Cooperative Law and Sustainable Development

Match or Mismatch?

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I Introduction

The current volatility of global development is marked by growing ecological, economic, social[1] and political imbalances and insecurities. These trends point to the very opposite direction of sustainable development. Sustainable development has become *the* development paradigm. Accordingly, public and private policy measures and actions must be designed and put into practice so as to further all of the interdependent and mutually reinforcing aspects of sustainable development, and especially those which are commonly discussed, namely economic security, ecological balance and social justice. [2] A fourth aspect is to be considered: political stability, both as an aspect of and as an overall objective of sustainable development.

The awareness of the need to act and the readiness to act according to the sustainable development paradigm are not but the other side of the perception of the world as one global world. This perception is induced by experiencing the world as such through modern (tele)communication. In turn, the thinking behind this modern (tele)communication is the same as the one behind perceiving the world as one global world. [3]

The Social and Solidarity Economy (SSE) unites people who are aware of the urgency to act. Given globalization with its current political power yielding economic imbalances, [4] governments will have to rely more than before on enterprises for the implementation of policies and laws which aim at achieving sustainable development. An additional argument is this: [5] One of the underlying objectives of international labour standards is to avoid social

[1] as for social imbalances cf. Alain Renaut, Un monde juste est-il possible ? Contribution à une théorie de la justice globale, Paris : Stock 2013.

[2] Cf. recently Pufé, Iris, Nachhaltigkeit, München: UVK 2012, in line with major international instruments (cf. footnote 22.

[3] Cf. Dürr, Hans-Peter, Das Lebende lebendiger werden lassen. Wie uns neues Denken aus der Krise führt, München: oekom 2011.

[4] Cf. Geissler, Heiner, "Wo bleibt Euer Aufschrei?", in: Die Zeit, 11.11.2004, 26. As for the political power yielding concentration of capital, cf. Henrÿ, Hagen, La promoción del modelo empresarial cooperativo por la Alianza Cooperativa Internacional y la Organización Internacional del Trabajo en el nuevo orden económico global, in : aci. Revista de la Cooperación Internacional, Vol. 42, No.1-2009, 7-24; Becerra Santiago Nino, El crash del 2010, 6th ed., Barcelona: los libros del lince 2009; Vidal-Beneyto, José, De la mundialisacion a la globofobia, in: El Pais, 29.9.2007, 10.
The words "global" and "globalization" stand for the process of abolition of barriers to the movement of the means of production, especially capital and labor (cf. Becerra, op. cit., 145). The words stand less for an empirical fait accompli than for the rapid transformation of the production where, because of new technologies, capital can be de-localized instantly and capital and labor can be drawn from anywhere and "used" everywhere, including in a virtual manner. I.e. they stand for a situation where space and time are losing their conditionality for the economy and where, hence, classical legislation becomes insofar ineffective (cf. below). As for a differentiation in French between "globalisation", "mondialisation ", and "universalisation", cf. Ost, François, Mondialisation, globalisation, universalisation : S'arracher, encore et toujours, à l'état de nature, in : Le droit saisi par la mondialisation, sous la direction de Charles-Albert Morand, Bruxelles : Bruylant 2001, 5 ff. (6 f.).

[5] Cf. Henrÿ, Hagen, Labour Law and Co-operatives? Co-operative Law and Labour!, in: Journal of Co-operative Studies Vol. 31:1 (No. 92), May 1998, 12-23.

dumping in a world of free trade. Today, globally acting enterprises are in many ways outside the reach of (international labour) law. Therefore, the objective to avoid social dumping must be pursued through additional means, including structuring enterprises legally in a way that social justice, the key aspect of sustainable development, can be done. Surprisingly, little is said about whether the legal type of enterprise matters in this context. [6] While the Corporate Social Responsibility (CSR) addresses sustainable development, it concerns the behavior of enterprises. The objective of this paper is to complement the CSR approach [7] by demonstrating that there is a functional relationship between sustainable development and the legal structure of enterprises. [8]

The approach is legal normative. [9] It is based on the premise that law is at all relevant for the subject matter. [10] In an effort to create coherence among already existing legal instruments, the paper attempts to bring together Human Rights, the legal concept of sustainable development and the legal structure of enterprises. It thus pays respect to the Human Rights based principle of the rule of law governing the policy/law nexus. Law is not policy; it is the

