Foreword/Editorial

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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