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The Creation of a Supportive Environment in Theory and Practice: Cooperative Law. Is it Necessary, Is it Sufficient for Cooperatives to Prosper?

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I. Introduction

In line with the universally recognized definition of cooperatives[1] as autonomous self-help groups which aim at meeting their members' common economic, social or cultural needs by running a jointly owned, used, and controlled enterprise, the title of my contribution reflects a paradigmatic change in international discussions. Indeed, after decades of viewing cooperatives as instruments to achieve a variety of political, economic or social objectives and under the combined pressure of defaulting public budgets, overall political changes and the effects of globalization, governments all over the world, international organizations, cooperative movements and other national and international non-governmental organizations have come to the conclusion that the gap they allowed to develop between cooperative values and principles[2], on the one hand, and reality, on the other hand, leaves huge cooperative self-help potential underutilized, if not unutilized. All actors now agree that in order for cooperative self-help potential to unfold and withstand the harsh winds of local, national, regional and international competition it is necessary to provide for adequate political, legal and administrative frameworks, i.e. a supportive environment for cooperatives.

From among the numerous elements that contribute to the development of prosperous cooperatives[3] I have chosen to speak on cooperative law as one of the practical aspects of a supportive environment for cooperatives. Over the past twenty years we have been witnessing a worldwide wave of changes in cooperative laws in response to structural adjustment requirements.[4]

Is cooperative law necessary for cooperatives to prosper? Is cooperative law sufficient for cooperatives to prosper? It is neither necessary, nor is it sufficient!
I shall try to go beyond this neither/nor answer.

To speak in a world of many cultures – and hence of many law-ways and many kinds of cooperatives – on laws and cooperatives in the singular is a hazardous undertaking. Every country is, by the very fact of it being an identifiable entity, at any given moment in its history in a unique situation. Its economy, its religion, its political system, its social ties, in short: its culture, differs so much from any other country that generalizing statements harm understanding. Yet I dare to generalize for four main reasons:

(a) Despite of all differences, and maybe beyond them, cooperatives around the world exist because of universally shared values like self-help, self-responsibility, equality, equity, solidarity and honesty. This is the common ground, which allows us to speak in general terms on cooperative law.[5]

(b) Cultural differences coincide ever less with political boundaries. Despite of cooperatives, as we portray them in international meetings, being a produce of the specific sociological, economic, political and legal circumstances, which prevailed at a certain moment in European

history and despite of my being formed by Western culture, the cooperative law model I have in mind might be applicable/applied outside the geographical area traditionally associated with "western culture".

(c) One of the common denominators in cooperative policy is to find a better balance between the unalienable control by the state and cooperative autonomy.

(d) International cooperation in cooperative legislation has become a standard component of national law making. This reinforces the trend towards harmonizing cooperatives laws worldwide.[6]

II. Is Cooperative Law Necessary for Cooperatives to Prosper?

If law is at all necessary, certainly not any law will do!

Why cooperative law?

In certain countries, such as Denmark and Norway, cooperative movements prosper without being ruled by their own *law*. But there are no cooperative movements prospering without legal rules applicable to them. The following main reasons for this may be given:

(a) Together with a set of international and regional Human Rights instruments[7], those international instruments, which establish the duty of states to take measures enhancing the development of their countries, as well as the International Labour Organisation Convention 141 on the right to form rural organisations and the International Labour Organisation Convention 169 concerning indigenous and tribal people in independent countries, International Labour Organisation Recommendation no. 127 of 1966 (and its forthcoming new recommendation), the 1995 ICA Statement on the Cooperative Identity and the UN "Guidelines aimed at creating a supportive environment for the development of cooperatives"[8] form what may be called the public international cooperative law. It sets the legally binding standards for national cooperative laws.

(b) In times of human rights, democracy and the rule of law-driven development efforts, aiming to secure sustainability, i.e. ecological balance, economic security and social justice, legal relationship between citizens and economic entities, on the one hand, and the state, on the other, must be founded on acts of parliament. This is all the more true for Human Rights oriented organisations like cooperatives.[9]

(c) Cooperative law is a means to make cooperative policy work. Contrary to a wide-spread belief, liberal market economy requires a highly complex political and legal structure.[10] The balance between non-intervention into the private sector and the duty to publicly protect cooperative members, third parties and public interests is the result of a densely woven net of interrelated legal rules. The law must induce and secure maximum participation of a maximum number of private economic actors who should have the essential decision-making power in economic matters.

(d) As globalisation evolves, law takes on additional roles besides the one of regulating, namely that of satisfying the growing need for information and communication. In international cooperation law has become a reference point and a guide mark.Structural adjustment includes institution building. By definition, laws are building bricks of most societies.[11] Law is an element of institution-based and institution-supported development.[12] Law is increasingly being recognized as a political stabilizer and as an adequate regulator in rapidly changing social relationships.

