Foreword/Editorial

NOTE BY THE EDITORS/PUBLISHERS
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This is the first issue of the International Journal of Cooperative Law (IJCL). In fact, it is the first time an international journal on cooperative law is being published.The reasons for the publication of such a journal are complex. No answer would be exhaustive.

Why an international journal of cooperative law?

Ever more policy makers and legislators at the local (municipalities, counties and provinces), national, regional and international level rediscover the potential of cooperatives. They raise questions concerning the application of existing law or its adaptation to new circumstances. Cooperative practitioners have concrete legal questions relating to the purpose or objective of their cooperative and the best way to pursue it. For example: should a consumer cooperative welcome its employees as members? Should cooperatives reject government support - of all kinds? - in order to ensure their autonomy? Should they support financially a political organization or may they express religious preferences and disrespect the political and religious neutrality principle? Should a cooperative acquire or set up a company or pay dividends in order to attract investors and facilitate its development?

Often even academics do not have answers to these questions. Cooperative law, be it statutes, case law or any other source of law, is little developed. Soft law in the form of statements by regional organizations or the cooperative movement itself and guidelines by international organizations is insufficient, not the least when cooperatives deviate through their byelaws from the set law or court decisions.

One of the missing tools to find answers is a scientific journal to which, necessarily, authors representing the variety of legal traditions contribute. Such knowledge creation is a source for the advancement of cooperative law, eventually for the elaboration of a theory of cooperative law. It will be all the more effective, if lawyers take the roughly 200 years of "cooperative thinking" into account. Cooperative law, in turn, will enrich this thinking. This will contribute to finding solutions to major economic, social, societal and political problems...unless cooperatives, and with them cooperative law, were a thing of the past or had no identity that sets them apart from other enterprise forms.

The raison d´être of cooperative law: the identity of cooperatives

The classical signs in academia signal that cooperative law might indeed be a thing of the past. The number of articles and books on cooperative law is relatively small, so is the number of references to cooperative law in publications on related subjects. The lack of research and knowledge translates into the quasi absence of the subject from the education curricula;hence the lack of interest in the subject by the legal community.

The reasons for this disinterest need researching. Their understanding might help to assess whether or not this disinterest is justified.The financialization of the economies as of the early 1970ies might be one reason. Its conceptualization excludes enterprise types with other purposes than producing high financial

returns on financial investments, and who are not controlled by the stock market, from the spectrum of efficient enterprise forms. Another reason might be the following phenomenon: Instead of applying Heraclites' description of the world as a moving thing to cooperative enterprises, the prevailing attitude of cooperative organisations over the past half century has been to see cooperatives as we imagine them to have been in the past. Cooperative organizations might not be the only ones to blame for this way of seeing. However, again and again, they have celebrated their original mid-nineteenth century European model as a measure of authenticity, if not as the essence of the cooperative idea. No surprise then that we started assuming that cooperatives have remained the same since that origin. If assumed right, then cooperatives would indeed be a thing of the past, as obviously the world has changed since then. If assumed wrong, then cooperatives might have betrayed their origin.

In order to find out what is the case, we need to differentiate between the model and the idea behind it. The original model of cooperatives, portrayed by the Rochdale Society of Equitable Pioneers, was a self-help response to the social questions of industrialization. Its members were at the same time the producers and providers of goods and services they themselves determined and the users of these goods and services. The idea behind the model had two aspects, a self-help approach and a logic to put it into practice which differed from the logic of the capital versus labour, conflict-driven mode of production and distribution of the produced wealth by avoiding this conflict. This made for a clear identity.

But things have changed since. The model and its idea underwent numerous changes and adaptations in space and over time. The changes and adaptations in space meant that the idea became a ubiquitous one. The changes and adaptations over time were driven by a mix of (geo)political, economic and cultural factors. Colonialism and decolonization, migrations from Europe to the Americas, the integration of cooperatives into state-led economies, the transformation of these economies into market economies, sophisticated adaptations of the model in China, Japan and Korea, the emergence of the welfare state, including labour law, as well as social and consumer protection laws, and today´s multi-facetted, world-wide circulation of the cooperative idea have left specific marks on it without, however, altering it fundamentally. In many instances, state interventions and/or the influence of so-called donors and of non-governmental organisations, or the effects of the welfare state weakened the self-help character of cooperatives or their capacity to address besides the economic also other needs of their members. This reflects in a diversity of national, regional and international cooperative laws, less however of their texts than of the interpretation/implementation of these texts.

