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NATIONAL CONSTITUTIONS AND COOPERATIVES: AN OVERVIEW

Ifigeneia Douvitsa

Abstract

The national constitutions as the supreme laws of countries are expected to influence the interpretation and application of ordinary laws to varying degrees. Moreover, they tend to be permeated with political considerations, ideas, ideals and ethics more than other legal texts. They have also the potential to enforce supranational norms in the domestic legal order. For these reasons, their study may reveal valuable information about the national legislator's stance and perception towards cooperatives. Thus, the present article undertakes a large-scale inquiry on the topic of constitutions and cooperatives. In particular, it examines which and how many countries have introduced in their constitutions cooperative-related provisions, under which content and whether any particular trends can be noted. With regard to the potential impact of such constitutional provisions on ordinary law, the case of Portugal and Italy is examined.

Due to the large-scale range of the study, its subject matter is limited to the constitutional texts that explicitly use the term cooperative or its derivative. Although the above term is not expected to have the same exact meaning in each country, it is assumed to have to a higher or lesser degree of relevance to the broadly accepted definition of a cooperative by the International Cooperative Alliance. The sources that were used in this study were various legal databases, a previous study of the ICA and existing literature on the Portuguese and the Italian constitution by national experts.

The study's findings indicated that one out of three constitutions has explicit provisions about cooperatives, which permeate all sectors of the constitution from governmental ruling, to allocation of powers and protection of rights. The constitutional acknowledgement of cooperatives has been an innovation of the Latin American region. The latter has also the highest rate of constitutions with cooperative provisions, whereas the European continent holds the lowest percentage. It was also found that in the Italian and Portuguese case the constitutional provisions on cooperatives affected the cooperative and tax law in a certain degree.

Based on this study, the constitutional text when acknowledging the cooperative identity or certain aspects of it, it can serve as a guide for the ordinary legislator when cooperative laws are enacted, but it may also encourage a different tax treatment from for-profit companies. In such cases, the 193/2002 Recommendation of the International Labor Organization, which prescribes for an enabling legal environment on cooperatives, is reflected at constitutional level and enforced by the national constitution of the country.

1. Introduction

The de jure or "big c" constitutions are the legal documents that are self-defined as the fundamental or the supreme laws of countries, regulating the state's structure and powers, as well as its relationship with the public and are usually harder to amend or repeal than other laws (Law, 2010). Evidence shows that such legal documents "proclaiming their higher status appear in 90% of the countries" (Elkins et al., 2009, p.49), making constitutions a global legal phenomenon that exceeds specific legal traditions and families in the current world. Apart from their superiority, the constitutions also tend to bear other features, such as being constitutive of a legal system, written, justiciable and expressing a common ideology (Raz, 1998). However, such features may not appear in all constitutions, due to the variety and pluralism of the constitutional universe. Even if "*constitutions are not textbooks on the governance of a particular country, it does not follow that such textbooks should, or even can – without peril – ignore the constitution of that country*" (Finer et al., 1995 p.2). In many cases, they are still at the centre of the political debate and considered to shed some light to the political scene and the country's historic, economic, and social particularities (Finer et al. 1995; Breslin, 2009). Furthermore, research findings indicate that the majority of constitutions not only claim to limit government power, but are reasonably or fully operative in practice (Breslin, 2009, p.29).

The current article focuses on a specific institution protected by the constitutions, that of cooperatives. A broadly accepted definition of cooperatives is the one included in the historic Statement on the Co-operative Identity in 1995, established by the International Cooperative Alliance (ICA), which is the representative organ of cooperatives worldwide (ICA, 1995). According to the latter, the cooperative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly owned and democratically-controlled enterprise (ICA, 1995). The ICA also prescribed a set of cooperative values (self-help, self responsibility, democracy, equality, equity and solidarity) and cooperative principles (voluntary and open membership, democratic member control, member economic participation, autonomy and independence, cooperation among co-operatives, concern for community) for all the cooperatives to follow (ICA, 1995).

Such cooperative values and principles have been incorporated in the 193/2002 "Promotion of Cooperatives" Recommendation of the International Labour Organization (ILO R. 193), which calls upon legislators to create an adequate legal environment "*consistent with the nature and function of cooperatives and guided by the cooperative values and principles*" (ILO R. 193, par. 6). The latter is considered to be the "*first and only instrument of universal applicability on cooperative law adopted by an international governmental organization*" (Henrÿ, 2013, page 66). There has been a growing agreement in literature and case law that the ILO R. 193 is legally binding, constituting the nucleus of public international cooperative (Henrÿ, 2013).

The growing literature on cooperatives has focused mainly on ordinary law, whereas there has been little investigation of where the national constitutions stand towards cooperatives. Therefore, the present study aspires to address that gap, undertaking an investigation of the national constitutions on a worldwide scale. Specifically, it will investigate which and how many countries have included cooperative-related provisions in their text. Furthermore, it will provide a classification of their content, noting also if there have been developed any trends. With regard to whether such constitutional articles have an impact in cooperative law or other fields of law that are applied to cooperatives, the case of

Portugal and Italy will be briefly viewed. The study's findings might offer a useful source of information for researchers interested in undertaking comparative constitutional inquiry on cooperatives.

2. Research methodology

In this research context, the legal texts that have been examined are the ones that are self-defined as constitutions and the supreme laws of the country, an approach that has been widely used in large scale inquiries (Law, 2010). According to previous research, the vast majority of countries have such texts (Elkins et al., 2009, p.49).

