

Cooperatives in a world in crisis

Expert Group Meeting organized by the Department of Economic and Social Affairs
(DESA) of the United Nations, 28-30 April 2009 at New York

Cooperatives, Crisis, Cooperative Law ¹

by
Hagen Henry
ILO, EMP/COOP

*« L'institution économique qui a le plus
d'avenir dans le monde contemporain est
la société coopérative » (Barnes) ²*

Table of contents

I Introduction

II Cooperatives and sustainability

1. Sustainability through economic security
2. Sustainability through social justice
3. Sustainability through ecological balance
4. Sustainability through political stability

III Sustainability defeating tendencies in cooperative legislation

IV Future cooperative law: return to the principles

1. Economic security through cooperative law
2. Social justice through cooperative law
3. Ecological balance through cooperative law
4. Political stability through cooperative law

V Conclusion

¹ The contribution relies partly on ideas expressed in my article "The Legal Structure of Cooperatives. Does it Matter for Sustainable Development?", which will be published by the Arbeitsgemeinschaft Genossenschaftswissenschaftlicher Institute e.V. (AGI) shortly

² "The simple existence of a (cooperative) institution is ... never sufficient by itself: it is necessary to add the weight of the law to complement the process. It is the role of the lawyer to work out the details of the institutional structures in society." (Barnes, William S., *La société coopérative. Les recherches de droit comparé comme instruments de définition d'une institution économique*, in: *Revue internationale de droit comparé* 1951, 569 ss.)

I Introduction

Available information suggests ³ that cooperative enterprises across all sectors and regions are relatively more resilient to the current market shocks than their capital-centred counterparts.

If preliminary findings on the resilience of cooperatives can be confirmed and can be explained, as I shall attempt to do, with the legal/institutional ⁴ characteristics of cooperatives, then we need to question our perceptions of what is currently happening. As the institutional characteristics, which in my judgment explain the resilience of cooperatives in the current crisis, are the same as those which lend cooperatives well to the pursuance of the goal of sustainable development, the currently so-called financial and economic crises, as well as the already forgotten food crisis, are just expressions of the real and much deeper, long looming ecological crisis. In fact, *this* crisis was programmed ever since economics replaced natural resources with capital almost three centuries ago. This is a well known fact, hidden in the unsuccessful attempt to capitalize natural resources. ⁵ De-linking capital markets and financing from the real economy is therefore not a recent phenomenon. But as of recently we cannot hide the disastrous consequences of this economics anymore. The origin of the modern state and of stock companies as enterprise model go hand in hand with the amputation of the French Revolution by defining "fraternité" as a corrective to the two other elements of the French Revolution rather than as an equal element among them.

Only by broadening the analysis to the requirements of sustainability will we be able to discuss the comparative advantages and disadvantages of different enterprise types on their own terms, instead of doing it on the terms of the stock companies. Let us finish with the « omniprésence de la finance dans la société » with the « encastrement (qui serait) aussi cognitif dans le sens où le langage scientifique pénètre le corpus réglementaire, comme les normes comptables internationales ou les réglementations de Bâle II et de Bruxelles sur la solvabilité des établissements de crédit. » ⁶ I.e.: capital centred enterprises must not be the yardstick by which all enterprise types are

³ ILO, EMP/COOP, prepared a preliminary paper on the issue in February 2009 (available from ILO, EMP/COOP) and it commissioned a more in-depth analysis from the ICA, which is expected to be finalised at the end of May

⁴ Among the many definitions of 'institutions' the one by North seems to be the most widely known. He writes (North, Douglass, Institutions, in: Journal of Economic Perspectives 1991, 97 f.): Institutions are "humanly devised constraints that structure political, economic, and social interactions. They consist of both informal constraints (sanctions, taboos, customs, traditions and codes of conduct) and formal rules (conventions, laws, property rights)." Granger (Roger, La tradition en tant que limite aux réformes du droit, in: Revue internationale de droit comparé 1979, 37 ff. (44 et 106) writes: « L'institution peut être définie comme le regroupement de règles de droit, agencées selon un certain esprit, autour d'une idée ou fonction centrale dont elles sont les instruments de réalisation. » Whereas North represents rather a sociological/economic view, Granger is close (cf. especially on p.106) to the "General System Theory" (cf. for example Bertalanffy, Ludwig von, Perspectives on General System Theory, ed. by Edgar Taschdjian, New York: George Braziller 1975). I prefer the definition by Granger.

As for the culture specific elements of legal persons, cf. Henry, Hagen, Les « hors traduction » en droit. L'exemple des coopératives comme personnes juridiques en milieu africain, (forthcoming). Cf. also Supiot, Alain, Homo juridicus. Essai sur la fonction anthropologique du Droit, Paris : Seuil 2005, 53

⁵ Cf. Henry, Hagen Entwicklungszusammenarbeit in den Grenzen der Ökologie: Wirtschaften in Zeit und Raum, in: Zwischen Collective Self-Reliance und Entwicklungshilfe. Internationale Wirtschaftsprobleme afrikanischer Staaten, Hrsg. Bryde/Gündling/Oestreich, Marburg: Institut für Kooperation in Entwicklungsländern in Verbindung mit der Gesellschaft für Afrikanisches Recht e.V. 1989, 114 ff.

⁶ Walter, Christian, Finance, maths et humanités, in: Le Monde, 19 septembre 2008, 19

compared and assessed. « Entreprendre autrement » is different from « entreprendre différemment »!

Enterprise-related policies and legislation may no longer continue disregarding, as they do up to now, the specificities of the various types of enterprises, among which cooperatives. There are signs that this might be happening; cooperatives are being given attention to again.⁷ The risk of seeing cooperatives once again being “used” to attain goals that are not determined autonomously by their members is real, however.

