International Journal of Cooperative Law

Issue V | 2023

www.iuscooperativum.org

The International Journal of Cooperative Law (IJCL) is a peer-reviewed, open access online journal, founded by Ius Cooperativum in 2018. It is the first international journal in the field of cooperative law. It aspires to become a venue for lawyers, legal scholars and other persons interested in the topics and challenges that the discipline of cooperative law faces.

ISSN 2799-2306

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Foreword/Editorial

The new challenge for cooperative law : to manage its double function

Ifigeneia Douvitsa, Cynthia Giagnocavo, Hagen Henrÿ, David Hiez and Ian Snaith (editors)

With the passage of time, the cooperatives are more and more numerous around the world and their international recognition is no more debated. Apart from its own organisation, cooperatives were officially acknowledged first in 2002 with the International Labour Organization (hereinafter « ILO ») recommendation[1] and more recently in 2012 by the United Nations and its International Year of Cooperatives[2]. This doesn't mean that the cooperatives don't face some difficulties, that no political, social or economic power fight to impede its development, but these efforts, even when successful, may not profit from an official public support. The cooperatives are considered as a legitimate way to make business and, with the successive crisis the world faces, they appear more and more attractive.

The cooperative law benefits from a parallel increasing recognition. The number of cooperative legislations has increased since the decolonization but most of cooperative laws have also been amended, as an evidence of their evolution. It is not possible to assess the place of cooperative law in the various jurisdictions, and it is sure that some countries have for a long time paid a strong attention to cooperative law (Italy, Spain, Latin America), but in most countries cooperative law was not considered by lawyers out of some very narrow cooperative circles. The observation was far more visible at the international level, so that the evolution is easy to perceive. The number of cooperative lawyers or experts in cooperative law is growing, as well as the events dedicated to cooperative law. The creation of this International Journal of Cooperative Law[3] in 2018 is the last evidence of the phenomenon. This is certainly the automatic consequence of the interest of international organizations for cooperative law and their support to the creation or modernization of national or regional legislations. But this explanation is not sufficient: generally speaking, the cooperatives, because of their development, are more and more intricate into the economic relations and require more and more structured elaboration of their functioning. The cooperatives are less and less marginal and can only survive in their relationships with capitalistic enterprises or state by fixing their specificities in such a way to allow the courts to enforce it.

During last years, another phenomenon has appeared: the institutionalization of the political partnership of cooperatives with some other enterprises, into a notion which is named social and solidarity economy. This is clearly visible through the number of national legislations on social

[1] Promotion of Cooperatives Recommandation, adopted in June 2002 (N°193)
https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_code:R193
[2] The General Assembly of the United Nations has declared 2012 as the « International Year of Cooperatives », through the theme of « Cooperative Enterprises Build a Better World » with three main objectives : increase awareness, promote growth and establish appropriate policies.
https://www.un.org/en/events/coopsyear/
[3] https://iuscooperativum.org/journal/

and solidarity economy[4], but it has been very recently extended to the international level : first in 2021 with the action plan of the European Commission[5], but also in 2022 with the official recommendation of the OECD[6] and the resolution of the 110th International Conference of the ILO[7]. And this is supported by the ICA, as it appears through its membership as funder in 2021 to the International Coalition of the Social Solidarity Economy[8]. That new reality, somehow more conceptual than materially observable (but isn't law a concept in the end of the day?) is not effectless for the cooperatives and cooperative law. On the one hand, cooperative law is undoubtedly a major source of inspiration for the elaboration of the definition and principles of the social and solidarity economy[9]. On the other hand, the existing of a supra grouping of enterprises, in which cooperatives are only a part, constitue a strong interrogation for them. Europe is a very good example, since Cooperatives Europe, the European branch of ICA, decided to remain outside Social Economy Europe, the organization of social and solidarity economy enterprises. The problem is not absolutely new, but the question becomes more and more accurate with the recent acceleration of the development of the social and solidarity economy. The dilemma for cooperatives is to choose between the risk to be out of a new political arrangement about social and solidarity economy with which they share many common features, and the risk to lose its specific identity. Maybe the cooperative law is able to propose a solution to that tricky question.

Our hypothesis is that the cooperative law is likely to present two sides, related to two different functions: an operational aspect of cooperative law and a conceptual aspect of cooperative law. On the one hand, the cooperative law is the legal regulation for the cooperatives. Elaborated by the cooperators themselves, then acknowledged by the public bodies, completed by the courts, and systematised by cooperative academic lawyers, that first side of cooperative law, that can be qualified as operational, must be detailed enough to allow the daily functioning of each cooperative, the development of its business. Relying on strong principles, it is necessarily technical, different in every jurisdiction because of the local political arrangements of the country. This operational side of cooperative law requires the training of practitioners as well as the elaboration of a coherent set of rules, which means some academic research and education.

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[4] CAIRE Gilles, TADJUDJE Willy, « Vers une culture juridique mondiale de l'entreprise d'ESS ? Une approche comparative internationale des législations ESS », RECMA, 2019/3 (N° 353), p. 74-88.
https://www.cairn.info/revue-recma-2019-3-page-74.htm

5 European Commission (EC), the Social Economy Action Plan « Building an economy that works for people : an action plan for the social economy", December 2021

[6] OECD Recommendation on the Social and Solidarity Economy and Social Innovation, June 2022

[7] International Labour Conference, Resolution concerning decent work and the social and solidarity economy – 110th Session, 2022 ;
Bouchard, Marie and Hiez, David, A Universal Definition For The Social And Solidarity Economy: A First Appraisal Of The International Labour Organization Resolution (August 15, 2022). Available at SSRN: https://ssrn.com/abstract=4294563 or http://dx.doi.org/10.2139/ssrn.4294563 ;
UNRISD, Working Paper 2023-02, H. Jenkins, Historic Breakthrough for Social and Solidarity Economy at the International Labour Organization, https://cdn.unrisd.org/assets/library/papers/pdf-files/2023/wp-2023-2-sse-breakthough-ilo-110.pdf ;
Reconnaissance internationale de l'économie sociale et solidaire : résolution de la 110e conférence internationale du travail – David Hiez – RTD com. 2022. 807

[8] https://www.ica.coop/en/newsroom/news/international-coalition-social-solidarity-economy-launched-week

[9] Perspectives on Cooperative Law, Festschrift In Honour of Professor Hagen Henrÿ, Hiez, D.. Background and Contribution of Hagen Henrÿ to the Development of Cooperative Law. In: Tadjudje, W., Douvitsa, I. (eds) Perspectives on Cooperative Law. Springer, Singapore. https://doi.org/10.1007/978-981-19-1991-6_2

On the other hand, as the most elaborated regulation of enterprises doing business in a non-capitalistic way, the cooperative law is necessarily a model, willingly or not. The capitalistic system has developed and extended as the unique model for the economic life, if not for the whole life since economy has gained all the aspects of our life. All the other ways to conceive the economy and the enterprises have been disqualified and marginalized as inefficient, unrealistic… With the critique of productivism increasing, the capitalistic way is becoming controversial as well: whereas the only possible critics were claiming for some social adjustments to it (i.e., by CSR), it is now common to look for another model to provide an answer to the environmental, political, social economic challenges our society faces in the 21st century. In such a context, the existence of a set of rules cannot be neglected as a model for new developments. This is exactly what happened in the elaboration of the social and solidarity economy acknowledgement, which has been mainly based on the model of cooperative law. The cooperative law which is used as a model doesn't differ in substance from the operational side of cooperative law, but it is not considered in the same way. The focus is not put on the technical arrangements but on the principles on which these arrangements are built, the coherence of the set of rules as a whole. The success of the cooperative law in that new role depends on its ability to tell a convincing and attractive story for most persons involved in the economic life. There shall not be any discrepancy between the two sides of the cooperative law, but they don't look like exactly similar. The elaboration of the conceptual side of the cooperative law doesn't require the same qualities as the operational one. It insists more on the originality of the cooperative enterprise compared to the capitalistic one than on its daily organisation. It requires a piece of inter-disciplinary approach in order to make visible the articulation between the legal definition and the social or economic feasibility of the project. The core of that aspect of the cooperative law is conceptual since the most important is not the tool box, that the operational side of the cooperative law is nevertheless able to provide, but the concepts by which the world is described. That is the way how the cooperative law will tell another story than the one proposed by the capitalistic system.

The deepening of these two aspects is one of the major goals of this Journal. It is crucial to help the cooperatives in their daily life and this requires to improve the legal mechanisms that they use. But it is also our responsibility to take part in the strengthening of non-capitalistic ways of enterprising. These two aspects must absolutely undertaken in parallel, precisely to avoid a separation between the two sides of the coin.

This is perceptible in all the articles of the Journal, including in this issue. When Daniel Menezes and Tatiana Vanessa González Rivera study sharing economy and platform cooperativism, it may be to show how cooperatives may concretely respond to the new needs and adapt to the the technical constraints of the new labour market, but it may also be to demonstrate that cooperatives offer a real alternative model. It is easy to understand that these two approaches differ, as well as to observe that they don't oppose. Again about the influence of new technologies, when Deolinda Meira studies Cooperative virtual general assemblies and cooperative principles and shows both the chance of video-conferences for a new figure of democratic governance and the intrication of that opportunity with another principle, i.e. education and training, she brings some knowledge in the actual functioning of cooperatives and a support for other cooperatives to experiment better implementations ; meanwhile, she demonstrates the importance of democratic principle and provides a face for voting in a general

meting totally alternative to the practice of capitalistic enterprises and, therefore, a model for any enterprise willing to deviate from that practice.

Some articles are more descriptive, such as Tendencies and directions of development of cooperative law and cooperatives in Poland by Aneta Suchon. This is the opportunity to highlight a national cooperative tradition, including agricultural, energy, housing and bank cooperatives. But this provides also some precious elements to discuss the nature of cooperatives, for example with the exposition of the court case that stated that housing cooperatives should be considered as voluntary associations related to the constitutional terminology. This means that cooperatives are not definitely qualified as for-profit organizations like in the European treaties (Treaty on the functioning of the European Union, art. 54.). In the meantime, this appears to be a case-by-case reasoning, and the qualification of voluntary association is also functional, i.e. limited to the legal question to be answered. Is such a consideration an idea useful for operational or conceptual cooperative law? Both, of course.

One rubrique is clearly more conceptual: the interview of a prominent academic. In this issue, Akira Kurimoto, from his specific experience and his own analysis, provides very stimulating thoughts for the conceptual side of cooperative law. Among others, one may highlight the idea that between the constellation of special cooperative laws and the inclusion of cooperative law in a single general act, a room remains for special laws and a general cooperative law which purpose would not be to make some generalization but to provide a simple cooperative framework for the ones who would like to run a business out of any specific model. Or this other one: Asian cooperative law cannot be a source of inspiration for policy-makers out of Asia; this raises questions very familiar to comparative lawyers. And probably there could be some discussions about the meaning of each word, because the assertion should be considered differently depending on these definitions. But it brings also a fruitful thought for the operational side of cooperative law: a general law is not necessarily, and maybe not firstly, a jewel for lawyers questing for harmonization, it is above all a practical tool for people who enter in no predetermined category.

In the contrary, the practitioner corner is naturally oriented to the operational side of cooperative law. The reflexions of Holger Blisse about the case for the legal protection of Cooperative Reserves in ‘Old ’Cooperatives in Germany and Austria are a good example. His point is not to discuss the principle of the protection of reserves, he takes it for granted. But he inquires its implementation, related to the difficulty for the legislator to satisfy the wish to make the cooperative somehow financially more attractive. The same could be said about the tool box proposed by Alberto Garcia Müller and Fabio Orjuela Barbieri in their « Defense of the cooperative identity: back to mutuality: the gradual sanctions and the incentives they suggest to deter from deviations and in the contrary to reaffirm cooperative identity are firstly targeted to cooperators themselves.». However, their description of the various kinds of discrepancies from cooperative identity are fruitful as well for the conceptual aspect of cooperative law, since it evidences the risk existing for any enterprise which take cooperative law as a pattern.

Ajibola Anthony Akanji proposes a critical analysis of the ongoing processes of harmonisation of African cooperative law. In the tradition of political glasses to look at socio-economic phenomena, with an important attention to history, this author offers an original and stimulating

interpretative framework, very useful to assess the situation of cooperative law in Africa, but which can inspire as well some other analysis in other geographic areas. Is this conceptual or operational? Firstly, conceptual for sure, but is it uninteresting for practitioners? Surely not also.

In their discussion of harmonization and cooperation among cooperatives in the context of MERCOSUR, Marília and Marianna Ferraz Teixeira and Mariana Avelar Jaloretto contribute to a better understanding of the 6th principle of the ICA statement on the cooperative identity. In that respect, the object of their work consists clearly in the conceptual side of cooperative law.

What is a tendency in this article is a goal in the paper of Jerome Nikolai Warren. It presents all the features of a conceptual approach of cooperative law: it is not technical but conceptual, it is inter-disciplinary. Nevertheless, that conceptual dimension has strong and important consequences in the implementation of cooperative law, i.e. in its operational dimension.

An analogous observation can be drawn from Changsub Shin's article. It deals with a strongly operational aspect since it is an analysis of part of the Korean legislation. However, that assessment is ment by a comparison with the principles of European cooperative law. As these principles are not positive law, they have a theoretical status. This offers a perfect example of the use of a theoretical piece to comment a practical point.

Indeed, the distinction of the two sides of the coin is itself didactic. Both sides are necessarily always present in the meantime; if not the coin (cooperative law) would vanish. With a different intensity, all the articles combine these two dimensions. If we consider important to insist on that dual dimension, it is because it creates a new responsibility for cooperative lawyers: they do not anymore work and speak only to cooperators; they must keep in mind that their work could be used by non-cooperators willing to run their business in a non-capitalistic way, without creating a cooperative. And that new reality has another implication: it will not be sufficient in the future to emphasize the opposition with capitalistic enterprises; it will be necessary to highlight the common features of cooperatives and other enterprises. The dream of a cooperative Republic was probably foolish, but it perceived rightly that cooperatives would be the head of that new world. However, it must be clear that cooperatives will not make that new world alone, and cooperative lawyers should not run after a pure cooperativism but facilitate the growth of cooperative seeds in new fields. This is part of the new challenge.

Articles

TENDENCIES AND DIRECTIONS OF DEVELOPMENT OF COOPERATIVE LAW AND COOPERATIVES IN POLAND, ESPECIALLY AGRICULTURAL AND FOOD, HOUSING AND BANK COOPERATIVES

***Aneta Suchoń*[1]**

Cooperatives are important entities in the economic, social and cultural spheres in Poland. They are of a diversified nature - from large dairy cooperatives, through medium-sized cooperative banks, or housing cooperatives, to small social cooperatives. In Poland, there are currently over 9,500 cooperatives[2]. There is a large number of housing cooperatives in urban areas. In total, Poland is home to over 3,722 such entities. There is also a large number of cooperatives operating in rural areas and agriculture. However, it is not just the cooperatives established by agricultural producers that are popular – there are also considerable numbers of cooperative banks and 'Samopomoc Chłopska' (farmer's self-help) cooperatives. In turn, 'Społem' food cooperatives are popular in many cities, including Warsaw, Kraków and Poznań. It is also worth noting the development of social cooperatives, which are part of the social economy.

Cooperatives have been developing in Poland for centuries. Most studies consider the first cooperative in the world to have been the Rochdale Society of Equitable Pioneers, founded in England in 1844.[3] Around the same time, in many countries in the world there emerged numerous similar pre-cooperative initiatives as well.[4] This was the time when Poland was partitioned and deprived of sovereignty.[5] Nevertheless, the cooperative movement also started to develop here, and its precursor on Polish territory was Stanisław Staszic, the founder of the Hrubieszów Farmers' Rescue Society (Towarzystwo Rolniczego Ratowania się Wspólnie w Nieszczęściach) in 1816[6]. Cooperatives of agricultural producers developed during the Partitions and the interwar period and after second Word War. The political transformation and Poland's accession to the European Union introduced new opportunities for the development of cooperatives.

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[2] *Spółdzielczość w liczbach*, http://ruchspoldzielcow.pl/baza-wiedzy/spoldzielczosc-w-liczbach, (accessed on: 2022-02-11).

[3] The literature emphasizes that the earliest forms of cooperation based on mutual assistance already existed in antiquity. Examples include Egyptian associations of leaseholders and craftsmen, Jewish shepherd's associations and Dead Sea communities, Greek associations of craftsmen, miners and fishermen, Roman carpentry colleges, blacksmiths, shoemakers, potters, doctors and musicians. See K. Boczar, *Spółdzielczość. Problematyka społeczna i ekonomiczna*, Warszawa 1986, pp. 27-28;

[4] See, e.g., K. Boczar, *Spółdzielczość…*, p. 28 et seq.

[5] F. Stefczyk, *Początki i ogólne warunki rozwoju spółdzielczości w Polsce*, Kraków 1925, p. 9 et seq.

[6] See httpp://krs.org.pl/index.php?option=com_content&view=article&id=27&Itemid=283 (accessed on: 2022-03-11); S. Staszic, *Przestrogi dla Polski*, Warszawa 1960, p. 25 et seq.

In Poland the basic legal act in the field of cooperatives is the Act of 16 September 1982 on Cooperative Law[7]. Mention should also be made of the Act of 27 April 2006 on Social Cooperatives[8], the Act of 4 October 2018 on Farmers' Cooperatives[9], the Act of 15 December 2000 on Housing Cooperatives[10], the Act of 7 December 2000 on the functioning of Cooperative Banks, their affiliation and affiliating banks[11]. The activities of the entities in question are affected by a wide range of legal acts, such as registration in the National Court Register, contracts, land issues, taxes, EU funding and others, such as the Act of 15 September 2000 on Agricultural Producer Groups and their Associations, which is particularly important for the research subject discussed here[12], the Act of 23 April 1964 entitled the "Civil Code"[13], the Act of 11 April 2003 on the shaping of the agricultural system[14].

The aim of this paper is to analyse and evaluate the tendencies and directions of development of cooperative law and cooperatives in Poland, especially agricultural, food, housing and bank cooperatives.

The cooperative movement during the Partitions and in the interwar period

The cooperative movement which was popular in Poland during the time of the Partitions in the 19th performed various functions. Among other things, it was a form of association and a provider of education for peasant farmers, which also served the landowners. The legal principles of the establishment and operation of cooperatives in the 19th century on Polish lands were determined by the legislation of the partitioning states, and the directions of development of cooperatives depended on the socio-economic situation in those states. Undoubtedly, the fastest development took place in Wielkopolska where the level of economic development was relatively high, and the social structure more modern than in the other two partitioned regions, with a middle class starting to emerge and form, initiating the ideas of "organic work." As is rightly emphasized in the literature, the specificity of the Wielkopolska system was its far-reaching social solidarity, connected with the effort to maintain the Polish identity.[15]

Immediately following the establishment of the Polish state after the end of the First World War, work began on the preparation of the Act on cooperatives. The cooperatives throughout the whole Polish territory were functioning well but, being formerly organised in areas under three different partitions, they operated within three different legal frameworks.[16] On 29 October 1920 the Act on Cooperatives[17] was passed, a very modern and progressive law at the time. According to the Act of 1920, a cooperative was an association with an unlimited number of people with variable capital and personal composition, aimed at increasing the earnings per household of its

[7] Uniform text: Dz. U. (hereinafter Journal of Laws) 2021, item 648, as amended.
[8] Uniform text: Journal of Laws of 2020, item 2805, as amended.
[9] Journal of Laws 2018, item 2073.
[10] Uniform text: Journal of Laws of 2020, items 1208.
[11] Uniform text: Journal of Laws of 2022, items 1595and 695, as amended.
[12] Uniform text: Journal of Laws of 2018, item 1026 as amended.
[13] Uniform text: Journal of Laws of 2022, item 1360 as amended.
[14] Uniform text: Journal of Laws of 2022 item 461, 1846 as amended.
[15] A. Piechowski, *Historyczny kontekst uchwalenia ustawy z 29 października 1920 r.*, in: *90 lat prawa spółdzielczego*, materiały pokonferencyjne Krajowej Rady Spółdzielczej, Warszawa 2010, p. 7 et seq.
[16] A. Jedliński, Ustawa z 1920 r. na tle ówczesnych regulacji europejskich, in: 90 lat prawa spółdzielczego, materiały pokonferencyjne Krajowej Rady Spółdzielczej, Warszawa 2010, p. 21 et seq.
[17] Journal of Laws No 111, item. 733, as amended.

members by running a joint enterprise. In carrying out these economic tasks, a cooperative was also to seek to improve the cultural level of its members. After 1945, there were many cooperatives operating in rural areas in Poland, but they were used to implement the policy of command and control.

Cooperatives lost their self-governing and social character at that time. That cooperatives and the cooperative movement were to be used for the purpose(s) of building a new economic and political system is confirmed by the reference made to them in the Constitution of 1952[18].Article 11 of the Basic Law stresses that the People's Republic of Poland also supports the development of various forms of the cooperative movement in the city and in the countryside and provides it with support in fulfilling its tasks, and that cooperative ownership, as a social property, is under particular care and protection (after amendment - Article 16).

On 17 February 1961 the Act on Cooperatives and their Associations was adopted.[19] In Article 1 it was stated that a cooperative is a voluntary and self-governing association with an unlimited number of members and a variable share fund; its aim is to conduct economic activity within the framework of the national economic plan, as well as social and educational activity for the permanent improvement of the financial and cultural wellbeing and social awareness of its members and for the benefit of the Polish People's Republic[20]. After 1989, i.e. after the political transformation, many cooperatives were abolished. In 1994 the Act on Cooperative Law was amended one more time,[21] membership in the European Union brought new opportunities for the development of cooperatives, including social and cooperative banks, and in the agri-food industry. Cooperatives have greater opportunities to develop and benefit from EU funds.

The basic rules for establishing and operating a cooperative

According to the Act of 16 September 1982 on Cooperative Law, a cooperative is a voluntary association of an unlimited number of persons, with a variable composition and a share fund, which conducts joint economic activities in the interests of its members. It should be stressed that Article 1 of the Act stipulates that a cooperative may also carry out social, educational and cultural activities for the benefit of its members and their environment.

Pursuant to Article 6 of the Act on Cooperative Law, persons intending to establish a cooperative (founders) adopt the cooperative statute and confirm its acceptance by affixing their signatures. A general provision stipulates that the number of founders of a cooperative may not be less than 10 if the founders are natural persons, and 3 if the founders are legal persons. The legislation stipulates that, for some agricultural cooperatives, fewer than ten founders may set up such an entity and, in addition, it lays down requirements for the members of the cooperative (or its founders). In agricultural production cooperatives the number of founders who are natural persons may not be less than five. After the amendment of the Act of 16 September 1982 - Cooperative Law,[22] cooperative groups of agricultural producers may be founded by no fewer than 5 entities. In the first instance, the founders of a cooperative have to determine the content

[18] Journal of Laws of 1952 No 33, item 232, as amended.
[19] Journal of Laws No 12, item 61.
[20] A. Suchoń, *Prawna koncepcja spółdzielni rolniczych*, Poznań 2016, p. 148 et seq.
[21] Act amending the Act on cooperative law and amending some other acts, entered into force on 26 September 1994 (Journal of Laws No 90, item 419).
[22] Dz. U. No 163, item. 1014.

of the statute and then adopt a resolution. The statute does not have to be in the form of a notarial document - a simple written form is sufficient[23].An essential activity at the stage of organising an cooperative is the submission of documents to the National Court Register for entry in the register of entrepreneurs. This must be done on the official printed form prescribed by the applicable provisions. A cooperative may only start its business activity after it has been registered in the National Court Register.

Cooperatives in the agricultural and food sectors

Agriculture is an important branch of the Polish economy. There are over 1 million agricultural holdings operating in this country. In 2018, 1,428,800 farms used 1,469,000 ha of agricultural land and reared 9,842,500 large livestock units[24]. There were ca. 1,398,000 farms that used over 1 ha of agricultural land. Yet the pace of the structural changes in this sector is still slow[25]. The fragmentation of agricultural farms is ongoing.[26] According to the announcement of the President of the Agency for Restructuring and Modernisation of Agriculture (ARMA) of 17 September 2019 on the size of the average area of agricultural land on farms in individual provinces, and on the average area of agricultural land on a farm in Poland in 2019, it was 10.95 ha.[27], in 2021 was it 11,20 *ha*[28]. Family farms are the basis of the agricultural system, and the legislator has supported and will continue to support such entities in the future. The main sectors are dairy, cereals, pigs, poultry and horticulture. The agriculture in Poland is of great national economic, social and environmental importance. *The above statistical data shows that agricultural producers and their farms make up small units in Poland and, therefore, joint action is extremely important.*

The new Act of 4 October 2018 on Farmers' Cooperatives, on the other hand, as the name already suggests, introduces the normative basis for the operation of such entities. The remit of farmers' cooperatives is to run a business for the benefit of their members relating to, for example, planning the production of products or groups of products and adjusting it to market conditions, especially in terms of quantity and quality, and to processing products or groups of products produced by the farmers and the marketing of such processed products.

Article 4 of the Act of 4 October 2018 on Farmers' Cooperatives[29], states that a farmers' cooperative is a voluntary association of natural or legal persons who: 1) run an agricultural farm as specified in the agricultural tax regulations, who conduct agricultural activity falling under special branches of agricultural production, who are the producers of agricultural products or of groups of these products, or who breed fish; 2) are not farmers and conduct activity related to the storing, sorting, packing or processing of agricultural products or groups of these products, or the fish produced by the farmers referred to in point 1, or service activities supporting agriculture, including those referred to in point 1, such as services using machines, tools or devices for the

[23] A. Suchoń, *Legal aspects of the organization and operation of agricultural co-operatives in Poland*, Poznań 2019, p. 15 et seq.
[24] Central Statistical Office, *Rolnictwo w 2018 r.*, https://stat.gov.pl/obszary-tematyczne/rolnictwo-lesnictwo/rolnictwo/rolnictwo-w-2018-roku,3,15.html (accessed on: 2022-03-11).
[25] Available on-line at: <https://swiatrolnika.info/rolnicza-statystyka-dane-gus-za-2018-rok> (accessed on: 2022-03-11).
[26] Central Statistical Office, *Rolnictwo w 2018 r.*, https://stat.gov.pl/obszary-tematyczne/rolnictwo-lesnictwo/rolnictwo/rolnictwo-w-2018-roku,3,15.html, (accessed on: 2022-03-11).
[27] https://www.arimr.gov.pl/pomoc-krajowa/srednia-powierzchnia-gospodarstwa.html, (accessed on: 2022-03-11).
[28] https://www.gov.pl/web/arimr/srednia-powierzchnia-gospodarstw-w-2021-roku, (accessed on: 2022-03-11).
[29] Journal of Laws of 2018, item 2073.

production of agricultural products by these farmers or groups of these products, or fish, and who are hereinafter referred to as the "entities which are not farmers".[30] A cooperative of farmers can be established by at least 10 farmers. According to the Act of 4 October 2018 on farmers' cooperatives, these entities are predominantly made up of farmers, variable compositions of persons and variable capital which conduct joint business activity for the benefit of their members.

According to the Act of 4 October 2018 on farmers' cooperatives, this entity is predominantly made up of farmers, variable compositions of persons and variable capital which conduct joint business activity for the benefit of their members. This Act provides that the subject of activity of a farmers' cooperative is running a business activity for the benefit its members, relating to: e.g. planning by the farmers their production of produce or groups of products and adjusting it to market conditions, especially considering their quantity and quality; concentration of supply and handling the sales of products or groups of products produced by the farmers; and concentration of demand and handling the purchase of necessary means for the production of products or groups of products.

There is no doubt that the introduction of the new act on farmers' cooperatives should be assessed positively. It is important for both the theory of cooperatives and practice. It confirms that the legislator attaches more and more importance to cooperatives in Poland. It introduces instruments to encourage the establishment of such entities. Certainly, membership in such an entity should be positively assessed. Apart from farmers, there may also be other entities.

In the author's opinion, it would be necessary to consider introducing a few changes to the discussed legal act on farmers' cooperatives. In its current form, the legal requirements the Act of October 4, 2018 may not encourage the creation of farmers' cooperatives. Some of the legal regulations may actually constitute a barrier to the development of these entities. One such barrier is the requirement that there should be 10 members who are farmers. Some municipalities lack such a large number of agricultural producers of the same product. Of course, the act does not introduce the principle of regionalization, but the functioning of cooperatives whose members are producers from various places, often distant from each other, which may be difficult. As regards the minimum number of members, the introduction of five agricultural producers seems justified. This number currently applies to cooperative groups of agricultural producers. A smaller number of cooperatives also occurs in other legal systems, e.g. in Germany - 3, and in France - 7[31].

For the durability of the cooperative, it would be more reasonable to introduce both the minimum period of minimum membership in the cooperative, e.g. 5 years, and the notice period. At the same time, it may be a factor discouraging some entities from establishing or acquiring membership in a cooperative. For the further development of the association of agricultural producers, the interpretation would be beneficial that the already functioning cooperative groups

[30] For more about the Act on Farmers' Cooperatives, see e.g. A. Suchoń, *Legal aspects of the organization and operation of agricultural cooperatives in Poland*, Poznań 2019: 7ff; idem, *Nowa ustawa o spółdzielniach rolników – wybrane zagadnienia*, „Studia Prawnicze KUL", 2020, no 3, idem, *Uwagi na tle projektu ustawy o spółdzielniach rolników*, Przegląd Prawa Rolnego, 2017, 2: 191–208ff.

[31] A. Suchoń, *Nowa ustawa o spółdzielniach rolników – wybrane zagadnienia*, Studia Prawnicze KUL 2020 , no 3, pp. 261-290.

of agricultural producers, if they meet the requirements specified in the Act of October 4, 2018, after supplementing the statute and the name with the phrase "farmers' cooperatives" (in the National Court Register), will be recognized for such entities. Due to the preferential treatment given to farmers' cooperatives, a question arises as to how to check whether a given cooperative is indeed a farmers' cooperative. For example, agricultural producer groups that also benefit from preferential taxes are entered in a separate register of agricultural producer groups. Therefore, there is no problem with determining whether a given entity has been recognized as a group of agricultural producers and thus may benefit from such preferential taxes. It is subject to entry in the register kept by the Director of the Agency for Restructuring and Modernization of Agriculture. Farmers' cooperatives are subject to entry only in the National Court Register. Some of the previously functioning cooperatives had the phrase "farmers' cooperative" in their name. It is likely that the tax offices will demand a declaration and confirmation that the farmers' cooperative is an entity that meets the requirements set out in the Act of October 4, 2018.

The question arises of whether operating cooperatives, including cooperative groups of agricultural producers and cooperative organizations of agricultural producers of fruit and vegetables, which meet the requirements set out in the Act of October 4, 2018, will be able to be recognized as farmers' cooperatives. On the one hand, it can be noted that there are interpretations according to which the act on farmers' cooperatives applies only to newly established entities, on the other, there are those stating that already operating cooperatives of agricultural producers, if they meet the requirements indicated therein, after supplementing the statute and name (in the National Court Register) with the phrase "cooperatives farmers", will be able to act as such entities.

Farmers' cooperatives may also apply for the status of an energy cooperative. As regards legal regulations, pursuant to the Act of 20 February 2015 on Renewable Energy Sources[32] (with amendments from 2019), an energy cooperative is a cooperative within the meaning of the Act of 16 September 1982 on Cooperatives or of the Act of 4 October 2018 on Farmers' Cooperatives, the purpose of which is the production of electricity, biogas or heat in renewable energy source installations, and balancing the demand for electricity, biogas or heat, exclusively for the needs of the energy cooperative itself and its members, connected to an area-defined electricity distribution network with a nominal voltage lower than 110 kV, a gas distribution network, or a district heating network. An Energy Cooperative is required to meet all of the following conditions: 1) it must operate in the area of a rural or urban-rural commune, within the meaning of the regulations on public statistics, or in an area of no more than 3 such communes directly neighbouring with each other; 2) the number of its members has to be less than 1000; 3) if the purpose of its activity is the production of: a) electricity, in which case the total installed electric power of all installations of a renewable energy source must cover at least 70% of the cooperative and its members' own annual energy needs; and cannot exceed 10 MW; (b) heat, in which case the total available thermal capacity cannot not exceed 30 MW; or (c) biogas, in which case the annual capacity of all installations cannot exceed 40 million m^3 (Article 38e).

The energy cooperative may start its operations once it has been entered in the register of energy cooperatives. The register of energy cooperatives is maintained by the General Director of the National Support Centre for Agriculture.

[32] Journal of Laws of 2015, item 478, as amended.

Besides the farmers' cooperatives which were established under the Act of 4 October 2018 on Farmers' Cooperatives, cooperatives of agricultural producers have existed for many years, such as dairy cooperatives, cooperative agricultural producers' groups, 'Samopomoc Chłopska' (farmers' self-help) cooperatives and others. The term 'agricultural cooperative' itself is not a legal term in polish legal system. It can be found in the literature,[33] draft bills,[34] and foreign legal systems.[35] The term 'agricultural cooperatives' designates cooperative entities engaged in agricultural production (agricultural holdings), and other entities operating in the agricultural sector, which are responsible for at least one stage of such activities, or which operate more broadly in this sector. The members of such cooperatives are mainly agricultural producers. Cooperation is needed at various stages of farming – from purchasing the means of production through the use of agricultural machinery, sale of crops and consultancy, to processing. Agricultural associations are crucial in representing farmers' interests at regional, national and EU levels. Cooperation between agricultural producers in the form of cooperatives is an expression of horizontal and vertical integration in agriculture.

In recent years, groupings of agricultural producers have gained popularity among Polish farmers including more than 500 agricultural cooperatives.[36] Pursuant to the Act of 15 September 2000 on Agricultural Producer Groups, natural persons, organisational units without legal personality, and legal persons, that, as part of agricultural activity, run: 1) a farm, in accordance with the agricultural tax regulations, or 2) an agricultural business in special branches of agricultural production – may be organised into agricultural producer groups in order to adjust agricultural products and the production process to market conditions, to jointly market the products, in particular to prepare the products for sale, to centralize sales and deliveries to wholesale buyers, to set out common rules pertaining to production – especially in connection with crops and the availability of agricultural products, to develop business and marketing skills, to streamline the innovation processes, and to protect the environment. The groups carrying out those objectives help to develop agriculture and to increase the incomes of agricultural producers.[37]

An agricultural producer group is not a separate legal entity, but such groups can be organised on the basis of each type of business entity, i.e. a limited company, a cooperative, an association and a voluntary association. Currently, most groups are formed on a cooperative basis. Additional provisions allow the formation of cooperatives on the basis of existing cooperatives. In addition to cooperative groups of agriculture producers, mention should also be made of organisations of agriculture producers. **So far, no agricultural producer organisations have been established in Poland on the milk market. The situation in other markets is the same. Fruit and vegetable producer organisations are an exception, but there are separate legal regulations**

[33] E.g. S. Wojciechowski, *Spółdzielnie rolnicze: jakie być mogą i powinny w Polsce według wzorów zagranicznych*, Poznań 1936; A. Suchoń, *Legal aspects of the organization and operation of agricultural co-operatives in Poland*, Poznań 2019.

[34] *MPs draft of the law on agricultural cooperatives* 2003, Print No 2759 of 2004. (accessed on: 2022-03-11). http://orka.sejm.gov.pl/proc4.nsf/drafts/2759_p.htm.

[35] Chapter III of the French Rural Code (*Code rural et de la pêche maritime*) applicable to Les societes cooperatives Agricole. See e.g. *Code rural et de la pêche maritime, code forestier, commenté*, La Rochelle 2014. The Italian legislature also uses the concept of agricultural cooperatives in the Civil Code, e.g. Article 2513 of the Italian civil code.

[36] Ibidem.

[37] A. Suchoń, *Cooperatives in the face of challenges of contemporary agriculture in the example of Poland*, in: R. Budzinowski (ed.), *Contemporary challenges of Agriculture Law: among Globalization, Regionalisation and Locality*, Poznań 2018 pp. 303–311.

in this area, and they already have a certain tradition.[38] **The Polish legislator intends to encourage the creation of organisations, which is why legal regulations have been amended and issued in recent years. For example, on 20 May 2020** the Regulation of the Minister of Agriculture and Rural Development of 27 April 2020 **took effect,** amending the Regulation concerning the detailed conditions and procedure of granting, disbursement and return of financial aid as part of the activity entitled "Establishment of groups of producers and producer organisations" covered by the Programme of Rural Areas Development for the years 2014–2020.[39]

Milk cooperatives in Poland have been developing since the interwar period. Currently, there are more than 130 of them.[40] However, it is not their number that matters most, but rather their market share and how they contribute to the development of agriculture. Milk cooperatives in Poland have been expanding. Most of all, similarly to cooperative agricultural producer groups, milk cooperatives have taken over some of the activities connected with the agricultural activity conducted by a member–agricultural producer. Those activities include purchasing milk from members and supporting cattle breeding. Moreover, they help to organize farms which specialize in milk production and delivery.[41] Such actions contribute to the development of the farms owned by milk producers and the innovative nature of the milk market. The milk cooperatives which deal with milk processing allow producers to participate at another stage of the food chain, i.e. to make money not only from the sale of milk but also from the balance surplus coming from the processing activity. Poland's milk cooperatives increasingly often sell their products on international market.

Many Polish dairy cooperatives are important on the market, not only in Poland. Some of their products are exported. For example, in 2018 the Mlekovita Group achieved a turnover of PLN 4,669.84 million[42] and employed over 2,390 people. The group consists of over 13 production plants and 23 of its own distribution centres. The cooperative produces a wide range of over 400 brand dairy products and is the largest exporter of the Polish dairy industry.[43] The cooperative Mlekpol SM achieved a turnover of PLN 4,045,58 million[44], Łowicz OSM: PLN 1,281,61 million; Piątnica OSM: PLN 1,235,20 million; and Koło OSM; PLN 678,31 million.[45]

It is also worth mentioning agricultural production cooperatives, which have been operating in Poland since the socialist era. According to Article 138 of this Act, the purpose of the agricultural activity of an agricultural production cooperative (APC) is to run a joint agricultural holding and to operate for the benefit of the individual agricultural holdings of its members. A cooperative may also engage in other business activities. The legislator used the connecting word 'and' to refer to the two basic types of activity of this type of cooperative.

[38] A. Suchoń, *Agricultural Cooperatives and Producer Organizations in Poland*, CEDR Journal of Rural Law 2015, No 2, pp. 25–37.
[39] Journal of Laws, item 799.
[40] *Spółdzielczość w liczbach*, http://ruchspoldzielcow.pl/baza-wiedzy/spoldzielczosc-w-liczbach**, (**accessed on: 10.05.2021).
[41] http://mleczarstwopolskie.pl/, **(**accessed on: 10.05.2021).
[42] https:// forummleczarskie.pl/FIRMY/0194/grupa-mlekovita, (accessed on: 2.01.2022).
[43] Ibidem.
[44] *TOP 25 producentów branży mleczarskiej w 2018 r. Ranking pełny według obrotów za 2018 rok,* https://www.forummleczarskie.pl/FIRMY/TOP-POLSKA/2018, (accessed on: 2.01.2022).
[45] Ibidem.

Housing cooperatives

The genesis of the Polish housing cooperatives is connected with Poznań, where the Towarzystwo "Pomoc" Spółka Budowlana was established. In the years 1904–1924, more than 20 housing cooperatives were established, including in Bydgoszcz, Grudziądz, Leszno, Inowrocław, Gniezno, Chorzów and Kraków[46]. In the first half of 2021, cooperatives made approximately 1.3 thousand square meters available as residential units throughout Poland, while developers made 60.5 thousand available. Yet in 2007/2008, cooperatives provided approximately 8 thousand more premises annually. Cooperatives build fewer and fewer new apartments. In Poland, new premises are mainly supplied by developers. However, there are still many cooperative flats available which were built in the 1970s, 1980s and 1990s. There are around 3,600 housing cooperatives in Poland and almost 15 million people live in them[47].

The functioning of housing cooperatives is based on the Cooperative Law and the Act of December 15 2000 on Housing Cooperatives. Article 1 of this Act states that the purpose of such cooperatives is to meet the housing needs of their members and their families by providing members with independent housing units or single-family houses, as well as premises for other purposes. This act also indicates that the activity of a cooperative may encompass, for example, the construction or acquisition of buildings in order to establish, for the benefit of members of tenant housing cooperatives, the rights to residential premises located in these buildings; building or acquiring buildings in order to establish, for the benefit of members, separate ownership of residential premises or premises for other purposes located in these buildings, as well as a fractional share in joint ownership in multi-car garages; building or acquiring single-family houses in order to transfer the ownership of these houses to the members; assisting members in the construction of residential buildings or single-family houses by them; the construction or acquisition of buildings. The cooperative is obliged to manage the real estate constituting its property or the property of its members acquired on the basis of the Act. The housing cooperative cannot derive any financial benefits at the expense of its members, in particular due to the transformation of rights to the premises.

As is rightly emphasized in the literature, a housing cooperative also has a purpose to its operation, related to the way it satisfies the needs of its members. It follows from the definition of a cooperative that a housing cooperative satisfies the housing needs and other needs of members and their families by carrying out joint economic activities in the interests of these members[48].

In the justification of the judgment of 15 July 2009, the Constitutional Tribunal stressed that "housing cooperatives should be classified as voluntary associations (Art. 12 of the Constitution), benefiting from the guarantees provided in Art. 58 of the Constitution. Housing cooperatives, the purpose of which is to meet the housing needs of members and their families, have a special legal status resulting from the Constitution, related to their role in the

[46] *Z historii światowej spółdzielczości mieszkaniowej (*http://smsrodmiesciegliwice.pl/wp-content/uploads/2016/06/HistoriaSM_cz_2-Polska.pdf, (accessed on: 2.01.2022).
[47] https://gethome.pl/blog/wspolnota-czy-spoldzielnia-mieszkaniowa/, (accessed on: 2.01.2022).
[48] J. Gajda, K. Królikowska, K. Pietrzykowski, J. Pisuliński, P. Zakrzewski, *Spółdzielnie mieszkaniowe*, Art. 1 SPP T. 21 red. Pietrzykowski 2020, wyd. 1, Legalis/el.

implementation of the state's tasks specified in Art. 75 sec. 1 of the Constitution[49]" (see reference number K 5/01). The above-mentioned constitutional dimension of the establishment and operation of housing cooperatives prompted the Tribunal to emphasize the fact that "any legislative interference in the constitutional rights and freedoms of these cooperatives and their members must meet the criteria of proportionality set out in Art. 31 of the Constitution". Thus, it will be considered admissible only if – in the opinion of the Tribunal – a given regulation is capable of achieving the intended effects (the principle of necessity); it is necessary to protect the public interest to which it is related (the principle of usefulness); and its effects are in proportion to the burdens imposed on the individual (the principle of proportionality sensu stricto)[50].

The Act on Housing Cooperatives specifies which persons can be members of such entities (Art. 3). Namely, these are natural persons who are entitled to at least one of the following entitlements: a cooperative tenant's right to a flat; a cooperative ownership right to the premises; a claim for the establishment of a cooperative tenant's right to a flat; a claim for the establishment of separate ownership of the premises, or being a founder of a cooperative, subject to paragraph 9 Article 3.

Both spouses can be members of a cooperative, if they are entitled to premises jointly, or if they apply jointly to conclude a contract for the establishment of a cooperative tenant's right to a flat, or separate ownership of the premises. Currently, from July 31 2007, it is not possible to establish a cooperative ownership right to the premises. This right was previously established by housing cooperatives and is still available to the people for whom it was established. A cooperative ownership right to the premises is transferable, passes to the heirs and is subject to enforcement. It is a limited property right.

