-operative laws were separately enacted to serve the specific needs of the co-ops; the Fishery Co-op Act of 1948 for fishermen and the marine product industry, the Small & Medium Enterprises Co-op Act of 1949 for industrial rehabilitation of SMEs, the Credit Bank Act of 1951 for urban businesses and the Labor Bank Act of 1953 for workers welfare etc. Such separate legislation had a great impact on the co-operative organizations. It fostered co-ops to take the quite different paths, which made it difficult to conduct joint actions and formulate common strategy. The separation of regulatory bodies has contributed to such tendencies, often spurred by the sectionalism of the ministries.[2] The other problem is the legal blankness for the newly created co-ops including worker co-ops, hybrid co-ops etc.

2. Institutional framework of agricultural co-operatives

The Agricultural Co-op Act of 1947 is an organization law for regulating agricultural co-operatives (JAs).[3] It has some characteristic provisions as follows.

- Two-tiered membership

The qualification for membership of an agricultural co-op is as follows, which is to be defined in its bylaws (Art.12, Sec.1).

(i) Farmers, except corporations who usually employ 300 or more employees and with capital exceeding JPY 300 million.

(ii) The individual who has an address in the area of the agricultural cooperative or one who has continued to receive supply of the goods and services concerning its enterprise from the cooperative, and can appropriately use the cooperative facilities.

(iii) The agricultural cooperative, whose area is the same or a part of the areas of the existing agricultural cooperative.

(iv) Agricultural organization, such as the *Noji Kumiai Hojin*.

As such, membership consists of Regular member (i) who has full-fledged rights and Associate member (ii,iii,iv) who has neither voting right nor claim for distribution of surplus.

- Limitation of non-member's trade

ACA allows agricultural co-operatives to trade with non-members up to the amount of 20 percent of trade with members for the relevant business year in accordance with provisions of their bylaws. Some

[2] MAF was replaced by the Ministry of Agriculture, Forestry and Fisheries (MAFF) for the first industry co-ops while MHW was replaced by the Ministry of Health, Labor and Welfare (MHLW) for consumer co-ops. The Ministry of Finance (MOF) regulated credit and labor banks while the Ministry of International Trade and Industry (MITI, later replaced by the Ministry of Economy, Trade and Industry:METI) regulated the SME co-ops.

[3] JA stands for Japanese Agricultural co-operative. It is used as an acronym such as JA Zenchu (CUAC).

exceptions are provided; allowance of 25 percent for loans and savings, that of 100% for health care, no limits to loans for municipalities or nonprofits (Art.10, Sec.17 ff). Those who belong to the same households are treated as members. However, since JAs had largely increased non-member trade for banking and insurance activities mainly in urban areas, MAFF took the critical stance requesting them to submit annual reports including the state of non-member trade to the administrative authorities which shall grasp the state of non-member trade in the annual hearing of co-operatives.[4]

- Multiple business activities

Co-operatives can carry out only economic activity stipulated by the relevant cooperative laws. Art. 10, Sec. 1 of ACA enlist the following activities; instruction for members on agricultural management and technology improvement, provision of loans for member's enterprise and life, acceptance of member's savings and term deposits, supply of goods required for member's enterprise and life, installation of common use facilities, installation of facilities for improved efficiency of agrarian labor, reclamation of agricultural land, its sale, rent and exchange, distribution, processing, storage and marketing of goods which member produces, installation of rural industry, institution of *kyosai*[5],institution of health care, institution of elderly welfare, institution of improvement of rural life and culture, making agreement for improvement of member's economic status, and activities which accompanies the above. As such, ACA provides for a wide range of activities to be undertaken by agricultural co-operatives.[6] The multi-purpose co-operatives can carry out all these activities while the single-purpose co-operatives are specialized in one of these activities (i.e. dairy co-operatives, citrus fruit co-operatives etc). The former is a dominant form and carries out banking and insurance businesses while federations for financial activities are not allowed to be engaged in other activities (Art 10, Section 23 and 24). Such combination of financial and other activities brought a bulky and complicated structure to ACA as a result of incorporating regulations pertaining to these businesses. In fact a large number of provisions in Banking Act, Financial Instruments and Exchange Act, Insurance Business Act shall apply mutatis mutandis to the ACA. In this regard, the organizational law incorporates business laws. In addition, such special arrangement that allows cooperatives to carry both economic (supply, marketing and others) and financial activities has been often criticized by financial industries that are given licenses and strictly regulated by the Financial Services Agency (FSA).[7] Now agricultural cooperative's banking activity is subject of special audits by the FSA.

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[4] It is based on "General Guidelines for Supervision aiming at Agricultural Cooperatives etc" published by the MAFF in August 2012 and backed by order for collecting information (Art.93, Sec.1, ACA).

[5] *Kyosai* literally means mutual aid but can be used in a variety of ways. There is a consensus in that *Kyosai*in cooperative laws means co-operative insurance that is used in the English translation of those cooperatives undertaking *Kyosai* activity.

[6] There are other activities stipulated by other special laws for agricultural warehouses, land leasing and commissioned businesses.

[7] Art.4 of Banking Act reads "No Banking Business may be conducted without having obtained a license from the Prime Minister." Insurance Business Act allows Stock Company and Mutual Company to carry on insurance business under thelicense of the Prime Minister prescribed in Art. 3, para. 1.

- Incorporation by competent administration's approval

Co-operatives are incorporated upon the approval of the administrative authorities[8] that must approve the establishment of organizations within two months after filing the application except for some cases. The exception includes the legal violation in the procedure of establishment and the contents of bylaws or the business plan, the lack of necessary managerial basis, and the overlapping area with that of other cooperative, in which the administrative authorities have to consult with concerned municipalities and prefectural cooperative unions before approving (Art 60, ACA). Such a limitation in establishing a new cooperative in the overlapping area is often criticized as infringing the freedom of association.

Co-operatives are subject to public supervision by the administrative authorities. The ACA provides for a wide range of supervising measures including collection of reports, inspection, order of dissolution, measures against violation of laws and ordinances, revocation of decisions at the general assembly but does not provide for public auditing. Since JAs are engaged in a wide range of financial activities, they are subject to much more inspections compared with consumer co-ops. In 2011, a guideline pertaining to the implementation of inspection on financial activities was jointly published by the MAFF and the FSA. The tripartite joint inspection by Prefectures, the MAFF and the FSA is being conducted on banking and insurance activities of JAs in accordance with these guidelines since 2011.

- Central union's strong functions

The provisions on JA Zenchu (national central union) and JA Kenchu (prefectural central unions) were introduced by the amended ACA in 1954. They have been exclusively designated by central and prefectural governments and have compulsory membership of JAs and federations.[9]JAZenchu can publish model bylaws that bind outsiders as well. It can make proposition on co-op-related matters to the government. Zenchu(National Audit Organization) can conduct compulsory auditing of JAs.Kenchu could make territorial coordination within a prefecture when new co-ops are established.[10]

In addition to the ACA, other laws have given impacts on JA's evolution by facilitating its reorganization and business operations.

- Special laws to rescue ailing co-ops and promote mergers among agricultural co-ops

After the enactment of the ACA, agricultural co-ops faced serious financial problems because of small size, shortage of share capital, inherited debts and lack of management skill. The situation was worsened when the austerity policy was introduced to stop hyperinflation by the GHQ (Dodge lines) in 1949 and the Japanese economy fell into depression. In 1950, 43% of co-ops were in the red while 1,054 co-ops stopped/limited the reimbursement of member's deposits. Based on the request from central organizations

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8 The administrative authorities shall mean the Minister of Agriculture, Forestry and Fisheries (and the Prime Minister delegating to the FSA Commissioner for inspection of banking activity) with respect to central unions of agricultural cooperatives, agricultural cooperatives, their federations and so on having for their area of activity exceeding the sphere of a prefecture, and federations having a prefecture for their sphere of activity, and the prefectural governor with respect to other co-operatives (Art. 98, ACA).

9 JA Zenchu was privatized and transformed to a special civil corporation in 2002.

10 It was intended to avoid competition among primaries.This function was removed in 2013.

of agricultural co-ops, the Agricultural, Forestry and Fishery Co-ops' Reconstruction and Readjustment Act was introduced to rescue ailing co-ops in 1951. This law requested co-ops to set up 5-year plans to comply with financial standards through raising share capital and liquidating inventories while they could get public loans. 2,480 co-ops and 142 federations were designated by the Act when their accumulated loss was JPY12.3 billion while their equity capital was JPY3.4 billion. The primary co-ops made progress in the reconstruction while federations were still in bad shape. Therefore, the Agricultural, Forestry and Fishery Co-op Federations' Reconstruction and Readjustment Act was introduced to cover most of the federations in 1953. The federations not only got the reduction of interest payable to the Norinchukin Bank but also received public subsidies and tax concessions. They quickly recovered thanks to these special measures, but that resulted in strengthened public intervention in the agricultural co-ops and had long lasting effects to the co-ops' autonomy and independence.

The Agricultural Basic Act passed in 1961 provided for the principles and measures of agricultural policy aiming to enhance labor productivity and farmers' income, and change the structure of agriculture. As a part of this policy, the Act for Promoting Mergers among Agricultural Co-ops was introduced to accelerate the mergers. JAs were given subsidies for building facilities and tax concessions. This Act was extended several times and JAs adopted the policy of promoting mergers. Accordingly, the number of JAs was halved from 12,221 to 6,185 in the 1960s. It has reduced to 654 as of 2017 compared to 1,718 municipalities.

- Foodstuff Control Act of 1942

The Foodstuff Control Act was passed in 1942 to control the production and distribution of staples such as riceand wheat under the wartime economy, in which they were wholly collected and rationed to cope with the severe shortage of food during and immediately after the war. This system had provided for the institutional framework of controlling price and quantity of staple food as well as the distribution channel. The government bought all the crops in the initial stage, decided prices and margins for buying, wholesaling and retailing and controlled the entire international trade. The distribution channel was fixed to a singular line from farmers to consumers, leaving no room for choice. Agricultural co-ops were assigned as sole collecting agents; from primary co-ops to provincial federations and national federation (Zen-noh). Only licensed wholesalers or retailers could deal with staples. When the urgent food crisis was overcome, and oversupply became the major problem after 1960's, the dual pricing system (higher producer price and lower consumer price) accumulated negative margins to be compensated by tax, the system was modified to introduce e a larger role for the market mechanism, but the basic idea was not changed.

This system has brought some significant effects to agricultural co-operatives. First, farmers pressed the government to raise rice price beyond equilibrium while the higher price stimulated the overproduction. From the 1960's onwards, co-operatives strongly mobilized farmers in a rice price campaign in parallel with trade unions' drive for higher wages since but they soon had to co-operate with the government's program of cutting back the acreage under cultivation. Secondly, the raised price helped marginal farmers who might otherwise have exited, to stay in unprofitable farming. They were employed in factories and other businesses to earn a living and constitute a bulk of co-operative membership. They were concerned with multiple services provided by co-ops, rather than competitive marketing capacity. Thirdly, JAs were designated as sole agents for collecting stable food and almost became a monopoly in

collecting government controlled rice with nearly 30% of wholesalers. They could automatically earn handling charges and deepened dependence on rice distribution as a mainstay of marketing business. Zen-noh exerted decisive power in maintaining a higher price in the quasi market for rice price. As such co-operatives contributed to the continued existence of food control system for more than 50 years. This law has been modified step by step since the 1980s and was finally replaced by the Staple Food Act in 1995. That introduced deregulation measures for distribution channels.

- Agricultural Land Act of 1946

The Agrarian reform created numerous small-holders to be protected by JA's. The Agricultural Land Law was enacted in 1952 to protect owner farmers by placing various restrictions on the transfer of land; restricting a lot's space for ownership, prohibiting absentee landlords, controlling rents for tenants and requiring permission to cancel leasing contracts. It also confined farmland ownership to farmers and did not allow corporations to enter. These restrictions contributed to maintaining small scale land ownership while hampering the expansion of a farm's scale through concentration of land use and/or ownership to entrepreneurial farmers. In addition, rapid economic growth triggered skyrocketing land prices with the effect of preventing farmers from buying at an earnings discounted price. Farmers in suburban areas could become upstart millionaires by selling land after getting permission for conversion from cultivation to the other development purposes. Since the cost of ownership for farmland was very low in terms of property and inheritance tax, farmers chose to retain land expecting a huge gain in the future. These factors have contributed to delaying any concentration of land in the hands of viable farmers and to the retention of part-time farmers. The law was amended several times but could not reverse that trend. Agricultural co-ops pursued an egalitarian approach and tended to maintain the current structure based on owner farmers, reflecting the interests of part-time farmers as against entrepreneurial farmers, and preventing new entries from non-agricultural sectors, especially joint stock companies. Thus, it can be said they have contributed the maintenance of the status quo in land ownership.

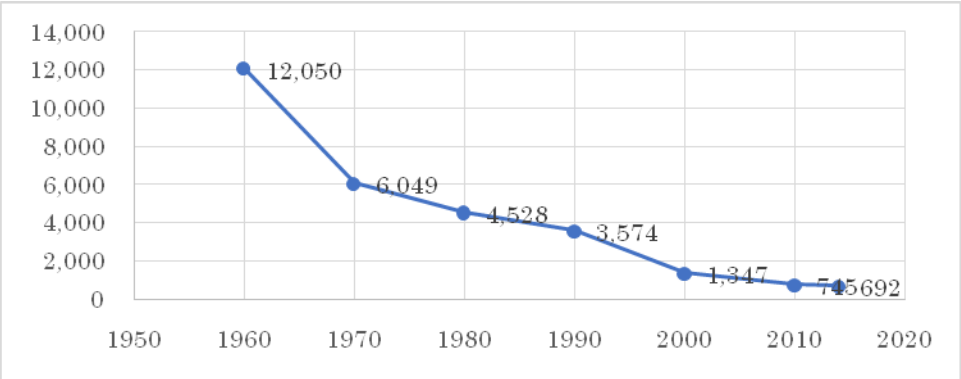
As a result, the land ownership remained small (on average 1.5 hectare per farm), which largely inhibited rationalization and mechanization. While farmer's overall standard of living has been enhanced thanks to out-of-agriculture incomes and their income surpassed worker's income in 1970, the productivity of agriculture was not improved as expected by the Agriculture Basic Law of 1961. The diversified diet of consumers accompanied with a westernized lifestyle resulted in the sharp increase of importation of food and fodder. As a result, the food self-sufficiency rate on a calorie base has dropped substantially from 79% in 1960 to 40% in 2000.

Under such an institutional framework, JAs have made a dramatic growth based on homogenous membership with small land ownership (0.5 hectare on average). The number of JAs has reduced from 4,528 to 703 in1980-2013 through mergers (Figure 1). The associate members rapidly grew and outnumbered full members in 2009 and the gap is widening (Figure 2). In each area of business, the national and provincial federations were set up and they were affiliated with the national and provincial unions. Thus, JA group developed the three-tier hierarchical agricultural co-operative system called *keitou* in line with the administrative system (state, prefectures and municipalities).

However, JAs have faced intensified competition since the 1980s. The globalized economy forced them to lower the price of produce while the deregulation of agricultural policies obliged them to compete

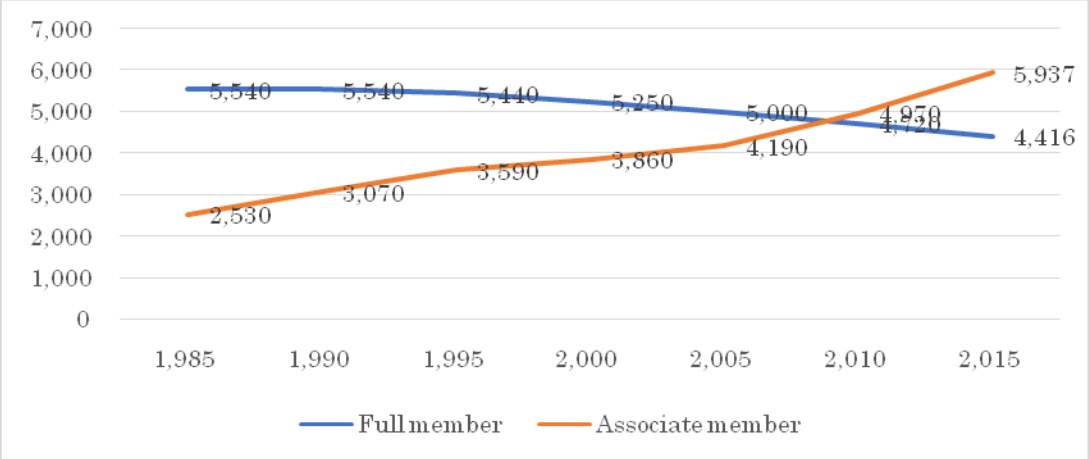
with for-profit firms. The member's business became heterogenous in terms of size/scope while large farmers requested the lower price of inputs and the higher margin of produce. To cope with such a situation, the vertical integration from three tiers to two tiers has been carried outsince the 1990's with mixed speeds. Zenkyoren (National Mutual Insurance Federation of Agricultural Co-ops) integrated all prefectural federations in 2000. Zen-noh (National Federation of Agricultural Co-ops) integrated 35 prefectural federations out of 47 while Norinchukin Bank (Central Bank for Agriculture and Forestry) integrated 10 prefectural federations. The supply, marketing and insurance businesses have been declining while banking business is still maintaining deposits and loans. The losses generated in supply and marketing businesses have been offset by profits earned by banking and insurance businesses (Figure 3).

Figure 1Mergers reducing number of JAs



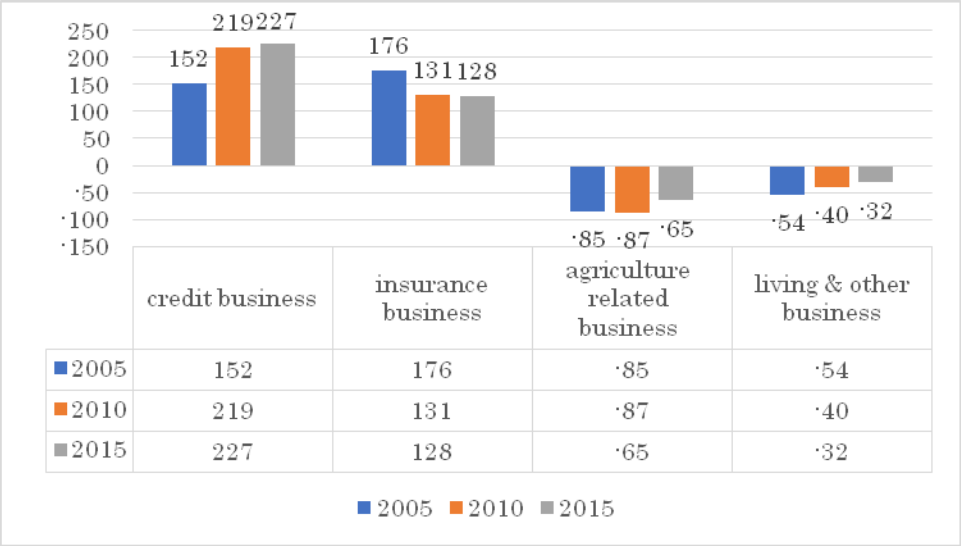
Source: MAFF's statistics on agricultural co-ops

Figure 2Associate members outnumber full members (in thousands)



Source: MAFF's statistics on agricultural co-ops

Figure 3. JA'sprofit and loss (JPY billion)



	credit business	insurance business	agriculture related business	living & other business
2005	152	176	-85	-54
2010	219	131	-87	-40
2015	227	128	-65	-32

Source: MAFF's statistics on agricultural co-ops

3. Reform of Agricultural Co-operative Act in 2015

The JA group has evolved into a complex group of organizations with multiple dimensions. It has a dominant economic force offering a variety of goods and services. It has been a major employer in rural areas and provides the basic infrastructure for rural population ranging from supply/marketing for farms, banking and insurance to health/elderly care, funeral services, land development and housing, travel, culture, media and so on. It has functioned as a MAFF's agent for implementing agricultural policies on pricing of produce, crop collection and distribution, production ramp-up and ramp-down in accordance with priorities of the time. To influence government policies on agriculture, it has grown to a strong lobby and pressure group with rural voters supporting the ruling Liberal Democratic Party (LDP).[11]

However, JA's identity has been questioned; is it a professional co-op for farmer's interests or a territorial co-op serving to wider rural population? JAs in large cities function as a financial institution rather than agribusiness since associate members largely outnumber full members while JAs in rural areas function as infrastructure serving all kinds of population's needs. They increasingly became the subject of criticisms by academic circles and media. The corporatist structure through 'agricultural policy triangle' made of JAZenchu, MAFF and Member of Parliaments (LDP) was criticized as a protectionist coalition hampering the Free Trade Agreement negotiations and the innovation for competitive agriculture. Zenchu's function of compulsory auditing and consulting was incompatible and gave detrimental effects

[11] Leading agronomists described JA's characteristics as the combination of triple natures of state's agent, pressure group and co-op per se (Prof. Fujitani), the institutionalized co-ops with all farmer's affiliation, *keitou*system and multi-purpose business (Prof. Otawara) or the co-ops typical in developing counties (Prof. Ishida).

to primary co-op's entrepreneurial drive. JA's expansion of non-member trade and associate members was also criticized. JA's characteristics as multi-purpose co-ops conducting both economic and financial businesses have been questioned since other financial institutions are not allowed to conduct non-financial business. Such criticisms have been intensified whenever JAs opposed trade liberalization of farm products and culminated when they led the campaign against the Trans-Pacific Partnership (TPP) in recent years. Now the traditional coalition is shaken under the Abe administration.

The Cabinet Office's Council for Regulatory Reform's proposed the radical reform of JAs in May 2014 for dismantling of JA Zenchu, demutualizing of JA Zen-noh, separation of financial business from other businesses and limiting associate member's use. The government proposal for the ACA reform was announced in June 2014. JA group made a strong reaction against imposed reform and organized nation-wide campaigns. The other co-operatives expressed opposition to such a move while the ICA published a press release expressing major concern in October. Finally, JA Zenchu agreed to the ACA reforms in February 2015 and the amended ACA passed the Diet in September 2015.

The ACA included the following amendments;

- Transformation of JA Zenchu to a general incorporated association from 2019

Zenchu shall be transformed to a purely private organization such as the Japan Federation of Economic Organizations or other trade associations based on specific industries or professions. Kenchu shall be transformed into prefectural co-op federations.

- Separation of auditing function from JAZenchu

JA group's auditing firm will be established succeeding to the functions of Zenchu's National Audit Organization. JAs with deposits exceeding JPY 20 billion will have to be audited by either the newly created auditing firm or other auditing firms after 2019.

- Facilitating changes of corporate status

JAs can separate organizations and transform into Public Limited Companies (PLCs), consumer co-ops or social medical corporations. Zen-noh and economic federations can be transformed to PLCs.

- Purpose of organizations

In addition to "making the utmost services for members", "paying maximum attention to the increased farming income" was added. The not-for-profit provision was removed.

- Composition of board to strengthen its capacity

A majority of JA's board needs to be entrepreneurial recognized farmers and/or those who have practical capacity in agricultural marketing, corporate management and so on.

- Limiting use of associate members

It was not included in this amendment but needs to be reexamined in 2019.

4. Institutional framework of consumer co-operatives

The Consumer Co-op Act of 1948 is an organization law for regulating consumer co-operatives. It has the following characteristic provisions:

- Membership

The qualification for membership in a consumer cooperative shall be determined by the bylaw applicable to the following persons (Art.14, Sec.1).

(i) Persons who have residence in the fixed area in the case of community-based co-ops.

(ii) Persons who are engaged in the occupation in the case of work place co-ops.

Sec. 2 In case of the co-operative by area, persons whose place of employment falls within the area of the co-operative and who have reasonable needs to utilize its facilities.

Sec.3. In case of the co-operative by occupation, persons who, living in the neighborhood of the place of occupation, have reasonable needs to utilize its facilities and who had worked in the place of occupation.

Sec.4. Students in case of the co-operative in universities and schools.

As such only user-members are allowed while there exist no corporate members in the primary co-operative. Employees working in the area of co-ops and students can become members of consumer co-ops, thus enabling multi-stakeholder membership.

- Prohibition of non-member trade

CCA completely prohibits consumer co-operatives to trade with non-members, which have had long-standing effects on the evolution of cooperatives (Art. 12). Co-operatives had been attacked by the retailer association's persistent anti-cooperative campaigns, which led to the enactment of Special Retail Measures Law in 1959 that brought further restrictions to non-member trade and introduction of the clause of coordination with the Ministry of International Trade and Industry (MITI) regarding to the interests of small retailers. The Ministry of Health and Welfare (MHW) conducted administrative inspections from time to time to gauge the extent of non-member trade.[12] Thereafter cooperatives had to fight back right up until the last anti-cooperative campaign was staged in 1986, when the stance of the government's commercial policy shifted to pro-competition.

- Limitation of operating area within prefectures

The other peculiarity is the limitation of area of activity within a prefecture. The co-operative shall not be established covering a wider area than that of a prefecture, except in case of the co-operative by occupation under inevitable circumstances and of the co-operative federations. (Art. 5) The restriction onco-operative operating area has often prevented co-operatives from serving consumers who live in their catchments areas, but have home addresses registered in another prefecture. This restriction has proved to be anachronistic as the economy has expanded to a global scale and to cyberspace. Under such circumstances, co-operatives had to adopt a strategy of establishing regional federations (consortia) in the

[12] The final administrative inspection was conducted by the Management and Coordination Agency in 1991.

1990s aiming at enhanced economies of scale.This solution bypassed the restriction, and prevailed throughout the country[13].

- Limited area of business

Art.10, Sec.1 of CCA confines activities that consumer co-op can undertake; to purchase and to supply materials needed by the members for their daily life, activity to establish useful common facilities for its members, activity to improve the mode of living and elevate the standards of culture for its members, activity to operate *kyosai*(insurance) on the lives of its members, activity to improve knowledge of its members and employees concerning a co-operative, activity concerning health care for its members, activity concerning to welfare for elderly, handicapped etc., activities incidental to the accomplishment of each of the preceding items. Consumer co-operatives have not been allowed to undertake banking activity despite their strong requests since the inception of CCA[14] They are allowed to provide only small loans for livelihood expenses provided they have bylaws and rules approved by the competent authorities and observe the regulations set by Moneylending Control Act. A large number of provisions in Insurance Business Act apply mutatis mutandis to the CCA.