[6] The 2011 European Commission "[…] renewed EU strategy 2011-14 for Corporate Social Responsibility", (COM(2011) 681 final), although moving CSR from purely voluntary to a mix of voluntary and compulsory, continues being limited to this aspect. The same critique applies for example to the OECD Guidelines for multinational enterprises, the ISO 26000 norm and the UN Global Compact.
The newer, so-called development literature is virtually void of references to institutions. On the other hand, we observe a peculiar phenomenon: enterprises and other private institutions are required to satisfy general interests, whereas public institutions are increasingly required to conduct themselves like private enterprises. Requiring private business to assume social and societal responsibilities in the legal sense and public institutions to adopt entrepreneurial behaviour are but two aspects of the dysfunctionalities we have established for both. It might be worthwhile to research whether the waning interest in institutional issues has to do with the dwindling importance of the concept of Übersumme (Aristoteles), as a possible consequence of the technology available to manage enormous amounts of data/information with the help of computers. The concept of Übersumme is the foundation of the legal person concept.

[7] As concerns this complemetary function, cf. 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..

[8] Cf. my previous paper "The Legal Structure of Cooperatives: Does it Matter for Sustainable Development?", in: Beiträge der genossenschaftlichen Selbsthilfe zur wirtschaftlichen und sozialen Entwicklung, Hrsg. Hans Jürgen Rösner und Frank Schulz-Nieswandt. Berlin: LIT 2009, Bd.1, 199-229; Idem, La promoción …, op. cit.

[9] For lawyers, the questions are whether the structure of cooperatives, prescribed by law, is compatible with sustainable development, whether cooperative law orients cooperatives to work towards this end and whether cooperatives can be compelled through legal means to do so where deviations give rise to concerns by legally interested parties. Cf. Henrÿ, Hagen, Where is law in development? The International Labour Organization, cooperative law, sustainable development and Corporate Social Responsibility, in: Governance, International Law & Corporate Social Responsibility, Geneva: International Institute for Labour Strudies 2008, 179-190.

[10] This raises the more general question of the functionality of law in development processes. It needs raising as through globalisation the position of law among the various types of norms is being debated rather controversially and this functionality is being challenged (cf. below and Henrÿ, Where is law …, op. cit.). We cannot define law, cf. for example Assier-Andrieu, Louis, Le droit dans les sociétés humaines, Paris : Nathan 1996, 40; Hart, Herbert L.A., The Concept of Law, Oxford: University Press 1961, 1; Tamanaha, Brian Z., A Non-Essentialist Version of Legal Pluralism, in: Journal of Law and Society 2000, 296 ff. (313). However, we may note the following: We find law almost everywhere. Doubts expressed by Sinha, Surya Prakash, Non-Universality of Law, in: Archiv für Rechts- und Sozialphilosophie 1995, 185 ff.. Their legal structure allows economic institutions to deploy a great, if not their greatest, potential. 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, et passim) frequently mentions this link. Similar Wenke, Hans, Geist und Organisation, Recht und Staat, Heft 241, Tübingen: Mohr 1961. Cf. also Javillier, op. cit.. Blackburn, Nadine, Desarrollo de nuevas herramientas para asegurar la continuidad de las entidades cooperativas financieras, in: Revista de la Cooperación Internacional, Vol. 32, no. 2/1999, 39 ff. (39 f.) and, without mentioning law, Gervereau, Laurent, Pour une écologie culturelle, in: Le Monde, 3.10.2008 are positive as concerns this functionality.

means par excellence to implement policies [11] until such time when a political process establishes new legal rules according to procedures established by law.

Because cooperatives constitute the bulk of the enterprise actors in the SSE, [12] because of the relative high number of their members – circa one billion, as compared to some 330 million holders of shares of capitalistic companies, – [13] and because of multiple congruencies between the objects of Human Rights and sustainable development, on the one hand, and the objectives of cooperatives, on the other hand, the paper takes cooperative law as an example.

These introductory remarks determine the outline of the paper. Part II establishes juridical coherence between the central notions of this paper, namely "cooperatives", "cooperative law" and "sustainable development". Part III deals with the functional relationship between the legal structure of cooperatives and sustainable development and it points to the effects of cooperative legislation on this relationship. Part IV outlines major challenges facing cooperative law-makers in the global world.

II The juridical coherence of cooperatives, cooperative law and sustainable development

The starting point of this Part are the following legally valid connotations of the three notions contained in the title of this paper, namely "cooperatives", "cooperative law" and "sustainable development".