(e) In complex societies, where social control can no longer be based on close personal relationships, law has proved to be the most adequate means of regulating the activities of economic agents who are not personally linked to one another. By definition, this is especially true where economic relations are not only entertained by physical persons but by legal persons as well. In order to provide for legal security, the law has to establish the criteria for the definition of the latter, the power of their organs and their liability in lieu of that of the members or the shareholders.

(f) Law is a suitable and tested means to represent and maintain the just balance between the autonomy of the cooperators and the cooperatives, on the one hand, and the scope of normative control by the state, on the other**.**

What Kind of Cooperative Law?

(a) Scope of the cooperative law

Before elaborating the law, the legislator will have to consider its scope: Is the law to apply to all forms of self-help or to organised forms of self-help only? Is the distinction between associations and communities to be considered?

It is suggested that the scope of the cooperative law be limited to cooperative organisations, i.e. to one specific, organised type of self-help. State structures do not allow for the reproduction of knowledge necessary to administer unorganised/informal self-help groups, let alone a combination of these and organised groups in one single law. Legislation on all forms of self-help in one law tends to neglect the informal, non organised sector in favour of the formal sector to the detriment of cooperatives. Besides, the administration of a comprehensive law on all forms of self-help would be extremely difficult and costly.

It is important to distinguish between *cooperatives as* voluntary *associations* of persons, i.e. a mode of organising a group, and *communities,* i.e. a way of life[13]. Cooperatives may only prosper if their members are autonomous in their economic activities and if economic life in general is kept separate from other social activities. Societies where the community is considered as an indivisible entity find it difficult to integrate the concept of legal personality, which allows for abstract bodies to exist in law, independently of their members.

Where the concepts of association and community are confused, it may happen that the implementation of the cooperative law will be hampered by community-type mechanisms. This

mixture tends to be harmful to both the cooperative and the community-type group in which cooperative members often continue living.

The distinction between associations and communities must not be confused with that between cooperatives and simplified cooperative structures. Simplified cooperative structures are organisations that function according to cooperative principles without fulfilling all the requirements of a fully-fledged cooperative. Such structures might not need, for example, a supervisory committee (where required), as many members in their organs, a full-time manager, a sophisticated capital structure, an elaborate documentation, and accounting system or a chartered accountant as an auditor. The distinguishing criteria might be the activity, the turnover or the membership size, the type and/or volume of business transactions with third parties etc.[14] This concept is gradually replacing that of "pre-cooperatives" according to which these entities had to either convert into "full" cooperatives or to dissolve after an unsuccessful probationary period of time.

(b) Nature of the cooperative law

(i) Public or private law?

The distinction between public and private law is not a universal distinction.

The legal nature of the cooperative law depends on the definition of its objective. If it is to regulate the activity of the cooperative sector, it will be part of public economic law and should include, besides rules on the formation, structure, operations and dissolution of cooperatives, also rules on the establishment, the set-up and the powers of a supervisory authority. If, on the other hand, it is to only propose to potential cooperators a mode of organisation, which will permit them to develop their activities in an autonomous manner, then it will be part of private law.

The insertion of the cooperative law in one or the other of these fields reflects a political choice.

(ii) Law and development

The answer to the question of whether externally geared, accelerated development in many countries requires a specific law that respond to specific development needs, also defines the kind and scope of issues to be dealt with in a cooperative law.

Guided by the theory of the "development of law", which saw law as a technique apt to be developed, and ignoring the theory of "development law", states in the past often ended up in managing cooperatives on a day-to-day basis in order to make them fit modern, more often than not imported law. What was originally meant to be provisional, often became institutionalised.

Thus, past experienced with the theory of the "development of law" have not proved satisfactory. Law is not to create social reality but to structure it. The "development law" theory, on the other hand, which is rather concerned with finding out

how development could be induced and supported by law, has been widely ignored. It pre-shaped, however, the current human rights approach to development.

(c) Which instrument?

The choice between the different legal instruments, i.e. the constitution[15], acts of parliament, government instruments, government authorized model bylaws etc., is not a free one. The principle of cooperative autonomy and the rule of law determine the choice. Mistakenly, the aforementioned issue of designing a development enhancing law is frequently "solved" by allowing for deviations from the law through government instruments in key areas of cooperative development.

The autonomy of cooperatives will only be achieved and/or maintained by respecting the principle of subsidiarity. Only matters, which surpass the competence of an individual cooperative, which are of public concern or involve third party interests may be regulated through public norms, while everything else must be left to be determined through bylaws. This notwithstanding, the cooperative law should be sufficiently detailed to avoid its character being altered through government rules. This is of particular importance in countries where laws take effect only once the relevant government decree of application is issued.

According to the rule of law, questions relating to cooperative principles must be regulated by law, whereas decrees or other administrative acts are only to operationalise the law, especially in matters that are of a temporary nature or which are subject to frequent changes, such as for example rules on fixed interest rates.