- Incorporation by competent administration's approval

Co-operatives are incorporated upon the approval of the administrative authorities[15] that must approve the establishment of organizations within two months after filing the application except for some cases. The exception includes the non-fulfilment of requirements prescribed in each item of Art. 2, Sec. 1, the legal violation in the procedure of establishment and the contents of bylaws or the business plan, the lack of necessary managerial basis, but there is no provision on limitation in the overlapping area (Art.58). Therefore, the area of consumer co-operatives is often overlapping especially in the large cities where some co-ops with different orientations are competing with each other. Co-ops are also prohibited from making use of co-ops for specific political parties (Art. 2, Sec.2).

Other laws have been impacting consumer co-ops' activities.

- Foodstuff Control Act of 1942

Consumer co-ops could not have retail license for rice under the Foodstuff Control Act. During and after the Second World War, co-ops had petitioned to get retail license for rationing rice and other basic commodities but in vain. So, they had to pay a high rent to licensed retailers to sell rice as tenants. This law was modified step by step since 1980s and finally replaced by the Staple Food Act in 1995 introducing deregulation measures for distribution channels. Consumer co-ops could take part to rice retailing after registering to the competent administration. They were also excluded from retail licenses of liquors since bottle shops have prevented new entries by pressing tax authorities not to grant new licenses.

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[13] More than 90 percent of cooperatives' turnover is concentrated in consortia and mega cooperatives.

[14] Agricultural, fisheries and credit cooperatives can provide loans and accept savings while business cooperatives can only lend loans.

[15] The administrative authorities shall mean the Minister of Health, Labor and Welfare with respect to consumer cooperatives having for their sphere of activity, by area or by occupation, which exceeds the sphere of a prefecture, and the prefectural governor with respect to other cooperatives.(Art. 97, CCA)

Since liquor retailers' associations have been so strong that they succeeded in blocking deregulation until recently. It was only in the late 1990s that liquor retailing was liberalized.

- Large-scale Retail Store Act of 1973

The retail industry has been a safety valve for unemployment and there had been always a pressure of small retailers to curve competition by forming cartels or lobbying to protect their interests against modernized large-scale retailers. They had exercised the strong political voice to the ruling party as they had votes and money to push their protectionist stance in formulating commercial policies. Thus, the Department Store Act was enacted to require the government's permission for store opening, operating dates/hours and so on in 1937. It was once abolished in 1947 but revived under strong pressure from retailers in 1956. This new law was replaced by Large-scale Retail Store Act in 1973 to include fast growing supermarkets within the regulatory framework, which required developers to undergo the prior examination by Commissions for Adjusting Retail Activities before filing notice to open new stores with selling floor exceeding 1,500 ㎡ (3,000㎡ for megalopolis). It also required large stores to conform to various restrictions on operating hours per day and a minimum number of closing days per month. This law was further amended in 1978 to strengthen restrictions. Consumer co-ops were also subject to the similar regulations published by the ministry. These regulations have delayed modernization in retailing but could not reverse the decline of independent small retailers despite subsidies and low-interest loans.

The public commercial policy shifted its basic stance from protectionist to pro-competition in late eighties. It is partly due to foreign pressure for market liberalization on the pretext of enhancing consumer's choice but also due to the increasing concerns for environment. The regulations set by the Large-scale Retail Store Act has been gradually eased since 1987 and finally replaced by the Large-scale Retail Store Site Act in 1998. This new law abandoned the idea of adjusting supply and demand of selling floor in favor of small retailers but introduced a new regulatory framework concerning to environmental impacts of large stores in terms of noise, traffic and garbage disposal. It is applied to all enterprises regardless of organizational forms. Co-operatives are also subject to the same regulations and facing the stiffer competition although they are not placed in the level playing field.

- Discriminating tax rate

The large-scale co-ops are taxed at higher rate compared with other co-ops since 1988. This measure was introduced by the Act on Special Measures concerning Taxation. The co-operatives with more than 500,000 members and revenue of more than JPY 100 billion are subject to higher rate of Corporation Income Tax. Only the large-scale consumer co-ops were targeted since no other entities had such a size.

Adapting to the institutional framework, consumer co-ops developed the specific organizational culture of strong self-reliance and adherence to membership. For example, co-op had to display in-store signboards stating, "This co-op store caters to members only. Please make use of the store after joining the co-op" to comply with legal requirements prohibiting non-member's use. Complying with the law entailed adopting a strategy of enrolling all customers as co-op members and conducting member recruiting drives every year, which contributed to the rapid expansion of ther membership, thus turning a handicap to their advantage. Co-ops learned to rely on members' patronage and members' capital investment. They promoted various ways to involve members in the administration through *Han* groups, district committees

and consumer panels in addition to the legally required AGM. Thus, they have developed a Japanese model of member participation based on the identity principle. Co-op's adherence to membership has resulted in an independent and self-sustained organizational culture.

At the same time, the containment of mutual interests among its members might have curtailed co-op's potential in the society at large, thus leading to a closed or complacent organizational culture. Co-ops could only grow by mobilizing internal resources derived from members while they were not very active in marketing to consumers at large nor in promoting their values to opinion leaders. In addition, some co-ops were closely associated with the left-wing opposition parties while only a limited number of co-ops maintained contacts with the conservative ruling party. Although co-ops have now grown to be the single largest consumer organization, involving 40% of all households in Japan, their influence in Japanese society at large had been limited.

5. Reform of Consumer Co-operative Act in 2007

The CCA was amended in 2007. It was an epoch-making event in that no substantial amendments have been made since this Act was originally enacted in 1948. The historical changes in the socio-economic environment and the unprecedented growth of consumer co-ops in these 60 years revealed a great discrepancy between the premises of the Act and the reality of consumer co-ops to an intolerable extent. The Japanese Consumer Co-operative Union (JCCU), therefore, took the initiative requesting the overhaul of the CCA.

Several factors were attributable to the major amendment. The most explicit factor was the overall deregulation and competition prompted by globalization. The changing stance of the government's commercial policy and the increasing pressure from the US resulted in easing the regulation of the Large-scale Retail Store Act in the 1990s, and finally replacing it with the Large-scale Retail Store Site Act in 1998. This new law focused on the environmental impact of retail development such as noise, traffic jams and waste management. In 2006 the legislation for retail planning was amended to curtail the excessive development of out-of-town shopping centers and activate inner cities that were hollowing-out. This move wasgenerally welcomed by retailer's associations and municipalities, although it was criticized by major retail chain stores as a serious setback.

There has been a change in retailer's attitude to the CCA. After the Second World War, the overall number of retailers continued to increase until the early 1980s while it declined from 2.2 million to 1.6 million in 1982-2004. This period was characterized by the growing market share of big chain stores, but independent retailer's reactions to large stores were more diverging; some retailers were against the opening of mega stores, while others opposed to the withdrawal of the latter. While the JapanChamber of Commerce and Industry (Nissho) had been a staunch anti-co-operative campaigner in past decades, it took more neutral stance on the amendment of the CCA.

Another factor that directly affected was the growing pressure from insurance companies, that complained of their market share being taken by co-operative insurance (*Kyosai*) and insisted that *Kyosai* should be subject to the same kind of regulation by the financial authorities. The pressure increased as

foreign insurance companies joined this claim that *Kyosai* should be placed on a level playing field. Accordingly, the ACA and the SME Co-operative Act were amended in 2004-2006, while the Insurance Business Act was amended to outlaw non-institutional *Kyosai* in 2005. The Life Insurance Association, the General Insurance Association and the American Chamber of Commerce in Japan (ACCJ) requested toamend the CCA in the same way.

At the same time, a number of governance problems in consumer co-ops surfaced in the late 1990s. The manipulation of accounts by the CEO of Co-op Sapporo, the second largest co-op, brought this co-op to the brink of bankruptcy, while the unethical behavior of top management was revealed by whistle-blowers in Osaka Isumi Co-op, then ninth largest co-op. Co-op Saga was criticized as disguising the regular beef as a top brand. Some co-ops also experienced financial crises or went bankrupt due to mismanagement. These events led to the urgent need to make thorough overhaul of co-operative governance.

The amendment covered three areas. In the first area regarding the business operations of consumer co-ops, the strict rules were relaxed to some extent. For example, the legal business operating area, which had been restricted to within a single prefecture, was extended to adjoining prefectures when necessary for implementing retail business. This would enable co-ops to make inter-prefectural mergers to enhance the economy of scale and solve the governance problems associated with dual board structure in co-op consortiums. The framework prohibiting non-member trade was maintained; the business of consumer co-ops remained unavailable for non-members. However, regulations were eased to some extent and exceptional cases were enlisted. Those cases that do not require government permission are shown in the table below, while the extent of non-member trade was stipulated.

Non-member tradeallowed in consumer co-ops

Government permission	Cases in which non-member trade are allowed	Extent to be allowed
Not required	Statutory car insurance for compensation	Unlimited
	Goods supplies in case of emergency	Unlimited
	Sales of monopolies	Unlimited
	Use of gymnastic and cultural facilities	Unlimited
	Business commissioned by governments	Unlimited

	Health and social care business	100% of MP
	Sales to institutions where co-op operates	20% of MP
Required	Goods supplied to remote areas	20% of MP
	Meals supplied to day care and nursing homes	20% of MP
	Goods supplied between co-ops	20% of MP

MP: Member's patronage

The health and social care businesses were clearly stated in the Act as part of consumer co-op's businesses. Co-ops are requested to maintain and provide separate accounts from other businesses and observe non-distribution constraint of surpluses generated in these businesses on the ground they are financed by tax and social insurance fees. The financial loan businesses were incorporated into the scope of businesses, which consumer co-ops can conduct under the condition of complying with regulations of the Moneylending Control Act. This was introduced to enable co-ops to offer micro-loans to support social entrepreneurs and help solve problems of heavy indebtedness.

The second area addresses the rules concerning governance of consumer co-ops. The original CCA of 1948 presupposed to deal with small organizations involving hundreds of members in line with the Civil Code, but some provisions became apparently unfit to govern the contemporary large-scale organizations with considerably large memberships. Therefore, provisions were introduced to improve co-op's governance corresponding to those of the Commercial Code. The newly introduced provisions on co-operative governance relate to the intensified competence of the board of directors; stipulation of the board of directors and the board chairs as statutory bodies, decision on maximum loan amount, standing orders for the board proceeding, methods of election, remuneration and compensation, the term of office, qualification, responsibilities of board members. Provisions for intensified functions of auditors; obligatory full-time auditors in larger co-ops with debts exceeding JPY 20 billion, investigation of proposed agenda to the AGM, a claim for suspending board member's misconducts, independence of auditors. Provisions for individual member's rights; a claim for inspecting books, a legal claim for invalidating AGM's resolutions or requesting suspension of a board's action, right of a member's derivative action. Provisions for disclosure and the third-party commitment; enlarged external directors from one fifth to one third, obligatory external auditors in larger co-ops, procedures disclosing books and minutes. Provisions for supervision by competent government bodies; orders for the removal of directors or enlarging the scope for mandatory liquidation of co-operative societies.

The third area includes provisions regarding insurance businesses referred to the Insurance Business Act. They aim to increase the soundness and transparency of management while maintaining the Ministry's regulatory framework. The newly introduced provisions on co-op's insurance business prohibited running other businesses in the co-op federations and primary co-ops whose insured amount exceeds JPY 1 million or whose premium income exceeds JPY 1 billion. Provisions to ensure financial stability; minimum share capital, obligatory buildup of reserves, appointment of actuaries, level of solvency margins, early correcting measures, obligatory external auditing. Provisions for protection of policy-holders and increased transparency; obligatory disclosure of management information, prohibition of improper conducts on recruiting, change of contract terms and transfer of engagement in case of bankruptcy, regulations on agents.

6. New legislation's impact to the co-operative identity

In relation to the amendment of the ACA for reforming agricultural co-ops, changes are taking place. JA Zenchuis is coordinating to implement the reform agenda towards the deadline of September 2019, including its own transformation and creation of auditing firm. Zen-noh is requested to lower the agricultural input's price to help farmers while Norinchukin Bank isabsorbing some JAs' credit businessbut many things are still in the pipeline. Mr. Okuno was elected as new president of JA Zenchu in 2015 andtook a reformist stance. He had close dialogue with Mr. Okuhara of MAFF and Mr. Koizumi of LDP but looks like deepening dependence upon the latter rather than intensifying autonomy and independence. In the election of Zenchu's president in July 2017, the candidate whom Okuno supported was defeated by Mr. Nakaie who had the traditional stance but admitted the necessity of the reforms. Therefore, it is too early to make a judgement on the JA group's future.

In relation to the amendment of the CCA for modernizing regulations, some changes took place. Co-ops conducting insurance and other businesses were obliged to maintain separate organizations. Accordingly, the Japanese Co-op Insurance Federation (JCIF) was set up by the JCCU, Zenrosai, 3 regional consortiums and 157 primary co-ops in October 2008. It started operation in March 2009 taking over the insurance businesses transferred from affiliated co-ops. Co-operative groups such as Pal System and Seikatsu Club also created their own insurance co-op federations. The Japanese Health and Welfare Co-operative Federation (HeW CO-OP JAPAN) was established separating from the JCCU in 2010. Based on the provisions on the establishment of regional co-ops covering adjacent prefectures, some mega consumer co-ops were set up. In 2011, Co-opKobe absorbed its sister societyOsaka Kita Co-op and had a membership of 1.68 million. In 2013, Co-op Tokyo, Saitama Co-op and Chiba Co-op merged to Co-op Mirai with 3 million members while Co-op Kanagawa, Co-op Shizuoka and Yamanashi Co-op joined to set up U Co-op with 1.76 million members.

As far as the co-operation among co-operatives is concerned, the International Year of Co-operatives (IYC) could not generate a tangible impact in Japan. In 2010, all the co-op organizations joined to organize the Japan National Planning Committee for IYC that submitted "a Co-operative Charter" seeking for the recognition of co-operatives to the government which gave no response. However, the liaison committees were set up or revived in many prefectures and national federations' leaders started the discussion on the possibility of creating an umbrella organization representing the Japanese co-ops.

7. Japanese co-operative laws in the light of PECOL

As described above, the Japanese co-operative legislation had modeled after the German law but evolved to quite country-specific laws. Co-operatives are required to seek government approval for incorporation, merger and liquidation and are placed under the strong supervision of competent ministries. In this regard, the Japanese legislation retain some elements of that of developing countries.

However, PECOL provides useful points of reference to the Japanese co-op laws. The Section 1.1 (Definition and objectives of co-operatives) makes distinction between "mutual co-ops" mainly pursuing the interest of their members and "general interest co-ops" mainly pursuing the general interest of the community. In the Japanese laws, JA *Koseiren* (agricultural co-operative federation for health care) falls in the latter since it is designated as a public medical institution under the Medical Services Act. It is not allowed to distribute dividends nor residual assets. In case of health co-ops regulated by the CCA, they are not allowed pay dividends.

The Section 1.5 (Non-member co-operative transactions) provides that mutual co-operatives may engage in non-member co-operative transactions unless their statutes provide otherwise and they shall keep a separate account of such transactions. In that case, profits from non-member transactions shall be allocated to indivisible reserves. In this regard, the Japanese law's prohibition of non-member transactions needs to be reconsidered.

The Section 3.8 (Liquidation) provides that in case of liquidation of a co-operative, members shall be entitled only to recover the nominal value of their shares and their portion of divisible reserves as provided in the co-operative statutes, while residual net assets shall be distributed in accordance with the principle of disinterested distribution. In the Japanese laws, it is not banned to distribute residual assets (divisible reserves) but in most cases restrained by the provisions of bylaws.

The Section 4.3 (Auditing entity and auditors) provides that the auditing entity is the entity in charge of the co-operative audit, which conducts it through independent auditors specifically qualified for co-operative audit according to minimum standards established by the law andmay be the state, another public authority, unions or federations of co-operatives or other private entities recognized by the state according to minimum requirements established by the law. In the ACA, audit function is being separated from the JA Zenchu (Central Union of Agricultural Co-ops). The large co-ops must undergo the external audit by CPA while small co-ops are audited by internal auditors.

Conclusion

The institutions matter in the evolution of organizations. Co-operatives are still divided by the different institutional frameworks and suffer from the lack of identity. It is attributable mainly to the fragmented co-operative legislation and different public policies. The favorable environment brought by the agriculture protection policy with supportive laws and subsidies resulted in the JA system that is politically influential as an agency for implementing the government policy and a strong pressure group.

On the contrary, adversarial environment placed by the commerce protection policy combined with retailers' anti-co-operative campaigns characterized as "containment policy" resulted in the consumer co-ops that are highly independent but least influential in the political arena. The former's top-down organizational culture and close affiliation with the conservative party is contrasts with the latter's bottom-up organizational culture and close connection with the opposition parties. Strong path dependency can be observed in the co-operative's evolution in these 70 years.

However, the wave of globalization and deregulation since the 1980s has had a strong impact on that institutional setting. Both the ACA and the CCA were amended to cope with such changes. This paper analyzed the outline of these laws and recent legal reforms. The following questions need to be answered; how JAs design and implement their own reform to become autonomous co-operative organizations independent from MAFF and LDP, how consumer co-ops break "containment policy" and how co-ops can regain an identity and recognition.

In addition, co-operatives are increasingly influenced by the changes in the Commercial Code (CC) and business laws. The provisions on the governance and financing in the CC are being taken in co-operative laws while the business laws for the banking and insurance industries are being applied irrespective of corporate forms. The competition laws and tax laws are also making an impact on co-operatives. The relevance of these laws to co-operative development need to be further analyzed.

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Court Cases

A BRIEF CHRONICLE OF AND SOME NOTES ON THE BANKRUPTCY PROCEEDING OF FAGOR ELECTRODOMÉSTICOS S.COOP.

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After the announcement of its insolvency on the 15th November 2013 Fagor Electrodomésticos S.Coop. (a worker cooperative based in Arrasate-Mondragón, Basque Country, hereinafter "Fagor Electrodomésticos") presented an application for its declaration of bankruptcy. That was accepted by the Commercial Court n. 1 of Donostia-San Sebastian (Juzgado de lo Mercantil número 1 de Donostia-San Sebastián) the 19th November.

In a context in which thousands of enterprises are declared bankrupt each year, the bankruptcy of Fagor Electrodomésticos was certainly shocking for various reasons. In this sense, the Court admits it's a "special importance bankruptcy" due to different aspects such as the liabilities, the number of workers and creditors and the turnover, apart from its social and media resonance[1]. Indeed, it was an enterprise with a considerable weight in the Basque economy (especially, in Gipuzkoa). At the same time, the shock could be explained by the fact that Fagor Electrodomésticos was an emblematic cooperative, "flagship" of the Mondragon cooperatives[2]. The cooperative-system itself, which admittedly is not immune to economic and financial crises[3], was questioned, and so was the viability of the Mondragon cooperatives, in a momentary "psychosis" which was surely more media-based than real. At the same time, the debate about the approach of cooperatives to the capitalist model and its consequences was reinforced.

From a legal point of view, this bankruptcy proceeding generated huge interest as a complex procedure was foreseeable, taking into account elements such as the size of the company, the existence of subsidiaries (some of them in other States), and the fact that it was the bankruptcy of a cooperative. The application of the insolvency legislation to these entities generates several issues[4]. In this case, the main laws of reference which should be applied were, on the one hand, the Spanish Insolvency Law (Law

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1 In this case, according to the Spanish insolvency legislation, at present the "special importance bankruptcy" declaration has consequences regarding to the number of bankruptcy receivers.

2 Even if it's not a corporate group in the usual sense of Corporate Law, it's the first Basque business group and a reference of cooperativism across the world.

3 In VILLAFAÑEZ PEREZ, I., "Kooperatiben konkurtsoaren inguruan zenbait datu eta hausnarketa", *REVES (Revista vasca de economía social – Gizarte Ekonomia Euskal Aldizkaria)*, Special number X anniversary, 2014, 117-135, we counted 447bankrupt cooperatives during the period 2005-2013 in Spain.

4 Although, as said, previously there had been many bankrupt cooperatives.

22/2003, of 9th July)[5] and, on the other hand, the Cooperative Law of Euskadi (Law 4/1993 –Basque Parliament-, of 24th June).

Without an in-depth analysis of the several controversial aspects of the bankruptcy of a cooperative, we provide a rapid overview of some interesting points of the insolvency of Fagor Electrodomésticos, following a brief chronicle of its bankruptcy proceeding[6].

As indicated, the bankruptcy of Fagor Electrodomésticos was declared the 19th November 2013 by the Commercial Court n. 1 of Donostia-San Sebastian, which judged it was ordinary[7] and voluntary[8], and ordered the intervention of the management and disposal powers[9] by the bankruptcy receivers, and its registration in the Cooperative Register of Euskadi.

Together with that of Fagor Electrodomésticos, the bankruptcy declaration of the subsidiary Fagor Ireland Limited was applied. The court stated it was the competent tribunal to handle both bankruptcies, even if the subsidiary's registered office was in Ireland, as its effective management and supervision (and its "main interests centre") were actually in Arrasate-Mondragon, and this fact was easily noticeable. Consequently, both entities were declared bankrupt, and their bankruptcy proceedings were conducted in a coordinated way, without consolidation of assets and liabilities.

During the previous and following dates, the bankruptcy declaration of the remaining subsidiaries of Fagor Electrodomésticos was applied and accepted: the Basque enterprises Edesa S.Coop., Grumal S.L. and Proiek Habitat y Equipment S.A, and the Polish Fagor Mastercook S.A. All the bankruptcies have been conducted by the same court[10].

One of the aspects of this bankruptcy proceeding, which has been (and still is) controversial, concerns the financial instruments of Fagor Electrodomésticos and Edesa, specially the voluntary capital contributions, the contributions of retired members, and the so-called subordinated financial contributions.

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5 Unlike what happened in the past, when there was a debate about the legislation applicable to insolvent cooperatives (because of the discussion about whether the cooperatives are or not traders for Commercial Law), at present there's no doubt that this Law is applicable to cooperatives, as it's the reference Law to any insolvency (with very few exceptions).

6 Note that this bankruptcy proceeding has been a complex one, involving several judicial decisions with reference to different issues, not always directly linked to the particularities of cooperatives' insolvencies (for example, debt admission or compensation…).

Regarding the special characteristics of cooperatives' bankruptcies in Spain, we refer to our monograph VILLAFAÑEZ PEREZ, I., *Cooperativa y concurso. Estudio de las relaciones jurídicas con sus socios*, Marcial Pons, Madrid 2014, and the sources referenced in the bibliography. Also, MARTÍNEZ BALMASEDA, A., "Algunos aspectos jurídico-mercantiles tras el concurso de Fagor", *CIRIEC-España, Revista Jurídica*, n. 25, 2014, 281-312.

7 Not abbreviated.

8 As the application was presented by the debtor.

9 Not their suspension.

10 The exception was the French subsidiary Fagor Brant, whose bankruptcy was handled in France, and came into hands of Cevital.

In the case of Fagor Mastercook, several Polish creditors presented an international plea, alleging that jurisdiction was in Poland. This plea was dismissed by the Commercial Court n. 1 of Donostia-San Sebastian the 10th March 2014.

On the one hand, Fagor Electrodomésticos (as well as Eroski, another referential cooperative of Mondragon Corporation) had issued "Aportaciones Financiaciones Subordinadas Fagor" (subordinated financial contributions). As these financial instruments were quoted in the fixed income market, according to the insolvency legislation a bankruptcy receiver should be appointed by the National Securities Market Commission. Yet, the main problem referred to these financial contributions was the position of its holders, as they were subordinated and perpetual debt, close to capital contributions (they were hybrid instruments), so in an insolvency situation it was almost impossible to recover the investment. These contributions are regulated in the Basque cooperative legislation, and in principle they don't raise problems respect to their legality. However, they've been challenged from the point of view of the contract consent, and there are several judicial pronouncements declaring their purchase contracts invalid on the basis that the distributors (financial institutions) failed to comply with the duty to inform retailer and consumer purchasers properly about the characteristics of these financial contributions, which have been considered complex financial products[11]. In any case, these pronouncements are independent from the bankruptcy proceeding of Fagor Electrodomésticos, and the respondent parties are the distributors, as it is understood that they concluded the contracts on their own name.

On the other hand, the treatment of voluntary capital contributions and the contributions of inactive members such as those who, even when not participating in cooperative activity, (e.g. retired former working members) maintained their capital contributions has also been questioned. In some cases, it has been alleged that they are debts and so should be part of the bankrupt's liabilities. Cooperative legislation clearly states that these contributions are part of the company's capital (even if they could be accounted for as financial liabilities as a consequence of the IAS 32), that they are subject to entrepreneurial risk, that they are liable for the cooperative's debts and losses and that, in the event of winding up, they will be returned to members after paying or assuring the cooperative's liabilities. Hence they do not involve a reimbursement right, but a claim in the liquidation[12]. However, that does not necessarily prevent the analysis of the consent of the members when acquiring or maintaining the contributions. Were contributors aware of the nature and characteristics of the funding tool they were buying and the level of risk they were assuming?

Concerning this last issue, the possibility of a declaration of culpability on the part of the bankrupt was particularly relevant. Some members intended to raise this by invoking depreciation of assets and fraudulent actions so as to impose personal liability on the cooperative's directors and managers for

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[11] Similarly as with the "preferential shares" (participaciones preferentes) sold by financial institutions to consumers.

Some court decisions in this sense: Supreme Court Sentence 715/2015, 30th November; Gipuzkoa Provincial Court Sentence (Section 3) 23/2015, 9th February; Bizkaia Provincial Court Sentence (Section 3) 346/2013, 18th September; Araba Provincial Court Sentence (Section 1) 10th October 2013 (in this case, referred to the subordinate financial contributions of Eroski).

