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Cooperative Law – the translation of the cooperative principles into legal rules which respect the legal concept of sustainable development

Prepared for the ICA
by
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Note: This paper draws also on the results of the virtual consultation on cooperative law organized by the International Cooperative Alliance (ICA) on May 24, 2021 in view of this submission to the United Nations for the elaboration of the 2021 Secretary General Report on Cooperatives in Social Development. The consultation brought together representatives of members of the International Cooperative Alliance (ICA), national and regional experts involved in the ICA-EU Partnership Legal Framework Analysis, members of the ICA Cooperative Law Committee, as well as other stakeholders. As for a summary of the consultation see the Annex prepared by the Director of Legislation of the ICA, Mr. Santosh Kumar.

The author wishes to thank them for their stimulating ideas and expresses a special thanks to Prof. Dante Cracogna, Dr. Ifigeneia Douvitsa and Mr. Santosh Kumar for their valuable comments on the draft version of this paper, for the content of which the undersigned remains solely responsible.

Contents

I Introduction

The title of this paper is to summarize the emerging consensus on what cooperative law is – or at least what it should be –, namely the reflection of the cooperative principles and of the legal concept of sustainable development. If not indicated otherwise, the words "cooperative principles" stand for the definition of cooperatives, the cooperative values and the cooperative principles, i.e. the constitutive elements of the identity of cooperatives as enshrined in the

1995 International Cooperative Alliance (ICA) Statement on the cooperative identity (ICA Statement). [1]

The objective of the paper is to show how international organizations, foremost the United Nations (UN), the International Labor Organization (ILO) and the ICA have contributed to shaping this consensus through their instruments and to highlight some areas which might require attention by governments and other actors, not the least because of the radically changing socio-economic circumstances. The main proposal is to continue working on the policy measures suggested by these organizations, while putting emphasis on certain aspects.

As did the League of Nations, the UN has repeatedly [2] emphasized the decisive role of cooperative law for the development of cooperatives. To date, its most elaborate [3] document on cooperative law are the 2001 "Guidelines aimed at creating a supportive environment for the development of cooperatives", annexed to the UN Secretary General´s Report on Cooperatives in Social Development 2001 (UN Guidelines). [4]

These Guidelines constitute an important milestone for cooperative law at the international level for three reasons. Firstly, they recognize the importance of cooperative law for all countries and go into some detail as concerns its making and its content; [5] secondly, their reference [6] to the definition of cooperatives and to the cooperative values and principles as enshrined in the ICA Statement relate cooperative law to an entity – cooperative – as identified by the cooperatives/the cooperators themselves over a period of more than 150 years through a unique, continuous process of theorizing practice and practicing theory; and, thirdly, the UN Guidelines helped preparing the ground for the adoption in 2002 of the ILO Promotion of Cooperatives Recommendation No. 193 (ILO R. 193).

As do the UN Guidelines, the ILO R. 193 also underlines the universal scope of the issue. By including the text of the ICA Statement – with few, but not unproblematic changes (see below "Challenges") into its text and its Annex, [7] the ILO R. 193 goes beyond referring to the ICA Statement. It brings the text of an international NGO, the ICA, into the ambit of public international law.

As concerns cooperative law, the ILO R. 193 specifically appeals to the "Member States [to] adopt specific legislation and regulations on cooperatives, which are guided by the cooperative values and principles ...".[8] While the opinion [9] that this appeal might since have transformed into a legal obligation might still fall short of the necessary commonly shared opinio iuris, its legal relevance may not be denied and it is not being denied. Indeed, an

[1] International Co-operative Review, Vol. 88, no. 4/1995, 85 f.; http://ica.coop/en/whats-co-op/co-operative-identity-values-principles
[2] References may be added.
[3] A number of other documents also underline the importance of cooperative law, not the least those relating to the UN International Year of Cooperatives 2012.
[4] Doc. A/56/73 – E/2001/68, Annex.
[5] See UN Guidelines, Points 9.-16.
[6] See UN Guidelines, Points 4., 6., 11.
[7] See ILO R. 193, Paragraphs 2., 3. and Annex.
[8] ILO R. 193, Paragraph 10. (1). Also other paragraphs of ILO R. 193 refer to law/legislation.
[9] See Henrÿ, Hagen, International Cooperative Law. Utopia, Realistic Utopia or Reality?, in: Revista Cooperativismo e Economia Social, no. 42/2020, 25-56.

increasing number of national laws cite or refer in one form or the other to the cooperative principles [10] and/or their rules reflect them. The same is true for regional laws. [11]

However, much remains to be done.

Before suggesting further action (Part VI), I shall mirror some points of current cooperative laws against what I see as the main acquis as far as the required content of cooperative law is concerned (Part II). I shall then (Part III) discuss the phenomenon of homogenizing all forms of enterprises and its reasons, where after I shall attempt to justify the raison d´être of the cooperative law (Part IV) and outline (Part V) some of the challenges law makers face when translating the cooperative principles into legal rules which respect the legal concept of sustainable development.

