Book Reviews

Picker, Christian, Genossenschaftsidee und Governance [The cooperative idea and governance], Tübingen: Mohr Siebeck 2019, XXII + 561 pp., ISBN 978-3-16-156567-0

and

Miribung, Georg, The Agricultural Cooperative in the Framework of the European Cooperative Society. Discussing and Comparing Issues of Cooperative Governance and Finance in Italy and Austria. Springer Series Economic Analysis of Law in European Legal Scholarship 8, Springer Nature 2020, XIV + 563 pp., ISBN 978-3-030-44153-1 and 978-3-030-44154-8 (eBook)

by Hagen Henrÿ[1]

As the review of Georg Miribung's book refers repeatedly to that of Christian Picker's book the reader might want to read the reviews in the sequence as presented here.

Picker, Christian, Genossenschaftsidee und Governance [The cooperative idea and governance]

I. Introduction

Christian Picker´s book "Genossenschaftsidee und Governance [The cooperative idea and governance]" is like a gemstone, both high quality and rare. It is also timely. His book is based on a text which the Ludwig-Maximilians-Universität at Munich accepted as habilitation thesis [Habilitationsschrift], i.e. the classic last stepping-stone in Germany to full professorship. Its scientific quality and value are therefore beyond doubt. Its content, which the title of the book does not fully reveal, makes it a rarity. This is because, as the author acknowledges on the very first pages, cooperative law is almost completely absent from research and education. Although, it should be noted, that this is not only a phenomenon in Germany, but world-wide. 2 The book is timely as it addresses the questionable drive to make the

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2 Cf. also Henrÿ, Hagen, Basics and New Features of Cooperative Law – The Case of Public International Cooperative Law and the Harmonisation of Cooperative Laws, in: Uniform Law Review. Revue de droit uniforme, 2012, Vol. XVII, 197-233; Lehmann, Matthias, Cooperatives as Governance Mechanism in: European Company and Financial Law Review (ECFR) 1/2014, 31-52; Villafañez Perez, Itziar, Algunas reflexiones en torno a la necesidad de integrar la perspectiva cooperativa en el estudio y desarrollo del ordenamiento jurídico [Some thoughts on the need to

governance structures of all types of enterprises converge. For those who are interested in German cooperative law - and can read German! - this 519 pages of dense text with more than 2800 footnotes and 35 pages of bibliography contain it all: description, critical analysis, sporadic outlooks to other jurisdictions and proposals for changes to the German cooperative law. This book will be a key reference for many years to come.

This short review cannot do justice to the book, given its volume and wealth of ideas. My approach is necessarily selective, as I present and reflect on those points which, in my view, are most likely to be of greatest interest to an international readership. To provide some structure to this review, I will begin with a brief summary of the contents of the book (II) and before concluding (IV) I will raise some questions (III). The questions posed are a reaction to an extraordinarily thought-provoking treatise.

II. Summary of the content

The book evolves from what the author sees as a German specificity in a double sense: Firstly, the purpose of registered cooperatives is to exclusively serve the user interests of their members, failing which they will be dissolved ex officio. Secondly, in contrast to other enterprise types, the ensuing specific legal form of cooperatives may not be used for any other purpose.

Consequently, and placing his treatise within organizational law ("form follows function", pp. 21, 67 et passim), the author sets out to demonstrate this purpose and to detect any part of the law which might hinder its pursuit. He consistently and meticulously keeps this focus. No matter which political, economic or social circumstances might have prompted certain legal figures in the past or might prompt in the future, he examines any aspect of German cooperative law, from its beginning in the 1860's, with an "anything goes" approach, provided that the law furthers the pursuit of the singular purpose of cooperatives. Contrary to the popular view, he is prepared to accept that such things as profit-making (in addition to surplus), the remuneration of the capital contributions of the members, non-member business, undemocratic management, management by non-members, divisible reserves and even measures that might be inefficient in the entrepreneurial sense, are acceptable, as long as they serve the members´ user interests. This approach allows the author to keep equal distance from two main tendencies in cooperative legislation (not only in Germany), namely a tendency to bring the features of cooperatives too close to

integrate the cooperative perspective in the study and development of the legal order], in: Hagen Henrÿ, Pekka Hytinkoski and Tytti Klén (eds.), Co-operative Studies in Education Curricula. New Forms of Learning and Teaching, 2017, 54-71 (University of Helsinki Ruralia Institute: Publications Series No. 35).

To be mentioned, however, a vibrant and diverse "culture" in Germany and few other countries of publishing and updating regularly commentaries on their cooperative laws.

those of commercial enterprises or to bring them too close to those of general interest organizations. It also allows him to avoid engaging with the ideological, traditionalist or essentialist overtones used to defend or reject one or the other of these tendencies.