[12] Regarding this issue, the Gipuzkoa Provincial Court Judgment (Section 2) 26/2015, 3th February, maintaining the pronouncement of the first instance judgement, after referring to the several financial instruments in the Cooperative Law of Euskadi, stated that the different financial contributions of members (including voluntary contributions and contributions of inactive members) derive from a commercial relationship, not from a labour relationship. On the other hand, against petitioners' claims, it concluded that Edesa's capital contributions and special contributions ("participaciones especiales", a kind of subordinate contribution) couldn't be recognised as Fagor Electrodomésticos's debts, as, even if it was its parent firm, they had different legal personality, and their bankruptcy proceedings were coordinated, but without consolidation of assets and liabilities.

damages, or even for the debts not covered by the cooperative's assets. However, the 4th September 2014, in line with the criterion of the bankruptcy receivers and the prosecutor, the Court stated that the bankruptcy of Fagor Electrodomésticos was fortuitous, on the understanding that there hadn't occurred important irregularities which had generated or aggravated the insolvency, excluding the members of the board of directors form liability. All of the foregoing is without prejudice to the possibility of using other accountability mechanisms (outside the bankruptcy proceeding), such as the liability actions of the cooperative legislation. Thus, in December 2015 more than 900 claimants brought an action against Mondragon Corporation to claim the money invested in voluntary contributions and other financial instruments, alleging damages caused by misleading information that induced them to maintain their savings in Fagor Electrodomésticos and Edesa, as they had been led to believe that those savings where protected[13]. The claimants argued that Mondragon gave priority to its assets over the interests of the members (notably, inactive members). The action was allowed to proceed and the trial is expected to take place in spring 2018. The legal interest of this proceeding is high, as the autonomy of the Mondragon cooperatives, the relationships among the Corporation and the cooperatives, and possible liabilities derived from them are likely to be analyzed, together with some interesting issues related to cooperative membership (economic participation, involvement, information rights…).

On the other hand, it seems important to highlight that during the bankruptcy proceeding the members of the cooperatives weren't declared liable for the companies' debts and losses. This clarifies, at least in this case, a controversial issue referring to the cooperative legislation: the limited or unlimited liability of the cooperative members for the results of the activity.

Finally, the 18th March 2014 the liquidation phase of the bankruptcy proceeding of Fagor Electrodomésticos was initiated, and so were the liquidation of Edesa (21th March) and the rest of the subsidiaries, in all cases as requested by the debtors. However, the liquidation didn't imply the end of the entrepreneurial activity (at least in that moment), but the extinction of the legal personality of the debtors. In April 2014 the liquidation plans of both cooperatives were presented, plans which were coordinated, considering the high interrelation between them, and in order to facilitate the interest of potential investors in the different productive units. After evaluating several bids, the productive units were awarded to CNA group (Galagarza electrodomésticos S.L., later Edesa Industrial S.L.), taking into account the sum offered and the employment commitment[14].

Three years after the extinction of the cooperatives Fagor Electrodomésticos and Edesa, their bankruptcy and its consequences are still news item. Apart from the previously mentioned action against Mondragon Corporation, Edesa Industrial SL has recently presented an application for its declaration of bankruptcy, a great part of its production has stopped and a collective dismissal of employees has been approved.

[13] Among other questions, according to claimants, because Mondragon Corporation had hidden the real asset situation of Fagor Electrodomésticos, and had led members to believe that its intercooperation and solidarity mechanisms would maintain the company.

[14] Some assets were transmitted to other interested parties during the proceeding (for example, in March 2014, some brands of Fagor Ireland to Cevital).

Book Reviews

SOME REFLECTIONS ON THE BOOK "PRINCIPLES OF EUROPEAN COOPERATIVE LAW: PRINCIPLES, COMMENTARIES AND NATIONAL REPORTS" [1]

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Abstract

This short article provides some reflections on the book "Principles of European Cooperative Law: Principles, Commentaries and National Reports." These reflections are based on my personal experiences while conducting research in comparative cooperative law. In the debate among cooperative law scholars, this book definitely provides a useful methodical tool for the study of cooperative law.

a) Introduction

The first time I was confronted in detail with the Principles of European Cooperative Law (PECOL) was in 2013 when I had the pleasure of participating in a meeting of the Study Group on European Cooperative Law (SGECOL)[2] in Trento (Italy). At that time, I was affiliated with the University of Innsbruck (Austria) where I had started to write a monograph dealing with the Statute for the European Cooperative Society (SCE); basically, I compared how the SCE has to be applied in two different jurisdictions. This includes a comparison of two jurisdictions and the laws on cooperatives contained therein. The debates in Trento stimulated my curiosity about PECOL because at that time I was still looking for the proper method to conduct my comparative research. PECOL promised to be useful – and eventually, it was.

Then, in 2015, the draft version of PECOL was published and it was this document that I eventually used to finish my studies. Therefore, the observations in this article are primarily based on experiences with the draft PECOL. Still, I believe I can make some essential comments on PECOL as the draft version does not particularly differ from the final version as contained in the book.

The book "Principles of European Cooperative Law: Principles, Commentaries and National Reports" is divided into two parts. The first part, entitled Principles of European Cooperative Law and Commentaries, is divided into five chapters and deals with different aspects of cooperative law. These are the definitions and objectives of cooperatives, cooperative governance, cooperative financial structure,

1. [1] Gemma Fajardo, Antonio Fici, Hagen Henrÿ, David Hiez, Deolinda Meira, Hans-H. Münkner and Ian Snaith (eds.), Principles of European Cooperative Law. Principles, Commentaries and National Reports, Cambridge et al.: intersentia 2017, XII + 721 pp.

[2] Its members are Gemma Fajardo, Anton Fici, Hagen Henry, David Hiez, Deolinda Aparício Meira, Hans Münckner and Ian Snaith. The members of the study group come from different jurisdictions and have been chosen as representors of jurisdictions with prominent cooperative traditions (Finland, France, Germany, Italy, Spain, Portugal and the United Kingdom).

cooperative audit, and cooperation among cooperatives. Every chapter contains commentaries that describe and analyse in detail the different rules. The second part contains national reports, using the structure as determined by PECOL. This clearly helps to grasp the method of PECOL. The reports refer to Finland, France, Germany, Italy, Portugal, Spain and the United Kingdom.

I used PECOL first of all from a methodological point of view and not to find information on national legislation. The national reports should be considered for obtaining information on national cooperative law structured according to PECOL. The reports give short but thoroughly developed insight into national cooperative law that might be used as a first reference and as a starting point for deeper analyses.

PECOL proved to be very useful as it helped me develop standards that can be used to compare the two different SCEs. Moreover, the specific information contained in the commentaries and which complete the principles, helps towards better understanding of the different solutions found in the various jurisdictions. It helps to broaden the understanding of how a cooperative works, why and where there are specific differences, and what that could imply when the law has to be applied.

This article is structured as follows: first, I make some short remarks on the methodology; then, I briefly outline the contents of chapters 1–5. In the conclusion, I stress the importance of this work.

My observations are not aimed at criticising the basic structure of PECOL nor its main findings as this would go far beyond the scope of a short review.

b) Methodology

The basic idea of PECOL is, as the name states, to determine the general principles that identify, according to European cooperative traditions, the features of a cooperative. It is based on principles and rules that are found in different European jurisdictions and therefore constitutes some kind of common denominator, which ultimately defines what might be understood under the notion cooperative. From this, it clearly follows that PECOL is applicable to European cooperatives rooted in different European jurisdictions. It has to be specified that these principles are meta-principles.

PECOL describes cooperative legal norms. In doing so, PECOL addresses how cooperatives are actually organised and function. The final goal of these principles is to create principles in parallel with European and national law. With this, the authors try to establish patterns that might help to better understand cooperative law.

In this regard, three reasons for establishing PECOL are identified: first, PECOLshall establish a legal cooperative identity. In this context, it has been correctly criticised that the principles established by the ICA are too general. Then, PECOL should work as a pattern for other enterprises and therefore PECOL can be used as a model. Last and not least important, PECOL should be used as a tool to enter into academic debates.

PECOL is written in a clear way and therefore is helpful for deepening the reader's understanding. As such, this work is, in its way, already unique as up to now no other group of scholars has conducted a

similar task of such high quality. Concerning my research, the commentaries have proved to be very helpful for gaining a good understanding of how the various jurisdictions solve specific problems linked to cooperatives and how these different solutions have been assembled in order to find a common denominator.

c) Main contents of chapters 1–5.

Chapter 1 deals with the definition and objectives of cooperatives and contains five sections that refer to basic aspects of cooperatives. These are objectives, legal sources, membership requirements, cooperative transactions, and non-member cooperative transactions. However, it has been correctly affirmed that first of all a definition as such and its importance shall not be overemphasised. Even though single jurisdictions normally contain some kind of definition, they are not enough to compare cooperatives. In fact, if one considers how cooperatives work, then a definition can never contain all its distinguishing features.

This chapter contains some very detailed findings; for instance, how the notion of profit or for-profit is used in the different jurisdictions. Already here it becomes clear how difficult it is to identify common principles: as the different jurisdictions use notions that may differ in content, it was also necessary to find concepts that can be accepted by the authors and that fit their personal legal backgrounds.

PECOL does not contain any reference to the nature of members' needs, which however is quite often used in the single jurisdictions. In this regard, PECOL highlights that such a formula is often used to introduce —what PECOL defines—a general interest cooperative.[3] It is stressed that the concept of general interest cooperative is highly discussed in the various jurisdictions[4] and also reflects the different national approaches to cooperatives. The social function that some jurisdictions link to a cooperative is not acknowledged in the same way by other jurisdictions. Here, the concept of general interest cooperatives refers to cooperatives that go beyond the interests of the members, also fostering the needs of the community. For the traditional cooperative, PECOL uses the notion "mutual cooperatives."

Regarding sources of cooperative law, PECOL stresses the problem of filling gaps in cooperative law by using company law instead of specific cooperative norms. It has been correctly stressed that these sources should only be used on the condition that they are compatible with the particular nature of a cooperative. With this, PECOL tries to safeguard the cooperative identity.

Chapter 1 continues by dealing with membership and its requirements; PECOL defines a minimum number of two members. Regarding requirements, they explicitly state that statutes cannot contain any discrimination or other artificial restrictions on membership. With this, PECOL tries to counterbalance, on one hand, the idea of open membership and, on the other hand, the specific needs of a cooperative. Regarding cooperative transactions with non-members, PECOL correctly stresses that these activities

[3] For instance, Italian cooperative law uses the notion of social cooperative.

[4] For instance, this specific aspect is highly discussed among German scholars where this aspect has not been seen to properly fit the traditional understanding of what a cooperative is.

should not be prohibited in mutual cooperatives, adding that it is, however, necessary to limit these transactions in order to safeguard cooperative identity.

Chapter 2 deals with issues of cooperative governance and contains six sections. The first section, (general principles of cooperative governance) also refers to recognised cooperative values and principles including cooperative social responsibility. This section then provides specific rules for the two different types of cooperatives (mutual cooperatives and general cooperatives).

Regarding open membership, PECOL requires a specific procedure, which, among other things, requires that specific reasons and appeal procedures be indicated in the case of refusal. Section 3 deals with obligations and rights of members and also determines specific obligations for investor members. In their case, participation in governance is restricted. This section also contains norms that deal with the collective rights of members.

Section 4 contains specific rules referring to direct member control, and generally requires that the members must be able to democratically control their cooperative. In order to foster democracy, the members' meetings can be organised as several separate meetings. Moreover, members may be represented by proxies or delegates.

The section then contains exceptions to the one member one vote rule. A specific provision determines that investor members and their influence shall be limited.

Section 5 contains rules regarding the governance structures. These are flexible enough to integrate the so-called collective model and a model where specific tasks are delegated to other organs/bodies. It is stressed that the collective model is best suited to small cooperatives. The possibility to adopt either the one-tier or two-tier system is fully in line with the specific traditional governance structures, which can be found in the different jurisdictions.

Again, a specific rule deals with cooperative values and principles and requires that the duties of the members of the organ include an obligation to adhere to these values and principles. PECOL also contains information on issues that should be decided on only by a qualified majority.

The last section deals with information rights of members and transparency requirements. **Chapter 3** deals with cooperative financial structure and contains eight sections. As a general principle, cooperatives perform economic activities without profit as the ultimate purpose. The commentaries highlight that the aim is not primarily profit but the mutualistic scope. Therefore, the financial structure is based on a logic of its own. This results not only from specific characteristics of the cooperative objective but also from the necessary obedience to values and principles.

Referring to cooperative share capital, PECOL explicitly allows cooperatives to be established without capital. It is stressed that share capital is instrumental in nature. Moreover, it contains references to the generally acknowledged principles of the variability of capital as well as distributed dissolution. Regarding capital, it is stressed that share capital remains equity/risk capital but also has many characteristics of debt capital. From this, it follows that share capital is the property of the cooperative and not a sum borrowed from its members.

Section 3.3 refers to the members' contribution to capital and provides for the possibility that new members are required to contribute more capital or to be paid interest on the capital, although only at a reasonable rate. It is explicitly determined that investor members cannot transfer their shares without permission from an organ of the cooperative. Any transfer of a member's shares is dependent on authorisation from the board. Moreover, there must be a member of the cooperative interested in acquiring shares or at least a potential member requesting admittance.

Regarding reimbursement of shares, PECOL determines that this can be at the nominal value and includes a portion of divisible reserves.

Section 3.4 contains specific details regarding reserves. It distinguishes between mandatory reserves and voluntary reserves. Mandatory reserves refer to legal reserves as well as other reserves required by law or statutes (for instance, reserve for cooperative education, training, and information). Voluntary reserves, as well as the legal reserves, are indivisible. In this context, it is correctly stressed that this principle shall help to counterbalance variable share capital as well as increasing the creditworthiness of the cooperative and protecting creditors. Moreover, it shall help to avoid speculative winding up. With it, some kind of common property is created and solidarity over generations shall be achieved. This section also contains specific rules regarding the establishment of the legal reserves and the establishment of the reserve for cooperative education, training, and information. Moreover, the rules deal with the way in which legal reserves can be used.

Chapter 3 contains rules regarding the limited liability of members and also allowing (by statutes) provision for liability of the member by guarantee (subject to a cap).

The next section deals with the important issue of economic results from cooperative transactions with members (surplus or losses in member cooperative transactions).The rules determine how the surplus can be used and, furthermore, specify cases when surplus cannot be distributed. Regarding remuneration, it is stressed that this is not a cooperative member's absolute right.

The last section refers to profits and other losses and the last section regards liquidation.

Chapter 4 deals with the cooperative audit and contains four sections. As a general principle, cooperatives are obligated and entitled to be audited. This is clearly necessary in order to verify that cooperatives pursue their objectives. This chapter also contains special provisions for small cooperatives as well as special features of cooperative audits. Regarding the latter, it is stressed that special instruments have been developed by the cooperative movement or by cooperative science and they should be taken into consideration.

Regarding the scope and forms of cooperative audits, section 4.2 indicates the different aspects that are audited: for instance, the economic sustainability of the enterprise, the amount of the indivisible and divisible reserves, member participation and cooperative governance, and the volume of cooperative transactions with members and with non-members. Basically, cooperative auditors have to monitor operational efficiencies, understand the cooperative's ways of doing business and the value-oriented management, and assess the cooperative societies' concerns for the community (beyond CSR) and so on.

It is important that PECOL also stresses the differences between the audits of commercial enterprises and cooperative societies. In fact, there may be growing distance between members of their cooperatives; there is also a danger that the differences between the different legal forms of an enterprise are levelled. However, despite these trends, lawmakers should foster cooperative values, principles and specific rules for auditing cooperatives.

Section 4.3 refers to the audit entity and auditors, requiring that they have to be independent and have a specifically qualified cause for cooperative auditing. PECOL here refers to different entities that may audit cooperatives (for example, states, other public authorities, unions, federations of cooperatives, and private entities recognised by the state), and which are in line with the solutions found in the different jurisdictions.

Section 4.4 contains rules regarding the conclusion of a cooperative audit. With the report, the audit activities and findings are testified and shall also contain suggestions on how to deal with deficiencies. This section then contains rules regarding discussions of the report and how to deal with irregularities/deficiencies.

The **last chapter** deals with cooperation among cooperatives and contains three sections. Section 1 contains the general principles of cooperation among cooperatives. Cooperation is used to safeguard their autonomy. It is stressed that cooperation must reflect the nature of the cooperative enterprise. Accordingly, cooperation is the main factor in the success of a cooperative. This is preferred over concentration. PECOL also acknowledges that specific jurisdictions contain obligations to adhere to an audit union; this is however not necessarily a characteristic of cooperatives.

Cooperation is an issue on its own that needs further guidance. Here, one can use guiding principles such as equality, solidarity, and subsidiarity in order to sketch an appropriate framework. To the contrary, it is also stressed that cooperatives should not participate in structures that prejudice their autonomy or prejudice members' ultimate control of the cooperative.

Section 5.2 refers to different forms of economic cooperation including contractual relationships for the exchange of goods or services, a secondary cooperative, or cooperative group. The formulation establishment of contractual relationships refers to light institutionalisation such as joint ventures. It is highlighted that cooperation in secondary or higher degree cooperatives may require that the number of votes of members is not calculated according to the one member one vote principle. PECOL mentions specific exemptions in this regard.

The last section considers forms of social-political cooperation. These forms conduct activities such as representation, assistance and protection or education and training.

d) Conclusion

In this short article I have briefly described some aspects of PECOL without, however, having had the aim of criticising the basic structure of PECOL or its main findings. I have considered PECOL for what I have used it: a clear, developed framework containing principles that establish common (European)

denominators in order to better identify what a cooperative is. It contains all the relevant aspects of a cooperative and gives a good understanding about how a cooperative can be identified; using them made me understand that finding these common denominators is a rather difficult and complicated task.

It has been observed[5] that there is need for scientific research in comparative cooperative law. Indeed, PECOL is not only a step towards establishing a common framework for comparing national cooperative laws, but it also provides a clear and detailed structure that can be used to compare the specific issues without being too much bound on the structure contained in a national legal framework. With this, a general structure is created that can be used for making things comparable.

PECOL or better the book "Principles of European Cooperative Law: Principles, Commentaries and National Reports" is not only highly recommended for researchers dealing with comparative cooperative law but also for (not only young) scholars and students who are approaching, for the first time, the complex issue of cooperatives. It would be desirable that PECOL become an important point of reference for tasks such as this.

5 On this issue, see Miribung, The European Cooperative Society, forthcoming.

Events

INTERNATIONAL COOPERATIVE ALLIANCE COMMITTEE ON CO-OPERATIVE RESEARCH: INTERNATIONAL CONFERENCE, STIRLING, UNITED KINGDOM, JUNE 20 - 23, 2017

CONFERENCE SUMMARY

Ann Apps, Lecturer,
Newcastle Law School,
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The 2017 conference in Stirling, United Kingdom, was a wonderful opportunity for co-operative lawyers from around the globe to meet, network and to learn about IUS Cooperativum. The conference provided lawyers who have travelled from remote countries like Australia, a rare opportunity to meet with lawyers from Europe, Asia and North and South America and to learn more about issues that concern and excite co-operative lawyers.

On the second day of the conference, members of the committee of IUS Cooperativum, Hagen Henry, Ifigeneia Douvitsa and David Heitz invited all lawyers present at the conference to attend a meeting to learn more about the organisation's two key projects – the World Map of Cooperative Lawyers and the launch of the International Journal of Cooperative Law. Approximately 15 persons attended the meeting and were encouraged to join an expanding community of researchers who are interested in co-operative law.

The Stirling conference theme was "Developing Inclusive and Responsible Businesses: Co-operatives in Theory, Policy and Practice". The conference attracted a richly diverse cohort of researchers, educators and practitioners. It also welcomed emerging scholars and hosted a series of special events to mentor and encourage young and new researchers to explore the field of research on co-operatives.

The introductory plenary session on day 1 of the conference addressed the issue of research on co-operatives from the perspective of academics, practitioners and policy makers. The academic panel included two co-operative lawyers, Professor Cynthia Giagnocavo and Professor Akira Kurimoto. The panel identified that while co-operative research has often been siloed into different disciplines with distinct theoretical lenses – there is a trend towards interdisciplinary research. Professor Giagnocavo reminded researchers that co-operatives have adapted to respond to contemporary issues, including "climate change, scarcity of resources, dignified work, changing balances of power, refugees and displacement"; co-operative researchers also need to address these areas. These two messages have relevance to co-operative lawyers who need to consider new opportunities for research across disciplines and to address how legal frameworks for co-operatives may hinder or encourage co-operative solutions to global problems.

Professor Mike Cook also raised an issue that is of interest to co-operative lawyers. He identified an increasing tension between academics who advocate for a distinction between 'pure' and 'hybrid' co-operative models and those that have a more flexible approach to co-operative identity. Professor Cook questioned whether this tension is productive, when co-operative identity is often a product of a country's legal, historical and cultural peculiarities. Professor Cook's views highlight the importance of further comparative research on co-operative law. Prof Akira Kurimotoalso reminded researchers that the International Cooperative Alliance's (Alliance) Blueprint for a Co-operative Decade is a good place to start – particularly the issues around governance and member participation, sustainable development, identity, legal framework and capital. These are all areas of relevance to those who research co-operative law and were topics that were canvassed in papers presented at this conference.

The conference also held a special panel inviting co-operative practitioners to inform researchers about how research was used and where it was needed. Scotmid's Chief Financial Officer, John Dalley called for research into how co-operatives can co-operate in spite of competition law. Mariane Shiels, Chief Executive of Capital Credit Union in Edinburgh said research on credit unions was welcomed particularly to make the case against some of the restrictive regulations credit unions have to face. This issue is also faced by credit unions and financial co-operatives in other countries and had been taken up by several of the co-operative law research papers presented at this conference.

The Director General of the Alliance, Charles Gould, spoke about the importance of research in shaping policy agendas at a global level, including the role of co-operatives in achieving the United Nations sustainable development goals. Ed Mayo said that work done by Co-operatives UK on co-operative development strategy has found that co-operative innovation tends to emerge regardless of sectors, depending on people's needs and the ability of co-operatives to meet these needs. However, he stressed the importance of appropriate regulatory frameworks to allow co-operatives to continue to grow and reminded researchers (including legal researchers) that they need to work with co-operative business to influence regulatory reforms.

The topics chosen by the lawyers at this conference dealt mainly with the fourth and fifth challenges raised in the Alliance´s Blueprint for a Co-operative Decade. For the purpose of this brief overview and analysis, most of the conference presentations considered here are divided into the presentations that consider how law influences co-operative legal identity and those that deal with the regulation of co-operative financial institutions.

On the first theme,- presentations by Kurimoto, Douvitsa, De Conto and van der Sangen concerned the overarching legal frameworks and their role in delineating and preserving co-operative legal identity. Akiro Kurimoto spoke about the fragmentation of co-operative law in Japan. In his presentation, "*Legal reform's impact to the co-operative identity*" Kurimoto discussed how bureau pluralism has impacted on the development of co-operative law in Japan and whether recent law reforms are likely to strengthen or weaken co-operative legal identity using the findings of the PECOL (Principles of European Co-operative Law) project as a point of reference. Ifigeneia Douvitsa's presentation titled "*National Constitutions and Cooperatives: A first approach*" presented some early observations from her study of national constitutions and their influence on co-operative law. Her research shows that there has been an increase from 1900 to 2016 of national constitutions that specifically acknowledge co-operatives. This increase mainly appears in constitutions in Latin American countries and is less prevalent in Europe. Douvitsa

explained her future research agenda to consider the influence of constitutional recognition on the subsequent development of co-operative law in those countries. Mario De Conto provided the findings of his comparative project on overarching legal frameworks –"*The 'Principles of European Cooperative Law' and the 'Framework Law for Latin American Countries': a comparative analysis*" (Ley marco). The objective of the analysis was to identify the main points of accordance and disagreement between 'Ley marco' and PECOL. A key finding is that in Europe there is a trend towards approximation with the investor owned firms, particularly where co-operative laws accommodate non-member investors. This trend is not duplicated in Latin America where an incentive to remain a distinct type of entity is found in the tax treatment of co-operative transactions. Ger J. H. van der Sangen in his presentation, "*Cooperative principles as a toolbox for cooperative law – lessons from the EU law-making process on cooperatives*" also used the PECOL project as a basis for further research. His hypothesis is that the cultural and institutional context of the development of co-operative law in many European countries has led to path dependency. To overcome the hampering effects of path dependency he proposed that the ICA principles and their articulation in the PECOL project are a useful toolbox for legislators when considering any future reform of co-operative law.

In a subset of the first theme, Hagen Henry's paper, "*Participation. Is it about voting rights only? A Legal Perspective*" provided a thought-provoking reminder about the interlinked nature of the co-operative principles and the importance of taking a broader view of the legal requirements relating to democratic participation in co-operative governance. Using a legal lens, he argues that participation is also about the division of decision-making power between the board and general assembly. It involved the members' active participation in the co-operative's economic activities and their legal obligations to meet the co-operative's capital requirements. Finally, it also involved attention to participation in governance, including the rotation of management roles and ensuring that members have the requisite information, education and training to enable this participation.

On the theme of co-operative finance and banks, presentations by Henry, Hiez and Prud'Homme, Groeneveld and Gaudio grappled with the relationship between co-operative law, co-operative principles and the specificities of co-operative banks in Europe. Hagen Henry's paper "*What is Special about Cooperative Banks? A Legal Perspective*" approached the issue of whether sector specific laws are required for co-operative banks from the premise that such laws hamper the development of cooperatives. Henry argued that the assumptions underpinning these specificities should be challenged as a harmonized legal identity for co-operatives emerges. David Hiez's presentation of Hiez and Prud'Homme's paper on "*The specificities of French cooperative banks related to the general cooperative law*" took Henry's broader argument to the national level, looking at French co-operative banks and the tendency of French co-operative law to be fragmented and specific, and more so when it comes to co-operative banks. Hiez argued the case that these specifities relate more to practice or process and that as most features of the cooperative entity remain, co-operative legal frameworks should instead be more flexible to adapt to these sector differences. This argument is made in the context of research on a new ideal cooperative legislation for France and the Principles of European Co-operative Law (PECOL) project. Both projects aim to elaborate extensive general provisions or principles and so contribute to the argument in favour of legal frameworks that minimise the need for special provisions or abrogation. Hans Groeneveld presented scientific research on co-operative bank in the paper "*The cooperative credentials of cooperative banks: the relevance of cooperative law*". The research involved examining several co-operative banking groups

and benchmarking their performance on a number of co-operative principles. The findings were then analysed in the context of the banks relevant national laws. The research suggests that, as co-operative banks adjust their business models and capital structures over time to comply with increasingly onerous regulatory and supervisory requirements, they move further away from their co-operative identity.