II Acquis and reality

Apart from numerous other details, the UN Guidelines and the ILO R. 193 share points which are of particular relevance to our subject and which the Member States of the UN and the ILO do not dispute, but which in reality do not always materialize. This commonly shared acquis might also have been the reason why the UN had both texts discussed by an Expert Group Meeting held in Mongolia in 2002, at a time when the ILO R 193 was still in draft form. [12] These points are: a definition of cooperatives, a partnership between the state and cooperatives, especially their higher-level organizations (secondary and/or tertiary cooperative organizations) and the principle of equal treatment of cooperatives.

***The definition*.** The definition reads: "The term cooperative means an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise." To be understood as entities based on the cooperative values which the cooperative principles put into practice. [13]

By their very nature these values and principles vary in space and over time. This will reflect on the interpretation of the elements of the definition. However, this may not alter these

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[10] Examples: Article 3 of the Portuguese Código Cooperativo; Article 1 of the Law on Cooperatives of the Basque Country. See for more examples the Introductory chapters of the country reports contained in: Dante Cracogna, Antonio Fici and Hagen Henrÿ (eds.), International Handbook of Cooperative Law, Heidelberg et al.: Springer 2013; ILO, "General Survey concerning employment instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization", Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22, and 35 of the Constitution [of the ILO]). International Labour Conference, 99th Session, 2010 Geneva: International Labour Office, Report III (Part 1 B); ILO, The Story of the ILO's Promotion of Cooperatives Recommendation, 2002 (No.193). A review of the process of making ILO Recommendation No. 193, its implementation and its impact, Geneva: ILO 2015 (available at: http://www.ilo.org/empent/units/cooperatives/WCMS_371631/lang--en/index.htm); and the results of the ICA Legal Framework Analyses, available at: www.ica.coop

[11] See Recital 6 of the 2003 EU Regulation 1435/2003 on the Statute for the European Cooperative Society (SCE); Section 4 of the 2008 ICA Americas Framework Law for the cooperatives in Latin America; Articles 6 and 18, 11° of the 2010 Uniform Cooperative Act of OHADA; and Article 4 of the 2014 East African Community Societies Bill.

[12] See UN DESA, Supportive Environment for Cooperatives. A Stakeholder Dialogue on Definitions, Prerequisites and Process of Creation. Report of an Expert Group Meeting held in Ulaanbatar, Mongolia, 15-17 May 2002, New York: United Nations 2003.

[13] See ILO R. 193, Paragraph 2 and Annex, as well as the ICA Statement to which the UN Guidelines refer in their Point 11..

elements, five of which need emphasizing. Firstly, the members, not the cooperatives, pursue a specific objective; secondly, this objective has three indivisible aspects (economic, social and cultural); thirdly, the means through which the members pursue this objective is an enterprise; fourthly, this enterprise is democratically controlled and, fifthly, cooperatives should acquire the status of a legal person. [14]

Reality. Reality reveals the following:

- Misconceptions and/or - often well-intentioned - external interference weaken the self-responsibility of the members.
- The law does not provide for an adequate balance of the three aspects of the objective which leads to emphasizing either one of the structural elements (association and enterprise) to the detriment of the other. This imbalance might also add to "companizing" or "socializing" the cooperatives through law (see below) and to not always conceiving cooperatives as enterprises (of a specific type), but rather as quasi-public means to implement public policies.
- Despite the absence of any restriction to this effect in the definition and explicit rules to the contrary in the texts discussed here [15]cooperatives are not always allowed to exercise all types of activity. These restrictions concern mainly the housing sector and the financial sector (insurance and banking). As for the latter, missing or failing prudential mechanisms are mentioned as justification.
- Despite the absence of any restriction to this effect in the definition, membership of certain persons in cooperatives is often not allowed. This concerns mainly [16] the membership of legal persons in primary cooperatives, which has negative effects especially, but not exclusively, on the development of small and medium-sized enterprises; [17] the membership of foreigners (at least as concerns posts of responsibilities), which is an obstacle to the formation of modern, transborder cooperatives; and at times the membership of women in the form of restrictions not to be found in the law on cooperatives, but in the civil code and/or customary law requiring the consent of husbands in the case of married women. [18]

Partnership State/cooperative organizations. Apart from being explicitly mentioned in the UN Guidelines [19] and implicitly in the ILO R. 193, the partnership between the State and the cooperative organizations is grounded in the link the two texts establish with the ICA Statement.

Reality. Many cooperative laws do not provide for effective and efficient secondary and tertiary cooperative organizations and/or the specific nature of these organizations as being part of the organizational set-up of primary cooperatives for the benefit of which and their members they ought to work [20] is confused with other types of cooperation, such as networks

[14] On the last point see specifically UN Guidelines, Point 6. and ILO R. 193, Paragraph 6.(a) et passim.
[15] See ILO R. 193, Paragraphs 1 and 12.(c).
[16] Also restrictions as concerns the domicile of the members can be found, especially in the banking sector.
[17] See for example Göler von Ravensburg, Nicole, Economic and other benefits of the entrepreneurs´ cooperative as a specific form of enterprise cluster, Dar es Salaam: International Labour Office 2010.
[18] A gender perspective on cooperative law could be added.
[19] UN Guidelines, Point 7..
[20] See ILO R. 193, Paragraph 6.(d).

etc.. In the absence of effective higher-level cooperative organizations, the promotion of cooperatives will by all probability be dysfunctional.

