**The Challenges and Opportunities of Agricultural Cooperatives in Transition Economies**

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# Sustainability and cooperative laws in the face of the public international cooperative law [1]

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

## I Introduction

It is generally not yet recognised that there is such a thing as a public international cooperative law. How does it relate to cooperative laws? How does cooperative law relate to sustainability?

These are some of the questions we shall try and answer. The emphasis of this contribution is on the legal structure of cooperatives and its potential incidence on sustainability, rather than on the equally important political will of the cooperative movement to act in favour of sustainability. [2] The contribution is limited to cooperative law proper, i.e. that law which regulates the structure and operations of cooperatives. It does not deal with such areas of law as taxation, labour law, competition law, accounting standards etc. and enforcement mechanisms, which are all essential elements of cooperative law as well.

This contribution suggests using the argument of public international cooperative law to demonstrate that the current trend in cooperative legislation works against sustainable development. The perspective is international; its focus is on development. The contribution reflects the preliminary result of a study on cooperatives and sustainability, on the one hand, and on the existence of a public international cooperative law, on the other hand.

Let me start by giving three apparently unrelated pieces of information:

1. Cotton farmers in Burkina Faso, one of the most important cotton producing countries, receive on average 0.24 Euros for one kilogram of harvested (hand picked!) cotton. [3] My shirt, 100% cotton, contains less than ½ of a kilogram of cotton [4] and cost me 40.- Euro. The difference between what the producer received and the price I paid is disproportionate … no matter how costly the production and commercialisation of this shirt!
2. One of the first consumer cooperatives in Switzerland, the Konsum-Verein-Zürich, had the following objective clause in its statutes: “Der Konsumverein … beabsichtigt..., die Konsumenten den Produzenten näher zu bringen, indem derselbe die Produkte wo möglich von der Bezugsquelle bezieht, und so den dazwischen liegenden Handelswucher, welcher durch Vertheuerung und Verfälschung der Waaren Produzenten und Konsumenten aussaugt, unnütz und unschädlich zu machen. …” [5]
3. The 500 largest enterprises in the world have a combined turnover equivalent to 47% of the gross world product. This amounts to double that of 107 low and medium income countries representing some 4 billion people. [6]

These pieces of information link societies in space and in time: the two first ones link African producers and European consumers, today’s and those of the 19th century. Bringing producers and consumers economically closer to one another seems still to be the problem. Law making as a potential contribution to overcoming this problem is

[2] As for this latter focus, cf. Ramirez, Enrique, Las cooperativas y su capacidad para impulsar el equilibrio ambiental y social, in : Revista de la Cooperación Internacional, Vol.40, No.2/2007, 85-90

[3] Stahnke, Jochen, Weisses Gold, schwarze Kassen, in: Frankfurter Allgemeine Zeitung, 13.3.2009, 8

[4] http://www.txfb.org/Resource%20Guide/Agriculture%20-%20Touching%20, visited March 16, 2009

[5] cited from, Schiedt, Hans-Ulrich, Die Welt neu erfinden. Karl Bürkli (1823–1901) und seine Schriften, Zürich: Chronos 2002, 106

[6] Delmas-Marty, Mireille, Les processus de mondialisation du droit, in: Le droit saisi par la mondialisation, sous la direction de Charles-Albert Morand, Bruxelles: Bruylant 2001, 63-80 (63)

marked by the intricacies indicated by the third piece of information. It is to caution against the belief in national law makers as the only ones to make law.

Expectations are again running high that cooperatives and law will be the answers to a number of evils. The risk of seeing cooperatives once again being "used" to attain goals that are not determined autonomously by their members is real. Not the least a growing awareness of the risks inherent in the non sustainable use of natural resources, of the man-made reasons of the current food, financial and economic crises let policy makers refocus on the farming world. Sustainable food production by small holders and valuing traditional knowledge are being advocated. Cooperatives, in general, rural and especially agricultural cooperatives are being given attention to again. The role of law in development is being rediscovered (cf. infra). [7]
This comes after several decades of neglect of the farming world by policy and law makers at all levels. Massive migrations from rural to urban areas, [8] which are partly due to this neglect, entailed and continue to entail an equally massive loss of traditional knowledge related to sustainable farming and to the ways of organising small holders. This loss of knowledge is accelerated by a cooperative legislation, which follows the path towards the world of law of investor driven enterprises (cf. infra).

In the following we shall

- highlight those institutional features of cooperatives, which lend this enterprise type to responding to the requirements of sustainability
- outline trends in cooperative legislation which dilute these institutional features
- assess this trend against the background of the public international cooperative law and
- sketch the traits of a new (in fact old), more genuinely cooperative law.

## II Cooperatives and sustainability

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

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

As for bibliographical data concerning law and development, cf. Henrÿ, Hagen, Co-operative Credit Societies Act, India, 1904. A Model for Development Lawyers?, in: 100 Years Co-operative Credit Societies Act, India 1904. A worldwide applied model of co-operative legislation, ed. by Hans-H. Münkner, Marburg 2005, 135 ff.

[8] the most current example is the re-migration of workers from the cities to the countryside in China. Similar developments in the Philippines

In line with the overall approach the following arguments are normative in nature. For lawyers, the questions are whether the structure of cooperatives envisaged by cooperative law is compatible with sustainable development, whether cooperative law orients cooperatives to work towards this end and whether cooperatives can be compelled through legal means to do so. [9] the arguments are to underline the potential of the cooperative form of doing business. They are based on the universally recognised cooperative values and principles as enshrined in the 1995 International Cooperative Alliance Statement on the cooperative identity (1995 ICA Statement), [10] the 2001 United Nations Guidelines aimed at creating a supportive environment for the development of cooperatives (2001 UN Guidelines) [11] and the 2002 International Labour Organization Recommendation No.193 concerning the promotion of cooperatives (2002 ILO Rec. 193) [12].