Despite these marks and diversity, the international community agreed in 2002 on what it sees as the identity of cooperatives to be institutionalized through law. It agreed on a definition of cooperatives and on a set of cooperative values and principles and laid them down in the International Labour Organisation Recommendation No. 193 concerning the promotion of cooperatives (ILO Recommendation). The definition and the cooperative values and principles are almost word by word copies from the text of the 1995 International Cooperative Alliance (ICA) Statement on the cooperative identity. The ICA represents many, though not all cooperative organisations. This is a unique case where a text of an NGO became part of the text of an international and transnational organization and it might be considered as an innovative way of making (soft) law.

The definition reads: "[…] the term "cooperative" means 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." This definition sets cooperatives apart from other enterprise types in three respects: Firstly, it specifies the purpose of cooperatives. As such, this is not noteworthy, as enterprise types distinguish by their specific purpose. Noteworthy is however the indivisibility of the three aspects of this purpose, namely the satisfaction of the economic, social and cultural needs and aspirations of the members. Secondly, the definition specifies the structural duality of cooperatives. They are associations of persons cum enterprises. Thirdly, the definition specifies the convergence of the members and the cooperative. The wording of this part of the definition – "persons [...] satisfy their common [...] needs [...]" – is as clear as its meaning is difficult to accept. It designates the members as the actors. Put simply, the cooperative does not do anything for the members; the members do together for themselves through a specific enterprise. This corresponds with the original idea of self-help, the kernel of the cooperative idea. This convergence of the members and the cooperative raises questions in terms of the legal personality of the cooperative, in terms of the attribution of liabilities, the application of labour law and competition law, the definition of an appropriate tax regime and accounting standards. Legislators answer them in divergent ways, if at all.

Based on the cooperative values, the cooperative principles guide the legislator as to the form of cooperatives. However, this guidance is not straight-forward. These principles and the way they have been integrated into the ILO Recommendation need harmonizing with the notions of "value" and "principle" in ethics and philosophy and they need translating into legal principles before they can be translated into law.

The agreement by the international community on a common definition and a common set of cooperative values and principles came in recognition of the (potential) role of cooperatives the world over. Besides serving their members and their activities having wider positive economic, social and societal effects, cooperatives were forerunners as concerns consumer protection standards; they have played a key role in the transfer of technological know-how to their members; they bring banking and insurance services to people who have no other access to these services; some have become leaders in their sector, for example in the banking and insurance sector, and in retail; in some countries cooperatives are the biggest employer, not to speak of the direct or indirect income effects they have in many places; cooperatives have been providing affordable housing in many instances. From the Rochdale Society of Equitable Pioneers, a cooperative that regrouped few persons of the same social class and with similar basic needs, the cooperative model has diversified and its structure has become more complex. Today, cooperatives may be found in virtually all sectors, including the production and supply of energy and other utilities,as agro-ecological food chains, in urban horticulture and farming, in education, health and care services and data protection, as well as as all youth cooperatives. Cooperatives with a high number of members (such as in modern consumer and bank cooperatives), cooperatives which are active in several sectors, whose membership is heterogeneous by interest, social background or profession, which do not only serve their members, but also, or exclusively, non-members, the community or even the public at large (public interest cooperatives), or which take other stakeholders´ (legal) interests into account (for example those of investor (members)) or which count among their membership not only private law persons, but also public law entities (as, for example, in health and care, as well as in utility cooperatives), make for more complex structures than the original model. Things are further complicated by all enterprises, including cooperative enterprises, integrating ever more into horizontal and vertical, operationally and organizationally linked chains that create wealth out of data where connectiveness is more relevant than

collectiveness. At the same time, the positions of producers and consumers merge ever more.The cooperative principle of autonomy might be at stake in such value chains; responsibilities and liabilities might have to be adapted in hitherto unknown ways, not to speak of possibly necessary adaptations of labour law, warranty law, competition law etc..