The principle of equal treatment. The principle of equal treatment is enshrined in the ILO R. 193 and it is mentioned several times in the UN Guidelines. [21] The UN Guidelines pertinently point out that "cooperatives, although different, are equal to other business enterprises …" and that it is important to not be satisfied with formal, textual equality, but that "real equality" is needed. Both points refer to the legal notion of equality.

Reality. Unequal treatment of cooperatives or violations of the principle of equal treatment through law are too numerous as to be mentioned all here. The most frequent and relevant ones are:

1. Restrictions as to activities the cooperatives may exercise and as to the membership of certain persons and to which other forms of enterprise are not subjected to. They have already been mentioned in connection with the definition of cooperatives.
2. Unequal income tax treatment. In many, if not most countries the income tax regime of cooperatives does not take into account their legal structural difference as compared to other forms of enterprise, especially the capitalistic form of enterprise.
3. The negligence of cooperative law in publicly funded research and education institutions, foremost universities.
4. The homogenization of the features of all enterprise forms. The most relevant violation of the equal treatment principle lies in the fact that legislations tend to homogenize the features of all enterprise forms. If continued, there will be no raison d´être for a separate cooperative law. Because of the relevance of the phenomenon, it will be dealt with separately in Part III.

More often than not the gap between the acquis and these realities is not due to the law on cooperatives but to other laws which make up for the wider notion of cooperative law as described below.

III Homogenization of enterprise forms through law and its reasons

Homogenization. Cooperative law never cut itself free from its roots, the law on associations and the law on capitalistic companies, especially the stock company type. [22] That might be one of the main reasons why legislations over the past 50 years have "companized" cooperatives by approximating their structural features with those of stock companies, [23] either directly or indirectly through other laws than the laws on cooperatives, such as labor law, public procurement law, accounting standards, competition law, tax laws etc.. The mentioned increasing reference to the cooperative principles in the laws on cooperatives,

[21] See ILO R 193, Paragraph 7.(2); UN Guidelines, Points 6., 11., 12., 15. and 21..

[22] This may be seen in many laws on cooperatives which refer to the rules of the law on commercial companies as default or subsidiary rules. It also shows in the fact that more and more laws on cooperatives are modeled on the stock company law and in the fact that research methodologies take the stock company as the measure against which other types of enterprise, including cooperatives, are being compared and assessed.

[23] This is one of the results of the consultation, which confirms prior studies. See on "companization" and "convergence", Henrÿ, H., Quo Vadis Cooperative Law?, in: CCIJ Report No. 72 (2014), 50-61 (in Japanese; original in English); and Villafañez Perez, I., Algunas reflexiones en torno a la necesidad de integrar la perspectiva cooperativa en el estudio y desarrollo del ordenamiento jurídico, in: H. Henrÿ, P. Hytinkoski and T. Klén (eds.), Co-operative Studies in Education Curricula. New Forms of Learning and Teaching , Mikkeli and Seinäjoki/Finland. University of Helsinki/Ruralia Institute Publications No. 35 (2017), 54-71. Both with ample further references.

national and regional, must not mislead. Laws on cooperatives constitute only a part of the cooperative law in this wider sense, which in addition also comprises related court decisions, government regulations and practices etc. (cooperative law in the wider sense). [24]

As a reaction to the 2007/08 so-called financial crisis especially regulators started imposing the same rules for the governance structure of all types of enterprises (mainly in the financial sector) in an attempt to make enterprises more resilient against shocks of the kind experienced then (convergence).

Reasons. Among the many reasons for this homogenization three might stand out. As the factors of globalization (digitalization and teletransferability of data) weaken the classical means (the welfare state and labor market negotiations) to (re)generate social justice

- the scope of the Corporate Social Responsibility (CSR) extends to include societal aspects and this CSSR juridifies, i.e. becomes a legal obligation for all forms of enterprise;
- the social economy actors (social enterprises, social entrepreneurs) fill a gap, also in terms of the sustainable development goal, which cooperatives are not allowed and/or not willing to fill, and they are promoted more effectively; and
- the divide between the shareholder value and the member value dissolves in the unifying figure of the stakeholder value.

The question is therefore whether there is room/need for a separate cooperative law. This will be discussed in the following part.

IV The raison d´être of cooperative law

The principle of the economy of legislation might require refraining from having a separate law when the entity to be regulated has lost its identity. Those who argue in this way and plead for the unification of enterprise laws, leaving the specifics of the various forms to be regulated through byelaws (statutes or articles of association) of the individual enterprise, confuse the empirical with the normative, overlook the functions of law in the sense of law made by a legislator [25] and they might also overlook the following three reasons for a separate cooperative law: Firstly, the self-identification of cooperators; secondly, the need for a diversity of enterprise forms; and, thirdly, the need for sustainable development.

Self-identification. When adopting its Statement in 1995 the ICA had a membership of ca. 700 million individual members; today it represents ca. 1.2 billion individual members who identify themselves and their cooperatives in the way laid down in the ICA Statement. It would be unwise for any legislator not to take account of this self-identification, whilst also

[24] See Henrÿ, Hagen, Guidelines for Cooperative Legislation, 3rd revised edition, Geneva: International Labour Organization 2012, Box 2.