In the following I shall

- highlight those institutional characteristics of cooperatives, which lend this enterprise type to responding to the requirements of sustainability
- sketch the tendencies in cooperative legislation, which defeat sustainability, and
- suggest a return in legislation to the cooperative principles.

II Cooperatives and sustainability

Generally, four *aspects* of sustainability are considered in the development debate: Economic security, social justice, ecological balance and political stability. For didactical reasons these four aspects are dealt with separately. Overlaps and repetitions are unavoidable.

In line with my approach to deal with the legal aspect of cooperative institution building, the following arguments are legal-normative in nature. For lawyers, the questions are whether the structure of cooperatives prescribed by law is compatible with sustainable development, whether cooperative law orients cooperatives to work towards this end and whether cooperatives can be compelled through legal means to do so.⁸ Most of the arguments put forward must therefore not be construed as a report on the empirical behaviour of cooperatives. They do not but underline the potential of the cooperative form of doing business. They are based on the universally recognised cooperative values and principles as enshrined in the 1995 International Cooperative Alliance Statement on the cooperative identity,⁹ the 2001 United Nations Guidelines aimed at creating a supportive environment for the development of cooperatives¹⁰ and the 2002 International Labour Organization Recommendation No.193 concerning the promotion of cooperatives.¹¹

⁷ Activities and reports are numerous. Suffice it here to cite the following: World Bank, World Development Report (2008: Agriculture and Development; 2009: Reshaping Economic “Geography”, What role for rural areas?); UNDP, “Creating Values for All: Strategies for doing business with the poor”, 2008; 2008 International Assessment of Agricultural Knowledge, Science and Technology for Development (IAASTD); Report on the Madrid High-Level Meeting on Food Security for All, 2009); International Labour Conference (2007) Conclusions Concerning the Promotion of Sustainable Enterprises; International Labour Conference (2008) Report on Promotion of Rural Employment for Poverty Reduction. Cf also almost the entire volume of Rural 21. The International Journal for Rural Development, Vol.43, No.2/2009.

⁸ This last point might well be a decisive distinguishing feature between cooperatives and other types of enterprises fulfilling the so-called corporate social responsibility or corporate societal responsibility. Cf. also infra argument “cooperative specific audit” as a legal obligation

⁹ Reproduced in: International Co-operative Review, Vol. 88, no. 4/1995, 85 f

¹⁰ UN doc. A/RES/54/123 and doc. A/RES/56/114 (A/56/73-E/2001/68; Res./56)

¹¹ ILC 90-PR23-285-En-Doc, June 20, 2002

1. Sustainability through economic security

Cooperatives create economic security mainly through their economic stability. Their economic stability (indicated by their longevity and a low number of bankruptcies)¹² stems from the following features, among others:

- as capital requirements are low and the acquisition of skills (where necessary) possible in most instances, cooperatives are a rather easily accessible organizational form which may be registered as a legal entity, thus adding an element of stability
- registration not only confers recognition as legal entity by business partners, it operates also a widely unknown and underestimated shift of economic risks, which boosts entrepreneurial behaviour¹³
- cooperatives have low transaction costs because the members are also the main users.¹⁴ The costs caused by complex decision making processes are outweighed by the advantages of these processes (cf. infra "Political stability") and they may be held low by providing for an efficient power-sharing between the different organs of the cooperative (cf. infra)
- cooperatives can generally count on member, and hence user loyalty and commitment
- cooperatives have an inbuilt early warning system through regular cooperative specific financial, management, social¹⁵ and societal¹⁶ audit and professional advice
- cooperatives avoid the negative sides of the conflict between investor and member-user interests through the limitation put on the admission of investors, be they members of the cooperative or not
- cooperatives are to prefer the production of surplus (on transactions with members according to special cost calculation schemes) over that of profit (on transactions with non-members according to profit maximization principles)
- most cooperatives are human being-centred. This helps them adjusting to changing circumstances (cf. supra as for their stability in time), especially to the current change of the production pattern from that of goods and services to that of knowledge. While it is true that cooperatives face difficulties when it comes to capital intensive activities, such as the production of knowledge, as their capitalization suffers from drawbacks (voting rights are not proportional

¹² Cf., for example, study by Ministry of Economic Development, Innovation and Export, Government of Quebec, at: [http://www.mddc.com.gc.ca/index.php?id=187&tx_ttnews\[tt_news\]=100&tx_ttnews\[backPid\]=2206&tx_ttnews\[currentCatUid\]=75](http://www.mddc.com.gc.ca/index.php?id=187&tx_ttnews[tt_news]=100&tx_ttnews[backPid]=2206&tx_ttnews[currentCatUid]=75)

¹³ To my knowledge, the link between the attribution of legal status to entities and (economic) development has not been researched. Only Fikentscher (Wolfgang, *Modes of Thought*, Tübingen: Mohr 1995, 183, 219, 258 ff., 359, 372, 379, 387, 470 f. et passim) frequently mentions this link. Similar Wenke, Hans, *Geist und Organisation, Recht und Staat*, Heft 241, Tübingen: Mohr 1961. Cf. also the writings of Mary Douglas; Javillier, Jean-Claude, *Responsabilité sociétale des entreprises et Droit: des synergies indispensables pour un développement durable*, in: *Gouvernance, Droit International & Responsabilité Sociétale des Entreprises*, Genève: OIT (forthcoming), 54 ff.