Not the least these new-type cooperatives attest to the fact that cooperatives are not a thing of the past. But, do these variations of the original model betray its origin? Essentialists claim that they do and that this were the main reason for the disinterest of the legal community in cooperative law. Others see in the adaptability of the model signs of cooperatives being a suitable enterprise form also, if not especially, for the future. Arbitration between the two positions is to take the following into account: Unless we were to limit the function of law to providing public rules by which potential members regulate their relationships and those with third parties or solve conflicts, we need to understand the conditions under which enterprises operate today and we need to apprehend the challenges they will face in the future.

As enterprises, cooperatives experience the same tensions as other types of enterprises do. This has led to two phenomena, which make it difficult to identify the identity of cooperatives. These phenomena are a "companization" of cooperatives and a convergence of enterprise forms. Competing ever more on the market, and thus pressured to perform well in financial terms, cooperatives also react by diminishing staff costs and by lobbying for and benefitting from social costs and tax dumping measures. They partly ask for, partly they are submitted to an institutional isomorphization through law with stock companies as models. Signs of this "companization" are, among others, the possibility to use nearly all financial instruments stock companies do; the acquisition or establishment of subsidiariesin the form of stock companies without effective safeguards as to the control of these subsidiaries by the members; the recruitment of managers trained in business schools and also otherwise without cooperative experience, instead of elected cooperative members; the partial apportionment of voting rights and surpluses in proportion to capital contributions, instead of transactions; the application of law which is tailored on other forms of enterprises to cooperatives, such as for example the general labour law, competition law, taxation, accounting and auditing rules, without taking the specifics of cooperatives into account. This jeopardizes the rights and obligations of the members to control their enterprise; it leads to cooperatives not being able to pursue their wide purpose; and it exacerbates in many instances the cooperative specific control risks. On the other hand, and not the least through the recognition of sustainable development as a concept of (public international) law, the social responsibility of all enterprises (CSR) is being extended to comprise societal aspects and it is juridifying. This might eventually ease the pressure to have financial performance as the sole success indicator for enterprises. At the same time, the debate on the CSR shifts its focus from results to the governance of enterprises. This shift leads to a convergence of the features of the governance structures of all enterprise types.

This double approximation of the enterprise forms through law – companization and convergence – and relatively recent phenomena, such as social enterprises, shared economy arrangements, community interest companies, have two effects. Firstly, they lead to dysfunctions and inefficiencies as they happen without regard to the functional relationship between the form and the purpose of enterprises. Secondly, they make it more difficult to distinguish cooperatives from other enterprise forms. Hence, it becomes more difficult to justify the need for a journal specialized in cooperative law.

The germ for the justification of this need lies in the paradox borne by the convergence. The paradox is this: The reason for the convergence, which is a greater social and societal responsibility of enterprises, also calls for the preservation of a diversity of enterprise types. Diversity in its two aspects, biological and cultural, including a diversity of enterprise types, is the only known source of the possibility to develop which, in turn, is a precondition of sustainable development. The central aspect of sustainable development, on which the other aspects, namely political stability, economic security and ecological balances depend, is social justice. Social justice needs regenerating.

This is where cooperatives must continue making a difference of such quality that it adds to the vital diversity of enterprise types. This does not mean a return to the original model of cooperatives, but rather a return to the raison d´être of cooperatives at their origin. As mentioned, traditionally cooperative enterprises have given a specific answer to the social questions of their time and place, The challenge consists in understanding the social question of our time and in adapting that mechanism which regenerates social justice, namely democratic participation in the decisions on what and how to produce and how to distribute the produced wealth, in a way which continues distinguishing cooperatives from other types of enterprises and which capacitates them to help filling the gap the welfare state and the labour ´market partners are increasingly leaving in terms of social justice. By their very purpose, other types of enterprises cannot organize democratic participation. The welfare state and the labour market partners find it increasingly difficult to cater for social justice as their capacity to organize democratic participation diminishes inasmuch as the unity of political and economic orders dissolves and as the conflict between capital and labour does not yield the positive result in terms of social justice as it has over the past many decades. The unity of political and economic orders dissolves and the labour market partners fail in terms of social justice as knowledge becomes the main product and its main means of production and as it may be transmitted and used digitalized and quasi instantaneously, hence independently of time and space constraints (globalization). If social justice cannot be reproduced, political stability is at stake and with it economic security. In such circumstances, the necessary consensus on concern for the indivisible global biosphere cannot be had.