It is rightly emphasized in the literature that a cooperative fulfils its main objective through the specific method of supporting its members, i.e. by making available and selling to its members specific legal titles authorizing the use of the premises, houses and real estate of the cooperative[51]. In Art. 9, the Act on Housing Cooperatives stipulates that by the agreement to establish a tenant's right to a flat, the cooperative undertakes to give the person for whom the right is established the flat for use, and that person undertakes to make a housing contribution and pay the fees specified in the act and in the statute of the cooperative. Cooperative tenants' right to a flat may be established for the benefit of a member of the cooperative or a member of the cooperative and his or her spouse. The said right shall expire upon termination of membership and in other cases specified in the Act.

It is also worth adding that in the event of the expiry of the cooperative tenant's right to a flat as a result of the death of the entitled person, or in the cases referred to in Art. 11, claims for the conclusion of an agreement to establish a cooperative tenant's right to a dwelling are due to his or her relatives. The Act also provides for the possibility that, at the written request of a member who is entitled to a tenant's housing cooperative right to a dwelling, the cooperative is obliged to

[49] K 64/07, Journal of Laws of 2009 r. No. 117, item 988, OTK Series A 2009 No. 7, item 110, Legalis
[50] K 64/07, Journal of Laws of 2009. No/ 117, item. 988, OTK Seria A 2009 No 7, item 110, Legalis
[51] K. Królikowska, *Art. 1 SpMieszkU*, ed. K. Osajda 2019, Legalis, Nb 2.; A. Stefaniak, *Prawo spółdzielcze oraz ustawa o spółdzielniach mieszkaniowych. Komentarz,* Warszawa 2018; M. Stepnowska-Michaluk, *Prawne formy zaspokajania potrzeb lokalowych rodziny przez spółdzielnię mieszkaniową*, [in:] *Ewolucja prawa polskiego w dobie globalizacji*, ed. D. Tyrawa, Lublin 2013; J. Gajda, K. Królikowska, K. Pietrzykowski, J. Pisuliński, P. Zakrzewski, *Spółdzielnie mieszkaniowe***,** Art. 27, [in:] *System Prawa Prywatnego* vol. 21, ed. K. Pietrzykowski, Warszawa 2020.

conclude an agreement with that member for the transfer of ownership of the premises after he or she has made debt repayment due to fees (referred to in Article 4 (1) of the Act).

A member of a housing cooperative has the right to receive a copy the statute and regulations as well as copies of resolutions of cooperative bodies and minutes of the proceedings of cooperative bodies, lustration protocols, and annual financial statements. Each member of the cooperative has the right to participate in the general meeting or meeting of a member group, and to elect and be elected to the cooperative bodies. The general meeting of the housing cooperative cannot be replaced by a meeting of representatives; however, if the statutes so provide, if the number of members of the housing cooperative exceeds 500, the general assembly may be divided into parts. The supervisory board sets the rules, for the inclusion of members in the various parts of the general meeting, except that members entitled to premises located within the same property may not be included in different parts of the general meeting (Art. 8^3 (1) of the Act on Housing Cooperatives).

Persons interested in purchasing new residential premises and establishing separate ownership of the premises may sign an agreement with the cooperative for the construction of the premises (Article 10). An agreement concluded in writing under pain of nullity, should oblige the parties to conclude, after the construction of the premises, a contract for the establishment of a cooperative tenant's right to this property, and should also include the obligation of the person applying for the establishment of a cooperative tenant's right to the premises to cover the costs of the investment task in part attributable to his or her premises by making the housing contribution specified in the contract.

It is also worth mentioning the law of separate ownership of the premises. According to Art. 18, the cooperative concludes a contract for the construction of the premises with a person applying for the establishment of separate ownership of the premises. This agreement, concluded in writing under pain of nullity, should oblige the parties to conclude, after construction of the premises, contracts for the establishment of separate ownership of the premises.

Membership in the cooperative ceases with: e.g. the expiry of the cooperative tenant's right to a flat; disposal of the cooperative ownership right to the premises or participation in it almost; sale of the right to separate ownership of the premises or participation in this right; disposal of the expectation of ownership or participation in this right; or expiry of the claim for the establishment of a cooperative tenant's right to a residential premises.

Cooperative banks

It is emphasized in the literature that cooperative banking began in the Middle Ages, when the first organizations implementing the idea of self-help were established[52]. These were the pre-cooperative organizations (organizations referred to as "social enterprises"). The reason for the creation of such organizations was always the economic situation of the population, associated with the need to obtain additional funds. They implemented the idea of financial self-help, and were known as merchant guilds, fishermen's groups, mounts of piety, widow's funds; then cheap

[52] A. Zalcewicz, *Rozdział I Geneza i rozwój banków spółdzielczych w Polsce do 2008 r.* [in:] *Bank spółdzielczy. Aspekty prawne tworzenia i funkcjonowania*, Warszawa 2009.

loan foundations and mutual societies appeared, the purpose of which was to help people who had suffered misfortunes[53].

Cooperative banks are particularly popular in rural areas in Poland, but also in small towns and big cities. The genesis of Polish cooperative banks can be traced back to Wielkopolska. As early as 1850, Towarzystwo Oszczędności i Pożyczek was established in Śrem, which is considered to be the oldest credit cooperative in Poland. However, the Loan Society for Industrialists of the city of Poznań is better known; it was founded on the initiative of figures such as Hipolit Cegielski and Mieczysław Łyskowski, in 1861. This marked the beginning of Polish cooperative banks. In 1886, the first financial headquarters of Greater Poland cooperatives was established under the name of the Bank of the Union of Profit Companies, headed by Józefa Kusztelan[54].

One important stimulus for later development was the Cooperative Law Act of 1920 and the general economic boom after 1925. It was a period of development of cooperatives, including loan and credit activities. The number of credit unions, banks and societies increased in 1925 to over 5,600, and the number of members amounted to 1,515,000. After 1945, the cooperative sector was nationalized. The reactivated pre-war and newly created cooperatives were associated in new state structures. A period of slow reconstruction of Polish banking cooperatives in Poland began with the "thaw" of 1956. In 1957, the nationwide Union of Savings and Loan Cooperatives was established as the headquarters of the cooperatives associated with it. 1989 saw the beginning of the revival of banking cooperatives and a return to the mechanisms of the market economy. The banking cooperative movement once again became an element of a self-governing, democratic society in the emerging state organized according to the rule of law.

At the end of 2014, there were 565 cooperative banks with over one million members in Poland. In the past, there were many more cooperative banks, e.g. in 1960 there had been 1307. These banks in total maintain 6.9 million customer deposit accounts and employ over 27.9 thousand employees, which accounts for over 18 percent of the overall employment in the banking sector.

As A. Załcewicz emphasizes, “Traditionally, cooperative banks, both in Poland and Europe, are perceived as national banks (with capital coming from members of local communities, residents of a given country), local, deriving their roots from institutions implementing aid ideas in practice, therefore, pursuing not only commercial goals in their activities. Thus, in the case of a cooperative bank, the specificity of its operation, as an economic entity focused on achieving profits on the one hand, and on the other, pursuing social goals, caused and causes that they were and are often treated in a special way in the legislation of individual countries”

According to the Act of December 7, 2000 on the functioning of cooperative banks, their affiliation and affiliating banks, a cooperative bank should be understood as a bank that is a cooperative, to which, in the scope not regulated in the aforementioned Act and in the Act of August 29 1997 has applied. The banking law is governed by the provisions of the Cooperative Law of September 16, 1982. These cooperative banks in total maintain 6.9 million customer deposit accounts and employ over 27.9 thousand employees, which accounts for over 18 percent of the overall employment in the banking sector[55]. Cooperative and affiliating banks may belong

[53] Ibidem.
[54] https://krs.org.pl/branze-spoldzielcze/banki-spoldzielcze, (accessed on: 2.01.2022).
[55] https://krs.org.pl/branze-spoldzielcze/banki-spoldzielcze, (accessed on: 2.01.2022).

to the National Association of Cooperative Banks and to the Polish Bank Association, as well as other organizations established to represent the common economic interests of these banks, in particular towards state bodies, foreign and international institutions (Article 3 of the Act of December 7 2000). The purpose of a cooperative's activity shows that the overriding goal of a cooperative bank is different from the objectives of banks in the form of joint-stock companies, which aim primarily at maximizing profit. In a cooperative bank, profit maximization should only be a means to achieve the goals of the cooperative members [56]. In smaller towns, farmers are often members of cooperatives.

The Act of December 7 2000 on the Cooperation of Cooperative Banks, their Association and Affiliating Banks currently in force, repealed the Act of 24 June 1994 on the Restructuring of Cooperative Banks and Bank Gospodarki Żywnościowej and on the amendment of certain acts. This previous legal act defined the rules for the creation, organization, operation and association of cooperative banks, regional banks associating cooperative banks, and the national bank associating regional banks. The Act lays down the rules for the restructuring of cooperative banks affiliating under this Act and for the restructuring of Bank Gospodarki Żywnościowej.

As a rule, a cooperative bank is obliged to affiliate itself with the affiliating bank on the terms specified in Art. 16 Act of December 7 2000 on the Cooperation of Cooperative Banks, their Association and Affiliating Banks. This obligation does not apply to cooperative banks whose initial capital is at least the equivalent of EUR 5,000,000. Regulations concerning an affiliated cooperative bank and a cooperative bank operating outside the association should be distinguished. In the case of affiliated banks, a lower initial capital is sufficient.

The Act of December 7 2000 on the Cooperation of Cooperative Banks, their Association and Affiliating Banks states that a cooperative bank with an initial capital higher than the equivalent of EUR 1,000,000, but lower than the equivalent of EUR 5,000,000, may operate in the voivodship where its seat is located and in the poviats in which its outlets perform banking activities. A cooperative bank with an initial capital equivalent to at least EUR 5,000,000 may operate throughout the country. Thus, the scope of a cooperative bank's activity depends on the founding contribution[57].

In May 2014, there were two associations of cooperative banks: Bank Polskiej Spółdzielczości and Spółdzielcza Grupa Bankowa. Each member of a cooperative bank is obliged to have at least one declared and paid-up share. The minimum membership share is specified in the statutes. Granting a loan, cash loan, guarantee or surety may be conditional in the bank's statute on the need to declare and pay by the borrower, person to whom the surety or guarantee is to be granted, at least one share in this bank (Art. 10).

Art. 6 of the Act of December 7 2000 on the Cooperation of Cooperative Banks, their Association and Affiliating Banks states that cooperative banks, having obtained the authorization of the Polish Financial Supervision Authority pursuant to the Banking Law Act,

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Ibidem.

[56] https://www.knf.gov.pl/dla_rynku/procesy_licencyjne/bankowy/banki/formy_dzialalnosci/bank_spoldzielczy, (accessed on: 12.01.2022).

[57] https://www.knf.gov.pl/dla_rynku/procesy_licencyjne/bankowy/banki/formy_dzialalnosci/bank_spoldzielczy, (accessed on: 12.01.2022).

may perform the following banking activities: accepting cash deposits payable on demand or on a specified date and keeping accounts of these contributions; keeping other bank accounts; granting credits; granting and confirming bank guarantees; carrying out bank money settlements; making money loans; granting consumer loans and credits within the meaning of the provisions of a separate act; check and bill of exchange operations; providing payment services and issuing electronic money within the meaning of the Act of 19 August 2011 on payment services, storing items and securities and providing safe deposit boxes.

Conclusion

The above considerations confirmed the development of cooperatives and related legislation in Poland from the nineteenth century to the present day. The first cooperatives founded by Stanisław Staszic were focused on agriculture. In the following years, cooperative banks and other cooperative financial institutions were also established. The development of agricultural cooperatives continued from the Partitions and through the interwar period, when they took over one or more stages related to the agricultural and processing activities of their members, and then in the period after the Second World War they predominantly became cooperatives conducting agricultural activities. Following Poland's accession to the EU, trends in the development of agricultural cooperatives continued in two directions. However, this trend is reversing: cooperatives supporting their members in their agricultural activities and those associated with them, i.e. taking over the various stages of the cooperative's agricultural activity, are becoming increasingly important. Some of them are also involved in the processing of agricultural produce produced by cooperatives. At the same time, there are cooperatives engaged in agricultural manufacturing activity which provide work for members of cooperatives on an agricultural holding, but their importance is much smaller than it was in the period after the Second World War.

The considerations showed that housing cooperatives and cooperative banks are still popular in Poland. The former are found in cities, especially large ones (e.g. Warsaw, Kraków, Poznań). Social cooperatives are also becoming more and more popular in Poland: there are over 2,000 of them in rural areas. Summing up the development of the legislation related to cooperatives, it should be stated that initially such regulations derived from the legal systems of other countries, especially Germany. After Poland regained its independence in 1918, the act on cooperatives was passed, which applied to all cooperatives, regardless of the subject of their activity. After World War II, cooperative legislation also took into account the principles of a socialist country, which had a negative impact on the implementation of the cooperative principle and its popularity in society. The law currently in force is the Act on Cooperatives of 1982. Apart from this legal act, separate legal acts concerning banking, housing, social, and farmers' cooperatives should be noted. The development of branch cooperative industries is influenced by legal regulations related to the specific area of their activity, e.g. banking law, housing and social economy regulations[58].

The current trend in the development of cooperatives is in line with the development of EU policies and global challenges. Social and economic changes, environmental degradation,

[58] T. Skotarczak, M. Śpiewak-Szyjka, *Spółdzielnie mieszkaniowe w nowym otoczeniu społeczno-gospodarczym* w: *Spółdzielnie mieszkaniowe Dylematy funkcjonowania i rozwoju,* Warszawa 2015.

civilization development present new challenges for agriculture. What is needed is a sustainable development of agriculture, combining economic, social and environmental goals (agritourism, renewable energy, commerce, high quality food production)[59]. The evolution of agricultural cooperatives from static units to more dynamic entities expanding their activities goes in line with a multifunctional and sustainable development of agriculture. It is connected with, e.g. the necessity to enhance the competitiveness of agricultural producers, the protection of regional products, social economy, energy, environment protection and processing. All the amendments to the Common Agricultural Policy and EU policies make cooperatives complex legal bodies. The activity of agricultural cooperatives is increasingly being influenced by the regulations connected with the development of agricultural law and food law. Agricultural cooperatives carrying out agricultural activities, such as agricultural production cooperatives and social cooperatives, are obliged to meet many requirements relating to environmental protection and animal welfare. Dairy cooperatives, on the other hand, such as milk collectors and processors, are obliged to operate in accordance with the provisions of the EU milk market and food law. The Europeanisation of regulations affecting the organisation and operation of agricultural cooperatives is connected precisely with the expansive development of agricultural law[60] and food law. The adoption of the laws on agricultural producer groups, social cooperatives, the act on farmers' cooperatives, as well as some amendments to the Cooperative Law Act, which simplify the establishment and operation of cooperatives, the use of EU funds, and giving tax preferences, should be positively assessed. From January 2023, new legal regulations regarding the Common Agricultural Policy will apply. Certain agricultural regulations and aid measures are also targeted at cooperatives. First, mention should be made of agricultural production cooperatives that benefit from the system of direct payments and rural development measures.

In Poland, there are no agricultural producer organizations that meet the requirements set out in the EU regulations entered in the register kept by the Agency for Restructuring and Modernization of Agriculture (except for the organization of fruit and vegetables). The Polish legislator is also trying to encourage agricultural producers to register agricultural producer organizations by changing other legal regulations. In the years 2019-2020, the implementing regulations to the act of 20 April 2004 on the organization of the milk and milk products market, as well as the act of 11 March 2004 on the organization of certain agricultural markets, were amended, with regard to selected issues associated with establishing agricultural producer organizations, including those involved in the production of milk. Agricultural producer organizations will be even more important as an agricultural development instrument after 2022, under the Common Agricultural Policy. Therefore, the best solution is for Polish Farmers to set up farmers' cooperatives, which will then submit applications to the Agency for Restructuring and Modernization of Agriculture for registration as agricultural producer organizations. At the same time, a farmers' cooperative that meets the conditions could apply for entry in the register of energy cooperatives, if it supplies its members with agricultural producers with electricity. The Strategic Plan for the Common Agricultural Policy for 2023-2027 for Poland contains

[59] The United Nations in their document "Transforming our world: the 2030 Agenda for Sustainable Development" say that what is advised to achieve by 2030 is to double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, to implement resilient agricultural practices designed to increase productivity and production, to help maintain ecosystems and to strengthen capacity for adaptation to climate changes. ONZ, *Transforming our world: the 2030 Agenda for Sustainable Development*, https://sdgs.un.org/2030agenda, (accessed on: 2022-11-11).

[60] Tendencies in the development of agricultural law – see R. Budzinowski, *Problemy ogólne prawa rolnego, Przemiany podstaw legislacyjnych i koncepcji doktrynalnych*, Poznań 2008, p. 73 et seq.

measures addressed to producer organizations and groups of agricultural producers, e.g. point 13.2. - Establishment and development of producer organizations and agricultural producer groups[61].

As for cooperative banks, despite many socio-economic transformations, they have been a stable sector of cooperatives since the nineteenth century. The stability of relations with clients, satisfaction of local communities, building social capital and taking into account new developments resulting from the development of banking law and digitization, as well as the needs of clients of natural persons and entrepreneurs, should be emphasized. For cooperative banks, important issues are those associated with Corporate Social Responsibility (CSR) in the cooperative banking sector, which has been implemented for years.

[61] According to the Polish strategic plan, the aim of the program *Establishment and development of producer organizations and agricultural producer groups* is to increase the activity of agricultural producers in joint structures, namely producer organizations and groups of agricultural producers and, respectively, their associations and unions. Certain selection criteria included in the strategic plan, e.g. the entity has the legal form of a cooperative; members of the operator produce under EU or national quality systems; the product or group of products, or the sector for which the entity is recognized, encompasses the following: pork, beef and veal, lamb and goat, hops, flax and hemp, sugar beet, tobacco. Plan Strategiczny dla Wspólnej Polityki Rolnej na lata 2023-2027 [Strategic Plan for the Common Agricultural Policy 2023-2027], p. 32 and next https://www.gov.pl/web/wprpo2020/zatwierdzony-przez-komisje-europejska-plan-strategiczny-dla-wspolnej-polityki-rolnej-na-lata-2023-2027, (accessed on: 2022-11-11).

THE NECESSITY OF HARMONIZATION AS A GUIDING PRINCIPLE: FOCUSING ON COOPERATIVE LEGISLATION IN SOUTH KOREA

***Changsub Shin*[1]**

Abstract

The law, in a broad sense, includes precedents, equity, and custom as well as the will of legislators. From this perspective, the principles and experienses accumulated in the international cooperative movement serve as foundation for creation of a cooperative legal tradition.

In terms of the cooperative legal tradition, harmonization presupposes differences, and allows the disconnection and replacement of a paradigm. As shown in the term "paradigm," harmonization does not mean uniformity between positive laws. Legal theories and concepts function as guiding or interpretation principles in relation to the positive laws through comparison and evaluation of those positive laws. Harmonization means such common legal theory that operates on the principle of interpretation of the cooperative laws in a nation.

This study aims to examine how the concepts of cooperative transactions and member shares works in Korean cooperative legislation. The definition of these two concepts refer to the contents of the Principles of European Cooperative Law (hereinafter referred to as its acronym, PECOL). PECOL focused on the ideal legal identity of cooperatives, drafted by a team of legal scholars, and aimed to describe the common core of European cooperative laws through an incorporated comparative study. My intention was to compare the guiding principles provided by PECOL with Korean cooperative law. Korea has nine cooperative laws including The Framework Act on Cooperatives. The Framework Act on Cooperatives was enacted to function as a general law, all the acts except for the Framework Act on Cooperatives are referred to as a "special cooperative law".

Key words: harmonization, guiding principle, cooperative law, cooperative transactions, member share

Introduction: Formation of the cooperative legal tradition

The existence of national cooperative laws around the world provides the starting point for investigating the cooperative legal tradition. Legal institutions have some independence from morals, norms, and ideas. They retain their own history of origin, formation, and transformation.

Cooperative legal institutions are also relatively independent of the cooperative movement, values and ideas. Despite their relative independence, national cooperative laws around the world are interrelated. The reason for this is, firstly, although national cooperative movements follow their own path of development, they share the history, experience and identity of the international cooperative movement. Secondly, national cooperative movements and identities affect cooperative laws.

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The beginnings of the cooperative movement began in Britain in the 18th and early 19th centuries. The UK enacted the Industry and Provident Societies Act in 1852. This was the world's first cooperative legislation. Here, we can ask one question: Did the history of cooperative laws start at this point?

From the concept of law being a body of rules derived from statutes and court decisions, the answer would be "Yes." However, such a concept is too narrow for any study that seeks to understand the cooperative legal systems of all countries around the world, or to support a study of transnational cooperative legal culture.

This study intends to use the concept of law in a broad sense, in which rules have meaning in the context of institutions, procedures and values. From this broader perspective, the source of law includes not only the will of the lawmaker, but also the reason and conscience of the community and its customs and usages[2]. In this respect, the values and principles expressed by the pioneers of the cooperative movement, as well as the regulations and statutes written by early cooperatives, can be considered as this source.

Reviewing the entire history of cooperative law is beyond the scope of this study, so I will only consider the cooperative legal traditions from 1980 and after. The International Cooperative Alliance (ICA) adopted the Statement on the Co-operative Identity, Values and Principles at its 1995 Centennial Congress and General Assembly in Manchester, England. The starting point of the Statement was Dr. Laidlaw's report to the 1980 Congress in Moscow. Many discussions over the previous 15 years had resulted in the Statement. Subsequently, Cooperatives in Social Development, Resolution No. 56/114 was adopted by the United Nations General Assembly at its 57th Session, December 19, 2001. Principles have also been integrated into the International Labour Organization's Recommendation n. 193/2002, which increases the authoritativeness of those principles, as well as their juridical effectiveness if one holds that said Recommendation is a source of public international law[3].

The ICA issued a paper entitled, "Blueprint for a Cooperative Decade", in celebration of the 2012 United Nations International Year of Cooperatives. This paper is the first to devote a chapter to the legal framework for cooperatives and seeks to ensure supportive legal frameworks for cooperative growth[4]. Around this time, in Europe, the Study Group on European Cooperative Law ("SGECOL") was formed in 2013, which in 2017 issued Principles of European Cooperative Law ("PECOL"), aimed at developing principles for European and international cooperative law.

Even before 1980, there were many studies of cooperative laws around the world, but these trends since 1980 can be seen as serious signs for the appropriate formation of a cooperative legal tradition, as a cooperative legal system was emerging as one of the main strategies of the cooperative movement.

[2] Berman, Harold Joseph (1983), *Law and Revolution, The Impact of the Protestant Reformation on the Western Legal Tradition*, Harvard University Press, Korean Ver. (2013). 60.
[3] Cracogna, D., A. Fici, H. Henrÿ, and EURICSE et al. (2013), *International Handbook of Cooperative Law*, Springer, 5.
[4] See ICA (2013), *Blueprint for a Cooperative Decade*, 4.

Cooperative legal tradition and harmonization

Harmonization is based on differences. The legal tradition does not exclude differences, and can allow radical changes. Rapid progression of real events or legal theories affects the entire legal tradition because the elements that make up the legal tradition are organically related to each other.

As an example of harmonization based on differences, Berman's study of the Western legal tradition will be examined[5]. According to Berman's study, the most distinctive characteristic of the Western legal tradition is legal pluralism, which refers to the coexistence of ecclesiastical law, royal law, feudal law, manorial law, urban law, and mercantile law[6]. The paper identified coexistence and competition within the same community of diverse jurisdictions and diverse legal systems as the driving force behind the development of Western law. Which court has jurisdiction? Which law is applicable? How are the legal differences to be reconciled? Such questions resulting from the complexity of a common legal order contribute to legal sophistication. Since the 11th century, Western law has undergone several drastic paradigms shifts from secular to ecclesiastical law, and from ecclesiastical to secular law again. Berman understood that these revolutionary changes have shaped Western legal tradition.

Berman used the transformation of Western culture to analyze Western legal traditions. Since the 11th century, the Western culture has been rejuvenating itself through selective adoption of parts of three different ancient civilizations—Israel, Greece, and Rome—at different times. The West is not Greece, Rome, and Israel but the people of Western Europe turned to the Greek, Roman, and Hebrew texts for inspiration, and transformed those texts in ways that would have astonished their authors. The emergence of the concept of meta-law and rule of law was the basis of Western legal tradition, out of which grew English law, German law and other legal systems, as well as a variety of competing legal philosophies[7].

From this viewpoint, harmonization doesn't mean eliminating differences. It is also completely different from thrusting uniformity on the cooperative legislation in each country. Harmonization refers to constructing legal concepts and theories beyond the actual laws of each country through the question of how and to what extent differences of each law will be reconciled.

The important thing in harmonization is to find the basis for developing the theory of a cooperative legal system through differences between cooperative laws. This will form the foundation for developing a cooperative legal tradition.

It should be noted that the objective of harmonization isn't limited to actual national cooperative laws. Cooperative movements around the world have shared principles and values. However, there are differences in practice in each country. These differences in practice are the driving force behind enriching values and principles, as the intensity of differences in practice always exceeds the virtual identity of principle. With a broader view, the source of law includes not only the will of the lawmaker but also the reason and the conscience of the community, its customs, and usages. The intensity of differences in the conscience of the community, its customs, and

[5] Berman, supra note 1.
[6] Berman, ibid, 59.
[7] Berman, ibid, 34-39.

usage also exceeds the virtual identity of cooperative law. Due to this transcendence, legal concepts and theories for cooperatives are constantly evolving.

From this perspective, harmonization can be defined as a guiding principle for cooperative law. While the authors of PECOL also rejected the top-down way the European Union enacted the European cooperative law, they wanted their common principles to function as guides[8]. In this study, harmonization is viewed as a guiding principle, which means that common concepts and categories are derived from various cooperative laws and their sources, which are then refined and theorized in consideration of cooperative identity. As an attempt to explore this harmonization, this study will compare some of the concepts of PECOL with the concepts of cooperative laws in Korea.

One step toward establishing a cooperative legal theory

The cooperative movement was born in the early stages of capitalism, and sought to transcend that capitalism. Cooperative movements emerged on a variety of ideas such as liberalism, communism, and socialism. Such ideas commonly sought to prioritize people over profit, pursue social solidarity, and have the will to reform the capitalist system[9].

For this reason, perspectives on cooperatives were classified according to various criteria such as relationship with the capitalist system, or the attributes of cooperative organizations. Regarding the former, cooperatives are classified by whether they represent a movement that seeks to complement or provide an alternative to capitalism. Regarding the attributes of cooperative organizations, cooperatives are classified on whether the emphasis is on attributes as an association or as a company. Additionally, in some cases, the public saw cooperatives as part of a peripheral corporate model, as if they were the exclusive property of certain political parties, political forces, and social groups.

The ICA published the Background Document of the Statement on Cooperative Identity ("Background Document") in 1995. The Background Document reveals the background of the ICA's Statement in 1995 as follows.

First, since the 1970s, the economic environment has been changing, including through globalization and expansion of the influence of investor-centered companies. Second, the end of the socialist experiment gave Eastern European countries the opportunity to revitalize their cooperatives. Third, after World War II, new experiences with cooperative expansion and growth in Asia, Africa and South America have been built upon. This change in the economic and social environment was used as an opportunity to reflect upon the principles of cooperatives, and through this, a new leap forward was attempted.

Meanwhile, the Statement is also a confirmation of differences. Above all, it is to confirm the difference between cooperatives and investor-centered companies. However, it also confirms the difference between cooperatives and associations. By doing so, in 1995, the ICA took a step

[8] See Fajardo, Gemma, Antonio Fici, Hagen Henrÿ, David Hiez, Deolinda Meira, Hans-H. Münknur & Ian Snaith (2017), *The Principles of European Cooperative Laws: Principles, Commentaries and National Reports*, 8-13.
[9] See Jeantet, Tierry (2016*), Economie Sociale - La solidarite au defi de l'efficacte, 3edition*, Direction de l'information legale et administrative. Paris, Korean ver. (2019); 18-19.

further over organizing principles, defining cooperatives and formalizing the values pursued by cooperatives. The reason for emphasizing the difference between cooperative and company is that the former can also be seen as a type of company. Classifying cooperatives as a type of business organization does not reduce their value. The way cooperatives do business is different from the way investor-centered companies do business. Differences in the way cooperatives do business enables cooperatives to become a key part of the pluralistic market.

While suggesting strategies for 2020, the Blueprint emphasizes that cooperatives are different from companies. The Blueprint also points out that cooperatives are excluded from the regular curriculum and education on start-ups. Also, the existing financial, supervisory, and legal infrastructure are all centered on for-profit companies. This environment can strengthen the tendency of people who conduct business as cooperatives to follow the management style or governance structure of investor-owned companies[10]. For this reason, cooperative researchers and practitioners emphasize the establishment of a cooperative legal system that maintains the differentiation from investor-centered companies and supports and protects cooperative identity[11]. The first step toward establishing a cooperative legal theory is to develop the legal foundation of member-centered enterprise distinct from investor-centered companies.

Some concepts of cooperative law

There are many legal issues related to cooperatives, such as those connected to cooperative corporations, the relationship between general and special laws, and the legal definition of cooperatives. It would be outside the realm of this study to deal with all of them, so I will only deal with matters related to cooperative transactions and members' shares.

The definition of these two concepts refer to the concept of PECOL. It is assumed that PECOL is a guiding principle of European cooperative law, and I want to compare the situation with Korean cooperative law. Discovering and comparing the differences between guiding principle and positive law can be the first step toward harmonization.

1) Cooperative transactions

Unlike investor-centered companies, cooperatives are member-centered enterprises above all else. Cooperative members are users of the cooperative enterprise and not just contributors of capital to the cooperative[12]. If we consider that cooperative members are users of the cooperative enterprise, we find some properties that distinguish cooperatives from invertor-centered companies.

First, the purpose of a cooperative is different from that of a for-profit company. User-centered business organizations meet the economic, social, and cultural needs of their members. They don't pursue profit as their primary purpose.

[10] ICA (2013), ibid, 20.
[11] Cracogna et al, ibid, 5.
[12] Fajardo et al, ibid, 38.

Second, cooperatives have emerged as a unique business model that achieves this goal. Cooperatives have advocated the combination of self-help and solidarity as important values since the beginning. In 2015, ICA published Guidance Notes on the Cooperative Principles ("Guidance Notes"). The Background Document and Guidance Notes explain that self-help refers to people striving to carve out their own destiny; solidarity refers to union members and cooperatives combining mutual responsibility while respecting differences. The Guidance Notes explain that the concept of mutual self-help is a combination of self-help and solidarity, and that mutual self-help refers to cooperatives working together to achieve more than the sum of their parts[13].

This combination of self-help and solidarity creates a unique way of doing business for cooperatives. Cooperatives seek to achieve their mutual purpose mainly through transaction with their members for the provision of goods, services or jobs. PECOL give a name "cooperative transactions" to the typical transactions that take place between the cooperative and its members[14]. The fact that corporate law generally restricts transactions between corporations and their shareholders shows the uniqueness of the cooperative business model. The Statement explicitly states the purpose for cooperatives as being to benefit the interests of their members but does not mention how this is to be realized[15]. Therefore, if the definition of a cooperative includes a method for realizing its purpose, it can be modified as follows: A cooperative is an enterprise in which members meet their economic, cultural, and social needs and aspirations through cooperative transactions by the members themselves.

Third, cooperatives have a unique financial structure and follow the principle of disinterest distribution. According to the Guidance Notes (2015; 98), the third principle of cooperatives is related to the economic participation of its members. First, part of the capital they contribute is usually the common property of the cooperative. Second, if there is any member compensation on the capital provided by members as a condition of membership, it is usually quite limited. Third, member benefits should be proportional to their transactions with the cooperative.

The third principle is that members should allocate part of surpluses to indivisible reserves which are the common property of the cooperative, and these reserves should not be distributed to members both while the cooperative exists but also when liquidating. When a cooperative is liquidated, residual property should go to other cooperatives. Allowing distribution of residual assets upon liquidation consequently renders indivisible reserves ineffective.[16] PECOL also suggested a similar view and named it the principle of "disinterested distribution''[17].

2) Members' shares

When an enterprise organizes its internal legal relationship centered on a combination of users, the group of users and the group of corporation contributors coincide. PECOL named this

[13] See ICA (2015), *Guidance Notes to the Cooperative Principles*, 80.
[14] Fajardo et al, ibid, 41.
[15] Cracogna et al, ibid, 23.
[16] ICA (2015), ibid, 99.
[17] Fajardo et al, ibid, 43.

coincidence the principle of identity. Let's look at how these characteristics affect members' shares.[18]

Contributing capital to a cooperative is not the only thing that membership is about. Before contributing capital, applicants for membership must agree to the purpose of the cooperative and meet the required qualifications. After that, the applicants must obtain approval from the cooperative through the prescribed procedure. After joining in this way, members have rights and obligations according to their individual status in relation to the cooperative. The rights and obligations of cooperative members are different from those of company shareholders according to their relevant legal system.

There are usually two dimensions of meaning to a share in a company. First, the share represents shareholder status and forms the basis of shareholder rights and obligations. Second, a share held by shareholders represents a piece of the company's property. Shareholders' share of company property refers to the value that can be returned should the company be dissolved. Therefore, equity shares usually exist only in concept, and appear as a specific amount when a company liquidates[19].

However, cooperative members are obliged to contribute capital in accordance with the law and articles of incorporation, as well as having an obligation to engage in transactions with the cooperative. It is an expression of the principle of identity that members have both an obligation to participate in cooperative transactions and to contribute capital.

Company shareholders hold a share of the company's property as soon as they invest in the company. However, with a cooperative, even if a member contributes capital, the member does not hold any share of the cooperative property proportional to the amount of capital contributed. Additionally, member voting rights and dividend claims are not proportional to the amount of capital contributed either.

In cooperatives, voting rights are based on member equality, and cooperative transactions, not contribution of capital, is the basis for members' shares. In accordance with the third principle, members can receive a surplus in proportion to their usage, while the residual property during liquidation can be distributed only among the reserves determined to be the share of the members. In cooperatives, the contribution of capital is meaningful only as a nominal value. There is no further meaning to holding shares.

Case: Cooperative transactions and members' shares in the Korean cooperative legal system.

From the viewpoint of harmonization, I will examine whether the above two legal concepts consistently permeate the Korean cooperative legal system. Korean cooperative legislation consists of one general law and eight special laws. The names and dates of enactment of each law are shown in the table below.

[18] Fajardo et al, ibid, 267.

[19] Park, Sang-Geun (2007), *Equity Company Legislation*, Gyeongin Munhwasa, 9-16.

<Table 1> Cooperative Laws in Korea[20]

Cooperative Laws	Year Enacted	Authorizing Entity
Agricultural Cooperatives Act	Feb. 14, 1957 Law No.436	Ministry for Food, Agriculture and Fisheries
SME Cooperatives Act	Dec. 27, 1961 Law No.884	Ministry of SMEs and Startups
Fisheries Cooperatives Act	Jan. 20, 1962 Law No.1013	Ministry of Oceans and Fisheries
Tobacco Cooperatives Act	May 29, 1963 Law No.1347	Ministry of Strategy & Finance
The Credit Union Act	Aug. 17, 1972 Law No.2338	Financial Service Commission
Forestry Cooperatives Act	Jan. 4, 1980 Law No.3231	Korea Forest Service
Community Credit Cooperatives Act	Dec. 31, 1980 Law No.3622	Ministry of Interior and Safety
Consumer Cooperatives Act	Feb. 5, 1999 Law No.5743	Fair Trade Commission
Framework Act on Cooperatives	Jan. 26, 2012 Law No.11211	Ministry of Strategy & Finance

1) Relationship between general law and special law

The Framework Act on Cooperatives ("FAC") does not apply to cooperatives established in accordance with other laws (Art. 13 (1)). However, other laws and regulations related to the establishment and fostering of cooperatives must conform to the purpose and principles of the FAC when they are enacted or revised (Art. 13 (2)). With this provision, it can be assumed that

[20] Song Jae-il (2019), *LEGAL FRAMEWORK ANALYSIS: National Report of the Republic of Korea*, The ICA-EU Partnership.

the legislative purpose of the FAC was to present and systematize a comprehensive system and policy in the field of cooperatives.

The legislative purpose of the FAC was to systematize and to harmonize special laws through the analytical function of the framework act.[21] Since each special law has been managed by a different authorized office, it is necessary to systematically establish policies across the organizations in charge of cooperative policies.

However, 10 years after its enactment, the FAC still has been failing to harmonize the special laws, and there has yet to be a comprehensive cooperative development plan between the authorizing entities.

For this reason, the FAC's status as a general law is not well established.

The reason such fragmentation of the legislation came to be is because of its historical background. Kim (2022, 316) states that the Korean National Assembly did not consider the identity of cooperatives until South Korea's democratization in 1987. Cooperatives were simply treated as subordinate to the state. However, as they developed in close alignment with government policy, they received a variety of institutional benefits.

The people's autonomous cooperative movement also grew little by little. The credit union movement began growing in the 1970s, while the consumer cooperative movement grew exponentially in the 2000s. The people's voluntary cooperative movement had little contact or solidarity with cooperatives that had grown under government policy. The FAC was enacted at the request of the people's voluntary cooperative movement, with contact and solidarity growing little by little since its enactment.

2) Cooperative transactions

The concept of cooperative transactions is not organized as a separate clause in the legal text but is partially indicated in provisions and precedents on topics such as membership qualification, expulsion, and business.

Above all, cooperative transactions are related to membership. According to Hansmann (1996; 35), "users" refer to consumers who purchase products produced by companies, producers who supply raw materials/ingredients to companies, workers who supply labor, and investors who supply capital.

Cooperative transactions are a specific form of transaction varying by type of cooperative, and not all transactions between members and cooperative are recognized as cooperative transactions. For example, in a consumer cooperative, the act of a member purchasing goods from the cooperative is a cooperative transaction, but it is not a cooperative transaction for a member to be employed by the consumer cooperative. In other words, cooperative transactions

[21] Lee, Sang-Don (2001), Integration of health and medical care through the law: Critiques and prospects for systematic planning of the Framework Act on Health and Medical Care, *Korean Law*, No. 36. 119.

are limited to actions that satisfy the economic, social, and cultural needs that members aim at when they establish a cooperative. This causes the following legal considerations.

First, as cooperatives modernized, different types of members, not users, began to appear. In Korea, volunteer and investor members are examples. When looking at such non-cooperator members, it is necessary to determine how to stipulate their voting rights and institutional participation. There are no appropriate regulations yet in Korea, so non-cooperator members can participate equally with cooperator members. There have been cases in which entities, such as boards of directors, were composed mainly of non-cooperator members.

Second, this situation is known as indirect reciprocity. In the modern industrial ecosystem, cooperatives conduct projects by forming a variety of associations, subsidiaries, joint ventures etc. along the supply chain. Here, the relationship between members and cooperative also becomes complicated. For example, when a worker cooperative establishes a subsidiary, if the worker cooperative sends its member to manage the subsidiary, the member may have to leave the cooperative even though he or she does not wish to. In Korea, there are no regulations on subsidiaries or business groups in the Framework Act on Cooperatives nor the Consumer Cooperatives Act. Only the Agricultural Cooperatives Act has regulations on such subsidiaries. Each of the nine cooperatives is treated as a separate corporation, and they are not legally treated as equivalent cooperatives.

Third, cooperative transactions are a right and obligation of members. Usually, obligations are stipulated in law and articles of incorporation, but in Korea, this is not the case. However, the articles of incorporation do stipulate that one reason for expulsion is a failure to transact with the cooperative within the period of time prescribed.

In cooperatives, contribution of capital is a means to conduct economic activities, while cooperative transactions are essential to realizing the cooperative's purpose of meeting member needs. The contribution of capital is not a standard for members' rights and obligations. In cooperatives, the economic source of the right to self-profit accrues from cooperative transactions, while member rights are based on the principle of human equality.

As such, for cooperatives, it is necessary to specify the obligation to transact with the cooperative considering that equity shares are given for cooperative transactions, not for contribution of capital. However, note that the obligation to transact with the cooperative does not apply to non-cooperator members. How much obligation exists to engage in cooperative transactions is the question, which I think a minimum is best determined by the members themselves in the articles of incorporation.

Since members establish or join cooperatives to use them, cooperative transactions are also a member right, albeit an abstract one. If a member specifically requests a contract for business use, it will become reality (Park, Jang, and Lee, 2012; 95). In terms of the right to transact with the cooperative, it can be interpreted that the cooperative is obligated to comply with the transaction unless there are special circumstances otherwise. However, cooperatives may not be able to meet all members' transaction demands. There may be physical restrictions on the workplace, insufficient stock, or sluggish sales that prevent meeting this demand. Therefore, the

principle of fair treatment needs to exist so that there is no unjustified discrimination against members in transactions with cooperatives[22].

Fourth, it is necessary to examine how cooperative transactions relate to other laws. For example, in consumer cooperatives and producer cooperatives, cooperative transactions are classified as commercial activities, while in worker cooperatives, cooperative transactions have a relationship with labor law. In Korea, at present, relationships with other laws are not explicitly written in the law. Court decisions for this are rare. However, there are theories and a few court decisions that the cooperative transactions in consumer cooperatives and producers' cooperatives are not classified as commercial activities because they are not for profit. There are few theories or precedents for workers' cooperatives. Regarding tax law, it is unclear whether the principle of distribution of cooperative surplus has been legally accepted. However, eight special laws have a separate taxation system for non-profit corporations under tax law, so tax regulations that apply to for-profit corporations are not applied. However, under the Framework Act on Cooperatives, tax law applied to for-profit corporations also applies to cooperatives, excluding social cooperatives. Additionally, the application of these tax laws is inversely problematic as social and other cooperatives are separate corporations under the Framework Act on Cooperatives.

3) Members' shares

The function of the contribution of capital in cooperatives is quite limited, and the members' shares in cooperatives is not a conceptual share of the entire property of the cooperative, but rather, represent sum of the nominal value contribution of the members and the divisible reserves. In Korea's cooperative legislation, the law that best applies these principles is the Agricultural Cooperatives Act, although, since it is written in the articles of incorporation rather than in the law itself, it appears indirectly.

According to the Agricultural Cooperatives Act, the residual property of a dissolved cooperative is to be disposed of as prescribed by the articles of incorporation, unless prescribed otherwise by law (Art. 86). The agricultural cooperative's standard articles of incorporation are as follows.

In principle, if there are any residual assets after repaying the debt, it shall be distributed to the cooperative members according to the ratio of equity shares calculated according to Article 28, and other property shall be transferred to the cooperative prescribed by the General Assembly. Article 28 stipulates the scope of equity shares of cooperative members in three institutional means; capital contribution, rotating share, and business reserves.

Amount of contributed capital is included in the scope of equity shares. The business reserves are one of the voluntary reserves. When there is a surplus remaining after accumulating legal reserves and carryover for education and support projects, at least 20/100 of remained surplus can be put into the business reserves.

By confirming the scope of cooperative members' equity shares, other assets are treated as indivisible reserves. A court decision[23] determined that it was not against the law to set the scope

[22] Fajardo et al, ibid, 40.
[23] Supreme Court, Dec. 24, 1974. Case No. 73Da1653.

of equity shares in this way by the articles of incorporation, as long as the law delegates matters related to the scope of equity shares to the articles of incorporation.

However, the Agricultural Cooperatives Act does not distinguish between the surplus generated from transactions with cooperative members and profits from transactions with non-members when determining the scope of equity shares. Additionally, in PECOL, if during the general meeting the membership decides to set aside the current surplus in divisible reserves, the share ratio shall be calculated annually in proportion to the usage of each member[24]. This is because the membership composition of cooperatives changes every year. In Korea, only the SME Cooperatives Act states in its articles of incorporation that a share ledger is to be kept for each member.