Presentations by Gaudio, Solel and Apps continued with the theme of co-operative finance and banks in Brazil, Israel and Australia. Ronaldo Gaudio in his "*Applying PECOL in the current Brazilian regulation of financial cooperatives - challenges of the equalization between efficiency and identity*" presented the findings of his research into the application of PECOL to Brazils' regulatory structures for financial co-operatives. In his presentation, Gaudio noted the importance of distinguishing between PECOL's role in guiding the establishment of "adequate legal regimes that preserve the cooperative identity, and the structural elements of the typical model that the regime intends to protect". Yifat Solel's presentation, "*Israel's New Credit Union Law: From Social Protest to Legislation*" told the story of how a group of social activists after five years of effort finally succeeded in their quest to reintroduce legislation to allow credit unions in Israel. Ann Apps in "*The capital conundrum for co-operatives – An Australian legal perspective*" explained how constitutional federalism in Australia has resulted in the separation of non-financial co-operatives, regulated under state law and co-operative financial institutions that are required by law to incorporate as companies under the federal *Corporations Act* 2001 (Cth). The removal of credit unions from the sphere of co-operative law has created particular problems for co-operative financial institutions who must not only deal with prudential regulators who do not recognise their distinctiveness, but also find it increasingly difficult to maintain their co-operative status in a legal environment designed for investor owned banks.

There were also presentations by Fajardo-Garcia, Torres and Manrique on the impact of external regulatory frameworks on co-operatives. Gemma Fajardo-Garcia considered the impact of employment law on the legal status of workers in a co-operative in her presentation "*Which legal status to use for cooperative workers*?" Fajardo-Garcia argued that there is a need to distinguish different legal status depending on the type of worker, whether a member or non-member of the co-operative. This study compared Spanish cooperative legislation with legislation in other countries to reveal commonalities and differences between the legal statuses of the various categories of workers in the cooperative and made recommendations for reforms to promote co-operative self-management without detriment to workers´ rights. Francisco José Torres Pérez presented "*Cooperative integration: the dairy group CLUN (Galicia-Spain)*", a case study on the creation in 2016 of the Galician dairy co-operative group and the impact of Spain's Law 13/2013, in enabling the integration of small dairy businesses. This presentation provided some insight into different approaches to competition law in different countries and its relevance to the promotion of co-operative business structures. Fernando Manrique López in "*Identifying effective measures and policies adopted in order to favour employment of disabled people: A cross border approach to the cooperative society, and disability in the workplace*" provided an important perspective on the potential role of co-operatives in providing decent work for people with disabilities. This is a significant contemporary issue. The paper provided findings from a research study comparing legislation defining 'disability' and the scope and use of the term 'disabled worker' in the United Kingdom, Spain, Germany, France, and Italy. One objective of this research is to consider the advantages and potential limitations of co-operatives as a vehicle in the compared countries to assist the integration of disabled workers in mainstream employment.

The presentations by co-operative lawyers at this conference show that co-operative law is an emerging field of research. It was exciting to attend an event that show-cased the work of lawyers from countries around the globe who share a passion and interest in co-operatives and the role that law plays in promoting or hindering the co-operative identity. This overview of presentations may inspire more lawyers to bring their expertise to this field and to join in Ius Cooperativum and engage with a growing community of co-operative lawyers in future research projects.

REPORT ON THE 1st INTERNATIONAL FORUM ON COOPERATIVE LAW. MONTEVIDEO, 16th-18th OF NOVEMBER 2016: COOPERATIVE LAW HIGHLIGHTED

David Hiez and Ifigeneia Douvitsa

Several events concerning cooperative law took place in Montevideo (Uruguay) in November 2016 - in particular the 1st International Forum on Co-operative Law (conference of the Law Committee of the ICA). The main event was the IV Co-operative Summit of the Americas with its II Continental Congress on Co-operative Law.

The first surprise for a European man or woman: we were not less than 140 attendees and a quick survey by show of hands indicated that most of them were lawyers. Moreover, the profile was diverse: Professors, young researchers, practising lawyers, cooperative employees, civil servants, and they came from various Latin American countries, Canada, Israel and Europe. Nearly everybody attended or made a presentation to all the sessions, both of the Latin American Congress and of the International Forum. The number of young law researchers and lawyers was very promising for the development of cooperative law.

The coincidence of both events was very fruitful for two reasons. First, with regard to organization, this allowed attendees to mutualize their efforts and profit from the presence of Latin American lawyers, who were far more numerous. In terms of funding, there was less mutualization, but great generosity from ICA Americas and CUDECOOP (the Uruguayan co-operative confederation). They provided the premises, the interpretation Spanish-English-English-Spanish during all three days free of charge and charged only low fees for enrollment. Such arrangements are often the outcome of personal relationships, and the friendship of Hagen Henry (Chair of the Law Committee of the ICA) and Dante Cracogna (Chair of the regional Law Committee of ICA Americas) was the basis of that success.The Europeans in Montevideo have long dreamed that European cooperatives might share that level of attention to research.

The second benefit from the collaboration was intellectual. Instead of having two successive or parallel events, one American and one worldwide, the diverse sessions were mixed or joint. The outcome was very fruitful: the opportunity was available for everyone to learn more about research on Latin American and international cooperative law, and to debate. The whole event was very stimulating, but also very friendly.

Eight sessions were scheduled: three for the Latin American Congress (on the cooperative act, the regulation of financial and banking cooperatives, and the control of cooperatives), two for the international forum (on cooperative law and cooperative principles, and cooperative law and economy), and three joint plenary sessions (on cooperatives in constitutional law, cooperative taxation, and worker cooperatives).

It would take too long to develop all the aspects of the conference. The full program is accessible at: http://ica.coop/en/events/1st-international-forum-co-operative-law.

However, we will focus on several points. The keynote speaker for the opening of the conference was Hagen Henry, the best comparativist of cooperative law for many years. He spoke about cooperative law for the 21st century, and developed the major questions of present cooperative law. One of the most exotic session for a European lawyer was about the "acto cooperative" that we simply translate as "cooperative act". Inspired by Spanish law, the concept of the "cooperative act" developed in Latin American doctrine in the 1960ies. It has involved both case law and legislation, and is nowadays a pillar of cooperative law.
In our understanding, a cooperative act is an act which qualifies the relationship between the cooperative and each cooperator. It seems to be nearly exactly the opposite of the double quality principle developed in Europe. Indeed, instead of presenting two different qualities, two relationships (as a shareholder and as a user of the cooperative's services), the cooperative act provides for a synthesis of these two sides of the coin. The cooperator is not schizophrenic; he/she is a member for whom the political involvement and the use of cooperative's services are the outcomes of a single quality: membership. This concept may be an answer to the problems created by the notion of double quality. Indeed, the double quality principle allows the use relationship to operate as a separate contract, which involves the various contracts of traditional types such as employment, loan, or sale.

The second interesting topic of the conference was the control of cooperatives, considered as a mixture of cooperative auditing and state control. It seems that the use of cooperatives for the purpose of public policies was present in all the minds, and made people reluctant to contemplate any state intervention. The situation differs from one state to another, the state sometimes still acts as an auditor of co-operatives. The hostility against the situation is so high that some lawyers contest the principle of external auditing itself, considering that the legitimate audit controls must be made by members. However, most speakers defended auditing, at least with the condition that it is finally, even if indirectly, under the responsibility of the cooperative.

We may as well note a major focus on cooperative banks, and a unanimous hostility to the uniformity of regulation for capitalist and cooperative banks. The critique sometimes culminates in contesting the application for developing countries of regulatory systems established with consideration to northern countries.

Most presentations by the less numerous non-Latin-American lawyers centered, directly or indirectly, on cooperative principles and their connection with cooperative law, notably through constitutional provisions, in a comparative perspective. Another popular topic was the relationship between cooperative law and competition law or tax law. The detail of the contributions was, however, disparate, because of the varied culture of the speakers. This is part of the value of such events, but it shows that the community of cooperative lawyers would profit from a stronger structure.

Apart from the development of communication, two major concrete initiatives aimed at the creation of technical tools to facilitate research in cooperative law, were presented. On one hand, ICA is preparing a database of cooperative legislation. This project is ongoing, with the International Labor Organization and FAO as partners, and the possible support of the World Bank. Its structure and functionality remain vague

(notably its updating), but very promising. A beta version will be online soon, with 40 countries integrated. In the medium term it should be more than a static database, and should stimulate debate.

On the other hand, five European cooperative lawyers launched Iuscooperativum (http://www.iuscooperativum.org), a website to facilitate cooperation and dissemination of news, ideas, and stimulate debates among cooperative lawyers. This website will offer a map to provide contact details of cooperative lawyers in as many countries as possible. The website will also contain information on case law or legislation changes, conferences, as well as book reviewss. The Iuscooperativum is also planning to launch an international journal of cooperative law to give voice to, and facilitate the development of, cooperative law worldwide. The website is new, initiated by academics without any institutional support, and relies wholly on your participation to develop.

To sum up our feeling after these three days in Montevideo, we were impressed by the number of lawyers attending, by their attention, and by the variety of the covered topics. That diversity derives from the multiple understanding of what is cooperative law, lato sensu, in connection with the traditional branches of law. The event was closed by Hagen Henry and with a closing presentation by Dante Cracogna to synthesize the discussions. They both echoed the opinions expressed during the conference that such events should be organized more regularly. Will that wish be heard by European cooperatives?

2nd INTERNATIONAL FORUM ON COOPERATIVE LAW ON "COOPERATIVE LAW AND COOPERATIVE PRINCIPLES", ATHENS, 26-28 SEPTEMBER 2018

The 2nd International Forum on Cooperative Law follows the one organized in 2016 at Montevideo, Uruguay. The fruitful outcome of the Montevideo Forum – both as concerns the number of participants and the positive feed-back – led to the decision to organize such meetings biannually.

The 2nd International Forum on Cooperative Law will be organized at Athens by Ius Cooperativum, with the support of the International Co-operative Alliance and of two local co-organizers: the Hellenic Open University (Athens) and the Peoples' University on Social and Solidarity Economy (Thessaloniki).

Aim

Under the overall theme of "Cooperative Law and Cooperative Principles", which is to point to the relevance of the internationally recognized cooperative principles for cooperative law, the 2nd International Forum on Cooperative Law will focus on the place of the cooperative principles in cooperative law, the research and education in the field of cooperative law, and on an exchange of views on cooperatives by lawyers and economists.

The themes of the Forum might include:

- The legal relevance (if any) of the cooperative principles for cooperative law
- The legal relevance (if any) of the cooperative principles for other fields of law (e.g. constitutions, administration law, tax law, bankruptcy law, labor law, competition law, audit regulations, book-keeping and accounting standards)
- Legal requirements (if any) for specific types of cooperatives, either by sector (e.g. agricultural, banking, energy cooperatives), or by governance/structure (e.g. workers' cooperatives, multi-stakeholder cooperatives, social cooperatives)
- The unification of cooperative law at national, regional and international levels
- Cooperative law and the legal framework of the social economy
- Cooperative law and globalization
- Policies on research and education in the field of cooperative law
- Educational programs in the field of cooperative law
- Tools for the research and study of cooperative law.

It is also planned to have a dialogue on any of the above or related themes between economists and lawyers, the motto being: "What can we/what must we learn from each other"?

Call for expression of interest

To express your interest in attending, please send an email to Ifigeneia Douvitsa (at: idouvitsa@iuscooperativum.org) no later than the end of July 2018.

If you would like to speak at the event, you are kindly invited to submit an abstract of 500-800 words to Ifigeneia Douvitsa (at: idouvitsa@iuscooperativum.org), indicating one of the above-mentioned themes, to which it relates, no later than the end of July 2018.

The full papers should be submitted no later than 28th August 2018 and may be considered for publication for the 2nd issue of the International Journal of Cooperative Law.

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Practicioners' Corner

CO-OPERATIVES, THE STATE, AND MORAL HAZARD

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This article explores the nature of the relationship between co-operatives and the State, written primarily from a UK perspective.

In the United Kingdom (specifically Great Britain) "co-operative" is not defined in law. Therefore, co-operatives are free to use any legal form or none at all.

The decision to adopt some kind of legal form – and in particular to become a body corporate - leads to perhaps one of the first interactions a co-operative has with the State. In Great Britain, most co-operatives choose to register under the Co-operative and Community Benefit Societies Act 2014 (2014 Act). The 2014 Act specifically enables a society to register *as* a "co-operative society".

With registration, comes legal personality and limited liability. To achieve such status a group of (at least) three people have to establish to the registering authority's satisfaction, currently the Financial Conduct Authority (FCA), that they are a "bona fide co-operative", and that their rules cover the matters required of them by the 2014 Act.

The 2014 Act is short on definition. It must be "shown to the satisfaction of the FCA" that "the society is a bona fide co-operative society"[1]. The 2014 Act goes on to rule out any society that "carries on, or intends to carry on, business with the object of making profits mainly for the payment of interest, dividends, or bonuses on money invested or deposited with, or lent to, the society or any other person"[2].

No further definition is given. One could speculate on why the UK Parliament chose to give no further definition. It could be argued that such a vague definition allows the nature of a co-operative society to evolve over time. It could be a product of the context and time in which the provisions of the 2014 Act were written.

Prior to the commencement of the 2014 Act, the legislation under which co-operative societies were registered was known as the Industrial and Provident Societies Acts. The first of these appeared in 1852, with limited liability and corporate body status appearing in an Act of 1862, the next major revision and consolidation in 1893, and then no further consolidation until the Industrial and Provident Societies Act 1965, which remained the act of registration (albeit with amendments over time) for 49 years. Despite the first "industrial and provident" society piece of legislation appearing in 1852, it was not until an

[1] Section 2(2), Co-operative and Community Benefit Societies Act 2014

[2] Section 2(4) ibid

amending Act of 1939 that the word "co-operative" first appeared on the UK Statute books. The Prevention of Fraud (Investments) Act 1939 (1939 Act) was concerned with the mischief of "share pushing".

The 1939 Act made amendments affecting every legal form available in the UK. When it came to the industrial and provident society legislation, it considered that conditions of registration ought to be created, with the Registrar[3] of the time being empowered to cancel the registration of any society that failed to meet those conditions.

The 1939 Act and the debate leading up to it present a rare and interesting insight into the effect the features of a co-operative have on the State when legislating. The 1939 Act brought about a "licencing" regime for those involved in public offers of shares.

> "Clause 1 provides that on and after the appointed day, no one shall carry on the business of dealing in securities unless he is the holder of a principal's licence and that no one shall in the capacity of a servant of any such person deal in securities unless he is the holder of a representative's licence"[4]

And concluded that there should be exemptions from this requirement:

> "Industrial and provident societies…are excluded because they are otherwise regulated in the Bill—namely, in Clause 10[5]"

Clause 10 of the Bill sets out what we discussed above – the conditions of registration as a basis for registration and cancellation. It can be concluded therefore that Parliament was of the view that requiring a co-operative society to be a "bona fide co-operative", and making clear that it could not exist for the object of making profit to pay interest on shares, was sufficient regulation to justify exempting societies from licencing for the promotion of their shares.

These days we are familiar with the International Co-operative Alliance Statement of Identity, Values and Principles ("the ICA Statement"). Yet no such definition existed, in common parlance, at the time the 1939 Act was drafted. We can only speculate as to what it is about a co-operative that gave Parliament sufficient confidence to exempt them from requiring applying to other legal forms.

The clearest indication we have of the view of Parliament is from their prevention from registration as a co-operative society any society existing to pay interest on shares. It is clear that Parliament was of the view there should be some other main object, and no doubt few if any people in the co-operative movement would disagree. Still though, there was no widely accepted definition of a co-operative in place at the time. Yet, whatever the commonly held view of a co-operative was, it was implicitly incorporated into exemptions from licencing on share offers and the "bona fide co-operative" test.

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[3] Space does not permit a full historical account of the role of the 'registrar' – the origins of which come from the Friendly Society Acts pre-dating the industrial and provident society legislation.

[4] Hansard, HL Deb 28 February 1939 vol 111 c972

[5] Ibid c973

The lack of a universally accepted definition was true too when Parliament legislated in 1965. By 2014, the position was different. We had the ICA Statement which had been recognised in international law through International Labour Organisation (ILO) Recommendation 193. However, the 2014 Act was simply a consolidating piece of legislation – it was not able to make any substantive amendments. The renaming of the legislation and the legal forms therein came from the lesser known Co-operative and Community Benefit Societies and Credit Unions Act 2010 (2010 Act), simultaneously commenced and repealed on 1 August 2014. As a "Private Members Bill"[6] it provided little room for substantive change.

This leaves us in the position we are in today: societies being able to register as "co-operative societies" subject to the satisfaction of a registering authority whose role is to establish whether the society is a "bona fide co-operative society".

Normally in the UK, where Parliament has legislated sparingly, we benefit from a rich tapestry of case law, with binding precedent to fill-in the gaps[7]. Unusually, no such case law exists in this field. At no point has a UK court made a binding judgment as to the definition of a co-operative, or as to how the legislative test should apply.

This leaves us in the position where co-operative law and the ICA Statement have developed quite separately.

What then from a legislative perspective is a "bona fide co-operative society", and how does one judge this?

This is a question the FCA asked in its 2014 consultation[8], and answered in its 2015 Finalised Guidance[9]. The FCA concluded:

> "We generally consider something to be a bona fide co-operative society where it is an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise."[10]

It went on to state that:

> "Reflecting the ICA Statement of Co-operative Identity, we consider it an indicator that the condition for registration is met where the society puts the values below [ICA

[6] A bill brought by a backbench Member of Parliament without Government time or support

[7] Leaving aside the jurisprudential debate as to whether judges make law…

[8] CP14/22 Guidance on the FCA's registration function under the Co-operative and Community Benefit Societies Act 2014 - https://www.fca.org.uk/publications/consultation-papers/cp14-22-guidance-fca's-registration-function-under-co-operative-and

[9] Pages 26-29, FG 15/12 – Guidance on the FCA's registration function under the Co-operative and Community Benefit Societies Act 2014 -

[10] Para 4,10 ibid

> Statement Values] into practice through the principles quoted below [ICA Statement Principles]."[11]

This puts the registering authority in the position of determining whether it is satisfied something is a "bona fide co-operative society" by reference to the ICA Statement.

But what does that mean in practice?

As mentioned earlier, the condition of registration is also a basis for cancelling the registration of that society where the condition is no longer met. In other words – a society can be cancelled if "it appears to the registering authority"[12]that the society is no longer a bona fide co-operative society.

Is it the role of the registering authority to regulate the activity of the co-operative society to secure compliance with the condition of registration? What if the co-operative ceases to abide by the ICA Principles?

This brings us into the topic of the line between a registering authority and a regulator. In the UK, the registering authority is just that. The overarching role of the FCA in its context as registering authority under the 2014 Act is set out in legislation:

> "The FCA must maintain arrangements designed to enable it to determine whether persons are complying with requirements imposed on them by or under [the 2014 Act]"[13]

It is worth pausing on this requirement –as much for what it does not say, as for what it does.

The requirement on the FCA is to "enable it to determine". This is not a requirement to "ensure", or "provide" for anything. It must be able to determine "whether persons are complying". This suggests ongoing compliance – both at the point of the initial registration of the society and thereafter. And finally, "with requirements imposed on them by or under…" the legislation. It is clear here that the requirements are created not by the FCA, but by the legislation.

The FCA is given no power to create rules by which societies must abide. The rules are created by legislation. It can be said that societies are regulated not by the FCA, but by the Act.

Of itself that would be fairly meaningless. This creates a role for a "registering authority". A body able to determine compliance and, should it wish, to take action where it sees non-compliance.

There is however an important distinction here still between the role of a registering authority and a regulator. For the registering authority, ultimately its actions are confined to prosecuting offences, and cancelling registration – essentially, removing the privileges the Act has provided, where those privileges have been abused.

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[11] Para 4.12 ibid

[12] Section 5(5) Co-operative and Community Benefit Societies Act 2014

[13] Para 5, Schedule 1, The Financial Services Act 2012 (Mutual Societies) Order 2013

This distinction may be easily understood by some. But how widely is it understood by the co-operative societies, and more importantly, by their members and the public at large?

Today, corporate body status and limited liability seem fairly uncontroversial. Looking back at its introduction though, we are reminded that its passage through Parliament was not without opposition. That opposition, in part, comes in the form of moral hazard. When you limit the liability of some, it is inevitably at the expense of someone else. In the case of the firm, the risk is that third parties, i.e. creditors, are exposed to undue risk with limited redress when dealing with someone whose own liability is limited.

Balancing out this risk, the privileges of limited liability come with reporting requirements – such as the requirement to submit annual returns and accounts to a registering authority to be made available to the public, enabling the creditor to reduce the risk of trading with someone with limited liability.

This is true for a co-operative society. For a co-operative society, however, there is an added dimension in the form of what is expected from co-operative governance, as reflected in the ICA Statement.

To what extent do the public rely on these features? The 1939 Act shows us that Parliament has, at least in part, relied on the nature of a bona fide co-operative to exempt it from regulations designed to protect the public from "share pushing". Are the public aware of these exemptions – or do they rely on the fact the society is "registered" to give them equal confidence in the society's business?

What expectations do members have of their co-operative? For example, members of a co-operative expect their society to be run democratically. Referring to the rules of their society members may look and find that it should be run on the basis of 'one-member-one-vote'. Or they may find that their co-operative has rules requiring the accumulation of indivisible reserves, with dissolution clauses preventing distribution to members on a solvent dissolution – instead directing funds to some other common ownership entity.

What then, do members do, if they find these rules are not being adhered to?

As a scenario – you have two rival factions in a society. One faction is "in power", the other trying to gain power. The first faction decides to ignore certain aspects of the co-operative's rules to maintain power; the second faction understandably objects to this.

In some instances, those breaching the rules will be in the minority and will succumb to a decision made by the majority to remove them from office or to reverse any policies or practices they have put in place. That is fine where that works. But what happens where it fails?

It is natural that members may then look to the registering authority. After all, it is their job to make sure the co-operative is behaving properly, isn't it?

This scenario brings us to the core of the issue. Stepping in to force a co-operative society to take a particular course of action in relation to a particular decision is the act of a regulator, not a registering authority. The registering authority cannot order specific performance. This does not mean it is powerless;

quite the opposite. The registering authority has a big stick at hand – the threat of cancellation of registration.

However, the wielding of that stick is likely to all too often be the last thing those concerned members want to see happen. Here we see a gap between perception and reality. A gap between what members think a registering authority ought to be able to do, and what in reality it is able to do.

It is not clear whether members take undue risk in these situations, in the sense that they fail (whether due to lack of resources, know-how, energy or inclination) to step-in to take action to prevent a situation arising, because they think there is ultimately a registering authority who can sort it for them. Evidence would be required to support this - but it is not beyond the realms of possibility to imagine at least some instances where this is the case.

While the registering authority may not be able to order specific performance in this instance, is there another arm of the State that can help? It is possible to refer these sorts of matters to the court. There have been numerous unreported cases where County Courts in England have settled disputes such as these – taking a view on the application of the rules and ordering a course of action to be followed.

But what happens where existing precedent hinders rather than helps?

In the scenario above, we had two rival groups of members. It is a classic dispute, of the sort the courts are more than familiar with, and a sort not unique to co-operatives.

Let us take a different scenario[14]. What if there were a co-operative society established many decades ago. In its rules, it established that it was a common ownership co-operative. A co-operative where the members would never benefit from surplus funds on solvent dissolution (above the return of their own share capital). Members may have even gone one step further and stipulated that these rules can never be changed. This is in keeping with ICAPrinciple 3 –the build-up of an indivisible reserve. And it is in keeping with the view that co-operative members are stewards of the enterprise, for successive generations.

Down the line one particular set of members decide that they want to change the rules. They want to change the dissolution rules to enable distribution of assets to members on solvent dissolution. In English law, it is likely that the *Duomatic principle*[15] applies. This principle, originating from company law, means that unanimous consent of the members can override any provision in the governing documents. Therefore, the current group of members could unanimously agree to change the rules of the co-operative to enable them to benefit from solvent dissolution[16].

The registering authority would be presented with a rule amendment that it can only reject if the amendment is "contrary to the Act'. In this instance, the registering authority, given the current legislative

[14] For the purpose of making a point succinctly, the nuance that would ordinarily be present in any such situation has been omitted

[15]Re Duomatic Ltd [1969] 2 Ch 365

[16] It is yet to be seen whether the courts would uphold this precedent in this sort of context – but in the absence of any nuancing of the established precedent, we must assume this would be permissible.

position, would have been able to offer little protection to those previous generations of members who have helped the co-operative accumulate its capital. Perhaps a regulator, given broader powers through legislation reflecting a detailed understanding of the co-operative movement, could have been empowered to do more.

This begs another question – why does case law not better cater for the position of co-operatives? The simple answer, most probably, is because co-operatives have rarely litigated points of law (as opposed to having recourse to the courts for determination of disputes). They have rarely engaged with the legal system to test out different situations. It cannot be taken as read that a court would not distinguish the *Duomatic principle* in the case of a common ownership entity.

Likewise, there are other cases – such as *Trevor v Whitworth*[17], which has previously created debate on whether a co-operative can have redeemable shares (on the basis that it, in effect, ruled that a company cannot buy back its own shares). It is not inconceivable here that a court would understand that *Trevor v Whitworth* arose from a company with fixed capital, whereas the co-operative society has never had its number of shares fixed in the same way, and accordingly distinguish the case. After all, on rare occasions where co-operatives have litigated points of law, they have been successful[18].

There is inherent risk in litigating a point of law – you could lose and have a definitive answer against your favour. That risk is not unique to co-operatives. But, does the crystallisation of that risk pose a greater threat to co-operatives from the perspective of autonomy and independence; or more broadly, depending on the point being litigated, to any of the other ICA Principles?