Paragraph 2. of the International Labour Organization (ILO) "Promotion of Cooperatives Recommendation, 2002" (ILO R. 193) [14] defines cooperatives as "[...] autonomous association[s] of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise." ILO R. 193 constitutes binding public international law. Two main arguments [15] support this opinion. The first one is the democratic legitimacy of ILO R. 193. The definition, as well as the cooperative values and principles enshrined in ILO R. 193 are those of the 1995 International Cooperative Alliance Statement on the co-operative identity (ICA Statement). [16] The ICA represents the mentioned one billion members of cooperatives in a great number of countries. The cooperative values and principles, as developed over time, give guidance to legislators when specifying the elements of the definition. [17] The main features differentiating

[11] Assier-Andrieu, op. cit., 39 f.; 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. (574) ; Kemmerer, Alexandra, Ordnungskraft, in : Frankfurter Allgemeine Zeitung, 11.1.2007, 40, referring to Eberhard Schmidt-Aßmann. Cf. also Wassermann, Rudolf, Sprachliche Probleme in der Praxis von Rechtspolitik und Rechtsverwirklichung, in : Zeitschrift für Rechtspolitik 11/1981, 257 ff. (258).

[12] A good number of cooperatives reject all together the idea of them belonging to the SSE; others claim that cooperatives are the very incarnation of this economy.

[13] They are members of cooperatives of all sizes and types and in all sectors of the economy. Together with their dependents they make up circa one third of the world population that improves its livelihood through cooperatives. Cooperatives contribute substantially to the Gross Domestic Product of their countries. As for global data, cf. Birchall, Johnston, People-Centred Businesses. Co-operatives, Mutuals and the Idea of Membership, Palgrave Macmillan, London 2011, 9 ff., and the website of the International Cooperative Alliance (ICA) at: http/www.ica.coop/al-ica/.

[14] Recommendation 193 concerning the promotion of cooperatives, ILO document 90-PR23-285-En-Doc..

[15] For a detailed argumentation cf. Henrÿ, Hagen, Public International Cooperative Law: The International Labour Organization Promotion of Cooperatives Recommendation, 2002, in: International Handbook of Cooperative Law, ed. by Dante Cracogna, Antonio Fici and Hagen Henrÿ, Heidelberg: Springer 2013 (forthcoming).

[16] International Co-operative Review, Vol. 88, no. 4/1995, 85 f..

[17] To the author´s knowledge, little has been published on the subject in recent years. But cf. Hans-H. Münkner (ed.), "Nutzer-orientierte" versus "Investor-orientierte" Unternehmen, Göttingen: Vandenhoeck & Ruprecht 2002. For a preliminary and summary list, cf. Henrÿ, Guidelines for Cooperative Legislation, 3rd ed., Geneva:

cooperatives from stock companies (as a pars pro toto for capitalistic enterprises) is that cooperatives are member-user driven, whereas stock companies are investor driven; their capital serves the objectives set by the definition, i.e. it is not investment capital; and control is exercised democratically, i.e. financial interests and control power are not linked. The second argument to support the opinion that ILO R 193 constitutes binding public international law is that more and more legislators respect the obligation put on them by the ILO R. 193 [18] to guarantee these distinctive features of cooperatives and they thus create a source of public international law which, in turn, is co-constitutive of the legal value of ILO R. 193. [19]

The objectives of the members of cooperatives according to the cited definition, namely "[to] meet [their] common economic, social and cultural needs and aspirations" are the same as those which the legally binding International [Human Rights] Covenant on Economic, Social and Cultural Rights [20] assorts with legal value. These objectives also cover two out of the four aspects of sustainable development. [21] Besides having evolved into a policy paradigm, sustainable development has also evolved into a concept of public international law. [22] This evolution of the notion of sustainable development into a legal concept is one of the results of a shift in emphasis in the development debate from goals to action. The commitment of almost all United Nations Member states to the Millennium Development Goals (MDG) in 2000 [23] marked also the end of the "developed"/"developing" countries-divide. This is reflected in ILO R. 193. It is a prerequisite for approaching the issue of sustainable development according to its global nature.
Furthermore, the definition of cooperatives predetermines the notion of "cooperative law" underlying this paper. By cooperative law I understand all those legal acts - laws, administrative acts, court decisions, jurisprudence, cooperative bylaws/statutes or any other source of law - which regulate the structure of cooperatives as institutions in the legal sense. [24] Cooperative law thus comprises not only the cooperative law proper (law on cooperatives),

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ILO 2012, 37 ff. (also available at: www.ilo.org/empent/Publications/WCMS_195533/lang--en/index.htm); Idem, Public International Cooperative Law …, op. cit..