The provisions related to the shares of cooperative members in the nine cooperative laws are as follows. Looking at these, the Agricultural Cooperatives Act is the only law that determines the scope of union member shares in the law or articles of incorporation and prohibits the distribution of residual property, excluding members' shares.

The Fisheries Cooperatives Act, the Credit Cooperatives Act, the SME Cooperatives Act, and the Forest Cooperatives Act allow the distribution of residual property to members according to their stake ratio. The Consumer Cooperatives Act and the Framework Act on Cooperatives allow the distribution of residual property to members at the ratio of capital contributed, which is contrary to the principle of cooperatives. According to the Guidance Notes, distributing residual property violates the formation of individual reserves in the third principle.

<Table 2> Equity Share-related Regulations in Korea's Cooperative Legislation

	Right to Request Refund of Equity Shares	Disposal of Residual Property
Agricultural Cooperatives Act	Refund as prescribed by the articles of incorporation from the fiscal year following the fiscal year at the time of withdrawal. Articles 13 and 28 of the Standard Articles of Incorporation stipulate in detail the calculation of shares. The claims are extinguished if not exercised for two years.	Disposition as prescribed by the articles of incorporation other than those prescribed by law. In the articles of incorporation, property belongs to the Central Committee except for member shares.
Fisheries Cooperatives Act	Refund as prescribed by the articles of incorporation from the fiscal year following the fiscal year at the time of withdrawal.	Disposition as prescribed by the articles of incorporation other than those prescribed by law.

[24] Fajardo et al, ibid, 83-87.

	Articles 27 and 30 of the Standard Articles of Incorporation stipulate in detail the calculation of shares. The claims are extinguished if not exercised for two years.	According to the articles of incorporation, distribution to members is based on the share ratio
The Credit Union Act	Refund the investment, deposit, and installment savings immediately upon withdrawal. Article 27 of the Standard Articles of Incorporation provides for calculation of shares.	Dispositions as prescribed by the articles of incorporation According to the articles of incorporation, the share ratio calculated during the general meeting is distributed to the members.
SME Cooperatives Act	Refund as prescribed by the articles of incorporation in relation to the property of the cooperative at the end of the business year prior to the year during which the withdrawal occurs. Article 18 of the Standard Articles of Incorporations stipulates the scope of shares. Claims will lapse if not exercised for two years.	Disposition as prescribed by the articles of incorporation other than those prescribed by law. According to the articles of incorporation, distribution to members is based on the share ratio
Tobacco Cooperatives Act	No provision for equity refunds	General meeting to decide on a disposition plan
Forestry Cooperatives Act	Refund as prescribed by the articles of incorporation from the fiscal year following the fiscal year at the time of withdrawal. Articles 20 and 33 of the Standard Articles of Incorporation stipulate in detail the calculation of shares. The claims are extinguished if not exercised for two years.	Dispositions as prescribed by the articles of incorporation According to the articles of incorporation, the share ratio calculated during the general meeting is distributed to the members.
Community Credit Cooperatives	Immediate withdrawal can be requested for deposits and refunds.	Dispositions as prescribed by the articles of incorporation

Act	Investment is refunded as prescribed by the articles of incorporation from the fiscal year following the fiscal year at the time of withdrawal.	According to the articles of incorporation, the share ratio calculated during the general meeting is distributed to the members.
Consumer Cooperatives Act	Refund as prescribed by the articles of incorporation, which does not mention the timing. Article 16 of the Standard Articles of Incorporation stipulates the amount equivalent to contribution unit. The right to claim is extinguished unless exercised for two years.	The law stipulates that investments should be distributed to members according to the ratio of their investment. However, cooperatives engaged in health and medical services cannot distribute investments among their members.
Cooperatives under FAC	Request for a refund of the shares as prescribed by the articles of incorporation from the fiscal year following the fiscal year at the time of withdrawal. Article 20 of the Standard Articles of Incorporation stipulates the scope of shares. The right to claim is extinguished unless exercised within two years.	Disposition as prescribed by the articles of incorporation According to the articles of incorporation, it is distributed to the union members according to the ratio of investment or attributed to other non-profit corporations without distribution.
Social cooperatives under FAC	It is stated as a right to claim a refund of the contribution unit, not a right to claim a refund of shares.	The distribution of residual property to cooperative members is prohibited. Residual property belongs to higher social cooperatives, social cooperatives for similar purposes, non-profit corporations, and the national treasury.

Conclusion

The law, in a broad sense, includes precedents, equity, and custom as well as the will of legislators. From this perspective, the principles and examples developed by the international cooperative movement serve as foundation for creation of a cooperative legal tradition, and from which legal principles and concepts can be extracted.

In terms of the cooperative legal tradition, harmonization presupposes differences, and allows the disconnection and replacement of a paradigm. As shown in the term “paradigm,” harmonization

does not mean uniformity between positive laws. Legal theories and concepts function as guiding or interpretation principles in relation to the positive laws through comparison and evaluation of those positive laws. Harmonization means such common legal theory that operates on the principle of interpretation of the cooperative laws in a nation.

In this study, I attempted to examine how the concepts of cooperative transactions and member shares appear in Korean cooperative legislation, and draw out implications. In Korea, the general law on cooperatives does not function as a guiding principle over the related special laws, leading to one cooperative being treated as 10 separate corporations.

Several factors should be considered in relation to cooperative transactions. Additionally, the difference in shares between cooperatives and companies is not clearly recognized in law and in the field. In the future, research is needed on these matters both in the field and in academia.

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THE HARMONIZATION OF COOPERATIVE LAW IN THE MERCOSUR AND THE PRINCIPLE OF COOPERATION AMONG COOPERATIVES

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Abstract

The present work aims to analyze how the effective harmonization of laws within the scope of Mercosur can favor cooperation among cooperatives inserted in such economic bloc, promoting, in the first instance, the development of cooperativism, so that it becomes possible to face the challenges to come and, as a consequence, enabling regional growth. To this end, the Mercosur recommendations on this matter and its correlation with the Cooperative Laws, among its member countries, will be analyzed. Furthermore, it is also intended to address the extent to which the insertion of rules of Community Law in local laws and regulations can create a friendly environment in favor of intercooperation, especially due to new technological advances. On the other hand, the possible obstacles to the harmonization of laws to take place will be also analyzed, having in mind that Mercosur was established in 1991, the Statute of MERCOSUR Cooperatives has existed for 13 years and, yet, none of those main principles set forth in the Statute were effectively fulfilled.

Key words: Legal Harmonization - Mercosur - Cooperatives - Cooperative principles

Summary

Introduction

With globalization and the creation of economic blocs to improve global trades, the harmonization of laws is a subject to be considered to reduce the differences among legal systems in terms to reach an attractive field for transnational trade.

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The harmonization of laws could occur in distinct ways and, according to each economic bloc and to each national legal system, this integration of rules may or may not improve the establishment of a set of harmonic rules between the state-parties.

When analyzing The Southern Common Market (Mercosur), it is possible to see that despite harmonization being a compromise the state-parties assumed when they joined the bloc, the harmonization issue within the scope of the Mercosur is imprecise and restrictive because it does not determine how the harmonization will be done and which body will be responsible for that. In addition, the decisions of the Mercosur Council do not have direct effect on the legal systems of the state-parties.

This limitation that obliges the states-parties to incorporate the Mercosur laws into their legal systems according to their internal rules in order for them to be effective is a barrier to achieving the intended integration.

Thus, for the rules of cooperative law to be applied equally by all Mercosur countries, it is necessary to overcome the existing barriers for the harmonization of the laws of the bloc as a whole.

If this obstacle is overcome, the observance of the sixth principle of cooperativism, that of cooperation among cooperatives, will be fundamental to strengthen and empower cooperatives at a regional level, providing products and services in a better way than the commercial companies.

The harmonization of laws

After the 2nd World War, international trade developed very fast and the borders trade gradually were no longer an issue for international transactions, which culminated with the creation of economic blocs (Fernandes, 2001).

The globalization of the world economy is a continuous evolution process that has existed since the birth of international commerce and international investments, which was available especially with regional economic integrations (European Union, NAFTA, MERCOSUR, for example), with the implementation of laws for global trade by the World Trade Organization (WTO) and with the boom of the Asiatic economies (Tang, 1997).

According to Emanuela Carbonara and Francesco Parisi (2007), when economies are characterized by closed legal markets, the harmonization of laws is considered unnecessary. However, the globalization phenomenon made the harmonization of legal regimes a reality to reduce the differences among legal systems in terms to reach a leveled playing field for transnational commerce.

The harmonization of legal regimes could occur in three different ways. The first one is called legal transplantation and could be seen when national legal systems introduce statements and principles that belong to other legal systems or even customes that are widely accepted, reducing or potentially eliminating the differences between legal systems through the unilateral non-cooperative effort of one system. There are two ways of harmonization that occur when legal systems can bilaterally or multilaterally coordinate their efforts by harmonizing or unifying their

national systems, resulting in a cooperative attempt of the countries involved, the legal harmonization and the legal unification (Carbonara, & Parisi, 2007).

When legal harmonization happens, "nations agree on a set of objectives and targets and let each nation amend their internal law to fulfill the chosen objectives", meanwhile when legal unification is observed, "nations agree to replace national rules and adopt a unified set of rules chosen at the interstate level" (Carbonara, & Parisi, 2007, p. 3). These two types of harmonization constitute the homogeneous law that is a consequence of the economic integration (Andrade, 2010).

Vera Lúcia Viegas (2004) writes that the unification in a strict sense happens when there is an insertion of rules of same content in two or more national legal systems, taken from a model established in conventions, in international treaties or in model laws, while harmonization (considered unification in a non-strict sense) refers to the procedures that are supposed to modify the legislation of many States without reaching a complete unification, however, they tend to reach an essential affinity among many legislations.

The objective of harmonization is to eliminate or reduce disparities between the dispositions of domestic law, insofar as the functioning of a common market requires and to establish a set of harmonic rules between the state-parties based on Integration Law (Basso, 2000; Saraiva, & Toffano, 2014).

To clarify, the Integration Law is a new branch of law, an offshoot of International Law, and has the function of regulating community international organizations, in principle with supranational bodies, creating a uniform legal system with certain characteristics such as: (a) the possibility of visualizing a certain degree of institutionalization (an existence of a own structure that cannot be confused with the institutional structure of each state-party; (b) the existence of own juridical sources, different from the inherent sources of the national legal systems, as a consequence of the own structure; and (c) the existence of one interrelationship between the community legal system and the juridical structure of each state-party. This means, to exist a community legal system, this system must create its own juridical relations with other national legal systems (Viegas, 2004).

There are two distinct theses about harmonization in the community law, the European and the Legal Nationalism. The first one, adopted by the European Union, consists in the primacy of economic bloc rules over national rules, applying the law according to the specialty criteria, which does not revoke the internal law, but makes the community law prevail. On the other hand, the second thesis does not give primacy to the community over national sovereignty. According to this thesis, the rules of community law have the same rank as national laws (Schlindwein, 2016). It applies within the scope of Mercosur.

Mercosur and the harmonization of laws

The Mercosur was born on March 26th, 1991, with the signing of the Treaty of Asunción, initially established by Argentina, Brazil, Paraguay and Uruguay and most recently joined by Venezuela, in 2006 (suspended from all rights and obligations as a state-party due to the

breakdown of its democratic order) and Bolivia, in 2015 (still complying with the accession procedure).

It is a regional integration process that aims to promote a common space that generates business and investment opportunities through the competitive integration of national economies into the international market. It is the largest regional integration initiative in Latin America and emerged in the context of re-democratization and rapprochement between countries in the region at the end of 1980s, being a fundamental instrument of cooperation, development, peace and stability promotion in South America (Ministério das Relações Exteriores, 2021).

According to the Treaty of Asunción, the state-parties are compromised with the harmonization of their laws in order to strengthen the process of integration in pertinent areas, which are the subjects that are not included in the constitutive treaties and could become obstacles to the formation and the consolidation of the common market.

Maristela Basso (2000) writes that the Treaty of Asunción deals with the harmonization issue in an imprecise and restrictive way because it does not determine how the harmonization will be done and which body will be responsible for that, as well as referring to legislation in pertinent areas as those that are not included in the Treaty.

After the signing of the Treaty of Asunción, there was a period of transition which lasted from 1991 until the advent of the Protocol of Ouro Preto, in 1994. During this period, the Common Market Council, the Common Market Group and the Joint Parliamentary Committee were created. The Common Market Council was the competent body to study how the harmonization of the laws of the state-parties should occur and to propose rules of community law (Basso, 2000).

With the Protocol of Ouro Preto, the Trade Commission of Mercosur, the Economic-Social Consultative Forum and the Mercosur Administrative Secretariat were created to work with the other commissions created during the transition period. It is important to highlight that none of the six Mercosur bodies have a supranational character because they have an intergovernmental character and the harmonization issue is restricted to the Common Market Council decisions and the conventions among the state-parties (Saraiva, & Toffano, 2014).

This obligation of the harmonization of laws within the Mercosur differs from the methods adopted in international law, which are through a uniform law and through international conventions. That is why the decisions of the Mercosur Council do not have direct effect on the legal systems of the state-parties. They only bind them to introduce harmonization norms in their legal systems through the normative hierarchy or the delimitation of the subject (Basso, 2000; Saraiva, & Toffano, 2014).

The Mercosur rules must be incorporated into the state-parties' legal systems to establish full rights and obligations in each legal system which becomes a barrier to achieving the intended integration, given the legal uncertainty and instability that it generates when there is no uniform interpretation and application of the rules, causing a lack of external reliability due to the effective risk to the *pacta sunt servanda*, a basic principle of international law. Furthermore, the

treaties are submitted to the principle of *lex posterior derogat priori*, and any legal alteration may lead to chronic non-compliance with the commitments assumed (Saraiva, & Toffano, 2014).

Beyond the mentioned barriers, the constitutional issue of each member country must be observed when it comes to the question of harmonization. Without the provision of a supranational juridical order that takes over part of national sovereignty to facilitate the adoption of the treaties, it will be hard to achieve the Mercosur integration, since it is a relevant barrier. Nowadays, around 50% of Mercosur norms are not incorporated into the internal legal systems of the member states (Saraiva, & Toffano, 2014).

For this reason, a uniform common law among the southern countries must have an immediate application and a supremacy over the national rights, as it is seen in the European Union, mainly because it is an integration law and fundamental to the protection of economic rights, promoting, this way, the objective of regional integration.

The harmonization of cooperative law within Mercosur

According to Henrÿ (2018), the harmonization of the cooperative law must observe the interpretation of the cooperative definition, values and principles and the elaboration of cooperative legal principles, aiming to inform legislators. This is important because clarifying how the values and the principles can fit the existing legal systems is more successful than developing cooperative legal principles specifically for legal systems.

Henrÿ (2021a) writes that there are two different trends in the evolution of cooperative law that can generate the harmonization of laws or principles at the same movement. The first one can be observed across national borders, and the second one happens when national and regional legislations are harmonized materially mentioning the cooperative principles without specifying if they are the ones that are referred in the 1995 ICA Declaration on Cooperative Identity, in the 2001 UN Guidelines or the 2002 ILO Recommendation n.º 193. That is why the harmonization of cooperative law is so complex.

Currently, some of the relevant texts for public international cooperative law are the 1995 International Cooperative Alliance Declaration on Cooperative Identity (that mentions the cooperative principles, which are the guidelines for the practical application of the values in cooperatives), the 2001 United Nations Guidelines (that aims to create a supportive environment for the development of cooperatives), the 2002 International Labor Organization Recommendation n.º 193 (that aims to promote cooperatives) on an international level and the 2009 International Cooperative Alliance in Americas Framework Law Project for Latin American Cooperatives (that aims to be a model for legislators from the different Latin American countries) on an regional level.

Despite the existence of these norms, their regional harmonization could occur differently, more precisely in four distinct categories: a) the regional laws that will be applicable directly to many States; b) the regional laws that will be conditioned by a change in national law; c) the regional laws governing the cross-border cooperatives incompletely, applicable directly or after transformation; and d) the regional laws in progress (Henrÿ, 2021a).

Regarding the Cooperative Law applicable to Mercosur, the Framework Law Project for Latin American Cooperatives falls into the second category, meanwhile, the 2009 Statute of MERCOSUR Cooperatives (Norm 1/2009), converted into the Decree CMC n.º 54/2015 (Cooperatives of MERCOSUR) falls into the third.

Although the Framework Law Project was adopted by a non-governmental organization (the American branch of the ICA), its legal value is verified by the fact that the parliaments of the regions covered have endorsed the law without major changes through their delegates in the Latin American parliament to become a general orientation framework about cooperatives and its fundamental contents to be adapted by each Latin American country (Henrÿ, 2021b; Cracogna, 2013).

The Project was created as a guidance document that influenced the laws of many countries in Latin America and was relevant to the progress of the regional cooperative law, despite it was not emanated by government sources or from integration agencies. According to the ICA, "it is structured and drafted in an accessible manner and susceptical [sic] of being adapted to the needs of each country, on a solid doctrinal and legal basis. Shortly after its approval it began to gain influence in the laws of cooperatives that were sanctioned in different countries, which is evident both in the adoption of different institutes and in the reception of concepts and provisions" (ICA, 2021).

The Framework Law Project was first released on 1988, however, twenty years later, an update was necessary and the new version was approved in July 2008 by Cooperatives of the Americas, taking into consideration the Declaration on Cooperative Identity approved by the 1995 ICA Congress, the guidelines for the creation of a favorable environment for the development of cooperatives, sanctioned by the United Nations in 2001 and the ILO Recommendation n.º.193 on the promotion of cooperatives in 2002. After that, the Latin American Parliament approved the Project in 2012 and emanated recommendations to the legislative bodies of the sub-regions, to guide and influence the cooperative subject (ICA, 2021).

The 2009 Statute of MERCOSUR Cooperatives (Draft Standard 1/2009), converted into the Decree CMC n.º 54/2015 (Cooperatives of MERCOSUR), on the other hand, creates the possibility to constitute transnational cooperatives (cooperative entities of MERCOSUR) in the bloc context, according to the characteristics and modalities of the legislation without changing the cooperative spirit and scope proposed, so these entities could contribute to integration, falling into the third category of regional harmonization[4].

However, the Statute of MERCOSUR Cooperatives will only be valid and mandatory within member states when integrated into the national legal system. At the moment, the draft standard is currently under review by part of the member states – Uruguay and Brazil has already internalized the Decree as the Law n.º 18.723/2015 and the Order of the Ministry of Agriculture, Livestock an Supply n.º 1.395/2017, respectively.

[4] In fact, the Statute of the Mercosur Cooperatives, unlike the Statute of the European Cooperative Society (EU Regulation 1435/2003), contains virtually no regulatory provisions for the organization and operation of cooperatives, but essentially regulates the establishment of transnational cooperatives within the sub-regional integration area. It establishes the collections that such cooperatives must make for their constitution and determines that they will be governed by the rules of the cooperative legislation of the country of their establishment and may be made up of associates from two or more countries or by cooperatives from two or more countries wishing to form a higher-grade entity (ICA, 2021, p. 6).

This happens because regardless the Statute of MERCOSUR Cooperatives was approved by the Mercosur Parliament in 2009 as a community norm, the Treaty of Asunción does not allow any of its bodies to have the powers to issue supranational laws. Due to this impossibility, the norms produced by the Mercosur bodies must be internalized in an identical way in the national legislation of the member states, through decisions of the respective national parliaments (ICA, 2021; Arboleya, 2009).

Thus, what is noticeable is the existence of barriers that prevent full harmonization of cooperative legislation within the economic bloc.

The principle of cooperation among cooperatives

According to the International Cooperative Alliance (ICA), the sixth principle states that cooperatives serve their members most effectively and strengthen the cooperative movement by working together through local, national, regional and international structures.

This principle is also known as Intercooperation and seeks the freedom of cooperatives, specially from governmental interference, when they establish alliances, mergers and joint-ventures among them to achieve their full potential, because those societies can only maximize their impact with the collaboration of one another. In addition, global cooperatives and organizations are needed to promote the movement into the public sphere (MacPherson, 1996).

The intercooperation can be seen both horizontally and vertically according to the subjects of the relationships, types or economic sector, and may be divided into horizontal unisectoral intercooperation, vertical unisectoral intercooperation, horizontal multi-sector intercooperation and vertical multisector intercooperation.

The horizontal unisectoral intercooperation is the simplest level of intercooperation and occurs when two cooperatives from the same sector establish associative bonds with each other, usually at a local level. Meanwhile, vertical unisectoral intercooperation occurs when a union or federation of cooperatives, at a regional level, receive intercooperation demands from their associates (Leite, 1982).

Dante Cracogna (2016) affirms that vertical integration is the most complex way of integration when creating a new entity that leaves the singular cooperatives that constituted it subsisting and autonomous, being, therefore, an entity totally distinct from its members.

To João Salazar Leite (1982), the vertical intercooperation implies a balanced and harmonic development of all entities involved, because the higher-level cooperatives act on behalf of the interests of the filiated cooperatives, helping them to imbue the cooperation philosophy.

It is also worth noting that when the horizontal or the vertical intercooperation occurs multisectorial way, a high cooperative spirit of conscience is revealed when realizing that other cooperative branches share the same ideal, reaching an excellent level of cooperation that will strengthen the cooperative sector as a whole (Leite, 1982).

Deolinda Meira (2021) explains that in addition to the aforementioned division, intercooperation can be divided into two other distinct criteria: a) the formal and informal intercooperation; and b) the representative intercooperation and the economic intercooperation.

For her, the formal intercooperation resides in the integration of cooperatives of a higher degree or in the association of cooperatives with each other or with other legal entity, which can be transformed into another legal person. Informal intercooperation, on the other hand, is a set of contractual bonds that represents an economic collaboration or other type, maintaining the autonomy and personality of the contracting cooperative (Meira, 2021).

The representative intercooperation, also known as socio-political, is seen when there is an association of cooperatives with common objectives and problems in collaboration structures, such as unions, federations or confederations, to give external visibility and to represent those institutions at representative forums in order to defend their interests. Economic intercooperation, in turn, refers to the business linkage process and covers a variety of models, resembling the phenomenon of concentration that occurs in commercial companies (Meira, 2021).

As seen, all the criteria of cooperation among cooperatives seek to strengthen and empower cooperativism, so that they can reach an ever-increasing public and promote the values on which the activity carried out is based.

Conclusions

Considering that cooperatives are based on the alliance of efforts to increase productive and defensive efficiency, as well as to reduce expenses, in addition to aiming at the improvement of production and better use of work (Amaral, 1938) and that the harmonization of laws is essential for integration and development of common markets, some conclusions could be reached about the harmonization of cooperative law.

As a solid common market allows the improvement of the regional economy, the harmonization of cooperative legislation within Mercosur is essential to empower and to strengthen the regional cooperatives, especially in the post-pandemic scenario, which will be easier and decisive with the practice of the sixth cooperative principle. The reason is that the exercise of the sixth principle can help cooperatives become stronger and bigger and, with that, its performance can expand to a regional level.

Acting regionally, Mercosur cooperatives can compete in the Mercosur market with multinational and other capitalist companies, which will allow population’s wider access to products and services at fair prices, the regional economy to balance itself in a shorter period of time and the increase of job offer, employing those who lost their jobs as a pandemic consequence.

And for that, the harmonization of cooperative law within the scope of Mercosur must have a supranational characteristic, because that is an essential requirement for the full functioning of the economic bloc.

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LAW, LEGISLATION, COOPERATION: TOWARDS A GENERAL THEORY OF COOPERATION

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Abstract

This contribution attempts to respond to Antonio Fici's call for increased dialogue between law and economics on the topic of cooperatives. Concretely, it seeks to contribute two things: firstly, to ask what a *general theory* of cooperation might look like and secondly, to outline a framework for *cooperative economics.* It does this by attempting to embed *democracy* in an economic viewpoint, via the notion of a *relational* or *cooperative rent* and discovers that the presently dominant neoclassical model is not in a position to facilitate such a translation. It will be argued that the theory of *legal imputation* can serve as a benchmark for rendering organizational decisions respective of stakeholder status. Lastly, drawing especially on work by the German legal historian Otto von Gierke, it outlines the role of a synthetic "social law" that seeks to embed individuals within a collective, connecting these ideas with contemporary discourse on complexity and cybernetics.

Introduction

Cooperative enterprise has existed for several centuries[2]. While the first "modern" cooperative enterprise is argued to have been founded in 1844, similar efforts have been developed over the centuries. At the same time, thinkers like Pyotr Kropotkin documented untold cases of human, animal and plant life cooperating to meet needs and even wrote a (posthumously published) book on ethics which discussed the possibility of a cooperative ethic evolving[3]. Many of the examples Kropotkin documents existed over long periods of time and entailed a large degree of autonomy on the part of the individuals engaged in cooperation. Later authors like E.O. Wilson followed Kropotkin's innovation and developed entire disciplines, like *sociobiology*, to account for the interactions between genes and culture in producing cooperative behavior, an issue that already concerned Charles Darwin[4]. In subsequent decades, these findings were only reinforced[5].

One promising development in recent decades has been the resurgence of the field of *cooperative law*, thanks in part to the work of individuals like Hans-Hermann Münkner, Hagen Henrÿ and others[6]. The success of academics and multilateral institutions like the International Labor Organization (ILO), International Cooperative Alliance (ICA) and United Nations (UN) in spearheading a revival in cooperative law at numerous international law schools and within policy-making circles should serve as a template for introducing a cooperative logic into other disciplines. The fact remains, however, that, not only has there been less success in developing similar paradigms in other disciplines, like economics. Moreover, most social sciences have been

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[2]Cf. Patmore, G. and Balnave, N. (2018). *A global history of co-operative business.* Routledge.
[3]Kropotkin, K. (2021). *Ethics: Origins and development*. Black Rose Books Ltd.
[4]Nowak, M. A., Tarnita, C. E., and Wilson, E. O. (2010). The evolution of eusociality. *Nature*, 466(7310):1057–1062.
[5] Axelrod, R. and Hamilton, W. D. (1981). The evolution of cooperation. S*cience*, 211(4489):1390–1396.
[6] cf. Fici, A., Cracogna, D., and Henry, H. (2013). I*nternational Handbook of Cooperative Law*. Springer-Verlag.

slower to take up either 1) notions of an evolutionary cooperative logic generally, or 2) to develop curricula or paradigms comparable with the still developing corpus of cooperative law. The result is an often truncated view of the topic of cooperation, which is frequently relegated a second-class status in the literature, behind competition[7].

This article therefore hopes to fill this gap by attempting to take lessons from the success of cooperative lawyers in carving out an intellectual space for themselves and their work in order to develop a formal epistemic framework for analyzing, understanding and *contextualizing* cooperation more generally, i.e., for outlining a general theory of cooperation. Secondly, the contribution attempts to sketch out, in anticipation of certain current developments, what a *cooperative economics* would look like, in particular.

The structure of this contribution is as follows.

The article begins by first crystallizing lessons derived from Fici's reading of cooperative law to attempt to derive necessary building blocks of a general theory of cooperation. Completing such a general theory will necessarily be an interdisciplinary endeavor, whose full exposition will necessarily require more space than the present contribution.

Following on and extrapolating from this preliminary exposition, I make some conceptual suggestions as to what a suitable *cooperative economics* framework would look like. This towards the goal of facilitating a respective curriculum on such topics. In particular, I will argue that the notion at the root of much economic reasoning, the principal-agent theory, is in many cases incorrectly applied to what Aristotle would call "moral civic" relations. In keeping with the relational economics literature and Emile Durkheim's famous rejection of contract theory[8], I will argue that the lens best suited to deal with the problems of the coming century, that of information, knowledge, complexity and uncertainty, is that outlined in the framework of *relational economics*, in particular with an emphasis on long-term cooperation[9].

It is exactly by pointing out the weaknesses of the neoclassical model in its impotence with respect to these domains that I and colleagues hope to find a place for a general theory of cooperation. In particular, the inability of the neoclassical model to deal with power asymmetries and conflict make it entirely unsuitable for deriving avenues and corridors for establishing and maintaining cooperation. Just as Aristotle accused those practicing "moral civic" friendships of "wanting to have it both ways"[10], the neoclassical framework on the one hand wishes away conflict, yet is at the same time unable to discover strong and suitable tools for approaching cooperation, as lackluster approaches like "mechanism design" have demonstrated[11].

That is to say, while an unfolding democratic imaginary is traceable during the course of history, and while the movements starting in the Reformation and culminating in the Enlightenment did seek to establish a firm foundation for individual human rights (e.g., Kant), these developments appear not to have unlocked the "iron cage" in which modern economics in its neoclassical guise

[7] In particular, the evolutionary perspective is missing. Cf. Veblen, T. (1898). Why is economics not an evolutionary science? *The quarterly journal of economics*, 12(4):373–397.

[8] Cf. Durkheim, É. (1893). *De la division du travail social*. Ancienne librairie Germer Baillière et cie.

[9] The author is currently (December, 2022) in talks with a major publisher in editing a handbook on *Cooperative Economics*, which would entail a synthesis of many of the issues in this preliminary article.

[10] Cf. Aristotle (2011). The eudemian ethics. Oxford University Press.

[11] Cf. Bowles, S. (2016). *The moral economy: Why good incentives are no substitute for good citizens*. Yale University Press.

has found itself in in the last century. In fact, much of the thinking of neoclassical economics either implicitly – albeit, sometimes rather explicitly – still entertains the distinction Aristotle made[12], of considering master and slave "not two different things" and "the same as that of craft and tools". In the remainder of this article, I attempt to argue why this is the case and point out some basic outlines as to how this can be remedied. I attempt in particular to emphasize how aspects of law and legislation can contribute to a shift towards a more cooperative conception of economy.

Necessary Building Blocks

While the Cooperative Principles and Values[13] are clear candidates for describing cooperation generally, I discuss them elsewhere[14]. In any case, if a *general* theory of cooperation is to be developed, it must include building blocks that go beyond the cooperative principles, which generally restrict themselves to the behavior of cooperative enterprises in the narrow sense of dealing with cooperative enterprise (save for principles 6 and 7). A set of principles for a *general* theory of cooperation must, however, also have room for cooperation or self-organization in a broader sense. This means interpreting cooperation *communicatively* and *evolutionarily*.

This means that the "building blocks" we develop here must necessarily involve at least two distinct aspects: an *institutional* and an *evolutionary* one. While the former entails a focus on the historical development of institutions like the Cooperative Principles and Values, the latter tends to emphasize the communicative structures that impinge upon the former, turning information into meaning and selecting (and deselecting) certain interpretations of events socially (see footnote 14).

While there will be many overlaps between the building blocks proposed below and the cooperative principles (for instance, building block 1 resembles ICA principle 4; building block 2 resembles ICA principle 2; and so on), they are more general in the sense that they attempt to provide a basis, a set of general principles, for introducing, firstly, curricula based on the practices and principles of cooperatives (in the narrower sense) into various social sciences and secondly, for introducing an evolutionary cooperative logic (in the broader sense) generally. This dual focus requires an emphasis on complexity, including incorporating elements like (second-order) feedback effects, synergy and redundancy[15]. For instance, while building blocks 4 and 5 directly refer to the role of government, academics will likely be involved in blocks 6 and 7, and so on. Certain principles may therefore in part be directed at particular actors or "relationholders" (a term borrowed from Thad Metz).

Thus, the following 9 "Principles" (we refer to them as "building blocks") are not to be seen as an alternative to the cooperative principles, but a more general framing of the necessary conditions for promoting and sustaining cooperation that incorporate the agency of "external" stakeholders like policymakers, civil society and researchers.

[12] Frank Knight, for instance, suggested that "there is […] no difference between a worker and a horse, or a slave, for that matter" as regards the going concern.
[13]Cf. https://www.ica.coop/en/cooperatives/cooperative-identity/
[14]Cf. Chapter 6 of my doctoral dissertation: Warren, J. (2022). *The Cooperative Economy: Toward a Stakeholder-led Democracy* (Doctoral dissertation, Universität zu Köln).
[15] Leydesdorff, L. (2021). *The evolutionary dynamics of dis- cursive knowledge: Communication-theoretical perspectives on an empirical philosophy of science.* Springer Nature.

1. Self-Organization, Autonomy

Based on the fourth cooperative principle and the ICA Guidance notes, it would appear that an understanding of the role of *self-organization* in motivating cooperation is required. To be more precise, when reading Gierke, as I do in the last section of this contribution, it becomes clear that one of his main motivating concepts is the contradiction between *heteronomy* and *autonomy*, as seen throughout history in the legal sanctioning of self-organized activities. If, for example, in the ancient world, Roman emperors were ultimately responsible via the principle of *concessio* of legitimating the collective activity of subjects, and the Catholic church later took on this role, sanctioning the establishment of orders, monasteries and other "spiritual cooperatives" in the language of Gierke, then the question of interest for Gierke, and which he at least answers in the affirmative, is whether such cooperatives or associations exist only by means of the consent of the ruler, or whether they have their own existence. Thus, the first essential building block is the question *whether the particular jurisdiction allows an independent existence of collective agency institutions (e.g., cooperatives).*

2. Existence and Promotion of Democratic Choice Mechanisms

The second question is whether, if self-organization is allowed, the mechanism for collective choice is *prevalently* democratic or coercive? Coercive mechanisms can often take the mantle of being democratic (e.g., "*shareholder democracy*") but, in practice, reserve similar requisites for participating as do poll taxes and similar phenomena for political participation[16]. Thus, the second essential building block is *the place and role of democratic choice mechanisms (DCMs) in the context of self-organization.* These must respect that all representation can only ever occur via *concessio* and not via *translatio,* which David Ellerman has argued is a more vital distinction than that between *consent* and *coercion. Hierarchies* must be constructed in such a way as to reflect that. That is, they must be designed to allow both *information* and *accountability* to flow in multiple directions.

3. Cooperative Activity or Enterprise

Cooperation must play a central role in the network or organization. Cooperation

is a characteristic of cooperatives that, when properly understood, significantly contributes to their distinction from companies. In companies, like in any other for-profit entity, the economic activity is simply an instrument for pursuing the entity's final objectives, and it is irrelevant whether this activity is conducted with the members. By way of contrast, cooperatives are formed and exist to run an enterprise that might directly satisfy the interests of their consumer-, provider- or worker-members (who, together, may be referred to as "user-members", since in fact they are the direct recipients of a service provided by the cooperative enterprise). [Fici et al., 2013, pp. 23-4]

Thus, whereas cooperation in the sense of Marx (Chpt. 11, Vol. 1 of *Capital*) is merely incidental in a company, in a cooperative, it is the *raison d'etre* of the enterprise. "This is the reason why in cooperative legal theory these transactions must be kept separate from all others, beginning by giving them a distinct name, as some cooperative laws appropriately do, using formulas such as

[16] Majority voting is a good example of such a mechanism, as Amartya Sen has pointed out and as organizations like DemocracyNext are underlining.

'cooperative acts' or 'mutual relationships'." (*Id.*) *Thus any general theory of cooperation must reserve a place for specifying (a diversity of) unique "cooperative transactions" that distinguish the network from an organization employing cooperation instrumentally.* Notions like "cooperative rents", discussed below, can help shed light on isolating such activities.

4. Legal Architecture Recognizing Special Character of Cooperation

The fourth question is *whether the legal framework recognizes the special character of the cooperative form of self-organizing*. This does not need to entail special privileged status with respect to state contracts or tax exemptions, though it may. It can occasionally merely suffice to recognize cooperation as a legitimate form of organization. The main factor of import is that public and private institutions like banks are familiar with the legal form and convinced in its longevity. State sanctioning helps this cause. Providing programs for Professional Education and Development (PED) for tax advisors, accountants, lawyers and other critical service providers is also a key element of ensuring a robust legal and institutional architecture.

5. Regulatory Oversight

Cooperation *requires both internal (to the interaction or organization) monitoring, as well as external oversight.* This can, for instance, prevent individuals from misusing the legal form of cooperation for unsanctioned ends, and it can provide further stability. State oversight is not the only option, as some countries like Germany and Italy show that auditing and cooperative federations can be effective stewards, when provided sufficient resources for monitoring and also sanctioning. There surely is no single recipe for regulatory oversight, and the focus should always be on balancing a desire for clearing regulatory obstacles for initiating startups and ensuring the integrity of the ecosystem as a whole.

6. Privileged Position of Certain "Fictitious" Commodities

Based on Ellerman's treatment of the centrality of responsible agency in the execution of labor, discussed in section 3 of this article, it would appear that as part of any general theory of cooperation *recognition of the special place of certain commodities*[17] *should be privileged in their rights to self-organize.* In keeping with classical theories of natural rights (*imputation*) and notions of the dignity of personality (*responsibility*) and in recognition of the limited quantity of land available and the special character of money as a circulating medium (both therefore prone to network effects typically referred to as "externalities"), the right to self-organize these commodities in autonomous organizations must be recognized and supported by legal and jurisprudential means.

To rephrase this condition relationally: *in many transactions, an increased focus on social logics, such as balancing private and public interest, arise. It appears reasonable to assume that such transactions particularly lend themselves to cooperative forms of organizing.*

7. Appropriate Balance between ius cogens and ius dispositivum

There is a necessary balance to be struck between individual autonomy of cooperative network, interpreted broadly, and the protection of the identity of cooperatives as a legal form (i.e., in the narrower sense), which is essential for their sanctioning and – occasionally – support by the

[17] E.g., following Polanyi, land, labor and money – in addition to, more recently, data.

state. Thus, *concern needs to be paid for the role of mandatory and discretionary characteristics*. A potential compromising role may be played by so-called “options":

To be sure, cooperative law increasingly comprises a third category of provisions that may be termed “options”. They are different from both mandatory rules, as they provide cooperatives with a choice among two or more alternative specified rules (of which, one would apply by default in the absence of a choice between them by the cooperative), and default rules, since in any event they confine private autonomy to the options provided therein (additional and different arrangements are therefore unavailable). In cooperative law, a trend may be observed in many jurisdictions toward replacing mandatory rules with options, as a result of the relaxation or reinterpretation of some cooperative principles, including the democratic principle “one member, one vote”. [Fici, et al., 2013, p. 13]

Moreover, another approach may be so-called “hybrid” organizations, like the (now-defunct) “Social Purpose Company” (SPC) in Belgian law [Fici et al., 2013, p. 253]

8. Facilitate “Agonic" Freedom

Jacob Burckhardt[18] and Friedrich Nietzsche were both fascinated with the *agonic* in Greek society. The concept, which underlies the modern word *agony* also referred to a form of freedom that is related to, but distinct from, the modern conception of competition.[19]. Thus, as opposed to the modern conception of “competition", the *agonic* refers to an internal struggle for mastery. As is made clear in the discussion of the relational rent in the following section, a relational view is not free from dynamic social processes, conflict or competition. However, it juxtaposes a competitive logic with one of cooperation, with *governance, a forteriori,* management, acting to balance these various logics. Thus, a better notion than “competition" within the framework of cooperative economics is the *agonic.* To remind the reader again:

…*agonic* practice cultivates […] the disposition to develop one’s powers to overcome the challenges posed by mastering the practice, including those challenges to achieving this mastery that are internal to one’s current constitution as an agent. Thus, the praxis of agonic practice cultivates an agonic relationship to oneself, a practical relationship to oneself characterized by a disposition to self-overcoming understood as the disposition to increase one’s powers to act and especially one’s ability to self-direct the exercise of one’s agency.[20]

Thus, *a healthy, accountable level of “coopetition” – even with one’s self in the form of self-mastery – is actually facilitated by taking a relational approach. It should seek to emphasize the foundational nature of cooperation with respect to competition, i.e., that without a foundation of interdependence and what ecologists refer to as “ascendency", competition would not be possible.* This observation should render much of economics rather uncomfortable. It directly contradicts the central role which competition has in social systems like the economy. In fact, according to Robert Ulanowicz, “mutuality manifested at higher levels fosters competition at levels below".[21] Competition arises because two mutualistic ecosystems are competing for the

[18] For an overview of the influence of the *agonic* in Burckhardt’s understanding of democratic practice, cf.
[19] A good example of the agonic is the Olympic games, where players are free to compete in a particular context that is itself contextualized within a greater social cosmos
[20] Owen, D. (2019) “Nietzsche’s antichristian ethics: Renaissance virtu and the project of reevaluation’”. *Nietzsche and The Antichrist: Religion, Politics, and Culture in Late Modernity*, pp. 67–88.
[21] Ulanowicz, R. E. (2009). *A third window: natural life beyond Newton and Darwin.* Templeton Foundation Press. p. 75

same scarce resources. Carrying this observation to its conclusion, it implies that there can be no competitive market without the overarching networks of mutually beneficial relations we call society.

Thus, a general theory of cooperation also must recognize the relation of cooperation to competition and study where these two elements are complementary and where they clash, and to clearly demarcate those corridors, developing strategies and heuristics for stakeholders traversing these corridors. This is of course related to education and training, which already forms the fifth ICA principle.

9. Connect with civil society and so-called “General Interest Cooperatives"

Not all cooperatives are single-member cooperatives. An increasing number of *multi-stakeholder cooperatives* is appearing. *A general theory must recognize logics behind the single-member model: producer, consumer, service, etc. and embrace a polylingual cooperative logic.* This, because the new types pursue the general interest of the community […], and not the interest of their members. They are not mutual cooperatives but *general interest cooperatives*. […] Cooperatives, therefore, are no longer necessarily linked to a mutual purpose, and the law increasingly admits their pursuing the general interest. Cooperative legal theory has to recognize this fact and start also dealing with general interest cooperatives, which relative to mutual cooperatives present different problems of regulation, due to their distinct objective. [Fici et al., 2013, pp. 33-4, own emphasis]

Thus, any *general* theory of cooperation must understand the genealogy, both *Ursprung* and *Entstehung*[22] of cooperative principles and legislation, which are deeply influenced by Webbite social democracy, which had a “tripartite conception of the world of labor"[23], split between producers, consumers and politicians. The Webbs were highly influential in their strategic endeavors to separate the then-still diffuse cooperative and trade union movement in the UK and in channeling much effort to separating out both agency and communication in the tripartite conception. Practically speaking, their focus on “common bonds" like consumption, labor and politicking have had the effect of reducing the *public* orientation – as well as the political impact – cooperatives have had. It thus reduced the immediate impact of the cooperative movement on the unfolding civic imaginary, reducing their role more to parochial self-help societies, as Bull and Ridley-Duff (2016, p. 247)[24] argue.

Before [the Webbs’ “division of labour”] the impulse [. . .] had been to bring such work together in whole people, by means of co-operative mutual associational forms, working [against] capitalist divisions by which they were surrounded. This impulse challenged – and fully realised would have transformed – capitalist divisions of labour, transforming the meaning of, and sites for, government, production and consumption.

Understanding this trajectory is important in terms of changing the regime of cooperation to more actively embracing a “general purpose" vision lodged in multi-stakeholding.

[22] Cf. Foucault, M. (1978). *Nietzsche, genealogy, history*.
[23] Harrison, R. (2016). *The life and times of Sidney and Beatrice Webb: 1858-1905: the formative years*. Springer. p. 177.
[24] Bull, M. and Ridley-Duff, R. (2016). Multi- stakeholder co-operativism: The (hidden) origins of communitarian pluralism in the UK social enterprise movement. EAEPE 2016.

From General to Applied Principles

A general theory of cooperation, as stated, must be able to account for both cooperation in a narrower sense, as well as in a general, evolutionary sense. In other words, it must facilitate "translation" of both those building blocks concerned with institutional and those concerned with evolutionary aspects. It must also be able to accommodate tensions between the various principles. For instance, building blocks 1 (autonomy) and 5 (regulatory oversight), or 8 ("agonic freedom") and 9 ("connecting with general cooperation") are each in tension. Overcoming such tensions in complex settings involves associating priorities with each building block and dealing with the relationship between the elements, i.e., their hierarchy.