¹⁴ Cf. Seiser, Michaela, "Wissensbilanzierung erhöht die Kreditwürdigkeit". Bericht über das Humankapital gewinnt an Bedeutung/Imagevorteil für Unternehmen, in: *Frankfurter Allgemeine Zeitung* 21.7.2004, 18; Watkins, W.P., *Co-operative Principles Today and Tomorrow*, Manchester: Holyoake Books 1986 (54 ff.). This point was emphasised during a panel discussion organised by the UK Cooperative Party at Westminster on October 6, 2008 by one of the panellists, Mr. David Anderson, Chief Executive, Co-operative Financial Services UK

¹⁵ Cf. Seiser, op.cit.

¹⁶ Cf. Münkner, Hans-H., *Die « Bilan sociétal » - ein neuer Ansatz zur Messung des Erfolgs von Genossenschaften in Frankreich* (forthcoming)

to the investment and non-member investments, and even non-member business, are restricted), it is equally true that the production of knowledge depends on human beings, as knowledge is generated, applied and transmitted by them and here cooperatives have a comparative advantage¹⁷

- cooperatives are often tied into - legally structured - inter-cooperative solidarity mechanisms, for example guarantee funds which operate in case of financial difficulties¹⁸
- cooperatives have a capital structure which guarantees that the main constituent parts of it, namely member shares and reserve funds, are not mobile: usually, member shares cannot be transferred and traded and reserve funds are indivisible. Both factors add to local stability¹⁹
- cooperatives tend to reinvest the positive results of their activities at the local level, thus impacting positively on local economies. This, in turn, helps them to develop themselves²⁰
- voting rights, and thus control, cannot be acquired by buying shares, but only through membership
- the locked-in capital of cooperatives (indivisible reserves), while controlled by the members, cannot be accessed by them
- cooperative managers must ensure that the reserves serve both current and future members. This intergenerational character adds in most cases to the economic security of local communities
- as those depositing their savings with a cooperative bank or a cooperative savings and credit institution are potentially also borrowers, and as they participate in the decision making processes, their risk assessment, concerning both lending and investments, differs from that in investor driven banks²¹ and,
- in general, risk assessment is facilitated through policies which limit financing to local projects.²²

¹⁷ Cf. the highly inspiring article by Snaith, Ian, "Virtual" Co-operation: The Jurist's Role, in: *Genossenschaften und Kooperation in einer sich wandelnden Welt, Festschrift für Prof. Dr. Hans-H. Münkner zum 65. Geburtstag*, ed. by Michael Kirk, Jost W. Kramer und Rolf Steding, Münster: LIT 2000, 391 ff. Similar, but limited to the argument that knowledge intensive enterprises will have an advantage in the future, if they do not have it already now, Bernardi, Andrea, *The Co-operative Difference: economic, organizational and policy issues*, in: *Co-operative Management*, Vol. 3/no. 2, November 2007, 11 ff. (18)

¹⁸ Cf. *Frankfurter Allgemeine Zeitung*, 7.10.2008, 21: "Nach 1930 hat kein Kunde oder Gläubiger einer Volksbank durch Bankinsolvenz Geld verloren."

¹⁹ Cf. Jeantet, Thierry, *Die französische Idee der 'économie sociale': Grundansatz und unternehmerische Umsetzung*, in: *Die Zukunft der Genossenschaften in der Europäischen Union an der Schwelle des 21. Jahrhunderts*, Hrsg. Wolfgang Harbrecht, Nürnberg 2001, 83 ff. The same point is also stressed by the World Commission on Fair Globalization (cf. *A Fair Globalization. Creating Opportunities for All*, World Commission on Fair Globalization, Geneva: ILO 2004)

²⁰ As an example one may cite the Italian legislation whereby the members of cooperative banks must have a territorial bond. For further examples, cf. Bernardi, op. cit.

²¹ The rather stable situation of cooperative financial institutions in the current crisis might be partly explained by this (not only in times of crisis. Cf. recently Hesse, Heiko and Martin Cihak, *Cooperative Banks and Financial Stability*, IMF Working Paper WP/07/2; Fonteyne, Wim, *Cooperative Banks in Europe – Policy Issues*, IMF Working Paper WP/07/159)

²² Cf., for example, the statutes of the Raiffeisen banks in the Canton de Genève, reported by the daily newspaper *Tribune de Genève*, 25.3.2009, 9

2. Sustainability through social justice

Social justice may be seen as having two aspects: Social needs satisfaction and social equality.

Among others, the following features ensure that cooperatives take **social needs** of their members into consideration:

- the universally recognised definition of cooperatives requires them to satisfy the “economic, *social* and cultural needs and aspirations of the members.”²³ The members themselves define these needs and the ways to satisfy them. The extent to which cooperatives are successful in achieving this objective is being assessed through the afore-mentioned cooperative specific audit
- the objective of cooperatives is member promotion, not the maximization of returns on investments
- the “growth or equity” alternative is leaning towards equity, as the role of capital is de-emphasized²⁴
- decisions are taken according to the one member/one vote principle, independently of the amount of capital invested by the members
- profits are not distributed. Surplus is distributed, but not in proportion to the investments, but in proportion to the transactions with the cooperative
- the characteristics of the main constituent parts of the capital, member shares and reserves, prevent - as mentioned - delocalisations and allow therefore for a better account of local social needs
- many cooperatives provide for social security coverage for their members by setting aside parts of the surplus for this purpose.²⁵

Cooperatives render **social justice** through, among other means,

- an equitable cost, risk and benefit sharing and co-control by the members, independently of the capital invested by them
- the open door principle,²⁶ which allows to create economies of scale and, given the objectives of cooperatives as well as their surplus distribution schemes, for a more wide-spread distribution of wealth and thus social equality. This is a structural means for an effective materialization of the right to participate in political decision making processes: Create the necessary economic power, which is necessary to enable people to make meaningfully use of this Human Right, through the production of well-being for the greatest