[18] Cf. ILO R. 193, Paragraphs 2., 6., 8.(2), 9., 10., 18. (c) and (d) et passim.

[19] As for the term "legal value" in public international law, cf. Virally, Michel, La valeur juridique des recommandations des organisations internationales, in : Annuaire français de droit international, 1956, Vol. II, 66 ff. (174). As for the argumentation cf. Henrÿ, Public International Cooperative Law …, op. cit.

[20] Cf. UN Doc. 993 UNTS 3 (1966). Cf. also Henrÿ, Cooperative Law and Human Rights, in: The relationship between the state and cooperatives in cooperative legislation, ed. by ILO, Genève: ILO 1994, 21-47; Ost, op. cit., 33.

[21] The main cooperative relevant international instruments, namely the ICA Statement (7th Principle), the 2001 United Nations Guidelines aimed at creating a supportive environment for the development of cooperatives (UN doc. A/RES/54/123, Paragraph 2, and doc. A/RES/56/114 (A/56/73-E/2001/68; Res./56)) and the ILO R. 193 (Paragraph 3 and Annex; Paragraph 4.(g)) deal with the subject matter. The final declaration of the 2012 Rio Conference refers several times to the relevance of cooperatives for sustainable development (cf. UN Doc. "The Future we want", (Paragraphs 70, 110 and 154), available at: http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm

[22] Cf. Case Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment. I.C.J. Reports 1997, Paragraph 140. Cf. also WTO dispute settlement procedure WT/DS58/AB/R, Paragraphs 12 et passim (especially 152-154).
As for a detailed account of the history and (legal) status of the sustainable development concept, cf. especially the five reports of the ILA Committee on Legal Aspects of Sustainable Development and Gehne, Katja, Nachhaltige Entwicklung als Rechtsprinzip, Tübingen: Mohr Siebeck 2011. Summary in: Henrÿ, Hagen, Sustainable Development and Cooperative Law: CSR or CoopSR?, available at:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103047

[23] UN GA resolution A/RES/55/2.

[24] Granger, Roger, La tradition en tant que limite aux réformes du droit, in: Revue internationale de droit comparé 1979, 37 ff. (44 and 106) defines institutions as follows : « L'institution peut être définie comme le

but also all other legal rules which shape this institution. The following areas are most likely to have this quality in any legal system: labour law, competition law, taxation, (international) accounting/prudential standards, book-keeping rules, audit and bankruptcy rules. This systemic notion is to be complemented by implementation rules and praxes, for example prudential mechanisms, audit as well as registration procedures and mechanisms. It also includes law making procedures and mechanisms, as well as legal policy issues. While being wide, this notion is hence limited to the form of the cooperative enterprise. The paper only discusses the normative incidence of the legal structure of cooperatives on sustainable development. The laws on the SSE which have been passed over the past years, the latest as recently as in March 2013 in Portugal, [25] on the other hand, regulate the promotion of specific social activities or outcomes.

III The legal structure of cooperatives, sustainable development and cooperative legislation

The hypothesis underlying this Part is that the distinct legal structure of cooperatives capacitates them well to contributing to the goal of sustainable development [26] and that the current cooperative legislation weakens this capacity. This can best be demonstrated by depicting the rules and principles related to that feature which impacts most the four aspects of sustainable development, namely the democratic participation of the members. [27] Democratic participation in the decisions on what and how to produce and how to distribute the produced wealth is the most efficient mechanism to provide for social justice. [28] In times of ever fewer possibilities for democratic participation [29] enterprises with a democratic structure, like cooperatives, might address a shortcoming which otherwise threatens sustainable development. Social justice, in turn, is the single most important factor of political stability. [30] Without social justice and political stability it is most improbable that people can be convinced to care for ecological balance which, in turn, is a prerequisite for economic security.

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regroupement de règles de droit, agencées selon un certain esprit, autour d'une idée ou fonction centrale dont elles sont les instruments de réalisation. »

[25] Other examples: the 2004 British Act on Community Interest Companies, the 2003 Finnish Law on social enterprises (Law 1351/2003), the 1991 Italian Law on social cooperatives (Law No.381) and the Spanish Ley 5/2011 de Economía Social.