This addresses what role the State *could* have, and leads us into consideration of what role the State *should* have in these matters when considered from the perspective of the ICA Statement. Principle 4 provides that:

> "Co-operatives are autonomous, self-help organisations controlled by their members. If they enter into agreements with other organisations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their co-operative autonomy."

Whether a co-operative can be truly autonomous is a bigger question than space permits, but it is worth exploring autonomy briefly in this context of what the role of the State should be in co-operative matters. Regulation by the State is present to varying degrees in every facet of a capitalist society. Regulation impacts autonomy. For example, regulation enabling property ownership – which on the one hands provides a framework for ownership, on the other creates conditions for those owners (such as the requirement to register that property, or seek permission for adaptations to it). The ICA Guidance Notes to the Co-operative Principles explore the relationship between the State and autonomyin more detail – concluding on the relationship between co-operative and State:

[17]Trevor v Whitworth (1887) LR 12 App Cas 409

[18] Co-operative Group (CWS) Ltd v Stansell Ltd [2006] WWCA Civ 538

> "engaging with government on legal and policy matters does not however mean compromising the autonomy and independence of co-operatives and the ability of members to democratically manage their organisations without government interference. This 4th Principle of Autonomy and Independence means that members of co-operatives are entitled to make decisions about their co-operative without undue influence from government beyond a wider policy environment that impacts equally on other forms of economic organisation."[19]

When it comes to the formation of co-operatives – in the UK at least – there appears to be a sliding scale of State involvement. A co-operative may wish to simply be a loose group of individuals, or maybe an unincorporated association, thus avoiding limited liability and body corporate status. With that, comes more freedom, the absence of reporting requirements.

But that would leave co-operatives in a disadvantageous position compared to other businesses. A co-operative could choose to become a company or limited liability partnership. Free from the requirement to have a registering authority determine whether it is or is not a co-operative. That does however leave a co-operative with nothing in place, legislatively, to set in stone that it is in fact a co-operative and can lose the privileges of registration by ceasing to act like one.

Or it could choose to be a co-operative society, with the abovementioned requirements in place. Legislation could go even further than it has and put in place a statutory asset lock, providing a solution to the scenario descried earlier in which the society decides to use its assets in a way not permitted by the original rules.

As we slide along the scale of State involvement, at each moment we risk reducing the autonomy of the co-operative. Has there been a trade-off? Is it the case that co-operatives are willing to sacrifice some autonomy, if by doing so they can more deeply embed other Values and Principles (such as legislative provisions ensuring democratic member control)? And if so, where should the line be drawn?

And, on the part of the State, to what extent can and should it take into account the unique features of a co-operative society when putting in place regulations more generally as explored earlier in the context of the 1939 Act?

This article does not provide the answers to those questions. But instead it is hoped some focus has been directed toward the delicate balance that exists between co-operatives and the State, and the impact one's understanding (or misunderstanding) of that relationship can have.

[19] Page 50https://ica.coop/sites/default/files/basic-page-attachments/guidance-notes-en-221700169.pdf

REFRAMING THE DEBATE ABOUT COOPERATIVE CAPITAL

Cliff Mills,
Mutuo

Paper prepared for the 1st International Forum on Cooperative Law, Montevideo, November 2016

1. Introduction

I have been working with cooperatives for about 25 years now. From my first encounter, I have been fascinated by the idea of trading for the benefit of everybody and anybody who wishes to engage, and I have reflected frequently on the marginal role played by cooperatives today in my own country, even though the UK played such a big part in the establishment of cooperation.

My interest in the subject of cooperative capital has a personal, as well as a professional background. As a self-employed lawyer, (and therefore not a member of any pension scheme) I have to make my own pension arrangements for my older years (rapidly approaching), to make sure that my wife and I have sufficient income to support us when we can no longer work.

It is profoundly frustrating that the only realistic options are for me to invest my savings in companies. Our financial services industry in the UK, our tax and savings arrangements, our whole financial infrastructure effectively requires me to support a way of trading with which I profoundly disagree.

I can choose to buy my food from cooperative or other businesses operating on a social basis. To some extent, I can choose to work for and earn my income from cooperative or values based businesses. But when it comes to the matter of how I save for my retirement – where I store my money for future years – I don't have that choice. But I should have; we all should have; and we all need to have that choice.

The subject of cooperative capital is really important. When we were writing the Blueprint for a Cooperative Decade[1], my first instinct was that capital must be the first of the five themes. Wiser heads than mine prevailed, and of course I realised that you have to start with participation or membership, the foundation of cooperation. And I was happy that capital didn't get lost in the middle, but was the last of the five topics in the final version of the Blueprint.

But I'm not sure that we have made the progress since 2012 that I would have hoped for. More specifically, I don't believe that we have had the conversations – certainly in the UK – which I think we need to have if we are to move ahead with this vitally important subject.

It is easily seen as a rather technical topic, something mainly of concern to people in the finance department. It can also become a rather narrow discussion about financial instruments and regulatory requirements.

[1] http://ica.coop/en/blueprint-co-op-decade

There is an associated risk that I have notice frequently working with cooperatives in the UK – that they are constantly being described as just another legal corporate form. They are reduced to the bare essentials of legal, regulatory and fiscal features described in tables which compare them with other corporate entities. And when you get to capital, the cooperative option doesn't compare very favourably by the criteria people generally apply.

In the UK, we do need a capital instrument which is specific for cooperatives, and distinct from a share in a company. A new law was introduced for other mutual organisations in 2014[2], but this did not include cooperatives. We are now starting to see conversations about this amongst financial people in larger cooperatives, which is a good thing, but there is much work to do.

What is missing from our discussions is an understanding of how capital fits into the bigger picture, and that is why I want to explain in this paper why I believe that we need to reframe the debate about cooperative capital. I want to argue that providing capital is a relationship, not just a transaction; that there is plenty of capital available, it is just in the wrong place; that we need to rekindle a vision of cooperation not just as a different legal structure but as a mechanism for transformation of society; that we may be approaching (or already in) a time where there is an opportunity for such transformation; and that we need to develop any capital instrument within that bigger vision. But first, we need to be able to articulate a cooperative proposition better than we are doing at present.

So here is how I will proceed. First I will say a little about what I mean by capital. Then I will explore how cooperative capital grew at astonishing rates in the UK in the nineteenth century and reflect on the reasons for that, before turning to consider our contemporary context. Then lastly I will look at what a cooperative approach means today, and how we might articulate it.

2. What is capital?

For present purposes we are talking about financial capital, the money which businesses use in order to trade. Broadly this comprises: (a) share capital or "equity", that is to say, money provided by the promoters who set up a business in the first place and by those who subsequently come on board as shareholders in the business; (b) money lent to or borrowed by a business from banks and other providers of loan capital, commonly referred to as debt; and (c) accumulated reserves, the money generated by trading activity which is retained by the business for future use.

In the present situation where we are considering how to enable more cooperative businesses to come into existence and existing cooperative businesses to grow, my focus of attention is on equity. Reserves can be built up over time based on successful trading; and debt finance is usually available to businesses, subject to cost and the ability to service the cost of borrowing; but the foundation of most trading corporations is their share capital – the money directly available to the business to carry on its activities.

[2]See my colleague, Peter Hunt's explanation of this in chapter 6 of the Capital Conundrum http://ica.coop/sites/default/files/ICA%20The%20Capital%20Conundrum%20for%20Co-operatives%20EN.pdf

But this money, of course, does not belong to the corporation. Whilst the corporation has the use of the money for its trading activities, it ultimately belongs to the providers of that capital, who in most cases are the corporation's shareholders.[3]

The corporation holds that money on certain basic terms, and those terms (which are set out in the constitution of the corporation) describe a relationship between the providers of capital and the corporation. Essentially the terms of the relationship are as follows:

- Subscribers provide money to the corporation
- The corporation carries on trading activities using the money subscribed
- Subscribers (now shareholders) have certain rights in relation to how the corporation operates, and are entitled to certain benefits depending on the success of the business.

On the face of it, that is all that the terms of the relationship provide. Furthermore in most, particularly larger corporations, whilst the shareholders have originally provided the money to the corporation to enable it to start trading, they do not generally have the power to demand that money back again. Unless the shareholders collectively decide to terminate the corporation and wind up its affairs, they can only withdraw from the relationship by selling their shares to somebody else, who then assumes their role in the relationship.

I have described here the most common form of trading corporation – the joint-stock company. It describes an arrangement – a relationship – between the providers of capital, and the business itself. It is a relationship which basically locks in the provider of capital, and it needs to do this to provide sufficient certainty for the business to be able to trade.

But what is the nature of this relationship? What is it FOR? What exactly is the deal, or the terms on which subscribers provide capital to a company? What is the company expected to do?

The place you would expect to find this would be in the constitutional document for the company. This is where the terms on which the company is organised and controlled ("governance") are set out. It sets out the rights of shareholders, and how they can exercise those rights. But mainly it sets out how those in control of the company – its board of directors – hold and exercise the collective powers of the company.

What it does NOT set out is what that deal is. It describes the "what" and the "how", but not the "why". In my country, it is only in the last ten years that it has been clearly set out in the law what the deal is. Of course, we have known for years, because it has been set out in the cases decided by the law courts over the last 180 years, but it was only in 2006 that our Parliament passed a statute stating that the basic duty of the directors of a company is "to promote the success of the company for the benefit of its members as a whole".[4]

[3] Trading companies generally present their accounts as net assets (i.e. assets net of liabilities, both non-current and current), represented by equity (share capital, share premium reserves/retained earnings. Financial services businesses present theirs differently, setting out all assets, net of all liabilities including owners' equity with other liabilities.

[4] Section 172 Companies Act 2016

So the deal is clear and transparent. Shareholders make their money available to the company, and the company must then trade for their benefit. It does this (essentially) by seeking to generate as much profit as possible from trading in order to distribute this to shareholders as dividends, and by building up the value of the underlying business owned by subscribers through their shareholding.

We refer to this as "maximising shareholder value". We subscribe the share capital, and the company then uses it to trade to obtain the maximum benefit for shareholders as a whole. This is what we expect when we entrust our funds to a company. We usually use the word "invest" to describe this activity, and "investors" to describe those who are seeking to maximise the value of their money by entrusting it to joint-stock companies.

So we might actually describe the arrangement rather more accurately, as follows:

- Shareholders invest capital in the company for it to use to carry on its trading activity
- The company carries on its trade in order to generate the best financial return on investment for its shareholders
- Shareholders have certain rights in relation to how the corporation operates, and are entitled to certain benefits depending on success
- Unless the shareholders collectively decide to terminate the corporation and wind up its affairs, they can only withdraw from the relationship by selling their shares to somebody else, who then assumes their role in the relationship.

As we all know, this arrangement is at the heart of most large trading corporations in my country, in the United States, and in many other jurisdictions around the world. Our legal systems may vary, but at the heart is the basic concept of investment in businesses to obtain the maximum return on capital invested for the benefit of the shareholder owners. As investors, we expect a maximisation of shareholder value; and as businesses that is what companies set out to deliver.

We have financial reporting arrangements so that we can monitor and measure the progress businesses are making; we have stock exchanges on which shares in corporations can be traded, and real-time share prices to show how investors and traders currently value the shares in particular businesses.

As an arrangement, it works very well. "Investor-ownership", as I will refer to it, delivers what it intends to deliver.

But we also know that this approach to business poses a threat to the future of our planet; that the optimisation of benefits for the few works to the disadvantage of the many; that the pursuit of gain by the powerful will ultimately be paid for by the weak; that the drive for competitive advantage by businesses pursuing private interests will continually look for areas of weakness, in the prices they charge to customers, the wages they pay to workers, the way they behave towards local communities, and the taxes they pay.

If we want there to be more cooperatives, if we want to change the domination of global trade by private interests, it's not just a question of having the right financial instrument. We need to be absolutely clear about what the cooperative deal is – and why people should be attracted to that deal rather than to

investor-ownership. This is what we should be talking about: an alternative proposition, which is utterly compelling for anybody who has a concern for the future of humankind. We will need to ensure that we have the right businesses to employ such capital, in the right sectors, andthe right arrangements for monitoring and measuring the delivery of the cooperative deal, mechanisms to hold to account those who exercise power; and much else besides.

But what is the cooperative deal? What is the cooperative promise which is equivalent to the promise made by a company to its shareholders – to maximise value for their private benefit – which we all find so attractive and addictive, and causes investor-ownership to dominate today?

I want to look at this question by revisiting the historical emergence of cooperative trading in England, as I believe that if we look carefully, it may help us with this question.

3. A historical perspective

Cooperative trading emerged in the North of England in the first half of the 19th century because ordinary people could not buy food and basic provisions at a fair price.[5] They were over-charged, cheated on measures, and frequently sold contaminated goods.

A wave of cooperative businesses had been started by William King earlier in the century, but they had all failed. The first cooperative shop based on the Rochdale method was established in 1844, in conditions of great poverty, at a time when the living conditions were some of the worst ever recorded in England. Cooperative trading was a response, by very poor people, to the terrible situation they found themselves in. It was born of a recognition that by taking the risk of doing things collectively, they could achieve together what they could never achieve individually. The method had evolved over a number of decades, learning what worked and what didn't, into a model which could be replicated.

The principle of the community sending somebody to the market in Manchester to buy food at a wholesale price, and selling it back to the community without charging a profit margin, was a simple one. But the hard part was getting started: finding the money or capital to buy the first stock of goods for sale, paying for the rent of the shop, and other essential set up costs. This could only happen if people, already living in harsh economic circumstances, could save the cash to make it happen.

The rule-books of the early cooperative societies may seem harsh to us today, but the Rochdale Society of Equitable Pioneers required that a person wanting to become a member of the society (amongst other things) had to subscribe for 4 £1 shares.[6] They had to make a payment of 1 shilling per share on

[5] The Fenwick Weavers in Scotland is generally regarded as the earliest attempt at cooperative trading. Founded as a friendly society in 1761, they operated a retail business for several years.

[6] In 1844, a worker in the cotton industry in Rochdale earned about 10 shillings a week. There were 20 shillings in a pound, so a £1 share was equivalent to two weeks' wages. Century of Co-operation, GDH Cole

admission to membership, and then 3 pence[7] per week after that until the shares were fully paid. Where members defaulted on payments, they were fined.

Customers were charged for the goods that they bought (cash only: no credit). The price paid included a mark-up to cover overhead costs and other potential risks, but no profit margin. On a quarterly basis during the year, the society calculated its ongoing costs, and to the extent that it was making a surplus beyond the needs of the society, that surplus was paid back to customers in proportion to the goods they had bought. The so-called "cooperative dividend" was an ex-post facto price adjustment to get back to the right and fair price. It was the original and archetypal fair trade.

Members were allowed to leave their undrawn dividends in the society, and to build up their share account until they had a need for the cash. In the days before high street financial services, the cooperative store was a much safer place for people to keep their money than under the bed at home, or in their pocket. The added benefit of an entitlement to even a relatively low level of interest on undrawn capital (though we wouldn't call 5% a relatively low level of interest in the UK today!) created an additional incentive for individuals to build up their capital in their society. Cooperatives effectively created the first savings account for working class people.

It is no surprise that based on this successful approach to trading and saving, the capital of cooperative societies grew at astonishing rates. The Rochdale shop opened with £28 of share capital in 1844. By 1881, that figure had risen to £300,000,[8] and by 1900, the UK cooperative movement collectively had some £23 million. This is an astonishing story. Indeed, having too much capital became a problem for many societies and there were regular debates at Congress (the annual gathering of UK cooperatives) about what to do with all this capital.

How had this happened?

Of course, we should recognise at the start that enlightened self-interest was at the heart of this success story: this was the motivation causing working class people to trade with, save with, and engage with their local society. We must also recognise that the growth of capital also owes a great deal to members leaving their undrawn dividends in the society to build up their share accounts – rather than depositing "new money". But none of this diminishes the economic results which cooperatives delivered. So what had made this possible?

First, there was a breakdown in access to basic goods and services, a market failure. The social and economic circumstances demanded a response, and provided an incentive for people to take risks – to try anything to meet their needs.

Second, a method of trading was developed through experimentation over a period of decades. It kept money local, and ensured that all surpluses generated by the trade essentially remained within the local community – to the members themselves, the community, or the society. It was extremely popular because it operated for the benefit of the customers who owned the business – none of the surplus

[7] There were 12 pence in a shilling, so paying this amount on 4 shares per week cost 10% of the weekly wages. Ditto

[8] Cooperative Statistics 1881

"leaked" to investor owners; it challenged private businesses on price, quality and fairness; and it built customer loyalty.

Third, new laws were then introduced which unlocked dead capital, and enabled the small amounts of money owned by a large number of working-class people to become the engine for economic growth and empowerment. Let me explain what those new laws were.

In the early 19th century, there were some very harsh laws in England which prevented people from meeting together in groups. Parliament was very worried that French revolutionary ideas might take route in England, and to prevent this, they made it unlawful for people to get together in meetings.[9]

One of the things which was permitted, however, was meetings of so-called friendly societies – organisations set up by tradesmen and artisans which enabled them to set up a fund to support them if they were sick or injured, to support their widows and children, pay for funeral expenses etc. Friendly societies were growing and flourishing in the early 19th century; but although they allowed people to set up a fund, they were not trading organisations.

When the Rochdale Pioneers set up their cooperative in 1844, it was registered, probably wrongly, as a friendly society. Many other societies then followed their example, and within a few years there was a growing number of such cooperative societies. A new law was needed. In 1850, Parliament set up an enquiry into "the savings of the middle and working classes" and one of those who gave evidence to this enquiry was the famous philosopher and political economist, John Stuart Mill.

In his evidence, he highlighted the unfairness that rich people with large amounts of capital could do things which poorer people with small amounts of money could not do. He argued that there would be great social benefit if working class people were able to do things collectively together, and combine their capital so that they could do what the wealthy could do.

In 1852, Parliament passed the first "industrial and provident societies act", an act which on its face seemed to be more about enabling tradesmen and artisans to combine together in trade and register a society as a vehicle for trading – what we would normally think of as worker cooperatives.[10] But this legislation became the vehicle for registering societies set up on the Rochdale method, which we now refer to as user or consumer societies, and these became the backbone of cooperation in the UK.

My point is that the subsequent flood of new capital into the emerging cooperative movement was no accident. There was a clear intention, through a new law, to breathe life into the otherwise dead capital in the hands of large numbers of relatively poor people. It was based on a grand vision to bring about profound social change.

But this grand vision had been developing over many years, through the efforts of people like Robert Owen and William King. So when the Rochdale Equitable Pioneers set up their society in 1844, their

[9] The so-called "Combinations Acts"

[10] Industrial and Provident Societies Act 1852

founding document, the so-called "Law First" had bold and ambitious plans: to raise capital to do a range of things to improve the financial, social and domestic conditions of the members, namely:

- To establish a shop for selling provisions
- To build houses for members to live in
- To start a manufacturing business to provide employment for members
- To buy or rent land to be cultivated by members who had no work
- To arrange the powers of production, distribution, education and government, or in other words to establish a self-supporting home-colony of united interests, or assist other societies in establishing such colonies
- Lastly, for the promotion of sobriety the opening of a Temperance Hotel.

What a grand vision this was. This wasn't just the creation of some new legal form as an alternative way of organising business, ownership and management. This was establishing a whole new basis for society itself, as envisaged by Robert Owen earlier in the century.

I have not yet even mentioned what is arguably the greatest achievement of the new movement. In 1845, the Rochdale Pioneers introduced an amendment to their rules to provide for members' meetings on the first and third Monday evening of each month, the business of which was to explain the principles, objects and laws of the society, discuss its affairs and suggest any improvements. An annual dinner or tea was then introduced which all members had to pay for and were expected to attend unless they were sick.

Societies started to provide reading rooms above the shops, giving members access to books and newspapers. From an early stage, the rule-books of societies provided that a percentage of the surplus should be set aside for education. Regular discussions and debates took place in the store-room at a weekend. Social and cultural events were organized for members. Women were treated equally to men and allowed to draw funds from the society.

All of this created a framework for what today we would call empowerment, political development and social progress. Ultimately, alongside the trade union movement the cooperative movement established the foundation for the establishment of the British Labour Party, and subsequently the establishment of the National Health Service and welfare state which is regarded as a major step forwards for the modern nation state.

As already stated, what drove individuals to participate in cooperatives and to build up their own and the movement's capital was enlightened self-interest – this was the basis of the relentless advertising by societies which drove growth. It made good economic sense.

But I believe that it also tapped into something else for people who had apparently been bypassed if not actually oppressed by the industrial revolution and the prosperity it was bringing to the more fortunate. Membership of a cooperative gave them some significance, a chance to say something and be heard, and some small foothold in the institutions which dominated their lives.

So what was the cooperative deal in nineteenth century England? I think that it was basically this:

- A business providing vital services, which trades for your benefit, and for the benefit of your family and your community, and the wider promotion of cooperation
- Somewhere to keep your money, where you receive basic compensation for the use of your money
- The chance of a relationship between you as an individual and your society, which gives you a voice and influence, gives all members collectively control over the organisation, and gives members entry into a whole range of social and cultural opportunities not otherwise available.

The rapid growth of cooperation in the UK and its success in terms of building up capital and growth of trade was the result. It would be interesting to hear from others about the emergence of cooperatives in their own countries, whether there are similar underlying themes. Without doubt, these things fundamentally changed the UK.

In summary and reflecting on all of this, three things came together to cause thefundamental change in society which resulted:

- A collective, community-based self-help approach to trading to meet the everyday needs of ordinary members of society, where market failure by private enterprise had left them with no alternative
- Legal reforms to enable cash held by individual members of society to be applied collectively to achieve the common good
- A grand vision about addressing a fundamental social need, and through collective action based around trading, enabling a substantial portion of the population to improve their situation through engagement, education, and political empowerment

But how is that relevant to today?

4. Contemporary context

I looked at the growth of cooperative capital in its wider social and political context because I believe that it is only in that wider context that we can properly understand what happened, and why. My argument is that if we look at capital today just in a narrow financial context, and not as part of a much bigger social, economic and political picture, we might both lack ambition and crucially might also miss the opportunity to do something significant today.

So in this next section, I would like to reflect on those three same aspects that we just looked at historically:

- Where are the areas today where ordinary people are currently being failed by traditional private enterprise and/or the state, and are already in search of analternative solution?
- Where are the opportunities today, comparable to the liberation of dead capital by cooperative trading 170 years ago, which will enable ordinary people collectively to bring about transformation with their own resources?

- What is the grand vision needed today, comparable to that of Robert Owen and others, in terms of social reform where a participative approach can be an engine for transformation?

I accept that this is itself rather a large task in today's context, but hope that you will allow me to set this bigger scene which we can explore in greater detail in the months ahead. Please also forgive me for looking at things rather from a UK perspective, but of necessity that is my main area of professional activity. I would like to know whether what I am saying about the UK is also relevant in other countries, and I hope that you will correct me where your own context makes things look very different. I would like to start with the grand vision question.

Grand vision

So what is today's grand vision?

Robert Owen, Friedrich Raiffeisen, Jose Maria Arizmendiarrietta – these were all great visionaries who weren't just interested in setting up new types of trading organization; they wanted to change society. They realised that you could only achieve such grand and noble objectives from the grass-roots, by transforming the very relationships people have with each other on a day to day basis, and in how they carried out their most mundane but essential everyday activities.

Cooperation was a means to an end, a self-help mechanism for providing access to basic provisions, jobs, and financial security; but by enabling people to meet their collective needs for food, work and money by working collaboratively together, they knew that they would create personal relationships which went further than food, work and money. They were the foundation for a fairer society. That was the grand vision.

But where is the grand vision for today? In the nineteenth century, the need was for a vision which provided opportunity for all, not just the prosperous. For sure, there are many places around the world where that is still vitally needed today – inequality remains a huge problem – but I would argue that there is an even greater priority today.

We live in a time when commercial and corporate interests are now more powerful than nation states; where the political power of governments is beholden to business leaders, and where governments no longer have the power to address the major challenges we face today: climate change; terrorism; migration; and conventional politics is stuggling.

Citizens have lost control. There is an obvious rise in populist candidates in democratic countries, with an entirely false image of old-fashioned power, and of their ability to wield authority as if they were still living in the world of a century ago. Where democratic politics is struggling to keep its head above water, and corporate power is advancing in leaps and bounds, a cooperative, people-based vision is desparately needed to reassert the authority of individuals in today's world. Democracy and consumer choice are no longer sufficient to protect the interest of ordinary people.

It is no accident that faith leaders are forcefully articulating this. Pope Francis in his encyclical Laudate si' (On Care for our Common Home) talks about "a technocratic paradigm in which the economy accepts every advance in technology with a view to profit, without concern for its potentially negative impact on

human beings."[11] He argues that politics "must not be subject to the economy, nor should the economy be subject to the dictates of an efficiency-driven paradigm of technocracy".[12] He asserts that unless "citizens control political power – national, regional and municipal – it will not be possible to control damage to the environment."[13] He talks of how the principle of the common good immediately becomes a summons to solidarity and a preferential option for the poorest of our brothers and sisters, and for future generations.[14] And he expressly recognizes the power of cooperatives, and how, while the existing world order proves powerless to assume its responsibilities, local individuals and groups can make a real difference. [15]

In my own country, before our last general election in 2015, the Bishops of the Church of England published an open letter to the people of the church called "Who Is My Neighbour?". They argued that pursuing the common good is a Christian obligation and included in our role as voters;[16] that our democracy was failing because successive administrations have done little to address the trends which are most influential in shaping ordinary people's lives[17]; that the problem was that no one in politics today has a convincing story about a healthy balance between national government and global economic power;[18] and that we need an honest account of how we must live in the future if generations yet to come are not to inherit a denuded and exhausted planet.[19]

I am sure you will be aware of other such statements by religious and other thought leaders. It seems that we live in a time where politics, business and faith overlap more than ever before, and need to work together in search of solutions.

I believe that the rise of solidarity movements, the growth of social enterprise and other initiatives to return to responsible trading also reflect an underlying widespread dissatisfaction with the status quo, and a thirst for something alternative; more reflecting human values, community, nurture, happiness.