[25] As for exclusive functions of law (in the sense of law made by a legislator) the following might be mentioned:

- guarantee democratic and equal access to law;
- maintain/guarantee legal security for all stakeholders;
- serve as a guide for the elaboration of public policies;
- serve as a tool for the implementation of public policies;
- satisfy the socio-psychological need to be recognized by law;
- serve as a social ligament – not only "ubi societas, ibi ius", but also "ubi ius, ibi societas".

See also Henrÿ, Hagen, Distinción por ley de la forma cooperativa de empresa. ¿Por qué? ¿Cómo?, in: Cooperativismo & Desarrollo 27(1), 2019, 1-14.

addressing public interests to ensure that the cooperative law is one on cooperatives and not one for cooperatives.
However, the loss of identity is not only due to the mentioned "companization" and convergence, but it is also due to the fact that the members of the ICA (and their members), for whom the ICA Statement is legally binding, [26] do not always and fully abide by it.

The need for a diversity of enterprise forms. It is noteworthy that the reason given for the measures leading to the convergence of the governance structures of all forms of enterprise, namely the strengthening of the resilience of enterprises, is contradictory, because the resilience of enterprises is also the result of a diversity of enterprise forms. [27]

The need for sustainable development. The source of development is diversity, not only biological diversity, but also cultural diversity in all its expressions, including a diversity of enterprise forms. The political objective of sustainable development [28] may not be pursued effectively without relay stations. Cooperative enterprises are such relay stations. Their three-fold objective is congruent with three of the four aspects of sustainable development. [29] The central [30] aspect of sustainable development is social justice, the regeneration of which may most effectively be achieved through democratic participation [31] in the decisions on what and how to produce and how to distribute the produced wealth. This mechanism is unique to cooperatives, as the definition of cooperatives (see supra) requires that their enterprise be "democratically controlled".
The latter reason to have a separate cooperative law (need for sustainable development) is all the more relevant as sustainable development has become a concept of law. At all levels, law and sustainable development has become a (separate) field of research and teaching, not the least as a consequence of the recognition of sustainable development as a concept of public international law by the International Court of Justice. [32]

[26] The ICA Statement forms part of the Byelaws if the ICA. The ICA is an association under Belgian law.
[27] See for example Burghof, H-P., Vielfältiges Bankensystem besteht die Krise [A diverse banking system resists the crisis], in: Wirtschaftsdienst 2010/7, 435 ff.; Groeneveld, H., The Value of European Co-operative Banks for the Future Financial System, in: Johanna Heiskanen, Hagen Henrÿ, Pekka Hytinkoski and Tapani Köppä (eds.), New Opportunities for Co-operatives: New Opportunities for People. Proceedings of the 2011 ICA Global Research Conference, Mikkeli and Seinäjoki/Finland. University of Helsinki/Ruralia Institute Publications No. 27 (2012), 185-199.
[28] As for the latest international text on sustainable development we may refer to United Nations, Outcome document of the United Nations Conference on Sustainable Development Rio de Janeiro, entitled "The future we want", Brazil, 20–22 June 2012.
[29] To be mentioned also the Human Rights congruency of cooperatives. See the two 1966 Human Rights Covenants.
[30] In general, sustainable development is being described as having three aspects (economic security, ecological balance and social justice). The fourth one, added here, is political stability, also in the sense of peace. Notwithstanding the indivisibility of these aspects, social justice is seen here as the central one, because without it, the other aspects might not materialize. Schematically and simplistically one may argue that without social justice, there will be no political stability; without political stability, economic security is at stake; and without economic security, people are not receptive for the concerns for a sound biosphere.
[31] To mean `per head´.
[32] See Case Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment. I.C.J. Reports 1997, Paragraph 140.
For the history of the concept, see Bekhechi, M. A., Quelques notes et réflexions sur le statut du droit international du développement durable [Some notes and reflections on the status of the international law on sustainable development], in: Mohammed-Jalal Essaid (sous la dir.), Variations sur le système international. Mélanges offerts en l´honneur du Professeur Mohamed Lamouri, Casablanca, Najah Al Jadida, 2010, 107-137; Henrÿ, H., Sustainable Development and Cooperative Law: Corporate Social Responsibility or Cooperative Social Responsibility?, in: International and Comparative Corporate Law Journal Vol.10, Issue. 3 (2013), 58-75.

The regulation of this unique feature of cooperatives faces a number of challenges which will be dealt with in the following part.

V Challenges for cooperative law makers

When regulating participation, law makers will face two major issues: the reconceptualization of participation in modern cooperative enterprises and problems related to the translation of the cooperative principles into legal rules which respect the legal concept of sustainable development.

The concept of participation. Legislators and cooperatives often satisfy themselves with translating the cooperative principle of one member/one vote [33] into respective legal rules. This does not conform to the ICA Statement, which hints to many other instances of participation (including control as a form of participation), nor is vote taking an often used practice in cooperatives. Instead, the loci and modes of participation, as well as the notion of "participant" (member) have to be rethought. As concerns the loci, participation must permeate all organizational and operational aspects of cooperatives. As concerns the modes, new secure techniques, digital platforms etc., must be used to allow for a more effective participation and debates and vote taking might be replaced with consensus finding through deliberation, which might be a more adequate mode in a people-centered organization. As concerns the participants, the notion of "member" might have to be widened to include other stakeholders. They must, however, be defined as precisely as possible to avoid cooperatives from becoming public entities.