Beyond their specific purpose, the distinguishing feature of cooperatives, their identity, must express through their cooperative social responsibility. It has two components: their legal structural elements link functionally to the aspects of sustainable development and democratic participation permeates all organizational and operational aspects. Given the mentioned diversity of cooperatives and their structural complexities, the accommodation by law of this identity is a challenging task indeed.

So, cooperatives are not a thing of the past. They are distinct from other enterprise types. This distinction may be and must be supported by (a specific theory of) law. But, does this require a specialized journal? We think it does. The IJCL is to promote cooperative law, so that the lively debate on “business law” may embrace the need for diversity, so that the debate on enterprises as a common and on forms of common property may include tested models, such as cooperatives. A specialized journal, not excluding the wish for a large presence of cooperative law also in other (law) journals, might be more effective in this sense.

What do we mean by cooperative law and by theory of cooperative law?

Cooperative law and theory of cooperative law

The editors/publishers understand cooperative law in its widest sense. By associating persons and by their very purpose, cooperatives are closely interwoven into socio-political and socio-economic structures of their respective societies or countries. Cooperative law has to take account of this. By "cooperative law", we understand all those legal rules - laws, administrative acts, court decisions, jurisprudence, cooperative bylaws or any other source of law, which regulate the structure and/or the operations of cooperatives. This notion of cooperative law comprises, hence, not only the cooperative law proper (law on cooperatives), but also all other law, which shapes this institution and regulates its operations. The following areas, which are most likely to have this quality in any legal system, need mentioning: constitutional law, labor law, competition law, taxation, (international) accounting/prudential standards, bookkeeping rules, audit and bankruptcy rules. The notion is to be complemented by considering implementation rules and praxes, for example prudential mechanisms, audit, and registration procedures and mechanisms. It also includes law making procedures and mechanisms, as well as legal policy issues. Furthermore, national cooperative laws are part of intertwined layers of regional and international cooperative law. The dynamics of these layers play out in a special way as through regional and international law the afore-mentioned so-called cooperative values and principles become relevant.

By "theory of cooperative law", we understand a canon of mutually referential principles, notions, rules and praxes which institutionalize the idea of cooperatives and constitute an autonomous field of law cultivated by a sufficient number of specialists. Principles, rules, notions do exist. But they do not constitute a theory, neither at the international level, nor at the national levels where we find cooperative law on a wide spectrum from the recognition of cooperatives by the constitution to seeing it as a part of civil or commercial law.

A theory of cooperative law is to help avoiding a repeat of the history of cooperative law. This history is marked by unsuccessful attempts to emancipate cooperative law from its two roots, namely from the law on associations and the law on capitalistic companies. Most jurisdictions try to translate the identity of cooperatives into derogations from stock company law. This technique barely hides its insufficiencies as, at the basis, cooperatives are associations of persons, and it must necessarily lead to contradictions between the cooperative law and other branches of law, such as competition law, labour law, taxation etc., if these branches of law are – and, as mentioned, in general they are - tailored on companies. On the other hand, in an increasing number of countries, cooperatives are part of the social or solidarity economy. That brings them closer to associations or mutual and this leads to other configuration of the various branches of law.

A theory of cooperative law cannot be elaborated without implicating the cooperative praxis. Indeed, rarely have theory and praxis been as intertwined as in "cooperative thinking". "Cooperative thinking" is thinking in action. Many of the cooperative thinkers in the 19th century were practitioners at the same time. When academia lost interest, they carried on and further developed this thinking. They best demonstrated this by continuously reworking the mentioned set of cooperative values and principles. Not all cooperatives might share them (all). However, few cooperators would not recognize them as guides. Furthermore, since the beginning of legislation on cooperatives in the mid-nineteenth century, cooperative law and its implementation anywhere has been, directly or indirectly, influenced by these values and principles and assessed accordingly.

This reciprocal link between cooperative law and "cooperative thinking", as well as the social and societal ramifications of cooperatives, makes cooperative law also interesting for other disciplines. This is not only true for research on social enterprises and non-profit organisations. Here, the proximity to cooperative enterprises might explain the interest. But it is true for other disciplines as well, not the least for the theory of knowledge, epistemology, for which the relationship between theory and praxis has always been a bone of contention.