²³ 2002 ILO Rec.193, Para.2

²⁴ As for the hyper concentration of capital (and thus the weight put on growth yielding returns), cf. Vidal-Beneyto, José, De la mundialización a la globofobia, in: El País, 29.9.2007, 10

²⁵ Cf. for example Article 42 of the 2008 Ley marco para las cooperativas de America Latina

²⁶ The so-called “open door principle”, the 1st ICA principle, is frequently construed as meaning that anybody can join a specific cooperative. It is therefore worthwhile recalling the full text of this principle. It reads:

“Voluntary and open membership

Cooperatives are voluntary organizations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination.”

possible number of citizens²⁷ instead of letting economic power yield political power

- the focus of cooperatives on their members, mainly natural persons
- the direct access of members to the knowledge, as well as the research and development results engendered by their cooperative and through
- the emphasis on cooperation instead of competition.

3. Sustainability through ecological balance

The last mentioned feature of cooperatives - their emphasis on cooperation instead of competition - goes a long way in preparing the ground for a heightened concern for keeping the ecological balance.²⁸ Cooperatives further contribute to maintaining the ecological balance through the following characteristics, among others

- being member-centred. This ensures that decisions concerning the operations of the cooperative enterprise are more comprehensive than those in capital-centred companies. Cooperatives do not allow for “economy *or* ecology” solutions. They have to find rather “economy *and* ecology” solutions
- being member-user driven. Members constantly redefine their needs and, in doing so, most probably include their concern for a healthy environment and the sustainable use of natural resources. Members are likely to make decisions that balance their welfare with the need for profitability. As cooperatives have to implement these decisions, their activities will include ecological concerns²⁹
- neutralizing the role of capital. Growth is commonly defined as the result of a favourable combination of capital, technology and labour. The finite character of natural, non-renewable resources, which are at the basis of most of our production, is not part of the “equation”. Where the role of capital is neutralized, i.e. where the financial return on the investment, which is taken as the main indicator of growth, is not the primary goal of the enterprise, and where production is demand-driven instead of supply-driven (cf. supra concerning the definition of needs by the members), the pressure to utilize these resources to achieve growth lessens³⁰
- intergenerational solidarity. Another element which helps maintaining the ecological balance is the intergenerational solidarity achieved by the nature of the reserve fund being indivisible, it being fuelled by the totality of the profit

²⁷ The need to reduce poverty is therefore for cooperatives a sign of failure as they might not have been successful in preventing their members from falling into poverty in the first place. Their approach is one of poverty prevention. Development cooperation seems to have forgotten about this nuance

²⁸ Meyer-Abich (Klaus Michael, *Leiblichkeit im natürlichen Mitsein*, in: Scheidewege 2008/2009 (38), 43-58, (56)) writes: “Mitsein und Verwandtschaft deuten demgegenüber auf Kooperativität in spezifischer und individueller Verschiedenheit hin.”

²⁹ The example of Migros and its consideration for bio-diversity in the supply chains of its consumer cooperatives may serve as an example. Cf. Migros magazine, 8.9.2008, 37

³⁰ Cf. also 7th ICA principle.

Despite of environmentally more friendly technologies, which have been developed over the past decades and which have allowed for productivity gains by using less resources per unit, the fact remains that the energy consumption per capita continues to rise and, as world population increases, so does the energy consumption

and parts of the surplus, as well as by the obligation of the responsible persons to manage the assets also for future members³¹

- pooling activities. For example, the common transport of goods diminishes pollution³² and
- introducing a societal audit which comprises ecological assessments of the performance of the cooperatives.³³

4. Sustainability through political stability

Political stability and high ratings in competitiveness seem to go hand in hand.³⁴ The United States of America and Switzerland are examples.³⁵ Both countries have a high prevalence and density of cooperatives.

We may assume that political stability is a function of the degree of effective participation of the highest possible number of people in the making of decisions concerning their daily lives. The participation of people in the organisation of economic life is therefore a highly relevant factor.³⁶ The topic relates closely to that of social justice (cf. supra). It is discussed nowadays under the notion of "governance".

Without passing any value judgment on other forms of business organizations, one may argue that "good governance" is an inbuilt element of genuine cooperatives.

Among others, the following elements may be mentioned:

- because of the identity principle, those who rule and those who are ruled in cooperatives are potentially the same persons. The division of roles underlying the governance concept with its potential conflicts does not exist in cooperatives, at least not as marked as it is in other business organizations
- another central structural feature of good governance is the division of powers and functions among the various groups within the cooperative and the reciprocal checks by these groups on each other, as well as the fact that the "ruled" have the right to elect their "rulers". This latter feature seems to be systematically overlooked when comparing the governance structures of different enterprise types
- democratic control of the cooperative enterprise by the members is required by the definition of cooperatives and by the universally recognised cooperative principles
- a specific, self-control mechanism at all levels (primary, secondary etc.), which not only ensures sustainability, but also autonomy and independence from whatever outside interference

³¹ It might be interesting to note that at its origin the debate on a responsible management of natural resources turned around the notion of intergenerational solidarity

³² Transport cooperatives, like the Swiss cooperative "Mobility", are examples where this is a side effect of their main objective

³³ Cf. Münkner, Die « Bilan sociétal » ..., op. cit.

³⁴ Cf. 2007/08 Competitiveness Report; Bernardi, op. cit., 16. Montesquieu (De l'esprit de lois, Quatrième Partie) insisted already on peace and stability as prerequisites for economic success

³⁵ Cf. also Bernardi, op.cit., 14

³⁶ Similar Partant, François, La guérilla économique. Les conditions du développement, Paris: Seuil 1976. Cf. Henry, Hagen Co-operative Law and Human Rights, in: The relationship between the state and cooperatives in cooperative legislation, ed. by ILO, Genève: ILO 1994, 21 ff.