[26] For more, albeit preliminary findings, cf. Henrÿ, Sustainable Development …, op. cit.. and Baranchenko, Yevhen and David Oglethorpe, The Potential Environmental Benefits of Co-operative Businesses Within the Climate Change Agenda, in: Business Strategy and Environment 2012, 21, 197-210.

[27] It is important to not limit the view to those rules which deal explicitly with the participation of members, for example the one member/one vote principle which is a direct expression of cooperatives being associations of persons. The 4th principle (autonomy) does not only empower cooperatives, but also their members. Furthermore, rules relating to independent and cooperative specific audit (cf. ILO R. 193, Paragraph 8.(2)(b)) not only monitor whether all objectives of cooperates have been promoted, but the audit report also enables the members to exercise their democratic control rights in meaningful way. ILO R. 193, Paragraph 6.(b) recommends that primary cooperatives unionize and federate in order to create economies of scope and scale, whilst maintaining the autonomy of the affiliates.

[28] Concerning the link between law and social justice, cf. Supiot, Alain, L'esprit de Philadelphie. La justice sociale face au marché total, Paris 2010; Idem, Contribution à une analyse juridique de la crise économique de 2008, in: revue internationale du travail 2010/2, 165-176. It is also indicative of the difference between solidarity (obligatio in solidum) and charity (caritas).

[29] Privatizations, shifts in the division of political power and standard setting by private actors are more and more excluding the demos from decision-making. For details, cf. Henrÿ, Public International Law …, op. cit., footnotes 21 and 43 and Idem, Guidelines for Cooperative Legislation, op. cit., footnote 191.

[30] This is one of the reasons why an increasing number of institutions develop social justice indicators.

Current cooperative legislation shows two aspects. On the one hand, we observe a trend towards more [31] respect for the public international cooperative law. [32] On the other hand, law-makers have since long started a multifaceted, complex process of aligning cooperative law on the law applicable to capital-centered companies, [33] supposedly in an attempt to enable cooperatives to remain competitive. This alignment is all the more effective where it concerns harmonized or unified law. [34] Those additional rules which make up for the wide

[31] This started with the so-called adjustment programs in the 1980ies and gained impetus as of the adoption of the main international instruments on cooperatives, namely the 1995 ICA Statement, the 2002 ILO R. 193 and the 2001 UN Guidelines, op. cit..

[32] For example, the 2010 OHADA Uniform act on cooperative takes ILO R. 193 into consideration; so does the 2008 Ley marco para las cooperativas de America Latina. An increasing number of states do likewise. The Corte Suprema de Argentina refers to ILO R. 193 in the case Lago Castro, Andrés Manuel c/ Cooperativa Nueva Salvia Limitada y otros. Case and comment by Dante Cracogna, in: La Ley (t.2010 –A) 290 ff.. This results in a growing number of legally relevant texts reflecting a similar view of the role of government in the development of cooperatives as that expressed in ILO R. 193 (promoting without interfering, separating promotion from supervision/control), translating the cooperative principles into legal rules, respecting the autonomy of cooperatives, the rule of equal treatment of cooperatives by taking into account their specificities, and reflecting the organization of cooperation between persons (members) in view of promoting their economic, social and cultural interests through an enterprise, i.e. more and more texts incorporate the essentialia of the definition of cooperatives, and they limit the scope of application of the cooperative law to the form of organizing cooperation without regulating any specific activity, which is in line with ILO R. 193 (Paragraph 7. (2)). Cf. also European Court of Justice decision C-78/08 – C-80/08 concerning state aid.

[33] Laws allow, for example

- for different classes of shares, investment shares with limited voting power, freely transferable (at times even at the stock exchange) investment certificates,
- to require symbolic share contributions only and to limit, at times exclude, the liability of the members,
- to have unlimited business with non-members,
- to hire professional, non-member managers and/or to increase their power and autonomy vis-à-vis the board and the general assembly,
- to grant members limited plural voting rights, partly in proportion to the capital invested,
- to arrange for delegate meetings, at times even with a free mandate for the delegates,
- for non-member employees to sit on the supervisory board,
  for unlimited mergers/acquisitions/concentrations/fusions
- to grant (non-user) investor members, and even non-member investors, similar rights as members,
- to have minimum share capital,
- to distribute the reserve fund upon liquidation or conversion into a stock company,
- to distribute the surplus according to the amount of capital invested by the members,
- to transform into stock companies,
- for different categories of members with different rights and obligations,
- for the capitalisation of the reserves and attribution of the new shares to the members in proportion to their share in the previous capital
- for the issuance of securities (other than shares) or debentures for members or non-members, without voting rights, however
- for the representation of non-members on the board of directors, of non-members (investors) in the general assembly and on the supervisory council.