## 1. Economic security

Cooperatives create economic security mainly through their economic stability. Their economic stability (indicated by their longevity and a low number of bankruptcies) [13] stems from the following features, among others:

- as capital requirements are low and the acquisition of skills (where necessary) possible in most instances, cooperatives are a rather easily accessible organizational form which may be registered as a legal entity, thus adding an element of stability
- registration not only confers recognition as legal entity by business partners, it operates also a widely unknown and underestimated shift of economic risks, thus boosting entrepreneurial behaviour [14]
- cooperatives have low transaction costs because the members are also the main users. [15] The costs caused by complex decision making processes are outweighed by the advantages of these processes (cf. infra "political stability") and they may be held low by providing for an efficient power-sharing between the different organs of the cooperative
- cooperatives can generally count on member, and hence user loyalty and commitment

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[9] This last point might well be a decisive distinguishing feature between cooperatives and other types of enterprises fulfilling the so-called corporate social responsibility or corporate societal responsibility

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

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

[12] ILC 90-PR23-285-En-Doc, June 20, 2002

[13] Cf., for example, study by Ministry of Economic Development, Innovation and Export, Government of Quebec, at: http://www.mdeie.gouv.qc.ca/index.php?id=187&tx_ttnews(tt_news)=1069&tx-ttnews(backPid)=2206&tx _ttnews(currentCatUid)=75

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

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

- cooperatives have an inbuilt early warning system through regular cooperative specific financial, management and social [16] audit and professional advice
- cooperatives avoid the negative sides of the conflict between investor and member-user interests through the limitation put on the admission of investors, be they members of the cooperative or not
- cooperatives are to prefer the production of surplus (on transactions with members according to special cost calculation schemes) over that of profit (on transactions with non-members according to profit maximization principles)
- most cooperatives are human being-centred. This helps them adjusting to changing circumstances (cf. supra as for their stability in time), especially to the current change of the production pattern from that of goods and services to that of knowledge. While it is true that cooperatives face difficulties when it comes to capital intensive activities, such as the production of knowledge, as their capitalization suffers from drawbacks (voting rights are not proportional to the investment and non-member investments, and even non-member business, are restricted), it is equally true that the production of knowledge depends on human beings, as knowledge is generated, applied and transmitted by them and here cooperatives have a comparative advantage [17]
- cooperatives are often tied into - legally structured - inter-cooperative solidarity mechanisms, for example guarantee funds which operate in case of financial difficulties [18]
- cooperatives have a capital structure which guarantees that the main constituent parts of it, namely member shares and reserve funds, are not mobile: usually, member shares cannot be transferred and traded and reserve funds are indivisible. Both factors add to local stability [19]
- cooperatives tend to reinvest the positive results of their activities at the local level, thus impacting positively on local economies. This, in turn, helps them to develop themselves [20]
- voting rights, and thus control, cannot be acquired by buying shares, but only through membership
- the locked-in capital of cooperatives (indivisible reserves), while controlled by the members, cannot be accessed by them
- cooperative managers must ensure that the reserves serve both current and future members. This intergenerational character adds in most cases to the economic security of local communities

[16] Cf. Seiser, op.cit.

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

[18] Cf. Frankfurter Allgemeine Zeitung, 7.10.2008, 21: “Nach 1930 hat kein Kunde oder Gläubiger einer Volksbank durch Bankinsolvenz Geld verloren.”

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

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

- as those depositing their savings with a cooperative bank or a cooperative savings and credit institution are potentially also borrowers, and as they participate in the decision making processes, their risk assessment, concerning both lending and investments, differs from that in investor driven banks [21] and,
- in general, risk assessment is facilitated through policies which limit financing to local projects. [22]

## 2. Social justice [23]

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

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

- the universally recognised definition of cooperatives requires them to satisfy the "economic, *social* and cultural needs and aspirations of the members." [24] The members themselves define these needs and the ways to satisfy them. The extent to which cooperatives are successful in achieving this objective is being assessed through the afore-mentioned cooperative specific audit
- the objective of cooperatives is member promotion, not the maximization of returns on investments
- the "growth or equity" alternative is leaning towards equity, as the role of capital is de-emphasized [25]
- decisions are taken according to the one member/one vote principle, independently of the amount of capital invested by the members
- profits are not distributed. Surplus is distributed, but not in proportion to the investments, but in proportion to the transactions with the cooperative
- the characteristics of the main constituent parts of the capital, member shares and reserves, prevent - as mentioned - delocalisations and allow therefore for a better account of local social needs [26]
- many cooperatives provide for social security coverage for their members by setting aside parts of the surplus for this purpose. [27]

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

- an equitable cost, risk and benefit sharing and co-control by the members, independently of the capital invested by them

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

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

[23] First objective of the ILO. Cf. Constitution, Preamble and Article 1

[24] 2002 ILO Rec.193, Para.2

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

[26] The advantage of being locally rooted, in this and other respects, has been emphasised by Mr. Lee during the same conference

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

- the open door principle, [28] which allows to create economies of scale and, given the objectives of cooperatives as well as their surplus distribution schemes, for a more wide-spread distribution of wealth and thus social equality. This is a structural means for an effective materialization of the right to participate in political decision making processes: Create the necessary economic power through the production of well-being for the greatest possible number of citizens [29] instead of letting economic power yield political power
- the focus of cooperatives on their members, mainly natural persons
- the direct access of members to the knowledge, as well as the research and development results engendered by their cooperative and through
- the emphasis on cooperation instead of competition.

