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

Marianna Ferraz Teixeira[1], Marília Ferraz Teixeira[2] & Mariana Avelar Jaloretto[3]

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.

[1] Lawyer. Master in Management and Corporate Legal Regime of the Social Economy at ISCAP/IPP, MBA in Credit Union Management at USP and Specialist in Law and Superior Court Procedure at Centro Universitário de Brasília. Member of Brazilian Institute of Studies in Cooperativism (IBECOOP). Address: SRTVS Quadra 701, Bloco O, Ed. Novo Centro Multiempresarial, Sala 360, CEP: 70.340-000, Brasília/DF. Electronic mail: marianna@tfa.com.br.

[2] Lawyer. MBA in Credit Union Management at USP. Member of Brazilian Institute of Studies in Cooperativism (IBECOOP) and Brazilian Institute of Criminal Science (IBCCRIM). Address: SRTVS Quadra 701, Bloco O, Ed. Novo Centro Multiempresarial, Sala 360, CEP: 70.340-000, Brasília/DF. Electronic mail: marilia@tfa.com.br.

[3] Lawyer and Historian. Specialist in Constitutional Law at Instituto Brasileiro de Ensino, Desenvolvimento e Pesquisa – IDP. Address: SRTVS Quadra 701, Bloco O, Ed. Novo Centro Multiempresarial, Sala 360, CEP: 70.340-000, Brasília/DF. Electronic mail: jaloretto@tfa.com.br.

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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