Other examples abound. As for details, cf. del Burgo, U., La desnaturalización de las cooperatives, in: Boletín de la Asociación Internacional de Derecho Cooperativo 2002, 51 ff.; Chulía, F.V., El futuro de la legislación cooperativa, in: CIRIEC españa, Revista Jurídica de Economía Social y Cooperativa, 13 (2002), 9 ff; Henrÿ, The Legal Structure … , op. cit.. Münkner described and foresaw this evolution already in 1993, cf. 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, Geneva: ILO 1993, 57 ff..

[34] A number of regional organizations have passed uniform laws, others have elaborated model cooperative laws or at least guidelines in view of harmonization, for example the mentioned 2008 Ley marco para las cooperativas de America Latina; the 1997 CIS "Model Law on Cooperatives and their Associations and Unions"; the UEAO uniform law on savings and credit cooperatives; the mentioned 2010 OHADA Uniform act on cooperatives; the "Referential Cooperative Act" of India; the CARICOM Credit union legislation; the 2003 EU Regulation on the Statute for a European Cooperative Society (SCE), 1435/2003.

notion of cooperative law as proposed here reinforce this alignment if they are tailored for stock companies and not adapted to the specificities of cooperatives. Furthermore, cooperative laws contain ever less mandatory rules and open more the space for cooperatives to set their own rules through statutes/byelaws. Where this is in line with the 4th cooperative principle (autonomy), it underestimates the pressure of the financial market. Cooperatives tend to give in to the requirements of that market and assort their statutes/byelaws with investor-friendly stipulations. Finally, the alignment is part of a wider process of standardising all types of enterprises on stock company criteria. In fact, it is part of a wider process of standardising laws.[35] Among other influencing factors, comparative lawyers continue defining their task as that of assisting law-makers in harmonizing and unifying laws. Where they conceive these processes as standardisation, they join hands with those who see in law, especially in the plurality and diversity of laws, costs ... to be reduced

These processes result in the transformation of the member-user relationship between cooperatives and their members into an investor relationship, be the investor a member of the cooperative or not. [36] What is intended by law-makers to compensate for comparative disadvantages of cooperatives turns into taking away their comparative advantages and it violates public international cooperative law.

IV Challenges facing cooperative law makers

Compliance of the legislators with the public international cooperative law will depend to a large extent on whether the ongoing legislative trend which aligns cooperative law on stock company law can be stopped (1) and on whether law can be conceived as a global matter (2).
(1)Generally, the main reason for the alignment of cooperative law on stock company law is that business entities like cooperatives are thought to have a competitive disadvantage over capital-centered entities. [37] While compensating the competitive disadvantages of

[35] Cf. Henrÿ, Hagen, Kulturfremdes Recht erkennen. Ein Beitrag zur Methodenlehre der Rechtsvergleichung, Forum Iuris, Helsinki: Hakapaino 2004, 111 ff..

[36]

- 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
- non-member professional managers tend to put competitiveness, growth and financial stability before the interests of the members
- unrestricted non-member business leads to a loss of autonomy
- investments lead to attaching more emphasis to 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. 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
- 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.

[37] Cf. International Labour Conference, 89th session 2001, Report V(1), , Chapter II, 3..

cooperatives and without neglecting the more traditional types of cooperatives, future cooperative law must strengthen the competitive advantages of cooperatives [38] and take into account new types of cooperatives. Such new types are already being set up in order to face phenomena which at the origin of modern cooperative legislation in the 19th century did not exist, such as generalized urbanization, migrations, demographic changes, the disconnection between social class and forms of organization, a growing incapacity of governments to provide for public services, a reorientation from anthropocentric world views with their preference for collective organizations to egocentric ones with their preference for orders of connected singularized individuals, [39] Some of the new cooperatives are still relying more on collectively (re)generated solidarity, but are moving from a single purpose to a multi-purpose approach and from homogenous membership interests to multi-stakeholder set-ups. [40] Some are relying more on connectivity and are working virtually.
While literature on the cooperative values and principles abounds, little has been published on the reinterpretation of them in the light of these phenomena and even less has been done as concerns the translation of the reinterpreted cooperative values and principles into law. [41] There are however some efforts underway in this sense. [42]