The ICA Cooperative Principles and Values offer an empirical example of how to deal with tensions between principles like "democratic member control", "member economic participation", or between "autonomy" and "intercooperation". Resolving them in other domains will involve in particular applying lessons from second-order cybernetics, whose fundamental epistemological framework is designed to emphasize "ubiquitous phenomena of control and communication, learning and adaptation, self-organization, and evolution."[25] These lessons can apply for psychology, sociology, economics, anthropology, biology and various other related disciplines. A recent revival in the fortunes of cybernetics as a research paradigm in the guise of complexity science, among others, is promising in this regard.[26]

The remainder of this contribution will be concerned with interpreting these notions for the case of *cooperative economics.* Ultimately, the connection between cooperation and *economy* must lie in the connection between the institutional practices (environment), persistent norms (preferences) and behavior in achieving the creation of value. This requires studying and understanding how value is created, assigned and distributed, i.e., what institutions exist to constrain the *governance* of value-generating productive undertakings[27]. That is, any cooperative economics at once involves the institutional (i.e., "governance") building blocks, i.e., building blocks 2, 4, 5, 6, and 7.

At the same time, a *cooperative economics,* guided by the experience of the cooperative law corpus introduced above, must seek to understand these institutional dynamics in terms of their transformation over time. This involves incorporating *evolution* and *communication* into the model, embracing, e.g., an evolutionary understanding of ethics that enables a "social imaginary" to develop over time. Such an evolutionary perspective involves building blocks 1, 3, 8 and 9.

In the remainder of this article, I attempt to trace out where these two general perspectives, the institutional and the evolutionary, can be connected at the intersection of *law, labor* and *cooperation.* I begin by developing an appropriate conceptual framework for contextualizing *cooperation,* particularly with the notion of the *relational rent.* Then, in the sequel, we shift our attention to the intersection of *law* and *labor* in the theory of *imputation.* Finally, I try to connect the other two in a triad via the concept of *social law* and finish by drawing preliminary conclusions to this theory-building exercise.

[25] Scott, Bernard. "Cybernetics for the social sciences." *Brill Research Perspectives in Sociocybernetics and Complexity* 1.2 (2021): 1-128.
[26] Id., p. 22
[27] [Bowles et al., 2012] Bowles, S., Fong, C. M., Gintis, H., and Pagano, U. (2012). The new economics of inequality and redistribution. Cambridge University Press.

Hierarchy & Relational Rents

While I alluded above to the potential for frictions to arise between different building blocks, in this section I attempt to move away from general principles to delineating how to navigate such potential conflicts. In particular, juxtaposing lessons from second-order cybernetics regarding issues of control and *autopoesis* with a critical examination of social contract theory, I ask what lessons these fields can offer for organizational cooperation, particularly the distribution of what I later refer to as "cooperative" or "relational rents". The main lesson from this discussion is that the nature of relationships in an organization, including the nature of information flows and what we generally call "hierarchy", matters for the production and distribution of relational rents within organizations.

Redefining the Social Contract

Gierke's juxtaposition of *concessio* and *translatio*[28], which juxtaposes *alienable* and *inalienable relations* makes clear there is a need to define the ability to withdraw from the social contract. Thus, there is a logical error in the assumption of an *implicit* contract. While Grotius and Pufendorf agreed that an explicit agreement had to be made, they assumed such an agreement to have occurred in the past[29]. Hobbes, Locke and Rousseau, on the other hand, saw the social contract largely as a figurative notion (a "regulative ideal", as David Ellerman states). Meanwhile, Kant argued that "The state of peace among men living side by side is not the natural state (*status naturalis*); the natural state is one of war. […] A state of peace, therefore, must be established"[30]. Moreover, Kant addressed in his *Zum ewigen Frieden* the role that *transitions* play in shifting from one constitutional order to another.[31]

In this regard, Kant speaks of *permissive law* (*Erlaubnisgesetze* or *leges permissivae*), by means of which he merely refers to a *transitional regime*. Kant writes, "if cracks or fissures which were unavoidable appear in a state's constitution or its relations internationally, a duty arises, particularly in its rulers, to […] as quickly as possible, concern themselves in repairing these, even should it cost self-sacrifice." (Id., p. 233) Thus, Kant argues, "A state may exercise a republican *rule*, even though by its present constitution it has a *despotic* rule, until gradually the people becomes capable of being influenced simply by the idea of the authority of law" (Id.)

For Kant, there is clearly a benefit in a negotiated settlement to a renewal or reform of the social contract: "for a legal constitution, even though it be right to only a low degree, is better than none at all, the anarchic condition which would result from precipitate reform". Thus Kant supports revolutions which "when nature herself produces them, and where political wisdom will not employ them to legitimize still greater oppression; on the contrary, it will use them as a call of nature for fundamental reforms to produce a lawful constitution founded upon principles of freedom, for only such a constitution is durable." (Id., p. 234, footnote)[32].

[28] Cf. Ellerman (below) on this.
[29] Baynes, K. (1989). Kant on property rights and the social contract. *The Monist*, 72(3):433–453.
[30] Kant, I. (1983). *Werke in sechs bänden*, hg. v. Von W. Weischedel. Darmstadt: wissenschaftliche. Vol. VI, p. 203
[31] For more on Grotius and Pufendorf's theory of the state and social contract, cf. Gierke, O. (1881). Die staats-und korporationslehre des al- tertums und des mittel-alters. Das deutsche Genossenschaftsrecht, III.) Berlin.
[32] A contemporary example of such a negotiated settlement can be found in Chile, where a process to reform a dicatorship-era constitution takes place within the formal framework provided by that same constitution.

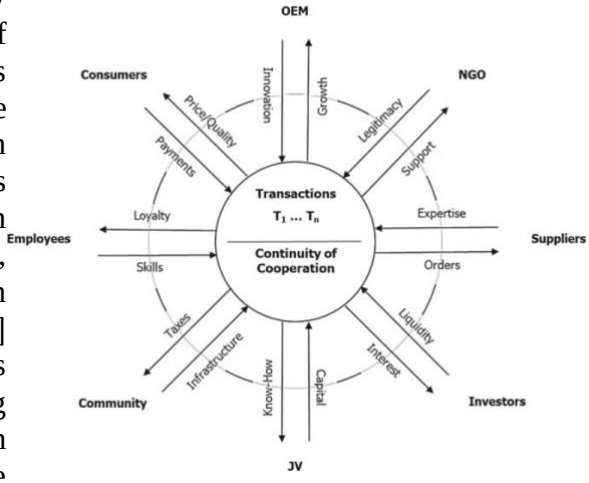
Both the "Indigenous Critique"[33] and the framework of relational economics place an emphasis on rethinking social contract theory, as well as functions like *leadership*. Kant's notion of a transitional order can also help us frame the context of a transition dynamically, from the legal logic of formal social institutions. Viewing such institutions as negotiated or contested terrain emphasizes the contingent nature of what Machiavelli called *legge* and *ordeni*[34]. We see examples of such a *dynamic transition* in cases like the constitutional plebiscite in Chile, a country which has recently begun referring to itself as a "plurinational state".

One of the problems with much of social science, and especially economics, with regards to collective choice, is its instrumental view of democracy. For many social scientists, democratic decision-making is simply a means of realizing private preferences. Or, as [Bowles and Gintis, 1986, p. 17] put it, "democratic institutions are held to be merely instrumental to the exercise of choice: democracy facilitates the satisfaction of perceived needs." This reasoning, it has been repeatedly shown, is mistaken and institutional as well as evolutionary economists regularly abandon it, especially in the growing field of cooperative economics[35].

In particular, as we come to understand firms as social networks, we recognize multiple functions besides a purely instrumental logic. Applying the lessons of second-order cybernetics perceives the relationship between motivation and empowerment and stimulates a progressive reading of social contract theory, rendering the ability to exit the contract explicit, not merely implicit. As Albert Hirschman famously observed, this "exit option" is often not available to firm actors, such as workers. In the remainder of this section, we analyze why it may be vital for the long-term survival of the business enterprise to more explicitly incorporate a cooperative logic.

[33] Graeber, D. and Wengrow, D. (2021). *The Dawn of Everything: A New History of Humanity.* Signal.
[34] Cf. Benner, E. (2009). *Machiavelli's ethics.* Princeton University Press.
[35] The author's own doctoral dissertation serves as an overview of the field. Cf. Chpt. 2 for a literature review.

Firms as Dominant Actors



What is the relevance of social contract theory and notions of "perpetual peace" for the issue of a cooperative economy? In fact, many authors speak of a "post-Westphalian order" where national sovereignty is no longer the common denominator in the international order[36]. In its place, networks of firms have taken an increasingly dominant position. In fact, the firm, not the nation-state, is the dominant actor in today's world. As [Wieland, 2018, p. 77] comments, over 70% of global trade today takes place in intra-firm transfer pricing, meaning markets are no longer the appropriate domain for engaging in economic theory. Their place has been taken by increasingly self-confident, aggressive and powerful networks of firms, which have become "the dominant institutions of the modern world" [Berle and Means, 1932, p. 313][37]. Thus, when governments seek policies to regulate markets, they are often mistaken in their focus. More focus of government policy must be placed in rendering firms more accountable to the communities they serve, and in which they are embedded, and to the stakeholders without whom they cannot exist[38]. This applies in particular to firms' workers and users, who are in most cases, *de facto*, powerless [Hirschman, 1970][39].

[Ferreras, 2017][40] has suggested that the contemporary labor market, dominated by service work, has shifted the domain of labor from the private to the public. It is clear that this is an extension of the argument begun by Marx in Chapter 11 of Vol. 1 of *Capital*. Thus, the fact of cooperation, which has itself acted to shape and redraw the distinction lines according to which the economy is delineated, has increasingly forced a public logic upon the "hidden veil of production". As we move further away from the classical master-slave dynamic, social institutions must catch up to the new facts on the ground. In this vein, the relational view emphasizes that leadership is a *relation* and not merely a role[41].

As a study of the rise of democracy in Athens demonstrates, the role of *citizenship*, i.e., membership in an inclusive collective, was essential[42]. If we view democracy as a progressive ideal, we must abandon the precept, followed by some within both economics and in the history of social thought, of the "partition[ing] of social space arbitrarily exempt[ing] such basic social

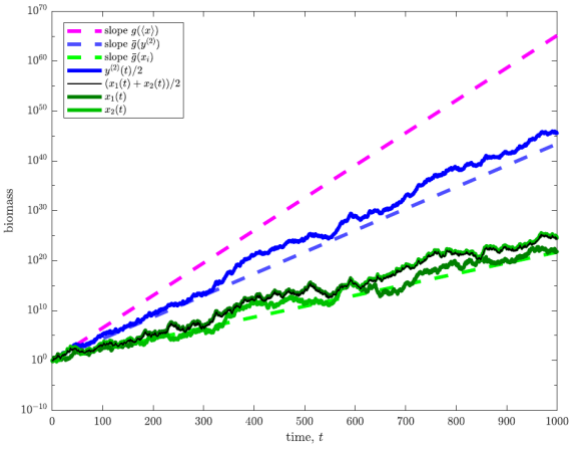
[36] Cf. Rothkopf, D. (2012). *Power, Inc.: The Epic Rivalry Between Big Business and Government–and the Reckoning That Lies Ahead.* Macmillan. or [Schneider and Mannan, 2020] Schneider, N. and Mannan, M. (2020). Exit to community: Strategies for multi-stakeholder ownership in the platform economy. *Georgetown Tech Law Review*.
[37] Berle, A. and Means, G. (2017 [1932]). *The modern corporation and private property*. Routledge.
[38] It is in this regard that the UN SDGs, the EU Sustainability Reporting Directive and other similar phenomena should be interpreted as an improvement over prior iterations of international law and norms.
[39] *Hirschman, A. O. (1970). Exit, voice, and loyalty: Responses to decline in firms, organizations, and states*, volume 25. Harvard university press.
[40] Ferreras, I. (2017). *Firms as political entities: Saving democ- racy through economic bicameralism*. Cambridge University Press.
[41]Cf. Montgomery, D. (1995). *Citizen worker: The experience of workers in the United States with democracy and the free market during the nineteenth century.* Cambridge University Press.
[42] Rhodes, P. et al. (1984). *The Athenian Constitution*, volume 285. Penguin.

spheres as the economy… from scrutiny of democratic institutions" [Bowles and Gintis, 1986, p. 17]. While his view of social ontology was static and negatively impacted millennia of thinkers to Schumpeter, Aristotle's notion of "civic moral partnership" appears one that must necessarily extend progressively to more domains and to include more individuals and groups, if the goal of democracy is to be seen in the progressive elimination of the master-slave relation[43]. Thus, I propose rendering the firm a dynamic "civic moral partnership", a "revolution" which Kant states can occur "even in a despotic constitution".

One way to achieve this is to move to exploit the beneficial outcome of *general cooperation*. As Figure 1 shows, not only employees, investors and suppliers, but also consumers, joint-ventures, NGOs, Original Equipment Manufacturers (OEMs) and the general community are stakeholders in a firm's *running concern* and all provide stakeholder resources. Shifting the stakeholder dialogue in firms to social value-creation can thus manifest the shift to viewing firms as "social institutions". This can be achieved by realizing a social contract between firm and society, by viewing the firm as a "principal of all stakeholders" [Wieland, 2018, p. 76] and by viewing management and leadership as agents, but not agents serving the interests of investors only, but rather as governance relations "identifying resources" and prioritizing these resources with respect to the ongoing concern's transactions[44].

Why Cooperation?

The domain of *ergodicity economics* has revealed many of the contradictions inherent in modern economic theory, particularly its notion of *expected utility*, which is based on an ontological contradiction and an epistemological paradox, which fails to recognize the path-dependent nature of preference development and the fact that individuals simply do not discount the future in the way that neoclassical economists assume[45].



One of the interesting results to come from this discussion, is the provision of a non-normative answer to the question of *why cooperation*? that recalls Robert Axelrod's work on the subject. To remind the reader: all things equal, individuals who share things can reduce the volatility of their endowment over time. Thereby, over time, *ceteris paribus*, individuals who share, also share risks and so have a higher growth in income than those who shoulder risks alone.[46] This point can be seen in Figure 2. This is a very elegant

[43] In fact, Aristotle had a quite "Utilitarian" or instrumental justification for slavery, suggesting that "If every tool, when summoned, or even of its own accord, could do the work that befits it," [Aristotle, 2003, Book I, Chapter IV], cited, e.g., in [Benanav, 2020].

[44] Cooperative principle 1 on "voluntary and open membership" is interesting in this regard. There is a question implicit in the principle, as the *Guidance Notes* specify, of counterbalancing *rights* with *responsibilities*, an issue of central concern to Gierke (see below). At the same time, the notion of "Creating Shared Value" introduced below also juxtaposes the benefits of extending membership with the need for the going concern's continued existence.

[45] In fact, people generally discount "quasi-hyperbolically" Cf. Elster, J. (2001). *Ulysses unbound.* Cambridge University Press, p. 28.

[46] Peters, O. and Adamou, A. (2015). An evolutionary advantage of cooperation. arXiv preprint arXiv:1506.03414.

and non-ethical justification for cooperation that is independent of any notions of *inclusive fitness* from biology, and can serve as an explanation as to *why* notions like altruism and tools like language evolved. It also emphasizes the point that "cooperation is hard to initiate, but easy to sustain" (E.O. Wilson).

The discussion of the relationship between (non)ergodicity and organizations is surely only beginning. In particular, organizations involve complex relationships between multiple resources in different geographical locations and at different times, thus the question of how to enable and sustain cooperation at the (inter)organizational level involves more than merely extrapolating from a simplistic model. However, when one does add an ethical dimension and elements like social learning, this perspective can give us an epistemic basis to the concept of an 'inclusive imaginary': societies developing the ideational infrastructure[47] and sustaining cooperation via appropriate syntactical tools appear to benefit from what we may call a *relational rent*. We introduce this concept below.

Introducing the Relational Rent

A rent "represents a form of free income not based on an additional performance." [Wieland, 2018, p. 122] According to David Ricardo, "rent is always the difference between the produce obtained by the employment of two equal quantities of capital and labour." It thus "costs no additional capital" (Wieland, *supra*, Id.) Thus, the real contribution of capital to the wealth of nations lies in its ability to convert the social process of production cooperatively. Thus, Marx concludes in his *Grundrisse* that cooperation is among "the highest forms of economy" [Marx, 1974, p. 21][48]. Thus, while capital is the necessary condition, it is the social process of organizing production cooperatively that is sufficient, in the form of the "Arbeits- und Verwertungsprozesses des Kapitals".

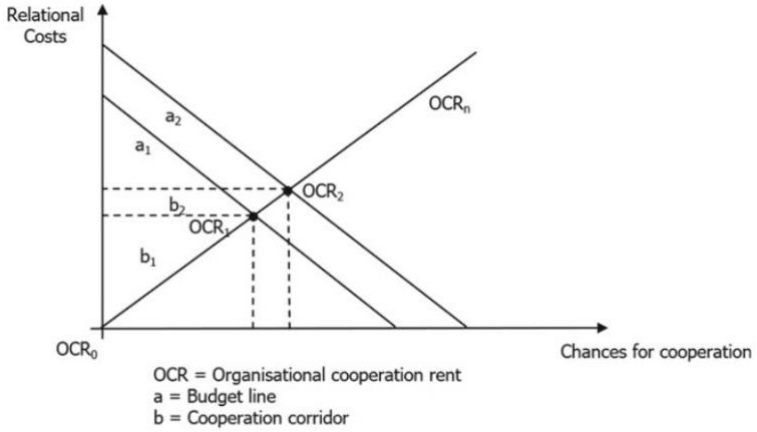
This social process, as trajectory, is influenced by the particular regime in which it is situated. Thus, within a socialized and politicized regime where the firm has become the dominant actor in the world, stakeholder management and governance take on new dimensions from those which, e.g., Schumpeter described in his *Theory of Economic Development*. In such an environment, "it is not only the individual entrepreneur who creates innovation. Companies now provide economic creativity in a collective and systematic manner. To survive in the long term, the company has become a collective entrepreneur." [De Woot, 2017, p. 14] Alternatively, if it is no longer the individual capitalist who (for the reasons explained by Marx) acquires the rent, but rather the organisation itself (the de-personalised organisation, an entity in its own right), it also means that every stakeholder who joins this organisation is not only entitled to a share of the organisation's earnings in the form of his/her factor income, but also to a share of the cooperation rent generated by and through an organisation. This is precisely why resource owners choose to join a given organisation: the return on investment as a combination of factor income and *cooperation rent*. [Wieland, 2018, p. 125, own emphasis]

As Wieland argues, following Barnard, "[i]t is the organisation as a functionally differentiated form that makes economic cooperation and the resultant rent possible" (Id.) In particular, the

[47] [Wilson et al., 2012] speak of "pre-adaptations", which are not necessarily genetic in nature, they can involve behavioral patterns, such as the fact that otherwise individualistic bees behave in cooperative ways in a given context. Moreover, the ecologist Bob Ulanowicz speaks of "propensities", borrowing the term from Popper [Ulanowicz, 2009].
[48] Marx, K. (1974). *Grundrisse der kritik der politischen ökonomie* (rohentwurf): 1857-1858; anh. 1850-1859.

idea of the firm as a nexus of relationships extends beyond the legal form of the firm itself, rendering an approach couched in Pareto optimality "at best a partial solution" (Id., p. 126) and a transaction-specific event. Thus, the relational view posits a firm as a "firm-specific network" with both private and public stakeholders. (Id.) Within this context, the "cooperative rent" should be seen as what the classical political economist James Steuart referred to as a "positive profit", particularly one derived from *differentiation*. It is thus a rent based on a continuing relationship[49].

Wieland speaks here of a *relational* rent, which refers to a jointly produced profit (i.e., Marx, 1910, Chapter 1], profit that could not have been generated in isolation). Transcultural skills, for instance, contribute to such a rent (by generating new conditions for exploiting resources)[50]. From this perspective, the inter-firm *network* is the basic unit of analysis. Within such a context, relational rents are generated from one or more of the four factors: 1) relation-specific assets (these impact the duration and volume of transactions); 2) knowledge-sharing routines (consist of institutions and routines); 3) complementarity of resources (these serve as mechanisms for identifying the above assets); and 4) effective governance (in particular, self-enforcing forms based on *informal* contracts).



Since these factors – and thus different types of relational rent[51] -- *are produced simultaneously*, conflicts necessarily arise as to the just distribution of such rents. It is arguable that, whereas in an era of homogeneous industrial production, these questions could be resolved by fiat. However, the present historical moment is one in which production is increasingly public and *mission*-oriented. Missions constrain organizations in preferring certain paths over others. Certain rules for clearly specifying stakeholder inclusion are therefore desirable.

Shared-Value Creation versus Creating Shared Value

In order to deal with these conflicts, the relational economics domain advocates a framework of *Creating Shared Value*[52]. This framework "approach[es] the societal problems triggered by globalisation, which are addressed, for example, in movements for Corporate Social Responsibility (CSR) and Sustainable Development Goals (SDGs), as opportunities for growth with win-win options for firms and societies". As [Porter et al., 2012, p. 1][53] state,

[49] [Malcomson, 2013, p. 1057]. cited in [Wieland, 2018, p. 127].
[50] For more on this, see [Biggiero, 2022, pp. 97ff.] and [Wieland, 2018, Chapter 8].
[51] cf. Lavie, D. (2006). The competitive advantage of interconnected firms: An extension of the resource-based view. *Academy of management review*, 31(3):638–658.
[52] Kramer, M. R. and Porter, M. (2011). *Creating shared value*, volume 17. FSG Boston, MA, USA.
[53] Porter, M. E., Hills, G., Pfitzer, M., Patscheke, S., and Hawkins, E. (2012). Measuring shared value–how to unlock value by linking business and social results. Foundation Strategy Report, pages 1–20.

More and more, companies are creating shared value by developing profitable business strategies that deliver tangible social benefits. This thinking is creating major new opportunities for profitable and competitive advantage at the same time as it benefits society by unleashing the power of business to help solve fundamental global problems.

The framework, in a nutshell, criticizes the fact that in the standard exchange paradigm of *Shared Value Creation* (SVC)[54], most stakeholders are only included *ex post*, which limits the scope of SVC's impact. CSV attempts to fix this delinquency by adopting a *multi-stakeholder* perspective *ex ante* and allows for non-market approaches for shared value. Moreover, whereas SVC "demands risk neutrality, transparency" and other strong assumptions[55], these "can be systematically ignored for the purposes of modern and global economies. Why? Because cultural diversity, differing risk preferences, contracts that cannot be formally enforced and resource revenues that cannot be separated (or only at a prohibitive cost) are the immutable preconditions for global cooperation and economic networks." (Id.)

In the place of such a reductionist approach, one steeped in a *relational* logic is required, focusing on 1) the willingness, 2) ability and 3) opportunities to cooperate. These three domains involve both psycho-social processes of cultural learning, feature institutional components, multi-level resources, values like reciprocity and organizational standards. As opposed to the *Transaction Cost Economics* (TCE) approach of Oliver Williamson, firms in the CSV approach are not merely focused on minimizing transaction costs, but also on generating shared value. (Id., p. 146)

The decision structure in a CSV approach includes a trade-off between *relational costs* and the *relational rent*. Relational costs consist of 1) *transaction costs* (these are very similar to those perceived by the neoclassical framework); but also 2) *adaptation costs*, which include so-called "bargaining costs" regarding matters like communication, diversity, etc.[56] and which can also be bundled (sub-additivity); 3) *cooperation costs* which are "those incurred in order to undertake a collaborative activity with a partner, separate from those incurred in reducing the threat of opportunism from that same partner" [White and Siu-Yun Lui, 2005, p. 914], (meaning they can be > 0).

According to this view, cooperation occurs if the value of the cooperative rent less the relational costs is greater than 0, or, represented as an equation, if

$$CR_t - RC_t > 0$$

Equation 1, where CR_t is the cooperative rent and RC_t the relational costs, merely represents the above relation mathematically. Figure 3 represents the trade-off visually. The point is that such a relational viewpoint does not act to constrain exchange transaction, instead it actually facilitates and increases the domain where these are possible. As organizational science is "not yet a fully developed field" [Wieland, 2018, p. 155], the strengthening of a relational point of view can only aid in a process of maturation.

Learning the Lessons from Sociocybernetics

[54] For an overview and comparison of each perspective, cf. [Wieland, 2018, p. 133ff.].
[55] Cf. [Wieland, 2018, p. 136].
[56] [Wernerfelt, 2016], cited in [Wieland, 2018, p. 147].

The fact that I have, following Josef Wieland, represented cooperative rents via a mathematical equation should not imply there is a linear relationship between relational rents and costs. Complexity, uncertainty, scarcity and second-order feedback effects can dramatically impact the relationship between the costs and benefits of cooperation. This makes dynamic, non-equilibrium models important. These must increasingly include elements dealing with organizational learning, transition and trans-cultural resource management. Such models will need to include both the institutional and the evolutionary building blocks[57].

In the end, viewing firms as social networks facilitates the importation of logics beyond optimization given constraints[58]. Even considering the present challenge of climate change, it is clear that traditionally node-centric approaches like "science-based transition plans" can only, at best, hope to deal with the institutional dynamics of the economy. In order to shift the evolutionary (or communicative) aspects of the economy towards a situation of "consummate cooperation", the notion of "creating shared value" can be a useful anchoring device.

It should be clear to readers familiar with cooperation in the narrower sense how the paradigm of CSV shares many isomorphic features with the ICA principles. For instance, the idea of viewing the firm as a "firm-specific network" resembles cooperative principles 6 and 7, while the idea of *ex ante* stakeholder engagement in value-creation is similar to principles 1 and 2. The focus on transcultural management resembles principle 5 and the trade-off between relational rents and relational costs is similar to principle 3. While the paradigm of relational economics is, to date, not sufficiently familiar with the "dialect" of the ICA principles and cooperation in the narrower sense, current and future efforts are being directed to closing this gap[59].

One example of a trade-off between a relational rent and costs is the fact that at many Italian cooperatives, elements of what we above called "cooperative costs" are split between the focal organization and the respective cooperative federation. For instance, at the large industrial cooperative CPL Concordia near Modena, courses for leadership trainees are provided both by the company and by Legacoop. This reduces the costs an individual organization must shoulder for training its leaders. The shared training costs can therefore be seen as a relational rent.

Moreover, a member of CPL Concordia's board described her role less in a "charismatic" sense and more in a "representative and networking" sense, in which she is, above all, "concerned with cooperative values and their application", as well as "concerned with finding opportunities for the cooperative" based on her connections and her daily work efforts[60]. This appears to underscore the notion that a cooperative or relational perspective on firm governance views leadership more as a function (a "relation of relations"), rather than a specific role.

Conclusions from The Relational Rent

Ultimately, while this line of reasoning is not extensively developed in this contribution, one conclusion is that a closer dialogue between and analysis of shared attributes between the

[57] One recent example of such a model is Sacchetti, S. and Borzaga, C. (2020). The foundations of the "public organisation": governance failure and the problem of external effects. *Journal of Management and Governance*, pages 1–28.
[58] Cf. Biggiero, L. (2016). Network analysis for economics and management studies. In *Relational Methodologies and Epistemology in Economics and Management Sciences*, pages 1–60. IGI Global.
[59] Cf. Ongoing research endeavors by the author and, e.g., Lucio Biggiero.
[60] Survey conducted in March, 2022.

paradigm of cooperation in the broader (e.g., CSV) and in the narrower sense (e.g., ICA cooperative principles) is necessary. More broadly, the generation of a relational rent is the necessary condition for cooperation. It is clear from the above that the *evolutionary* aspects described in the introduction, i.e., building blocks 1, 3, 8 and 9, are significant contributors to the facilitation of a relational rent. Moreover, it appears that general building blocks 1. (autonomy), 8. ("agonic" freedom) and 9. ("connection with civil society") are the most significant to the above discussion. Why? The discussion above attempted to show the centrality of an unfolding democratic imaginary embracing autonomy (principle 1) in maximizing the relational rent of a particular "society".

Moreover, the "agonic", as introduced above, entails a process of mastery, in the sense of education and training, which can be interpreted in terms of capital investment in codes[61]. This mastery entails certain practices that can be described as "cooperative" or "competitive" depending on the perspective on uses to frame them. Choosing a framing of "Creating Shared Value" will usually emphasize the cooperative aspect. We should remind the reader at present that such a mutualistic reading is only possible when sufficient resources are available so as to prevent a breakdown of cooperation (e.g., the interests of the going concern). Thus, *scarcity* forms the outer bounds of the social reading of the "agonic".

Lastly, the connection with "general purpose cooperation" extends and deepens cooperation to include a multi-stakeholder, relational logic. If firms are indeed dominant actors in the contemporary world, then their role as social – or even *political* [Ferreras, 2017] – institutions should be embraced. This requires moving beyond the framing of firm activities in terms of the rights of *ownership* of shareholders, the *agency* of managers or similar notions attached to either *authority* or *bargaining*, but instead encourages a framing in terms of *discourse.* This framing appears, according to the above discussion, necessary for realizing the promise of "Creating Shared Value".

It is clear that the fields of biology, anthropology and psychology, *inter alia*, can help shed light on the *why* of cooperation, clearly specifying the channels by means of which cooperative behaviors can evolve, even in environments "hostile" to cooperation [Axelrod, 1982]. These channels can connect environmental factors with behavioral and genetic elements and spell out emotional and psychic requisites for such behaviors to sustain themselves, investigating the role of factors like reward, esteem, punishment, monitoring, trust, empathy, etc. in such processes. Much of this work has already been conducted. It is therefore a matter of importing it into disciplines where such developments have been less successful in propagating, notably *law*, *economics* and *organizational theory*

It is to the nexus between these we turn next.

The Importance of Law in Realizing Cooperation

Whitehead in *Process and Reality* suggested the image of the "firm as society", featuring a "common element" that additionally "arises in each member of the nexus". Thus, according to the above view, a firm is a unity of *form*, *relation* and *reproduction*. Not objects (whether masters or servants), but *relations* should take primacy in description and analysis. Thus, the

[61] Arrow, K. J. (1974). *The limits of organization.* WW Norton & Company.

appropriate image for a "fundamental transformation" [Williamson, 2007][62] should be a "going concern" and not a machine. Now that we have established the vitality of such a perspective via the discussion on relational rents, the question is whether the existing framework of neoclassical economics is able to incorporate it or whether attempting to integrate such a view into a neoclassical economics framework resembles more "the complicated reasoning made by Ptolemaic astronomers to account for inexplicable orbits." [Biggiero, 2022, p. 55, footnote] If the latter does obtain, then it wouldn't make sense "[f]or a Copernican astronomer [to learn] the calculations required by the old paradigm [… instead] It [would be] necessary to simply change the paradigm." (Id.)

As Kant emphasizes, the master-servant relation is ultimately a *legal*, not merely a contractual relation [Kant, 1983, Vol. IV, p. 383]. Thus, we now turn to the legal domain, parsing how the dominant neoclassical economic model is unable (and, in fact, *unwilling*) to account for these vital *polycontextual* relations. In fact, one of the main criticisms of neoclassical offshoots like "New Institutional Economics" (e.g., TCE) is that, while some of its entrants do develop a constitutive understanding of either preference formation or contract enforcement [Bowles, et al., 1993][63], it typically does not extend this to the level of the organization.

In fact, the reason for the existence of the firm is frequently ascribed to a distinction between "hierarchy" and "market", without a consideration of qualitative differences in organizational hierarchies. It is here that a closer investigation between the intersection between *law* and *labor* is necessary. I contribute to the closing of this gap below by connecting the economics and law literature in their analyses of these concepts. Drawing on research by David Ellerman, I argue that the concept of *imputation* can serve as a bridge between the legal and economic domains.

Jurisprudence in Economics

Ellerman in his *Putting Jurisprudence Back into Economics* goes to lengths to show that economics did not always look as it did today, a collection of abstract models based on 19th century fluid dynamics, with some vulgar psychology to boot[64]. In fact, the German Historical School, containing such great names as Brentano, Schmoller, Weber, Hildebrandt and others was quite centrally concerned with the interaction between law, jurisprudence and economic outcomes (including distributional questions). However, especially since Alfred Marshall's *Principles of Economics*, this has changed[65]. Writes Ellerman, "John Stuart Mill […] was the last major political economist who considered the study of property rights as an integral part of economic theory." This is all the stranger, remarks Ellerman, as "[t]he property system underlies the price system. There is no market without an underlying system of property and contracts." (*(Id.*)

Moreover, as Ellerman eloquently notes, *property does not appear out of thin air*: "Property and the legal rights to property have a life cycle; they are created, transferred, and eventually

[62] Williamson, O. E. (2007). The economic institutions of capitalism. firms, markets, relational contracting. In *Das Summa Summarum des Management*, pages 61–75. Springer.
[63] Bowles, S., Gintis, H., Gustafsson, B., et al. (1993). *Markets and democracy: participation, accountability and efficiency*. Cambridge University Press.
[64] Mirowski, P. (1991). *More heat than light: economics as social physics, physics as nature's economics*. Cambridge University Press.
[65] Heilbroner, R. L. (1961). *The worldly philosophers: The lives, times and ideas of the great economic thinkers*. Simon and Schuster.

terminated. Market contracts transfer property rights but what is the institution for the legal creation and termination of property rights?" (*Id., p. 3*) In fact, establishes Ellerman, there is virtually no consideration of the question of creating and destroying property. Or, as Ellerman puts it: "It is a remarkable fact—which itself calls for explanation—that the sparse literature on the so-called 'economics of property rights' does not even formulate the question about the mechanism for the initiation and termination of property rights in these normal activities." (Id.)

The fact that this question isn't ordinarily discussed by orthodox economics makes it no less important: "Hence the question before us is *the mechanism for the appropriation of the assets and liabilities created in normal production and consumption activities*."(*Id., p. 4*, own emphasis) It would be a challenge to refer to existing economic texts, as, according to Ellerman, most economics literature "ignores the assignment of initial rights in normal production." (*Id., p. 5*) Thus, mainstream economics deals with a number of *myths* in this regard. For instance, it is rather commonly thought that the product rights are "attached to" or are "part and parcel of" some pre-existing property right such as the ownership of a capital asset, a production set, or, simply, the firm. This idea in various forms is so ubiquitous that it might be termed the *fundamental myth* about the private property system. It is the lodestone that sets so many compasses wrong in neoclassical Economics… (*Id.*)

One example of the "fundamental myth" for Ellerman is the doctrine of *jus fruendi*, usually interpreted as a "right of ownership-over-the-asset's-products." (Id.) In fact, Ellerman comments that the fundamental myth can be found in the writings of modern adherents to *Marginal Productivity*. Paul Samuelson is cited as such an example:

It is the interdependence of productivities of land, labor, and capital that makes the distribution of income a complex topic. Suppose that you were in charge of determining the income distribution of a country. If land had by itself produced so much, and labor had by itself produced so much, and machinery had by itself produced the rest, distribution would be easy. Moreover, under supply and demand, if each factor produced a certain amount by itself, it could enjoy the undivided fruits of its own work. [Samuelson et al., 2010, p. 234], cited in [Ellerman, 2021, p. 5]

With regards to product rights being "attached to" an undertaking, Ellerman coldly reflects that "It is only a tautology to say that a corporation owns 'its products'; the question is how did the products produced in a certain productive opportunity become 'its products.'" (*Id., p. 6*) Moreover, "residual claimancy is contractually determined in a market economy; it is not legally determined by some "product rights" supposedly attached to some already-owned asset." (*(d., p. 7*) A frequently-cited example that gives lie to the fundamental myth is the case of the Studebaker company renting factory space from the Chrysler Corporation. In the early 1950s, the Studebaker-Packard Corporation had the Packard bodies produced in a Detroit Conner Avenue plant of the Briggs Manufacturing Company. After the founder died, all twelve of the U.S. Briggs plants were sold to the Chrysler Corporation in 1953. 'The Conner Ave. plant that had been building all of Packard's bodies was leased to Packard to avoid any conflict of interest.' (Theobald 2004) Then the Studebaker-Packard Corporation would hold the management rights and product rights for the operation of the factory owned by the Chrysler Corporation. (Id., p. 6).

The Failure of Traditional Economic Models to Foreground Property Rights

Ellerman refers to the failure to consider the role of legal regimes in creating property rights. In particular, whereas concepts like "primitive accumulation"[66] discuss the creation or appropriation in the abstract, "It is a remarkable fact… that the sparse literature on the so-called 'economics of property rights' *does not even formulate the question* about the mechanism for the initiation and termination of property rights in these normal activities." (p. 96)

One of the most mystifying concepts in the economics literature – its "sacred cow" – is that of the "invisible hand", typically attributed to Adam Smith. However, as Ellerman argues, this concept completely ignores the background process by means of which property relations emerge. Thus, in order for "the invisible hand" to become a meaningful term, it requires a theory of property as a foundation: "Just as neoclassical economics addresses the question of under what conditions does the price system operate efficiently, so the theory of property must consider when the invisible hand of the property system operates correctly." (p. 9)

Issues like "data capital" reveal in stark terms that "primitive accumulation" does not merely refer to a historical fact in the prehistory of the present era, but is a continuing process of adjudicating on the legality of property claims. Ellerman discusses the creation and termination of claims on property as being a significant aspect of what is referred to as "the invisible hand". According to Ellerman, "Property rights are *defined as much by the inaction of the legal system as by its actions*." (Id., p. 8, own emphasis) Ellerman suggests that this idea can be applied normatively: "The normative principle of appropriation is just the ordinary juridical imputation principle: assign *de jure* (or legal) responsibility in accordance with *de facto* (or factual) responsibility — applied to normal production and consumption instead of being applied by visible judges to torts and crimes."[67] (p. 9)

At this point, Ellerman argues that it is the responsibility of the legal system to ensure that the responsibility principle, consent and no contract broach obtain, for "if the legal authorities just ensure that the contractual machinery works correctly in the external market relationships between parties — no property externalities and no broaches — then the market mechanism of appropriation will indeed satisfy the responsibility principle in the internal activities of the parties" (p. 12). Thus, Ellerman argues that "[t]he 'confused' myth about the 'ownership' of the means of production is not part of the actual legal system where capital goods are just as rentable as people. But it is part of neoclassical capital *theory* and corporate finance *theory*." (p. 99)

These observations raise two questions with reference to the ownership of the assets and liabilities produced in the going concern[68], one descriptive and one normative, so Ellerman: the descriptive question of appropriation is: "How is it that one legal party rather than another ends up legally appropriating (Q, -K,-L)?" The normative question of appropriation is: "What legal party ought to legally appropriate (Q, -K, -L)?"

[66] Cf. [Marx, 1867, Chapter 26] or also work by E.P. Thompson.

[67] Ellerman argues that the principle of imputation could theoretically be applied to the services of non-persons: "However, since the demise of primitive animism as a legal theory (e.g., after the trials of child-killing pigs during the Middle Ages), the law has only recognized persons as being capable of being responsible." [Ellerman, 2021, p. 9].

[68] These assets and liabilities are usually represented as (Q, -K,-L) in economics, referring to an output (Q), less the capital and labor costs (-K and -L, respectively).

The usual neoclassical response ("value-theoretic metaphor", as Ellerman claims) is that "in terms of property rights and liabilities, one legal party appropriates 100% of the input-liabilities (0, -K, -L) as well as 100% of the output-assets (Q, 0, 0) which sum to the whole product (Q, -K, -L)." (p. 100) However, "[a]ll who work in a production opportunity ('Labor', including managers) are *de facto* responsible for using up the inputs K to produce the outputs Q, which is summarized as Labor's product (Q, -K, 0). But Labor (*qua* Labor) only legally appropriates and sells (0, 0, L) in the employment system. *Labor is* de facto *responsible for but does not appropriate the difference* which is the "institutional robbery" of the whole product. This can be represented by Equation 2:

$$(Q,-K,0) - (0,0,0,L) = (Q,,-K,-L)^{69}$$

In unusually candid terms, Ricardo in his *Principles of Political Economy and Taxation* emphasizes the culturally relative content of wages, discounting any real notion of "natural wage rates":

It is not to be understood that the natural price of labour, estimated even in food and necessaries, is absolutely fixed and constant. It varies at different times in the same country, and very materially differs in different countries. *It essentially depends on the habits and customs of the people.* [Ricardo, 1891, Chpt. 5]

Thus, in a society tolerant of slavery (albeit, a very different form of slavery than occurred in the Atlantic slave trade), a different notion of "fair wages" would prevail than in one embracing the principle of general "moral civic" partnerships, or again one with relational contracts, etc.

In fact, neoclassicals are only able to hide behind the market mechanism's operations by equating creative human agency to the operations of machines. In a passage that clearly outlines neoclassical economics' roots in the master-servant ontology of Aristotle, Cicero and Kant, writes neoclassical *Grand homme* Frank Knight: "[i]t is characteristic of the enterprise organization that labor is directed by its employer, not its owner, in a way analogous to material equipment. Certainly there is in this respect *no sharp difference between a free laborer and a horse, not to mention a slave, who would, of course, be property*."[70]

If this observation, which serves a central role in the arguments legitimizing the human rental system, i.e., a system that legitimates the selling (or renting?) of responsible labor, were more prominently reproduced for public consumption, it is certain that the ethical conclusions therein entailed would generate a significant degree of controversy. This controversy is augmented by the above-cited observation of [Ferreras, 2017] of labor relations' increasingly public nature in the contemporary service economy, where any comparison between, e.g., a Starbucks barista or taxi driver and a brewery nag would certainly be unacceptable. Knight's observation also serves to underline the danger in extending the economic logic of (costs-earnings) to ever more domains of life, and also provides evidence for the benefit of a perspective lodged in what Oliver Williamson called "consummate cooperation", contrasting it with "instrumental cooperation".

[69] From [Ellerman, 2021, p.104]
[70] [Knight, 2013, p. 126, own emphasis], cited in [Ellerman, 2021, p. 104].

The Myth of Marginal Productivity Theory

To address the question raised at the outset of this section, namely, whether, with respect to the relational viewpoint, the neoclassical domain should be seen as amendable or rather as a Ptolemaic rigamarole, we now come to the workhorse model of value-creation in that domain: the theory of *marginal productivity* (hereafter, MP). Ellerman argues that "[i]n order to address that question about the actual appropriation of the assets and liabilities created in production, one needs a theory of property, whereas marginal productivity theory is actually *only a theory of the derived demand for inputs*." (p. 110, own emphasis)

Ellerman suggests that MP is faulty, as it rests on "a metaphor, a mistake and a miracle". (p. 106ff.) The "mistake" was actually discussed above in the fact that there is no actual division of property rights entailed in the theory, as represented by Equation 2. Moreover, the "metaphor" can be seen in Frank Knight's above quotation comparing workers to horses and slaves.

Meanwhile, the "miracle" Ellerman speaks of entails the failure to include mutual interdependence of so-called "production factors" in the analysis. Thus, "the ⍙L [that is, an increase in labor inputs] would typically require an increase in the other inputs K in order to produce some extra output ⍙Q at minimum costs" (p. 111), meaning labor's product would equal (Q, -K, 0). (Id.) Thus, labor *uses capital* to engage in the productive process of goods and services, like Ricardo's "cotton stockings"[71].

Attempting to clarify and demystify the supposed "miracle" of an immaculate conception on the part of capital, Ellerman suggests, among others, that "*[o]utputs are not responsible for using up the inputs*; the people who work in the firm are the ones who perform the responsible human actions that use up the inputs in the process of producing the outputs.