In a quest for something more human, more sustainable and more realistic I believe we are more likely to find good ideas amongst mothers caring for their children, than systems designers and process management; we are more in need of right-brain than left-brain thinking; more in need of the quiet wisdom of first nations rather than the brash knowledge of the post-enlightenment; more in need of female leadership rather than male.

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[11] http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html Paragraph 109

[12] Ditto paragraph 189

[13] Ditto paragraph 179

[14] Ditto paragraphs 158 and 159

[15] Ditto paragraph 179

[16] https://www.churchofengland.org/media-centre/news/2015/02/house-of-bishops'-pastoral-letter-on-the-2015-general-election.aspx paragraph 5

[17] Ditto paragraph 25

[18] Ditto paragraph 26

[19] Ditto paragraph 27

The grand vision which is needed is one which reconnects citizens, which gives them meaning and significance at a time when they feel that they have very little significance, whether as voters, workers or customers. It is a vision which recognises that citizens are the only people who can address the imminent challenges of climate change, energy use, waste disposal, and healthcare. Do we believe that cooperatives have a part to play in meeting these needs?

Trade

So what are the sectors where we expect to see cooperatives trading in the future?

It is clearly arguable that cooperatives continue to play an important part in retail trade, being more open about the source and content of food, treating workers, suppliers and producers more fairly, and offering an altogether more sustainable basis for the distribution of food in the 21st century. However, compared with the extreme exploitation of customers prevalent in the early 19th century, where the lack of transport made any real competition unlikely, we live in a very different world today.

If you were inventing consumer or customer cooperation for the first time today, I believe there are two areas where you would be most likely to say that ordinary citizens are most dependent and vulnerable to exploitation.

The first area is care. I mean care in the broadest sense, including basic healthcare, and care of the most vulnerable in our society today; those who most need the support of other people to lead their lives: care of vulnerable young people, care of older people, care of those with long-term physical and mental difficulties, care of those with addictions to alcohol and other substances, care of those caught in a cycle of crime.

In the UK, we have a crisis of care, where our National Health Service and other public services are stretched to the limits, and where an aging population with increasing care needs is likely to overwhelm the services available in the near future. As in many other countries, where public services no longer seem to be able to provide an answer, we simply look to private enterprise to solve the problem.

Except with care, it can't, and for two reasons. First, private healthcare is only an option for those who can afford it. Undoubtedly there is much that private healthcare does and can do; but as a system, it cannot meet the needs of the general population.

The second reason is this: there is a fundamental tension between a business model based on maximising shareholder value in pursuit of private gain, and the act of one human giving of themselves to another in an act of care. That business model is predicated on growth and demand, looking to provide more medical interventions, more "care". It is possible to commoditise the process of administering medical interventions to people; but I would argue that it is not care. We are seeing frequent extreme examples of this in the UK, with some shocking failures.

Here in Latin America of course, there is a big tradition of cooperative healthcare. In a number of other countries, there is already a well-established tradition of cooperatives in health and social care. I am thinking in particular of the social cooperatives in Italy, and the widespread use of cooperatives in care in Japan. But we are a long way behind in the UK, and have much to learn.

In my view, if in fifty years' time we look back at where cooperation has grown the most in the UK, I believe that one sector will be in care. This isn't just because private healthcare and state provision have their economic challenges; it is also because of the tendency towards a binary, done-to approach, where citizens are consumers and the medical services are effectively controlled by others who provide them. As individuals, we need to learn to look after our own health and well-being much more effectively; we need to be working as communities collectively meeting care and well-being needs; we need trained professionals who can be properly paid to do their job in providing specialist support which cannot be met from within communities; but the future of care, in my view, is in a cooperative approach where those needing care, those giving care, and those employed to provide care work collaboratively together to make best use of available resources.

This is a very big subject, probably for another day, but I do not believe that state-owned services or investor-owned corporations will solve society's future need for care.

If my first area of greatest need for cooperative trading is in relation to people services (personal services or human services as described in some countries), my second area of greatest need is what in the UK we call public utilities: energy (electricity and gas), water, drainage, telecommunications, and public transport.

The availability of public utilities is, and is seen as a basic requirement today, something which states seek to make available to all citizens. In my country, all of these services were provided at some stage by the state, but since the early 1980s and the policies initiated by Margaret Thatcher, all of these have been or are being transferred into private ownership, and, as that business model is designed, they are all operated as businesses that seek to optimise shareholder value.

Because these businesses in many cases operate as virtual monopolies, it was realised when they were being set up that to protect the interests of customers against overcharging and poor services, a system of regulation would be needed. So we have a regulator for electricity, for gas, for water, for telecoms, for the railways and much else besides. It is a system which works badly in a number of respects. We pay high prices, and receive poor services; senior executives of the companies concerned are paid excessively high salaries for running businesses which do not justify such rewards; and the businesses are funded by expensive share capital listed on the London Stock Exchange.

It is the wrong business model and ownership model for what are essentially public or community assets. Why should private interests extract economic value from the operation of public assets that should simply be operated for the benefit of us all?

This isn't just a question of value for money for customers in buying essential services that everyone needs. How these community assets are owned and operated are themselves a matter of concern to all of us and to future generations. It should not be for private economic interests to make the big decisions affecting the future of the physical resources of the planet. These are all public assets that could and should be owned and operated for the benefit of all citizens, not just a few.

So for me, just as people needed cooperatives to provide them with access to food in 1850, these are the equivalent areas where we need cooperatives to meet our needs today. Personal services, and public

utilities. Neither states nor private enterprise can provide a long-term solution; but some form of cooperative ownership, I believe, can.

These are also sectors with high and continuous levels of demand, making them relatively lower risk, rather than, say, in more speculative or creative sectors. Furthermore, both personal services and public utilities are also areas where there is a very important need for us all individually to change our behaviours and to become more responsible citizens: taking greater care of our own health and well-being so that we help to reduce care costs; being more careful with our use of energy, how we dispose of waste, and how we treat natural resources. These are therefore areas where we need to be more than just customers, more than just consumers; and where a real relationship with the organisation makes sense.

Capital opportunities

So this is where I come back to the main subject of this session: capital.

In the historical section above, I explained how the legislation introduced in 1852 unlocked the savings (the undrawn dividends) of working class people and enabled them to be used for their and the wider community purpose to fund cooperative shops and much else besides. The remarkable growth of cooperative capital occurred because at that point there were no financial services available to such people, and cooperative trading fulfilled a vital need.

But in the 21st century, things are very different. The modern financial services industry (including cooperatives) generally meets our needs in terms of everyday cash management. There is no equivalent opportunity to that found by cooperative shops in the UK in the 19th century. However, I would argue that there is an even bigger gap in financial services provision today, and this is in relation to our savings for retirement.

The provision of pensions for retired people is big business. Those working for bigger organisations (and in some countries like the UK, even those working for small businesses) are likely to be part of a pension scheme to which they and their employer make contributions. Those who are self-employed like me and probably some of you who are not part of a corporate pension scheme commonly make their own arrangements to set up their own pensions for retirement. In both cases, it is likely that the money is managed through funds administered by experts looking to ensure that our money retains its value as far as possible, and generates growth.

The money we set aside for our older years is our capital. Through many and complex arrangements, much of this is the capital used by businesses as described in my opening earlier. It is the money which businesses use for the purposes of their trade. I argued that when we entrust our money to a corporation, we enter into a relationship with that corporation: we provide the money, and they put it to good use for the purposes of their trade, and in so doing generate the best financial return they can to pay back to us. That's the deal.

But what if that's not the deal we want any more? What if we would prefer those corporations not simply to maximise shareholder value, but rather to behave in a way which was more socially responsible? What if we would prefer that they didn't pay their executive such high salaries? Or to pay their lower-paid

workers a living wage, or that they organized their affairs to pay a fair amount of tax for their trade, or that they took better care of their energy usage or waste disposal?

The problem is that this isn't the deal. Whilst in theory, as the ultimate shareholders we should be able to influence corporate behaviour, in practice we cannot. We are too remote, too small, and in any event, the system is set up to maximise profitability for private interests (ours, ironically), not to deliver the common good.

When a well-known car manufacturer was recently exposed for installing devices designed to cheat the regulation of emissions, the concern to investors wasn't that they had been installing these devices – it was that they were caught installing such devices. Just like the newspapers who were caught hacking people's phones to get stories; and banks which were caught colluding to fix interest rates. The concern of investors is simply to limit damage to the share price. Just pay the fine, settle the celebrity claims, do a deal with the regulator. This is not a system which is working for us.

Our powerlessness as providers of capital today means that the "relationship" is dead. In reality, the model of investor-ownership is now permanently locked into the idea of maximising shareholder value – even if that is not what shareholders want. It is as if business has been captured by an idea of private greed, and needs to be liberated to work for the common good.

In the UK, we had a very lengthy review of company law before our Companies Act was passed in 2006, and as part of that review, consideration was given to whether this principal of shareholder primacy should be limited in some way. It wasn't – no real change was made; just warm words about having to have regard to the interests of employees, suppliers, communities, the environment etc.

So my argument is this. The deal we are offered by investor-ownership is no longer the right deal. Although many may still prefer to continue to invest their money in businesses which are only focused on economic outcomes, those of us for whom maximising profitability isn't the only or even the top priority, and who want something else, we need to look elsewhere. We need to find a new home for our capital.

But if we don't want the investor-ownership deal, what is the deal that we do want? What would it take for us to contemplate moving our savings out of investor-ownership and into something cooperative? For that to happen, what should a cooperative capital deal comprise? And is that what cooperatives are currently offering?

5. A cooperative capital deal

So we return to our main subject of capital. What should we be doing in this context today? If I am right that we have the capital, but it's in the wrong place; if there is an opportunity for cooperative trading to become mainstream, and fulfil a need where state provision and investor-ownership can't or won't; what do we need to do? How do we position cooperative enterprise as the place where you should bring your capital, and make it more likely that we will hand on a better world to future generations?

Of course there is no single and simple answer to this. However, I do believe that this is a critical time of change for the reasons I have mentioned, where big ideas are being formed, and where the development of those ideas can only come to fruition if we are having the right conversations and dialogue. That is why I think this event in Montevideo is so important. I don't imagine that we lawyers will have these great ideas, we are more like the mid-wives who can help others to give birth to the next generation of thinking. So we must do our work.

So I want to finish with three brief reflections which I hope will help in this: one about language; one about articulating a cooperative capital deal; and one about nurturing the organisations which can deliver a cooperative capital deal.

Language

First, language. It is very difficult to have useful conversations without the language to express what is needed. We are at a great disadvantage today. Since cooperatives are marginal and investor-ownership dominates the world of business, the language of that approach to business dominates and generally expresses the perspective and view point of investor-ownership. Many of the words that are used carry the implications of investor-ownership, and for many people they can only be understood in that context. The language of corporations, of markets, of international accounting standards, of financial measurement and of rewards.

I think Frank Lowery and Wayne Schatz deal with this subject well in their essay in the ICA publication "The Capital Conundrum", where they say this: "Co-operatives are islands in a sea of investor-owned firms. As islands, they take on the language and concepts of the world around them, even when they know that they are not for them and do not fit."

If we use the words "investor" and "investment" in the context of attracting capital to cooperatives, we are taking big risks. It risks giving the impression to those who do not have our background that cooperatives seek to optimise shareholder value; it fails to explain the radically different objective of cooperatives; and by adopting the language of investor-ownership, it plays into its hands.

Even phrases apparently invented to describe a different approach are unhelpful. Phrases like "not for profit" (in the UK) or "non-profit" (in the US) give an impression of organisations which are not really commercially minded, and perhaps rather idealistic.

For me, another difficult phrase is "stakeholder" to define a group of people with an interest, for example, as customers, workers or local residents. But it is a word which describes one group over against another; it is a word which implies a conflict of interest, or an opposition based on competing interests. We need language which recognizes and respects the legitimate interests of customers, workers and citizens, but creates the foundation for collaboration and cooperation: not conflict. We may need to use different and potentially new language to communicate properly.

We need to take real care with language, both across jurisdictional boundaries when talking to each other, but particularly and most importantly when talking to those who do not have a cooperative background. It is my experience, when working with a new group of people who do not share our background, that the

first stage is a process of deconstruction in order to create a common understanding, with clear language. Even this process can be enlightening for many people.

This is fundamentally a question of education. You may be surprised that I have not previously mentioned cooperative education alongside care and utilities. I actually believe that cooperative education is a prior requirement for this whole subject; without education, we cannot develop the language, communicate the ideas, and engage in the conversations which are fundamental to change. It is so important that we as lawyers are fully engaged in that education process. If we expect to facilitate change, we should probably spend as much time involved in education as we do in the office. This is a big issue for us.

A cooperative capital deal

So to my second brief reflection – on a cooperative capital deal. If we tried to describe the key features of what "cooperative capital" was trying to deliver, I believe (though there is much room for discussion here), it would essentially be as follows:

- Members provide capital to the cooperative for it to use to carry on its trading activity
- The organization carries on its business on a fair and just basis, seeking to trade in a way which avoids exploitation, or causing oppression or harm. Essentially it operates for the common good, properly taking into account the interests of the people most affected by the business, generally customers, workers and local citizens, but also recognising the interests of those who provide the capital; of others who contribute to the business e.g. on a voluntary basis as in the context of care; and of future generations.
- Members have rights in relation to how the business operates, through participation and democratic governance, helping to ensure that the business delivers its objective. Members are entitled to compensation for the use of their capital subject to trading results, as part of the fair and just basis of trading.
- Members can withdraw their capital either at agreed points under the terms of the capital after say 5 or 10 years, or if in the meantime they can transfer/sell their shares to another member. Shares remain at par value

These features of what I would call a cooperative capital deal will require legal financial instruments which are designed to deliver such a deal, and this will take legal reform in the UK. In very brief summary, we are talking about

- Loss-absorbing equity capital (in the language of international accounting), which is permanent in the sense that it is capital that can only be returned to the providers at the choice of the cooperative. This might be on a fixed term basis, such as after 5 or 10 years. This would provide the exit for the owners of the capital. In the UK we also have withdrawable share capital – that is to say capital which members can withdraw at will, rather like taking money out of a deposit account. Such arrangements can and should continue for certain uses and situations, but I don't think they are appropriate for the context I have described.
- Compensation would be payable to the owner of the capital dependent on the results of the cooperatives' activities. An indicative or maximum level of compensation may be set out in the financial instrument. But it would need to be clear on the face of the constitution of the

cooperative and the financial instrument that compensation was intended to be on a fair and responsible basis taking into account all relevant interests.

- The shares would remain at par value. They could be transferable between members subject to the rules of each society, but they would not be tradeable on a stock exchange. I agree with Tom Webb,[20]Frank Lowery and Wayne Schatz[21] and others that you cannot mix different types of capital in a single corporate entity: it is either cooperative capital, or it is purely profit-seeking capital (investor ownership). Capital cannot serve two masters.
- The providers of capital, who would be members of the cooperative, would be entitled to certain rights to ensure that the voice of capital was heard alongside the voice of customers, of workers and of other interests. It is assumed that those providing capital would already be members of the cooperative as customers, workers etc. Any additional rights they might have as providers of capital would be limited to what was necessary in order to provide an appropriate balance in order to attract people to provide their capital to the cooperative.

Nurturing cooperatives

I believe that we all have a role to play, working in our own jurisdictions, to ensure that our local laws enable these ideas to be implemented.

We also have a role to play supporting the evolution and emergence of cooperatives which operate along the lines I have described above. It may be that this is already happening in your country; or that you are on a pathway towards this sort of future.

From the point of view of my own country, although progress has been made, we have quite a long way to go. Aside from the fact that our pensions industry is entirely dominated by investor-ownership and not geared up to enabling people to save for their retirement through cooperatives, our cooperatives themselves do not generally set out to attract capital on this basis.

It is common for the members of our larger retail societies to have nominal share capital of £1 only. This is possible because most of these societies no longer wish to use traditional withdrawable share capital, and they have historic reserves built up over the last 100 years of more which has met their needs. Some societies are now exploring the possibility of attracting member capital once again, as a cheaper option than borrowing money from the banks.

But how will they describe the deal they are offering to members? The expectation is that it will focus mainly on the compensation offered for the use of capital. But I believe that the present circumstances require a clear articulation of a cooperative approach to trading, and what the cooperative promise to members will be.

If such a promise is made, it is then important that societies are able to measure how they are performing against any such promise, and to report to members on progress. Here I believe that much good work has taken place over recent years in the UK and elsewhere to take forward the approach to monitoring and

[20]From Corporate Globalisation to Global Cooperation, Tom Webb 2016, Fernwood Publishing

[21]The Capital Conundrum, ICA 2016, chapter 2: The Cooperators Group Limited: a Canadian Perspective

reporting on a much wider range of outcomes than simply the profitability of the business. The treatment of employees or colleagues, of suppliers, of the local community, paying taxes, recycling, waste disposal, sources of energy and energy-use – much progress has been made in many areas which helps to inform a wider and rounder view of how fairly and responsibly a cooperative is behaving.

Measuring and reporting is of fundamental importance; but it is only meaningful if it then provides the basis for those in positions of responsibility to give an account of their actions, and to be held to account by members. The evolution of cooperative governance in the UK (and in your countries as well, I imagine) constantly responds to changing circumstances.

The traditional Rochdale model of governance with a democratically elected board and a separate employed management team (who are not board members) is the now subject of serious discussion. Many will have heard about the changes to the Cooperative Group, where this model was thrown out and replaced by something which is much like the governance of a public limited company where most of the power is held by a board of executive and non-executive directors, and much more limited power held by democratically elected representatives.

My own view is that there are serious flaws in this approach, but the changes came about in response to particular challenges for the business. I have no doubt that there will be further reforms at some point in the future, but currently Cooperative Group sets out an alternative approach which can be appraised over time, and help to inform what options are available.

One thing is clear. If we wish to see cooperative businesses attracting large amounts of capital, and becoming mainstream in our various economies, the ownership and governance structures of those businesses needs to be robust and fit for purpose. Those exercising real power within cooperatives – and having responsibility for our capital – need to have the skills and experience to hold such power; they need to be surrounded by others equally qualified to fulfil such roles, and to challenge, support and encourage talented executives to manage in a cooperative way.

The role of members and members' representatives also needs to be clear and understood. Unlike investor-owned businesses where virtually all of the company's powers are exercised by and under the authority of the board, members have a vital role to play in helping to shape the future of a cooperative. This difference balance of powers, including the role of members, makes a big difference in many situations including financial regulation, regulation of the particular trade sector, accounting treatment, and much else besides.

Concluding comments

I would like to conclude with these words from Ian MacPherson from 1995."Throughout its history, the co-operative movement has constantly changed; it will continuously do so in the future. Beneath the changes, however, lies a fundamental respect for all human beings and a belief in their capacity to improve themselves economically and socially through mutual self-help. Further, the co-operative movement believes that democratic procedures applied to economic activities are feasible, desirable, and efficient. It believes democratically-controlled economic organisations make a contribution to the common good."

There is much work for us to do; as legal practitioners, as cooperators, and as individual citizens in our own society. But I would like to conclude by congratulating and thanking the organisors of this event. I hope that it is just the first forum, with many more to follow.

COOPERATIVE AND (CAPITAL) MARKETS – MEDIATION OF MEMBERS' SHARES BY AN ONLINE-PLATFORM

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In Austria, the idea of crowdfunding has been linked to a cooperative: CrowdCoopFunding eG (eG: eingetragene Genossenschaft, i.e. registered cooperative) – a crowdfunding platform (https://crowdcoopfunding.at) – emerged from an initiative of the Austrian Association of Cooperatives (Schulze-Delitzsch) (Binder, 2015), which offers its members the opportunity to raise equity capital. This is realized by mediation, which is advertised as a form of investment with the invitation "buy shares". The platform is addressed to existing cooperatives to expand the group of members as well as to new cooperatives (start-up-coops).

This idea opens up an interesting perspective with regard to also a misunderstanding of cooperative membership within a generally observable "market orientation" (e.g. Dreher, 2014).

For a better understanding and clarification of the typical character of membership in a registered cooperative it is helpful to argue on the basis of the current situation of Cooperative Law. The paper concentrates on German Cooperative Law (G-GenG, Genossenschaftsgesetz – GenG) and takes additionally the Austrian Cooperative Law (A-GenG) into account.

Membership in a cooperative

Membership is always based on a legal framework ("constitution"), in particular on the company agreement or on the by-laws, and on the general legal basis (e.g. cooperative law). Membership results from individuals forming a group and promising to pursue jointly and responsibly the purpose of the group or the corporate purpose in a joint and responsible manner (Lutter, 1980).

As a permanent legal relationship, membership is limited in time only by its beginning and its ending. This is legally equivalent to the acquisition and loss of membership: in the case of a new cooperative membership is established from the outset with the company contract and the registration of the cooperative in the cooperative register. If the cooperative already exists, it is possible to join at any time, as an expression of the principle of open membership of the cooperative, which is followed by the variability of part of the capital. Membership is acquired by means of a written declaration of acceptance and approval by the cooperative (Art. 15 (1) G-GenG). Responsibility for approval usually lies with the Management Board (Lang, Weidmüller, 2016, 192, No. 11). The cooperative's membership is recorded in the list of members (Art. 15 (2) G-GenG), which since the end of 1993 is no longer at the registering court but exclusively at the cooperative (Art. 30 (1) G-GenG, Lang, Weidmüller, 2016, 368, No. 1).

How to become and remain a member

In principle, there is no claim to admission: a person's membership is a legal relationship based on private and autonomous decisions (Lutter, 1980, 97).

Membership expires when the number of members is lower than three (Art. 80 (1) G-GenG), on a liquidation decision (Art. 78 G-GenG), or with the expiry of a certain period of time, provided that the cooperative has been limited to a certain period of time (Art. 79 G-GenG). If the cooperative continues, membership can

- voluntarily end on the initiative of the member (resignation), which takes place at the eG by means of termination (Art. 65 G-GenG), or

- at the instigation of the cooperative (expulsion) (Art. 68 G-GenG).

In both cases the membership of the person concerned ends. While resignation and expulsion are also characteristicsof e.g. associations, such a general rule is not envisaged in the case of a corporation. This is an expression of the fixed capital of the corporation. The cooperative is characterized in contrast by open membership (1st principle of ICA – International Co-operative Alliance).

Membership and member's share

As a matter of principle, each member has to take over at least one member's share. The member's share doesn't constitute membership. It is a result of becoming a member that the member pays in capital on their share. The member's share is defined in the German GenG as "an abstract factor to be defined in the Articles of Association which specifies the maximum amount of the contribution - irrespective of the possibility of acquiring several shares" (Lang, Weidmüller, 2016, 123, No. 2). The statutes stipulate in more detail when payments have to be made (with a minimum of one-tenth of the member's share) and how much has to be paid (Art. 7 (1) G-GenG); instalment payments are possible.

Total capital paid up (or due to be paid up) on a member's shares defines the limit of the member's liability, the amount is never higher than the total nominal value of the shares individually held by a member (Lang, Weidmüller, 2016, 124, No. 5, cf. the concept in the law, in particular Art. 19, 22 G-GenG). A cooperative may adopt in its by-law further details of the membership with regard to its economic needs and the financial capacity of their members.

Due to the potentially unlimited number of members, a cooperative can increase its capital at any time – assuming a corresponding interest by (new) members – it has a kind of "permanent emission right" (Hofinger, 1991, 5). However, the cooperative must be able to respond in the opposite direction when members wish to leave the cooperative and get back the capital they paid up on their shares.

Distinction of membership

The differences in transferability influence the understanding of membership as a legal category. In jurisprudence, it is disputed whether membership is (a) a legal relationship from which arise (subjective) rights and obligations, or whether it is (b) to be understood as a subjective right, on which individual rights could be constituted.

There is agreement on the understanding that membership as a permanent relationship creates rights and obligations for members and their association. This so called "bundle" of rights and obligations characterizes the legal position of each member in relation to the company within its specific legal form.

As an independent subject, which combines the sum of rights and obligations of a member in a company taking a particular legal form, the manifold phenomena of concrete membership become marketable, e.g. in the case of the share, and legally clear and easily manageable (Lutter, 1980, 100). This concept, represented in (b), is already very close to the economic theory of property rights (Kramer, 1996) because "rights" are the focus. However, a legal approximation is made more difficult because the concept of private-law ownership in the Anglo-Saxon jurisdictions, in which the theory originates, is wider than the equivalent concept e.g. in Germany or Austria, despite legal regulations being regarded as property rights.

In the case of a cooperative, membership is expressly excluded from case (b) because "the legal order excludes transferability in general and independently of the will of the association and its members" (Lutter, 1980, 101). There is also a fundamental difference between a legal norm, its economic analysis and its historical dimension with its social requirements in both the past and the present.

Cooperative membership is not transferable

Stable capital is achieved by the cooperative by allowing a transfer ofall or part of the capital paid in on one or more members' shares (Art. 76 G-GenG). Corporations are instead based on the free transferability of their shares. Here, by contract with a former shareholder, his / her ownership can be taken over completely by a third party, for example, by the acquisition of shares of the seller (derivative acquisition). Membership in an association is non-transferable and irrevocable (Art. 38 German Bürgerliches Gesetzbuch – G-BGB (Civil Law)), insofar as the articles of association do not specify otherwise (Art. 40 G- BGB). Similar to G-BGB, membership in the registered cooperative neither can be transferred in principle nor can it be interpreted as transferable according to general principles. It is highly personal, and thus cannot be sold or traded (Großfeld, 1975, 9).

While Beuthien describes the lack of a solution in the German GenG close to the transferable shares of a private limited company as a "dogmatic structural gap" (Beuthien, 2000, 1163), Steding sees that "any fraudulent or unconsiderate violation of ... [the cooperative] principles ... would bring the legal form of the cooperative constructed by Schulze-Delitzsch from their balance into a misery (Steding, 1998, 46) (see for the area of conflict already Münkner, 1996). However, legislation apparently responded in 2006 insofar as the transfer of part of member's share capital was permitted (Art. 76 (1) G-GenG, Lang, Weidmüller, 2016, 924f., No 1).

Nevertheless, the personal character of co-operative membership is underlined by the strict rule that a legal successor (heir) becomes a memberautomatically only for the rest of the financial year but continued membership by an heir is possible (Art. 77 (1) and (2) G-GenG).