- a democratic structure. Self-determination, autonomy through the setting of own rules (statutes, bye-laws), self-management, voting according to the principle of one member/one vote, participation of the members in all phases of the operations of the cooperative etc.
- the provision of space for participation. In many instances people have no means to make their voice heard. As technological changes and deregulation processes (globalisation) lead to the deterritorialization of political orders, the space for democratic participation, for which states hitherto provided, is reduced. This comes after privatisation of public services had already considerably reduced this space. In these situations people turn towards member-centred enterprises with a democratic structure and tradition, like cooperatives, and finally
- a high Human Rights functionality of cooperatives.³⁷

III Sustainability defeating tendencies in cooperative legislation

For the past four decades legislators have engaged in a rather complex, somewhat contradictory, process of bringing, on the one hand, cooperative legislation in line with international standards while, on the other hand, operating a double approximation: They have been harmonizing cooperative laws across borders and they have started to homogenize cooperative law with the characteristics of capital-centred companies.³⁸

³⁷ Cf. Henry, *Co-operative Law and Human Rights ...*, op.cit.; Laville, Jean-Louis, *Un projet d'intégration social et culturel*, in : *le Monde diplomatique*, Octobre 2001, supplément, 1; Partant, op.cit.

³⁸

Harmonization of cooperative laws

- under a 1988 project for harmonizing cooperative legislations in Latin America (Proyecto de Ley Marco para las Cooperativas de América Latina), the Organización de las Cooperativas de América (OCA) elaborated a model law (Ley Marco). It became an important stimulus for the modernisation of cooperative legislations in several South American countries. A new Ley marco was elaborated and adopted by the ICA bodies in 2008
- in 1997 the Inter-Parliamentary Assembly of the Community of Independent States (CIS) adopted a "Model Law on Cooperatives and their Associations and Unions"
- the Member States of the West African Monetary Union (UEAO) have adopted a uniform law on savings and credit cooperatives, which has been transformed into national legislation by several West African States
- as mentioned, OHADA is currently elaborating a uniform cooperative law. It is expected to be adopted in 2009
- the 1997 "Referential Cooperative Act" of India is influencing the harmonisation process among the Indian States
- the Member States of the South Asian Association of Regional Cooperation (SAARC) entertain permanent, quasi institutionalised consultations on cooperative law matters which have already had a harmonising effect on the cooperative laws in the region
- the Organisation of East Caribbean States and CARICOM elaborated a credit union legislation, which has been translated into national laws by seven Caribbean States
- the Arab Cooperative Federation decided in 1999 to develop a model cooperative law to guide national legislators
- after almost four decades of discussions the European Union adopted in 2003 the Regulation on the Statute for a European Cooperative Society (Council Regulation (EC) No. 1435/2003 of 22nd July 2003 on the Statute for a European Cooperative Society (SCE), and Council Directive 2003/72/EC of 22nd July supplementing the Statute with regard to the involvement of employees, O.J. No. L 207 of 18/8/2003)

Homogenization of cooperative law with the characteristics of capital-centred companies:

The harmonization of cooperative laws across national borders is necessary in order to restore and maintain competitiveness, in order to facilitate beneficial regional and international (economic) integration and trade. It also contributes to forming the common core of cooperative laws, which substantiates the public international cooperative law.³⁹

The homogenisation can be summarized as concerning mainly the capital structure (minimum capital requirement; different classes of shares), the voting rights system

Cooperative laws in Europe and the 2003 EU Regulation on the Statute for a European Cooperative Society allow/require cooperatives (Articles in brackets refer to this regulation)

- to issue shares that are attractive to investors. Cf especially the following legislations: Sweden (1987) allows for debenture contributions from non-members which must not, however, exceed the amount of the ordinary share capital and not have voting rights attached to them. Finland (1990, 2002). France (1992): through bylaws non-member investments and revaluation of shares through incorporation of reserves. Italy (1992): financial backer members may have up to 33% of the total voting rights and 49% of the seats on the board of directors. Germany (1994)
- to issue freely transferable (even at the stock exchange) cooperative investment certificates. Cf. del Burgo, Unai, La desnaturalización de las cooperativas, in: Boletín de la Asociación Internacional de Derecho Cooperativo. International Association of Cooperative Law Journal 2002, 51 ff. (71)
- to have unlimited business with non-members (Article 1, 4.)
- to hire professional, non-member managers and increase their power and autonomy vis-à-vis the board and the general assembly
- to grant members limited plural voting rights (up to five votes) (Article 59, 2.), not based on capital contributions, however. Cf. Chuliá, Francisco Vicent, El futuro de la legislación cooperativa, in: CIRIEC España, Revista Jurídica de Economía Social y Cooperativa 13/2002, 9 ff. (40)
- to arrange for delegate meetings, at times even with a free mandate for the delegates (Article 63). Cf. Chuliá, op.cit., 40
- non-member employees to sit on the supervisory board, like for example in Germany under certain circumstances
- to have minimum share capital (Article 3, 2.)
- to merge and acquire other enterprises
- to grant (non-user) investor members, and even non-member investors, similar rights as members (Considerata 9; Articles 14, 1.; 39, 3.; 42, 2.; 59, 3.). Cf. Chuliá, op.cit., 38; del Burgo, op.cit., 68 ff., 79 ff.
- to distribute their reserve fund upon liquidation or conversion into a stock company (Article 75). As for the latter, cf. del Burgo, op.cit., 87 ff.
- to distribute their surplus according to the amount of capital invested by the members
- to transform into stock companies, cf. especially the legislation in Estonia, Finland, Germany, Latvia, Lithuania, Sweden.