"The actual non-metaphorical legal facts are that there is one legal party who stands between the input suppliers and the output buyers, and that one party legally appropriates the whole product, i.e., both the input-liabilities and the output-assets."`(pp. 110-111) In keeping with the relational viewpoint, this party is actually the firm, as we saw above. And the question of the distribution of the rents is a question that, as we saw in the prior section, requires the *ex ante* negotiation between all relevant stakeholders, including the workers who carry out the labor process. Neoclassical theory is not built for this purpose and so must be abandoned. I advocate for a *relational* orientation and next introduce a last epistemological element, the juridical principle of *imputation*, which allows the translation of a relational view into the legal domain.

The Juridical Principle of Imputation

Ellerman (re)introduces the so-called *juridical principle of imputation*, which derives from legal jurisprudence but which has also been accepted by a number of notable economists. The principle, which is common currency in law, merely states "assign legal responsibility in accordance with factual responsibility."; [Ellerman, 2021, p. 102]

Out of this, Ellerman intends to review what he calls the *labor* or *natural rights theory of property.* [Id., pp. 90ff.], also Ellerman [1990][72]. This theory has a long tradition going back in

[71] [Ricardo, 1891, p. 25], cited in [Cockshott et al., 2009, pp. 121ff.].
[72] Ellerman, D. (1990). *The democratic worker-owned firm: A new model for the East and West.* Routledge.

some aspects to antiquity, and found one of its earliest popular formulations – in a weakened form – in Locke's *Second Treatise on Government*. Numerous important economists have expressed support for the theory and its analogue in legal theory is firmly established. Among economists, the influential Friedrich von Wieser, foundational for both Austrian and neoclassical economists, expressed support for the principle. [Ellerman, 2021, p. 165]

As recalled above, Ellerman demonstrates that the neoclassical theory of MP is based on a fundamental error in reasoning. Again, this error has nothing to do with "being unrealistic, hard to measure, involving idealized informational assumptions", etc., but rather, that,

[b]y trying to show that the competitive ideal satisfies the principle of giving to each what it produces, [it] pays silent homage to the natural rights theory of property. Unfortunately for neoclassical theory, *the imputation is only metaphorical in MP theory* [Id., p. 90]

Thus, when neoclassical economists like Milton Friedman [Friedman, 1962, pp. 161–162][73] states his "ethical principle", attributing "[t]o each according to what he and the instruments he owns produces"[74], he is mistaking the *metaphor* of production factors for responsible agency. Ellerman uses the example of slavery to illustrate the logical fallacy of Friedman's and other neoclassicists' thinking and concludes that "[t]he real question is about *rights*, not real income." (Ellerman, *supra*, Id.) And, with respect to this question (i.e., rights), Ellerman suggests that economists have not paid nearly enough attention to this matter. In particular, "It is a remarkable fact—which itself calls for explanation—that economic theory, orthodox or heterodox, does not even formulate the question about the initiation and termination of property rights in these normal activities of production." (Id., p. 97) While termination, according to Ellerman, is considered by select economists working in the so-called "Law and Economics" tradition, these discussions are by no means general and Ellerman argues that the vast majority of economists have never broached the question of "what is the mechanism for assigning the liabilities for the normal deliberate using-up of inputs in production (or consumption)?" (*Id.*)

Again, as pointed out above, the fact of the rental of capital negates any naturalistic explanation, as Ellerman claims. Thus, in order to answer both the descriptive and normative questions, he enlists the services of the principle of imputation. Writes Ellerman, "The imputation principle applies in the first instance to deliberate human actions". (pp. 102-3) Thus, in the case of a productive undertaking (conventionally, a firm):

In factual terms, all who work in a productive opportunity (regardless of their legal role of employer or employee) are jointly *de facto* responsible for using-up the inputs and thus, by the imputation principle, they constitute the legal party who should owe those legal liabilities. And by those same deliberate human actions, they produce the outputs and thus, by the same imputation principle, they should be the legal party who should legally own those assets. Thus, the application of the conventional (i.e., 'bourgeois' in the Marxist sense) principle of imputation to production provides the juridical basis for the old claim of "Labor's right to the whole product"—to the positive and negative fruits of their joint labor. (Id., p. 103)

With regards to the employment contract, Ellerman elicits the *alienation* principle[75], suggesting that while "the owner of [an] instrument can factually fulfill [a rental or purchase] contract by

[73] Friedman, M. (1962). *Capitalism and freedom.* University of Chicago press.
[74] Cited in [Ellerman, 2021, p. 106].
[75] Cf. Also Dow (2018)

turning over the use of the instrument to the buyer or renter so that party can be factually responsible for using it and for whatever is thereby produced [because t]he services of a thing are factually alienable", the same cannot be said of the employment relation. Ellerman: "Responsible human agency is factually inalienable. Hence the contract to rent persons, like the voluntary contract to buy persons, is inherently breached and is thus inherently invalid. To pretend that responsible human agency can be transferred from one person to another is a legalized fraud carried out on an institutional scale in our current economic system, i.e., 'a barefaced though legalised robbery'". (Id.) This paradox can be seen in Figure 4, where the situation is described similarly to a Type I and Type II error in statistics.

Describing a situation of maximum conservatism in the traditional labor relation, Ellerman states that "At most, a person can and typically does voluntarily agree to obey the instructions of the employer, but then, in factual terms, they each share some of the *de facto* responsibility for the results of their joint actions." (p. 104) However, as above, the negative side of the invisible hand – i.e., the non-action of jurisprudence – is present in this circumstance, meaning that in the current scheme, the *de facto* shared responsibility is concealed behind the "legal fiction" of the labor contract. It is only by means of this "obverse invisible hand" that the laborer is considered an external supplier of "labor services". Ellerman concludes that the employment system inherently violates the juridical principle of imputation since one party is factually responsible for the whole product (the party consisting of all who work in the enterprise) while another party legally appropriates the whole product (the legal party playing the role of the employer). (*Id.*)

Table of injustices due to mismatch of factual and legal responsibility		Factual Responsibility	
		Factually responsible for X	Not factually responsible for X
Legal Responsibility	Held legally responsible for X	True positive	Type II injustice: Innocent party legally guilty
	Not held legally responsible for X	Type I injustice: Guilty party legally innocent	True negative

Thus, Ellerman forcefully argues that, if we are to accept the principles which the Enlightenment, the Reformation and modern constitutions and international law enshrine – principles of self-rule, autonomy, the inalienability of reason and responsibility: in short, if we subscribe to the progressive view of democracy outlined by John Dewey, Cornelius Castoriadis and Otto von Gierke, then *we must abandon the contemporary labor contract as not in keeping with the factual self-determination, or with the responsible, creative agency that the labor process naturally entails*. Even Adam Smith understood this, when he stated "[t]he value which the workmen add to the materials ... resolves itself ... into two parts, of which the one pays their wages, the other the profits of their employer'[76].

The Problem is the Human Rental System

If the modern wage contract is jurisprudentially questionable and ethically indefensible, then what should replace it? A natural candidate is the relational perspective advocated for by Biggiero [2022] and Wieland [2018] and introduced in the prior section. Ellerman supplements this view by clarifying the dangers of a pure exchange perspective. Agreeing with the relational

[76] Smith, 1974, p. 151, cited in [Cockshott et al., 2009, p. 121].

perspective's emphasis on informal rather than formal contracts and underlining the *associational* nature of labor relations, he argues

[t]oday, the root of the problem is *the whole institution for the voluntary renting of human beings*, the employment system itself, not the terms or completeness of the contract or the accumulated consequences in the form of the mal-distribution of income and wealth. (Ellerman, *supra*, p. 92)

"Hence," continues Ellerman, "the neo-abolitionist call… for the abolition of the contract to rent, hire, lease, or employ human beings in favor of companies being reconstituted as democratic organizations whose members are the people working in the enterprise" (p 105). Progressive U.S. Supreme Court justice Louis Brandeis[77] wrote that "no remedy can be hopeful which does devolve upon the workers participation in responsibility for the conduct of business; and their aim should be the eventual assumption of full responsibility—as in co-operative enterprises. This participation in and eventual control of industry is likewise an essential of obtaining justice in distributing the fruits of industry."[78]

Conservative thinker Lord Percy framed the issue as follows: Here is the most urgent challenge to political invention ever offered to the jurist and the statesman. The human association which in fact produces and distributes wealth, the association of workmen, managers, technicians and directors, is not an association recognised by the law. The association which the law does recognise—the association of shareholders, creditors and directors—is incapable of production and is not expected by the law to perform these functions. We have to give law to the real association, and to withdraw meaningless privilege from the imaginary one.[79]

Finally, and returning to a point made in the discussion of the rise of wage labor, "the system of economic democracy finally resolves the long-standing conflict between being a citizen whose inalienable rights are recognized in the political sphere and being a rented 'employee' in the workplace." (Id., p. 113) Thus, a relational view enables us to fulfill the demand of democracy as a progressive, emancipatory *process*, attributing dignity to increasing members of the human species and progressively breaking down barriers of translative, historically existent hierarchies.

Conclusions from Imputation

The above discussion has made the argument that the legal principle of *imputation* can serve as a foundation for a framework meeting the need for flexibility in the adjudication of priorities in terms of rights regarding the production and distribution of relational rents. Moreover, in line with this principle, building block 2 ("existence and promotion of democratic choice mechanisms") is significant. Just as there is a normative claim to political participation in the political arena, rendering hierarchies in firms more accountable would serve a role in extending and deepening cooperation. Building block 3 ("Cooperative Activity or Enterprise") makes explicit that not all "cooperation" is equal. Foregrounding cooperation in managing resources is essential to maximizing the relational rent and *imputation* can serve to clarify ambiguities as to which stakeholders are to be included in such activity.

[77] Brandeis served from 1916-1939 and was pivotal in shaping the notion of a "right to privacy" (cf. an eponymous article of his on the topic, published in 1890).
[78] [Brandeis, 1934, p. 270], cited in [Ellerman, 2021c, p. 112].
[79] [Percy, 1944, p. 38], cited in *supra*, Id.

Lastly, building block 6 ("privileged position of certain fictitious commodities") emphasizes the central role of certain resources, like labor, in producing economic value. There is a normative reason based on certain rights and based on the legal principle of imputation that legitimates privileging certain "inputs" to the productive process in terms of legal claims. This hierarchy of claims may create ambiguities. As mentioned above, the historical existence of cooperative principles and values stands as a vital example of how to deal with these ambiguities. There still remains the question of a higher synthesis between this form of cooperation in the narrower sense and the idea of cooperation defined more broadly. A question might be posed as to the potential for a *general* framework, suitable for accounting for both types of cooperation, including both institutions like social and agricultural cooperatives as well as, e.g., cooperation in R&D in the pharmaceutical industry.

Gierke: The Social Function of Private Law

In this concluding discussion, we will be concerned with how the suggestion of employing the imputation principle to generate relational rents can be executed in practice. For this, I turn to German legal scholar Otto von Gierke, who argues in a lecture given to the Vienna Legal Society in 1889 that, while science is obliged to analyze the facts, those studying the law must also study "[law's] purpose, which governs [it] as a […] designer." This, because "the currents of history hurry forwards and, in so doing, bring legal change that point to a future path." Thus, while the study of law may allow the analysis of disconnected parts, the legal corpus becomes over time impacted by "conscious action" (*bewusste That*)[80].

In order to understand, analyze and administer the law, however, "it is not just knowledge (*Wissen*) that is required, but wisdom, practical skill and a prophetic perspective (*prophetischer Blick*)." (Id., p. 4) Gierke addresses his audience on this particular occasion in order to review some criticisms of the draft of the German Civil Code (*Bürgerliches Gesetzbuch*), which he had critiqued previously in his doctoral dissertation, later published as the first volume of *Das Deutsche Genossenschaftsgesetz*, his *magnum opus*.

He introduces the discussion by asking "what is the purpose of private law (*Privatrecht*)?". Referring to the Roman law, Gierke suggests that it is separated into a *jus, quod ad singulorum utilitatem spectat* ("right, which pertains to the interests of the individual") on the one hand and a *publicum jus, quod ad statum rei Romanse spectat*" ("public right, which looks to the state of the Romans") on the other. The distinction in two domains "led [the Romans] to ascribe dissimilar purposes to the two great branches of law. Without a doubt, they had fixed a stationary starting point for every subsequent distinction between private and public law." (p. 5) According to Gierke, for better or worse, the Roman template has been adopted nearly universally subsequently.

Gierke suggests that this distinction is quite natural, "[b]ecause [it] is an expression of the dual determinations of human existence." Humans, as intelligent beings, are both totalities in and of themselves, as the philosopher Herder argued; at the same time, each individual is part of a greater whole. Or, as Gierke puts it, the distinction expresses that "every person lives

[80] One should remark at this point that Gierke is here agreeing with the Historical School's criticism and dismissal of Savigny's takeup of Montesquieu's notion of the "spirit of the law". In place of this concept, members of the Historical School were more adamant about the importance of *conscious* change and introduced evolutionary concepts into their analysis.

simultaneously as oneself and as one of a kind (species), that every individual is a world unto himself, a totality viz. the universe, and yet also a part of a higher unity, transient phenomena in the life process of a common existence. Insofar as the law, as the external world order, encounters this two dimensional content of human life, and accordingly constitutes itself in two distinct empires, on one side it must constrain and protect the external "life world" of individuals, and on the other side its goal must be to build and secure the life of the community as a whole." (Id.)

It is clear, then, that the distinction between the two domains is to some extent arbitrary. As Gierke puts it in his reflections, "unity and individuality are distinct only in our imaginations. What we call the individual and the whole are merely indispensable conceptual abstractions of, what is for us in its totality, the incomprehensible reality of society."

Thus, Gierke suggests, the Roman individualized law had outlived its use by his day and age (Gierke died in 1921), with its complex interdependencies, urban social life and a world guided by principles like the inviolability of human dignity. One particularly prophetic and withering critique Gierke lodges against the Roman law is its treatment of slaves: "Due to its leveling of persons *it did not know how to get beyond slavery*; it had simply drawn a line so that a slave nevertheless ranked *as a thing*". (p. 7, own emphasis) Internal contradictions like this one render the Roman law relatively impotent in many respects: "Built on this tremendous lie, without which it was unthinkable, the individualism of Roman private law stood helpless and powerless in the face of forces destructive of the social fabric of society." (Id.) Similarly, Gierke would argue, the Roman law (and likely all bodies of law merely privileging individual property rights) would not be able to deal with the controversies and dilemmas of the present.

Very much in keeping with contemporary complexity theory and second-order cybernetics' focus on dualism, Gierke advocates for a *synthesis* of public and private law as a solution to the dilemma facing societies dealing with tensions between individualism and collectivism. Accordingly, he develops the category of "synthetic law", which I now introduce.

A Synthetic Law

In keeping with his principle of "Genossenschaft" (cooperation), espoused throughout his oeuvre, Gierke suggests that the only way to supersede a vulgar patchwork of contradictory laws is if "the spirit of community penetrates private law from below". (Id., p. 17) Gierke goes on to list several "legal moments" to illustrate how this might occur. Using the example of property, Gierke argues, "[i]n truth, no law involves unilateral, but always mutual, relationships of wills. Even property law is, in the final analysis, a relationship between the wills of people, not between an isolated person's will and an inanimate object."[81] Due to this inherently *social* nature of property law, Gierke insists that no "duty free" or unlimited right to property exists: But where two persons confront another, contemporary values forbid having proprietary sovereignty without obligation. Thus, even private law appears to follow the phrase: *no rights without duties*. In fact, our contemporary legal order already ties our strongest and fullest rights, those to property, to an array of duties. (Id.)

[81] The similarity between this observation and Marx's discussion of labor's "belonging" in the production process is striking.

Gierke argues that such a dualism of rights and duties is not the result of the "insinuation of 'policing practices'" (p. 18) into the domain of private law. Instead, Gierke argues, such duties are mere "deductions from a higher principle". This principle consists of placing a higher priority on the domain of freedom than that of property (p. 19), particularly emphasizing the *inalienability* of certain fundamental (human, or personal) rights. We are again reminded of Gierke's juxtaposition of *translatio* and *concessio* in his *Das deutsche Genossenschaftsrecht*. Indeed, according to Gierke, "duty free property has no future!" In particular, he argues, the "highest duties" will derive from the domain of *morality* (*Sittlichkeit*). Such duties must necessarily be of both a *positive* and *negative* sort. The former must be anchored in particular stipulations (think of Kant's notion of *leges permissivae*, while the latter case "this requires a general proposition, which limits the misuse of property and the other asset rights to the detriment of others." (p. 18)

Thus, a synthesis requires both positive law and general principles that can be flexibly applied in a changing environment. Such formulations may, on occasion, extend further than merely prohibiting misuse of property and can, in fact, stipulate its "proper use". Mining regulations, law of inventions and hunting law are three examples listed by Gierke, but certainly one could extend this list indefinitely.

Property Law

For Gierke, this circumstance is quite clearly demonstrated in land ownership, which is by its nature "inherently more restricted than for moveable property." Gierke grounds this assertion with the argument referring to the Earth as commons, meaning "all rights in land exist only with the strongest reservation that they be used for the benefit of the community." Therefore, "[t]he idea that a part of our planet could ever belong to a single person, in a manner identical to an umbrella or a piece of currency, is a culturally endangering absurdity (*ein kulturfeindlicher Widersinn*)." (Id.) In particular, Gierke uses the example of air and groundwater rights to illustrate his point. If the exclusive right to dispose of land extends to such derivative domains as the air above and ground below the property, then the result is an "antisocial law" (Id., p. 22). It is worthwhile to quote Gierke at length here: Our planet is divided into parcels from its core of molten fire, to outer space, divided into property rights! The owner of land in the Alps who discovers that a tunnel runs beneath his plot of land may close part of the tunnel. If a telephone-cable runs over a single corner of my land, I may cut it. A pilot of an aircraft must first seek the permission of the landowner whose airspace he wishes to cross. Whoever has no property actually must ask permission even to breathe. (Id.)

Therefore, it is important, so Gierke, to acknowledge that "those in support of a regime of private property in land cannot emphasize enough that one has, not an exclusive and absolute right *ad infinitum*, but in the last instance *nothing but a limited right to use a part of the national territory* (*ein begrenztes Nutzungsrecht an einem Theile des nationalen Gebietes*)." (Id., own emphasis) Moreover, Gierke critiques the "special superstition" of a "dogma" that places property rights on a higher plane than all other rights. (p. 24). We already saw this in his criticism of the Roman "noxal" (i.e., slave) laws. Other planes of law such as *in rem* rights (*begrenzte dingliche rechte*) "are also good and defensible laws, just like those of property itself." (p. 25) In particular, Gierke substantiates this with an appeal to develop notions like third party property rights in the manner

of *usufruct* (*Rechte an fremder Sache*)[82]. This to avoid an "internal colonization (*interne Kolonisation*) towards "atomistic" and "materialistic" ends (p. 26).

In prophetic ways, Gierke anticipates many contemporary debates (e.g., "data sovereignty" or workplace occupations), referring to intellectual property in this regard.

Labor Law

"The most fundamental element of our private law must be a comprehensive law of persons. […]. Only with hesitation, and not without mixing with fiction, did the highest rights of personality – the right to life, body, freedom, and honor – become part of private law, and their protection remains incomplete. "

At the root of labor law, Gierke sees contract law (*Obligationsrecht*). This is another arena where the social dimension of private law becomes clear. Writes Gierke, when modern legal systems introduce the principle of freedom of contract, *this can only signify a reasonable, not an arbitrary, freedom – a* freedom whose moral purpose requires balance, freedom which sets itself boundaries. *Unrestricted freedom of contract destroys itself.* (Id., p. 28, own emphasis)

Thus, not "freedom of contract" should be the guiding principle for contract law, but a search for balance between "legal freedom" and the "moral freedom of personality". It is worth quoting at length from Gierke's talk: The law which, with wanton formalism, allows legally significant consequences to spring out of intentional, or presumptively intentional, conduct, under the pretense of peaceful order creates a *bellum omnium contra omnes* in its legal form. More than ever, it is the task of private law to protect the vulnerable from the strong, the welfare of the whole against the self-interest of the few. Ergo, the long-held common practice that contracts with an immoral content are void has drawn an outermost boundary of legitimacy, which with the development of a moral consciousness has increasingly converged towards a median.[83] (p. 29)

Examples of illegitimate and void contracts are voluntary slavery and the *couverture* marriage contract. (Id.) These examples serve as arguments for the conclusion that "Just the guarantee of an inalienable right to formal freedom does precious little by itself." Gierke argues that such thinking, which extends to the domain of debt law, "demand further evolution." (p. 30) Moreover, the priority of personality over property must extend, so Gierke, to the modern *labor contract*, which he argues is rooted in the Roman tradition of slavery (i.e., property law). Gierke writes prophetically in the year 1889: but where the law of personal relations is concerned, a robust private law must place the concept of personality at the center of everything. *This is especially the case for the regulation of employment contracts, as soon these produce more than a fleeting provision of "one-off" services, and instead subordinate the person to the purpose of the association and determine one's livelihood. It is unthinkable that we continue to adhere to the scheme of renting things that originated in Roman slave law for the hire of services!* (p. 32, own emphasis)

[82] "This is why in our time, as we are threatened by individualism, a private law order that pursues social objectives should never erase rights in things of third parties and without necessity constrain or weaken them."
[83] This argument of Gierke's should remind the reader of Ellerman's charge of the illegitimacy of the labor contract and of Ferreras' notion of the shift towards "public labor".

This is a damning statement, and its relevance shines through into the contemporary world. It captures what some decades later was argued by Berle and Means in their analysis of the modern corporation. In fact, Gierke addresses the implications of the corporation in the life of modern citizens. He adapts his conception of *Herrschaftsverband* to the role: above all, it is the case that charismatic authoritative private law associations small or large, and partly grown enormous, have emerged, in the form of business enterprise, as the standard bearer of our economic life. What is the use of ignoring this fact, which is as clear as day? What can be achieved through our legal system's clinging to the fiction that we are dealing with nothing more than a sum of individual legal obligations between free and equal persons? (p. 40)

Indeed, the contemporary labor contract is much more. According to Gierke, it "integrates the personality itself into an economic organism. Such an association appears internally and externally as if the organisational whole were a monarchy, the sole carrier being the entrepreneur, with the managers and workers belonging as serving organs." (p. 40-1) This unsustainable situation, largely today unresolved, despite certain formal Gierkian revisions like the German law on *co-determination* (*Mitbestimmung*)[84], can be resolved by recognizing the factual character of the corporation as a *collective of persons*:

All future socio-political legislation will only establish ever more clearly, and develop ever further, that the modern business enterprise is a form of association in the law of persons. Does the simplistic private law really resolve its role, if it sticks its head in the ground like an ostrich and clings onto the deceitful scheme of a pure and strictly individualistic law of obligations? (p. 41)

Gierke concludes his speech by appealing to the idea of private and public law as "children of one mother", which "continually re-encounter one another in their common labors." (p. 45)

Closing the Triad

It would appear, then, that Gierke's notion of "social law" is the suitable *legal* framing of what in cybernetics is referred to as the interaction between first- and second-order systems[85]. It appears to be a tool to connect the triad of *law*, *labor* and *cooperation.* If the correct coding for embedding cooperation generally is the *cooperative* or *relational rent*, and the suitable coding for connection *law* and *labor* is *imputation*, then Gierke's concept of *social law* appears to connect these two by establishing certain fundamental principles according to which priorities can be established. The notion of *social law* thus serves as the external recognition of the importance of the interaction between the institutional and evolutionary aspects of cooperation at both individual and social levels.

Gierke's discussion of "social law" is especially valid in so far as it pertains to building block 4 ("Legal Architecture Recognizing Special Character of Cooperation"). This, since any "social law" acknowledges the primacy of a fundamental mutualism undergirding the social fabric. In conflicts between public and private interest, it pragmatically underlines the primacy of the

[84] See [Ferreras, 2017, pp. 48ff]'s discussion of the limitations of the German law on "co-determination".
[85] Scott, Bernard. "Cybernetics for the social sciences." *Brill Research Perspectives in Sociocybernetics and Complexity* 1.2 (2021): pp. 88ff.

public, without however disqualifying the rights of the individual[86]. This balance can be guaranteed with building blocks 5 ("regulatory oversight") and 6 ("Appropriate Balance between *ius cogens* and *ius dispositivum*"), which each emphasize the iterative nature of the interaction between the institutional and the evolutionary perspectives outlined in the introduction. While questions related to what Lewis Mumford called "technics" (e.g., "science-based transition plans") can be solved relatively mechanically, such iterative processes applying what Habermas calls "discourse ethics" are needed when normative questions – for instance regarding distribution, relative intensity of preferences and inclusion in the collective – are posed.

Gierke's work on "cooperative law" should also be a useful reminder to cooperative lawyers that cooperation is not a copyrighted notion, that explicit recognition of the human, i.e., relational dimensions of business stands in the foreground and should be recognized as primary, and not merely incidental, to the business undertaking. That said, the special character of cooperation "in the narrower sense" (i.e., according to the ICA Cooperative Principles) should always be protected as a historically developed system-stabilizing innovation (a "counterveiling force", *a la* J.K. Galbraith). The tradition of cooperative enterprise is too particular to merely "fold it" into a broadened legal corpus.

Conclusion: A General Theory of Cooperation?

"And no one pours new wine into old wineskins. Otherwise, the wine will burst the skins, and both the wine and the wineskins will be ruined. No, they pour new wine into new wineskins." Mark 2:22

The above discussion has attempted to contribute to the development of a general theory of cooperation by pointing out 1) the deep connections between the domains of law and economics and 2) the potentials for developing a cooperative economics corpus along similar lines of the emergent cooperative law paradigm.

I attempted to underline the potential role for the notion of a "relational or "cooperative rent" as a framing device towards this endeavor and subsequently to shed light on why the neoclassical model is unable to accommodate such a relational perspective, in particular because it is designed to ignore such aspects. Finally, we saw the importance of a synthetic vision of law as the handmaiden of economic practice and the arbiter of what has colloquially been referred to as "the invisible hand".

As I conclude the foundational part of this project, we are now in a position to ask the question whether a "general theory" of cooperation is possible.

A general theory of a cooperation as envisioned by Gierke, Kropotkin and others, as I have argued above, is an essential component of any meaningful "cooperative economy", "cooperative political economy" or "cooperative economics", and would essentially seek to undergird the institutional and legal structures necessary to sustain a general degree of cooperation with the behavioral, historical, ethical and other evolutionary components necessary to both initiate and sustain cooperation. Certainly, the legal component can't be forgotten, as it forms a vital

[86]Gierke himself called for a liberal order recognizing the rights of the individual, "with a drop of socialist oil" recognizing the fundamental stake of the community and the collective in each individual. Cf. Also work by ecologist Robert Ulanowicz on mutualism and ascendency.

component of what becomes the "invisible hand", the negative component of an apparently "self-regulating" system of economic transactions:

In other words, when a legal entity, or category of legal entities, has a defining feature that relates to the objective pursued—whether negative (the profit non-distribution constraint that qualifies nonprofit entities) or positive (the mutual purpose that qualifies cooperatives […])—the organizational law of that entity, or category of entities, plays the essential role of defining their particular identity in light of the objective pursued. This applies yet to a greater extent to cooperatives, since their identity is complex and consists of several, at times interrelated, aspects, which do not only pertain to their purpose.[87]

In fact, the special character of cooperative businesses appears to require special recognition before the law. Writes Fici, "while there are legal entities that are 'neutral' as regards the purpose pursued, as is the general case with companies, there are other legal entities, including cooperatives (and nonprofit entities […]), that are not 'neutral' in this respect." [Fici et al., 2013, p. 18] Thus, cooperative businesses operate on the basis of particular values which are perceived as ends, and these operate as coordinating tools (what Karl Popper called "propensities") to achieve outcomes outside of those based on non-cooperation (e.g., Nash equilibrium). In order to achieve these "non-neutral" outcomes, the legal apparatus must recognize whatever the special features of such firm types are. These features, which I have attempted to outline in the 9 building blocks, and which contribute to a certain "rigidity"[88] stipulated by law, "enhance […]—within a jurisdiction recognizing a choice among several types of legal entities—a founder's or member's 'ability to signal, via her choice of form, the terms that the firm offers to other contracting parties, and to make credible [her] commitment not to change those forms'". [Fici et al., 2013, p. 19]

Any "general theory" should be constructed on such foundations. In particular, the general theory imagined here attempts to integrate historical fact, sociobiology, ethics, legal convention and economic activity in a relational ensemble that I tentatively call a *general theory of cooperation.* This contributions has focused especially on outlining a framework for a *cooperative economics* within this domain. In closing this preliminary, theory-building contribution, I reflect on a number of tensions in the nine building blocks. I subsequently close this discussion by asking whether such a general theory is even possible.

The Role of Law

The role of law in realizing a general theory of cooperation relates to Ellerman's observation of the "obverse invisible hand". Legislation and jurisprudence are in practice the "visible" side of the invisible hand. One should imagine a domain of "cooperative law" that extends beyond merely regulating and framing cooperatives as a recognized legal form. Just as the domain of "competition law" deals with individuals, organizations and states in as far as they engage in

[87] Fici writes,
"For example, while in the regulation of the European Company (Societas Europaea—SE)—the European Union law equivalent to a company (or business corporation) established under national law—nothing is stated with regard to the purpose of an SE,52 in the regulation of the European Cooperative Society (Societas Cooperativa Europaea—SCE)—the European Union law equivalent to a cooperative established under national law—the objective of an SCE is stipulated, and accordingly there are specific rules on the allocation of profits." [Fici et al., 2013, p. 17].

[88] One is reminded of paleontologist Steven Jay Gould's notion of "punctuated equilibrium", an idea connecting the flux of evolution with the apparent "rigidities" of biological life and speciation.

market competition, "cooperative law" in the sense outlined above ("broadened" cooperation) should underline the conditions and parameters under which cooperation occurs in the respective domains (sectoral, local, regional, national and international, etc.) context.

As such, we should begin speaking of a "cooperative law" in the *narrower* sense when speaking only of the legal form of cooperatives as recognized by the cooperative principles and values and international norms on cooperatives, such as ILO Recommendation 193. At the same time, we should begin speaking of a "cooperative law" in the *broader* sense to speak of cooperation more generally. This can refer to intra-industry or -firm cooperation on things like research and development, innovation networks, joint ventures, industrial districts, etc. but also to multilateral cooperation among states internationally. The common denominator of these two domains of "cooperative law" should be the connection between *relational rents*, *imputation* and a *social law* that prioritizes a multi-stakeholder or relational logic.

Cooperation vs. Cooperation

It is the last aspect, the prioritization of a multi-stakeholder (read: relational) logic, that displays the limitations of a strict focus on the "narrower" sense of cooperative law. Rory Ridley Duff's discussion of Webbite socialism's influence on the ICA cooperative principles[89] should underline that cooperative law *proper* has historically benefited from synergies and spillovers from the broadened discourse around cooperation in law (i.e., from "general" or "broad" cooperative law). This observation and the fact that many countries' legal codes do not (yet) feature a separate "cooperative law" should be interpreted as opportunities for creating more explicit linkages between the two *corpora*. Ideally, the two would converse with and mutually reinforce one another, both serving the individual communities they represent and at the same time creating opportunities for overlap and increasing synergy. Thus, one form of cooperation can beget another.

In particular, one arena in which there may be a great deal of future interest is the area today referred to as "competition law". In fact, since the Progressive era of the late 19th century, in American jurisprudence, "cooperation" has been associated with so-called "trusts" (cartels)[90]. Cooperation was therefore typically derided as something opposed to the rules of the market. However, in Europe and other jurisdictions (e.g., Japan), cartels were frequently encouraged. Thus, developing more explicit linkages between the two "cooperative laws" may encourage policymakers, educators and others to rethink "competition policy"; or, in the least, encourage a concomitant development of "cooperation policy", or even "coopetition policy".[91]

A number of scholars have been working from traditional competition policy in ways that can in fact be usefully combined with the narrower field of cooperative law. One example of this asymptotic *rapprochement* between the two domains is Kraakman & Armour's *The Anatomy of*

[89] Cf. Chapter 7 of my dissertation, entitled *The Cooperative Economy* (2022) or Ridley-Duff, R. and Bull, M. (2021). Common pool resource institutions: The rise of internet platforms in the social solidarity economy. Business Strategy and the Environment, 30(3):1436– 1453..

[90] Cf. Horwitz, Morton J. (1992). *The transformation of American law, 1870-1960: The crisis of legal orthodoxy*. Oxford University Press

[91] One example where a more granular approach to "competition", "cooperation" and "coopetition" would be helpful is the European Commission's ruling on Italy's Marcora Law, which facilitates "workers buyouts" of failing enterprises, as violating EU competition law. Cf. Gonza, T. , Ellerman, D. , Berkopec, G. , Žgank, T. , & Široka, T. Marcora for Europe: *European State Aid Law Quarterly.* 20: 1 (2021), pp. 61 - 73

Corporate Law (2017), which has interpreted corporate law in general to have two interpretations, one focused on a *prima facie* reading and the second focusing on a more *general* reading, focused on principles like stakeholder inclusion, etc.

In fact, the *prima facie* reading of the corporation, espoused by Milton Friedman's (in)famous dictum that corporations serve the public interest by "maximizing profit" appears untimely in the present era of crises, transformations and epochal shifts. Laws like the EU's Sustainable Finance Directive (SFDR), its Corporate Sustainability Due Diligence Directive (CSDD), its Non-Financial Disclosure Directive (NFDD), or the US SEC's Standardized Climate Risk Disclosure Rules and the Vermont Corporate Business Act show the move toward a more explicitly pro-social framing of corporate law that pushes the latter towards what cooperative lawyers have been advocating for for decades.

At the same time, recent research has shown that particularly younger investors are concerned with *values*[92]. Similarly, Fama & French[93] have found that investment funds provide not only investment, but also consumption, goods. These findings underline the continuing relevance of cooperative law in the narrower sense and also provide opportunities for cooperative lawyers to engage with and influence stakeholders in more traditional arenas like corporate, competition or trade law. Being that the former group have navigated frequently challenging environments, their historically accumulated knowledge may be more timely than ever in a changing world. Thus, interactions between cooperation in the narrower and the broader sense appears a *desideratum*.

Is a "General" Cooperation Possible?

With all the constraints imposed above, the question may be begged, whether it is even possible to craft a *general* theory of cooperation. Antonio Fici in his introductory chapter of *The International Handbook of Cooperative Law* states that the overall understanding of cooperatives, and of their distinct identity, would be greatly facilitated by an interdisciplinary approach to cooperatives, which would include cooperative legal theory and lend more attention and importance to it. For this to happen, it is necessary to strengthen cooperative legal studies and increase their visibility, which in particular would permit bridging the existing gap between economic and legal studies on cooperatives. In many cases, indeed, the cooperatives of economists do not correspond to the cooperatives of jurists. Economists tend to stress some characteristics of cooperatives (for example, their ownership structure) while overlooking others (for example, their solidaristic or altruistic orientation) that are fundamental to the global comprehension of cooperatives and their distinction from companies. On the other hand, legal scholars fail to analyze provisions of cooperative law and/or to compare possible solutions to a particular problem of cooperative regulation (also) in light of the economic theory.

It is my position that such a theory is possible, and that the groundwork for its *economic* manifestation has been laid by past and current initiatives, like the Preference Network at the MacArthur Foundation[94], as well as certain efforts within the domain of *Post-Walrasian*

[92] Barzuza, Curtis, and Webber, *The Millennial Corporation: Strong Stakeholders, Weak Managers* (September 6, 2021). http://dx.doi.org/10.2139/ssrn.3918443

[93] Fama, E. F., & French, K. R. (2007). Disagreement, tastes, and asset prices. *Journal of financial economics*, *83*(3), 667-689.

[94] Cf. Henrich, J. P., Boyd, R., Bowles, S., Fehr, E., Camerer, C., Gintis, H., et al. (2004). Foundations of human sociality: Economic experiments and ethnographic evidence from fifteen small-scale societies. Oxford University Press on Demand.

Economics and by newer theories of the firm, including democratic, bicameral and "needs-based"[95]. It will necessarily be an interdisciplinary undertaking, as Fici and others have suggested, and this article should be read as an attempt to contribute to such an effort from a particular reading of economic theory. This reading suggests that, if we are to devise a *cooperative economics* as part of a general theory of cooperation, it must be lodged in a re-examination of J.S. Mill's dictum that economics must concern itself only with "pecuniary self-interest".

In particular, as the above account has attempted to make clear, there are not only costs associated with cooperation, as Transaction Cost Economics' focus emphasizes. Indeed, there are also benefits to cooperation, in the form of *relational rents*. These may in many cases more than compensate for the costs of cooperation. The point is that both the institutional and the evolutionary requisites for cooperation interact to both enable, sustain and shape cooperation. No single logic or "form of integration", e.g., market-based exchange, should be privileged *ex ante*, as new ones (e.g., commons-based peer production) can enter the fray.

Ultimately, the principle of *imputation* can be employed in order to assign rights in accordance with responsibilities. This may put the legal profession in an uncomfortable position in cases where it involves doing away with convention (e.g., the classical labor contract), but it appears the clearest tool for grounding a *general* theory of cooperation in sound legal principles. As the nascent movement of "law and political economy" and its forebears have observed, law "gives shape to the relations between politics and the economy at every point. It is the mediating institution that ties together politics and economics."[96]

Lastly, a solid framing in a mezzanine of *"social law"* as envisioned by Gierke should be developed in each jurisdiction that places an emphasis on a progressive, emancipatory, multi-stakeholder (relational) logic, clearly outlining the rights not just of persons, but also of other life forms, above property rights. Both "cooperative law" *corporata* (both the "narrower" sense, referring to cooperative enterprise and the "broader" sense, referring to cooperation in the economy, including phenomena like cartels) should fall under the rubric of "social law". Such a development clearly requires a fundamental epistemic shift in thinking. However, past and current examples like Germany's *Mitbestimmung* (co-determination), the Basque country's notion of "associational labor"[97] and certain jurisdictions' decision to extend rights to non-human life, the planet or future generations speak to the contribution law and jurisprudence can make to realizing such a shift.

[95] For an overview, cf. Chapter 2 of my dissertation, *The Cooperative Economy* (2022).
[96] Cf. "LPE Manifesto": https://lpeproject.org/lpe-manifesto/
[97] Cf. Alkorta, A. B. (2021). Employment in worker cooperatives in the framework of spanish cooperative law. *International Journal of Cooperative Law*, (II):72–87.

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CO-OPERATIVES, THEIR POLITICAL ECONOMY, AND THE PROPOSED HARMONIZATION OF LAWS: A CASE FOR AFRICA

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Abstract

The materialists conceptualize history within the context of conflict relating to classes and socio-economic forces. Within history, co-operatives as socio-economic forces have played significant roles in the stages of development and have gained relevance in the class struggles that have ensued. Hence, co-operatives qualify as products and players in the dynamic and evolving Marxism versus capitalism struggles. As a result, co-operative laws are a reflection of the climax and anti-climax of class struggles, but in African's case a body of defective legal framework is presented. These deficiencies currently constitute hindrances to the optimal utilization of some projected benefits from the harmonization of co-operative laws. With Nigeria as the primary case study, this work critically reviews extant literature that problemitises the study, adopting the descriptive research methodology. The political economy of African co-operatives is appraised, with the following preliminary findings: African co-operatives have been impacted with variants of Marxism and capitalism through military and civil rules in the postcolonial era, both ideologies have influences on African co-operative laws, with capitalism having the better share, African co-operatives possess symptoms of peasant Marxism, but are regulated by laws highly influenced by imperial-capitalism, this ideological deficit is at the foundation of co-operative law in Africa. Although reviews and advancements are currently being attempted through the harmonization of co-operative legislations within the regions of Africa, regional frameworks have not been particularly successful on the continent. Therefore, an appraisal of the political economy of African co-operatives and its influences on co-operative laws is recommended as a primary remedial. Further, an apex international legal framework which addresses local peculiarities that influences such political economy, and by consequence sub-national and national co-operative legislations is recommended. A Universal Charter for Co-operative Societies fashioned after the Universal Charter on Human Rights 1948 is then proposed for further development.

Keywords: African co-operatives, Co-operative development, Harmonization of co-operative law, Political economy

Introduction

Co-operatives contribute significantly to economic and social development in virtually all the countries of the world. Their documented resilience to crisis and thus sustainability, and their particularity of being principles-based enterprises that are member-controlled and led are

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increasingly makes them relevant to sustainable development agenda[2]. The increasing degree of the relevance of co-operatives at addressing contemporary challenges, particularly in fields hereto exclusive to government and large corporations. Such fields include electricity, conventional banking, conventional insurance, telecommunication, Health care etc. Within this advancement, co-operatives retain their social peculiarities which differentiate them from strictly-profit making companies. Thus, co-operatives require laws that recognize their specificities. Laws are the primary framework upon which co-operatives are built[3]. However, laws that are applicable to co-operatives are not made by the co-operative movement. Such laws are made by the state, through the legislature, an arm of government detailed with law making[4]. These laws are executed by the executive arm of government and interpreted by the judiciary. Co-operatives are subject to the aforementioned process. In some jurisdictions, the process has been developed with the varying but reasonable contributions from the co-operative movement[5]. The reverse has been the case in many of the states of Africa. It is observed that although co-operative practice is widespread on the continent, co-operative law, or put in other words, laws that governs co-operatives are in their infancy. The deficiency is drawn from the following reasons:

a. Modern co-operative law in African was introduced by English and French colonialist during the colonial period[6];
b. These laws have to large extent remained in the form they were introduced during the colonial era[7];
c. The African co-operative movement have not been integrated in the attempts at reviewing co-operative law in African states[8]; and
d. There is not in place an Apex International Legal framework that "imposes" standards on African co-operative laws[9].

Therefore, co-operative law in Africa as currently obtains is largely an admixture of colonial administration and self-government dictations. As a result, the political economy is structured in favour of the state and other elements of elitism. Given the foregoing, it is argued that if the

[2] Hagen Henry (2012) Guidelines for Co-operative Legislation. Third Revised Edition. International Labour Organisation
[3] Nigerian Co-operative Societies Act Cap N98, Laws of the Federation of Nigeria, 2004
[4] Section 4 of the 1999 Constitution of Nigeria provides inter alia "The Legislative Powers of the Federal Republic of Nigeria shall be vested in a national assembly for the federation which shall consist of a senate and a house of representatives. The National Assembly shall have power to make laws for the peace, order and good government of the federation. The legislative powers of a state of the federation shall be vested in the house of assembly of the state"
[5] This has been the case with some states of Western Europe and North America. More recently in Japan, and also Rwanda.
[6] E.T Yebisi (2014) Appraising the Evolution and Sources of Co-operative Societies Law in Nigeria. International Journal of Humanities and Social Sciences. Vol.4 no. 6(1)
[7] E.T Yebisi (supra)
[8]Perhaps the boldest and most comprehensive attempt in this regards is the ongoing project by the International Co-operative Alliance, Africa region to have in place a model co-operative law in Africa. The idea of the project is to have in place a standard for the African co-operative movement. Although the project is drawing to a close, the idea is far from being holistic for the following reasons: (a) there was never a constituent assembly to share and collate ideas rather some apex co-operatives did an evaluation of the prevailing national co-operative legislation in their country; and (b) the final document tentatively entitled "African model law" has minimal chances of being adopted and domesticated by many African countries because it emanates from an international private organization, the ICA.
[9] This is draw from the fact that although the International Labour Orgnisation (ILO) Recommendation 193 (2002) appears comprehensive it has not taken the necessary binding effect on African countries. For example, Nigerian cooperatives laws make no pretence of its independence from any international legal framework.

proposed harmonization of co-operative laws[10] should not be built on the current provisions of African co-operative laws because it is not representative of the African co-operative movement and its values. This work adopts Nigeria as its primary research field.