(d) One cooperative law or several laws?

In view of the wide range of self-help organisations with differing activities, needs, membership bases, stages of development, sizes, degrees of complexity and inter-relatedness with competitors, it must be decided whether there shall be one law for all types of cooperatives (for example service, workers, consumer), all types of activities (for example agriculture, housing, fishery, cattle raising, savings and credit, transport, supply, marketing etc.), all types of professions (for example fishermen, craftspeople, medical doctors, herdsmen, lawyers etc.), single- and/or multi-purpose cooperatives, one law with separate parts for every or some types of cooperatives or several distinct laws. It might even be that there is no need for a separate cooperative law at all if the civil code, commercial or other laws provide for the regulation of cooperatives.[16]

Worldwide one finds any thinkable combination[17] – from many laws (like in France and in Japan, for example) to no law (like in Denmark and in Norway, for example). The trend is towards having one single general law covering all types of cooperatives because it is believed that:

- one law for all types of cooperatives, possibly with specific parts for specific types of cooperatives, for example housing or savings and credit cooperatives,

best guarantees the autonomy of cooperatives, i.e. their power to regulate their own affairs as far as possible through bylaws, since the degree of detail in such a law will be lower than in a multitude of laws;

- this low degree of detail diminishes bureaucracy;
- one single law avoids the fragmentation of the cooperative movement that might occur where different types of cooperatives were registered under different acts and placed under the supervision of different public authorities with, perhaps, heterogeneous policies;
- one single law creates legal security for those dealing with cooperatives. Legal security relates rather to structural and liability aspects than to a specific type of activity of a cooperative;
- in the context of development constraints, one single law is the most adequate tool to reach congruency between development oriented, member-oriented and self-sufficiency goals of cooperatives.

(e) Format of the cooperative law

The format of the cooperative law might seem of secondary importance. Nevertheless, it must be noted that form and content are one. The degree of detail and the sequence of the sections should, therefore, be reflected upon.

A brief law, only defining an organisational framework for cooperatives, necessarily refers to other provisions, making it less intelligible and therefore relatively difficult to apply. From a practical point of view, a detailed law thus seems preferable. However, such a text risks impeding the autonomy of cooperatives by limiting notably the space to be filled with the bylaws/statutes (cf. above (c)). On the other hand, a detailed law prevents the excessive resort to government decisions.

The time dimension has to be taken into consideration as well. Often, too detailed cooperative laws have become inapplicable because of the political, social and economic changes occurring over time. Frequent changes of the law not only consume resources but they also affect public opinion about the value of a law. They do not match the long term perspective of cooperative development, for which legal stability is vital, and they meet the inertia of administrators.

There are many ways to present the sequence of the different sections of a law. They have no influence on the legal value of the sections. However, the “life” of a cooperative pre-shapes to a certain extent this sequence. On the other hand, one may also think the sequence of the different sections from the point of view of those who shall apply the law, i.e. the members, the organs or their representatives. It is also possible to marry these two approaches by suggesting a sequence which follows the phases of a cooperative from its formation to its dissolution, on the one hand, while regrouping those sections which pertain to either single members or to the organs, on the other.

(f) Legislative procedure

Since the very idea of cooperation is based on participation, it is suggested to adopt a participatory approach to cooperative law making. This method constitutes the organic link between the generation, dissemination and implementation of the law. The right to participate in the definition and design of law, the right to share ideas of justice to create legal structures, and the right to use law to change law is an undeniable human right.[18] This approach must, however, be embedded in the procedures laid down in the respective national constitution in order to ensure that the text fit into the legal system and be respected by everybody.

After having been suggested for some time[19], participatory law making is now being practised. The procedures followed in Cameroon in 1992, in the Indian State of Punjab in the 1990ies and in Canada during the same period stand out as examples. Several countries have institutionalised this participatory approach by establishing, a national council for cooperatives or a similar organisation (Belgium, Burkina-Faso, France, Hungary, Mali, Namibia), others are planning to do so, for example Bangladesh and Rwanda).

(g) Key issues of a cooperative law[20]

It is generally agreed that the cooperative law must balance state prerogatives[21]and the influence of other actors, on the one hand, with cooperative autonomy and responsibility, on the other.

Basically, state powers should be limited to the implementation of strict but cooperative friendly registration criteria and to normative control, including prompt cancellation from the register of those cooperatives, which are not abiding by the law.

Cooperative autonomy is the result of a number of reciprocally working factors, among which financial independence, economic success and an efficient auto-control by the cooperative members. What is needed are:

- a precise **definition of cooperatives** Based on the internationally recognised standards[22], the definition should reflect those features, which best distinguish cooperatives from other forms of business organisations, namely the cooperative identity principle (the members are co-founding and co-financing their cooperative of which they become the co-owners, co-managers, co-controllers, co-users and co-beneficiaries and for the debts of which they are jointly liable) and the principle of member promotion (member promotion preferred over producing high returns on invested capital).