The reasons for the companization of cooperatives and the convergence of enterprise forms through law may not only be found in the mentioned market pressures. They also point to an epistemological problem in research. That has usually compared enterprise types on the characteristic features of stock companiesand limited the comparison to the forms of enterprises, without taking into account the functional link between the form and the specific purposes by which enterprise types distinguish. This violates basic rules of comparing.

The character of the IJCL: scientific, international, published electronically and in English

The IJCL is conceived as a scientific international journal. What do we mean by this? The past or current affiliation of the editors/publishers is no guarantee for these qualities. Nor is its publication in English a sign of its having these qualities. As for the qualifier "scientific", we hold the creation of knowledge through authors and advisory board members from different legal traditions as a precondition. If, in addition, we can attract the interest of readers from all over the world, then we will be another step closer to this quality. We also hold that being scientific requires to be independent. Whilst considering the views of interest groups, the editors/publishers intend to create knowledge of law *on* cooperative organisations, not of law *for* cooperative organisations. We do not disregard their views, but we want to confront these views critically with other views, with legal concepts as they apply to other types of enterprises and with the views other disciplines have of cooperative law. In the same sense we intend to not solely advocate the advantages of cooperatives. The IJCL is to also demonstrate that law cannot do away with the possible competitive disadvantages of cooperatives.

Therefore, cooperative law is the object of the journal. But contributions do not have to focus necessarily on it, as long as they enrich the creation of knowledge of cooperative law.

The IJCL is international, but its object is not international law, even if articles may contribute to the consolidation of international cooperative law. Nor is it a comparative law journal, although we hope that its analyses concerning various jurisdictions will be a precious source for comparatists. For the rest, we wish that papers coming from any country will be fruitful to readers from all countries. After all, they will highlight questions and problems that, by all experience, most lawyers, no matter where, experience and the reported solutions will help them in their work.

The decision about English as the language of the journal was particularly difficult to take. The diversity of jurisdictions and legal traditions is a wealth. Its components can only be described, studied and understood in their respective languages. For obvious reasons the submission of articles in any language would overburden the editors. Quality checks would be even more flawed than they might be already. Moreover, journals of cooperative law do exist in other languages, especially in Spanish. But, because of the language, their wealth remains inaccessible for many and therefore under-used. The IJCL is to

stimulate the communication beyond the existing law communities. So, when we decided that we would work with one language only, English became the obvious choice. We hope that our published policy on the language requirement is a compromise which potential authors will accept also in the future and that potential readers will find a way to overcome language barriers where they should exist

The IJCL is published electronically for several reasons. This form is not judged anymore as a sign of being "non-scientific"; it facilitates worldwide access and dissemination. But, we confess that the absence of external financial support was also decisive. A paper publication is far more expensive. We endeavour, however, to offer both an electronic and a paper version in the future.

Readership and structure of the IJCL

The readership of the IJCL is defined to a large extent by the nature of the journal as an international and scientific journal. As for the first characteristic, only experience will tell. As for the second characteristic, this does not and must not exclude non-academic readers. The editors/publishers hope to attract a wide audience also by having a practitioners´corner, through which the mentioned "cooperative thinking" will continue to be part of cooperative law. So, this corner must not be construed as a relegation to a less important part of the journal. For the rest, the IJCL is structured in the classical way.

Presentation of this first issue of the IJCL

This first issue of the IJCL does not meet the targets we are setting ourselves in all respects. It falls short of representing in a balanced manner the various legal traditions. This concerns both the contributions and the composition of the advisory board. Some might look for a thematic red thread, which this issue does not have. We hope to compensate by an overview of the variety of subjects combined under the term "cooperative law". The authors were free to use their own national reference style. Some readers will find this a minus, not to speak of language issues.
The readers will judge. We welcome, even ask for, criticism without which we may not progress.

Finally, we invite submissions for the next issue of the IJCL. It will also contain a selection of the contributions to the 2nd International Forum of Cooperative Law which is to take place at Athens 26-28 September, 2018.

Athens, Almería, Kauniainen, Luxembourg and Leicester, June 2018

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