A first impediment that needs to be overcome is linguistic pluralism, especially since the present study extends across four continents. Thus, a variety of legal databases (World Constitutions Illustrated, Constitute Project, Faolex, Natlex and the Political Database of the Americas - PDBA) is consulted and referenced. In particular, for the historic overview of the constitutional texts of each country the World Constitutions Illustrated, as well as Faolex, Natlex provided adequate information. With regard to the examination of the constitutions in force, the World Constitutions Illustrated and Constitute Project have been the main source of information, whilst Faolex, Natlex were only used supplementarily, since in many cases they lacked recent updating.

The above search took place with the term "cooperative/co-operative" as the key word with its derivatives (e.g. cooperative ownership, cooperatives, cooperative enterprise, cooperativism). Thus, we are confronted with the homonym issue, according to which similar terms may have various meanings in different jurisdictions (Pieters, 2009). However, in the cooperatives' case there is a specific particularity that may justify the above assumption. Specifically, from 1995 onwards, the ICA has provided a specific definition that is broadly used and accepted in legal instruments (such as the ILO R. 193/2002).

The inquiry has also been based on a previous study of the ICA Legislative Working Group which took place in 2009 (ICA, 2009). Its findings have been updated and the number of constitutions that were studied has been broadened.

The present study includes also a brief analysis on the Portuguese and the Italian constitution, due to the fact that they acknowledge certain aspects of the cooperative identity (the cooperative principles under the Portuguese constitution and the mutual cooperative aim under the Italian constitution) and promote supportive measures for cooperatives. For this inquiry, the existing literature from native legal scholars has been reviewed in order to gain an inner perception of the interpretation and application of the relevant constitutional articles within each national legal system.

3. Main Findings

a) Constitutions with cooperative-related articles: An increased tendency

For the period from 1900 to 2016, in which new constitutions have emerged from new and old polities, the introduction of the term "*cooperative*" in the constitutional texts has increased (Figure 1). This highlights a growing interest in the cooperative institution by the national legislator who has been willing to introduce relevant articles to regulate it. The highest percentage of such constitutions is noted during the first half of the 20th century and the lowest in the 1990s, after which the total number of such constitutions reaches to a plateau (Figure 1). Based on the above, the cooperative related articles were introduced in the early constitutions of the century, especially during the post-war era, whereas it is rare for such inclusion to take place in the newest and recent contemporary constitutions of the late 20th and 21th century.

The earliest introduction of such provision took place in Mexico with the Constitution of 1917, which in ar. 123.30 among other provisions in favor of labor and social welfare; it acknowledged the form of cooperatives. On the other hand, the latest inclusion of cooperatives in a national constitutional text belongs to Morocco. In an attempt to enhance the powers of the parliament and limit those of the King, the Moroccan constitution of 1996 was amended in 2011 and in its ar. 71 it includes cooperatives to the list of subjects under the legislative powers of the Parliament.

b) The current constitutions

The study found that the countries that have introduced cooperative articles in their constitutions are in Africa : *Angola, Central Africa, Congo, Egypt, Equatorial Guinea, Ethiopia, Guinea-Bissau, Kenya, Morocco, Mozambique, Namibia, Nigeria, Sao Tome and Principe, Swaziland* (Table 1); in Asia: *Bangladesh, China, Cyprus, India, Iran, Korea (DPR), Kuwait, Malaysia, Myanmar, Nepal, Pakistan, Philippines, Sri Lanka, Taiwan, Tajikistan, Timor-Leste, Thailand, Turkey, Uzbekistan, Yemen* (Table 2); in the Americas: *Bolivia, Brazil, Colombia, Costa-Rica, Cuba, Dominican Republic, Ecuador , El Salvador, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, Venezuela* (Table 3) and in Europe: *Belarus, Bulgaria, Greece, Italy, Malta, Portugal, Serbia, Spain* (Table 4). Compared to Africa (14/54, 26%) and Asia (20/48, 41%), South America has the highest rate (20/35, 57%), whereas Europe the lowest (8/43, 19%).

c) Latin America: a region with an abundance of constitutions with cooperative provisions

Latin America is found to possess the highest percentage of countries with cooperative provisions at constitutional level, compared to the regions of Africa, Asia and Europe. Due to the particularity that the former presents, a further examination is needed.

Historically, the idea of the rochdalean cooperativism was brought to Latin America by European immigrants, in the late 19th century and early 20th centuries (Bialosgorski Neto, 2012). Since then, cooperativism has been acknowledged by cooperative laws and constitutional provisions. Specifically, the first constitution of the Latin American region that recognized the status of cooperatives was the Mexican Constitution of 1917, as a result of the 1910 revolution. Its content was radical for its time, due to the social and economic rights that it prescribed, which later constituted the essence of modern labor law

(Gargarella, 2014). Its main influence was the Spanish Constitution of Cadiz (Mirow, 2015), which however did not have any references to cooperatives. From the study's research, it was noted that the Mexican Constitution was also the first constitution of the world that acknowledged modern cooperativism. Under the domino effect most of the Mexican constitutional provisions influenced the rest of the countries that promulgated new constitutions at the time, such as Peru (1919), Hondurras (1924), Brazil (1937), Bolivia (1938), El Salvador (1939) (Carozza, 2003, Figueroa, 2011).

To better understand the constitutional history of the region, its division into three distinctive periods, which are the period of liberal-conservative constitutions (1850–1910), of social constitutionalism (1910–1950) and of multiculturalism and human rights (1950–2010) ihas proved useful (Gargarella, 2014). The first wave of the introduction of cooperative articles in Latin American constitutions took place during the period of social constitutionalism, "*in which they expressed, through the use of legal language, the main social change that had taken place in the region during the first half of the 20th century- namely the incorporation of the working class as a decisive political and economic actor*" (Gargarela, 2014, page 12-13). In the cooperatives' case, it even took the active form of participation in constitutional drafting, as in the case of the Brazilian constitution of 1988 (Cracogna, 2016).