Members' shares and crowd funded capital

There are circumstances in which a specific amount of capital needs to be collected in a short period of time. Crowdfunding, based on a platform and thus a broader market solution, provides an opportunity to raise capital. Nevertheless, an online-offer inevitably negates the local or regional character of a cooperative because persons who have no relation to the cooperative society and its business are considered as members – better being called: investors. In this case, it is advisable to use the possibility introduced in 2006 to allow investing members to be admitted (Art. 8 (2) G-GenG) but they always have to remain a minority.

Also for this purpose the platform provides electronic support (a membership book), similar to the share register of a company that has issued registered shares. If the platform data of many cooperatives are bundled and administered, they will gain a superior insight into existing participations, which are now available to credit institutions within the framework of the safe custody of securities. With respect to these aspects the cooperative member's share converges to shares of a corporation, characterized by the element of participation in total assets and the transferability of shares on a capital market, i.e. a stock exchange.

As a compromise, each cooperative being interested in funding capital by members' shares installs its own platform and – additionally – its cooperative association offers a platform indicating these cooperatives that use such a platform by themselves and links to it.

Participation in cooperative assets?

Perspectively, an online-platform also works in the direction that Hofinger (1991, 1992) had designed for members' shares with general participation in cooperative assets in Austria at that time. The German GenG has set considerably narrower limits on the extent of divisible reserves in accordance with 3rd principle of ICA since at least 1974 (Art. 73 (3) G-GenG) whereas the Austrian Cooperative Law offers a greater freedom of design (Art. 55 (3) and 79 (2) A-GenG).

In no case would membership be transferred, but the capital paid in on a member's shares or parts thereof would be transferred to another member or would be taken over by a person who becomes a member and who credits this capital as payment to his / her member's share(s).

In the case of a transfer, both parties could agree on a higher value than the nominal one, so that for the transferring member part of the reserves would be realized by the transferee member taking the shareswithout the need for agreement by the cooperative without expanding the legal rights of membership in the cooperative.

However, this could give rise to or continue an expectation that future growth in assets' value could be realized. The general view on the cooperative character could move from personal to capitalistic elements. The cooperative wouldn't value its reserves having grown over several generations in the present or at any time but 'the market' for the takeover of existing members' shares would do so. This could only make sense if the direct way to become a member by paying in nominal amount on member's share is no longer possible or only possible to a limited extent but in this case the cooperative is not open any longer and converges also in this respect to a corporation.

Conclusion

The idea of an online-platform for members' shares seems to come into conflict with at least two principles that characterize a cooperative: the principle of open membership and the principle of (partly) indivisible reserves which is equivalent with the issuance of shares by nominal value (Blisse, 2015, 187).

It would be unproblematic in terms of freedom of contract but would be unfortunate in terms of future prospects for the cooperative model if cooperatives moved closer to the stucture of corporations (joint-stock companies) (see Taisch & Troxler, Switzerland) , 2013). The registered cooperative would lose its distinctiveness, as such developments would resemble conversion into a corporation. Even if this were done by cooperative associations, it would send a negative signal, because it would reduce the range of economic forms characterized by their different legal forms. That would impoverish our economic system, by reducing differences and choices – the constituting characteristics of an ecologically and socially responsible market economy.

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FROM SOCIAL PROTEST TO LEGISLATION: ISRAEL'S NEW CREDIT UNION LAW

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Preface

On December 22nd 2016 the Israeli Parliament passed The Supervision of Financial Services (Regulated Financial Services) Law, 5776-2016 – allowing the establishment of credit unions in Israel for the first time in half a century. The bill was brought as a governmental initiative – after a five years struggle of social activists who were determined to promote the idea of cooperative financial institution and its implementation.

This all started with the social protest of 2011 which evoked the need for a major change in the highly centralized and very expensive banking system. OFEK cooperative society was established in 2012 setting a goal of starting a cooperative bank. During the five years since then, governmental committees have risen and faded and many statements have been made in favor of the idea only to collapse into concrete decisions that would prevent it.

The former Supervisor of the Bank of Israel decided to prefer "stability" over "competition" – announcing the regulation of financial cooperatives would require equity capital of 75 million NIS (about 18 million €) prior to licensing and after expenses – which meant that the cooperative must raise about 40 million € from members - an impossible mission.

It was only when a new Supervisor of Banks was appointed that the barriers were lifted - as she announced that small financial institutions present no threat to the stability of the market, and should be supported by enforcing as little regulation as possible, in order to encourage them to operate.

A new challenge then began. This would be the first cooperative law ever enacted in Israel - the Cooperative Societies Ordinance was promulgated by the British Mandate. The challenge was how to make sure that the new law would be based on cooperative values and principles.

The Financial Market in Israel

The Banking Market in Israel is highly centralized. Five banking groups hold 93% of the market, three of which hold 72%. All those banking groups are conducted as profit maximization companies[1], their commission rates are suspiciously similar, and the customers' costs are dramatically higher than in other countries - on average the equivalent of about 800$ a year for a household[2]. The lack of competition has

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1 Even though one of the big banks' majority of stocks is owned by the state.

2 The Trachtenberg Committee

had harsh ramifications, mostly on small businesses, who are struggling both with high commissions and limited access to capital.

The profits of the banks kept rising, the CEO's salaries became outrageous, and even though the Bank of Israel applied concrete restrictions on commission rates, and issued warnings against unlawful coordination, the system kept inventing schemes meant to gain profits at public expense.

In 2009 the 5 major Israeli banks had profits of 5.35 Billion NIS[3]; in 2010 6.6 Billion NIS; in 2011 7 Billion NIS; in 2012 5.9 Billion NIS[4]; in 2013 7.05 Billion NIS; in 2014 6.4 Billion NIS; and in 2015 8.24 Billion. On average the banks' revenues on commissions amounted to about 14 Billion NIS a year.

The salaries' costs of the banks' CEO's are between 4 and 9.5 Million NIS a year.[5] It got to the point the Israeli Parliament decided on March 2016 to regulate banking CEO's salaries so that they would not exceed 44 times the lowest salary in the same bank. That would compel them to reduce annual salary to about 2.5 Million NIS.

Financial Cooperatives in Early Israel

When Israel was founded (1948) there were 2200 registered cooperatives serving a population of 650,000 and holding dominant positions in all sectors of the economy.

In pre-Israel Palestine, most of the social services given by the Jewish institutions to the public were provided by cooperatives: Healthcare services, employment agencies, and some educational institutions. The economy was based on producers' cooperatives in the agricultural and industrial sectors and on consumers' cooperatives.

Financial cooperative activities were registered in Palestine as early as the 1910's. During World War I, Palestine was going through a great famine[6]. The Jewish farmers – mostly small and new agricultural cooperatives – could not get credit from the banks that would allow them to hold up from one season to the next and they were on the verge of bankruptcy. The first wholesale cooperative in Palestine "Hamashbir"[7], which was not a financial cooperative but considered itself a major instrument for

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3 This paper is written in April 2015, in which 1$ equals a little less than 4 NIS and 1Ero equals a little more than 4NIS. In the past six years the rates changes between 3.6-4.5 NIS =1$ and between 5.5-4.25 NIS=1Ero.

4 a 50% drop of profits in National Bank.

5 The average salary in Israel *2014*was a little less than 9000 NIS a month, the minimum wage 4300NIS and the median salary in 2013 was 6500 NIS.

6 The Othman Rule over Palestine ended in 1917, when the British Army occupied the country.

7 Established in 1916.

developing the new Zionist society and economy, decided to provide farmers with small loans[8] to enable them to keep their farms and develop[9].

In 1921 the need for a financial institution for the working class was obvious, but the Histadrut – the major trade Union and workers' organization decided to establish "The Workers' Bank"[10] whose role was to help the development of the workers' economy. It was not organized as a Cooperative Society, but as a joint stock company and although it was considered as owned by "the workers"[11] it was not a cooperative either by name or nature[12].

The first Credit and Savings Cooperative Societies were registered in 1925. They were organized on a geographical and occupational basis and provided limited services. By the end of 1930 there were 7 Credit and Savings Cooperative Societies that served only 5600 members,[13] but by 1948 there were more than 80, with 125,000 members – about 20 percent of the population. That provided more than 20 percent of the market's financing. In the following years this number increased to 250,000 members in more than a 100 Credit and Savings Cooperative Societies[14].

The decline started in the mid 1950's when the Bank of Israel applied regulation which favored big financial institutions. Within a decade most of the Credit and Savings Cooperatives were gone – absorbed into the big commercial banks.

Since then, there was no vital attempt to start a credit union, even though there was no legal barrier. In 1981 the Israeli parliament approved the Banking (Licensing) law 5741-1981 which provided that no financial institution could operate without a permit from the Bank of Israel. That closed the door on the legal structure enacted in the Cooperative Societies Ordinance.

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8 In current terms we would consider this sort of loans as "Micro-finance".

9 "Hamashbir" had also bought a lot of the wheat the farmers grew, so black market merchants would not exploit the consumers. They kept enough wheat so the prices won't rise – which left them in a financial crisis after the British Army occupied the country and allowed import of cheap Australian wheat.

10 Incorporated in 1921 as a share holders company.

11 Most of its shares were owned by "Hevrat Ha'ovdim" - "The workers Company" – which was a legal parallel of the "Histadrut" trade Union. "Hevrat Ha'ovdim" was the financial branch that owned the property – factories, stores, a newspaper, a publishing house etc.

12 "Hevreat Ha'ovdim" considered itself as a mega cooperative – that is owned by all working class. Its lack of any cooperative conduct – no direct connection between workers and the place they worked at' or bought in, no democratic process (except elections to the Histadrut trade union once in 5 years) no economic involvement and so on. For many years "Hevrat Ha'ovdim" took a major part in Israel's economy, but as times and politics changed, it was very easy to diminish its power and its employees did not consider it their own, so had no reason to struggle in order to keep its different companies going.

13 Cooperative Palestine, Kurkland Samuel, The National Committee for Labor Palestine, New York, 1947, p. 248.

14 See Ziv, Neta, "Credit Cooperatives in Early Israeli Statehood: Financial Institutions and Social Transformation" Theoretical Inquiries in Law Vol. 11(1) 2010 (210).

The Legal Framework for Cooperatives

The legal framework for cooperatives in Israel is supposedly The Cooperative Societies Ordinance which was promulgated by the British Mandate in 1933. The Cooperative Societies Ordinance provides a vehicle for incorporation but it is deficient on the cooperatives' values front. There is no "values clause" and no direct reference to cooperative values and principles. The only clause suggesting a cooperative identity determines that an enterprise can be register as a cooperative society if it is "…a society which has as its objects the promotion of thrift, self help and mutual aid among persons with common economic needs so as to bring about better living, better business and better methods of production…"[15]

The lack of cooperative values and principles in what was supposed to be the Israeli cooperative law combined with the rise of neo-liberal regime eroded the cooperative notion in Israel. I would argue that out of 4200 cooperative societies registered in Israel, the number of societies with cooperative identity does not exceed a few hundred at best. Some are registered as cooperative societies only to be able to operate in opposition to cooperative values and principles and to be able to operate admission committees.

The cooperative Societies Ordinance grants the cooperative societies' registrar multiple powers, one of which is to announce different types of cooperative societies.

There are 29 types of Cooperative Societies according to the Cooperative Societies regulations – one of them is a credit union.

Since it has been forbidden to start a financial institution without a license from the supervisor of banks since 1981 and the supervisor of banks had no intention to granting such licenses the Credit Union category has existed in name only.

Regulators

Up to 2016 there were three regulators that were relevant for a Cooperative Bank or Credit Union in Israel: the Cooperative Societies Registrar, the Director of the Capital Market and the Supervisor of Banks, in the Bank of Israel.

The Cooperative Societies Registrar is in charge of registration of Cooperative Societies. As mentioned earlier, the Banking (Licensing) law 5741-1981 granted prior supervision powers regarding financial cooperatives to the Supervisor of Banks, yet it left the registration process, including approval of the cooperative society's bylaws in the hands of the Cooperative Societies Registrar.

Israel's Securities Authority - According to the Israeli law, an offer to sell more than 35 shares to the public, demands a preliminary submission of a prospectus. A prospectus and the bureaucratic procedures derived from it are designed to protect minority share holders. Submitting a prospectus is usually very expensive, but it's not only the early submission – the ongoing operation according to prospectus' bureaucracy is complicated and expensive.

[15] The Cooperative Societies Ordinance, no. 50 of 1933. (section 4).

Since there is no core control in a cooperative and the shares are not tradable – it is possible to ask for an exemption from the prospectus submitting demand. Ironically, in order to achieve an exemption, in many cases the organization must submit a prospectus.[16].

The main regulator is the Supervisor of Banks. Its functions are supervising the stability of banking corporations by avoiding excessive risks to their stability to protect depositors' money. It is also required to ensure that banking corporations are managed properly and to maintain fairness in bank/customer relations.

The Social Protest and Committees Followed

The social protest that swept the streets of Israel in 2011 was the outcome of a thirty year process in which neo-liberal governments allowed the gaps between the rich and the poor to increase, the middle class to deteriorate and capital and power to be concentrated in the hands of the few. It started as a protest against unaffordable housing costs and developed into a wide range of demands. The banking system was one of the focal points of the protest due to its centralized nature[17], high commissions and enormous profits, amounting to billions of NIS.

One of the main outcomes of the social protest was a new wave of cooperatives in Israel, in different fields, including the financial market, in which there were two groups that started operating. One declared its main goal as starting a cooperative bank[18].

In response to the protest, the government appointed a public committee. The committee pointed out that the banking market was highly centralized and harmful[19]. To follow the committee's conclusions, the government appointed another committee, of public officials, headed by the Supervisor of Banks. One of this committee's recommendations was, surprisingly, to "promote the establishment of credit unions".

A draft regulation was published in June 2014. It was then clear that what had seemed to be comprehensive support had translated into an impossible practical demand. The Co-operative Banks or

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[16] When the cooperative bank initiative approached the Israel's Securities Authority it took it 9 months to decide that the prospectus submitted by OFEK – the Cooperative bank initiative is entitled for an exemption. Only then – on November 2013 - the cooperative could legally ask members to join. The one thing the authority required was to change the cooperative's bylaws, so to eliminate the option of allocation of dividends to its members.

[17] Only 5 banks hold 93% of the market, 3 hold 72% of the market.

[18] The OFEK Cooperative Society was registered in 2012. The undersigned was one of its founders and is now an elected board member in charge of regulation and governance.

[19] The Trachtenberg committee dealt with different aspects of social and economic policies in Israel. It was appointed while the protesters were still on the streets on August 2011 and submitted its findings to the government on 24 September 2011. It was headed by an economics professor, who used to work in the Finance Ministry and its 14 members were public officials, academics and private experts. The leaders of the social protest did not accept this committee as relevant to their demands and started an alternative committee in which had about 140 members – academics and civil society experts. The alternative committees worked for almost a year and in July 2012 published their findings and recommendations – later published in a book: "To do things Different – A Model For A Well-Ordered Society: The Social Protest 2011-20012", Yossi Yonah, Avia Spivak (Editors), Kakibutz Hameuchad Publishing House Ltd., Tel-Aviv, 2012.

the Supervisor of Banks decided not to follow any existing method of operation or criteria. Even a new name "bank union" rather than "credit union" was used[20].

The draft regulation lacked any co-operative concept and limited the democratic nature of the new model. However it was the requirement of 75 million NIS (18 million euro's) of capital as a pre-condition for registration and the effective need for any group wishing to set up a financial co-operative to raise about 40 million euro before it could even apply for a licence that prevented the establishment of such enterprises[21].

The supervisor of banks claimed that although they were in favor of promoting competition and credit unions could contribute to that goal, it was more important to secure the stability of the system, thus requiring the pre-requisite capital.

New Regulator – The Great Breakthrough

The new Supervisor of Banks that was appointed in August 2015 had a different approach. She had announced that she does not consider small Credit Unions as any threat to the stability of the system, more than that, she decided small credit unions should not be under the supervision of the bank of Israel.

At the beginning of 2016 new government initiated legislation was brought to the Israeli Parliament, founding a new regulator – within the Finance Ministry – who would be in charge of supervising all non-banking financial institutions. The supervision of banks decided small credit unions would be supervised under the new regulator – with as few obstacles as possible – up to a limit of 1.5 Billion NIS (app. 400 million €) in lending and investing. If and when a Credit Union would grow and develop – it could apply for a license to become an actual Bank.

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[20] The definition of: "A ""Bank Union"" is a cooperative financial association owned and controlled by its members, not operating for profit. A "Bank Union" is intended to provide its members with bank account management services, savings, obtaining loans, and obtaining other basic banking services."

[21] The second draft was published a year after, and looked more or less the same. The OFEK Cooperative Society, which at that point had about 3700 members (that purchased a member' share for 800 € each) had to make a dramatic decision – to declare defeat or to continue. A new board was elected on May 2015 , making its first major decision to no longer linger on the one and only complete desirable outcome – the permit to start a bank. Instead it took upon a comprehensive re-evaluation of the market and the original goals of the cooperative – trying to dissect the concrete problems of the Israeli financial market.

At the beginning of December 2015 OFEK's general assembly decided to adopt a new operating method that would allow OFEK to provide financial-non-banking services, presumably in a matter of months. The plan designed to start by constructing a Peer to Peer lending mechanism that would be based on a low interest loans , for lenders and borrowers, and would include a social added value – creating preference for lending to cooperatives, social businesses and businesses that promote environmental goals. OFEK's P2P services started operating in November 2016.

The Supervision of Financial Services (Regulated Financial Services) Law, 5776-2016

The legislative process of the new credit union law took 10 months of deliberations. The Equity pre-requisite capital was dropped to 200,000€ - 800,000€ depending on the scope of its operation. Most banking services can be provided by the credit union, limited mostly in size.

As it was the first Cooperatives law ever to be legislated in the Israeli parliament, it was a challenge to assure that cooperative values and principles would be a part of it.

The form of the law dictated some compromises. It was not brought as a separate bill, but as an added chapter to the Supervision of Financial Services Law, so there was no place for initial clauses that would refer to Recommendation 193 of the ILO or to the UN guidelines.

The values and principles would have to be addressed in concrete wording. The public officials' team responsible for writing it was surprisingly willing to accept suggestions[22] and it ended up with requiring a democratic organization, in which every member has one share and one vote. An elected body must be appointed – as must a professional CEO. The law allows the Finance Minister to announce special requirements for members of the elected board, but unlike in earlier drafts they should not be pre-approved.

Only members could receive services from the credit union and the shares are of nominal value. There are wide transparency requirements. The law determines that a cooperation between credit unions would be allowed in specific fields, thus creating an unspecified exemption from antitrust law.

The one major theme the legislating team would not accept was regarding the corporate members. The bill suggested corporate members would be only up to small size – while we wanted to allow all Not for profits and all cooperative societies to be eligible to become members. That was settled only in the parliament committee – allowing membership – limiting only the scope of operation.

Concluding Remarks

On June 1st 2017 the new regulator can issue the first license to a Credit Union. There are many unknowns yet to be determined by the regulator, but it seems that there is a favorable environment but with a huge lack in knowledge. The greatest challenge after a license is be issued will be to persuade people to join. The banking market suffers from a grave public distrust so it would be up to the credit union to put its cooperative identity up front and to emphasise the differences between it and commercial banks.

At the same time it would have to provide good quality and inexpensive services – not an easy task for a small enterprise in a market of giants. The next year should determine whether the Israeli public is willing to take the next step and become a part of the change it asked for 6 years ago.

[22] OFEK sent 6 position papers to the team and appeared before it three times, one of which was a meeting with the chairperson of ICBA, Jean-Louis Bancel.

Interviews

Interview with Professor Dr. Hans-H. Münkner

Few scholars have had the impact Professor Münker has had on cooperative law. His research is all too well known. He taught cooperative law over decades, not only at his home university, the University of Marburg in Germany, but also abroad. He kept the subject alive and both reminded politicians of its value and international organizations of its necessity as a decisive development factor. And (above all?) he inspired young people to take the subject up at the risk of doing something, which many had come to believe as outdated.

For this reason, the editors thought it appropriate that they should open the series of interviews, which the International Journal of Cooperative Law (IJCL) intends to publish, with an interview with Professor Münkner.

The questions were prepared by Ifigeneia Douvitsa and Hagen Henrÿ, with input from Davd Hiez. The interview was conducted in writing at the beginning of 2018.

Douvitsa & Henrÿ: Professor Münkner, we are very grateful that You accepted to be interviewed for this 1st issue of the IJCL. To our knowledge, this journal is the first of its kind in the sense that it aims at world-wide coverage of cooperative law in English. We believe that there is a renewed and sustained interest in cooperative law. Given Your work on cooperative law, which spans over nearly six decades, do You think that we are right and that launching such a journal makes sense?

Professor Münkner: In my opinion, launching an international journal of co-operative law makes sense and is long overdue. Such a journal will bring together specialists from all over the world who for the first time will have a platform on which they can present their findings and exchange views.

Douvitsa & Henrÿ: What made You work on cooperative law? Was the subject part of your formal education? Did you ever doubt as to the choice of your career?

Professor Münkner: During my formal education at school and at the Faculty of Law of Marburg University, co-operative studies and co-operative law were not taught.

After my studies of law in Marburg, Mainz, Berlin and again in Marburg, I was offered an interesting position, initially as a lecturer and later as University Professor specialized on organization law, co-operative law and co-operative theory. I filled this position for 40 years. This choice proved to be very satisfying for me. However, there was no similar position in other German universities for which I would have been qualified with my specialization. Accordingly, career-prospects outside Marburg would have been bad. But I have never regretted my choice.

Douvitsa & Henrÿ: Your doctoral thesis is on Ghanaian cooperative law. Africa and African law seems to have been/to be close to Your heart. Why?

Professor Münkner: My interest in Africa has several sources. Relatives were working in Tanganyika in the 1920's (Bethel Mission, Usambara Mountains) and through them I received some information on life in Africa and on African art. Today, our house is full of African art.

In Marburg, a Professor for religious studies (Prof. Damman) had worked as a pastor in Tanzania. In Marburg, he offered courses in Suaheli in which I participated. At the same time (in the 1950ies, three students from Sierra Leone studied medicine in Marburg. Together with them and German students we established the German African Students Association in Marburg, which still exists today.

Moreover, I was among the founder-members and a long-term board member of the German Association of African Law. Between 1975 and 1997, this society organized annual conferences and published nine volumes of its Yearbook.

When I was accepted by Prof. Rudolph Reinhardt as a doctoral student, the combination of interest in Africa and in co-operative law resulted in a thesis on development of co-operative law in Africa, with Ghana as an example. Ghana was selected because it was the first African territory in which the British Colonial Co-operative Legislation was introduced in 1929. In Ghana, a strong co-operative movement developed and passed through phases of political interference. It was and still is a country reflecting the experience of many countries of English-speaking Africa.

Henrÿ: You influenced my thinking on cooperatives and cooperative law. Was there somebody in your life who had a similar influence on you?

Professor Münkner: My interest in co-operatives and co-operative law was influenced by the Directors of the Marburg Institute for Co-operative Studies, Prof. Kirsch and Prof. Reinhardt, who designed the degree course of co-operative economics for students from Africa and Asia, in which I later worked. Prof. Kirsch had close contacts to the German Federation of Consumer Co-operatives, which became instrumental when planning the new degree course on co-operative economics together with the German national co-operative federations.

In 1962 I was advised by the Professors Reinhardt and Kirsch to take part in a special two-years training program for co-operative advisers in developing countries, organized jointly by the Committee of German Co-operative Federations (Freier Ausschuss der deutschen Genossenschaftsverbände) and the German Federal Government. I worked as a trainee in different types of co-operatives, including an Israeli Kibbutz, and participated in several seminars. After successful completion of this program, I was invited by Prof. Kirsch to join a team of lecturers for the new Masters' Degree Course in Co-operative Economics of Marburg University.

Working as a doctoral student of Prof. Reinhardt gave me the opportunity to learn a lot from one of the leading academic teachers of organization law, in general, and co-operative law, in particular. I will never forget his advice when writing my doctoral thesis: "Underline what is important and leave out the rest."

Henrÿ: In a short telephone conversation in 1992, You convinced me to start working on cooperative law. What made You so sure then that we would eventually overcome the disinterest in the subject and see cooperative law reestablishing itself side by side with other fields of enterprise law?

Professor Münkner: In 1992 I had already established many contacts with colleagues in developing countries, travelled widely, given lectures in Goethe-Institutes (German cultural centers) in many countries and participated in the International Cooperative Alliance (ICA) Committee on Co-operative Values. I was convinced that the subject matter of co-operative law was a field with a future, provided that enough qualified and gifted people could be interested to work for a career in this field, reaching far beyond the formal law of business organizations and being present on international level. My work in the Masters' Degree Course on Co-operative Economics for students from Africa, Asia and Latin America gave me ample opportunity to meet colleagues and to gain experience in this field. I tried – successfully – to interest You in this field of research and teaching, which I found most promising.

Douvitsa: Would you recommend to young scholars to take up the subject?

Professor Münkner: Young scholars looking for a field of specialization should be aware that the subjects of co-operative law and co-operative studies in general are usually not part of curricula and at best a side-line of law professors, who usually have a much broader qualification. For good reasons I remained in my Marburg position from 1964 to 2000. In other universities there would not have been much interest in someone with my specialization – tailor-made for the legal part of our Marburg Degree Course in Co-operative Economics.

Douvitsa & Henrÿ: You have been part of the debate on whether cooperatives are or have an enterprise through which they act. The three main international instruments on cooperatives, namely the 1995 ICA Statement on the cooperative identity, the 2001 UN Guidelines aimed at creating a supportive environment for the development of cooperatives and the 2002 International Labour Organization Recommendation No. 193 concerning the promotion of cooperatives (ILO R. 193) are clear on that: they are! Despite this, it is being questioned again and again. Not the least at the time when some of the members of COPAC, the inter-agency Committee for the Promotion and Advancement of Cooperatives, prepared the activities for the 2012 International Year of Cooperatives. The debate might lose its sense given that the very notion of "enterprise" is undergoing radical changes under the condition of globalization. Economic actors integrate ever more into vertical and horizontal value chains, operationally and organizationally. The position of producers and consumers merge into that of co-pro-sumers. What is Your view on this?