The political economy of African co-operatives and their governing laws.

One of the primary focuses towards the understanding of co-operative law in Africa should be the analysis of the historical development of co-operative law on the continent and the nexus with co-operative development. African mutual support groups have been in existence since time immemorial, they had existed during the pre-colonial times. The introduction of formal co-operatives in Africa was undertaken by the British, French, Portuguese, Spanish, German and Belgium colonial administrations[11]. In Nigeria, co-operatives existed in variants before the advent of the British colonialist, this is captured in the following words "from time immemorial, there were in Nigeria various types of traditional "Mutual Aids" through which people provided services and catered for their needs. The "Esusu" or "Ajo" or "Ebese", a system employed by villagers to clear their farm or harvest their crops rotationally, and the "Owe" a mutual aid process through which people assist themselves to build houses are usually employed for diverse adventures through the solidarity model"[12].

There were diverse elements of these solidarity models in virtually all of Africa. In each of the cases, a model was a reflection of custom of the people and their needs. Colonial intrusion into the geographical area that will be later known as Nigeria triggered a gradual change in approaches. There were economic interests which brought conflicts between the colonialists and the locales. One of these was the trade in farm produce such as cocoa and palm oil. The locales were the farmers and the colonialists were the merchant buyers. The former stood in a privileged position and harnessed the advantage to dictate the prices of the farm produce. This became unfavorable to the farmers who in response established the Agege Planter's Union in 1928[13] as a common front against the imposition of prices they considered low on their produce. This was followed in 1932 by the establishment of the Abeokuta Teacher's Association formed by Nigerian teachers to pull their resources to press home their demands against the colonial administrators and promote the social and economic interest. The ideology was rapidly cultivated from far and wide within Nigeria.

Firstly, as a shield against perceived oppressive colonial policies, and secondly, as mechanism for socio-economic upliftment. This coincided with growing nationalist agitations in Nigeria, Ghana, Kenya, and many parts of Africa brings some political demission into a supposedly socioeconomic relationship.

Within, P.A. Oloyede, 1988 (supra) posits that the customary co-operative models had in place their own laws and rules of engagements. This assertion gains validity in the face of the realities

[10] The "Harmonization of Co-operative Laws" is a proposed project of the Co-operative Law Committee (CLC) which is a thematic committee of the International Co-operative Alliance.

[11] Develtere et al, 2008, pp 02. Develtere, P. 1993. "Co-operative Movement in the Developing Countries: Old and New Orientations. Annals of Public and Co-operative Economics. 64(2), 179-208.

[12] P.A Oluyede (1988) Administrative Law in Nigeria, University Press Plc, Ibadan. pgs 160 - 182.

[13] The Agege Planter's Union is on record as the first known modern co-operative in Nigeria. It was a group of farmers who practiced their trade within the area now known as Lagos city. However, the Gbedu Co-operative Association is on record as the first registered co-operative society in Nigeria.

of customary Nigerian laws, which predates colonialisation and survives till date. Therefore, it is hereby argued that the Co-operative Ordinance of 1935[14], was in form a law for the regulation of Nigerian co-operatives, but in substance an instrument to subject the co-operative societies to government control and suppress their revolutionary tendencies. "Modern" co-operative law has antecedents that are totally alien to local social and economic conditions[15].

Under the classical British-Indian pattern of co-operation, co-operative societies are expected to be state sponsored, under the believe/proposal that such societies would be transformed into autonomous self-reliant co-operatives of the Raiffeisen and Rochdale models as time evolves[16]. However, the "lack" of technical know-how on the handling of modern co-operatives which Munker, H. H canvassed as the reason for the statutory provision for a specialized government agency headed by a Registrar of co-operative societies, appears more like a guise to keep the societies under the control of the colonial administration. That the colonial administration in Nigeria would put in place a law to promote co-operatives, an initiative which has evolved in revolt to perceived oppression at a time of growing nationalism against colonial rule in Nigeria is very much in doubt. Further doubt is cast since the aforementioned period also coincides with a time of growing Rochdale pioneer influenced socialism in Britain[17]. Importantly, the British government in London took strategic actions against the spread of socialism on British soil, which meant some state policies were programmed against the Rochdale pioneers and its offshoots[18].

The intentions and approaches used by Britain to check cooperativism in Britain could not have been substantially different from the one employed in Nigeria, but only subject to local peculiarities. This did not however hinder the adoption of co-operatives as tools for public administration and socio-economic development in Nigeria.

Of particular importance was the approach of the defunct Western Region government of Nigeria which in 1952 adopted a policy paper titled "Co-operative Department Policy for the Western Region, Nigeria". The paper highlighted the policy framework of the government as follows[19]:

a. Expansion of the co-operative movement;
b. Inclusion of the co-operative's economic plans;
c. Stimulation of the co-operative movement towards independence; and
d. List of the facilities and services to be provided by the government. This was supported with the donation of one million pounds sterling to the co-operative movement by the government.

However, the Co-operative Ordinance of 1935 has retained its provisions to substantial extents till date, although with different nomenclatures. According to P.A. Oloyede, 1988 citing J.T

[14] The Co-operative Ordinance of 1935 is the first Nigerian legislation on co-operatives. It is a colonial era legislation. It was a British statute that was imported from Britain into the then British-Indian (now India), where it was "test-runned". Thereafter, it was transplanted into the then colonial Nigeria.

[15] E.T Yebisi (2014) Appraising the Evolution and Sources of Co-operative Societies Law in Nigeria. International Journal of Humanities and Social Sciences. According to Munker H.H (1971) New trends in co-operative law of English speaking countries, Marburg. India was one of the earliest colonies to adopt the co-operative system and law based on the British and German patterns.

[16] Munker H.H (197I) New Trends in Co-operative System and Law of English Speaking Countries, Marburg.

[17] G.D.H Cole (1951) The British Co-operative Movement in a Socialist Society. Republished May, 2020 by Routledge.

[18] G.D.H Cole (1951) supra

[19] P. A Oluyede (1988) supra

Caxton[20] stated as follows "The Co-operative Ordinance of 1935 was amended in 1938 and 1945, and was completely revised in 1948 to conform to the (British) Secretary of State's Circular, Dispatch of 1946. This dispatch laid the co-operative law for all the British Territories[21].

Thereafter, the administrative structure of Nigeria was delineated into three (3) regions, each with a government and the exclusive enablement to make laws on co-operative matters within its territory. Each region proceeded to enact its co-operative law based largely on the Ordinance of 1935[22]. The Western region in was established in 1953, the Eastern and Northern regions in 1956, and Lagos in 1958 when it became the Federal Territory. The provisions of the Co-operative Ordinance of 1935 are substantially retained till date.

This establishes a link between the intentions of the colonial administration as established above, and the intention of the Nigerian elite to suppress the co-operative movement is continuation of the class struggles between the Nigerian Bourgeoisies and Proletariats. Thus, it is safe to posit that co-operative law in Nigeria and many Africa countries is a product of class struggles. Schewettwan (2014)[23] captures the political economy of African cooperative from another angle. To the scholar traditional systems of cooperation, mutuality, reciprocity and solidarity exist in all African Societies, and remain vibrant till date. At independence, many African countries identified and harnessed co-operatives as tools for economic development and social stability often along the path of state welfarism or African socialism[24]. However, this did not defeat the fact that the co-operative movement attracted most of its members outside of the African elite class. Further, the patronage the co-operative movement enjoyed in the immediate post-colonial era were not particularly inimical to the interest of government and the elite class who saw in the movement an instrument to support their economic, social and political aspirations.

Within, the fortune of the co-operative movement grew on a blend of the ingenuity of cooperators and government support. However, the mid-1980s through the 1990s saw the beginning of the end of the once robust African co-operatives[25]. Schewettwann (supra) at page four identified two factors as responsible for the decline:

a. The Structural Adjustment Programme that changed the economic fabrics of many African states; and
b. The rapid democratization process that accompanied the Structural Adjustment Programme.

[20] Report of the Review Panel on Co-operative Principles, Law and Regulations in Nigeria,1978. Cited in P. A Oluyede (1998) supra
[21] This model of co-operative law is included in the Manual of Co-operative Law and Practice (1958) Surridge, B.J; Digby, Margaret.
[22] P.A Oluyede (1988) supra. E.T Yebisi (2014) (supra)
[23] Schewettwann, J. (2014). Co-operatives in Africa: Success and Challenges. A contribution to the international symposium on co-operatives and Sustainable Development Goals. International Labour Organisation.
[24] Akanji. A.A (2020) The Challenge of Poverty in Africa: Innovative Cooperativism Through Political Incentives. A Case Study of Nigeria. Journal Cooperativismmoy Desarallo, Universidad Cooperative de Colombia. 28 (116), 1 -22.
[25] Akanji, A.A (2020) supra

Cumulatively, the foregoing has relegated both the co-operatives in Africa and their governing laws to a level of subsistence.

Indigenous attempts at upscaling the legal frameworks in some African states

There have been several initiatives to develop the co-operative laws in Africa. These initiatives may be classified under the following:

a. Attempts by the co-operative movement: Firstly, through primary co-operative societies that put in place bye-laws for their internal control and other engagements. Secondly, through secondary co-operatives that also put in place bye-law as a representation of their consensus on the applicable policy for their various engagements[26];

b. Attempts by National and Sub-national legislature on co-operatives and allied matters: Firstly, is the ground norm of each of the states in Africa. That is the constitution of each of the sovereign African entity[27]. This is followed by the nation primary legislation on co-operatives[28], and national legislations with provisions for co-operatives[29]. Secondly, there are laws made by the legislature, of component units within each country[30]. These legislatures make primary laws that are in some cases whole devoted to co-operatives, and in other cases, legislation with few provisions for co-operatives.

The above attempts are influenced by the African political economy, particularly the variant of political economy that prevails within each jurisdiction. Cameron G. Thies[31] explores internal and external rivalries among and within African states has predatory mechanism on national development. This author takes it further by identifying some of the elements involved in the internal rivalry thereafter draw a link with the current state of co-operative law on the continent. Virtually all the countries in Africa are heterogeneous in terms of ethnic or religious composition[32]. A circumstance that had at different times catalyzed sectarian violence or civil wars[33]. Ethnic and religious beliefs form significant parts of African customary laws[34]. In the African case, ethnic and religious rivalries are the basis disagreement. Thus, finding a common group on public issues that boarder on ethnic or religion becomes a difficulty.

When this identified deficiency is combined with the earlier identified challenge of class struggle with African states, then it becomes easy to understand the reasons, the African co-operatives

[26] Virtually all co-operative legislation in Africa provide for the cooperatives to have in place bye-laws for their internal administration. For example, the Nigerian Co-operative Societies Act (supra) provides at section 11 Power of a society to make bye-laws.

[27] For example, the 1999 Constitution of the Federal Republic of Nigeria provides at section 1 (supremacy of the constitution) subsection 1 provides: "this constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria"

[28] In the Nigerian case, the Nigerian Co-operative Societies Act (supra)

[29] In the Nigerian case, the Companies and Allied Matters Act, Federal Inland Revenue Service Act etc

[30] In the Nigerian case, the co-operative law of each of the thirty-six states of the federation. For example, the Cooperative Societies Law of Oyo state, Co-operative Societies Law of Lagos State etc

[31] The Political Economy of State Building in Sub Saharan Africa. The Journal of Politics, Vol 69. No. 3 August 2007. PP 716 – 731.

[32] Fosu A. K (2018)., Governance and Development in Africa: A Review Essay. Working Paper Series No. 298, African Developmental Bank Group, Abijan, Cote d' ivoire

[33] Halvard Buhaug (2010) Climate Not to Blame for African Civil Wars. Proceedings of the National Academy of Sciences of the United States of America.

[34] Elizabeth Bakibinga – Gaswaga (2020) African Traditional Religion and Law: Intersections Between the Islamic and non-Islamic Worlds and the Impact on Development in the 2030 Agenda Era. Law and Development Review 14(1).

law retains significant relics of colonialism. In the Nigerian case, the heterogeneous composition of the country has a significant impact on her political economy. The country is an amalgamation of about two hundred ethnic nationalities, with the Hausa, Yoruba and Igbo having the highest population. Further, there is a Christian dominated south and a Muslim dominated north. Prior to the advert of the colonial administrators, there are records of animosity between the aforementioned divides. Many of these animosities resulted into tribal wars.

One of the gains of colonial administration was the reduction in these armed conflicts. The reductions were product of arbitration exercise carried out by the colonial administrators and in some cases is imposed peace treaties among warring communities. Ethnic and religious suspicious are current realities in the public policy discourse in Nigeria. It is under the camouflage of these scathing realities that corruption, and nepotism flourishes. Members of the elite class ascend power and maintain their hold on the flag of either ethnicity or religions, and in some cases both. Therefore, the elite class sees the need to maintain their hold through every means that keeps ethnic and religious sentiments paramount in the minds of the populace. Thus, the law-making processes is hinder with religious and ethnic agitations, hence aside amendments that are at the instance of the elite class, the law-making process stagnates. Some goes with the development of co-operative law.

The challenges identified above are similar in most African states.

International Legal Frameworks and Co-operative Law in Africa.

That modern Africa law has a plural configuration is settled. The origin of the plurality is in colonial, tribal, and religious influences, both imported variants of law. Religious influences started with the advent of Christianity and Islam in Africa. also has profound impact on the African law. These incursions made their marks in the development of African jurisprudence. In particular, the Sharia legal system, an imported law from the Middle East is a direct offshoot of the introduction of Islam. Today, a good number of African countries adopt the sharia as part of their jurisprudence, although at varying degrees[35].

Technically, both public and private international laws became operational on each African country at independence from colonial administration. Thus, for a country like Nigeria, the operation of International Law technically begun on the 1st of October, 1960[36].

Basically, international legal instruments from three institutions have direct applications on African countries:

a. International legal instruments from the United Nation and any of her agencies; and
b. International legal instruments from the African Union or any of her agencies; and
c. International legal instruments from any of Africa's regional bodies or any of their agencies.

In each specific case, an African country must be a signatory before such instrument could be interpreted to bind on her. More specifically, the following are the international legal instruments applicable to African co-operatives:

[35] Some of these countries are Nigeria, Sudan, Tunisia, Egypt,

[36] Nigerian obtained her independence from colonial administration on the 1st of October, 1960. From that date Nigeria gained sovereignty.

a. Universal:

(i) United Nations General Assembly Resolution 56/114 "Co-operatives and Social Development". This resolution is to encourage the governments of member states to keep under review, as appropriate, the legal and administrative provisions governing co-operatives with a view to ensuring a supportive environment for them and to project and advance the potentials of co-operatives at achieving their objectives. Accordingly, Hans Munker[37], identified the co-operatives objectives of Resolution 56/114 and how to actualize them as to be encapsulated in the "statement on the cooperative identity" of the International Co-operative Alliance (ICA). The statement is made up of a definition for co-operatives, and a list of co-operative principles and values. These principles and values which are jointly known as co-operative ethics are operate as advisory instruments on states. This is because the ICA is a private international organization, hence is recommendations and resolution cannot bind states.

(ii) International Labour Organization (ILO) Recommendation 193 (2002)

This international legal framework was adopted in June 2002. It replaced recommendation 127 which was largely structured around the needs of developing countries. Recommendation 193 was meant to address the evolution of the context in which cooperatives function. The was to serve as a template and promote uniformity in the in the administrative and legal polies on co-operatives across the world. It was built around cooperative ethics as developed by the International Co-operative Alliance. This recommendation, same as the Resolutions of the United Nations General Assembly on co-operatives and social development were necessary because of the limitations of the International Co-operative Alliance as a private international organization.

b the following challenges with OHADA[38]

i. The OHADA Regulation appeared as a surprise for many national law makers and authorities. Some of them did not even know of the existence of such law;

ii. There are resistances to apply the OHADA, because: (a) national authorities are not ready and need more time; (b) they resist because in some countries national actors and authorities were not associated to the process of law making.

Tadjudje[39] further identified the following problems with the OHADA:

ii. The OHADA made no provision for savings and credit co-operatives (SACCOs);

iii. OHADA provisions are ambiguous on the status of para-cooperatives, for example the village groups in Burkina Faso and the Common Interest Groups (CIG) in Cameroun.

The challenges identified with the OHADA are similar with what obtains in Africa countries in their attempts at domesticating other international legal frameworks on co-operatives. Hans-

[37] Hans Munker (2014) "Ensuring Supportive Legal Frameworks for Co-operatives Growth". Paper presented at the International Co-operative Alliance 11th Regional Assembly, Nairobi, Kenya 17 -19, 2014

[38] Heiz, David and Tadjudje, Willy (2013) The OHADA Co-operative Regulation, in: Cracogna et al. pp 89 -113

[39] Tadjudje, Willy (2013) La cooperative fananciere et al politique d' uniformisation du droit OHADA, in: Revue International d' Economie Sociale (RECMA), No 330, pp 67 - 72

Munker (supra) captures the problem in the following words "contents illustrate the problems which law makers may encounter when making laws "for the people" rather than "with the people".

The following positions are therefore canvassed:

i. The body of co-operative law within the various jurisdictions in Africa is currently defective due to the prevailing political economy on the continent;
ii. The prevailing political economy has produced and sustains a co-operative law that is to the advantage of a cross-section of the elite class (bourgeoisies) and disadvantageous to the co-operative movement;
iii. International legal frameworks are in the best position to provide remedial;
iv. International legal frameworks on co-operatives as currently configured are inadequate at providing the needed remedial. Consequently, a higher tiered and more elaborate international legal instrument is conceptualized.

A Proposal for A Universal Charter for Co-operatives.

The idea of a universal charter for the co-operative movement is built around the value that the Universal Declaration on Human Right[40] (UDHR) has contributed to the development of humanity. On the strength of the UDHR economic, social and political rights have been holistically articulated into human right humans in both their individual and joint capacities. By virtue of the UDHR, continents developed their own versions through domestication of its provisions e.g., Africa, same with sectors such as women and child. Further, constitutional development particularly in among the developing countries is substantially linked to the provisions of the UDHR. Currently, every constitution must pass the test of the UDHR to earn basic validity before the international community and the local populace. Thus, the section on human rights as guaranteed by the UDHR has become a fundamental component of every acceptable constitution the world over. The acceptable standard is as set by the UDHR, with the duty to integrate the standards with local peculiarities imposed on the government of each sovereign state. The following is a list of international instruments that have come after the UDHR, and have been built around the substance and success of the UDHR.

List of International Human Rights Instruments[41]:

- International Convention on the Elimination of All Forms of Racial Discrimination (CERD) - 1965
- International Covenant on Civil and Political Rights (ICCPR) - 1966
- International Covenant on Economic, Social and Cultural Rights (ICESCR) - 1966

[40] It is an international policy document that was adopted by the General Assembly of the United Nations in 1948. It contains thirty (30) main points. It laid the foundation for not only the human rights that is currently known across the world, but also the sustainable development of legal, political and socioeconomic development that the world has known.
[41] United Nations Human Rights: Office of the Commissioner

- International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) - 1979
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) - 1984
- Declaration on the Right to Development (UNDRTD) - 1986
- Convention on the Rights of the Child (CRC) - 1989
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) - 1990
- Declaration on the Elimination of Violence against Women (DEWAW) - 1993
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP – 1) - 2000
- Convention on the Rights of Persons with Disabilities (CRPD) - 2006
- International Convention for the Protection of All Persons from Enforced Disappearances (ICPEP) - 2006
- Declaration on the Rights of Indigenous Peoples (UNDRIP) - 2007

The office of the High Commissioner United Nations Human Rights between the Sustainable Development Goals (SDGs) an agenda pioneered by the UN through the United Nations Development Programmed UNDP and the UDHR with the following table.

Sustainable Development Goals	Related Human Rights
End poverty in all its forms everywhere.	• **Right to adequate standard of living** [UDHR art. 25; ICESCR art. 11, CRC art. 27] • **Rights to social security** [UDHR art. 22; ICESCR art. 9; CRPD art. 28; CRC art. 26] • **Equal rights of women in economic life** [CEDAW arts. 11, 13, 14(2)(g), 15(2), 16(1)]
End hunger, achieve food security and improved nutrition, and promote sustainable agriculture	• **Right to adequate food** [UDHR art. 25; ICESCR art 11; CRC art. 24(2)(c)] • **International cooperation,** including ensuring equitable distribution of world food supplies [UDHR art. 28; ICESCR arts. 2(1), 11(2)]
Ensure healthy lives and promote well – being for all at all ages	• **Right to life** [UDHR art 3; ICCPR art. 6], particularly women [CEDAW art. 12] and children CRC art. 6] • **Right to health [**UDHR art 25; ICESCR art. 12], particularly of women [CEDAW art. 12]; and children [CRC art.24] • **Special protection for mothers and**

	children [ICESCR art.10] • **Right to enjoy the benefits of scientific progress and its application** [UDHR art. 27; ICESCR art, 15(1)(b)] • **International cooperation** [UDHR art. 28, DRtD arts. 3-4], particularly in relation to the right to health and children's rights [ICESCR art. 2(1); CRC art. 4]
Ensure inclusive and equitable quality education and promote life-long learning opportunities for all	• **Right to education** [UDHR art. 26; ICESCR art. 13], particularly in relation to children [CRC arts. 28, 29]; persons with disabilities [CRC art. 23(3), CRPD art. 24]; and indigenous peoples [UNDRIP art. 14] • **Equal rights of women and girls in the field of education** [CEDAW art. 10] • **Right to work, including technical and vocational training** [ICESCR art. 6] • **International cooperation** [UDHR art. 28; DRtD arts. 3-4], particularly in relation to children [CRC arts. 23(4), 28(3)], persons with disabilities [CRPD art.32], and indigenous peoples [UNDRIP art. 39]
Achieve gender equality and empower all women and girls	• **Elimination of all forms of discrimination against women** [CEDAW arts. 1-5] and girls [CRC art. 2], particularly in legislation, political and public life (art. 7), economic and social life (arts. 11, 13), and family relations (art. 16) • **Right to decide the number and spacing of children** [CEDAW arts. 12, 16(1)(e); CRC art. 24(2)(f)] • **Special protection for mothers and children** [ICESCR art. 10] • **Elimination of violence against women and girls** [CEDAW arts. 1-6; DEWAW arts. 1-4; CRC arts. 24(3), 35] • **Right to just and favourable conditions of work** [ICESCR art. 7; CEDAW art. 11]
Ensure availability and sustainable management of water and sanitation for all	• **Right to safe drinking water and sanitation** [ICESCR art. 11] • **Right to health** [UDHR art. 25; ICESCR art. 12]

	• **Equal access to water and sanitation for rural women** [CEDAW art. 14(2)(h)]
Ensure access to affordable, reliable, sustainable and modern energy for all	• **Right to an adequate standard of living** [UDHR art. 25; ICESCR art. 11] • **Right to enjoy the benefits of scientific progress and its application** [UDHR art. 27; ICESCR art. 15(1)(b)]
Promote sustained, inclusive and sustainable growth, full and productive employment and decent work for all	• **Right to work and to just and favourable conditions of work** [UDHR art 23; ICESCR arts. 6, 7, 10; CRPD art 27; ILO Core Labour Conventions and ILO Declaration on Fundamental Principles and Rights at Work] • **Prohibition of slavery, forced labour, and trafficking of persons** [UDHR art, 4; ICCPR art 8; CEDAW art. 6; CRC arts. 34-36] • **Equal rights of women in relation to employment** [CEDAW art. 11; ILO Conventions No. 100 and No. 111] • **Prohibition of child labour** [CRC art. 32; ILO Convention No. 182] • **Equal labour rights of migrant workers** [CMW art. 25]
Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation	• **Right to enjoy the benefits of scientific progress and its application** [UDHR art. 27; ICESCR art. 15(1)(b)] • **Right to access to information** [UDHR art. 19; ICCPR art. 19(2)] • **Right to adequate housing**, including land and resource [UDHR art. 25; ICESCR art. 11] • **Equal rights of women to financial credit and rural infrastructure** [CEDAW art. 13(b), art. 14(2)]
Reduce inequality within and among countries	• **Right to equality and non-discrimination** [UDHR art 2; ICESCR art. 2(2); ICCPR arts. 2(1), 26; CERD art. 2(2); CEDAW art. 2; CRC art. 2; CRPD art. 5; CMW art. 7; DRtD art. 8(1)] • **Right to participate in public affairs** [UDHR art. 21; ICCPR art. 25; CEDAW art. 7; ICERD art. 5; CRPD art. 29; DRtD art. 8(2)] • **Right to social security** [UDHR art. 22;

	ICESCR arts. 9-10; CRPD art. 28] • **Promotion of conditions for international migration** [CMW art. 64] • **Right of migrants to transfer their earnings and savings** [CMW art. 47(1)]
Make cities and human settlements inclusive, safe, resilient and sustainable	• **Right to adequate housing** including land and resources [UDHR art. 25; ICESCR art. 11] • **Right to participate in cultural life** [UDHR art. 25; ICESCR art. 15; ICERD art. 5, 7; CRPD art. 30; CRC art. 31] • **Accessibility of transportation, facilities and services** particularly of persons with disabilities [CRPD art. 9(1)], children [CRC art. 23], and rural women [CEDAW art. 14(2)] • **Protection from natural disasters** [CRPD art. 11]
Ensure sustainable consumption and production patterns	• **Right to health** including the right to safe, clean, healthy and sustainable environment [UDHR art. 25(1); ICESCR art. 12] • **Right to adequate food and the right to safe drinking water** [UDHR art. 25(1); ICESCR art. 11] • **Right of all peoples to freely dispose of their natural resources** [ICCPR, ICESCR art. 1(2)]
Take urgent action to combat climate change and its impacts	• **Right to health** including the right to safe, clean, healthy and sustainable environment [UDHR art. 25(1); ICESCR art. 12; CRC art. 24; CEDAW art. 12; CMW art. 28] • **Right to adequate food & right to safe drinking water** [UDHR art. 25(1); ICESCR art. 11] • **Right of all peoples to freely dispose of their natural wealth and resources** [ICCPR, ICESCR art. 1(2)]
Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss	• **Right to health** including the right to safe, healthy and sustainable environment [UDHR art. 25(1); ICESCR art. 12; CRC art. 24; CEDAW art. 12; CMW art. 28] • **Right to adequate food & right to safe drinking water** [UDHR art. 25(1); ICESCR art. 11]

	• **Right of all peoples to freely dispose of their natural wealth and resources** [ICCPR, ICESCR art. 1(2)]
Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels	• **Right to life, liberty and security of the person** [UDHR art. 3; ICCPR arts. 6(10, 9(1); ICPED art. 1] including freedom from torture [UDHR art. 5; ICCPR art. 7; CAT art. 2; CRC art. 37(a)] • **Protection of children from all forms of violence, abuse or exploitation** [CRC arts. 19, 37(a), including trafficking (CRC arts. 34-36; CRC-OP1] • **Right to access to justice and due process** [UDHR art. 8, 10; ICCPR arts. 2(3), 14-15; CEDAW art. 2 (c)] • **Right to legal personality** [UDHR art. 6; ICCPR art. 16; CRPD art. 12] • **Right to participate in public affairs** [UDHR art. 21; ICCPR art. 25] • **Right to access to information** [UDHR art. 19; ICCPR art. 19(1)]
Strengthen the means of implementation and revitalize the global partnership for sustainable development	• **Right of all peoples to self-determination** [ICCPR, ICESCR art. 1(1); DRtD art. 1(1)] • **Right of all peoples to development,** & **international cooperation** [UDHR art. 28; ICESCR art. 2(1); CRC art. 4; CRPD art. 32(1); DRtD art. 3-5] • **Right of everyone to enjoy the benefits of scientific progress and its application**, including international cooperation in the scientific field [UDHR art. 27(1); ICESCR art. • **Right to privacy** [UDHR art. 12; ICCPR art. 17], including respect for human rights and ethical principles in the collection and use of statistics [CRPD art. 31(1)]

The above table is a practical reflection of the position of the UDHR as a foundational and parental international legal instrument from which other international legal or policy instruments have been built and could be built. As captured above, the UDHR served as a template for the framework of the sustainable development goals. the co-operatives require an equivalent of the UDHR to address its challenges, particularly the development of the governing laws in Africa. The Universal Charter for Co-operatives is conceptualized to draw its strength as an extension of

the UDHR with adoption of provisions of the ILO Recommendation 193 of 2002 and the resolution of the co-operative constituents, particularly an African co-operative constituent.

Conclusion and recommendations.

The development of law in Africa has been a blend of both home grown initiatives and the guidance of international legal instruments. The homegrown initiatives are often at the instance of the disadvantaged groups such as the co-operatives. At such instances the initiatives are largely encumbered by elitist elements through government mechanism. Thus, there is the imperative of having in place an international framework for the needed remedial, much on the exploit of the UDHR which has been the foundation for the development of social and political rights in Africa.

Therefore, this research arrived at the following:

(a) there is proposed the convening of a general assembly for the development and harmonization of co-operative law;
(b) this general assembly is proposed to be organized under the guidance of the ICA, ILO and the UN;
(c) the proposed general assembly should have as many representatives as the voting slots of each of the apex co-operatives on the general assembly of the ICA;
(d) each of the apex co-operative should have on its team, at least one legal practitioner with the authorization to practice law in the home country;
(e) the general assembly and its activities should be coordinated under a team of experts by from the ICA, ILO, UN;
(f) the general assembly should arrive at a resolution that not only harmonizes but sets a standard for cooperative law;
(g) the resolution should replicate the UDHR with a focus on co-operatives and their governing laws; and
(h) the proposed resolution becomes the Universal Charter on Co-operatives.

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SHARING ECONOMY AND ECONOMIC LIBERALISM: NEW CONTEXT FOR PLATFORM COOPERATIVISM[1]

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Abstract

The current technological advance, driven by the generalization in the use of information and communication technologies and social networks, together with the dynamism of economic markets, has favored the emergence of the collaborative economy phenomenon. Its evolution has led us to the implementation of large digital mediation platforms that have created new business models that capitalize on the collaboration of users and appropriate the capital gains generated by their interaction. In addition, they have become promoters of a supposed new way of working that, in reality, is one more level of the flexibilization trend of the labor market and its consequent precariousness of labor relations. In fact, the existence of an employment relationship within these platforms is denied under a friendly discourse focused on freedom, proactivity, and cooperation. In this work, we intend to reflect on the concept of the collaborative economy and its raison d'être, the context in which this phenomenon occurs, and the consequences that begin to manifest themselves in the economy in general and in the labor market in particular.

Keywords: collaborative economy, digital platforms, precarious employment

Introduction

The evolution of information and communication technologies (ICT) in cooperation with the development of communication networks and their massive use in developed countries has completely modified the way in which people interact, both personally and in terms of communication. The significance of these changes leads us to think that we are facing a new paradigm such as the one that occurred during the Industrial Revolution and the invention by industrial capitalism of the "labor market" and, as Gorz (1997) pointed out, of what today we still mean by "work".

Thus, as Ruiz (2014) points out, we may be witnessing the deconstruction, or destruction, of expectations about work. in addition, we must be aware that there is intentionality; it is not the result of a natural event of technological evolution, but rather, as in the Industrial Revolution (Noble, 1987; Polanyi, 2021) there is an ideological impulse to eminently liberal vision backed by the Wall Street oligarchy and Silicon Valley venture capital funds (Ruiz, 2014). As Rodríguez-Piñero (2016) points out, it is not a matter of being flexible and agile in the face of the

[1] Paper resulting from Research Project 404253/2022-9 - financed and supported by CNPQ no Publishing CNPQ/SESCOOP Nº 11/2022.

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dynamics of current environments, but of a business strategy with the aim of reducing production costs and leading to less job creation, higher index rotation of workers, and temporary employment.

The current situation of the labor market and its relationship with the platform economy is heir to its flexibilization trend that exploded in the 1990s with the emergence of temporary employment agencies and the blessing of outsourcing for everything and that it promoted, from the neoliberal ideology, the labor reform of 2012 with the mantra of flexibility as a banner. Flexibility has been taken as a resource and an objective at the same time, by the dominant ideologies and those related to real power today under the argument of the search for competitiveness and the free market. But the reality is that such flexibility translates into increased capacity or unilateral power of employers to make decisions about hiring, firing, and changes in working conditions. This, together with the high unemployment rates, permanent since the financial crisis of 2008, gives rise to an unprecedented setback in social rights and an advance in job insecurity with falling wages, abusive working conditions, temporary employment, etc.

In these years we have witnessed the reality of the decoupling between the financial economy and the real economy and how it is the financial economy that controls the real economy and political decisions. To this, we must add that we are currently witnessing a new disconnect that takes place between the prospects for economic recovery and employment recovery, which is also precarious and unstable. For the generation that was born in the late 1970s, precariousness was a process that facilitated entry and that in the medium term allowed stability in a job with acceptable working conditions. However, it is now a structural characteristic of a whole generation that will accompany it throughout its life (Gentile, 2013), since it not only conditions the present but also the future social benefits to which it may be entitled.

In this context, the mediation platforms through the Internet burst into view, which are vulgarly integrated under the Anglo-Saxon range of the "sharing economy" and the mistranslated "collaborative economy". The friendly and current discourse of those who sell it is easily combined with the new digital habits of the population, the lack of opportunities in the traditional job market, and the official marketing that pushes us to become "entrepreneurs", "freelance workers"; owners of their own destiny, although, in reality, the destiny is in the hands of large transnational companies that capitalize on the value of our work. Thus, we have gone from searching for a job to working on projects; from providing a job to providing a service.

There is no doubt that we are facing an unstoppable process and if it is to maintain social cohesion, a clear and adapted regulation of labor law is necessary to the new forms of work (López, 2016). In the long term, the current configuration of the collaborative economy takes us away from direct employment with social protection and appears yet another turn of the screw from the neoliberalism that was imposed forty years ago. But what is the collaborative economy, what are its characteristics, in what way does it condition economic relations and consequently the world of work? In order to answer the previous questions, this descriptive research is based on the documental investigation.

The controversial concept of the sharing economy

The delimitation of the sharing economy is ambiguous (Meelen, Frenken, 2013). If we go back to its possible origins, it may be heir to the collaborative consumption coined by Felson and Spaeth in 1978 from Hawley's theory (1950) on community structures and sustainable activities. Initially, the definitions focused on altruistic motivation (Stokes, 2014), but this does not apply to the whole due to the spread and extension to exchange models with eminently lucrative purposes. In fact, large companies have adopted the forms of the traditional community-based exchange movement to pursue their own economic interests (Codagnone, Martens, 2016). Therefore, there is a dichotomy between those who defend a fully open collaborative economy focused on sharing and those who see only a business opportunity and the opening of new markets.

The term "Sharing Economy" comes from the English expression and was disclosed separately by Lisa Gansky and Rachel Bootsman with Roo Rogers in 2010. This inappropriate translation helps to generalize and fictitiously transpose the original values of the sharing economy to the reality predominant today and that focuses on the consumption and intermediation of digital platforms between consumers or users. As Ruiz (2016) points out, consumption is only one of the economic activities; production, innovation, communication, and these, at the moment, are not controlled by users but respond to a commercial interest.

Other terms, such as collaborative consumption, shared consumption, peer-to-peer (P2P) economy, on-demand economy, etc. that describe a new scenario in which people, thanks to the new power represented by coordination among equals on a massive scale, are empowered to get what they need from each other directly (Heimans, 2014). However, the problem is that in most cases the relationship is not between equals, since there is usually a third party, typically the intermediary, which imposes its guidelines and interests even if it does so in a subtle way and which regulates its market while promotes non-regulation by the States.

The debate on the conceptualization of the collaborative economy transcends the existence or not of profit, which is mostly there (just look at investment data in large digital platforms), but rather, as Trillas (2014) points out, in the willingness or not of the service intermediaries to share the value created with the users who have helped them to generate it. If there is no provision, we are simply faced with new capitalist economy markets that in many cases are controlled by a large transnational company located fiscally in some paradise and that benefits from the unjust enrichment of the cheap or altruistic work of thousands of collaborators (Fuchs, 2014).

Therefore, we are faced with a dichotomy of two models that, although they share technology, are different in substance and in form. Fuster (2016) speaks of "Unicorn collaborative economy", which are private companies that maximize profit, and "platform cooperativism" which are "open source" and maximize the construction of a community. The former are part of what in turn could be called the corporate collaborative economy, which is a phenomenon that takes advantage of the post-crisis situation as a strategy to dismantle working conditions. As Diana Filippova (2015), one of the main representatives of the new integrating employers' association of large companies that owns digital platforms, recognizes that what characterizes the

collaborative economy is that it is a post-salary economy, where the person must proactively build their life and that it is based on monetizing private property with the consequent reinforcement of inequality.

Consequently, under the umbrella of the collaborative economy, we find a heterogeneous, emerging, rapidly changing, and evolving set that covers modes of production and consumption by which agents share assets, goods, or services that are normally underused, in exchange or not for a monetary value. The interaction of these new exchange relationships usually takes place through the intermediation of digital social platforms and, especially, the internet and web 2.0 (Hamai et al., 2014; Kaplan, Haenlein, 2010). It is a widely accepted phenomenon (Nadler, 2014) with important economic and social implications, a strong innovative component, very dynamic and heterogeneous (Bostman, Rodgers, 2010).

If we look at Stokes (2015), the collaborative economy is characterized by the use of the internet to connect distributed networks of individuals and goods in order to use idle assets, such as goods, time, capacities, spaces, and financial resources. In this way, the sector encompasses very diverse activities that allow individuals to share time and skills, parking spaces, toys, or boats, but also includes others such as those that allow public administrations to share data in applications of public transparency, to mention examples very far apart. Some of these activities incorporate money and others replace it with barter or alternative currencies of more or less diffusion.

In addition to the way in which the participants relate to each other, the importance of the objective sought is pointed out as a defining element. In this way, different types of digital platforms can give rise to exchanges with identical operations but at the same time with very different objectives. These include activities and agents that seek to obtain profit under market approaches and many others that seek to obtain totally altruistic objectives and are financed through donations. In this sense, Belk (2010) distinguishes the "truly collaborative" economy (true sharing economy), which would be one that allows temporary access to the property without the need to pay fees or compensation and without transferring ownership. We speak of living with less dependence on money because collaboration with others also means that less is needed. This is related to one of the most widespread revolutions underway among young people from digital culture and that is the disregard of the property value (Rusiñol, 2013). It means rebuilding the value of collaboration, cooperation, sharing, and trust.

But, as we have said before, a good part of the exchanges made through digital platforms, many of which are for-profit, would not fall into this category. This is the case of large organizations such as Uber or Airbnb that are of «access-based consumption», which is the set of transactions that are carried out through the market but that does not imply a change of ownership (Bardhi, Eckhardt, 2012) but that respond to capitalist economic models.

Botsman (2013) understands the collaborative economy as the space in which different labels can be encompassed such as "collaborative economy", "peer economy" or "collaborative consumption" allows the development of ideas such as "community sourcing" (crowdsourcing), "maker movement" or "co-creation". This author defines the collaborative economy as the one

built on distributed networks of connected individuals and communities that transforms the way of producing, consuming, financing and learning, and contrasts it with the traditional one based on centralized institutions. The four concepts on which it is based are:

- Production, which involves the design, production, and distribution through collaborative networks;

- Consumption. It involves maximizing the use of assets through efficient models of redistribution and access to share them;

- Finance, without financial intermediaries, from person to person using decentralized investment financing models (crowd-driven investment);

- Education, open with person-to-person learning models that allow the democratization of education.

This definition seems especially significant to us, which supposes a broader concept than collaborative consumption and which puts the focus of interest not only on what is consumed but also on how it is made and what for.

Of course, we must pay the attention it deserves to the phenomenon of the development of digital technologies as the engine of the collaborative economy, and that in the opinion of Sundaranjan (2016) has acted in three directions. In the first place, much of the information has become digital and this facilitates the emergence of new forms of handling and transport at a very low cost. The second element has been the exponential growth in the capacity of the hardware coupled with the third, programming. The confluence of these factors bases the generation of four consequences that are the basis of the appearance of the collaborative economy:

• The first consequence is that individual consumers have become the main customers of internet companies;

• The second consequence is the digitization of the physical that is reflected in the internet of things and in the transformation of traditional production processes;

• The third is decentralization in economic decisions that implies the disappearance of intermediaries and direct contact between consumers and producers thanks to web 2.0. Although we must remember at this point the majority presence of large companies that act as digital mediation platforms;

• The fourth pillar of economic relations arising from the digital economy is the expansion of the collaborative component and the act of sharing. The new internet-based schemes make it possible to access a good part of the resources without receiving anything in return and have generated communities that allow people to use things for free. But in addition, such forms of information sharing have been disruptive models for entire industries such as record companies, which were based on a form of property rights incompatible with them.

Consequently, the creation of a digital trust is an indispensable element for the existence of the collaborative economy (Rivera, 2016) and which we will deal with in detail later. In addition, providing greater access to information generates a positive impact on the economy (Rivera, 2016). However, from a critical point of view, we can also think that these systems constitute, in many cases, a way that has allowed capitalism to commodify the kindness of people. In short, and to offer a conclusion to this epigraph that by the very nature of the concept we cannot close and that invites more reflection than internalization, we are left with the definition provided by Noguera et al. (2014).

According to these authors, the collaborative economy refers to the processes of exchange of goods and services converted, for the most part, into exchange models in which activities are facilitated through the use of platforms where collaboration between the different parties involved creates a market open, with easy access and exit, both for bidders and demanders and where the product cannot be understood as finished or simply does not exist, without the participation of the public.

Characterization of the collaborative economy and its different variants

The collaborative economy is based on creating meeting spaces, usually digital, where people with common interests or complementary needs exchange value or collaborate for a common goal (communities). The use of information technologies provides the necessary trust and reciprocity, while drastically reducing coordination and transaction costs (Cañigueral, 2014). Undoubtedly, the sharing economy has taken advantage of technological advances such as the increase in the use of the internet or the proliferation of smartphones. The use of mobile applications generates a feeling of belonging to a group and reinforces trust and the internet reduces the costs of searching and evaluating partners, customers, and suppliers/workers. According to the European Commission (2016), collaborative economy processes involve three different agents:

- Service providers who share assets, resources, time, or skills and who can be individuals or professionals;

- The users;

- The intermediaries that, through an online platform, perform the function of the interconnection of the markets.

At the same time, there are three main models of collaborative economy organizations depending on the way in which the exchange takes place and always starting from the cornerstone of the web: (Codagnone, Martens, 2016):

- Peer-to-peer (P2P) model also called (C2C): goods or services are shared between individuals and the company simply acts as an intermediary between supply or demand. This service may or may not be free for users;

- Business-to-consumer (B2C) model: the company provides the intermediation platform and supplies the goods or services. It differs from traditional business models in that the interactions are based on ICT;

- Business-to-business (B2B) model: it can take the form of either of the two previous models, with the only exception that the interacting parties are business organizations.

Einav (2015) describes the common characteristics and the innovative elements that differentiate the collaborative economy or P2P markets that he identifies with collaborative digital platforms that favor exchanges between a large number of fragmented buyers and sellers, generally for profit. These markets take advantage of the technological possibilities, the use of data, and the search algorithms created by the platforms to increase the chances of meeting between bidders and buyers and implement flexible pricing systems or based on auctions. The consequence of this has been that P2P markets have reduced the entry costs of sellers, which has allowed individuals and small companies to compete with traditional companies. Belk (2014) also points out the reduction of transaction costs as an essential element that has made it possible for individuals to access instruments that were previously only accessible to companies. The other bases of its operation are the maintenance of the quality of the goods through the reputation and the feedback mechanisms between the participants.