**3. Ecological balance**

The last mentioned feature of cooperatives - their emphasis on cooperation instead of competition - goes a long way in preparing the ground for a heightened concern for keeping the ecological balance. [30] Farmers will increasingly be seen again in their historical role not simply as food producers, but as caretakers of the countryside. [31] Cooperatives further contribute to maintaining the ecological balance through the following characteristics, among others

- being member-centred. This ensures that decisions concerning the operations of the cooperative enterprise are more comprehensive than those in capital-centred companies. Cooperatives do not allow for "economy or ecology" solutions. They have to find rather "economy and ecology" solutions
- being member-user driven. Members constantly redefine their needs and, in doing so, most probably include their concern for a healthy environment and the sustainable use of natural resources. Members are likely to make decisions that balance their welfare with the need for profitability. As cooperatives have to implement these decisions, their activities will include ecological concerns [32]
- neutralizing the role of capital. Growth is commonly defined as the result of a favourable combination of capital, technology and labour. The finite character of natural, non-renewable resources, which are at the basis of most of our production, is not part of the "equation". Where the role of capital is neutralized, i.e. where the financial return on the investment, which is taken as

[28] The so-called "open door principle", the 1st ICA principle, is frequently construed as meaning that anybody can join a specific cooperative. It is therefore worthwhile recalling the full text of this principle. It reads:
"Voluntary and open membership
Cooperatives are voluntary organizations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination."

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

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

[31] Reportedly, the EU-Commission issued a new agricultural policy in this sense

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

the main indicator of growth, is not the primary goal of the enterprise, and where production is demand-driven instead of supply-driven (cf. supra concerning the definition of needs by the members), the pressure to utilize these resources to achieve growth lessens [33]

- intergenerational solidarity. Another element which helps maintaining the ecological balance is the intergenerational solidarity achieved by the nature of the reserve fund being indivisible, it being fuelled by the totality of the profit and parts of the surplus, as well as by the obligation of the responsible persons to manage the assets also for future members [34]
- pooling activities. For example, the common transport of goods diminishes pollution [35] and
- introducing a societal audit which comprises ecological assessments of the performance of the cooperatives. [36]

**4. Political stability**

Political stability and high ratings in competitiveness seem to go hand in hand. [37] The United States of America and Switzerland are examples. [38] Both countries have a high prevalence and density of cooperatives.

We may assume that political stability is a function of the degree of effective participation of the highest possible number of people in the making of decisions concerning their daily lives. The participation of people in the organisation of economic life is therefore a highly relevant factor. [39] The topic relates closely to that of social justice (cf. supra). It is discussed nowadays under the notion of "governance".

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

Among others, the following elements may be mentioned:

- because of the identity principle, those who rule and those who are ruled in cooperatives are potentially the same persons. The division of roles underlying the governance concept with its potential conflicts does not exist in cooperatives, at least not as marked as it is in other business organizations

- another central structural feature of good governance is the division of powers and functions among the various groups within the cooperative and the

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[33] Cf. also 7th ICA principle.
Despite of environmentally more friendly technologies, which have been developed over the past decades and which have allowed for productivity gains by using less resources per unit, the fact remains that the energy consumption per capita continues to rise and, as world population increases, so does the energy consumption

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

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

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

[37] Cf. 2007/08 Competitiveness Report; Bernardi, op. cit., 16

[38] Cf. also Bernardi, op.cit., 14

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

reciprocal checks by these groups on each other, as well as the fact that the "ruled" have the right to elect their "rulers". This latter feature seems to be systematically overlooked when comparing the governance structures of different enterprise types

- democratic control of the cooperative enterprise by the members is required by the definition of cooperatives and by the universally recognised cooperative principles
- a specific, self-control mechanism at all levels (primary, secondary etc.), which not only ensures sustainability, but also autonomy and independence from whatever outside interference
- a democratic structure. Self-determination, autonomy through the setting of own rules (statutes, bye-laws), self-management, voting according to the principle of one member/one vote, participation of the members in all phases of the operations of the cooperative etc.
- the provision of space for participation. In many instances people have no means to make their voice heard. As technological changes and deregulation processes (globalisation) lead to the deterritorialization of political orders (cf. infra), the space for democratic participation, for which states hitherto provided, is reduced. This comes after privatisation of public services had already considerably reduced this space. In these situations people turn towards member-centred enterprises with a democratic structure and tradition, like cooperatives, and finally
- a high Human Rights functionality. [40]

## III Cooperative law and sustainable development

### 1. Law and development

Any thought on cooperative law and sustainable development is irrelevant if there is no relationship possible between law and development in general. This needs mentioning as lawyers are increasingly being challenged to produce empirical proof of a causal relationship between law and development. No lawyer dealing with the normative side of social life can produce such proof. The misunderstanding is particularly striking as the rule of law and the rights based approach to development have found their way into the political and economics literature on development. It is even more striking when considering that uncountable official documents at all levels, not the least those of the ILO, stress the importance of legal institution building. In the past, nobody really doubted that law and institution building go together. To cite Barnes: "The simple existence of a (cooperative) institution is ... never sufficient by itself: it is necessary to add the weight of the law to complement the process. It is the role of the lawyer to work out the details of the institutional structures in society." [41]

[40] Cf. Henrÿ, Co-operative Law and Human Rights …, op.cit.; Laville, Jean-Louis, Un projet d'íntégration social et culturel, in : le Monde diplomatique, Octobre 2001, supplément, 1; Partant, op.cit.

[41] Barnes, William S., La société coopérative. Les recherches de droit comparé comme instruments de définition d'une institution économique, in : Revue internationale de droit comparé 1951, 569 ff. (570) (translation by the author)

## 2. The trend in cooperative legislation and its conflict with the public international cooperative law

### a) The trend in cooperative legislation

For the past four decades legislators have engaged in a rather complex, somewhat contradictory, process of bringing, on the one hand, cooperative legislation in line with international standards while, on the other hand, operating a double approximation: They have been harmonizing cooperative laws across borders [42] and they have started to homogenize cooperative law with the characteristics of capital-centred companies. [43]

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[42] A number of regional organizations have passed uniform laws, others have elaborated model cooperative laws or at least guidelines in view of harmonization:

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

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

- to issue shares that are attractive to investors. Cf. especially the following legislations: Sweden (1987) allows for debenture contributions from non-members which must not, however, exceed the amount of the ordinary share capital and not have voting rights attached to them. Finland (1990, 2002). France (1992): through bylaws non-member investments and revaluation of shares through incorporation of reserves. Italy (1992): financial backer members may have up to 33% of the total voting rights and 49% of the seats on the board of directors. Germany (1994)
- to issue freely transferable (even at the stock exchange) cooperative investment certificates. Cf. del Burgo, Unai, La desnaturalización de las cooperatives, in: Boletín de la Asociación Internacional de Derecho Cooperativo. International Association of Cooperative Law Journal 2002, 51 ff. (71)
- to have unlimited business with non-members (Article 1, 4.)
- to hire professional, non-member managers and increase their power and autonomy vis-à-vis the board and the general assembly
- to grant members limited plural voting rights (up to five votes) (Article 59, 2.), not based on capital contributions, however. Cf. Chuliá, Francisco Vicent, El futuro de la legislación cooperativa, in: CIRIEC españa, Revista Jurídica de Economía Social y Cooperativa 13/2002, 9 ff. (40)

As for the increasing respect for international standards and the concomitant harmonisation of cooperative laws across national borders, we shall deal with this in the context of the contents of the public international cooperative law. As for the homogenisation, it can be summarized as concerning mainly the capital structure (minimum capital requirement; different classes of shares), the voting rights system (in proportion to the capital invested), the introduction of negotiable shares, the representation of non-members in the general assembly, on the board of directors and on the supervisory council, the admission of non-member users, non-member investors, non-user members and member investors, with or without - additional - voting rights, the hiring of professional non-member managers, concentrations/fusions and it concerns the control mechanisms.

The harmonization of cooperative laws across national borders is necessary in order to restore and maintain competitiveness, in order to facilitate beneficial regional and international (economic) integration and trade. It also contributes to forming the common core of cooperative laws, which substantiates the public international cooperative law (cf. infra). The homogenisation of cooperative law with company law helps cooperatives to become more competitive in the narrow economic sense. [44] However, this homogenisation transforms cooperative enterprises, being based on transaction relationships with their members, into enterprises that are based on investment relationships with their investors, be they members or not. [45] It weakens

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- to arrange for delegate meetings, at times even with a free mandate for the delegates (Article 63). Cf. Chuliá, op.cit., 40
- non-member employees to sit on the supervisory board, like for example in Germany under certain circumstances
- to have minimum share capital (Article 3, 2.)
- to merge and acquire other enterprises
- to grant (non-user) investor members, and even non-member investors, similar rights as members (Considerata 9; Articles 14, 1.; 39, 3.; 42, 2.; 59, 3.). Cf. Chuliá, op.cit., 38; del Burgo, op.cit., 68 ff., 79 ff.
- to distribute their reserve fund upon liquidation or conversion into a stock company (Article 75). As for the latter, cf. del Burgo, op.cit., 87 ff.
- to distribute their surplus according to the amount of capital invested by the members
- to transform into stock companies, cf. especially the legislation in Estonia, Finland, Germany, Latvia, Lithuania, Sweden.

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

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

Examples from other regions of the world could be added

[44] I.e. to grow economically and to increase their capital through mergers (side-effect: the absolute number of members tends to increase with the decrease of the number of cooperatives caused through mergers (cf. von Wild, Christian, Credit Unions in den USA - ein historischer und aktueller Vergleich mit deutschen Genossenschaftsbanken, in: Genossenschaften in Europa - damals - heute - morgen, Hrsg. Historischer Verein bayerischer Genossenschaften e.V., München: Bayerischer Raiffeisen- und Volksbanken-Verlag 2000, 264 ff. (266)), to lower their costs, to create economies of scale, to increase their reserves and to increase their profit, at times also their surplus. Cf. Kalaitzis during the same conference

[45] This trend started with the 1973 German cooperative law reform and continued throughout the 1990ies in most European countries. In Latin America the trend set in with the agreement on the first Ley Marco para las cooperativas de América Latina in 1988.

Some of the consequences are:

the associative character of the specific governance structures of cooperatives. The aptitude of the cooperative model to respond to the requirements of sustainability finds itself diminished by this homogenization. Furthermore, and for lawyers of a more immediate concern, this homogenisation violates the public international cooperative law.
This latter aspect will be dealt with in some detail in the following chapter. [46]

**b) The conflict between cooperative legislation and public international cooperative law**
The above outlined trend in cooperative legislation violates the public international cooperative law. This rather strong statement presupposes the existence of such a law the contents of which would require a different evolution.

**aa) Sources of the public international cooperative law**
The following summary remarks are limited to two interrelated questions:

1. Is there a public international law, which binds states legally? [47]

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

For more details cf. Chuliá, op.cit., 11, 14, 28, 30; Münkner, Hans-H., Structural Changes in Cooperative Movements and Consequences for Cooperative Legislation in Western Europe, in: Structural Changes in cooperative movements and consequences for cooperative legislation in different regions of the world, Genève: ILO 1993, 57 ff.

[46] As for the former aspect, cf. previous footnote

[47] It is generally recognised nowadays that public international also binds other entities than states, under certain circumstances even individual persons

2. Do the three main relevant instruments mentioned earlier, namely the 1995 ICA Statement, the 2001 UN Guidelines and the 2002 ILO Rec.193 constitute such a law?

This discussion does not include the discussion whether the organisations, which adopted these instruments, are competent to work on cooperative law.

All of these instruments emphasize the importance of cooperative law, lay down its principles and, to a certain extent, give detail as to its contents. None of these three instruments falls however into one of the categories of sources of public international law as listed in Article 38 (1) of the Statute of the International Court of Justice. [48] Despite of what this Article seems to suggest in its Section 2, namely that in the absence of the sources listed under Section 1 the Court may decide a case only "*ex aequo et bono,*" it is generally recognised that there are other sources of public international law, [49] among which especially resolutions and recommendations adopted by international organisations. [50]
As the 1995 ICA Statement emanates from a private law grouping of private law entities, it cannot bind states. This does not, however, exclude the ICA Statement from our further discussion. It is, in our opinion, relevant both for the determination of the legal quality of the 2001 UN Guidelines and the 2002 ILO Rec.193, and for the delimitation of the contents of these instruments. We shall therefore proceed to first qualify the 2002 ILO Rec.193 according to the ILO Constitution and in the context of other international intergovernmental instruments, including the UN Guidelines, and then suggest considering the 1995 ICA Statement in a broadened view of today's law making.