Professor Münkner: In the 1960ies it was still very clear that co-operatives did not have an enterprise as part of their dual structure, but a "joint plant", one reason being that in co-operatives their economic unit was not connected with the market on both sides (buyer/seller), but only on one side – while on the other side economic relations with their members followed different rules.

Today, in Spain, Portugal and countries of Latin America, "actos cooperativos" are perceived as being different from commercial relations with third parties. In Germany, a distinction is made between "internal markets" (relations between co-operatives and their members), also referred to as "Zweckgeschäft" (purpose transactions – transactions for which the co-operative was formed) and "external markets" ("Gegengeschäft" – counter-transaction), linking the co-operative enterprise to the market. This distinction is mainly designed to distinguish business policies – profit making on external markets, on the one hand, and maximum member-promotion on the internal market – service near cost –, on the other.

This clear distinction is gradually fading away. Regarding organization and management, co-operative enterprises, like any other enterprises, must aim at a maximum economic efficiency to survive on the market. Enterprises, including co-operative enterprises, are not only seen as elements of a market economy, competing with other enterprises to survive in the market, but also as an organizational pattern designed to make best possible use of scarce resources in an efficient and effective manner for achieving the objects of an economic organization. In this meaning, co-operatives have an enterprise.

Douvitsa & Henrÿ Despite the declared end of the times of ideologies, cooperatives continue being a preferred subject in some quarters who would like to revive those times. Some see cooperatives as a cure to all the inconsistencies of capitalism. Others see them as a tool to substitute capitalism. Are we reviving/ should we revive the old debate about the transformative role of cooperatives?

Professor Münkner: The issue "co-operatives and capitalism" has been discussed for many years and in great detail in France, e. g. by Thierry Jeantet in his book "Social Economy as an Alternative to Capitalism", which I translated into German. It appears that most people propagating Social Economy (SE) no longer see SE as an alternative to capitalism, but as a means to improve capitalism, avoiding mistakes made by dangerous financial capitalism, while regarding "family capitalism" as less dangerous and in effect a necessary form of "mild" capitalism, prevailing in up to 85 % of all enterprises.

Positive features of the co-operative form of doing business, making the co-operative way "better" than capitalism are

- to be need-oriented, instead of profit-oriented,
- to work with patient capital rather than being focused on maximizing profit on investment,
- to aim at sustainable development, instead of seeking short term success – irrespective of negative "externalities" (toxic quarterly capitalism).

Co-operatives and companies require different designs of organization law, suited for accomplishing different tasks.

Douvitsa & Henrÿ: You were one of the founding members and then, for many years, the Managing Director of the Institute for Co-operation in Developing Countries at the University of Marburg/Germany. The institute trained hundreds of cooperative experts. Many of them are now in key positions in their countries. It was closed shortly after You retired. In hindsight the decision to close it was certainly a mistake. But was it also a mistake at the time of its closure when cooperatives and cooperative law were not so high on political and academic agendas, to say the least?

Professor Münkner: When the Degree Course in Co-operative Economics started in Marburg in 1964, this was a time when – after colonial rule – models for development of the new African States were in high demand. Co-operative Economics was seen as a well-tested model to help these new states develop their economies and infrastructure. When the Degree Course in Co-operative Economics was closed in 2002, demand for this very special degree-course was still very high, but the Department of Economics, of which the degree course was part, was flooded by students of business administration – without disposing of adequate teaching staff. In this situation, four professors teaching about 30 students of co-operative economics were seen as inadequate – although the funds for these professors had originated from the foreign aid budget of the Government of the federal state of Hessen.

When the original team of professors of the Institute for Co-operation in Developing Countries (ICDC) was reduced, because two colleagues died and a third retired, the Department decided to close the degree course with the official reason that this study program did not fit into the planning of the Department. Reactions to this decision from former students and from abroad were that it was a mistake to close down this successful project.

Douvitsa & Henrÿ: You have written and published extensively, not only on cooperative law. The jubilee publication on the occasion of your 65th birthday in 2000 contains a never ending list of Your writings. It has grown since, just to mention the new edition of Your "Ten Lectures on Cooperative Law". Despite that, is there still a text inside You waiting for publication? Did You ever refrain from publishing something which was already in the making? If so, why?

Professor Münkner: A new project which I am currently preparing is a "Handbook on Programs and Projects against Rural-Urban Migration of the Young". My idea is to present models how the trend among young people to desert the rural areas and to look for greener pastures in the urban areas can be stopped and what the role of organized self-help in groups could play in this process.
It is intended to analyze the situation in industrialized countries and in developing countries and to invite scholars with practical experience from both worlds to participate.

So far, I have managed to complete all publication projects that I started.

Douvitsa & Henrÿ: The perception of the world has changed since You started Your career. We assume it has changed from a more universal perspective to that of seeing it from the perspective of its cultural

diversity. If that is so, do You think that we can still defend the position that cooperatives across the world share and should share a common set of distinctive features? And if so, which are these features?

Professor Münkner: Having been involved as an adviser in many different countries, I have always been impressed by the cultural diversity in which co-operatives operate. This is most visible in African countries, where local and international values and norms meet.

When we discussed co-operative values and principles in the ICA Commissions on co-operative values and on co-operative principles between 1990 and 1995, the members of the Commissions were aware of the broad spectrum of value systems in the different countries. Therefore, care was taken not to define co-operative values too precisely, leaving margins for interpretation, avoiding clear borderlines of principles, but insisting on core values (distinctive features) which determine the nature of co-operative societies being self-help organizations of their members, serving mainly their needs and aspirations, in which members are at the same time owners of its facilities and users of its services, ruling out

- forced co-operation – i.e. involuntary organizations without internal mobilizing force,
- co-operatives for helping others – i.e. charity being different from self-help and mutual aid and
- co-operation for making profit – not being need-oriented and sustainable.

Douvitsa & Henrÿ: The distinctive features of cooperatives are - or should be - a translation of the internationally recognized cooperative values and principles. Are these values and principles still relevant in our globalized world? Should they be revised or should we drop them?

Professor Münkner: Co-operative values and principles, as defined by the ICA, were formulated in 1995. Co-operative values, not being hard and fast rules to be followed by the letter, and the cooperative principles, being guidelines for putting them into practice, allow adjustments, but not complete negation without leaving the co-operative model.

Douvitsa & Henrÿ: Is it not a sign of intellectual blindness to defend the need to maintain the distinctiveness of cooperatives and the need for its institutionalization through law in times of a paradigmatic change as concerns the social responsibility of enterprises in general and in times of a reemerging social economy debate? In addition, there is a school of thought whose adepts have thought for some time that there is no need for the legislator to distinguish enterprise forms - which led to what I call the companization of cooperatives - , who see their opinion confirmed and who see organizational law dissolve into contractual arrangements. So, is there really a need to distinguish cooperatives through law from other forms of enterprise? If so, why?

Professor Münkner: The reason to distinguish different forms of enterprises and to offer different legal frameworks for each of these forms is to offer legal patterns for pursuing different objectives and purposes. In organization law, the object determines the form.

- Accumulate sums of money for investment: Company

- Organize economic co-operation to meet common needs of participants: Co-operative Society
- Organize economic collaboration of people without strict rules: Partnership with unlimited liability of the members
- Organize collaboration of people for pursuing mainly common social or cultural objectives: Association, not allowed for running a joint enterprise as its main purpose.

These different legal forms help founder-members to find a suitable legal framework for pursuing their common objectives.

There are also hybrid forms of organization, e. g. co-operative companies (e. g. the Indian Producer Companies Law of 2001), where shareholders and users of the joint facilities have to be identical, and social co-operatives, where services of the organization are offered to members and third parties.

Douvitsa & Henrÿ: The reported school of thought even claims that, if there is any effect of cooperative law on the development of cooperatives, that effect is a negative one. Is there evidence for this or for the contrary view, which You certainly hold?

Professor Münkner: To answer this question, it is useful to look at the reasons given by the Norwegian law makers, who after 50 years of discussions decided to adopt a co-operative law, because

- it gives founder-members guidance and facilitates the formation process,
- it saves legal costs and
- it protects members and creditors in an effective manner.

Douvitsa & Henrÿ: State involvement in cooperatives has been a constant subject of Yours. Is there any role for the state, apart from registration and deregistration, at least in the form of supervision/audit?

Professor Münkner: Here are clear opinions – based on experience – where state involvement has negative effects on co-operative development:

- Financial support, subventions – usually combined with supervision: Control follows money. As a rule, such projects do not succeed in mobilizing members' resources and run only as long as external support lasts.
- Outside goal setting not suited to mobilize active member-participation.
- External control – audit – which should be a matter left to the co-operative movement, carried out by their auditing federations, with "super-audit" i.e. control of the proper working of the auditing federations by the state.
- Use of co-operatives as instruments for the implementation of government policies.

Henrÿ: Besides a long career in research and teaching, You also have a long practical experience in cooperative law and legislation matters. A certain aversion against theory building has crept into the high places of theory, including universities. Among the many things I learned from You is that "there is nothing more practical than a good theory". If one of our aims is to rebuild a cooperative legal theory, can we/must we learn more from practitioners?

Professor Münkner: A good theory should help to decide what to do, what to avoid and what are tested ways out of problems. A good theory should be derived from analyzing practical cases and drawing conclusions. It should compare the rules derived with past experience, without developing dogmas, ready to rethink existing theories.

Douvitsa & Henrÿ: Cooperative legal studies (research, education and training) have been neglected over decades. Where do you see the direst need for change? Are there particular issues that academia must change?

Professor Münkner: Co-operative legal studies are a neglected field. SGECOL, the Study Group on European Cooperative Law, has tried to bring this subject matter into the academic discussion and to raise interest in the research-findings through its project on the Principles of European Co-operative Law (PECOL), now published as a book with this title.

Problems with this field of studies and research are:

- to raise funds for such projects from co-operative sources,
- to draw attention to research results,
- to link up with the growing interest in co-operation among enterprises (networks, franchising, vertical integration, business groups etc.) among researchers of business administration and organization law, who often ignore more than one hundred years of experience made by co-operatives in this field.

What is needed is more public attention following the UN International Year of Co-operatives in 2012.

As often suggested, generating knowledge on co-operatives and the way they work has to start at school by adding this subject matter to the curricula and by training teachers. What can be learnt from Japan is that university co-operatives could be a good way of bringing co-operative ideas to young people.

Douvitsa & Henrÿ: The history of cooperatives abounds of examples of compulsory (membership in) cooperatives, also in our countries. In Greece, for example, the constitution allows for the prescription of compulsory cooperatives by law; in Germany cooperatives must be a member of an audit union. Many of these compulsory cooperatives failed. Are there successful cases? Are all these cases comparable? If not, why not?

Professor Münkner: In Germany there are classical examples of co-operatives with compulsory membership, existing for more than a century: Co-operatives of forest owners and of water users. Membership in such co-operatives is combined with the obligation to protect the environment and natural resources and with self-interest of the members in efficient and effective management of these resources. Such co-operatives with compulsory membership are different from voluntary co-operatives, as defined by the ICA, and closer to public corporations.

The quoted example of compulsory membership of German co-operatives in co-operative auditing federations has to be seen differently: According to the German courts, the choice of legal forms for joint activities is voluntary. Nobody is forced to choose the legal form of co-operative society. But once this choice is made, the legal pattern is selected as it is regulated by law, including the obligation to be affiliated to a co-operative auditing federation, the reason being that every registered co-operative society with its object of member promotion has to be audited by specially qualified auditors.

German Co-operative Law also provides for pre-registration audit of new co-operative projects by a co-operative auditing federation, meant to protect this legal form from misuse and against false or non-viable projects under the co-operative name.

Different cases are compulsory membership in co-operatives as part of a government policy, e. g. using co-operatives for land reform like the Samahang Nayons in the Philippines in the 1980ies.

Voluntary participation of members in co-operatives means that the members decide to join and to make contributions because it is in their interest. They also have the right to withdraw.

I have no information on compulsory co-operatives in Greece.

Douvitsa & Henrÿ: One of the debated issues is whether cooperatives may only serve their members or, more precisely, that the members may serve only themselves through a jointly owned and democratically controlled enterprise. You have been defending this position with good arguments. The internationally recognized definition of cooperatives, which is in-built into our question, supports Your opinion. Not without sophism, one could argue that it could well be the need of the members to serve non-members, and we are not only referring to workers cooperatives.

Professor Münkner: The principle that in co-operatives owners and users must be the same people (principle of identity) is the core of the co-operative form of organization. The reason for participation and for commitment of own resources (shares) to the common cause is expecting a "co-operative advantage". The principle of identity of owners and users is a source of strength. As a result, there is no conflict of interest between investors and market partners, as in the case of commercial business.

In co-operative theory there are two reasons why deviations from this principle are justified and should be allowed, namely

- attempts to recruit new members and
- the use of idle capacities.

Members have to decide whether to allow transactions with non-members. They also must be aware that deviation from the principle of identity devaluates membership. The danger is to turn members into simple customers and to attract free-riders. Special problems arise in multi-stakeholder co-operatives, where non-using, but investing members are expressly admitted.

A good example of problems arising when transactions with non-members are prohibited by law, but the number of using members is decreasing and the number of using non-members is growing, is the case of agricultural multi-purpose co-operatives in Japan, where a new category of quasi members or second class members was invented: "associate members" with the right to use the facilities of the co-operative, but without the right to vote.

Workers co-operatives are a special case: Relations between the co-operative enterprise and its worker-members are mainly regulated by the bye-laws, while the relationship between the co-operative and non-members working in the co-operative enterprise is governed by labor law.

Douvitsa & Henrÿ: You have also had a long career as a consultant. You participated in the elaboration of the above mentioned international instruments on cooperatives. The sort of internationalist/universalist spirit which carried these elaborations seems to be vanishing. Is this a reason for concern?

Professor Münkner: Internationalist/universalist spirit concerned with co-operative development still exists (e. g. SCECOL). The danger of growing mass poverty, rural urban migration and growing numbers of refugees from wars and social unrest will see new promoters of organized self-help emerge. There is no need for concern. International instruments are in place. However, the need to revise and to adjust them to changing conditions remains. More co-operative education and research would be helpful to support such innovations

Douvitsa & Henrÿ: You strongly pushed for widening the notion of cooperative law and to become aware of the fact that it is not sufficient to focus on the law on cooperatives. You were the master-mind behind a series of events in the 1990ies on labour law, competition law, taxation and other fields of law in their relation to cooperatives/cooperative law. You were also the master mind behind the so-called favourable climate studies by the ILO. These were decisive steps toward the adoption in 2002 of the ILO R. 193. These subjects are as relevant today as they were then. Is this due to the nature of the issues or is it that we still have not worked out satisfactory answers to the questions raised then?

Professor Münkner: Co-operative law as a special branch of organization law and private law cannot be seen and studied separately from the general legal system of which it is part. Other domains of law, like labor law, tax law and competition law, apply to co-operatives as they do to other legal forms of organization. However, the special character of co-operatives may need considering. E. g., collaboration of enterprises allowed under co-operative law cannot be prohibited under competition law. In tax law, an equal level playing field means that co-operatives cannot be given favorable tax treatment without good reason, based on their special way of doing business.

Mixing provisions of organization law, tax law, labor law and competition law in one enactment – the co-operative societies act – is not recommended. Among other things because organization law has to be stable and lasting, while tax law, for example, may be subject to frequent changes.

Douvitsa & Henrÿ: The argument goes that the world of cooperatives, and that of similar organizational types, has become so complex and diverse (common and public interest cooperatives, multi-stakeholder cooperatives, especially in the utilities, health and social care, as well as education sectors; social and solidarity enterprises etc.) that appeals for the maintenance or restoration, as the case may be, of the classical cooperative identity, by law or otherwise, will neither work, nor would it be desirable. These new types of cooperatives also add additional flavor to the classical questions, such as the participation of legal persons, including public authorities, as members in cooperatives, the limits to transactions with non-members, the deviation from the one member/one vote rule, the allocation of surpluses and profits.

We know, or rather sense, that You do not share the opinion that there is no need for maintaining the classical cooperative identity. Why not?

Professor Münkner: Clear (good) law can only be made, if the concept on which it is based is also clear. The original co-operative model was clear in many respects. It had the following features:

- Homogeneous membership group;
- One member – one vote;
- Focus on member-promotion;
- No (purpose-) transactions with non-members;
- Patient capital (de-emphasized role of capital, voting rights per head, limited return on capital, indivisible reserves);
- Service near cost, patronage refund.

With the introduction of new types and forms of co-operatives, multi-stakeholder co-operatives, social co-operatives, deviations from clear principles are being allowed in order to overcome presumed weaknesses of co-operative societies as compared with companies. Such new rules are calling co-operative strengths into question without generating new strengths. Such deviations are:

- Admission of non-using, investing members,
- Plural voting with inbuilt limits by number of votes per member and subject-matter,
- Transactions with non-members,
- Introduction of new financial instruments from the tool-kit of company law.

All these innovations make co-operative law more complicated and complex, e.g. allow deviations from established principles, and define limits of such deviations in order to preserve the co-operative character of the organization. All this is making the co-operative societies acts long and complicated, e. g., in Finland, where one third of the more than 300 sections are on new financial instruments.

Henrÿ: When You convinced me to work on cooperative law in 1992, we had known each other already for a number of years. In fact, we had met in the late 1970ies through our membership in the German Association of African Law, which You mentioned before. In 1982, You encouraged me to do postgraduate studies in development law. This led to us exchanging over questions of the role of law in development and over (African) land law. Cooperatives played a central role in development thinking over decades. Our common friend, deceased Professor Paul Trappe, wrote extensively on the issue in the late 1950ies already. During the 1960ies, land law was closely related to the debate on cooperative law. For example, the International Labour Organization Co-operatives (Developing Countries) Recommendation, 1966 (No.127), so to speak the predecessor instrument to the mentioned ILO R. 193, includes a chapter on this. Subsequently, the subject disappeared from the debate. Lately, it has become virulent again, not the least in the face of unprecedented land-grabbing by international investors. The Food and Agricultural Organization of the United Nations (FAO) has renewed its interest; during some of my recent work trips related to cooperative legislation, I was confronted with the question: do you think that organizing in cooperatives could help farmers to defend their interests and to strengthen their position by increased integration, operationally and organizationally, into food producing and distributing value chains?

Professor Münkner: Organizing in co-operatives is an old strategy of farmers, not only to defend their farms against land-grabbing by international investors, but also to co-operate in production, to establish themselves jointly as potent market partners and to work together with other co-operatives and in vertically integrated systems. This allows local farmers, through a network of co-operative organizations, to protect and strengthen their production units and marketing channels so as to benefit from co-operation on international markets.

The issue of ownership of natural resources, such as land, is strongly reflected in autochthonous African law. The Tanzanian Village Land Act of 1991 is a good example. All village land is vested in the President. Village land cannot be sold, but limited use rights can be given to “investors”, also limited by time, ruling out “land-grabbing”. Rules may be imposed to be respected by users of land, e. g. preventing deforestation, excessive use of chemical fertilizers and pesticides, industrial agriculture on large surfaces of land no longer available to local farmers.

In rural Africa, as a rule, land is not a commercial commodity that can be freely sold and bought, but is the inalienable basis of life, that needs to be protected and used with care. Attempts to enforce land reforms by using co-operative organizations were made in the Philippines (Samahang Nayons) and in Tanzania (ujamaa) in the 1980ies. Both attempts failed.

Co-operatives for common land use (like the Israeli Kibbutz and the East German rural production co-operatives (LPGs) during the times of the German Democratic Republic) have lost their importance. In many of the former socialist countries of Eastern Europe, collective farms were dissolved and land was either returned to their original owners or the former land owners were compensated. In countries like China and Vietnam, small surfaces were returned to original owners after dissolution of socialist collectives, but were usually too small to support individual farmers, who had to join new agricultural co-operatives to survive on the market. In Germany, former LPGs were transformed into Agrarian Co-operatives being highly efficient large industrialized farms, while former land owners were compensated.

Douvitsa & Henrÿ: The development debate has shifted toward global issues. There is consensus that sustainable development is the new paradigm. As in previous periods, there is a risk of seeing cooperatives as a panacea, this time as a means to achieve the numerous SDGs, the sustainable development goals. Are cooperatives a panacea and/or are there sectors for which cooperatives should rather not be established? A case could be the banking sector. It is strictly regulated (prudential regulation). Does this denaturalize cooperative banks?

Professor Münkner: Co-operatives and sustainable development are one of the major topics of the ICA Blueprint for a Co-operative Decade 2011 – 2020. The co-operative way of doing business is different from their commercial competitors, because co-operatives do not

- work for short-term profit (toxic quarterly capitalism), but for long-term promotion of their members, and do not
- work with high risk aiming at high return, but with low risk, with security first, even with moderate return, offering their members services near cost.

Good law should not allow what can cause damage to business partners in order to increase their own profit.

Corporate social responsibility has become a new trend in commercial firms, a feature known to co-operatives for a long time and laid down in the 7th ICA Co-operative Principle: "Concern for Community" with policies approved by their members.

Banking laws are made to keep risks at a balance. Some co-operative banks have introduced "ethic filters" in their bye-laws to avoid the use of co-operative money for detrimental purposes, excluding investment in unethical or dangerous projects, e. g. industries producing military equipment, speculation on food and natural resources, violation of rules of fair trade, use of chemical fertilizers and deforestation. The prudential regulation of the banking sector does not de-naturalize co-operative banks, but only confirms what they should have been all the time.

Douvitsa & Henrÿ: Harmonization of cooperative laws at national, regional and international levels is both a fact and a highly questioned phenomenon. What are, in Your opinion, the "pros" and "cons" of harmonizing cooperative laws, taking also into account some of the questionable examples, like the European Council Regulation 1435/2003 on the Statute for a European Cooperative Society (SCE)?

Professor Münkner: Harmonization of co-operative laws at national, regional and international levels raises the question: who is in charge of making and harmonizing co-operative laws and making supranational regulations?

In the Preamble of the SCE Regulation of the European Union of 2003 it is expressly said that the Regulation is not meant to harmonize national laws. In fact, national laws are regulating the legal, economic and social system of co-operatives in line with the special needs of the respective country, e. g.

in Spain with 16 different laws by province and by subject-matter. In France there are many laws and decrees by subject-matter and type of co-operative, e. g. the Rural Code for agricultural co-operatives. In Italy, part of co-operative law is contained in the Civil Code and in special laws, e. g. a law for small co-operatives.

Best practice can be found in Latin America, where a law for transnational co-operatives was made by the MERCOSUR countries and a model law for all Latin American countries with commentaries was adopted to advise national lawmakers of the region on how to make good national co-operative laws. A similar approach is taken by the Credit Unions Movement, where in 1987 WOCCU offered its member organizations a model Credit Union Law with commentaries, leaving the national lawmakers to decide, but giving them ideas and models for their work.

Douvitsa & Henrÿ: According to the ILO R. 193 governments should include the subject of cooperatives in the education curricula at all levels of the national education system. What could be done/what should be done in order for this to happen? Would this imply major changes in the curricula, in the way enterprise law is being researched and taught?

Professor Münkner: The ICA in its Statement on the Co-operative Identity of 1995 (5th Co-operative Principle), the UN in its Guidelines of 2001 and the ILO in Recommendation 193 of 2002, as well as the EU Commission in 2003 all recommended that co-operative subject matters should be taught in schools and universities, but few countries reacted to that.

Good examples are Japan, Singapore and Korea with their university or campus co-operatives. Experience in Indonesia and Malaysia show that it is not enough to introduce co-operative studies in schools and universities, but that it is important to train qualified and motivated teachers or lecturers, to plan such education, to produce good textbooks and other learning material. In Singapore, membership of students in a campus co-operative is recognized in the examination with extra points.

Co-operative studies remains a neglected field in school and academic teaching and, despite the existence of research institutes at universities (in Germany, Austria, and Switzerland, for example), co-operative studies have not reached the mainstream of academic research and teaching.

Douvitsa & Henrÿ: The emergence of social economy enterprises entails the question of social impact measurement, if they are to be promoted. Might that be a chance to revive interest in cooperative specific audit, which is being neglected more and more? Is there a need to agree internationally on audit criteria and rules?

Professor Münkner: In case of social economy enterprises, profit made by the enterprise is not the essential criterion for social impact measurement. The same is true in case of co-operatives working for member-promotion by a jointly owned co-operative enterprise. This difference between success-criteria of commercial enterprises, on the one hand, and co-operatives, as well as social enterprises, on the other, has led to the development of a special type of "material" audit, meaning that, apart from auditing the

economic performance of the enterprise (books correct, complete and in accordance with law), the audit has to cover the efficiency and effectiveness of the organization in reaching its particular objectives – effective member-promotion in the case of co-operatives and the degree of social impact in the case of social enterprises. Instruments to allow such audits include, for co-operatives, a promotion plan, a promotion program and a promotion report. In the case of social enterprises they include the planned and achieved social impact. In each case that is in addition to the financial audit.

Trends to approximate co-operative management to company management and to apply international standards of (company) audit to all enterprises have led to changed views on the need for special co-operative audit. If large co-operative enterprises operate like companies, there is no need to give co-operative auditors special training. But co-operative leaders and the ICA should make the point that because there is a special way of doing business in co-operatives, even large co-operative enterprises should respect this difference, and that there is need for special co-operative audit, namely financial and management audit, irrespective of the size of the co-operative enterprise.

Douvitsa & Henrÿ: At least insiders know about Your skills as chef/cook. What are the main ingredients for the composition of a tasty cooperative meal?

Professor Münkner: The main ingredients for the composition of a viable co-operative society are:

a) A group of co-operative individualists, i.e. of people who have decided to improve their own situation and pursue their own interests by working together with others having similar interests for their individual and mutual benefit.
b) Leaders elected and controlled by the group, able and willing to combine the economic efficiency of the co-operative enterprise with effective member-relations-management to achieve a measurable co-operative advantage for the members.
c) A legal and administrative environment allowing the establishment and operation of private economic group activities without undue government control and interference.

Douvitsa & Henrÿ: We wish to thank You, Professor Münkner, for the interview and we wish all of us many more of Your inspiring contributions to the debate on cooperative law!

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