A particular trait of the Latin American constitutionalism is constant reform or replacement of the constitution, aising the issue of their entrenchment (Eustace, 2014). Nevertheless, the constitutional protection of cooperatives does not seem to be affected by the phenomenon of fluid constitutionalism. In fact, unlike those in other regions, none of the Latin American constitutions currently in force have abolished the constitutional protection of cooperatives (Figure 2).

d) A taxonomy of constitutional provisions on cooperatives

The content of such constitutional provisions shows great variety and complexity, considerably hindering the task of their classification. Based on the perception of constitutions as the legal documents that prescribe rules on the government's powers, on the allocation of such powers to different organs, on the protection of individual and collective rights, and on state intervention on economy and its limits (Gavison, 2002; Negretto, 2008), a preliminary observation is that cooperative–related articles have permeated all of those aspects of constitutions.

Specifically, the constitutions under study specify the organs that produce the cooperative laws, as well as the ones that promote, supervise and control cooperatives (*e.g. ar. 66 of Constitution of Central Africa, ar. 189.24 of Constitution of Colombia, ar. 87.1 (h) of Constitution of Cyprus, ar. 165.1 (x) of Constitution of Portugal*). The above powers are distributed among the legislative and executive power (*e.g. ar. 71 of Constitution of Morocco*) as well as between the central government, the provincial and/or county governments (*e.g. ar. 28 of Constitution of Mexico, ar. 246(43) 7th Schedule of Constitution of India*). Some constitutions also prescribe cooperatives' participation and representation in state organs/bodies (*e.g. ar. 150.13 of Constitution of Nicaragua, ar. 289(9) of Constitution of Haiti, ar. 332(G:e), of Constitution of Uruguay*).

With regard to cooperatives and the rights that are protected by the constitution, the following remarks can be made. The constitutional legislator acknowledges the right to form, join and develop a cooperative (*e.g. ar. 38.2 of Constitution of Angola, ar. 19.1 (c) of Constitution of India, ar. 42 of*

Constitution of Thailand, ar. 61.2 of Constitution of Portugal), as well as the right of its members to access information (*e.g. ar. 243ZO Constitution of India*). Cooperatives have also the right for state support (*e.g. ar. ar. 92.3 of Constitution of Mozambique*) and for setting up an economic enterprise (*e.g. ar. 12, sec 6, of Constitution of Philippines*). In some cases, there is also the tendency to associate specific rights with cooperatives, which may facilitate their exercise, such as the right of education (*e.g. 79.3 of Constitution of Angola, ar.17 of Constitution of Peru*), of housing (*e.g. ar. 36 of Constitution of Tajikistan, ar. 65.2 (d) of Constitution of Portugal*) and that of property (*ar. 321 of Constitution of Ecuador, ar. 105 of the Constitution of El Salvador*).

Furthermore, cooperatives are not usually perceived separately but as a part of the national economy and a type of ownership or property that coexists with the public and private sector (*e.g. ar. 33 of Constitution of Egypt, ar. 306 Constitution Bolivia, ar. 283 of Constitution Ecuador, ar.99 of Constitution of Nicaragua, ar. 13 of Constitution of Bangladesh, ar. 51.1(d) of Constitution of Nepal, ar. 80.2 (b) Constitution of Portugal*).

A significant number of the constitutions under study introduce provisions on state protection, promotion and support of all kinds of cooperatives (*e.g. ar. 174(b) of Constitution of Brazil, ar. 145.2 of Constitution of Taiwan, ar. 45 of Constitution of Italy, ar. 13 of Constitution of Belarus*). On the other hand, some constitutions emphasize on the protection of specific cooperative types, such as farming cooperatives (*e.g. ar. 109 of Constitution of Nicaragua*), mining cooperatives (*e.g. ar. 370.2 of Constitution of Bolivia*) and housing cooperatives (*ar. 65.2 (d) Constitution of Portugal*). Preferential treatment towards cooperatives may take the form of providing various benefits in their favor, such as an adequate tax treatment (e.g. *ar. 146.3 (c) of Constitution of Brazil, ar. 14 sec.4(c) of Constitution of Philippines*) or credit and technical assistance (*e.g. ar. 67 of Constitution of Guatemala, ar. 174.4 of Constitution of Brazil*).

Cooperative promotion and support is often associated with broader goals, to which cooperatives may contribute, such as attaining full employment (*ar. 43.2 Constitution of Iran*), improving life conditions for workers (*ar. 64 of Constitution of Costa Rica*), increasing production, protection of customers (*ar. 171 Constitution of Turkey*), promoting local development (*ar. 148 of Constitution of Yemen*) or the development of the national economy towards socialism (*ar. 50.3 of Constitution of Nepal*).

The constitutional text may also introduce articles about the cooperatives' internal affairs. In this aspect, the Indian constitution is noted as the most detailed constitutional text, often resembling a cooperative ordinary law by the amount and content of regulations it introduces at constitutional level, such as for example the number and term of the Board of Directors of a cooperative, pursuant to ar. 243ZJ.

Safeguarding cooperative identity or certain aspects of it occurs in only a few constitutions. For instance, the ar. 55 of the Constitution of Bolivia stipulates that the cooperative sector is based on the principles of solidarity, equality, reciprocity, equity of distribution, social purpose, and the non-profit motive of its members. A similar provision can be found in ar. 113 of the Constitution of Paraguay, according to which the cooperative sector is based on solidarity and social profitability and according to the same provision the cooperative principles are to be disseminated through the education. The cooperative principles are mentioned in the Indian Constitution, as well. The ar. 243ZI of the latter states

that the cooperative law shall take into account the principles of voluntary formation, democratic member-control, member-economic participation and autonomous functioning. On the other hand, the Portuguese Constitution acknowledges and protects the cooperative principles in its articles (61.2, 82.4(a)), but it does not specify what they are. On a similar note, the Italian constitution mentions the social function and mutual non-speculative scope of cooperatives in ar. 45 without further specifications.