Reputation and recommendation systems developed by platforms have been pointed to as the root cause for the development of P2P markets or 'sharing economy' markets, even to a greater extent than the explosion of smartphone use. Horton and Zeckhauser (2016) or Belk (2014). Comprehensive taxonomies and classifications are made of individuals and goods that compensate for the lack of physical contact, which is the way in which traditional markets solve this problem. The information provided by such reputation systems makes it possible to alleviate the regulatory needs of traditional markets. Although from our point of view, when we find that said classification is the result of a patented system by a company that is the owner of the digital intermediation platform, what really happens is that it creates its own self-regulating monopoly outside of a legal framework state or supranational.

In addition, the ease of use of the platforms and access to information, as well as the classification systems for consumers and providers based on experience ratings have made it possible to generate the aforementioned required trust (Finley, 2013; Allen, Berg, 2014). These systems allow participants to review classifications before deciding to exchange, reduce information asymmetry and encourage feedback (Fradkin et al. 2015) while constituting a form of self-regulation (Allen, Berg, 2014; Koopman et al., 2014; Thierer et al., 2015).

According to Demary (2014), the most radical impact of new business trends comes from P2P, which differs strongly from traditional companies and B2C. P2P models connect individual customers and providers through virtual networks.

In the case of companies, these are based on the exchange promoted by individuals to use their own assets. The success of Uber and the like is a consequence of capitalizing on network individualism in their favor over collaboration through a digital platform that mediates to close a

transaction that will provide income via commissions. The common characteristics that will promote the success of these platforms are described by Shy (2011):

• Complementarity: without a provider to provide the good or service, the platform, and the sharing economy are unable to meet the demand. And, without demand, suppliers can't do business;

• Compatibility: supply and demand have to be compatible for a network to work;

• Standards: a consensus on the internal rules of the network is necessary;

• Externalities: the number of participants using a platform is positively related to the value of using the platform and, furthermore, the number of users on one side attracts more users on the other side;

• Network change costs: the network change involves training and learning costs, search costs for the new platform, and loyalty costs due to the fact that trust mechanisms are formed through interactions;

• Economies of scale: there are fixed costs to operate the platform and to maintain it regardless of the volume of users.

However, Bucland et al. (2016) point to something much more basic: the success of digital platforms is based on scalability and expansion. So, the more users they have, the better. In addition, success belongs to the one who arrives first and the winner takes it all. But this growth is only guaranteed with external capital. This is reflected in the data of the National Market and Competition Commission (2016). The total investment in collaborative economy digital platforms during the period 2000-2015 was 25,972 million dollars, of which 8,489 correspond to the year 2014 and 12,890 to the first nine months of 2015. In fact, according to this same source.

For the same period, the great dominators of the market received multimillion-dollar amounts of investment: Uber, more than six billion dollars, Airbnb or BlaBlaCar, more than two billion dollars. If we go down to the national level, Wallapop has an investment of more than 219 million dollars and a market valuation estimated at about a billion dollars and all it does is mediate between users. According to Ruiz (2015), the main objective of investors who support internet platforms for collaboration or exchange is to create new markets or expand existing ones, based on intermediating the supply and demand of underused goods or services. And, of course, in exchange for an expected benefit in the future that outweighs the high risk of investing in new business models.

Even so, and probably with greater difficulties, citizens can be co-owners of the platforms in which they operate and thus become empowered (Gansky, 2011), and they can do so through cooperative platforms that bring social responsibility closer to cooperative values. to these new economic environments. It is true that platform cooperatives, owned by users,facet more difficulty because the cooperative movement, precisely because of its values, does not have the

same financial capacity (Bucland et al., 2016) but other factors such as cost reduction entry or decentralization of economic processes make it possible to design new forms of governance, where economic decisions do not have to be based on the exchange through price, but rather on sharing, giving the option to new economic processes outside of commodification (Bauwens, 2014). Bostman and Rodgers (2010) indicate that the horizontality of exchanges is the main characteristic of the collaborative economy.

However, a large part of the literature identifies the sharing economy with for-profit digital platforms, which allow their clients to have access to tangible and intangible assets, instead of owning them. This narrower vision is being imposed not only in the scientific field but also in social consciousness. Codagnone and Martens (2016), in their report for the EU, make an exhaustive list of definitions trying to determine the activities that the collaborative economy comprises, and with this they establish the clearest characterization of the sector, pointing out the bases of what can be its adequate delimitation. Specifically, they establish three broad categories of activities that the collaborative economy encompasses and that link with traditional markets:

1. Recirculation of goods, links with the markets for second-hand or surplus goods.

2. Increases in the use of assets, related to the markets for production factors.

3. Exchange of work and services (labor markets). The latter can be considered encompassed in the latter.

Main consequences

To finish the work, we reflect on the effects that such a development may have, focusing on the economy, especially the functioning of the market, as well as in the workplace. Among the works that have contemplated this general perspective, the analysis by DeLong and Froomkin (2000) stands out. These authors consider that the characteristics of the collaborative economy will qualitatively and profoundly modify the resource allocation system through the market. The system relies on prices conveying the appropriate information that generates the correct incentives so that they inform about scarcity or abundance. However, there are supposedly exceptional circumstances in which such information is not adequately transmitted: market failures. Their existence leads to an inappropriate allocation of resources.

According to DeLong and Froomkin (2000), revolutions in data processing and communication have changed the fundamentals, totally modifying the nature of goods and services and the exchange process. The result is that the economic activity framed within the digital economy has characteristics that make the market stop being a correct guide to allocate resources. For the market to be able to organize and distribute production, it is necessary that prices exclude non-paying consumption, that there is rival consumption and that there be transparency in the sense that individuals can know what they need, the characteristics of the goods they buy, and the degree to which it meets those needs.

But, in addition, when it comes to the digital economy the main source of exchange is information, processed in different forms, and in these circumstances, the price, when it can be established, does not meet any of the aforementioned requirements. The object of exchange, the information, does not allow individuals to be excluded from their consumption once it has been generated. On the other hand, its consumption is unrivaled, so acquiring knowledge by one person does not limit the availability of the same one for another to acquire. Finally, it cannot be transparent because when the information is known you no longer have incentives to pay to acquire it.

Some authors go one step further and consider that these circumstances make it possible to speak of a new stage in historical development that they label as cognitive capitalism. In cognitive capitalism, the maximum incorporation of knowledge into productive activity has been reached, in a process that had been taking place since the industrial revolution to repress the variety and variability and indeterminacy of the world, to conform it to the demands of production (Rullani, 2004). Such information revolution has modified the very nature of value and the ways to extract it, compared to the previous stages of development. Cognitive capitalism is characterized by the disappearance of scarcity as a basic element in the functioning of the system. Knowledge, once created, can be disseminated, at zero marginal cost, and therefore, the basis of the creation of exchange value, in Marxist terminology, is linked to the limitation of its free diffusion.

Knowledge-based societies are characterized by the increasing importance of positive externalities. However, even though the activity of continuous generation of knowledge is the main source of value in today's societies, it surpasses everything that traditional economic thought has considered work capable of receiving remuneration. As Boutang (2004) indicates, social cooperation, the knowledge generated by a multitude of cooperating agents, constitutes a source of immeasurable value and increasing size, but it incorporates a considerable amount of activity that is not recognized as work with the right to remuneration.

But the technological revolution that we are considering also generates numerous uncertainties regarding its long-term effects. In particular, it is concerned about the effect it may have on employment, updating a controversy present in all technological revolutions since the industrial revolution. The reality is that we are faced with the possibility posed by Keynes 1930 in his economic possibilities of our grandchildren of a technological world in which machines were the ones to work. Keynes points out that ways of reducing the human labor force in today's economy advance much more rapidly than forecasts of using surplus labor in tomorrow's economy. Leontief also raised this possibility from a much more pessimistic position, assuming that labor would be replaced by capital in most activities in the near future. There is, therefore, the substitution of capital for labor, giving priority to the interests of capitalists over those of the people, whose work is considered expendable.

Acemoglu and Restrepo (2016) foresee that technology generates two types of opposing forces and the equilibrium depends on the one with more relative importance. On the one hand, technology makes it possible to automate complex tasks that previously performed work. That is, it substitutes labor for capital, but at the same time creates more complex versions of existing tasks for which labor will have a comparative advantage. In short, the revolution of the digital

economy is no different from previous technological revolutions, and therefore, it is destroying jobs at the same time that it is creating another in which workers perform new tasks. But empirical studies (Frey, Osborne, 2013) consider that current technological development is not creating employment in the same amount that it destroys it, and they foresee that a good part of current occupations will be automated in the near future. If automation exceeds the creation of new tasks for humans, the net effect will be the destruction of employment or the technological stoppage that would have alarmed Leontief. We would find that the spread of digital technologies results in the destruction of jobs.

Both processes are related, since automation itself creates the technological changes that give way to the creation of new and more complex versions of existing tasks, for which work will have a comparative advantage to undertake these new tasks. In addition, the relative price relationship generates a counterweight so that both forces remain in equilibrium in the long term. Likewise, they establish different scenarios regarding the evolution of inequalities, which is another of the concerns generated by technological development. Once again, opposing forces are produced that determine dynamics that lead to different scenarios in which inequality can grow but can also evolve in the opposite direction. However, these authors demonstrate the theoretical possibility of a displacement of the innovation possibilities frontier that ends up breaking the balance towards the automation of tasks.

On this last possibility, the scenario in which the digital economy ends up increasing inequality, Sachs (2016) has also reflected. The author compares the effect of what he calls "intelligent machines" with international trade, since both phenomena generate considerable growth in economic activity, modifying their distribution significantly. Overall, he expects jobs and earnings to continue to be shifted to higher-skilled workers, but he also believes that artificial intelligence and robots are likely to make income even more concentrated in the capital, along with an intergenerational transfer from youth with each and fewer possibilities of employment towards greater owners of these machines.

If there were the strong displacement of the innovation possibilities frontier pointed out by Acemoglu and Restrepo (2016), it could lead to the situation that Kurzweil (2005) has called “singularity”, a situation in which machines would be better than humans throughout. In such a situation, young people would only possess skills that would have been replaced by capital that would increase their share of income, causing a strong concentration of income and wealth in the hands of capitalists and initiating a vicious circle to the extent that young people could not save money. It is likely that this situation is already occurring in all developed countries and explains the growth in the share of income that capital appropriates in all of them.

We must remember at this point the ideological depth of these phenomena that overwhelm us. As in the Industrial Revolution, the main innovation was not technological, but ideological (Polanyi, 2021), the digital economy and the platform economy show us these same impulses. During the Industrial Revolution, these impulses were fostered by what Noble (1987) called “robber barons”, that is, the bankers and industrialists who dominated the basic industries of the time such as electricity, oil, chemicals, etc. Today they are the oligarchs of the Internet, with the ultraliberal backing of the big companies of Wall Street and the venture capital of Silicon Valley.

Agents like Goldman Sachs or Morgan Standley, as well as the demagoguery of the Singularity University. A whole hidden face of giants like Facebook, Uber, Airbnb, etc. For this reason, States cannot allow the rhythm to be imposed by private interests disguised as great friendly marketing campaigns but must set the direction of this technological evolution that responds to the general interest and not to the interests of a minority. In this regard, media is as little suspicious of being labeled anti-system as The Economist has spoken.

What does seem clear is that the large digital intermediation platforms have managed to expand the scope of the market economy by implementing new business models thanks to the application of new technologies and the influence of social networks, as well as the fruit of campaigns marketing that have popularized and deified their business models while convinced that access is the new property. Although, as pointed out (Benítez, 2015), it is a misleading statement because to share someone has to previously possess. That is, to be inserted in it you have to possess that capital, be it a good, a skill, a knowledge, etc. (Dagnaud, 2011) from which an intermediary will benefit through the capitalization of its use. It is an eminently market trend that has managed to put a price on what began as community altruism (Benítez, 2015).

This expansion of the market economy, towards new horizons previously non-existent or previously minority, causes it to become a disruption of the existing regulation. In general, the criticisms are focused on the taxation of the new commercial relationships that take place on these platforms and on the new framework in which labor relationships are carried out that either escape the current legal framework or praise in its essence precariousness.

In fact, one of the slogans of collaborative consumption is to facilitate that consumers also act as producers, achieving a favorable state of opinion so that individuals assume the responsibility of acting as entrepreneurs and entrepreneurs themselves. However, in this way, ways of contracting services are promoted that avoid the obligations that labor legislation imposes on the employer. The consequence is to erode through the facts the legal protection of employed workers. (Ruiz, 2016) It is about continuing with the promotion, which already borders on satiety, of entrepreneurship and self-employment, of the proactive individual as a reason for being, without noticing that self-employed workers have a greater social lack of protection in Spain and that In cases of need (to which we are also led by the high long-term unemployment rates) they will be willing (and they are) to auction their workforce downwards, doing so, in addition, in conditions of clear negotiating disadvantage.

These new business models impose a series of changes that especially affect the organization of work (Dagnaud, 2011) and that from our point of view is rooted in the same principles that have been used by neoliberalism to promote the outsourcing of services in all levels, both organizational and geographic. The argument put forward over and over again is that the specialization of production units increases efficiency and provides flexibility to large companies. However, the reality is that this increase is not a consequence of better performance, but lower cost. A reduction in costs is supported by the fragmentation of the process, cutting labor costs (salary, contributions, dismissal), reducing the size of the workforce and their fixed costs, individualizing labor relations, and hindering union action. But, in addition, outsourcing processes promote competition from the subcontracted force that encourages new cost reductions

and that is mainly due to the working conditions of those who finally do the work (Recio, 2016). As Rodríguez-Piñero (2016) points out, in practice subcontracting has acted as a "precariousness mechanism" by providing any service with the temporary component and with worse working conditions.

Ultimately, as Benítez (2016) points out, it involves the replacement of thousands of employed workers by fictitious self-employed, whose real employment relationship is not with a platform, but with a company. The idea is to apply the just-in-time model implemented by Toyota in the eighties to the labor market to reduce costs and charge suppliers with all the risk. Now companies save salaries, social contributions, training costs, social protection costs, vacations, etc., and with the guarantee of having a qualified workforce, proven and ready to provide their services with full availability and obedience. Otherwise, if the client is not satisfied (it is really the employer), the user (worker) may lose a score in the assessment they have within the platform and a lower assessment means losing work options.

And all this, in a context like Spain with high unemployment rates and job insecurity. In this regard, the majority presence of temporary contracts has become, together with unemployment, a hallmark of our labor market (Rodríguez-Piñero, 2016), to which we must add the high number of workers with a time shift partial involuntary and the generalization of working conditions, beginning with decreasing real wages, long before democracy. The demands of the economic gurus sponsored by neoliberalism have led to a permanent and continuous erosion of Labor Law since the approval in 1980 of the Workers' Statute. On more than fifty occasions, this rule has been reformed with a clear objective: to make labor regulation more flexible (González, 2016). In this scenario, it is almost worrying that the legislator must face the challenge of regulating the new work relationships that are the protagonists of the world of the collaborative economy and digital platforms.

As Trillas (2016) points out, collaborating remotely is not equivalent to teleworking, for example. We are talking about things like outsourcing of functions, freelance work, project work, casual work, freelancers capable of developing micro-projects, crowd-employment, gig economy, etc. All this, yes, sweetened with the marketing of modernity, of being proactive (as if looking for a job and working every day is not), of being "free" and not depending on bosses, and so on. But what these formulas suppose and intend is a brutal impact on the social vulnerability of the worker for two fundamental reasons: to disarm him as a worker member of a group with common interests and to reduce costs to increase the profit margin. It is, if the expression is allowed, the return to the square of any town in Andalusia eighty years ago when the day laborers offered their workforce every day in a public wait while the landowner chose who would have work that day; But yes, now we do it through a digital platform.

Concerning the fiscal area, and saving the difficulty that the taxation of companies entails for the State, referring to the large transnational platforms, which are the result of countless shell companies, with opaque accounts and that if they declare profits, they do so in some paradise tax, the debate seems to focus on user taxation. This is also the result of the ability and capacity to influence the institutions of these large companies that have been able to divert the debate from their own taxation and the use of tax havens to the user who rents a second residence during

vacation periods or the teacher who gives private lessons. In addition, at this point, the debate on the professionalism or not of the users arises, of the competitive disadvantage that for traditional professionals the emergence of thousands of providers of substitute services supposes. But what they do offer in a transparent way is the option of facilitating the monitoring for the payment of taxes of those citizens who demand or offer services in them.

In general, if adequate fiscal policies are articulated, the welfare of the entire population could be increased. Undoubtedly, we are facing a disruptive historical stage with previous societies from which we are already experiencing changes in the way of producing, consuming, and even relating, although the essence that is the control of resources remains. For this reason, the reflection of Pérez (2002) seems very correct when he affirms technology only defines the space of what is possible, but creating an environment where everyone benefits is a socio-political choice, and that is the debate that as Citizens cannot lose: it is not a natural phenomenon, it is not just an economy; It is a matter of priorities and of policy.

Conclusion

Cooperatives, as observed, have a contradictory character since their first initiatives, due to their modes of insertion in the capitalist system. Contradictions are accentuated in the current stage of capitalism, with distinct as platform cooperativism projects and a cooperative as a radical project, both existing in media and digital. The accent of the latter is in the political and social transformation realism denaturalizes the capitalist. On the other hand, platform cooperativism, although a more critical accent theoretically from Scholz (2017), mainly in its opposition to the "sharing economy", shows – both in the opening text of the sharing platform. of the initiatives present on the site are its enunciation marks by a grammar of enunciation, in which the marks are publicized as a media, and marked – they are publicized as "saved in media places, and marked as expressions of political transformation". They address that there is democracy in the world of work, but there are no details about associative work and the distribution of surplus value or the issue of the "common" is not mentioned, to list the points mentioned by De Peuter and Dyer-Witheford (2010).

On the one hand, it is necessary to emphasize the importance of collective organization and alternative forms of work organization in the area of communication, which prevent the flexibilization – along with individualization and precariousness – of work in the current neoliberal hegemonic model. On the other hand, the debate is not whether it is "reform or revolution", but to what extent platform cooperativism, based on the statements of media initiatives, presents itself as more of a "platform" than effectively "cooperative", adjusting to the prescriptions of cool capitalism. Thus, we ask ourselves to what extent platform cooperativism is discursively closer to platform capitalism than one might imagine.

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COOPERATIVE VIRTUAL GENERAL ASSEMBLIES AND COOPERATIVE PRINCIPLES. A LEGAL AND EMPIRICAL ANALYSIS[1]

***Deolinda Meira*[2]**

Abstract

Cooperatives must achieve the digital transition in its various dimensions. New technologies must be put at the service of promoting democratic participation, supporting democratic management, and bringing cooperators closer to the cooperative. Virtual general meetings can be a way of consolidating the cooperative principle of democratic member control. In turn, the principle of education, training, and information may enhance the digital transition in cooperatives and promote virtual general meetings. The pandemic caused by COVID-19 forced social distancing to deal with health restrictions, which boosted internal digital-based organisational processes, including general assemblies. The results of the COOPVID Project show that in some cooperatives the general assemblies that were held via videoconference had more participation than when they were held in person and some cooperatives are already thinking about changing the model of how meetings will be held during the post-pandemic period. The project also highlighted that in general the cooperatives do not use the reserve for education and training to combat digital illiteracy.

Keywords: cooperative law, digital transition, virtual general assemblies, democratic member control, cooperative education and training, COOPVID Project.

Introduction

The pandemic generated by the SARS-COV2 virus represents one of the most significant challenges of recent decades posed to organisations, including cooperatives. The pandemic highlighted more intensely the centrality that communication and information have in current society, and it is in this digital society that today's cooperatives are positioned and operating.

Cooperatives necessarily have to achieve the digital transition in its various dimensions. New technologies must be put at the service of promoting democratic participation, supporting democratic management, bringing cooperators closer to the cooperative,

[1] - This publication is one of the results of the COOPVID Project "COOPVID - Impact of COVID-19 on Cooperatives (in particular Social Solidarity Cooperatives). An interdisciplinary study". Operation No. POISE-03-4639-FSE-000291.

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transparency in governance, preventing conflicts of interest, communicating with the community, cooperative training, and information (European Commission, 2020).

In both larger and smaller cooperatives, this challenge implies significant adaptation. Incorporating new technologies into members' democratic participation, cooperative management, and supervision represents a challenge to cooperative principles and governance rules. Such examples are virtual general meetings or electronic voting of cooperators.

The exceptional circumstances experienced cannot fail to be considered by cooperatives' bodies, both the management and the bodies where the cooperative members sit.

Decree-Law No. 10-A/2020 was published in Portugal, establishing exceptional and temporary measures related to the aforementioned epidemiological situation.

The law allows general meetings of cooperatives to be held by telematic means "unless otherwise provided for in the statutes." Thus, this will be a possible "path" to be adopted in this period in which the intention is to avoid face-to-face meetings as much as possible.

It should be noted that holding general meetings electronically implies that the cooperative "ensures the authenticity of the declarations and the security of the communications, registering their content and the respective participants."

Moreover, article 5(1) of Law 1-A/2020 favours telematics means as a means of holding general meetings, establishing that "the participation by telematics means, such as video or teleconference of members of collegiate bodies of public or private entities in the respective meetings, does not prevent the regular functioning of the body, particularly concerning quorum and resolutions, although the form of participation must be recorded in the respective minutes."

Note that this practice was already allowed in the pre-covid period. In fact, since 2006, the use of telematic means for the meetings of the General Assembly of cooperatives has been allowed. However, the pandemic has made this option almost inevitable for most cooperatives.

In democratic organisations, all cooperative members must be involved in the decision-making process. Members must participate in the annual meetings (or general assembly) in which they elect the board of directors and (dis)approve the cooperative's financial statements. Some members are even more active, as they participate in the board of directors or supervisory bodies. Nevertheless, different scholars have highlighted a decline in members' commitment to their cooperative, reflected in an ever-decreasing participation in general assemblies (Fajardo, 2020).

It is in this context, in this paper we intend to reflect on the impact of virtual general assemblies on the functioning of cooperatives, particularly concerning the principle of

democratic member control by specifically answering the following questions: (i) Can virtual general assemblies be a way of consolidating this strategic principle of cooperatives, or, on the contrary, can they discourage cooperative members who do not have adequate equipment and training from participating in their cooperatives? (ii) How can cooperatives overcome possible difficulties of cooperative members in this area? (iii) Can the principle of education, training and information enhance the digital transition in cooperatives and, as a result, the holding of virtual general meetings?

The answer to these questions will be based on a legal and doctrinal reflection, complemented with some empirical data. We will therefore take into account the results obtained in the COOPVID Project, an interdisciplinary study on the impact of COVID-19 on Portuguese Social Solidarity Cooperatives, a study commissioned by CONFECOOP and CIRIEC Portugal and carried out by the Social Economy Unit of the Centre for Social and Organizational Studies of the Polytechnic of Porto (CEOS.PP)[3].

The question of the binding or non-binding nature of the cooperative principles

In the doctrinal elaboration about the cooperative principles, two currents stand out: those who understand that the cooperative principles are mandatory rules of a binding nature for the legislator, who is obliged to adhere to such principles, and must implement them in legal rules (Vicent Chulià, 2002; Llobregat Hurtado, 1990; Namorado, 2005); and those who understand that the cooperative principles are soft law rules (Hiez, 2013, Sangen, 2014, Santos Dominguez, 2015).

In the Portuguese legal system, this issue has a substantial practical relevance, given that the cooperative principles are enshrined in the Constitution of the Portuguese Republic (CRP) (Meira, 2011).

Thus, article 61(2) of the CRP states that "everyone has the right to freely establish cooperatives, provided that the cooperative principles are observed". In turn, Article 82(4)(a) of the CRP states that the cooperative subsector "encompasses the means of production owned and managed by cooperatives in compliance with the cooperative principles".

The CRP does not identify the cooperative principles, there being an express reference to the principles defined by the ICA and which are described in art. 3 of the Portuguese Cooperative Code, approved by Law 119/2015, 31 August (PCC): voluntary and free membership; democratic member control; economic participation of the members; autonomy and independence; education, training, and information; cooperation among cooperatives; and concern for the community.

According to Namorado (1999, p. 20), this position adopted in the CRP places the shaping of the Portuguese cooperative sector at the mercy of the ICA's decisions so that when the

[3] - See https://social-economy.net/coopvid/the-impact-of-covid-19-on-social-solidarity-cooperatives/

ICA changes the principles, it will be the new option that will come into force in the Portuguese legal system.

In the words of Canotilho and Moreira (2007, 793) "The "cooperatives" which do not respect these cooperative principles are not true cooperatives in the constitutional sense, and therefore cannot enjoy the respective guarantees".

In terms of ordinary legislation, the Portuguese Cooperative Code associates the notion of cooperative (Article 2 of the PCC) with the necessary obedience to the cooperative principles. According to Article 2(1) of the PCC, cooperatives are "autonomous legal persons, freely established, with variable capital and composition, which, through cooperation and mutual assistance among their members, in compliance with the cooperative principles, aim to satisfy their economic, social or cultural needs and aspirations on a non-profit basis".

Therefore, the legal regime of cooperatives in Portugal shall be based on compliance with these cooperative principles set out in Article 3 of the PCC.

The cooperative principles thus constitute the limit to recourse to subsidiary law. Article 9 of the PCC, regarding the subsidiary law applicable to situations not provided for therein, establishes the possibility of recourse, "as long as the cooperative principles are not disrespected, to the Commercial Companies Code, namely to the precepts applicable to public limited companies" (Frada & Gonçalves, 2009).

In this context, in the Portuguese legal system, the legal-constitutional consecration of the cooperative principles in Articles 61(2) and 82(4)(a) of the CRP gives them a binding and conforming force typical of legal-constitutional rules. According to Canotilho and Moreira (2010, p.881), "As the Constitution is the supreme norm of the country, all other rules must respect it". This means that the ordinary legislator is legally obliged to respect the meaning of the cooperative principles when producing legal rules concerning the legal regime of cooperatives. As a result, legislative acts of the ordinary legislator which disrespect the cooperative principles are unconstitutional (Article 277(1) of the CRP).

Along the same lines, the PCC provides that the non-respect of the cooperative for the cooperative principles in its functioning shall constitute grounds for its dissolution [Article 112(1)(h) of the PCC]. This is a cause for compulsory dissolution by judicial means.

The António Sérgio Cooperative for the Social Economy (CASES), a public interest cooperative that brings together the State and various social economy organisations, was created by Decree-Law 282/2009 of 7 October. In exercising its supervisory functions over the cooperative sector in Portugal (articles 115 to 118 of the PCC), it is responsible for supervising, following the law, the use of the cooperative form, respecting the cooperative principles and the rules regarding its establishment and functioning.

To this end, cooperatives are required to send CASES copies of the acts of incorporation and amendment of the bylaws, annual management reports, annual accounting documents and the balance sheet.

Through the Public Prosecutor's Office, CASES must request the competent court to dissolve cooperatives that do not respect the cooperative principles in their operations (Meira & Ramos, 2015).

The relevance of the General Assembly of cooperatives

The use of telematics means in the functioning of the general assembly may be an important means of facilitating and encouraging cooperators' participation in the meetings, thus contributing to the consolidation of the democratic and participative functioning that characterises these entities.

We must not forget that the general assembly is the organ in which all cooperators participate (art. 33 of the PCC). It is the supreme organ of the cooperative, and its decisions are mandatory for the remaining organs (Article 33(1) of the PCC).

The term "supreme organ" of the cooperative assumes a threefold meaning: (i) the most important and decisive issues in the life of the cooperative fall within the remit of the general assembly (art. 38 of the PCC); (ii) the members of the corporate bodies are elected by the general assembly from among the collective of cooperators (art. (iii) the resolutions adopted by the general meeting according to the law and the bylaws are binding on all the other bodies of the cooperative and all its members (Article 33(1) of the PCC) (Münkner, 1995; Henrÿ, 2012).

Pursuant to Article 38 of the PCC, in addition to other powers set forth in the bylaws, the General Assembly has elective powers (election and dismissal of members of the bodies of the cooperative), strategic powers (amendment of the bylaws; approval of the voluntary merger, demerger or dissolution of the cooperative, voluntary membership of the cooperative in unions, federations and confederations), management powers (annual review and vote on the management report and accounts for the financial year; review and legal certification of accounts; review and vote on the budget and the business plan; fixing the interest rates to be paid to members of the cooperative; approving the form of distribution of surpluses; fixing the remuneration of members of the corporate bodies of the cooperative) and control (deciding on the exclusion of cooperative members and the loss of mandate of the corporate bodies; functioning as an appeal body in relation to the admission or refusal of new members and in relation to the sanctions applied by the management body; deciding on the exercise of the right to civil or criminal action against directors, managers and other representatives or members of the supervisory body).

The consequence of this rule is that cooperatives do not have a concentration of management powers in the management body, and General Assembly may decide on matters directly related to the management of the cooperative. Thus, in addition to the

powers mentioned in Article 38 of the PCC, the bylaws may add other management powers to be exercised by the General Assembly. Thus, a provision in the bylaws which grants the cooperative members the right to pass resolutions on other matters relating to the management of cooperatives or requires the management body to submit any of these matters to the cooperative members to obtain prior consent for the practice of certain categories of management acts shall be lawful.

In this context, the bylaws may reserve management powers for resolution by the cooperative members, similar to the regime provided for private limited companies (art. 246, no. 1 of the Commercial Companies Code) (Abreu, 2012) or provide for the possibility of the cooperative members passing resolutions issuing instructions on the general business policy of the cooperative or on certain matters. They may also provide for the possibility of the cooperative members passing resolutions issuing instructions on the general business policy of the cooperative or on certain matters, provided that the powers which are mandatorily attributed by law to the board of directors are reserved, with particular emphasis on the preparation of the management report and the proposal for the application of results [Article 47(a) of the PCC]. It should be noted, however, that in the Portuguese legal system, a provision in the bylaws granting the cooperative members practically all decision-making powers in management matters is not lawful, and the Board of Directors is responsible for the mere execution of such resolutions (we are talking about the management and not the representation of the cooperative). Taking into account the model provided for in the PCC, the board of directors is a necessary management body. Although there is a principle of dependence between the management body and the general meeting, this principle must respect the corporate structure that, by law, cooperatives must adopt based on differentiated bodies with specific powers (Abreu, 2012). Solutions are similar to those provided in the Italian legal system for the "Piccola società Cooperativa", which may be managed directly by the members' assembly, which must appoint a president who will be its representative before third parties (Frascarelli, 2006), or in the English legal system in which it is allowed that in small cooperatives the founding members choose a governance model based on a collective structure in which all decisions are taken directly by the General Assembly (Snaith, 2017), will not be admissible in the Portuguese legal system.

Furthermore, in cooperatives, the resolutions passed by the cooperative members shall be binding on the management body ("their resolutions, passed under the law and the bylaws, shall be binding on the other bodies of the cooperative" - Article 33(1) of the PCC). In a public limited company, by the combination of the provisions of section 373(3) and section 405(1), both of the Portuguese Commercial Companies Code, it is up to the bylaws to determine if and when the members' resolutions on management issues are binding for the administration body.

The relevance of participation in the General Assembly of cooperatives

Participation in general assemblies is a right/duty of cooperative members. All cooperators and investor members fully enjoying their rights have the right to participate in general assemblies (Article 33(2) of the PCC).

This participation in the general assembly is not restricted to the right to express a statement of will by voting. The right to participate in the general assembly includes, in addition to the right to vote, other rights such as the right to be present (or represented) at the meeting of cooperators, to submit proposals and to participate in the discussion of proposals (Article 21(1)(b) of the PCC).

The right to participate in the general meeting and vote on the proposals on the agenda is the hard core of the right of participation of a cooperative member in a cooperative. It is one of the manifestations of the cooperative principle of democratic member control (Article 3 of the PCC). This principle particularly values the participation of cooperators in the functioning of cooperatives and underlines the responsibility of leaders towards the cooperators who elect them. From this principle, the members democratically control the cooperative. They should actively participate in formulating policies and taking fundamental decisions based on the one-member, one-vote rule (Article 40(1) of the PCC) (Fici, 2018).

Some specific operational features of virtual assemblies

When a virtual general meeting is held, the means chosen must ensure the following (i) the authenticity and security of communications; and (ii) the entire record of the meeting, its content, and the respective participants.Article 5 of the Law 1-A/2020 states that "the participation by telematic means, namely video or teleconference of members of collegiate bodies of public or private entities in the respective meetings, does not hinder the regular functioning of the body, particularly about the quorum and resolutions, although the form of participation must be recorded in the respective minutes."

Therefore, holding these meetings cannot prejudice "the regular functioning of the body", i.e. the collegiality of the General Meeting. If there is an interruption of the transmission due to technical problems or hackers, this may determine the invalidity of the resolutions taken at the meeting.

As for the notice of the general meeting, the most relevant aspect to note is that, since it will not take place in any physical location, but through the various applications available for videoconferencing, care should be taken to place in the notice the link that will allow participation in the general meeting.

In the course of the meeting, if sound and image recordings of the participants are to be collected, the Chairman of the Meeting Board shall inform the participants in such a way as to ensure compliance with the applicable provisions on data protection.

We have seen that, in the name of the principle of democratic member control, the members must be guaranteed full intervention in the assembly, allowing them to ask questions, make proposals, and vote.

The question of voting in a virtual General Assembly deserves special consideration. The realisation of a virtual General Assembly will only be fully ensured if it can guarantee that all members exercise the right to vote by telematic means. The cooperator member has two possibilities: the electronic vote, which is cast in real-time in the virtual assembly, and the electronic postal vote, which is cast before the General Assembly.

Although not expressly provided for in the Cooperative Code, by reference to article 9, the provisions of the Portuguese Commercial Companies Code shall apply, which allows cooperative members who participate by electronic means to exercise their right to vote, in real-time, by electronic means, provided that the cooperative guarantees the authenticity of the vote cast (article 384, paragraph 9 of the Portuguese Commercial Companies Code, by reference to article 9 of the PCC).

Suppose the cooperator is absent from the meeting. In that case, he/she may, unless such procedure is prohibited by the cooperative's bylaws, vote by correspondence (postal vote), which is an important mechanism to facilitate and encourage the participation of cooperators in the General Assembly thus consolidating the democratic functioning of cooperatives.

In addition to the traditional form of written correspondence, we now have electronic correspondence in this digital context. Therefore, in principle, this type of vote may also be exercised by email, using an advanced electronic signature. However, specific legal limitations should be considered. In effect, article 42 of the PCC requires that postal votes remain confidential until voting. This means that if it is impossible to ensure such confidentiality for electronic votes, the exercise of postal votes by email shall not be admitted, but only in the traditional written form.

In addition, for acts requiring secret ballots, namely roll call votes or elections, if confidentiality cannot be assured — e.g., electronic voting — the meeting cannot be held by telematic means.

The obligation to educate and train for full virtual functioning and participation in general assemblies

Meetings by telematic means may be online meetings (or mixed) and cyber meetings (or virtual meetings).

Regarding the first, not all cooperators may have access to telematic means to participate in the General Assemblies. This issue must be taken care of by holding a mixed General Assembly (face-to-face meeting for those cooperators who wish to participate in person at the registered office, namely because they do not have access to videoconferencing systems, coupled with the permission of the remaining cooperators to attend and participate in the assembly through a videoconferencing system). In virtual General Meetings, there is no face-to-face meeting of cooperative members, who participate exclusively through remote means of communication.

So, in the context of virtual participation, the cooperative shall ensure that all cooperative members have the means and training to fully participate in a virtual general assembly. If this is not the case, the cooperative shall develop the necessary education and training to enable such virtual participation.

The principle of education, training and information is described in Article 3 of the PCC as formulated by ICA in 1995, namely: "Cooperatives shall promote the education and training of their members, elected representatives, leaders and workers so that they can contribute effectively to the development of their cooperatives. They should inform the general public, particularly young people and opinion leaders, about the nature and benefits of cooperation".

Torres Lara (1983, p. 89) calls this principle the "golden rule of cooperativism", being a condition for the applicability of the other principles and a factor of their validity and effectiveness (Namorado, 1995).

This principle highlights the vital importance of education, training, and information. The first two vectors have a predominant relevance in the internal scope and the third vector in the external scope (Gutiérrez Fernández, 1995).

Following MacPherson's (1996, p. 33) thinking, "education will mean more than distributing information, engaging members' minds, elected leaders, managers and workers in fully understanding the complexity and richness of cooperative thinking and action." "Training will mean ensuring that all those involved in cooperatives will have the skills necessary to assume their responsibilities effectively. Information will focus on disseminating the specificities and advantages of cooperation to the community where the cooperative is located (García Pedraza, García Ruiz & Figueras Matos, 2018).

The cooperative movement has always been based on the paradigm of integral development of its members. Therefore, in addition to the civic component, cooperative education and training are aimed at the cooperative member to acquire skills and knowledge that reinforce their organisational culture based on cooperative principles and values, and adequate technical and professional tools and skills (Corberá Martínez, 2005).

The beneficiaries of cooperative education and training shall be the cooperative's members, elected representatives, leaders, and workers. The beneficiaries of cooperative information shall be the community in which the cooperative operates.

According to the statement of the principle, education and training aim to "contribute effectively to the development of their cooperatives."

The external dimension of the principle is evident in the duty to provide information "on the nature and benefits of cooperation", aimed at "the general public", that is to say the community and, within it, particularly young people and opinion leaders. Information will enable cooperatives to be dynamically inserted in the community, fostering a sense of

solidarity and responsibility among the general population, making them aware of the nature and benefits of cooperation, thus enhancing the social legitimisation of cooperatives (Namorado, 1995; Macías Ruano, 2015).

One of the internal projections of this principle is the recognition of the right of cooperative members to participate in cooperative education and training activities (Article 21(1)(f) of PCC).

It is part of the DNA of cooperatives to promote and foster education on the cooperative values and principles so that cooperators can fully live out their membership, be aware of their rights and duties, and the necessary participation in the activity of the cooperative. The cooperator or candidate cooperator must be fully aware that, among other relevant aspects: (i) the cooperative fulfils not only an economic function, reflected in the satisfaction of the needs of its members but also a social function, evidenced by the primacy of the individual and social objectives over the capital, the reinvestment of surplus funds in long-term development objectives, the conjunction of the interests of members with the general interest; (ii) the cooperative is a collectively owned and democratically managed enterprise by the members (Meira, 2012).

The recognition and internalisation of these cooperatives' specificities are essential for cooperators' adequate participation in the cooperative's activity, whether in its economic dimension, political dimension, or management and supervision dimension (Meira, 2017; Rodríguez González, 2018).

Cooperative education and training should provide the cooperative members with adequate knowledge about the cooperative principles and methods for them to actively and fully participate in their cooperative, properly decide in the assemblies, consciously elect their bodies, and control their actions.

Therefore, cooperative education and training are essential for this democratic participation to take place in all its breadth and depth (Meira, 2020).

In exchange for recognising this right, cooperatives are obliged to organise such education and training activities. To that end, they shall set aside a reserve fund for "the cultural and technical education and training of cooperative members, cooperative workers and the community" (Article 97(1) of the PCC). The organisation of these education and training activities is one of the specific competencies of federations and confederations of cooperatives. Article 108(1)(d) of the PCC states that federations and confederations are responsible for "fostering and promoting cooperative training and education and may manage the education and training reserves of members".

The reserve for cooperative education and training is regulated by art. 97 of the PCC and is mandatory by law.

According to Article 97, paragraph 2, of the PCC, the following shall revert to this reserve: the part of the fees that is not allocated to the legal reserve; at least 1% of the annual net surplus from transactions with cooperators (this percentage may be higher if the bylaws or the general meeting so decide); donations and subsidies that are specially allocated to the purpose of the reserve; and the annual net profits from transactions with third parties that are not assigned to other reserves.

The legislator establishes neither a minimum amount nor a maximum limit for establishing this reserve, after which reversals for the establishment of the reserve are no longer mandatory. Thus, during the entire life of the cooperative, the legal obligation to allocate the cooperative education and training reserve will subsist, regardless of its amount or the time elapsed (Meira, 2017).

The General Assembly shall be responsible for defining the basic lines of application of this reserve and for the subsequent control of its application, and the administration body of the cooperative shall have the duty to include an annual training plan in the business plan for the application of this reserve (Article art. 97(4) of the PCC).

The general meeting may allow the management body to deliver, in whole or in part, the amount of this reserve to a higher-level cooperative, provided that the latter pursues the purpose of the reserve in question and has a business plan in which that cooperative is involved. We must not forget that the powers of federations and confederations include fostering and promoting cooperative training and education, and, to that end, they may manage the education and training reserves of their members (Article 97(5) and Article 108(f) of the PCC).

The Cooperative Code also allows for the possibility of a part, or all of this reserve being allocated to education and training projects which, jointly or separately, involve the cooperative in question and: (i) one or more legal persons under public law; (ii) one or more legal persons under private law, non-profit; (iii) another cooperative or cooperatives (Article 97 (6) of the PCC) (Meira, 2017).

The virtual general assemblies during the pandemic. The COOPVID Project.

The COOPVID project started in December 2020 and will end in December 2022. The impacts on the internal and external practices of cooperatives resulting from the pandemic are subject to study, as well as the challenges for the post-COVID phase.

The Project covers four interdisciplinary work areas: law, management (financial and human resources), provided services, and information systems/digital transformation – that complement each other, to obtain, analyse and interpret the results, as well as the final considerations and recommendations necessary to anticipate and respond to the post-pandemic challenges, continuous improvement and innovation that these organisations must face (Meira et al, 2022).

The Project has as main goals: (i) the analysis of the legislative contribution to attenuate the adverse effects and solve the challenges identified in the context of the pandemic; (ii) the identification of the digital transition strategies that took place at the level of work organisation to face the challenges of social distancing and teleworking; (iii) the understanding of how the social solidarity cooperatives are positioned for the post-covid challenges, and (iv) the identification of recommendations for intervention at the internal and external level, to meet current and future needs.

The social solidarity cooperatives were selected to be as diversified and representative as possible of all the activities developed by this cooperative branch and the areas of activity to be studied were: a) Human resources management; b) Services provided; c) Financial resources management; d) Digital transformation.

The study of the impact caused by the pandemic in all these areas was supported by the legal framework due to the legal regime of the social solidarity cooperatives, as well as the legislation produced in the pandemic context.

The COOPVID project has three phases, and it was conducted using a qualitative and quantitative methodological approach. The activities of the first phase consisted of a literature review of the legislation that was put in place to overcome the difficulties created by the pandemic and the implementation of eleven exploratory interviews with cooperatives leaders.

The second phase: consisted of two stages of questionnaire surveys applied to social solidarity cooperatives:

- The first stage began in June 2021 and lasted until February 2022, through the presentation of a survey by a questionnaire containing a set of questions of an exploratory and extensive nature on the characterization of the cooperative, the impact of the pandemic on all the areas covered by the study, and how it was possible to cope with the pandemic period.
- To have a more comprehensive understanding of how cooperatives have dealt with the pandemic over the different waves, in March 2022 a new questionnaire was implemented to produce a further overview of the main changes caused by the pandemic and to allow a longitudinal study about the theme. This questionnaire was closed on the 30th of June, 2022.

Finally, in the third phase, different focus groups were held to discuss the sector's needs, strategies, and recommendations.

From the results of the interviews in phase one, we can conclude that regarding the virtual general assemblies some technical difficulties were experienced by some cooperatives and even some of those general meetings were either postponed or held through video conferencing, using Zoom or Teams. Participation increased in meetings involving

cooperative members or general meetings held by videoconference. Some cooperatives are considering holding meetings in a mixed format in the future to increase participation.