Adaptations to these changes presuppose laying the methodological groundwork for overcoming the intellectual crisis into which the financialization of research on enterprises has led.[43] The first step towards this end is to revisit the term "competitiveness" on the basis of a comparison of enterprise types using two intertwined methods: comparison on criteria which are not their definitional features, but relate to a tertium, and comparison with one another (secundum comparationis). The first method is to prepare legal policy choices concerning the question of how enterprises relate to the challenges of our time, like for example sustainable development; the second one is to sharpen the legal profiles of enterprise types.
(2) The legal policy choice and the law itself are facing the challenges of globalization. The economy is marked by a multilayered shift from the production of goods and services to the production of knowledge and from the internationalization of trade of goods and services to the globalization of the production and distribution of knowledge. Knowledge has hitherto been an input and came with the workers/laborers, whereas it is now, in addition, an output and an independent resource. These observations indicate what globalization means for the

[38] As for an overview of the comparative advantages of cooperatives, cf. Bernardi, Andrea, The Cooperative Difference: Economic, organizational and policy issues, in: Cooperative Management, Vol. 3/no. 2, 2007, 11 ff.
[39] Cf. Montolío, José María, Legislación cooperativa mundial. Tendencias y perspectivas en América Latina, in: Boletín de la Asociación Internacional de Derecho Cooperativo 2011, 225 ff.; Rosanvallon, Pierre, La société des égaux, Paris : Seuil 2011, 432 ff.
[40] To mention especially social cooperatives, school cooperatives, care cooperatives, health cooperatives, energy cooperatives, community cooperatives, general interest housing cooperatives, agricultural cooperatives in urban agglomerations, liberal profession cooperatives, think tanks etc..
[41] As for exceptions, cf. Cracogna, Dante, Problemas actuales del derecho cooperativo, Buenos Aires: Intercoop Editora 1992; Idem, Manual de legislación cooperativa: Buenos Aires: Intercoop Editora 1998; Münkner, Hans-H., Ten lectures on cooperative law, Bonn: Friedrich-Ebert-Stiftung 1982. More recently, Fici, Antonio, Cooperative Identity and the Law, in: European Business Law Review, 2013, issue 1 (forthcoming).
[42] Cf. for example the activities of the Study Group on European Cooperative Law, SGECOL: S. Fajardo G., Fici A., Henrÿ H., Hiez D., Münkner H.-H., Snaith I., New Study Group on European Cooperative Law: "Principles" Project, Euricse Working Paper, N. 024 | 12, 2012 at: http://euricse.eu/sites/euricse.eu/files/db_uploads/documents/1329215779_n1963.pdf
[43] It is no coincidence that this alignment of cooperatives on stock companies started in the early 1970ies. It was the time when the report of the Club of Rome ("The Limits of Growth") had failed to produce the changes which the SSE is now trying to produce in the light of the urgency to act. Cf. my manuscript "Cooperatives – from Ignorance to Knowledge." Cf. Barreto, Thomas, Penser l´entreprise coopérative: au-delà du réducionnisme du mainstream", in Annals of Public and Cooperative Economics, 2011 Vol. 82, Issue 2, 187 ff. (187) as concerns the focus in research on the stock company model.

notion of law. Knowledge (means of production and product) is in-form, in-material. Its global production is virtual production. Time and space disappear with the things they determine (Einstein).
The technological innovations of telecommunication, which are at the basis of globalization, 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, [44] globalization makes us experience today a multitude of de-phased and variable internormativities on territories the boundaries of which were hitherto defined by one law each, and which are now disappearing. The spatial reorganization of social life is affecting the law-making and the sources of law. The state, which lawyers continue considering as the main guardian of law, has become too small an entity for global actors who are outside the reach of (state) law because they are not subject to time and space constraints. [45] Global actors do not disrespect the law; the law does not reach them, because it is time and space conditioned, whereas they are not. And it has become too big to manage the interculture. [46] National, supranational, regional, international and transnational layers of law and law-making intermix and meet a growing body of standards set by private entities. [47] A clear distinction between the ensuing rules is no longer possible. Laws in the material sense are becoming global. We move from legal systems to a global legal system of legal systems which determines cooperative law. The question is whether new legal communities develop around organisation laws, such as laws on types of enterprise, for example.[48] The SSE might be a sign of this.