  A clear definition helps:

  - the government to carry out the normative functions of the state;
  - to distinguish genuine cooperatives from false ones;
  - to determine the rights and obligations of the members, as well as those of the organs of the cooperative;

- to specify the qualifications and duties of cooperative officers concerning capital management and serving the interests of the members;
- to state minimum rules concerning accountancy and audit in order to further the efficient use of financial and human resources;
- to resolve the conflicts that might arise between cooperative law and labour law or between cooperative law and competition law;
- to establish criteria for the taxation of the members and/or of the cooperative;
- to regulate the relationship between private and public entities;
- to facilitate the evaluation of the economic, social and political impact of cooperatives;
- to promote international co-operation between cooperatives.

- rules on **non discriminatory treatment of cooperatives and their members**, for example in taxation;
- rules on the **administration and management** of cooperatives[23]
- rules on a **surveillance committee**
- **r**ules on **qualified managers** to manage capital and provide service to the members within the limits set by the general assembly and the board;
- economic and political **incompatibility criteria for office holders**;
- rules on balanced **internal and external financing** (non-member business, non patronising members investments, non-member investments in order to allow cooperatives to also go beyond the production of goods and services and participate in capital intensive modern knowledge production.[24] The conflict between user and investor interests, which is to be avoided by the cooperative model, is likely to emerge;
- rules on **information, education and training of members and employees;**
- rules on internal and external timely and regular **audit** of the financial, management and social standing of the cooperative by qualified and independent auditors[25];
- rules on efficient **apex structures;**
- rules on efficient **dispute settlement** procedures.[26]
- rules on the **transition from one socio-economic system to another, where applicable**.[27]

(h) Cultural particularities

To share common cooperative values and principles worldwide, to speak in favour of harmonisation of cooperative laws in order to allow for cooperatives to participate in regional

and international economic integration does not mean to minimize the importance of taking cultural particularities in account for the sake of an effective and efficient implementation of the law. Such cultural particularities concern, for example:

- the conception of the relationship between the individual person and society;
- the conception of the relationship between the sate and society;
- the conception of law;
- decision making procedures;
- the election of leaders without giving in on the qualification and incompatibility requirements;
- the arbitration procedure;
- the composition of bodies/organs, commissions and committees taking into account geographical and religious differences as well as differences between cities and countryside and between types of cooperatives;
- sanctions;
- the rights concerning the use of the means of production of the cooperative and/or of the members;
- the administration of the law by traditional structures.

III. Is Cooperative Law Sufficient for Cooperatives to Prosper?

Cooperative law and other factors

Complementarity and systemics of law. Out of the many prerequisites for cooperative law to be favourable for the development of prosperous cooperatives the nature of the relationship between social factors and the sysyemic nature of law, as well as the importance of proper dissemination of the law are mentioned here.

(a) Complementarity of social factors

To be clear, cooperative law, and be it the best possible, is not a sufficient means to establish a cooperative system. An effective and efficient cooperative legislation may be described as a system where the general ideas in economics and political science (market economy and democracy[28], the ethical concept of cooperation, cooperative values and principles and cooperative law reciprocally generate, stabilize and complement one another[29] (complementarity of social factors). Law is a translation of the other elements into legal rules – provided these other elements are given! As for the translation of principles into legal rules it is increasingly understood that rule-like principles impede cooperative autonomy and variety in legislation and byelaw drafting and that principle-like rules impede practical implementation of the law.

(b) The systemics of law

Cooperative legislation is part of cooperative law. The notion of cooperative law is much wider than that of a set of cooperative specific rules. Cooperative law is constituted by all national, supra- and international normative, administrative and judicial acts and the praxes commonly accepted among cooperators as they bear on the formation, the structure, the operations and the dissolution of cooperatives. Thus, the rule on the non discretional and non discriminatory exercise of administrative power and on the justiciability of all public acts, constitutional and administrative norms, rules on local and regional administration, real estate and private law in general, irrigation, water, investment, commercial law, company, tax, competition, labour, bankruptcy, and credit laws, regulations on imports, exports and pricing, on contracts, inheritance, accountancy, banking, consumer protection and social security, transports and marketing, etc. must all be severally and jointly conducive to and supportive of genuine cooperatives if cooperative legislation is to be effective.

When drafting the law the legislator must therefore make sure that other legal provisions do not run counter to his project. It is particularly important to be vigilant regarding the provisions contained in social and labour laws. These are marked by the wish to guarantee minimum social protection and to re-establish a balance between unequal partners, and they are at times incompatible with the right to self-determination of cooperatives and their members.