The cooperatives adopted digital technologies to face the pandemic, but not all at the same level. As far as we understand, this adoption is primarily due to the level of digital literacy of the target group of intervention. The situation forced leaders and workers to use digital tools as never before to work in collaboration at home. In addition, it built digital literacy of all cooperative's workers sent home because it forced workers to learn and develop a potential awareness of how things can be done differently.

The results of the eleven interviews show that during the covid-19 pandemic, the cooperatives' human resources were focused on continuing to fulfil the cooperative's mission and showed high adaptability to changes. They found strategies to deal with the situation by using tools to communicate at a distance, such as telephone and video conferencing. Both at the level of teamwork and institutional communication, where work meetings and general meetings were held by video conferencing, participation in general meetings was greater than when they were held in person. Many cooperatives are already considering changing the model of how meetings are held for the period post-pandemic.

In stage two, regarding digital assemblies, the results obtained indicate little change during the pandemic period about the use of the digital model.

From the results, most of the answers (over 65% in the first phase of the study and 58% in the second phase of the questionnaire survey to participating cooperatives) were: Not applicable; Did/do not have and still do not have/do not hold digital assemblies/digital voting. This may be explained by the need for the legal contextualisation of these instruments, as well as appropriate conditions free of subjectivity or, possibly, fraud, in a pandemic scenario that came as a surprise, evolved rapidly, and forced successive confinements.

As for the projection for the post-pandemic future, regarding the probability of holding remote general assemblies, we observe very varied results, in which 37.5% of the cooperatives refer that it is unlikely and very unlikely to use digital meetings, 32.5% refer that it is likely and very likely that they will be held and 30% still have no opinion on the matter. In this way, there is some uncertainty as to what is expected for the future in the sector of Social Solidarity Cooperatives in Portugal as regards digital assemblies.

Regarding the reserve for cooperative education and training, in the results obtained through the questionnaire presented in phase two of the project, we found that in the year 2020 this reserve fund was used by only 4.2% of the responding cooperatives and conversely, 79.2% responded that they had not used the reserve for training.

Spending on digital training for employees remained the same in 50% of the cooperatives and increased only in 12,5% of the cases, making a total of 63%, during 2020.

So, cooperatives make very limited use of the reserve for cooperative education and training.

Although only 12.5% of cooperatives increased spending on digital training, more cooperatives increased the allocation of some type of computer equipment to employees. This data raises the question of whether the expenditure on digital training was maintained because people already had a good level, or whether they were given the equipment, expecting them to learn by doing, without specific training.

Conclusions

Incorporating new technologies into members' democratic participation, cooperative management, and supervision represents a challenge to cooperative principles.

As democratic organisations, all cooperator members must be involved in the decision-making process. Nevertheless, different scholars have highlighted a decline in members' commitment to their cooperatives, reflected in ever-decreasing participation in general assemblies.

The use of telematics means in the functioning of the general assembly may be an essential means of facilitating and encouraging cooperators' participation in the meetings, thus contributing to the consolidation of the democratic and participative functioning that characterises these entities.

In the context of virtual participation, the cooperative shall ensure that all cooperative members have the means and training to fully participate in virtual general assemblies. If this is not the case, the cooperative shall develop the necessary education and training to promote members' digital literacy, using the reserve for cooperative education and training.

Digital transformation is considered one of the biggest side effects of the pandemic caused by COVID-19. The social distancing to deal with health restrictions drove not only virtual working but also digital-based internal organisational processes, among which the general assemblies.

The COOPVID Project revealed that some cooperatives that used virtual general meetings had greater participation of cooperative members than in face-to-face general meetings. Some cooperatives are considering holding meetings in a mixed format or virtual only in the future to increase participation. The Project also revealed that cooperatives make very limited use of the reserve for cooperative education and training, which is one of the privileged instruments for promoting members' digital literacy.

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Legislation

IRELAND'S PROPOSED CO-OPERATIVE SOCIETIES BILL 2022

Bridget Carroll

In November 2022 the government of Ireland published the General Scheme of the Co-operative Societies Bill, 2022. To date, co-operatives in Ireland have largely made use of the Industrial and Provident Societies Acts (1893-2021) which pre-date the state. The proposed new legislation, which is specific to co-operatives, is significant in scale, consolidating existing provisions and introducing new ones aimed at modernising co-operative governance in areas such as the legal duties of directors, compliance and financial reporting requirements. It follows an overhaul of the Companies Act and a public consultation exercise.

Changes proposed include reducing the minimum number of directors; permission for co-operatives to raise funding by public offering; the repeal of existing provisions for raising funds; provision for audit exemptions for smaller co-operatives and changes in the entities that may form a co-operative. In recognition of their distinctive characteristics such as their democratic nature, co-operatives registering under the proposed legislation will be "required to adhere to the co-operative ethos" (Department of Enterprise, Trade and Employment, 2022a).

Dáil (Parliament) debate and the policy response to the public consultation highlights a "balanced approach" (Department of Enterprise, Trade and Employment, 2022a) which aims to recognise the diversity of co-operatives in Ireland and seeks to refrain from restricting them unduly or being overly prescriptive. The aim is to place the co-operative model in a "more favourable and clearer legal basis" and to "create a level playing field" with companies which will in turn encourage the use of the co-operative form "for entrepreneurs and for social and community activities" (Joint Oireachtas Committee, 2022). The proposed legislation is intended to be "broad based" and confined to provisions that are "generally applicable" (Department of Enterprise, Trade and Employment, 2022a) thus allowing co-operatives flexibility around rules they adopt, for example, on whether to utilise an asset lock or legal reserve. It is proposed that existing Industrial and Provident Societies legislation largely be repealed with a transition period offered to existing societies to choose a legal structure.

While this Act is certainly the most comprehensive reform of co-operative-related legislation ever to take place in Ireland, previous efforts to modernise the legislation have not always managed to get through the political system. Parliamentary debate on the proposed bill raised the perceived need for dedicated promotion and support for co-operatives in Ireland. How co-operatives are promoted and supported and by whom and what "new capacities" (Joint Oireachtas Committee, 2022) will be required by enterprise development agencies and professional advisors for those activities are important related issues.

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Joint Oireachtas Committee on Jobs, Enterprise and Innovation, Wednesday 14th December 2022. Debate on the General Scheme of the Co-operative Societies Act 2022; Department of Enterprise, Trade and Employment. https://www.kildarestreet.com/committees/?id=2022-12-14a.101

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Events

COOPERATIVE LAW RELATED INTERNATIONAL EVENTS IN 2022

Hagen H e n r ÿ

Three international events were at least to a considerable extent dedicated to cooperative law in 2022. In chronological order these events were: the European Research Conference 2022 of the International Cooperative Alliance Committee on Cooperative Research from 13 to 15 July in Athens (ICA CCR conference); the VIII Congreso Continental de Derecho Cooperativo [VIII Continental Congress on Cooperative Law], organized by the Regional Organization of the Americas of the ICA from 27 to 29 October in Asunción/Paraguay (Congreso Continental); and the Centennial Event of the International Cooperative Banking Association (ICBA Centennial) from 17 to 19 November in Brussels.

The ICA CCR conference under the overall theme of "Rethinking co-operatives: from local to global and from the past to the future" further consolidated the now regular place of cooperative law in this biannual event. Already the densely stuffed pre-conference for young scholars highlighted the relevance of cooperative law and its dia-disciplinary character. The unprecedented high number of young participants throughout the conference matched the overall conference theme. It attested to the renewed interest in the cooperative idea. It reflected in the conference atmosphere and in many session themes and individual contributions: modern technologies in general, digitization & digitalization, platform arrangements, sustainable development … to name but a few of these subjects.

Out of 29 sessions, framed by four plenaries, at least three were entirely dedicated to cooperative law (Taxation and cooperatives; Cooperative law and policy; Roundtable discussion on the proposed Model Law for Cooperatives in Greece). Another six sessions dealt partly with cooperative legal issues (Cooperatives and social economy; Cooperatives and social enterprises; Law and policies for socially responsible public procurement; Reflections on the cooperative principles and their adaptation to current social, economic and environmental demands I and II; Cooperative law, policy and politics).

No simple conclusion can be drawn from the wide array of presentations, discussions, exchanges, except the one that cooperative law is slowly finding its earned place in research. Ius Cooperativum hopes, of course, that the same level of interest will be demonstrated on the occasion of the next ICA CCR conference to be held from 10 to 13 July this year in Leuven/Belgium.

As for the Congreso Continental, it was another milestone in the history of these congresses, stretching over a period of more than half a century (see our report on the celebration of its 50th anniversary in 2019 in San José/Costa Rica in the IJCL IV). Starting with the first such congress in 1969, these events have been masterminded by Professor Dante Cracogna. This Congress was

held back-to-back with the VI Summit of the Regional Organization of the Americas of the ICA under the theme of "The cooperative identity and cooperative law post-pandemic". Besides the subjects that have had a long tradition during these congresses, such as the "Acto cooperativo e identidad cooperativa [cooperative act and cooperative identity - "cooperative act" being the term used in many laws in the region to distinguish the relationships within cooperative organizations from commercial and civil law relationships]", the "Realization of the 7th ICA Principle [Concern for community]" and "Regulation and supervision", the Congress took up new developments, which the Covid 19 pandemic had given a boost, such as "Technology, democracy and cooperative governance". The remaining three themes dealt with "Unemployment, decent work and worker cooperatives", with "The use by cooperatives of new energy sources" and with "Innovation and new frontiers of the cooperative enterprise".

The contributions, as well as the key notes, will soon be made available by the Regional Organization of the Americas of the ICA.

During the same week the International Academy of Comparative Law held its General Congress in Asunción. It was the second time in recent history that an event on cooperative law and on comparative law took place concomitantly in the same city. The first time this happened in 2016 in Montevideo/Uruguay where Ius Cooperativum had organized the first ever International Forum of Cooperative Law. The organization of these Fora is one of the three main activities of Ius Cooperativum.

The undersigned availed himself of the opportunity to present the work of Ius Cooperativum during a session of this General Congress to which he reported on the integration of cooperatives and cooperative law into a project by Unidroit that is to elaborate a guide on the Legal Structure of Agricultural Enterprises (LSAE). Ius Cooperativum might want to explore possibilities to join hands with the Academy and with Unidroit.

Finally, the ICBA Centennial. As the name indicates, the event was to celebrate the 100 years of this association. The Presidency of the association, under the leadership of Dr. Subrahmanyam Bhima, and the Director of Legislation of the ICA, Santosh Kumar, had organized the event in two intertwined, mutually enriching parts: a 'Thought-leaders' Symposium' on the first day and a more practice-oriented second day on the 'Future of cooperative financial institutions'. On both days cooperative law played a central role. Hardly any contribution or discussion point, which did not relate to cooperative law. Many of the contributions attested to the specificities of cooperative banks, which general cooperative laws often to do adequately accommodate. Many participants were of the opinion that indeed the link between national law and the cooperative principles of the ICA and international law is worth exploring further.

Here too, the undersigned used the opportunity to add to his contributions' information on the activities of Ius Cooperativum and to extend an invitation to join the association.

Practicioners' Corner

THE CASE FOR THE LEGAL PROTECTION OF COOPERATIVE RESERVES IN 'OLD' COOPERATIVES IN GERMANY AND AUSTRIA

Holger Blisse[1]

In this article, the term 'old' cooperatives is used to refer to e.g. agricultural, consumer, credit or housing cooperatives that have been in existence for more than a generation. Legislation has provided a legal form for cooperatives in Germany and Austria since the late middle of the 19th century. Although cooperatives today are different from the time of their creation,[2] these 'old' cooperatives still can fulfill their historical and social functions.[3] In their areas of activity, their established systems and structures can contribute socially in the division of labor, and in an increasingly competitive economy they can counteract monopolistic concentration and economic and social imbalances.

1. Solidarity and capital

Cooperatives began in difficult circumstances. It was a time when many people were not able to obtain certain services at all or under less favorable conditions than others.[4]

For example, credit cooperatives provided financial relief to members by opening up access to a means of payment.[5] These credit cooperatives were founded without financial reserves and many of their first-generation members did not have enough money to fully pay up their membership share or even to pay an entrance fee.

The development of the solidarity (unlimited) liability basis took place parallel to the gradual build-up of the amount paid up on member's share and the cooperative's own capital (reserves). The more capital the members were able to make available to their cooperative, or the more the cooperative was able to form its reserves from successful dealings with members and non-members, the less it was necessary for the cooperative to maintain such a broad basis of liability. Eventually, liability was limited or reduced to the amount of capital that the member had committed to fully pay up. Liability had to be limited to encourage new members to join. At the same time, as the number of members

[1] The author has been a self-employed analyst and researcher in Vienna.
[2] Ref. for Austria and Germany *Brazda* (2017), *Stappel* (2020).
[3] Ref. *Brazda* (2012).
[4] Ref. *Faust* (1965), *Kluge* (1991), *Aschhoff, Henningsen* (1995).
[5] Ref. *Schulze-Delitzsch* (1855), pp. 45 ff., 82.

increased, the level of personal acquaintance and trust between members reduced, and the potential for conflicting interests increased.

2. Beginning and ending of membership

When a membership ends there is a direct recourse to the cooperative. Exiting members (or their heirs) are refunded at least the amount paid up on each member's share(s). Even before the first cooperative law was introduced by the legislature in 1867, it was common practice that the cooperative could include in its by-laws the opportunity to extend the amount paid back (§ 38 German *Cooperative Act* of 1867 and § 39 German *Cooperative Act* of 1868)[6]. This rule is still valid in Austria and appears also worth considering in particular for the creation of cooperatives today. According to this, members do not participate in the reserve fund and in the other existing reserves of the cooperative *unless* the by-laws of the cooperative provide otherwise ((§§ 55 (3) or 79 (2) Austrian *Cooperative Act*, created 1873). In the German *Cooperative Act*, this explicit opportunity was omitted in 1889 when the law was amended to protect the cooperative's growing reserves, but it continued to be allowed in practice.[7]

2.1 Clarification by amendments of 1973

Just like the possibility of conversion in the *Stock Corporation Act* (1969, §§ 385m to 385q), the amendment to the German *Cooperative Act* (1973) was intended to preserve "the competitiveness of cooperatives compared to companies with other legal forms"[8]. A starting point was seen in "creating incentives for greater financial participation by the members and thus for increased equity formation"[9]. The amendment also cleared up legal uncertainties regarding the extent of participation.[10] Finally, according to the added § 73 (3) German *Cooperative Act*, in the event of termination of membership, the by-laws can grant to "members who have fully paid up their shares, a right to payment of a part of a profit reserve to be created for this purpose from the annual surplus". Additional requirements can be regulated within the by-laws.

§ 73 German *Cooperative Act* for recourse (limited to the nominal value of the member's share) represents a protective norm preserved by the legislature and § 73 (3) has become only a supplement. The protection applies to the legal property unit of the cooperative as a whole, which results in its social dimension. Because a "cooperative is not suitable for investing according to the regulations of the *Cooperative Act*, since no participation of

[6] 1867 for Preußen (Prussia), since 1868 for the Norddeutscher Bund (North German Confederation).
[7] Ref. *Meyer, Meulenbergh* (1961), § 1, No. 3.
[8] Deutscher Bundestag (1971), Vorblatt, (1973), p. 1.
[9] Deutscher Bundestag (1971), Vorblatt, (1973), p. 1.
[10] Ref. *Bauer* (2000/1973), p. 6.

resigning members in any increase in value is provided and the cooperative is designed for an open number of members."[11]

In this sense, a cooperative differs from its 'competitors'. To the extent that each generation of members is willing to leave part of the profits in the cooperative to strengthen its substance, the cooperative contributes to the diversity, can moderate other business models and preserves a 'social' dimension within a competitive market economy. The situation is similar to the social welfare function of the state, provided that it does not place an undue burden on its population's ability to pay taxes.[12] On a smaller scale, and within its sector, a cooperative can do this for its members and customers (not-yet-members). The protection of its reserves ensures that a cooperative can meet the expectations of its present and future members, and the contribution of members to the reserve provides the requisite mutuality in favor of the cooperative.[13]

If the regulations of inheritance law are transferred to membership in a company, then the inheritance law for a member of a cooperative states that the profit generated during membership and not paid back as dividends or reimbursed in the long term remains in the cooperative beyond the individual membership.

2.2 Cooperative reserves

The reserves of today's 'old' cooperatives have grown over many generations – and possibly under a specific tax regime e.g. in the case of the Austrian limited-profit housing associations,[14] which indicates a general public interest in protection.[15] It could even be said that due to the constitution of reserves in the event of a recourse with the member, 'something social' has arisen through the contribution of the individual (which may or may not be supported by a state's tax regime) as a renunciation of individual rights in favor of the whole, the cooperative.[16]

Over time, the accumulation of significant reserve funds may arouse greed,[17] and this places the cooperative at risk of being abolished (demutualised) or relocated (merger) with legal(ized) means. Many of the cooperatives, some of which have existed and been operating for more than 100 years, find themselves in this situation. With every merger and transformation, there are fewer and ever larger institutions that correspond to their

[11] Ref. Deutscher Bundestag (2019), p. 7.
[12] Ref. *Krejci* (2015).
[13] Ref. *Rößl, Pieperhoff* (2018).
[14] The legal form of Austrian limited-profit housing associations is either a corporation, limited or cooperative.
[15] Ref. e.g. Österreichischer Verband gemeinnütziger Bauvereinigungen – Revisionsverband, Österreichischer Mieter-, Siedler- und Wohnungseigentümerbund, Mietervereinigung Österreichs (2012), Österreichischer Verband gemeinnütziger Bauvereinigungen (2019).
[16] Ref. *Blisse* (2019), (2020), p. 16.
[17] Ref. *Beuthien/Klappstein* (2018), p. 123.

cooperative founding idea, which becomes more difficult to recognize.[18] Merger also reduces a cooperative's ability to promote members in its original local and regional area.[19]

3. Contribution to capital market or protection of cooperative capital?

At the turn of the 19th to the 20th century, many cooperatives were not viable on their own after their conversion.[20] In the course of time, people spoke out against converting cooperatives into joint-stock companies,[21] e.g., at the cooperative days in Rostock (1897) and Westerland (1905).[22]

Today, more and more 'old' cooperatives merge. The liquidation or conversion of cooperatives is an exception. In the case of a merger, assets are transferred to the absorbing cooperative (e.g., bank). A merger seems to be unproblematic, so long as the cooperative's orientation, local or regional size, and legal form are retained and the generation of the creators of the cooperative is living and completely represented in the cooperative. However, if there is a change in legal form or a merger with superordinate institutions within a multi-level cooperative association (federal system), then reserves that have been built up and kept for the service of the local or regional cooperative for generations will be relocated. If the absorbing companies are listed corporations, then cooperative assets are individualized and tradable, and available for exploitation in the capital market.

In cooperative sectors with a listed central institution, transfers of reserves to a leading institute which is listed on the stock exchange, appears to be extremely regrettable: On the one hand, the cooperatives whose offers helped to moderate prices are lost in the present and future system. On the other hand, one generation is allowed to profit from the reserves that have grown over many generations. In this way, a conversion or merger with listed affiliated companies allows investors on the capital market to receive a windfall profit that was built up by members over the generations. Present and future members are deprived, at least partly without their knowledge and consent, to the social functions of the cooperative.

Cooperative reserves that have been intended to grow locally or regionally over generations need to be protected and used responsibly. They can reduce part of the pressure to adapt or change the market and price mechanism within a money-based competitive economy. Cooperatives also complement state services, for example, by contributing to the economic and social protection of people who are particularly affected in phases of major social

[18] Ref. *Beuthien* (2019), pp. 108-111.
[19] Ref. *Scheumann* (2017).
[20] Ref. *Heyder* (1966), p. 39.
[21] For Schulze-Delitzsch, the cooperative represented only a transit station to the joint-stock company (corporation). He "never get rid of this idea" and writes "of the uplifting and education of the members through the cooperative, so that they become mature for the joint-stock company" (*Waldecker* (1916), p. 26, Fn. 1).
[22] Ref. *Crüger* (1910), p. 112.

change.[23] This is one of the reasons why awareness of the social dimension and the preservation of the assets of the 'old' cooperatives are required.

Generations of members in 'old' cooperatives have contributed to the reserves in good faith, trusting that their cooperative would continue in existence and be available for future generations, given the validity of the designated protective norm (§ 73 German *Cooperative Act*). This trust should be maintained or restored with suitable legislative protection.

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[23] *Haubner* (2019), (2020).

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Interviews

Interview with Professor Akira Kurimoto

Questions prepared by Ifigeneia Douvitsa and Hagen Henrÿ

Douvitsa & Henrÿ: Thank You Akira for having accepted this interview!

The IJCL, the International Journal of Cooperative Law, has a tradition of interviewing personalities who have worked over a long period of time on cooperative law. We have a set of standard questions and also more personal questions. As for the standard ones, we are first of all curious to learn what made You develop an interest in the subject and - for the purpose of fact finding - we would like to know whether the subject of cooperatives in general, that of cooperative law in particular, was part of Your formal education.

Professor Kurimoto: Not at all in my formal education. I graduated the law faculty at the University of Tokyo without being taught on co-operatives in 1973 when I joined the Japanese Consumer Co-operative Union (JCCU). When I was a student, I took part in the Tokyo University Co-operative as a student committee member, then as an executive director and learned about the co-operative theory and practices. At the JCCU, I wrote its history in 1977 and worked for the strategic planning, the international relations and the co-operative research (Consumer Co-operative Institute of Japan: CCIJ) that have made my career trajectory as a self-made researcher on the co-operative science.

Douvitsa & Henrÿ: Is there anybody who inspired and maybe continues inspiring You when it comes to cooperative law?

Professor Kurimoto: It is Professor Hans-H. Münkner who continues inspiring me most when it comes to cooperative law. I was impressed by his lecture at a seminar held in Tokyo in the late 1970s. From time to time, he kindly answered my inquiries on co-operative laws in Germany and other countries that has helped me to deepen understanding on the national co-operative laws. We took part in some joint projects including the International Handbook of Co-operative Law, the Kobe Symposium for the International Year of Volunteers and the Korea Development Institute's comparative study on some co-operative sectors. He has also given guidance in the discussion pertaining to co-operative values and principles over decades. He has been my teacher on the co-operative law.

Douvitsa & Henrÿ: The previous issues of the journal carry interviews with Professor Hans-H. Münkner, Professor Dante Cracogna, Professor Isabel Gemma Fajardo García and with Professor Ian Snaith. Would You like to tell the readers how You got to know these four personalities and whether and how they or their thinking has helped You in Your career?

Professor Kurimoto: Professor Dante Cracogna has been a specialist in the Latin American co-operative laws that have been instructive to think about the wider perspectives of social and solidarity economy. I met him on many occasions organized by the ICA since the 1980s. He joined the ICA Principles Committee, and drafted the guidance notes for the 7th Principle. Professor Isabel Gemma Fajardo García has been involved in the PECOL project that gives me points of reference in considering the specificities of the Japanese legislation and kindly answered my inquiry on 'trabajo asociado' in the Spanish co-operative law. Professor Ian Snaith has been instructive whenever I refer to the British co-operative legislation. The legal department of the Co-operatives UK has often recommended to read his papers on the law-related inquiries.

Douvitsa & Henrÿ: We want to believe that the interest in cooperative law is increasing. Is this more wishful thinking than reality?

Prof. Kurimoto: It can be said that the interest in the cooperative laws is increasing among the Japanese co-operative practitioners as demonstrated by the unanimous support to the Worker Co-operatives Act of 2020. However, the interest has been strong in the consumer sector since the Consumer Co-operatives Act of 1948 has placed some impediments to the development of the sector including the total ban of non-member trade, the limited operating area within the prefecture etc. These regulations had been incorporated due to the strong lobbying of small retailers who insisted their difficulty had derived from the consumer co-operatives. Therefore, the sector has been struggling to remove these obstacles. CCIJ conducted the research on these legal matters since its inception in 1989 and published papers and a book pertaining to the legal framework. Its study group published a proposal to enact the framework act of co-operatives in 2020, modeled after the Korean law.

On the contrary, the agricultural co-operatives have been promoted by the protectionist government while they have been largely helped by the legislation of the Agricultural Co-operative Act (ACA) of 1947 and special laws to promote restructuring/mergers of the agricultural co-operatives (JAs) to grow a world-class organization. However, the government has shifted its policy stance to pro-competition to cope with the globalized economy through trade liberalization and industry deregulations since the 1990's and introduced the drastic revision of ACA in 2015 despite the sector's opposition; abolishing the compulsory auditing by the JA central union, changing its status from the statutory organization to the general association and introducing provisions enabling to transform JAs to PLCs and so on. Such a political shift made JA leaders sensitive to gain the public support and promote collaboration among co-operatives that led to the formation of the Japan Co-operative Alliance (JCA) in 2018. JCA is conducting the research on the legal framework since its inception. However, there is no sign of the increasing interest in cooperative law in the media/academia.

Douvitsa: What can be done to have cooperative law included in research curricula, as well as in the education and training of lawyers? Could/should the ICA take a more active role in this respect?

Prof. Kurimoto: I have taught the co-operative law in the co-operative program of the Institute for Solidarity-based Society at Hosei University, Tokyo, during 2015-2020. But it was not

continued and there are no research curricula on cooperative law in universities. We need to set up a group of co-operative lawyers in the Japan Society for Co-operative Researches (JSCS) to promote research on this subject. I think the ICA Law Committee could take a more active role in this respect through mutual exchange of information/knowledge and publications.

Douvitsa & Henrÿ: Career opportunities for cooperative lawyers inside and outside academia are scarce. Were You able to make a career out of Your interest in cooperative law? If so, how did You do it? Would You recommend to young people to try building a career on it?

Professor Kurimoto: I have been interested in a wide range of co-operative practices and theories, a part of which is concerned with law. I think the co-operative law is an essential part of the political economy that embraces various aspects of co-operation. In this regard, I am a social scientist with wider perspectives but not a specialist in the law interpretation. So, I cannot answer this question.

Douvitsa & Henrÿ: You have not only published widely on cooperative law and related subjects, but You have also taught, engaged in law-making, consultancies and counseling. Please tell us about these and possibly other aspects of Your work and how they link together.

Professor Kurimoto: I have studied on co-operative theories from a variety of disciplines such as economics and management, political science and law, sociology, historiography and so on. I have taught them in the university, and have been engaged in studying on comparative law, but not necessarily in consultancies and counseling. Teaching and studying are inextricably linked as both sides of the same coin; the former is based on finding of the latter while the latter is tested by the former. As far as co-operative law is concerned, the international comparison enables us to identify peculiarities of national laws while the interdisciplinary studies help to deepen understanding of them. Today's complex phenomena can be effectively analyzed by combining different perspectives and disciplines. For instance, the research on corporate governance can be enriched by mobilizing knowledges created by commercial laws and management studies. In this way, we can deepen understanding of the subject.

Henrÿ: The 1995 International Cooperative Alliance Statement on the Co-operative Identity (ICA Statement) contains a definition of cooperatives, cooperative values and values of the cooperative members, as well as cooperative principles and it relates these three elements of the cooperative identity in a specific way. The sentence which lists the values of the cooperative members starts with the following words "In the tradition of their founders the cooperative members believe in the ethical values of …" If my memory is correct, You explain in one of Your writings or papers that the words "In tradition of their founders" refer to the fact that cooperative thinkers were not only Europeans, as is often falsely assumed. Could You please name some of these "non-European" thinkers and elaborate on this? The point is of particular importance as often the failure of cooperatives is "explained" by or attributed to the supposedly European origin of the model and as the ICA is currently discussing whether the ICA Statement, which is of universal applicability, needs an up-date.

Professor Kurimoto: As a reason why the term of plural "founders" was used, I explained that not only Rochdale Pioneers but also other thinkers did contribute to initiating and encouraging various types of co-operatives. MacPherson himself explained this in the Background Paper.

> "In the tradition of their founders..." refers to the fact that all the great movements have, at their origins, remarkable men and women who made outstanding contributions as "founders". Such individuals as the Rochdale Pioneers, Friedrich Wilhelm Raiffeisen, Hermann Schulze-Delitzsch, Philippe Buchez, Bishop Grundtvig and Alphonse Desjardins are revered throughout the movements they helped begin; they are admired by co-operators in other movements as well."

I wrote in a paper "Why Asian Pacific Co-operative Models Matter?" that the concept of "Asian values" were advocated by Mahathir Mohamad (Prime Minister of Malaysia during 1981–2003) and Lee Kuan Yew (Prime Minister of Singapore, 1959–1990) as a political ideology of the 1990s, which defined elements of society, culture and history common to the nations of Southeast and East Asia, aiming to use commonalities – for example, the principle of collectivism – to unify people for their economic and social good and to create a pan-Asian identity as contrasted with perceived European ideals of the universal human rights. The popularity of the concept waned after the 1997 Asian financial crisis, when it became evident that Asia lacked any coherent regional institutional mechanism to deal with the crisis.

I agree that the ICA Statement was approved as a universal norm and I do not think that the failure of co-operatives is "explained" by or attributed to the supposedly European origin of the model. The Indian Co-operative Credit Societies Act was enacted in 1904 by the British colonial power borrowing Raiffeisen model and thereafter so-called "British-Indian Pattern of Co-operation" became a prototype of co-operative legislation in Asia. The top-down tradition was inherited by the new independent states since the 1950's where co-operatives were expected to play a vital role for socio-economic development. There were some attempts of creating top-down co-operatives such as Indonesian KUD, Bangladesh's Comilla and the Philippine's Samahan Nayon but they all failed shortly without farmers' support (Hans Münkner, Robby Tulus). Or the supply and marketing co-operatives had been nationalized to serve the population in the rural area in China. Even today a large part of Asian co-operatives operates in the developmental states that support and control specific types of co-operatives, in particular in agricultural sector. This is why the Asian Co-operative Ministerial Conferences had to repeat the recommendations to establish autonomy and independence since 1990.

Douvitsa & Henrÿ: Japan has a multitude of sectoral cooperative laws. Could You tell us why and how it all started and why it is maintained? Were their influences from other parts of the world? Why is this multitude of cooperative laws a challenge, if indeed it is a challenge?

Professor Kurimoto: The origin of current co-operative legislation can be dated back to the Japan's surrender in 1945. The allied force introduced the drastic reforms to dismantle the militaristic regime; the agrarian reform to curve landlords' power, the democratization of industries to destroy zaibatsu's influence and the legitimization of trade unions. Thus, the Agricultural Land Act of 1946, the Anti-monopoly Act of 1947, the Trade Union Act of 1949

were enacted. The land reform was made so thoroughly that millions of small farmers with less than 1 hectare plot were created. The Agricultural Co-operative Act (ACA) was enacted to cement the effects of the land reform in 1947. Then other co-operative laws were enacted in accordance with industrial policies (fisheries, SMEs, credit banks etc.) since 1948. Today there exist more than 10 specific laws but there is no general law on co-operatives. Such fragmented co-operative legislation has hampered the sense of identity among co-operatives because of different organizational cultures and political preferences. In addition, co-operatives are not seen as entities sharing common characteristics and resulted in the lack of public policy as a distinct organizational form. It is also felt problematic that current laws do not allow setting up co-operatives to meet the new socio-economic needs for dealing with the aging population, energy transition, and community devastation. This system has been maintained since it follows the same pattern of political economy often characterized by the industrial policy triangles involving ministries, parliament (LDP) and trade associations. It is not realistic to think about the uniform law after the path-dependent evolution of over 70 years. There are no influences from other parts of the world. Only South Korea had taken the similar trajectory but could enact the Framework Act of Co-operatives in 2011.

Douvitsa & Henrÿ: You are a proponent of a single general cooperative law for Japan. In countries with a similar situation, like France, Greece and Spain, i.e. several cooperative laws, although some not by sector, but because of the constitutional set-up of the country, like Spain, there are also thoughts on unifying these various laws in one. From an economic point of view the number of laws does not seem to make a difference. So, why go for a single law? Apart from political arguments, what are the pros and cons? Is there any discussion in Your country, Japan, about having a single general cooperative law unifying the existing ones? Is there an interest from academia or/and policy makers in this sense?

Professor Kurimoto: In those countries, there exist general laws in addition to specific laws and there are cases in which co-operatives are recognized in the constitution. Neither of them exists in Japan, whereas the general laws had been enacted for companies and nonprofits in 2005 and 2006 respectively integrating existing laws but there is no such move in the co-operative legislation. I am proposing a framework law embracing the international public law of co-operatives or a general law enabling small number of persons to set up co-operatives for any objectives/activities, not a uniform law unifying the existing ones. This proposal is being discussed in CCIJ and JCA while there is so far little interest from academia and/or policy makers.

Henrÿ: You have a deep understanding of cooperative law and related fields not only in Japan and more widely in Asia, but also and especially in Europe. That allows You to make different ways of thinking law accessible to those who are not as versed as You are and to bridge divergent views. Am I portraying You correctly?

Professor Kurimoto: As I have worked as the international relations officer of JCCU during 1977-2003, I was interested in the international comparison of consumer co-operatives and wrote some papers on the question whether the Japanese and European models might converge or diverge. At the same time, I was also involved in the development work for the Asian co-

operatives to promote consumer co-operatives, women's and youth co-operatives in collaboration with the ICA Asia Pacific. Recently I co-edited a book "Waking the Asian Pacific Co-operative Potential" in 2020. Such a career helped me to understand the peculiarities of the Japanese legal system on co-operatives that had been created following the German model but evolved differently in the unique political economy and historic background. If I may have an advantage, that is the availability of information/advices of other researchers who kindly answer my inquiries on legal matters. But my study on the comparative co-operative law is still in the infant stage.

Henrÿ: Again and again You made us aware of the differences between the various regions of Asia as concerns cooperative law. Could You outline some of these differences and their incidence on cooperative law? This is of interest not the least in the context of the trend to harmonize cooperative laws, in particular on a regional basis. Although not intended to unify the cooperative laws of the European Union Member States, the European Union Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) had to a certain extent a harmonizing effect; we have two uniform cooperative laws in Africa; Mercosur has a law similar to the EU Regulation; the African Union is elaborating a model cooperative law for its Member States.

Professor Kurimoto: I'm afraid I cannot answer this question properly since the database on national legislations is not available, making it almost impossible to conduct a comparative legal study. Since the Asian region is so diverse in the political system, the level of socio-economic development, religions and languages, the EU-funded Legal Framework Analysis project had to compile the reports of 6 sub-regions (East, Southeast, South, West, Central, Pacific) and the regional summary is not available so far. I was assigned to write a report on the Eastern Asia, but overwhelmed by the differences among China, Japan, South Korea and Mongolia. There is no move towards the political and/or economic integration in the region that is the basis of regional harmonization of laws. The ASEAN is an exception, but it faces the serious setbacks in Myanmar etc.

Henrÿ: Is there anything in what we typify as Asian laws which makes them incompatible with the cooperative laws of other regions of the world, but which, on the other hand, could be a source of inspiration? I am also thinking of the relatively recent Japanese workers´ cooperative law. You have explained and written about it widely.

Professor Kurimoto: I don't think there is anything in Asian co-operative laws which could be a source of inspiration for other regions of the world. Asian legal system is so diverse reflecting on the historical path dependency; some countries had followed the common law tradition or civil law tradition, while other countries took the Islamic law or the socialist law tradition.

The Worker Co-operatives Act (WCA) is the latest co-operative legislation in Japan. It has some positive characteristics; allowing five persons to set up a co-operative without the government permission, no limitation on the types of businesses it can conduct except for the worker dispatch business. It was put into force on October 1, 2022 and the JCA supports the development of this sector under the WCA.

Douvitsa: As the chair of the International Committee for Cooperative Research of the ICA, as well as the regional expert on the Legal Framework Analysis for the region of Asia-Pacific, what are the dominant trends in cooperative law and relevant research that you have identified.

Professor Kurimoto: As far as the Asian co-operative law is concerned, there are no dramatic changes but we pay attention to some cases. The Constitutional amendment requesting to strengthen the co-operative autonomy in state's co-operative legislations was passed in India but not fully implemented due to political reasons while the Framework Act of Co-operatives brought the explosion of new co-operatives in South Korea. The enactment of Worker Co-operatives Act in Japan is also attracting attention. We need to make the comparative studies of these cases. I am also interested in the notion of localization of norms proposed by Amitav Acharia. How and to what extent the universal norm such as the ICA Statement of Co-operative Identity has been localized in national co-operative laws is one of the themes that I wish to investigate.

Douvitsa: We are witnessing the (re)emergence of concepts, such as social enterprises, social economy, social and solidarity economy, social, solidarity and community economy. They are gradually acknowledged by an increasing number of governments. Isn't possibly the impact of these concepts on cooperative law greater than the difference between what we call legal traditions?

Professor Kurimoto: The concepts such as social enterprises, social economy, social and solidarity economy (SSE) have been crafted in southern Europe, and followed by Quebec (Canada) and Latin America and gradually acknowledged by the UN agencies like the ILO. However, in Asia only South Korea has accepted the SSE, enacting a series of legislations to cope with difficulties after the IMF crisis in 1997. Japan has much larger co-operative and nonprofit sectors compared with South Korea, but there is no recognition of SSE in the public policy, media and academia. SSE is a political construct and may have benefits for co-operatives (David Hiez). I think the SSE approach is valid as the extended co-operative sector but I do not think the impact of these concepts on co-operative law is greater than the difference between legal traditions.

Douvitsa & Henrÿ: The IJCL set out to become a journal which brings all the legal traditions together. As cooperative law is being given different weight in different parts of the world, this remains one of the biggest challenges for the editors. Do You have any advice for us on how to be more effective as concerns this goal?

Professor Kurimoto: The IJCL is only a journal which brings all the legal traditions together. To increase its impact, it is advisable to approach the policy makers and co-operative managers who might be interested in what happens in the different countries/regions. Given very limited

number of specialists on co-operative law, it is also important to recruit new readers from other disciplines including economics/management, sociology and political science.

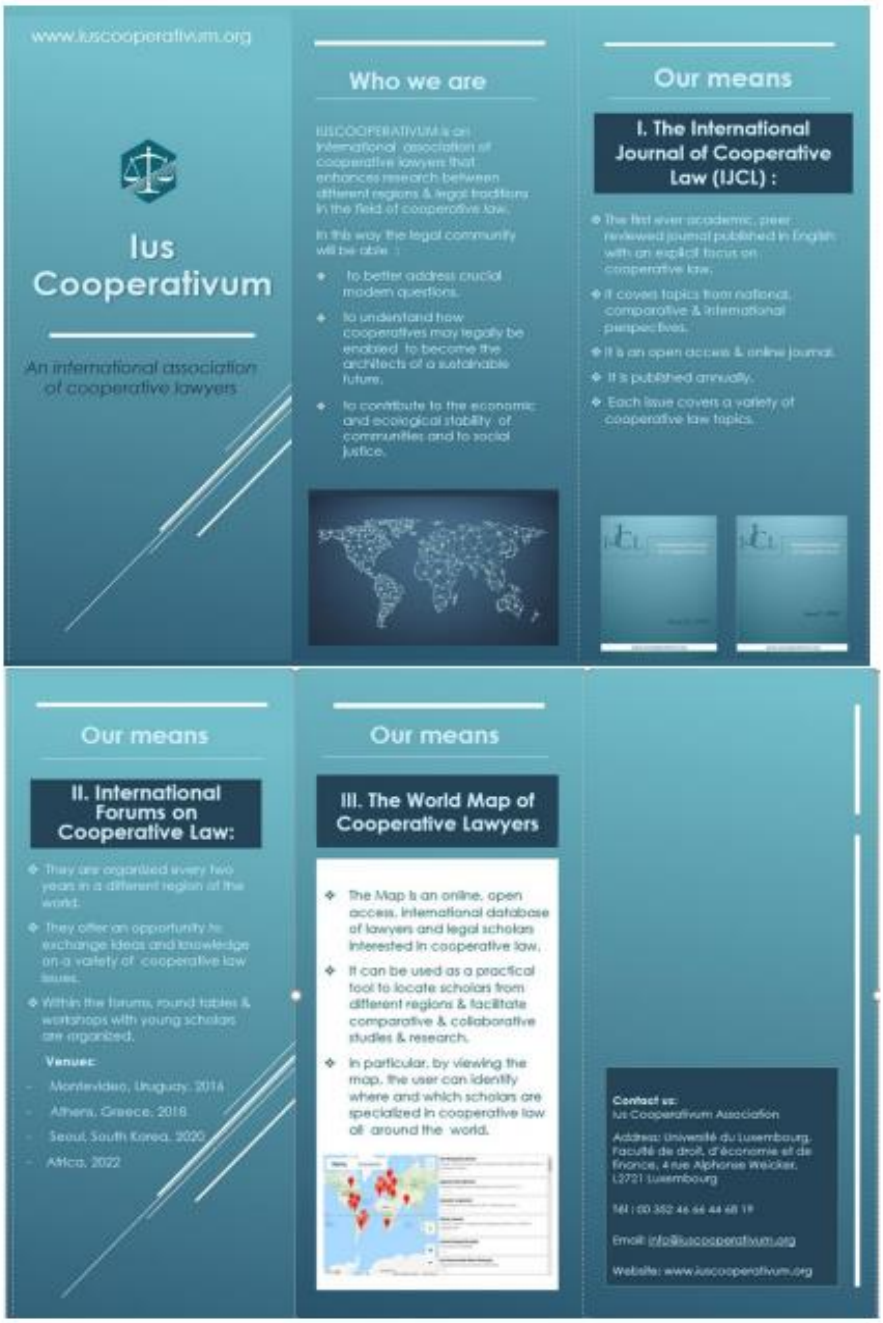
Henrÿ: Akira, we are both members of the CIAG, the Cooperative Identity Advisory Group of the ICA. It was set up after the 2021 ICA Congress in Seoul which had as its overall theme that of "Deepening our Cooperative Identity". The CIAG is to advise the ICA on whether to change the ICA Statement and if so, how? Given that the ICA Statement, or at least its content, is included or is being included or referred to in an increasing number of international, national and regional texts and/or laws, I have been cautioning against any fundamental change to the ICA Statement, not excluding a renewal of its interpretation. You participated in the elaboration of the 1995 ICA Statement and You wrote one chapter of the 2015 ICA Guidance notes on the cooperative principles. Although the CIAG is still at the beginning of its work, You might already have some initial thoughts on what the advice to the ICA should be.

Professor Kurimoto: Now the CIAG is analyzing the result of the Survey to gauge the understanding and opinions of co-operative leaders and researchers on the Identity Statement. Based on such an empirical study we need to move to think about how the Identity Statement is to be modified to meet today's context reflecting huge changes that occurred since 1995 including the economic/financial crises following the Lehman shock, the political instability after the 9.11. attack and the populist governments, and social/environmental challenges of the climate crisis and the COVID pandemic. For this purpose, the ICA is requested to mobilize the knowledge base accumulated in the multi-disciplinary co-operative studies and I believe the co-operative lawyers should play an active part.

Henrÿ: Maybe the requirements of sustainable development, the digitization and digitalization of our lives prove me wrong. Apart from these challenges possibly requiring changes to the ICA Statement, do You think that these are issues which must be considered by cooperative lawmakers? If so, how?

Professor Kurimoto: I believe the ICA Identity Statement is a well-crafted formula containing the definition, values and principles of a co-operative. What we need is a fine-tuning of the Identity Statement to reflect contextual changes that occurred since 1995. The requirements of sustainable development, the digitization and digitalization of our lives and other trends affecting co-operative businesses and members' lives need to be considered in this fine-tuning. I think these are issues which must be considered by cooperative lawmakers since they are all relevant to the future of humankind but there should be a room to be decided by the co-operatives based on the autonomy and independence principle.

Douvitsa & Henrÿ: Thank You again Akira for having accepted being interviewed!



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