Apart from the provisions that regulate the state's intervention in cooperatives, in some cases limits are imposed, by prohibiting the state's inference to a cooperative's affairs (*e.g. ar. 5(18) of Constitution of Brazil*) or by guaranteeing the cooperatives' autonomy and self-governance (*ar. 113 Constitution of Paraguay, ar. 12.4 Constitution of Greece*).

In summary, the constitutions referring to cooperatives have grown in numbers over the years and in Latin America such constitutions appear to be the majority in the region. Regarding the content of the constitutions, overall, there is a great variety of provisions on cooperatives permeating all sectors of a constitution, from the rules on the government's powers to the protection of rights.

4. The impact of constitutional related provisions on legislation: the case of Portugal and Italy

Considering the aforementioned findings, the question of whether such references have an impact remains open. Although based on the theory of sources of law, the constitutions as supreme laws are guiding the ordinary laws' production and interpretation; there has been growing criticism of their effectiveness.

According to the study's findings, only a few of the domestic constitutions have articles that prescribe the cooperative principles and other aspects of the cooperative identity as crystallized by the ICA. In such cases, it would be interesting to examine if and to which degree such constitutional provisions affect both cooperative organizational law[1] and other fields of law that apply to cooperatives. For this reason, an analysis of the constitutions of Portugal and Italy follows. These countries have been chosen because they protect particular aspects of cooperative identity and preserve a preferential protection for cooperatives within the constitutional text. The aim of such analysis is not to extensively cover those topics, but to draft preliminary remarks to offer a reference point that could be examined and compared in other countries.

a) Portugal

Portugal presents a great case for study, since the country has been considered to have a "*truly cooperative constitution*" (Namorado, 2013). Cooperatives were acknowledged constitutionally in 1976 as an autonomous economic sector alongside the public and private ones. Such acknowledgement was later followed by the enactment of a separate code that regulates cooperatives as a whole, giving

[1] Organizational cooperative law consists of all the rules that regulate the operation of a cooperative, such as its definition, formation, capital structure, dissolution. Fici (2013).

cooperativism a relevant normative autonomy, contrary to the cooperatives' previous status as a special type of commercial company under the commercial code (Namorado, 2013).

The current Constitution of the Republic of Portugal (CPR), after the reviews of 1989 and 1997, places cooperatives within the sector of social economy (Namorado, 2013). Specifically, ar. 82 refers to the three sectors of ownership of means of production, which are the public, the private and the cooperative and social sector. Although not using the exact wording the latter ("cooperative and social sector") is an equivalent of the social economy and it further consists of the co-operative division (including the co-operative sub-sector) and the social division (including the worker collective, community and charity sub-sectors) (Meira, 2014).

In the constitutional text, there is a number of principles protecting cooperatives and the overall "*cooperative and social sector*". One of the most significant is the principle of conformity with the cooperative principles of the International Cooperative Alliance (Meira, 2014). Specifically, ar. 82.4 of the Constitution of the Portuguese Republic (CPR) states that "*the cooperative sector shall comprise of means of production that cooperatives possess and manage in accordance with cooperative principles, without prejudice to such specific provisions as the law may lay down for cooperatives in which the public sector holds a stake and are justified by the special nature thereof*". Therefore, with the sole exception of the cooperative "regies", which are the public interest cooperatives that due to their nature they may not comply with some of the principles, for the rest of cooperatives the commitment to the cooperative principles is mandatory by the constitution (Namorado, 2013). The latter is also confirmed in ar. 61.2 CPR which reads that "*everyone shall possess the right to freely form cooperatives, subject to compliance with cooperative principles*".

The strong constitutional commitment to the cooperative principles is further enhanced by the ordinary legislator in various articles of the Cooperative Code (CC), such as in the cooperative definition, of which cooperative principles are a fundamental part. Specifically, according to ar. 2.1 CC, cooperatives are considered to be autonomous collective persons, freely established and of variable share capital and composition, which, through mutual assistance and cooperation between their members, in compliance with the cooperative principles, aim to satisfy their economic, social and cultural needs without profit-making objectives. Such commitment to the cooperative principles is also reflected in ar. 3 CC which reads as follows: "*cooperatives, in their incorporation and functioning, obey the following cooperative principles, which form part of the declaration of cooperative identity adopted by the International Cooperative Alliance*", and then the provision integrates all of the ICA cooperative principles. Following the cooperative principles is also included in the list of member duties in ar. 22.1 CC and in case of their infringement, there is a legitimate reason for their dissolution (112.1(h) CC). Apart from the provisions that protect the cooperative principles as a whole, the CC introduces also articles with regard to specific principles, such as the 5th principle of cooperative education, which is enhanced by the mandatory formation of an educational and training fund (ar. 97 CC) or the 6th principle of cooperation among cooperatives, which is promoted by ar. 101 et seq. through the formation of upper level organizations under a cooperative structure.

Other constitutional principles are the protection of cooperatives on the basis of ar. 81(f) CPR and the support and stimulation of their creation and activities by the state according to ar. 85.1 CPR (Meira, 2014). In line with the above provisions is ar. 85.2 CPR according to which "*the law shall define*

the fiscal and financial benefits to be enjoyed by cooperatives, as well as preferential terms and conditions for obtaining credit and technical assistance". Thus, the ordinary legislator is able to define what kind of benefits will be granted to cooperatives but he is not constitutionally authorized to provide no benefits at all (Namorado, 2013; Meira, 2014). This is reflected in the 2011 reform of the cooperative taxation. Even though ar. 148 of law n. 64-B/2011 repealed the Cooperative Fiscal Statute, it preserved a few but significant benefits in ar. 66 of law n. 64-B/2011, such as the exemption from corporation tax and council tax (Namorado, 2013).