It is increasingly accepted that labour law should apply to the members of workers' cooperatives only to the extent it does not jeopardise the self-determination of these cooperatives.[30]

For the rest, government should be concerned with providing a well-functioning business environment at all levels, for example an effective and efficient tax administration, independent judiciary, banking and insurance systems, and with promoting chambers of commerce, industry and agriculture as well as professional organisations.

Dissemination of the cooperative law

The cooperative law, by and of itself, does not change anything. Besides the many other conditions to be fulfilled in order for an effective and efficient cooperative movement to emerge and/or to evolve, the law must be applied. In order to be applied the law must be understood.

Knowing that in a good many countries the official language and, *a fortiori*, the legal vocabulary are not mastered by the addressees of the law, who are often even illiterate, and knowing that the difficulties related to the implementation of the law are not limited to language issues, one understands that maximum attention must be focused on the dissemination of the cooperative law. This task rests as much with the state as with the cooperative movement.

Some countries have started to develop laypersons' guides and in the main vernacular languages and to organise nationwide popularisation campaigns.[31] In a similar move, cooperative apex organisations of most industrialised countries have produced guides to or commented versions of the legislation, and the internet is increasingly being used to popularise and explain the legal provisions.

IV. Conclusion

It must be repeated that this was an account of a system, which needs adapting to the cultural postulates of the country, region or locality concerned. The world is plural. Pluralism is the core of the Human Right to Development. The complementarily of social factors, mentioned above, is open for culture specific different articulations of its elements. This openness must be made use of.

Information about the reciprocal effects of the factors conducive to a sound cooperative development may be transmitted, advice on how to design the relevant laws may be given, but the attitude to bring about the necessary changes and adaptations to the specific circumstances must be engendered locally.

Trying to secure the uniqueness of cooperatives through unity in diversity of cooperative laws is a challenge lawyers must accept. They face major problems. Although public awareness concerning cooperatives has certainly improved over the past years[32], it cannot compare with that concerning stock companies. But as mainstream economics starts to discover the role of people in modern knowledge production, as it is made aware of the insufficiencies related to share holder information and control, it will turn towards the comparative advantages of the way cooperatives are organised.

Notes:

[1] cf. International Labour Organization Recommendation Concerning the Role of Cooperatives in the Economic and Social Development of Developing Countries (Recommendation No.127, 1966), 12.(1)(a) and the International Cooperative Alliance Statement on the cooperative identity, 1995, "Definition"

[2] These include; open, voluntary and variable membership in primary and higher level cooperatives, regardless of gender, social origin, race, political affiliation or religion;-self-determination (i.e. self-help, self-administration of autonomously set, in byelaws specified goals, self-responsibility) and democratic management and control; equitable economic contribution as a condition for membership and equitable participation in the economic results, independently of the amount of capital invested; de-emphasized role of capital (limited interest payments on capital, one member/one vote as a rule); obligatory information, education and training of cooperative members and employees; cooperative identity (the members co-found, co-finance, co own, co-administer, co-use and co-control their cooperative, they are the co-beneficiaries and they are jointly liable for the debts of their cooperative); member-oriented economic efficiency by running an enterprise; concern for the community; and cooperation between cooperatives.

[3] cf. for example, International Labour Conference, 89th Session 2001, Report V (1), Promotion of cooperatives, Geneva: International Labour Office 2000 and the series of so-called favourable climate studies commissioned by the International Labour Office from different authors: Creating a favourable climate and conditions for cooperative development in Africa (Münkner and Shah), ILO 1993; Creating a favourable climate and conditions for cooperative development in Asia (Taimni), ILO 1994; Creating a favourable climate and conditions for cooperative development in Latin America, ILO 1996; Creating a favourable climate and conditions for cooperative development in Central and Eastern Europe, ILO 1996.