**(i) The legal nature of the 2002 ILO Rec.193 according to the ILO Constitution**
The ILO Constitution distinguishes in its Article 19 between conventions and recommendations. Once adopted by the International Labour Conference, both these instruments need to be communicated by the governments of the Member states to the national authorities competent "for the enactment of legislation or other action". [51] Once a Member state has ratified a convention, it becomes binding on that state as any other international treaty. Concerning further effects of the adoption of ILO instruments, the Constitution uses a similar wording for conventions, which are not

[48] Article 38:
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
[49] Cf., for example, Kennedy, David, International Legal Structure, Baden-Baden: Nomos 1987, 18 ff.. Another "school" prefers dealing with these other sources by fitting them into one of the categories listed in Article 38, 1. of the Statute of the International Court of Justice. The result being the same, I shall not dwell on the difference and proceed as opted here
[50] cf. Politakis, George et Kroum Markov, Les recommandations internationales de travail: instruments mal exploités ou maillon faible du système normatif, in : Les normes internationales de travail : un patrimoine pour l´avenir. Mélanges en l´honneur de Nicolas Valticos, Genève : OIT 2004, 497 ff. (513)
[51] Cf. ILO Constitution, Article 19, 5.(b) and 6.(b) respectively

ratified, and for recommendations. [52] This wording seems to indicate that recommendations are not legally binding.
Without insinuating that ILO recommendations have the same legal status as ratified ILO conventions, which would contradict the ILO Constitution, we argue that the recommendation under discussion here, namely the 2002 ILO Rec.193, is legally binding.

Before giving reasons to this argument we need to distinguish between the inbound and the outbound legal effects of recommendations adopted by international organisations. Considering the first ones, the 2002 ILO Rec.193 determines the activities of the International Labour Office as concerns cooperatives. These effects are undoubtedly of a legal nature. As far as cooperative law is concerned, the ILO "Guidelines for cooperative legislation" further specify these activities. [53]
As for the outbound legal effects, they need to be established on a case by case basis as not all recommendations share the same qualification. [54] Contrary to the well-established term "convention", the term "recommendation" covers a variety of instruments.

The following facts surrounding the adoption and position of the 2002 ILO Rec.193 are to distinguish Rec.193 from other recommendations, both those adopted by other organisations and those adopted by the ILO itself, and they are to support the argument that Rec.193 is legally binding on ILO Member states:

- first of all, the ILO Constitution, although giving recommendations a lesser legal degree, holds Member sates accountable under its Article 19, 6.(c) and (d) [55] as concerns the ways by and the extent to which they have given effect to recommendations
- the ILO Rec. 193 was adopted by an overwhelming majority [56] and this
- with the voices of delegates who have a free mandate, who are not bound but by their own conscience, i.e. they do not represent the will of the organization/ institution which delegates them. [57] This is a unique feature of the standard setting by the International Labour Conference (ILC). It must be qualified as transnational standard setting [58]
- the decisions of the ILC do not only reflect the opinions of governments but, due to the unique tripartite structure of the ILO, also those of the social partners and finally
- the very nature of the relationship between the ILO and its Member states needs to be considered. The ILO must not be seen as an organisation

[52] ILO Constitution, Article 19, 5.(e) and 6. (d)
[53] Cf. Henrÿ, Hagen, Guidelines for cooperative legislation, 2nd ed., Genève: ILO 2005
[54] This is generally accepted
[55] And Article 7, 1.(b) of the Standing Orders of the International Labour Conference
[56] With only two abstentions. Cf. Roelants, Bruno, The first World Standard on cooperatives and on their promotion. Recommendation 193/2002 of the Internacional Labour Organization, in: RECMA, Revue internationale de l'économie sociale, no. 289, 2003, 1 ff. (1). The legal weight given to a recommendation is also determined by the majority it acquired
[57] ILO Cnstitution, Article 4, 1.
[58] Cf. already Jessup, Philip C., Transnational Law, Yale University 1956 and Schnorr, Gerhard, Das Arbeitsrecht als Gegenstand internationaler Rechtsetzung, München: Beck 1960. Schnorr saw in this an evolution from an international society to a transnational community

independent from its Members states. The ILO is mandated to pursue common goals of the Members states. However, the obligations under the recommendation have not been ceded to the ILO. The execution of the obligations is a joint obligation of the ILO and the Member states. The difference between a ratified convention and a recommendation in this respect is that Member states, while not legally bound to transpose the recommendation into national policy and/or law, must respect its contents when acting in the field covered by the recommendation and they may request the assistance of the International Labour Office.

Where the foregoing reasons should not be fully convincing, the following arguments might be considered as supplementary ones.

**(ii) The legal nature of the 2002 ILO Rec.193 derived from its relation with other instruments**

The 2002 ILO Rec.193 must not be seen in isolation. It needs embedding into other international instruments, governmental and non governmental.

**Intergovernmental instruments**

- An intergovernmental instrument dealing with cooperative law are, as already mentioned, the 2001 UN Guidelines. As with ILO recommendations, they do not have the binding force of treaties or conventions. However, having been adopted by consensus and hence by the consensus of the ILO Member states, they attest to a repeated same behaviour of states and thus reinforce the legal nature of the 2002 ILO Rec.193. [59]
- The 2002 ILO Rec.193 and the 2001 UN Guidelines are mere concretisations of cooperative-relevant *binding* Human Rights instruments, [60] foremost the 1966 Covenant on Economic, Social and Cultural Rights and the Declaration on the Human Right to Development, [61] those international instruments which establish the obligation of states to take measures enhancing the development of their countries, [62] the ILO Convention No.141 on the right to form rural organizations, and the

[59] This amounts to a certain extent to mixing the two afore-mentioned “schools” concerning the interpretation of Article 38 of the Statute of the International Court of Justice