Considering the gamut of cooperative articles in the constitution of Portugal, several conclusions can be drawn. The strong commitment of the CPR to the cooperative principles has led the ordinary legislator to also follow such commitment by introducing various articles in the CC that are specifically based on the ICA identity statement and prevent their infringement. However, one may argue that the constitutional protection of the cooperative principles has no particular significance, since it lies upon the ordinary legislator to translate the cooperative principles into applicable legal norms. This argument may also be strengthened by the inclusion of plural voting rights and the introduction of investor members to cooperatives under the new CC (ar. 41.5), which may be viewed by some scholars as not fully in line with the letter or spirit of the cooperative principles (Namorado, 2013). Although under the CC the cooperative principles can be redefined, this should not lead to the conclusion that complete abolition or severe infringement of some or all of them would be consistent with the current CPR. Therefore, the constitutional commitment to the cooperative principles should not be viewed as a tool for their absolute and literal application, but as a normative directive for the cooperative legislator to guide him in any future attempts to pass a new law on cooperatives or to reform the existing framework. One other remark that should be noted about the CPR is the fact that it offers the foundation for the cooperatives' positive discrimination (Meira, 2014). The latter is not only constitutionally justifiable but mandatory to the point at which the CPR sets a threshold, permitting the diminution but not the total abolition of the beneficial treatment of cooperatives in various areas, such as in taxation (Meira, 2014).

To conclude, the CPR with its cooperative provisions has not only influenced the organizational cooperative law under the form of the CC, but also tax law, under which cooperatives enjoy favorable provisions compared to private corporations.

b) Italy

After the end of the World War II and the constitution of the Republic, the Italian government became in favor of cooperativism, which was expressed at constitutional level (Borzaga et al. 2010). Specifically, the Constitution of 1948 includes a direct reference to cooperativism[2], preserving its mutual scope and social function as well as promoting its growth. Its ar. 45 states specifically that "*the Republic recognises the social function of cooperation for mutual benefit free of private speculation*" and then it prescribes that "*the law shall assist and promote its development by the most suitable means and shall ensure, by means of appropriate controls, its nature and purposes*".

[2] Although the article refers to co-operation, it has been clarified that it is applied to cooperatives (Miribung, 2014).

As the Italian law evolved over the years to a cooperative–enhancing framework, it further developed the mutual purpose of cooperatives in a consistent manner (Fici, 2013). The mutual aim of cooperatives became a fundamental element that has defined and differentiated them from other types of companies (Fici, 2013). This can be viewed in the very definition of cooperatives by the ar. 2511 Civil Code (CC), according to which cooperatives are a distinctive type of society with a variable capital and a mutual purpose. Although such purpose is not defined in the CC, it has been interpreted by the Italian Supreme Court in line with the Ministerial Report on the CC, in n. 1025 (Fici, 2013). Based on the above, "*a prevalently mutual aim consists in providing goods and services and work opportunities directly to the members of the organization under more favorable conditions than those they would find on the market*".

Based on the above defined mutual scope, the cooperatives are divided in two categories: the prevalently mutual cooperatives (PMC) and the non-prevalently mutual or other cooperatives (OC). The former have to act prevalently with their members and are obligated to report on the volume of transactions with them, which needs to be higher than 50% of the total amount of transactions (ar. 2513cc). On the contrary, the non-prevalently mutual or other cooperatives are neither obliged to act or report as such (Fici, 2013). The latter are also free from any capital remuneration restraints, whereas the prevalently mutual cooperatives can remunerate the capital subscribed by the members but only within certain strict limits (ar. 2514 CC). Therefore, the prevalently mutual cooperatives are in line with the constitutional model of cooperativism and its two conditions of mutuality and absence of speculative purposes. On the other hand, the non-prevalently mutual or "other" cooperatives, which are free to transact with non-members and to remunerate capital without limits, seem to drift away from the constitutional cooperative model, and adopt, instead, a weak version of the cooperative identity (Fici, 2012).

Despite their differences, both cooperative models follow the same governance regulations (with the sole exception of conversion) (Fici, 2013). However, this is not the case with their tax treatment. The only ones eligible for tax benefits are the prevalently mutual cooperatives, whereas the other cooperatives are not eligible to such preferential tax treatment (although they can be recipients of other supportive measures). (Fici, 2013).

The issue of the cooperative tax exceptions and their compatibility with the European Union law and in particular with ar. 107.1EC (prohibited state aid) was raised before the European Court of Justice (ECJ) in a preliminary ruling[3]. The ECJ ruled that tax exceptions constitute state aid, in general. However, they are not considered to be prohibited when they are granted to cooperatives, as long as the particular traits, which were developed by the ECJ, are also reflected in the domestic legislation (Fici, 2013). The aforementioned tax exceptions also need to be justified "by the nature or general scheme of the tax system of which they form part"[4], in order to be compatible with the European Union law. Such justification can be offered by the various provisions of the Italian constitution and most importantly by the ar. 45 for the promotion of cooperatives by law with adequate measures, such as tax exceptions (Fici, 2011).

Based on the above, a liaison is noted between the constitution, the organizational cooperative law and tax law, rooted in ar. 45 of the Constitution. In particular, the mutual scope of ar. 45 of the Italian

[3] See Court of Justice of the European Union, 8 September 2011 (C-78/08 to C-80/08).

[4] See ECJ, 8 September 2011, cit. par. 75.