These challenges increase when considering the degree of complexity found in modern-type cooperatives. [34]

These challenges further increase where enterprises, cooperative enterprises included, integrate ever more intensively – as they do – into global values chains, not only operationally, but organizationally. These value chains are composed of various enterprise forms, most frequently under the leadership of non cooperative enterprises, and they bring together various legal traditions.

Finally, to add another layer of complexity, enterprises and whole values chains dissolve into networks of actors without structure, relying more on ephemeral connections than on collective bonds.

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[33] 2nd ICA Principle.

[34] Indeed, the dynamics of cooperative development has led from the Rochdale Society of Equitable Pioneers (which is held to be the first modern cooperative), a group of persons of the same social class and a set of similar basic (consumer) needs, to cooperatives being established by persons coming from all social strata, being active in virtually all sectors (including the production and supply of energy and other utilities (pro-sumer cooperatives, affecting consumer protection law)), as agro-ecological food chains, in urban horticulture and farming, in education, health and care services (social cooperatives), as bio-data banks and data protection cooperatives etc.. Some cooperatives are active in several sectors (multi-purpose cooperatives); some have very high numbers of members (especially cooperative banks, insurances, consumer cooperatives), their members may be heterogeneous by interest, need, social background or profession); they may not only serve their members, but also, or even exclusively, non-members, their community or the public at large (public interest cooperatives); they may (have to) take also other stakeholders´ than their members (legal) interests into account, for example those of (non-user) investor members (multi-stakeholder cooperatives); and/or they may count among their membership, beside private law persons (natural and legal persons), also public law persons (municipalities for example), especially in the health, care, education and utilities sectors. The latter case indicates a decline in the provision of what used to be considered public services.

The translation of the cooperative principles into legal rules which respect the legal concept of sustainable development. This translation involves a number of complex steps:

1. The transformation of the cooperative principles via cooperative legal principles (to be elaborated) and, to the extent possible, via existing legal principles into legal rules. The mentioned reference to the cooperative principles in the national and regional laws on cooperatives is no more than a starting point, which still leaves many questions unanswered.
2. These legal rules have to establish functional relations to the aspects of sustainable development. [35]
3. Cooperative law-making does not only concern the laws on cooperatives, but cooperative law in the wider sense as described supra. [36]
4. In addition to state law other types of laws might have to be considered in order to fully make use of the potential of cooperatives as concerns the economic and social development. Such non-state laws are for example religious laws, customary laws, standards set by private actors (for example on accounting and book-keeping) and the law of informal economy actors.
5. The afore-mentioned point hints to challenges of law-making, in addition to national law-making being part of regional and international law-making.

VI Proposals for further action

If the mentioned three reasons for cooperative law are valid, then the profile of cooperatives needs sharpening, through law and policy. This might require greater respect for the principle of equal treatment of cooperatives as compared to other enterprise forms. A sharpened and certified profile, besides providing clarity for business partners, also helps effectuating promotional policies and the adequate application of laws, such as tax laws, labor laws etc., to cooperatives, respecting their specific features.

Notwithstanding the need for continued action by all actors, and especially cooperatives and governments, on the recommendations and guidelines given by the ICA Statement, the UN Guidelines and the ILO R. 193 and concerning the content of cooperative law and its making, the following proposals might be considered. Some are new; most of them are chosen from the discussed texts because acting on them might have the greatest effect.

Actors might consider

1. working towards replacing ILO R. 193 with an ILO Convention on the promotion of cooperatives;
2. protecting cooperatives through their constitution, where not yet done, providing for their equal treatment in policies and laws;
3. passing, where applicable and feasible, a general law applying to all categories of cooperatives in an effort to avoid fragmentation and increase efficiency, in congruence with a single policy document on the promotion of cooperatives (see below) ; [37]

[35] See Henrÿ, Quo Vadis …, op. cit..
[36] See UN Guidelines, Points 13. and 14.. See also Chapter III. A. of the ILO R. 127 (Co-operatives (Developing Countries) Recommendation, 1966), superseded by ILO R. 193, but nevertheless a useful source of ideas.
[37] See UN Guidelines, Point 11. and ILO R. 193, Paragraph 18.