[4] Seventeen Sub-Saharan African states (Burkina Faso (1990 and 1999), Cameroon (1992), Chad (1992), Côte d´Ivoire (1997), Ethiopia (1993), Kenya (1997), Madagascar (1999), Mali (2000), Mauritius (1995), Namibia (1996), Niger (1997), Nigeria (1993), Sudan (1991), Tanzania (1991), Uganda (1991), Zambia (1999), Zimbabwe (1990)) have adopted new cooperative acts since 1990. Others have substantially amended existing legislation during that period, and many more have elaborated drafts for a new cooperative legislation or are planning to do so (Benin, Cap Verde, Chad, Ghana, Guinea-Bissau, Guinea-Conakry, Morocco, Niger, Republic of South Africa). In Asia, reforms of the cooperative legislations have also accelerated in recent years. More than ten Indian states are in a process of drafting new legislation or supplementing existing ones. To a large extent these reforms are inspired by the Mutually Aided Cooperative Society Act of Andhra Pradesh of 1995, which strongly emphasizes the concept of cooperative autonomy and self-reliance. Another ten Asian countries have adopted new cooperative acts in the 1990s (Fiji (1998), Indonesia (1992), Jordan (1997), Malaysia (1992), Mongolia (1993), Nepal (1992), Philippines (1990), Singapore (1997), Thailand (1999), Vietnam (1996)). Bangladesh and several Central Asian countries are considering the revision of their cooperative legislation. The People´s Republic of China drafted a law on agricultural marketing and supply cooperatives which is to become the first of its kind in the country. Cambodia intends to introduce cooperative legislation soon. The least changes occurred in Latin America. Only Mexico has enacted a cooperative law in the 1990s (1994). Most of the cooperative laws of the region are based on legislation dating back to the time between the two world wars. Reforms in eleven states between 1971 and 1988 did not exclude state influence on cooperative affairs. Several Caribbean states, among which Haiti, as well as Bolivia and Chile are currently revising or planning to revise their cooperative legislation. In the industrialised countries, recent legislative amendments, in order to strengthen the competitiveness of cooperatives, allow them to raise equity on the capital markets, provided non-member investors do not gain managerial control over the cooperatives. For example Australia: New South Wales since 1997; Canada allows since 1998, among others, for investment shares and membership shares without par value; Finland since 1990; France allows since 1992 for non member investment through stipulation in the bye-laws and for the revaluation of shares through incorporation of reserves; Germany since 1994; Italy allows since 1992 financial backer members may have up to 33% of total voting rights and 49% of seats on board of directors; Sweden allows since 1987 for debenture contributions from non members which must not, however, exceed the amount of the ordinary share capital, nor have voting rights attached to them. After a trial and error period, resulting in frequent legislative changes and in a proliferation of texts, all so-called transition countries now have a cooperative legislation, which respects internationally recognised cooperative values and principles.

[5] cf. Henrÿ, Hagen, Guidelines for Cooperative Legislation, in Review of International Co-operation, Vol.94, No.2/2001, 50 ss. (51)

[6] Under a 1989 project for the harmonisation of 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), which was to be used as a guideline by national lawmakers. It has become an important stimulus for the modernisation of cooperative legislations in several Latin American countries. Its promoters are currently contemplating to review this model framework law in the light of recent socio-economic and political developments; in 1997 the Inter-Parliamentary Assembly of the Community of Independent States (CIS) adopted a "Model Law on Cooperatives and their Associations and Unions". It is currently under review; 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; similarly, the sixteen member states of the "Organisation pour l'harmonisation en Afrique du droit des affaires" (OHADA) organized in March 1999 a meeting with the objective of launching the elaboration of a uniform cooperative law; the 1997 "Referential Cooperative Act" of India is influencing the harmonisation process among the Indian states; the European Union is debating/finalising the adoption of a Regulation on the statute for a European cooperative society, which will have a harmonising effect on the cooperative legislations of its member 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.

[7] These grant: the right to assemble, associate and federate, and the right not to do so, without negative legal or administrative consequences; the right to freely choose one´s economic activity and business partner, be it at home or abroad; the right to property; the right to self-determination; the right to free access to competitive national and international markets; the rule of law, i.e., inter alia: all acts of public authorities must be based on a law, all basic matters must be regulated in the law and cannot be left to the administration. Discretional powers of the administration must be kept to a minimum; the right to positive and negative non-discrimination; the right to free access to ordinary courts of law. cf. Henrÿ, Hagen, Co-operative Law and Human Rights, in: The relationship between the state and cooperatives in cooperative legislation, Genève: ILO 1994, 21 ss.; Penn, G. Awa Eddy, Co-operative Legislation and Citizens' Rights: The Case of Cameroon, in: The relationship …, op. cit., 5 ss.

[8] cf. UN doc.A/RES/54/123 and doc.A/RES/56/114

[9] cf. Henrÿ, 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, p. I; Partant, François, La guerilla économique. Les conditions du développement, Paris : Seuil 1976, 155; Watkins, W.P., Co-operative Principles Today and Tomorrow, Manchester : Holyoake Books 1986, 54 ss.

[10] Hösle, Vittorio, Soll Entwicklung sein? Und wenn ja, welche Entwicklung?, in: Entwicklung mit menschlichem Antlitz. Die Dritte und die Erste Welt im Dialog, ed. by Leisinger and Hösle, München: Beck 1995, pp. .9 – 38 (13)

[11] Cf. Ripert, George, Aspectos jurídicos del capitalismo moderno (translation), Buenos Aires: EJEA 1950, pp.2 - 4

[12] North, (D., Institutions, in: Journal of Economic Perspectives 1991, 97 ss.) defines institutions as " ... the humanly devised constraints that structure political, economic and social interactions. They consist of both formal and informal constraints (sanctions, taboos, customs, traditions and codes of conduct) and formal rules (conventions, laws, property rights)."