Constitution seems to be a focal point of the Italian legislature, affecting how cooperative law defines and categorizes cooperatives, having also an impact on tax law (Fici, 2011). On the other hand, the introduction of the "other" cooperatives seems to be a deviation from the constitutional cooperative model. The inclusion of the category of the "other" cooperatives in the legal text was mainly circumstantial, in order not to exclude large cooperatives from the cooperative sector at the time that used to operate with non-members without limits (Fici, 2010). Therefore, the above provision is not expected to change the Italian cooperative movement significantly, since new "other" cooperatives are highly unlikely to emerge, due to the fact that they are subjected to the same governance rules with the prevalently mutual cooperatives, but without the incentives of a preferential tax treatment. Moreover, the tax benefits that Italian law provides for the prevalently mutual cooperatives are not incompatible with the European Union law and can be justified by the Italian Constitution and its ar. 45, which not only authorizes but obliges the legislator to promote cooperatives with various measures (Fici, 2013).

c) Remarks

Both countries, which have been briefly studied in this investigation, acknowledge certain aspects of the cooperative identity at constitutional level. Specifically, the Portuguese constitution prescribes the cooperative principles and the Italian constitution provides for the mutual aim of cooperatives. This creates a compass for the ordinary legislator, who has further developed the above elements and enhanced their protection. Nevertheless, that did not prevent the legislator from drifting away, at times, from the cooperative identity of the ICA, such as with the plural voting rights and investor members in light of the new Portuguese Cooperative Code or by creating a category of cooperatives that might be non-prevalently mutual under the Italian Civil Code.

Moreover, a common denomination between the Portuguese and the Italian constitution is the special protection status and supportive measures attributed to cooperatives. Such provisions had an impact on the country's tax law, resulting in the cooperatives' favorable treatment, compared to for-profit companies.

Overall, the Portuguese and the Italian constitutional provisions on cooperatives have influenced the development of the cooperative law of each country to a certain degree. More importantly, based on such constitutional provisions, cooperatives are recipients of tax exceptions and benefits.

5. Conclusions

The present study focuses on the domestic constitutions of the world that introduce specific provisions about cooperatives, offering in that matter a general overview. This topic presents an interesting area for research in the field of cooperative law due to the constitutions' supremacy over ordinary laws, their potential to enforce supranational norms, as well as their embedding of political considerations, morals and ethics. Despite that, the topic has not attracted sufficient scientific interest. Thus, this study aspires to contribute to the gap in research by undertaking a study on constitutions and cooperatives in a worldwide scale.

Our findings show that one out of three constitutions in the world introduces cooperative-specific articles in their texts and the number of such constitutions increased from 1900 to 2016. The content of the cooperative-related provisions in the constitutional text varies from country to country, covering different chapters of the constitution from articles on governmental powers to the allocation of power and the protection of human rights.

The largest number of such supreme laws appears in the countries of Latin America and their promulgation may be traced to the period of social constitutionalism, in which the working class started to have a significant presence in the political and economic sphere. Despite Latin America's fluid constitutionalism, the acknowledgement of cooperatives has not been removed by any of the contemporary constitutions of the region. Latin America's strong commitment to the constitutional protection of cooperatives is also indicated by the fact that the Mexican Constitution of 1917 was the first constitutional text in the world to acknowledge cooperatives. Thus, the constitutional protection of cooperatives was a Latin American innovation, a fact that shows the richness and particularity of their constitutional history.

Furthermore, the impact of constitutions on ordinary law was examined in two cases: the Portuguese and Italian constitutions. The strong commitment to cooperative principles found in the Portuguese constitution and the protection of mutual purpose by the Italian constitution became central points of the cooperative law in each country, despite some noted deviations. The Italian and Portuguese supreme laws, to the extent that they offer constitutional protection of certain aspects of cooperative identity, can be considered as tools to realise of ILO Recommendation 193/2002's call on legislators to safeguard the cooperatives' particular traits.

One other effect of those constitutions is that they both justify and require cooperatives' preferential tax treatment compared to for-profit companies. When the tax exceptions and benefits for cooperatives have their basis in the constitution, measures abolishing them or subjecting cooperatives to the same regulations and criteria as for-profit companies could be deemed unconstitutional and invalid. Apart from the legal argument of unconstitutionality, the constitutional acknowledgement of cooperatives gives also more weight to any political argument promoting legislation ifavouring cooperatives. In Portugal, although the tax benefits enjoyed by cooperatives have been diminished over time, they were not completely repealed due to ar. 85.2 CPR. Therefore, the constitutional protection of cooperatives' distinctiveness and promotion of supportive legislation has the potential to fix a minimum threshold and prevent the legislator from subjecting cooperatives to the same conditions as for-profit companies.

Moreover, the compatibility of tax benefits with European Union law can be justified by the constitutional acknowledgement, protection and promotion of cooperatives. In that case the member state can show that the tax measure flows from the basic or guiding principles of its tax system, as they are embedded in the constitution. The above preliminary remarks on the impact of the constitutions may be used as a hypothesis to be tested in other countries; an open question to be addressed by future research.