4. involving, in addition to cooperative organizations, also parliamentarians and ministries in a permanent structured, possibly institutionalized, debate on issues of cooperative law and policy, building on the experience in some countries/regions;
5. shifting emphasis
   i.) from the law on cooperatives to cooperative law in the wide sense as explained supra, including non-state law;
   ii.) from the texts of the laws to their implementation;
6. complementing to this effect the work on law with one single [38] policy document on the promotion of cooperatives, [39] respecting the law/policy nexus and which could address the following four main issues:
   i.) The implementation of the law (for example improve procedures and mechanisms to facilitate the registration and if necessary de-registration of cooperatives; design a realistic way to set up efficient higher level cooperatives, an efficient cooperative specific audit system and a joint (State and cooperative organizations) monitoring/regulatory system which would be less commanding, more promotional and de-politicize the approach to cooperative development.
   ii.) The promotion of cooperatives. The promotion of cooperatives should be based
   / on an agreed goal, which according to the texts discussed here is the development of autonomous and independent cooperatives
   // on principles, such as the principle of subsidiarity, the principle of commensurability, i.e. a policy which does not overstretch the capacities of the government and of the cooperatives, and the principle of equal access for cooperatives to promotional policies/measures available to other forms of enterprise; and
   /// on the actors - cooperatives and their higher-level organizations and/or the State (not excluding other actors) with a commitment by the State to withdraw [40] from those areas which are not a prerogative of the State and which the cooperatives must be enabled to take over as soon as possible.
   iii.) Promotional measures. For example, disseminating the law by making necessary language versions and laypersons guides available; assisting in organizing education and training, not the least by granting tax exemptions on the part of the positive result which is being used for this purpose; applying a cooperative adequate income taxation.
   iv.) Support for the establishment of effective and efficient higher-level cooperative organizations.
7. Creation of basic "tools", foremost
   i.) Statistics and data. [41] Collaborate with the ILO on this. Consider satellite accounts.
   ii.) Include research and education [42] on cooperative law into the curricula of law faculties. Consider collaboration with UNESCO on this and support related

[38] For the recommendation that it be "one single", see UN Guidelines, Point 23.
[39] Suggested by both texts. See UN Guidelines, Point 11. and ILO R. 193.
[40] As for this withdrawal, see UN Guidelines, Point 15..
[41] UN Guidelines, Points 18; ILO R. 193, Paragraph 8.(1)(l).
[42] As concerns cooperative education in general, see ILO R. 193, Paragraph 8 and UN Guidelines, Points 17. and 20..

initiatives. The shortcomings reported supra under "Reality" are a direct result of cooperative law not being taught – very rare cases aside. [43]

Annex

Brief summary : ICA (virtual) Consultation on Cooperative Law organized on 24 May 2021 in preparation of the UN Expert Group Meeting on 2021 Report of the UN Secretary General on Cooperatives in Social Development

International Cooperative Alliance through its Thematic Committee on Cooperative Law (ICA-CLC) organized an online consultation on 24 May ahead of the 2021 Report of the UN Secretary General on Cooperatives in Social Development. Participants of this consultation were cooperative law experts associated with the ICA including members of the ICA CLC, legal experts engaged on the ICA-EU Partnership (#Coops4Dev) Legal Framework Analysis, and representatives of the ICA bodies such as the ICA Board, ICA Regions, Sectors and Thematic Committees.

The focus of the consultation was on understanding the meaning, nature and the implementation of cooperative laws in the background of creating a supportive environment for the development of cooperatives. The thematic address titled *Cooperative Law: the translation of the cooperative principles into legal rules that respect the legal concept of sustainable development,* was delivered by Prof. Hagen Henrÿ, chairperson of the ICA-CLC.

The consultation was inaugurated by Ms. Florence Raineix, Director General, Fédération Nationale des Caisses d'Epargne and ICA Board Member who gave an overview of the historic role of the ICA in promoting cooperative law since 1897 during the third ICA Congress in Delft (Holland). She spoke about the significance of international instruments such as the ILO Promotion of Cooperatives Recommendation (No. 193) of 2002 and the 2001 UN Guidelines aimed at creating a supportive environment for cooperatives. She also mentioned the landmark changes brought in around the UN International Year of Cooperatives 2012 and specifically mentioned the Framework Act on Cooperatives, 2011 of the Republic of Korea, that had opened cooperatives to encompass all business sectors as opposed to the previous legal framework that allowed registration of cooperatives in 8 business sectors designated by their corresponding sectoral legislation.

Mr. Andrew Allimadi of the UNDESA made his opening remarks by highlighting the continuing importance accorded by UN member states to cooperative law reform. He said

[43] As for cooperative law not being taught (sufficiently), see Henrÿ, Hagen, Basics and New Features of Cooperative Law – The Case of Public International. Cooperative Law and the Harmonisation of Cooperative Laws, in: Uniform Law Review. Revue de droit uniforme, 2012, Vol. XVII, 197-233; Lehmann, Matthias, Cooperatives as Governance Mechanism, in: European Company and Financial Law Review (ECFR) 1/2014, 31-52; Villafañez Perez, op. cit..

cooperatives put people over profit and how law was to be used as a tool for the growth and development of cooperatives. He put to legal experts the question “how law could be used to effectively promote cooperatives?”