The EU Council Regulation on the Statute for a European Cooperative Society allows for/requires, in addition

- different categories of members with different rights and obligations (Articles 4, 1.; 5, 4.)
- capitalisation of the reserves and attribution of the new shares to the members in proportion to their share in the previous capital (Article 4, 8.) and the
- issuance of securities (other than shares) or debentures for members or non-members, without voting rights, however (Article 64, 1.).

Examples from other regions of the world could be added

³⁹ Cf. Henry, Hagen, La contribution de l'Organisation internationale du Travail à la formation du droit public international coopératif, paper to be presented to the Conference « Politiques sociales transnationales. Réseaux réformateurs et Organisation internationale du Travail. Transnational social policies. Reformist networks and the International Labour Organization (1900-2000) », organised by Prof. Dr. Sandrine Kott and Maître de conférences Isabelle Lespinet-Moret, with the support of Université de Genève, Fond national suisse, ILO, Université de Paris X, CNRS and MIRE, 7-9 May 2009 at Genève

(in proportion to the capital invested), the introduction of negotiable shares, the representation of non-members in the general assembly, on the board of directors and on the supervisory council, the admission of non-member users, non-member investors, non-user members and member investors, with or without - additional - voting rights, the hiring of professional non-member managers, concentrations/fusions and it concerns the control mechanisms.

The homogenisation of cooperative law with company law helps cooperatives to become more competitive in the narrow economic sense, i.e. to grow economically and to increase their capital through mergers,⁴⁰ to lower their costs, to create economies of scale, to increase their reserves and to increase their profit, at times also their surplus. However, this homogenisation transforms cooperative enterprises, being based on transaction relationships with their members, into enterprises that are based on investment relationships with their investors, be they members or not. This trend started with the 1973 German cooperative law reform and continued throughout the 1990ies in most European countries. In Latin America the trend set in with the agreement on the first Ley Marco para las cooperativas de América Latina in 1988.⁴¹

⁴⁰ Side-effect: the absolute number of members tends to increase with the decrease of the number of cooperatives caused through mergers. Cf. von Wild, Christian, Credit Unions in den USA - ein historischer und aktueller Vergleich mit deutschen Genossenschaftsbanken, in: Genossenschaften in Europa - damals - heute - morgen, Hrsg. Historischer Verein bayerischer Genossenschaften e.V., München: Bayerischer Raiffeisen- und Volksbanken-Verlag 2000, 264 ff. (266)

⁴¹ Some of the consequences are:

- mergers and acquisitions lead to a larger number of members whose direct participation in management/administration is difficult to organise. Meetings of delegates/representatives do not fully compensate for the loss of direct democracy and of the means for good governance
- the evolution of bigger sized cooperatives with increased turnover requires professional, paid managers who might find it difficult to close the widening qualification and information gap between them and the members, and even between them and the board of directors. The members' and the board's possibilities to effectively control are thus lessening (cf. infra)
- non-member professional managers, often trained outside the cooperative system, tend to put competitiveness, growth and financial stability before the interests of the members. The principle of member-centrism is at stake
- unrestricted non-member business leads to a loss of autonomy and threatens the principle of identity
- investments lead to putting more emphasis on the economic objectives to the detriment of the social and cultural ones
- in heterogeneous memberships it is difficult to convince members to maintain the constituent principle of equal rights and obligations of all members. Plural voting rights and share contributions in proportion to the business done with the cooperative are introduced. Where rights and obligations are linked to the volume of capital contribution, the borderline between a (stock) company and a cooperative disappears
- symbolic share contributions, combined with limited liability, lead to decreasing motivation to participate in the administration and control of the cooperative
- membership in economically successful cooperatives is not any more based on an immediate economic need, but it tends to reflect economic speculation. The relationship between the members and the cooperative is becoming that of a client/business relationship, marked by anonymity and depersonalisation
- transferability of investment shares, which may even be quoted at the stock exchange, adds to the dependency on anonymous capital holders. The clash between user and investor interests, which the cooperative principle of identity is to avoid, is imminent in these arrangements.

For more details cf. Chuliá, Francisco Vicent, El futuro de la legislación cooperativa, en: CIRIEC España, Revista Jurídica de Economía Social y Cooperativa 13/2002, 9 ff. (11, 14, 28, 30); Münkner, Hans-H., Structural Changes in Cooperative Movements and Consequences for Cooperative Legislation in Western Europe, in: Structural Changes in cooperative movements and consequences for cooperative legislation in different regions of the world, Genève: ILO 1993, 57 ff.

It weakens the associative character of the specific governance structures of cooperatives. The aptitude of the cooperative model to respond to the requirements of sustainability finds itself diminished by this homogenization. Furthermore, and for lawyers of a more immediate concern, this homogenisation violates the public international cooperative law.