[60] cf. especially the

- Universal Declaration of Human Rights, doc. A/RES/217 A (III) of Dec,10, 1948
- International Covenant on Civil and Political Rights, doc.999 UNTS 171 (1966)
- International Covenant on Economic, Social and Cultural Rights, doc. 993 UNTS 3 (1966)

which contain all the basic legal guarantees for freely setting up and running a genuine cooperative, cf. Henrÿ, Hagen, Wartosci I zasady spóldzielcze w legislacjach spóldielczych. Panstw Czlonkowskich Unii Europejskiej dotyczacym Statutu Spóldzielni Europejskiej, in: Miedzynarodowy Zwiazek Spóldzielczy Miedzynarodowa Organizacja Pracy, National Co-operative Council of Poland, Warsaw 2004, 3-21 (translation of: Co-operative values and principles in the cooperative legislations of the EU Member States and in the EU Regulation on the Statute for a European Cooperative Society (SCE), paper presented to the joint ICA/ILO meeting in Budapest, April 1-2, 2004)

[61] cf. Henrÿ, Cooperative law and Human Rights, op.cit.

[62] cf. for a full list, Lindroos Anja, The Right to Development, Erik Castrén Institute of International Law and Human Rights, Research Report 2/1999, Helsinki 1999

ILO Convention No.169 concerning indigenous and tribal people in independent countries.

**International non governmental instruments: the 1995 ICA Statement**

What is the weight to be given to the 1995 ICA Statement?

The answer to the question raised here requires a broader view of law making.

The starting point is the profound changes law and law making are undergoing at the moment. Whatever law might be in terms of essence or functions, it is a "constantly renewed way of envisioning reality ... an intermediary between the world of tangible facts and the ideal world." [63] At the same time as it permits a continuous rebalancing of the different forces operating in a society, law represents an equilibrium between the visions of these forces. This consensus will depend, inter alia, on the concepts and the perceptions of law that groups create for themselves during the process of consensus finding.

Nowadays, in addition to profoundly changing the production patterns, globalization is disrupting these processes. The technological innovations of recent decades have been implying a reorientation within new time frames and a spatial reorganization of social life with considerable effects on law. While in the past the conditions of time and space engendered a multitude of geographically separated internormativities, globalization makes us now experience what Emongo calls interculture: [64] the ever more frequent and intensive intermixing of radically differing internormativities. Within the space of countries several divergent internormativities meet daily.

The spatial reorganization of social life through technological changes and globalization has not only affected the law, but also the law-making and the sources of law. The state, which lawyers continue to consider as the main guardian of law, has become too small an entity for global actors, and too big to manage the interculture. [65] National, international, supranational and transnational levels intermix and meet a growing body of standards set by private entities. [66] In this latter context the special

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[63] Assier-Andrieu, Louis, Le droit dans les sociétés humaines, Paris : Nathan 1996, 38, referring to Gurvitch (translation by author)

[64] Emongo (Lomomba*, L'interculturalisme sous le soleil africain: L'entre-traditions comme épreuve du noeud,* INTERculture, no. 133, 1997, 10) describes the intercultural as follows : « … le fait interculturel n'a rien à voir avec la seule cohabitation plus ou moins harmonieuse, la coexistence pacifique sans plus. L'interculture ne s'épuise ni dans la recherche d'un consensus universel, ni dans un modus vivendi universel, qu'il soit éthique, social, du droit international, etc. Le fait interculturel est la toile d'araignée dans sa totalité, c'est le donné par excellence dont est concerné chaque fibre, chaque chose, tout ce qui est, le divin, le cosmique, l'humain. » Cf. also Obiora, L. Amede, "Toward an Auspicious Reconciliation of International and Comparative Analyses", in: The American Journal of Comparative Law 1998, 669 ff.

[65] Cf. Koizumi, Tetsunori, Cultural Diffusion, Economic Integration and the Sovereignty of the Nation-State, in: Rechtstheorie, Beiheft 12, 1991 (?), 313 ff. Cf. also supra II 4. concerning "political stability"

[66] Cf. Bogdandy, Armin von, Gubernative Rechtsetzung. Eine Neubestimmung der Rechtsetzung und des Regierungssystems unter dem Grundgesetz in der Perspektive gemeineuropäischer Dogmatik, Tübingen: Mohr Siebeck 1999; id., Democrazia, globalizzazione e il futuro del diritto internazionale, in: Rivista di diritto internazionale 2004, 317 ff.. These private entities have their distinct ways of making rules and enforcing them. A clear distinction between these different rules is no longer possible. Laws in the material sense are becoming global (cf. already Jessup, op.cit; Schnorr, op.cit.) The nature of the lawmaker becomes of secondary importance. The rules of the global capital market are the most striking example. To be noted is the transformation of stock exchanges in the form of associations into stock companies. Another example, which directly affects cooperative legislation, is the quasi standard-setting by the Financial Accounting Standards Board (FASB) and the International Accounting Standards Board who even have intellectual property rights concerning the rules they elaborate

relationship between the ICA and ILO needs to be considered, as also the nature of the ICA itself.

- The relationship between the ICA and the ILO is documented by a number of reciprocal cross references in their texts: As mentioned, Paragraphs 2 and 3 of and the Annex to ILO Rec.193 copy, albeit not explictly, from the 1995 ICA Statement, thus recognising the ICA as the world representative body of cooperatives. Article 12, 3. of the ILO Constitution can therefore only be read as referring to the ICA; the ICA endorsed at its General Assembly in 2001 the ILO "Guidelines for Cooperative Legislation" [67]
- the ICA, the guardian of the cooperative values and principles since 1885, is the largest international non-governmental organization worldwide and it is probably also the oldest one. In addition to considering these facts when weighing the ICA Statement, one also needs to consider that the ICA is itself democratically structured and represents some 800 million co-operators. The same cannot be said concerning many other non-governmental standard setting actors. [68]

**bb) The contents of the public international cooperative law**

The contents of the public international law can be divided into two categories:

1. principles, which guide legislators and
2. a growing common core in national and regional cooperative laws. [69]