Figure 1. Increase of constitutions with cooperative provisions from 1900 – 2016

A Number of countries with cooperative provisions in their constitutions in each region for 1900 - 2016

B Increase and total number of countries with cooperative provisions for 1900-2016

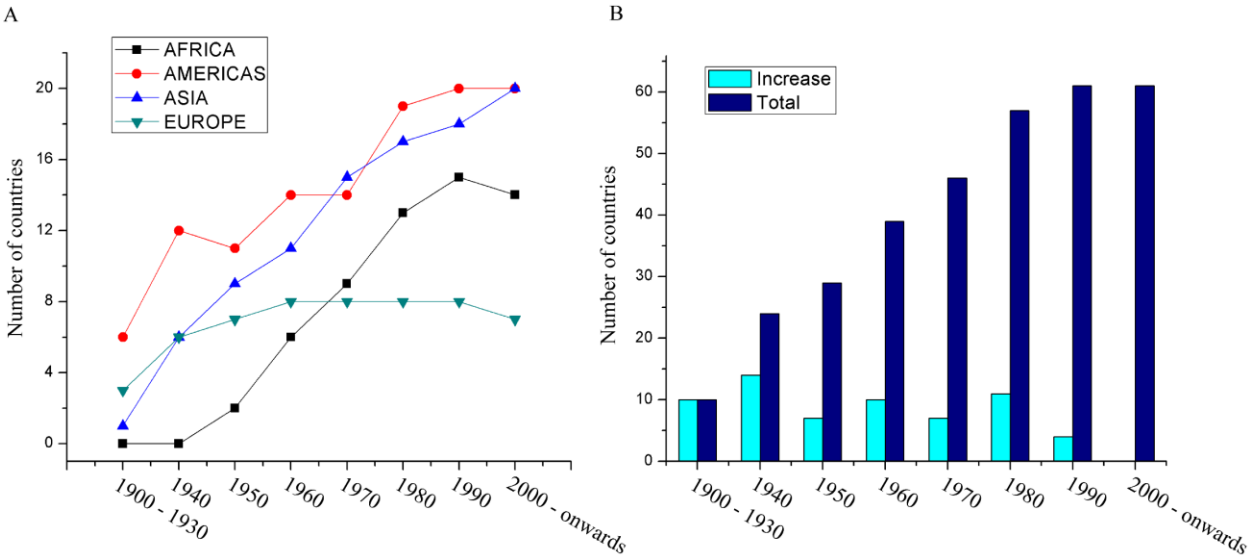


Table 1. The national constitutions of Africa in force with cooperative provisions

No	Countries of Africa	Constitutions in force
1	Angola	2010
2	Central Africa	2016
3	Congo	2006/11
4	Egypt	2014
5	Equatorial Guinea	1991/12
6	Ethiopia	1994
7	Guinea-Bissau	1984/96
8	Kenya	2010

9	Morocco	1996/2011
10	Mozambique	2004/07
11	Namibia	1990/10
12	Nigeria	1999/10
13	Sao Tome and Principe	1975/03
14	Swaziland	2005

Table 2. The national constitutions of Americas in force with cooperative provisions

No	**Countries of Americas**	**Constitutions in force**
1	Bolivia	2009
2	Brazil	1988/17
3	Colombia	1991/13
4	Costa-Rica	1949/11
5	Cuba	1976/02
6	Dominican Republic	2015
7	Ecuador	2008/15
8	El Salvador	1983/14
9	Guatemala	1985/93

10	Guyana	1980/09
11	Haiti	1987/12
12	Honduras	1982/13
13	Mexico	1917/17
14	Nicaragua	1987/14
15	Panama	1972/04
16	Paraguay	1992/11
17	Peru	1993/17
18	Suriname	1987/92
19	Uruguay	1967/04
20	Venezuela	1999/09

Table 3 The national constitutions of Asia in force with cooperative provisions

No	**Countries of Asia**	**Constitutions in force**
1	Bangladesh	1972/86/14
2	China	1982/04

3	Cyprus	1960/13
4	India	1949/15
5	Iran	1979/89
6	Korea (DPR)	1972/98
7	Kuwait	1962/92
8	Malaysia	1957/07
9	Myanmar	2008
10	Nepal	2015
11	Pakistan	1973/02/15
12	Philippines	1987
13	Sri Lanka	1978/15
14	Taiwan	1947/05
15	Tajikistan	1994/16
16	Timor-Leste	2002
17	Thailand	2017
18	Turkey	1982/17
19	Uzbekistan	1992/11

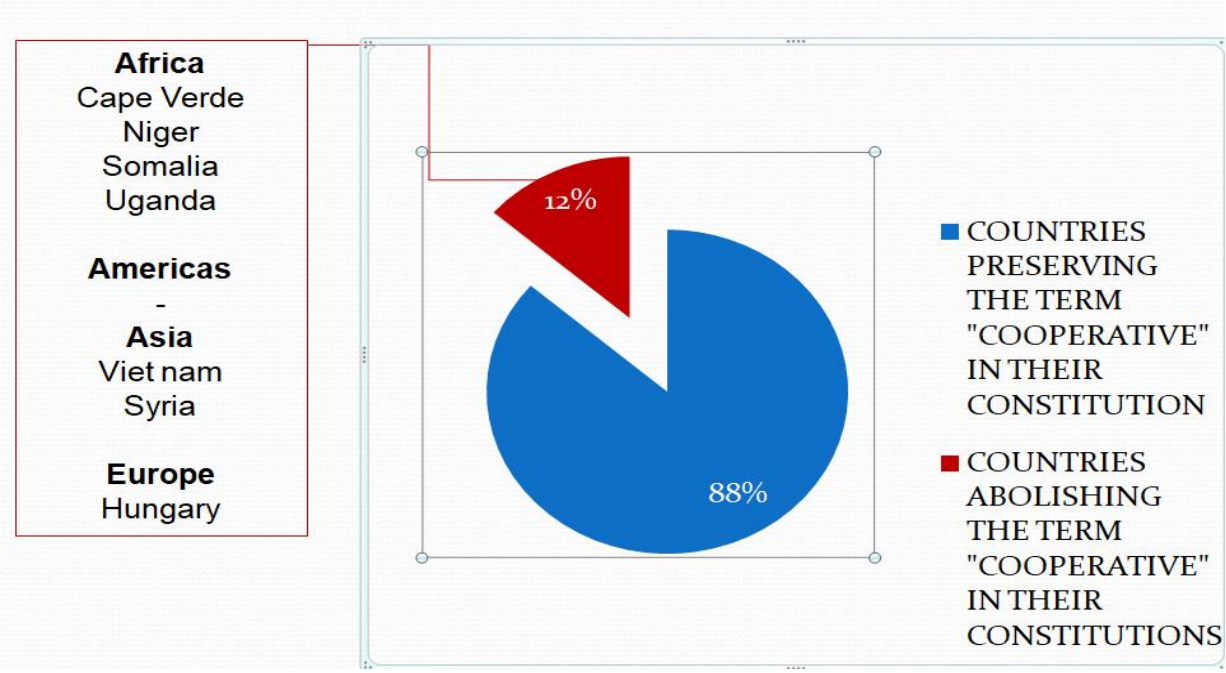
20	Yemen	1991/01

Table 4 The national constitutions of Europe in force with cooperative provisions