[13] For the distinction between cooperative organisations and non-organised self-help groups c.f. Henrÿ, Hagen, Co-operation in Co-operative Legislation, in: Co-operative Development and Adjustment in Anglophone Africa, ed. by Harms and Kückelhaus, Feldafing: Deutsche Stiftung für Internationale Entwicklung 1998, pp. 208 ss.

[14] Recent cooperative laws (cf. 1992 Cooperatives Act of Cameroon ("common initiative groups"); 1997 Italian cooperative law ("small cooperatives"); 1999 cooperative law of Madagascar ("groupements à vocation économique"); 1982 Cooperative Act of South Africa; 1999 Cooperative Law of Burkina Faso ("groupements"); 2000 Cooperative Law of Mali). A number of general cooperative laws (Austria, Belgium. Finland, France, Germany) include exemptions for "smaller" cooperatives from certain requirements

[15] Bangladesh, Columbia, Guyana, Italy, Mexico, Namibia, Portugal, Spain and Thailand, for example, recognise cooperatives in their constitutions

[16] Principle of the economy of legislation. Montesqieu: "S'il n'est pas nécessaire de faire une loi, il est nécessaire de ne pas en faire une."

[17] For more details cf. fn.3, pp. 74 ss.

[18] cf. Paul, James C.N./Dias, Clarence J., Law and Legal Resources in the Mobilization of the Rural Poor for Self-Reliant Development, New York: International Center for Law in Development 1980

[19] cf. Diaby-Pentzlin, Rechtsprojekte auf dem Weg zur Endogenisierung, in: Entwicklung und Zusammenarbeit 1996, 310 s.; Münkner, Hans-H., Participative Law-making. A New Approach to Drafting Co-operative Law in Developing Countries, in: Recht in Übersee. Law and Politics in Africa, Asia and Latin America 1986, pp.123 ss.; Recommendations générales relatives à la réforme des politiques et législations coopératives, Panafrican Cooperative Conference, July 1996, Cotonou

[20] For details cf. Henrÿ, Hagen, Guidelines for cooperative legislation, ICA Review, Vol.94, No.2/2001, pp.50 ss.

[21] In its 1997 World Development Report the World Bank suggests a two-fold strategy which well describes the wide consensus on the role of the state in today's development endeavours: Seek congruency of development goals with capabilities and focus on core public activities which are crucial to development, and for the exercise of which public institutions must be build and/or strengthened

[22] cf. ILO Recommendation 127 and ICA Statement on the cooperative identity

[23] Legislators are trying to strike a balance between inefficiencies that arise where a badly informed membership retains too much of the management powers, on the one hand, and the loss of cooperative distinctiveness where the membership loses its effective control because the management uses its information without properly consulting with the membership, on the other hand. The solution of recent cooperative laws is to clearly demarcate the unalienable powers of the organs of the cooperative and those of the more and more professionalizing management. Thereby, issues pertaining to the associative character of the cooperatives are decided by the general assembly. The broad lines of business that relate to the cooperative being or having an enterprise are decided by the board of directors, whereas a professional manager may take the day-to-day decisions under the supervision of the board. A clear demarcation of these powers is also necessary in order to allow for the assessment of responsibilities and liabilities under civil and penal law

[24] The general withdrawal of public funds from the private sector and growing competition put cooperatives in a difficult situation in many a country. Today's markets are global, dominated by capital, through which the main means of production, i.e. knowledge, is/will be accessed. (Cf. highly inspiring article by Snaith, Ian, "Virtual" Co-operation: The Jurist's Role, in: Genossenschaften und Kooperation in einer sich wandelnden Welt, Festschrift Prof. Hans-H. Münkner zum 65. Geburtstag, ed. by Michael Kirk, Jost W. Kramer and Rolf Steding, Münster: LIT 2000, pp. 391 ss.) On the one hand, cooperative autonomy is largely determined by their financial independence. On the other hand, competitiveness presupposes a capital base that is difficult for cooperatives to constitute, given the structure of cooperative capital formation. As additional capital contributions by the members do not increase their voting power, and as interest payments are limited, members are not inclined to invest more than the obligatory share. The difficulties in raising a sufficient amount of capital are seen by many as the principal drawback of cooperatives. If governments want to avoid cooperatives being restricted to low productivity, easy to imitate activities, they must see to it that the inherent weak capital base of cooperatives be raised to a level where they may stand the harsh winds of national, regional and international competition. Especially in industrialized countries, legislators have therefore opened the way to capital formation similar to that of stock companies, as mentioned above.