This common core needs certainly further substantiating by using the methods of comparative legal science. But already now one may assert that more and more cooperative laws

- reflect a similar view of the role of the state in cooperative development: supportive, but non interventionist, separating the promotional from the supervisory/monitoring function
- translate the ICA values and principles into legal rules
- respect the autonomy of cooperatives
- reflect the equal treatment principle taking into account the specificities of cooperatives as compared to other enterprise types [70]

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[67] Cf. ACI. Review of International Co-operation, 95, 1/2002 42 ff. (45)

[68] Not the least because of democratic deficits in international lawmaking, special attention is (to be) given to those NGOs, which have themselves a democratic way of forming their opinions and standards and which represent such large numbers of people

[69] Cf., for example, the EU Regulation, as well as the new Ley marco para las cooperativas de America Latina and the forthcoming Uniform cooperative act of the Organisation pour l´harmonisation en Afrique du droit des affaires (OHADA). The resolutions of the Ministerial Conferences organized by the ICA Regional Office for Asia and the Pacific since 1983 also contribute to shaping this law (cf. especially the 1999 and 2007 resolutions). Cf. also Münkner, Hans-H., Internationales Genossenschaftsrecht, Festschrift Beuthien 2009 (forthcoming)

- reflect the organisation of cooperation between persons (members) in view of promoting their economic social and cultural interests through an enterprise, i.e. more and more cooperative laws incorporate the internationally recognised definition of cooperatives
- limit their scope to the form of organising cooperation without making any reference to a specific activity. This is in line with the ILO Rec. 193. [71]

**3. The future of cooperative law**

Before looking towards the future, which is rather a look backwards to the cooperative principles, we need to try and understand the above outlined current tendencies in cooperative legislation: We are witnessing the transformation of the system of production, from the production of goods and services to the capital-intensive production of knowledge. The pressure on legislators to give in to demands for more investor influence in cooperatives will rise even further.

Considering that the production of knowledge requires large quantities of capital, that the capital of a number of companies exceeds the national budgets of a rising number of states, [72] that central bank policies are not democratically controlled, [73] that financial markets tend to organize themselves as stock companies, considering the above mentioned shifts in lawmaking, and considering the current financial and economic crisis, the need to rethink lawmaking becomes obvious.

Whoever is called upon to make cooperative law must recall these challenges and the challenges for cooperatives to remain competitive in a context driven by the rules of a single financial market. However, the following might also have to be considered: By definition, cooperatives can never access the financial market as successfully as capital-centred companies can. As much as it would constitute a success to admit this, would it be a success if we could also accept that competitiveness does not relate exclusively to financial issues. Competitiveness varies rather with the criterion against which it is measured. The above listed legislative measures, which lift the limitations of cooperatives concerning mergers and acquisitions, non-member business, non-member investments, the hiring of non-member managers not trained in cooperative specificities, and on voting rights etc., reflect a reaction to a specific kind of competitiveness, the one where capital-centred companies excel because their structural features are designed accordingly. The competitiveness of cooperatives relates to other criteria. I suggest here to consider their aptitude to cater for sustainable development. Still others do exist. [74] We need therefore cooperative specific answers to the challenges mentioned. We need cooperative laws which, in addition to addressing the comparative disadvantages of cooperatives without jeopardising their distinctiveness, especially in the areas of financing and of management, allow for the comparative advantages of cooperatives to play out, i.e.

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[70] Cf. the 2002 ILO Rec.193, Paragraphs 3., 6.,7., 8.(1)(b), 10.(1); UN Guidelines (Res.56/114), Paragraph 3; UN Guidelines (A/56/73), Paragraphs 4., 6., 11., 15., 21. As for the EU Member States, cf. also cf. EU Regulation and Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions on the promotion of co-operative societies in Europe, COM (2003)

[71] Paragraph 7. (2). In her presentation to the same conference Ms. Runce implied the risk of false cooperatives being created where this limitation is not observed

[72] Cf. 3rd piece of information supra

[73] Cf. Henderson, Hazel, Prix Nobel d'économie. L'imposture, in: Le Monde diplomatique, février 2005, 28

[74] As for a good overview of the comparative advantages of cooperatives, cf. Bernardi, op. cit.

we need laws which emphasize the transaction relationship between the members and their cooperative instead of transforming it into an investor relationship. In one sentence: Approximate business laws where possible, differentiate where necessary!

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

**a) Economic security through cooperative law**
Cooperatives must be allowed through law, for example,

- to be active in all sectors and in all forms. In many countries, cooperatives are still excluded from providing financial services (insurances and banking services). In many countries, there are still legal and other barriers to the formation of shared services cooperatives as an effective way of organising especially small and medium sized enterprises. These examples demonstrate also how important it is to consider possible difficulties in the implementation of the cooperative law. Restrictions concerning financial activities, for example, might be justified where prudential mechanisms are missing or failing
- to establish effective and efficient self-control mechanisms (by unions and federations) which would allow for public authorities to limit their involvement to promotional measures without intervening and thus hindering the development of cooperatives
- to improve the internal financing mechanisms, for example by increasing members' financial liability, [75] by attracting supplementary share contributions by members (fixed interest payments, secondary liability and the right to be refunded at any time), by reinvesting part of the distributed surplus, by - to a limited and specified extent - dissociating the variability of the number of members from capital requirements (minimum capital, minimum length of membership period)
- to efficiently build up indivisible reserves through tax exempt transfers of surplus monies
- to hold stocks of companies, not the least in order to access financial markets, as long as the cooperative members retain the managerial control
- to make use of alternatives to concentrating through mergers and acquisitions, for example by improving the conditions for cooperation, for vertical and horizontal integration at all levels, while maintaining the independence of the involved entities and ensuring democratic decision making procedures and by allowing to form strategic alliances, including cross-border, under the same provisos and
- to make use of their comparative advantages in the production of knowledge.