IV Future cooperative law: return to the principles ⁴²

Before looking towards the future, which is rather a look backwards to the cooperative principles, we need to try and understand the reasons for the above outlined current tendencies in cooperative legislation: We are witnessing the transformation of the system of production, from the production of goods and services to the capital-intensive production of knowledge. ⁴³ The pressure on legislators to give in to demands for more investor influence in cooperatives will rise even further. However, the following might also have to be considered: By definition, cooperatives can never access the financial market as successfully as capital-centred companies can. As much as it would constitute a success to admit this, would it be a success if we could also accept that competitiveness does not relate exclusively to financial issues. Competitiveness varies rather with the criterion against which it is measured. The tendency in legislation to lift the limitations of cooperatives concerning mergers and acquisitions, non-member business, non-member investments, the hiring of non-member managers not trained in cooperative specificities, and on voting rights etc., reflect a reaction to a specific kind of competition, the one where capital-centred companies excel because their structural features are designed accordingly. The competitiveness of cooperatives relates to other criteria. As I tried to show here, cooperatives lend themselves relatively well to the achievement of sustainable development. ⁴⁴ And even the capital intensive production of knowledge requires more than just capital. ⁴⁵

We need therefore cooperative specific answers to the challenges mentioned. We need cooperative laws which, in addition to addressing the comparative disadvantages of cooperatives without jeopardising their distinctiveness, especially in the areas of financing and of management, allow for the comparative advantages of cooperatives to play out, i.e. we need laws which emphasize the transaction relationship between the members and their cooperative instead of transforming it into an investor relationship. In one sentence: Approximate business laws where possible, differentiate where necessary!

The following non-limitative list of possible legislative measures relates to the four aspects of sustainable development.

⁴² This paper is limited to cooperative law proper. In order to be more meaningful, other areas of the legal systems must also be considered as they might have an influence on the structure and operations of cooperatives, such as taxation, competition law, labor law, accounting standards and also the law enforcement mechanisms

⁴³ Cf. recently, Guallart, Vicente, *Hacia un habitat autosuficiente*, in: *El País*, 28.3.2009, 33

⁴⁴ As for a good overview of other comparative advantages of cooperatives, cf. Bernardi, *op. cit.*

⁴⁵ Cf. *supra* at footnote 17

a) Economic security through cooperative law

Cooperatives must be allowed through law, for example,

- to be active in all sectors and in all forms. In many countries, cooperatives are still excluded from providing financial services (insurances and banking services). This example demonstrates also how important it is to consider possible difficulties in the implementation of the cooperative law. Restrictions concerning financial activities, for example, might be justified where prudential mechanisms are missing or failing. In many countries, there are still legal and other barriers to the formation of shared services cooperatives as an effective way of organising especially small and medium sized enterprises. This is especially disadvantageous during this time of a rapid change of the physical production pattern⁴⁶
- to establish effective and efficient self-control mechanisms (by unions and federations) which would allow for public authorities to limit their involvement to promotional measures without intervening and thus hindering the development of cooperatives
- to improve the internal financing mechanisms, for example by increasing members' financial liability,⁴⁷ by attracting supplementary share contributions by members (fixed interest payments, secondary liability and the right to be refunded at any time), by reinvesting part of the distributed surplus, by - to a limited and specified extent - dissociating the variability of the number of members from capital requirements (minimum capital, minimum length of membership period)
- to efficiently build up indivisible reserves through tax exempt transfers of surplus monies
- to hold stocks of companies, not the least in order to access financial markets, as long as the cooperative members retain the managerial control
- to make use of alternatives to concentrating through mergers and acquisitions, for example by improving the conditions for cooperation, for vertical and horizontal integration at all levels, while maintaining the independence of the involved entities and ensuring democratic decision making procedures and by allowing to form strategic alliances, including cross-border, under the same provisos and
- to make use of their comparative advantages in the production of knowledge (cf. supra).

b) Social justice through cooperative law

In order to be able to serve the social interests of their members, cooperatives must be incited, through law, for example,

- to improve member promotion through social audits, good labour conditions, insurance schemes⁴⁸

⁴⁶ Cf. Guallart, op.cit

⁴⁷ Cf. Gómez Urquijo, Laura y Marta de los Ríos Añón, La sobrevivencia del modelo cooperativo en un contexto de competencia, in: Revista de la Cooperación Internacional, Vol. 32, no. 1/1999, 55 ff. (59)

⁴⁸ Cf. Tan Kin Lian, The Unique Co-operative Response to Globalisation, in: Review of International Co-operation, Vol. 95, no. 1/2002, 14 ff. (15). It is estimated that 80% of the world's population live without any social insurance coverage

- to grant plural voting rights, not in proportion to capital contributions, however, and not to be exercised when taking decisions relating to the associative character of the cooperative.⁴⁹

c) Ecological balance through cooperative law

As implied by the observations reported on under II 3., the key issue here is to prevent investor interests from prevailing over member-user interests. Effective cooperative specific governance structures and operations will lead to integrating ecological concerns of the members into the decision making.

d) Political stability through cooperative law

In line with what was outlined under II.4. concerning the role of cooperatives in contributing to political stability, the effective and efficient involvement of cooperative members in decision making and control must be restored.

The governance structure of cooperatives must reflect their double nature: they are associations of persons and enterprises at the same time. The functioning of cooperatives as a group of persons (associations) depends on the participation of the members who must be able to exert an effective influence on the decision making and who must be able to control the execution of these decisions. Therefore, the internal organisation, the sharing of powers between the different bodies, the elections to offices, as well as all important decisions must reflect the will of the members. Nevertheless, as a legal entity having an enterprise, the management must be enabled to take decisions without having to consult with the members. This demarcation of powers between the membership and the management is to avoid inefficiencies that arise where democratic decision making does not match the requirements of flexibility and speed on the market and/or where a non-informed membership retains too much of the management powers. Furthermore, the demarcation of powers is to cope with the problematic situation whereby

- the management is allowed to use its knowledge and know-how without properly consulting with the membership and where, hence, the membership loses its effective control and/or whereby
- the members do not have the knowledge, time or practical possibility to control the board of directors because of the business being too complex (turnover, type of activity, multipurpose, heterogeneous membership etc.) or because of the membership being too numerous and/or - and even more complex - whereby
- the board of directors loses the effective control over the management because it suffers from basically the same inabilities as the membership does.