No	**Countries of Europe**	**Constitutions in force**
1	Belarus	1994/04
2	Bulgaria	1991/07
3	Greece	1975/08
4	Italy	1947/12
5	Malta	1964/14
6	Portugal	1976/05
7	Serbia	2006
8	Spain	1978/11

Figure 2 The vast majority of countries preserve the term "cooperative" in their current national constitutions

Percentage of countries that preserved the term "cooperative" in their constitutions (blue color) and countries that abolished it (red color)



References

Bialosgorski Neto, S. (2012). The history of the Rochdalian cooperatives in Latin America. In: Heiskanen, J., Henrÿ, H., Hytinkoski. P., Köppä, T. (eds), New opportunities for co-operatives: New opportunities for people. Proceedings of the Global ICA Research Conference, 24-27 of August 2011, Mikkeli and Seinäjoki (Finland). University of Helsinki and Ruralia Institute, Publications 27, pp. 64. Available at : https://www.fearp.usp.br/cooperativismo/sig_paper_suecia.pdf

Borzaga, C., Depedri, S., Bodini, R. (2010). Co-operatives: The Italian Experience. European Research Institute for Cooperatives and Social Enterprises.

Breslin, B. (2009). From Words to Worlds: Exploring Constitutional Functionality. The John Hopkins University Press.

Carozza, P.G. (2003). From conquest to constitutions: Retrieving a Latin American tradition of the idea of human rights. Scholarly works. Paper 581.

Cracogna, D. (2016). Las cooperativas en las constituciones nacionales. 1st International Forum on cooperative law and IInd Continental Congress on Co-operative Law. Montevideo, 16th-18th of November.

Elkins, Z., Ginsburg, T., and Melton, J. (2009). The endurance of national constitutions. Cambridge University Press.

Eustace, R. (2014), Fluid Constitutions: A Latin American Phenomenon, in: COHA, 3th of July. Available at : http://www.coha.org/fluid-constitutions-a-latin-american-phenomenon/

Fici, A. (2010), Italian co-operative law reform and co-operative principles, Working Paper n. 002 | 10. Euricse.

Fici, A. (2013). The European cooperative society regulation. In: Cracogna, D. Fici A., Henrÿ, H. (eds.), International Handbook of Cooperative Law. Springer.

Figueroa, D. (2011). Current Constitutional Developments in Latin America. International Legal Research Informer. Summer Issue, pp. 8-18. Available at: https://poseidon01.ssrn.com/delivery.php?ID=527000067124027072081123072065107108039003024042071075093072113088116125097093002067114102007027106035006116104118073005027092005082039040022087025068120103026075010057077009092027071074113120083093119094011090023072099004112125064022065022007111101001&EXT=pdf

Finer, S.E. Bogdanor, V., Rudden, B. (1995). Comparing constitutions. Clarendon Press.

Gargarella, R. (2014). Latin American Constitutionalism: Social Rights and the "engine room" of the constitution. Notre Dame Journal of International & Comparative Law. Vol. 4(1), pp. 9-18. Available at: http://scholarship.law.nd.edu/ndjicl/vol4/iss1/3

Gavison, R. (2002). What Belongs in a Constitution? Constitutional Political Economy. Vol. 13, pp.89-105.

Henrÿ, H. (2013). Public international cooperative law. In: Cracogna, D. Fici A., Henrÿ, H. (eds.), International Handbook of Cooperative Law, pp. 65-88. Springer.

ICA Legislative Working Group, (2009). References to cooperatives in national constitutions. Centre International de Conférences Genève- CICG, 18 November.

ICA, (1995). Statement on Co-operative Identity, General Assembly of the International Co-operative Alliance. Available at http://www.gdrc.org/icm/coop-principles.html

Law, D. (2010), Constitutions. In: Cane P. Kritzer, H.M. (eds), The Oxford Handbook of Empirical Legal Research, pp. 376-398. Oxford University Press.

Meira, D. (2014). The Portuguese law on social economy. Working paper 2014/12, Ciriec.

Miribung, G. (2014). Über das genossenschaftliche Eigentum in der italienischen Rechtsordnung. In: Genossenschaftswissenschaft zwischen theorie und geschichte. Festschrift für Prof. Dr. Johann Brazda zum 60. Geburtstag.p.779- 791.

Mirow, M. C. (2015). Latin American constitutions: The Constitution of Cádiz and its Legacy in Spanish America. Florida International University College of Law.

Negretto, G. (2008). The durability of constitutions in changing environments: Explaining constitutional replacements in Latin America. Working Paper no 350 of August.

Pieters, D. (2009). Functions of comparative law and practical methodology of comparing. In: Syllabus research master in law, Leuven-Tilburg.

Raz, J. (1998). On the authority and interpretation of constitutions: Some preliminaries. In: Alexander L. (ed). Constitutionalism: Philosophical Foundations, pp.152 ff. Cambridge University Press.

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