**b) Social justice through cooperative law**
In order to be able to serve the social interests of their members, cooperatives must be incited, through law, for example,

[75] Cf. Gómez Urquijo, Laura y Marta de los Rios Añón, La sobrevivencia del modelo cooperativo en un contexto de competencia, in: Revista de la Cooperación Internacional, Vol. 32, no. 1/1999, 55-66 (59)

- to improve member promotion through social audits, good labour conditions, insurance schemes [76]
- to grant plural voting rights, not in proportion to capital contributions, however, and not to be exercised when taking decisions relating to the associative character of the cooperative. [77]

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

**d) Political stability through cooperative law**
In line with what was outlined under II.4. concerning the role of cooperatives in contributing to political stability, the effective and efficient involvement of cooperative members in decision making and control must be restored.
The governance structure of cooperatives must reflect their double nature: they are associations of persons and enterprises at the same time. The functioning of cooperatives as a group of persons (associations) depends on the participation of the members who must be able to exert an effective influence on the decision making and who must be able to control the execution of these decisions. Therefore, the internal organisation, the sharing of powers between the different bodies, the elections to offices, as well as all important decisions must reflect the will of the members. Nevertheless, in a legal entity having an enterprise, the management must be enabled to take management decisions without having to consult with the members. This demarcation of powers between the membership and the management is to avoid inefficiencies that arise where democratic decision making does not match the requirements of flexibility and speed on the market and/or where a non-informed membership retains too much of the management powers. Furthermore, the demarcation of powers is to cope with the problematic situation whereby

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

Matters relating to the associative character of the cooperative must be dealt with by the general assembly, the broad lines of business that relate to the cooperative being or having an enterprise must be dealt with by a board of directors, whereas the day-to-day running of the enterprise might have to be delegated by the board of directors to

[76] Cf. Tan Kin Lian, The Unique Co-operative Response to Globalisation, in: Review of International Co-operation, Vol. 95, no. 1/2002, 14-19 (15). It is estimated that 80% of the world's population live without any social insurance coverage
[77] The latter idea is borrowed from the Polish cooperative law

an executive/manager, member of the cooperative or not, member of the board of directors or not, while responsibilities and liabilities must match the effective possibility to control, i.e. control of the board (members) by the members and control of the management by the board.

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

- members have a right to be informed
- members and the board of directors communicate effectively on relevant aspects [78]
- officers have the obligation to inform themselves on members' knowledge, know-how, needs etc.
- members, board members and management have a right and an obligation to receive permanent and systematic functional education and training. [79] Especially the board of directors needs professionalizing
- the board of directors and the management must be trained to not perceive members participation as an obstacle to economic efficiency and
- managers must be trained to not consider themselves company managers.

Especially the position of the members needs reinforcing through law

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

[78] Lees, M., Corporate Governance in European Co-operatives, in: The World of Co-operative Enterprise 1995, 59-64 (63)
[79] Cf. Harvey, B., Effective Governance: The Co-operative Union Perspective, in: The World of Co-operative Enterprise 1995, 91-98 (93)

- by having a compulsory, external, regular, independent, cooperative specific audit, the results of which are reported to the members and
- by having offices rotate as often as possible amongst the members.

**IV Conclusion**

Without translation to the legal structure of enterprises sustainability will remain a political wish. Cooperative lawmakers will, however, only make significant contributions to sustainable development if they place it within the wider notion of diversity. Sustainable development is an expression of the existential diversity principle of which we may dispose only at the risk of destroying life. The diversity principle has two aspects: bio-diversity and cultural diversity. Whereas neither this principle nor the public international cooperative law call for the preservation of specific enterprise types, there is no other way of paying respect to the diversity principle than by including in social traditions the knowledge on the greatest possible number of business types. This knowledge allows to find the most adequate answers to multiple and diverse needs. It needs continued consolidating through practical experience. [80] It is therefore not sufficient to exclusively care for bio-diversity. Without cultural diversity, including in the field of law, [81] bio-diversity might be protected, but it cannot be preserved. This means, we have to continuously develop cooperative laws, which reflect the cooperative values and principles. We have to allow for diverse cultural postulates to be expressed through these laws. Legal homogeneity might save costs at the enterprise level. Legal diversity enriches the national economy. [82]

Besides this being a contribution to the preservation of diversity as a source of life, it is also a contribution to justice, hence to peace.

An assessment of the comparative disadvantages and advantages of the legal types of enterprises related, inter alia, to the various aspects of sustainable development, is needed. It must be based on research. The research method must not pay tribute to

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

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

As for the importance of law in this context, cf. Blackburn, Nadine, Desarrollo de nuevas herramientas para asegurar la continuidad de las entidades cooperativas financieras, en: Revista de la Cooperación Internacional, Vol. 32, no. 2/1999, 39-42 (39 f.); Henrÿ, Hagen, Aktuelne tendencije u uporednom zadruznom pravu (Zakon o zadrugama, aktuelne tendencije, idealni sadrzaji), en: Pravo. Teorija i praska (Novi Sad) 8/2002, 48-61 (49)

[82] Schanze (Erich, Rechtsökonomik im Wirtschaftsrecht. Ein erfolgreicher Brückenschlag zweier Studiengänge, in: Neue Zürcher Zeitung 11./12.3.2006, 13), introducing a new curriculum on the legal analysis of law, does not distinguish between these aspects when he writes: “Grundeinsicht (für das Studienprogramm) ist, dass rechtliche Institutionen nicht nur Rahmenfaktoren ökonomischer Entscheidungen sind, sondern vielmehr kostenträchtige Variablen

what Walter [83] describes as the “omniprésence de la finance dans la société”, as an “encastrement (qui serait) aussi cognitif dans le sens où le langage scientifique pénètre le corpus réglementaire, comme les normes comptables internationales ou les réglementations de Bâle II et de Bruxelles sur la solvabilité des établissements de credit.” I.e.: capital centred enterprises must not be the yardstick by which all enterprise types are compared and assessed. « Entreprendre autrement » is different from « entreprendre différemment »!

[83] Walter, Christian, Finance, maths et humanités, in: Le Monde, 19 septembre 2008, 19