V Conclusion

These few remarks on a vast and complex issue lead back to the policy/law nexus. Should legislators continue aligning cooperative law on the features of stock companies, the legal value of the public international cooperative law diminishes, as these acts are co-constitutive of this very law. Positive law on types of enterprise, organization law, be it national law, including constitutions, regional or international law, is no guarantee for its contents over time. The Human Rights which guarantee a number of basic principles that are also important for cooperatives, like for example the freedom to associate and to exercise economic activities etc. do not prescribe any specific form of business organization. The question becomes therefore a political one. Its debate must consider the wider effects of the standardization of business

[44] The term "internormativity" is borrowed from Carbonnier and adapted to the purpose of this paper (cf. J. Carbonnier, "Internormativité", in: Dictionnaire encyclopédique de théorie et de sociologie du droit, LGDJ, Paris (1988), reprint in: Jean Carbonnier, écrits, Textes rassemblés par Raymond Verdier, Paris: PUF (2008), 697 f.). By "internormativity" I understand two concomitant, constantly changing phenomena, namely the interconnection of the different categories of "rules" of behaviour and the processes of juridicisation and de-juridicisation of these rules, i.e., their movement from law to non-legal norms and vice versa.
[45] There is therefore a research-worthy parallel in this context between global actors and informal economy actors, as the latter are also defined as those not reachable by state law. As for the informal economy the ILO has developed since 1972 a set of working definitions.
[46] Cf. Koizumi, Tetsunori, Cultural Diffusion, Economic Integration and the Sovereignty of the Nation-State, in: Rechtstheorie, Beiheft 12, 1991 (?), 313 ff.; Villeneuve, Jean-Patrick, l'Etat ne suffit plus pour réguler les jeux d´argent. La mondialisation des jeux de hasard et d´argent et les pressions exercées par les sociétés de jeu en ligne fragilisent les législations traditionnelles, in: Le Temps, 13.4.2010, 16. The term "interculture" is borrowed from Emongo, E., L'interculturalisme sous le soleil africain: L'entre-traditions comme épreuve du nœud", INTERculture, No. 133 (1997), 10. Cf. also Obiora,. L.A., Toward an Auspicious Reconciliation of International and Comparative Analyses, in: The American Journal of Comparative Law 1998, 669 ff.
[47] Cf. footnote 29.
[48] Jessup, Schnorr and others predicted such developments some time back already. Zweigert and Kötz have expressed doubts as to the sense of comparing national legal systems, pointing to the "materiebezogene Relativität" of areas of law.

types. In its extreme forms this standardization is part of the disappearance of the normative from the economy which, in turn, is a consequence of a generalized pensée unique, [49] destructive of the vital diversity.

Diversity is the *principium vitae*. It has two aspects: biodiversity and cultural diversity. Without cultural diversity, including in the field of law, biodiversity might be protected, but it cannot be preserved. The need to develop sustainably is thus a qualitatively different type of need than the needs which historically animated the search for adequate enterprise types. It is an existential need in the sense that the denial of its satisfaction is equivalent to the impossibility to pursue the satisfaction of any other need. This is the kernel of development. The principle of diversity does not call for the preservation of specific, existing types of enterprises, cooperatives in our case. It calls for the preservation of the possibility for different and diverse types of enterprises to exist. Development is its possibility. This possibility is best served by the greatest possible number of enterprise types. This number is a function of the knowledge about different and diverse types of enterprises. This knowledge (re)generates through the experience with real, existing types. This is why we need to "preserve" them. This is why we need cooperative law. Promoting the idea of a "more cooperative cooperative law" will be the more efficient the more cooperative laws are harmonised. [50] In the end, harmonization is a tool to ensure diversity. This somewhat surprising argument points to a need for clarification of the term "harmonization". Harmonization of laws is part of the wider concept of approximation of laws. It covers at distinct realities. There is no need to harmonize the objects of laws, cooperatives and stock companies. The advantages stock companies have by their laws being harmonized can be ensured for cooperatives by harmonizing the legal principles to be developed on the bases of reinterpretation of the cooperative values and principles. This would allow for the possibility to accommodate cultural, regional and other variants which is of particular importance for people-centered enterprises, like cooperatives. [51]

[49] cf. Walther, Christian, Finance, maths et humanités, in: Le Monde, 19.9.2008, 19.

[50] International, transnational and regional organisations suggest further harmonisation, cf. for example, ILO R. 193, Paragraph 18 and the 2004 European Union Commission Communication on the promotion of cooperative societies.

[51] I have been inspired by the latest essay of Jan Assmann (Religio duplex. Comment les Lumières ont réinventé la religion des Egyptiens, Aubier, 2013).