The thematic address of the consultation was delivered by Prof. Hagen Henrÿ of the University of Helsinki (Finland) and chairperson of the ICA-CLC who elaborated on the topic cooperative law: translation of cooperative identity into legal rules that respected the legal concept of sustainable development. He said sustainable development had been included within the realms of public international law by the International Court of Justice through its numerous judgements on the subject. He highlighted that UN Member States needed to go beyond legal texts and focus on their implementation. He stressed the crucial role played by the 2001 UN Guidelines and the Promotion of Cooperatives Recommendation in developing cooperative law, globally. He made a specific mention of the ILO Recommendation that had included within its legal text, a text of an NGO (ICA) that had defined cooperatives as what cooperators (members of cooperatives) had defined during the 1995 ICA General Assembly. Furthermore, he said the Recommendation legally mandated States to enact specific legislation on cooperatives. He brought out the tendency of certain laws that approximated features of companies to cooperatives and that that was one of the biggest threats to the cooperatives. He discussed the meanings of shareholder value and stakeholder value in the context of member-value. The diversity of enterprises and the importance of it in the context of resilience of enterprises was discussed. Emphasis was laid on cultivating State-Cooperative relationship and about appropriate legal framework for secondary and tertiary cooperatives and cooperative organizations wherein he said cooperatives’ specific nature of building federations and groups was being increasing confused with other (capitalistic) forms and that, guidelines on this aspect would benefit the States. He mentioned that the status of implementation of cooperative laws in sectors like banking and insurance were often influenced by industry regulators which effected the implementation of laws that protected the rights of members to practice cooperative values and principles. He added that the means to enhance participation and democratic control of members was more important than a law that laid down the tenet of one member one vote. A solid link between cooperative law, international law and sustainable development was made during the speech. Among the proposal made in his address were, the need for a strong dedicated policy on cooperatives to complement the law, enabling partnership between the State and cooperatives, facilitation of basic tools concerning statistics and education, and enhance the impact of cooperatives in global value chains.

Information about recent and ongoing changes to cooperative laws in Japan, Mongolia, India, and Fiji was shared by representatives of ICA member organizations in a short yet important session. Mr. Osamu Nakano of the Japan Worker Cooperatives Union informed that a new law on ‘associated work’ was passed by the Diet in 2020 and that that was a first of a kind reform in over 40 years. A key feature of this legislation on worker cooperatives is that cooperatives must fully adhere to labour laws. The legislation, he said, was enacted to enable cooperatives to create employment opportunities, meet diverse demands and realize a vibrant community. While stating that the new law reflected through its provisions, the concept of sustainable development and the 7th Cooperative Principle on Concern for the Community, Mr. Nakano said the legislation on social cooperatives in Italy had inspired stakeholders in Japan to advocate for the new law and exchanges on implementation of the law would be helpful for Japan.

Ms. Altantuya Tseden-Ish of the National Association of Mongolian Agricultural Cooperatives and the Mongolian National Cooperative Alliance shared the news of the passing of a new cooperative law in the country, which was more of an overhaul of the existing legal framework than limited amendments. She highlighted the role played by cooperative apex organizations in active advocacy for several years with the government and importantly the role cooperators played in informing the parliamentarians on the expanse of cooperatives as well as in clarifying questions related to cooperatives' profit vs. non-profit character. She stressed that effective lobbying with government and parliamentarians proved key for Mongolian cooperative law reform. She acknowledged the role played by ICA and its law committee in providing information and legal analysis to support the work of the apex cooperatives in advocating for the new law.

Mr. Faizal Khan, Registrar of Cooperatives in Fiji shared information about the ongoing consultative work with the ICA on potential legal reform of the cooperative law in Fiji. He said a revision to certain provisions of the existing law will be aimed at reducing bureaucratic procedures and making creation of cooperatives simple to inspire a new generation of cooperatives and cooperators, including young people and women, as well as promote cooperative education. He stated the analysis currently undertaken by the ICA and its law committee would help countries in the Pacific to revise and update their own cooperative laws.

Mr. Bhima Subrahmanyam, President, International Cooperative Banking Association and Managing Director of the National Federation of State Cooperative Banks in India, stated with concern the recent amendments to the banking regulations in India. He said the 2020 amendments to the Reserve Bank of India Act, 1949 brought cooperative banks under the purview of the federal bank and gave the government larger powers of control and supervision than before. He said the amendments created an uneasy atmosphere of dual control – first by the elected management of a cooperative financial institution and the second direct supervision by the State, and that the developments must be analyzed by the ICA to quell persisting confusion on the matter among cooperative financial institutions in India. He stated in his opinion some of the amendments went beyond the existing national policy on cooperatives as well as known practices of regulating cooperative banks.

Mr. Balasubramanian Iyer, Regional Director, ICA Asia and Pacific presented his views on the challenges and opportunities concerning cooperative law reform. He noted that the cooperatives had been persistent in advocating for better laws and that was particularly helpful for there was limited understanding among law makers on cooperatives as an enterprise, especially the international experience. Cooperatives were regulated and controlled but were not being actively promoted as he saw the case with other social economy actors. He stressed the importance of cooperatives in and after the pandemic and mentioned the role of cooperatives in the services and social sector, as well as the need to enable youth entrepreneurship through cooperatives. In conclusion, he highlighted the need to invest in collecting data on cooperatives, on the need to inform the public of the benefits of cooperation, and on proactively engaging in creating networks of parliamentarians supportive of cooperatives.

The section below summarizes the main findings shared by legal experts during the consultation.