Matters relating to the associative character of the cooperative must be dealt with by the general assembly, the broad lines of business that relate to the cooperative being or having an enterprise must be dealt with by a board of directors, whereas the day-to-day running of the enterprise might have to be delegated by the board of directors to an executive/manager, member of the cooperative or not, member of the board of directors or not, while responsibilities and liabilities must match the effective

⁴⁹ The latter idea is borrowed from the Polish cooperative law

possibility to control, i.e. control of the board (members) by the members and control of the management by the board.⁵⁰

V Conclusion

We need more than just one business type. Human needs are diverse. So must be the means to satisfy them. Beyond this empirical fact, we need to understand the existential rationale for the need to act in accordance with the diversity principle. Sustainable development through adequate enterprise structures may serve as an example to demonstrate the point. Sustainable development is an expression of the existential diversity principle of which we may dispose only at the risk of destroying life. The diversity principle has two aspects: bio-diversity and cultural diversity. Whereas this principle does not call for the preservation of specific enterprise types, there is no other way of paying respect to the diversity principle than by including in

⁵⁰ In the light of the said, it is suggested that each group of persons within the cooperative work according to clearly laid down rules concerning its responsibilities: Statutes/byelaws for the members/general assembly, rules for the board of directors and any other commission or committee and a labour contract with the manager, if any. These rules must ensure that

- members have a right to be informed
- members and the board of directors communicate effectively on relevant aspects (Lees, M., Corporate Governance in European Co-operatives, in: The World of Co-operative Enterprise 1995, 59-64 (63))
- officers have the obligation to inform themselves on members' knowledge, know-how, needs etc.
- members, board members and management have a right and an obligation to receive permanent and systematic functional education and training (Cf. Harvey, B., Effective Governance: The Co-operative Union Perspective, in: The World of Co-operative Enterprise 1995, 91-98 (93)). Especially the board of directors needs professionalizing
- the board of directors and the management must be trained to not perceive members participation as an obstacle to economic efficiency and
- managers must be trained to not consider themselves company managers.

Especially the position of the members needs reinforcing through law

- by dividing the general meeting into regional and/or sectoral meetings, where necessary
- by allowing members to participate in general assemblies through representatives and/or by using new forms of decision making (by post, by electronic means, tele-conferences, e-mails etc.)
- by leaving a reasonable space in the law to be filled through byelaws/statutes, i.e. the members must not be seen as merely executing the law. This has implications for the choice of the legal instrument - law, regulation, statutes etc. - for the various matters to be dealt with by legal rules
- by compensating for some of the mentioned shortcomings in the control system through the establishment of a supervisory committee or commission, elected by the general assembly. The supervisory committee must be independent from the board of directors in order to be able to control the administration and the management on behalf of the members. This system, compulsory in Austria, Germany, Tanzania and some Latin American countries, optional in Belgium, Finland, France and the Netherlands for example, must not replace internal control mechanisms of the board of directors, such as internal auditors, nor must it replace the obligatory external audit of the co-operative
- by having a compulsory, external, regular, independent, cooperative specific audit, the results of which are reported to the members and
- by having offices rotate as often as possible amongst the members.

social traditions the knowledge on the greatest possible number of business types. It needs continued consolidating through practical experience.⁵¹ It is therefore not sufficient to exclusively care for bio-diversity. Without cultural diversity, including in the field of law,⁵² bio-diversity might be protected, but it cannot be preserved. This means, we have to continuously develop cooperative laws, which reflect the cooperative values and principles. Legal homogeneity of enterprise structures might save costs at the enterprise level. Legal diversity enriches the national economy.⁵³

⁵¹ This seems to be a paradox: the principle of diversity does not call for the preservation of specific existing types. It calls for the preservation of the possibility for diverse types to exist. Because of the link between knowledge, tradition and experience, this possibility is maintained only through the knowledge of the greatest number of existing types. Given the dynamic nature of social institutions, this does not amount, after all, to the preservation of specific existing types. The paradox is therefore only apparent, but not real

⁵² Similar, but without mentioning law, Gervereau, Laurent, Pour une écologie culturelle, in: *Le Monde*, 3.10.2008, 18. For more details cf. Henry, Hagen, Kulturfremdes Recht erkennen. Ein Beitrag zur Methodenlehre der Rechtsvergleichung. *Forum Iuris. Veröffentlichungen der Rechtswissenschaftlichen Fakultät der Universität Helsinki*, Helsinki: Hakapaino 2004, especially D III.

As for the importance of law in this context, cf. Blackburn, Nadine, Desarrollo de nuevas herramientas para asegurar la continuidad de las entidades cooperativas financieras, en: *Revista de la Cooperación Internacional*, Vol. 32, no. 2/1999, 39 ff. (39 f.); Henry, Hagen, Aktuelne tendencije u uporednom zadruznom pravu (Zakon o zadrugama, aktuelne tendencije, idealni sadržaji), en: *Pravo. Teorija i praksa* (Novi Sad) 8/2002, 48 ff. (49)

⁵³ Schanze (Erich, *Rechtsökonomik im Wirtschaftsrecht. Ein erfolgreicher Brückenschlag zweier Studiengänge*, in: *Neue Zürcher Zeitung* 11/12.3.2006, 13), introducing a new curriculum on the legal analysis of law, does not distinguish between these aspects when he writes: "Grundeinsicht (für das Studienprogramm) ist, dass rechtliche Institutionen nicht nur Rahmenfaktoren ökonomischer Entscheidungen sind, sondern vielmehr kostenträchtige Variablen. Single enterprises externalise costs effectively only when these costs are borne by a well functioning national economy