[25] The situation whereby cooperative members are less and less involved in the running of their cooperative requires provisions that guarantee the transparency of the management in order to preserve the democratic nature of the cooperative. An efficient supervisory board and an audit comprising a management and a social audit, in addition to a financial audit, are means employed to this end by many a new cooperative law. These laws establish audit as a responsibility of the cooperatives themselves and not as the responsibility, or even the privilege, of the government. The government may still remain, however, the auditor of last resort and/or participate alongside the cooperative movement in setting up an audit fund in order to allow access of financially weak cooperatives to these services when they are most in need of it. Any auditor qualified under the national legislation and capable of carrying out the management and the social audit, in addition to the financial audit, may be hired. In a number of countries audit is performed by entities owned by the cooperative movement. The 1992 Italian cooperative act, for example, weakens the ex-ante control by members by enlarging the decision-making power of the management, but at the same time it strengthens the ex-post control by members by increasing the frequency of management audits and by introducing the concept of social audit

[26] In many countries, the administration responsible for cooperatives may take final decisions in cooperative disputes. Legislators have come to accept that this violates the rule of law. Several recent cooperative acts 26 introduced provisions for the establishment of "cooperative tribunals", "arbitrators" or "conciliation commissions" that act as conciliators, mediators or arbitrators without excluding access to a court of justice. Others (f. ex. Bangladesh) are planning to do so. Representatives of the cooperative movement and the government sit as judges together with at least one professional judge. Generally, these bodies come together on an ad-hoc basis. Countries where so-called traditional ways of dispute settlement are still used and effective, legislators are increasingly supportive of letting cooperators use these means of dispute settlement.

[27] This is a particularly neglected field by lawyers, who are used to legislate in static situations but rarely on processes

[28] Hanel (Alfred, Ordnungspolitische Aspekte der Genossenschaften in Entwicklungsländern, in: Genossenschaftswesen, ed. by Laurinkari, München: R. Oldenbourg 1990, pp. 337 ss. (339, 346) speaks of "Ergänzungsmodell". Hamm (Walter, State and Co-operatives in a Market Economy, in: International Handbook of

Cooperative Organizations, ed. by Dülfer, Göttingen: Vandenhoeck & Ruprecht 1994, pp.823 ss.) discusses in detail the interrelatedness of these issues.

[29] cf. previous footnote and Münkner, Hans-H., Co-operative Principles and Co-operative Law, Marburg 1974; Status and Role of cooperatives in the light of new economic and social trends, Report by the Secretary General of the United Nations to the General Assembly 1994, doc.A/49/213

[30] cf. Meeting of Experts on cooperative law 1995, Final report, Genève: International Labour Organisation 1996

[31] For example Vietnam 1997, West African countries, Cameroon 1993, Andhra Pradesh/India 1996, Namibia 1997, Niger 1997, Malawi 1999

[32] The ILO recognizes the importance of cooperatives in article 12 of its Constitution. An ICA publication (Review of International Co-operation, Vol. 87, no. 1/1994, p. 50) lists a series of 28 UN Resolutions and Decisions since 1950 in which the General Assembly and the Economic and Social Council recognize the important contribution that cooperatives have made and are capable of continuing to make. In special reports to the General Assembly on the status and role of cooperatives in the light of new economic and social trends, the General Secretary of the UN repeatedly (Gen.Secr., doc.A 47/216 E/1992, 43, para,46(a) and (f); doc.A 49/213-1994, para.72 (a) and (f)) emphasized that cooperative enterprises are a means to create productive employment, to overcome poverty and to achieve social integration and that they are an important means to mobilise and allocate societal resources effectively. The World Summit for Social Development in 1995 endorsed the last mentioned report by committing itself to utilize and fully develop the potential of cooperatives for the creation of full and productive employment through the establishment of legal frameworks that would encourage cooperatives to mobilize capital and promote entrepreneurship. Specialized UN organizations and UN programmes, such as UNESCO, UNHCR, FAO, WHO, UNFPA, UNRISD, HABITAT, UNDP, WFP, IFAD, UNIDO, refer to cooperatives as vital organizations in the pursuit of their goals (cf. von Muralt, Jürgen, UN System and Co-operatives , in International Handbook …, op.cit., pp. 898 ss.) Cooperative policy issues have been on the agenda of innumerable regional and international meetings, e.g.: Ministerial meetings organized by the International Cooperative Alliance for different regions of the world (Gaborone 1984, Lusaka 1987, Nairobi 1990, Sydney 1990, Arusha 1993, Colombo 1994, Chiangmai 1997); meetings of the member states of the SAARC region, especially in 1997; FAO sponsored meeting at Gödöllö/Hungary on cooperative issues in Central and Eastern Europe; ILO and DSE sponsored regional conference for Anglophone Africa 1996 at Diessen/Germany (results in Co-operative Development and Adjustment …, op.cit.; meetings of the Conférence Panafricaine Coopérative, especially its 11th and 12th meetings in 1996 and 1998 respectively; two ILO Expert Meetings in 1993 and 1995 on Cooperatives and cooperative law respectively; series of ILO commissioned studies and co-sponsored colloquia on different aspects of cooperative policy and law