Asia Pacific [Ms. Ann Apps, Drs. Robby Tulus, Dr. Akira Kurimoto, Mr. Morshed Mannan and Mr. Babul Khanal]

There appeared a general lack of autonomy for cooperatives and at the same time tax related benefits accorded to cooperatives were getting eroded. It is important to note that the arguments for tax benefits for cooperatives have a sound legal basis and principles in support and must not be confused with extraordinarily preferential treatment by the State. 'Positive' legal reforms in the region were cited, including the enactment of the Framework Act, 2011 in the Republic of Korea which among other things, recognized the International Day of Cooperatives, the constitutional amendment in India that among other things allocated seats for the representatives of the marginalized, historically oppressed communities as well as women on boards of primary cooperatives, and in addition applied the Right to Information Act, 2005 to cooperatives. The role of ICA-AP ministerial conferences in ushering in legal reforms was mentioned, and the key part played by the Promotion of Cooperatives Recommendation in helping governments update cooperative legislation was also cited. It was mentioned that the ICA Statement on the Cooperative Identity was not mentioned in all laws applicable in Southeast Asia and that despite some jurisdictions being conducive for cooperatives, the tendency was increasingly to approximate the treatment accorded to companies to cooperatives. The role of law for cooperatives during the ongoing pandemic was discussed in the context of remote voting and online general meetings, digital literacy and data security. The need to actively engage on reforms to enable cooperative enterprise on internet platforms, and to explore cooperatives with membership from beyond national jurisdictions was highlighted. It was reported that the 2015 constitution of Nepal recognized the role of cooperatives as central to the growth and development of the country, and that that guided the national legislation to allot 33% of seats on management boards of cooperatives to women. The creation of sectorial cooperative unions was enabled through the new legislation.

Africa [Dr. Alphonce Mbuya, Dr. Willy Tadjudje and Dr. Sifa Chiyoge]

Several laws have colonial era laws that needed urgent update and be driven by AU Agenda 2063 vision and the UN Agenda 2030. It was noted that the ICA Cooperative Law Committee and the Pan African Parliament were undertaking work related to proposing a model (national) law for cooperatives in Africa. The nature of cooperatives being 'general' and not 'sectorial' was mentioned. There were a few countries that recognized the role of cooperatives in their constitutions. Experts mentioned the need to strengthen the aspect of self-regulation and accountability of cooperatives in order to quell notions of cooperatives being quasi-public bodies and not independent enterprises. The need for a strong and coherent national policy on cooperatives to support and complement legislation was mentioned. Additionally, dispute resolution was cited as a key feature of cooperatives and the need to explore its role in promoting the cooperative type was stressed. In some jurisdictions, Savings and Credit Cooperatives or SACCOS fell under the dual control of the cooperative registrar as well as the financial authorities which the experts felt impeded the practice of cooperative principles. Tax treatment for cooperatives in several countries was like that accorded to companies though in some States income from agricultural sources was not taxed. Ghana was cited as one of the exceptions where cooperatives were not taxed like companies. Central concerns remained at facilitating greater autonomy and independence for cooperatives as well as the need to enhance data on the contribution of cooperatives to the national social and economic development. Additionally, the importance of bye laws and the significance of member participation in preparing bye laws was highlighted. A short presentation on the 10 years of

OHADA Uniform Act on Cooperative Societies, 2011 was made and the expert mentioned it being a lengthy piece of legislation and that its intent and implementation were being analyzed by legal experts.

Europe [Dr. Ifigeneia Douvitsa, Dr. Isabel-Gemma Fajardo, Dr. Deolinda Meira, Dr. Maria Elisabete Ramos, Dr. Piotr Zakrzewski, and Mr. Ian Snaith]

Two main trends - 'companisation and socialisation' were observed as the main experience of cooperatives in the region. It was noted that cooperatives had a visible legal presence in legal frameworks throughout the continent, though there were variations in terms of there being a general law or different (fragmented) laws for cooperatives. In some jurisdictions, the legal meaning of cooperatives did not clearly include 'member purpose' and this was seen as a barrier for development of cooperatives. The need for legal education, and the value of proper implementation, evaluation and co-construction of laws was highlighted. A strong recommendation was made by experts to re-establish public institutions for the promotion of cooperatives through law, policy and access to finance etc. Experts mentioned new cooperatives were being organized in the field of technology and that cooperative laws needed to be conducive for them as cooperators often opted for the Limited Liability Partnership model (in the U.K.). Main challenges cited were *Fragmentation* where general provisions scattered in different codes, *Guaranteeing* the specific legal nature of cooperatives, *Clear definition* highlighting member purpose, *Governance structures* must be made simple and compliant with cooperative values and principles, and *Interface* of cooperatives with other fields such as taxation, public-procurement, labour laws etc., must not diminish the nature and identity of cooperatives.

Americas [Dr. Dante Cracogna, Mr. Francisco Valle]

Several countries in the Americas followed the civil law system whereas a few had implemented the common law system, and this spelled to a certain extent the difference in regulatory treatment for cooperatives. Several jurisdictions had specific laws for credit unions and worker cooperatives, and national constitutions usually recognized cooperatives in their text. This, however, did not mean that the State accorded preferential treatment to cooperatives. Cooperatives and legal experts in South America had made efforts towards creating a framework law for the region that acted more as guidelines for countries at the time of revision of cooperative laws. A clear trend towards cross-border membership of cooperatives had emerged and this the experts felt must be addressed. The importance of participation of cooperatives in the law-making process was highlighted. In this regard examples of Brazil, and most recently Chile was provided. The discrimination against cooperatives from plying in certain business sectors, specifically insurance, was mentioned along with the fact that there were many procedures to be followed by promoters to register their cooperatives. Lastly, an urgent need to include cooperatives in the university level education, particularly in law faculties was mentioned.

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