Chapter 1 is titled "[the] need for a cooperative governance [Notwendigkeit einer Cooperative Governance]" Referring to the economic and social importance of cooperatives the author leaves no doubt as to the need for such a specific cooperative governance. At the same time the chapter outlines the methodology and it introduces the content of the following three chapters.

Chapter 2 details the "function of a cooperative governance [Funktion einer Cooperative Governance]". The chapter divides into two parts in line with the scope of organizational law. In the first part the author deduces the "German specificity" from German cooperative law using classic methods of statutory interpretation: understanding the wording of the law, seeking to establish the intention of the legislator, using teleological and systematic interpretation. He concludes that 1) member-user promotion is constitutive of the legal form of (registered) cooperatives and 2) that contrary to other forms of enterprise this legal form may not be used for any other purpose. He qualifies the latter aspect as a restriction on freedom of association and in doing so introduces a constitutional question with two interrelated aspects: the need to justify the restriction and the need to vest cooperatives with the widest possible byelaw autonomy. Concerning the first aspect, he argues that the restriction is justified on the ground of member and third party (mainly creditors) protection (p. 67 et passim). But he firmly rejects any justification on the ground of promoting general interests. He holds that positive economic and social effects of cooperative activities are desirable, but that having these would be jeopardized if cooperatives were obliged or allowed to serve other than their members´ user interests. This argument is expanded in Chapter 3. Concerning the second aspect, the author presents an adequate and (for legislative purposes) highly useful distinction between law and byelaws. This distinction also addresses the problem of how one general cooperative law might effectively cover the modern diversity of cooperatives (a solution the author favours). This diversity concerns the size (number of members and/or amount of turnover), the membership (homogeneous or heterogeneous by interest, social strata, profession etc.), the activity (single or multiple), the sector etc..

In the second part of Chapter 2 the author discusses self-help, self-administration, self-responsibility and democracy as structural principles of cooperative governance. It is arguably here that his approach best plays out. He upholds that, regardless of the origin, raison d´être, or role these principles may have played in practice or theory, the extent that they should be applied depends entirely on whether and how effectively they further the user interests of the members.

At the end of this chapter the author points to the two legislative tendencies mentioned earlier, namely commercialization, which he distinguishes from economization [Ökonomisierung, p. 294], and general interest orientation. They both pose a threat to the identity of cooperatives by distancing them from their purpose. He details these threats in the following two chapters.

Chapter 3 is on "cooperatives and general interest [Genossenschaften und Gemeinwohl]" and deals with the first of these two threats. The author starts by discussing different conceptions of the purpose of cooperatives in some European states and the one behind the Societas Cooperativa Europea as regulated by the Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE). He compares these conceptions with the "German specificity" and after further embedding this specificity in Germany's constitution, he concludes that there are irreconcilable differences, which excludes any possibility of harmonization, even at the European level. He then goes on to challenge his own view. First, by exploring whether general interests could and should be made part of the purpose of cooperatives. He rejects this idea arguing that the cooperative self-help approach cannot be married with a help-for-others approach. He acknowledges that cooperatives should be of public utility [gemeinnützig], but does not accept that they may have a general interest purpose [gemeinwirtschaftlich]. He tests this conclusion by replacing the notion of share-holder value (capitalistic enterprises) and the notion of member value (cooperatives) with the notion of stakeholder value. The stakeholder value theory drives much of the contemporary governance debate. However, the author remains loyal to his basic tenet to reach a conclusion which will be counter-intuitive to many readers - cooperatives are less socially and societally responsible than other (capitalistic) types of enterprises as far as their purpose is concerned. As with the general interest, social or societal responsibility must not be made part of the one-dimensional purpose of cooperatives, which is to serve the members´ user interests.

Chapter 4 is titled "cooperatives and ´capitalism´ [Genossenschaften und "Kaptalismus"]". In this chapter, the author deepens his discussion of the second threat to the identity of cooperatives, namely the development of a capitalistic enterprise interest, detached from and potentially conflicting with the member-user interests. Against the background of what he sees as a general "economization" of entrepreneurial activities, the author develops ideas on new enterprise types, such as a cooperative stock company [genossenschaftliche AG] and a capitalistic cooperative ["kapitalistische" eG]. He rejects both. The first one on the ground of its perplexity of purposes, the second one on the ground of creating an unsolvable conflict between investing and user member interests. He concludes this chapter with suggestions for a "member promotion adequate capital structure [Förderzweckkonforme Kapitalverfassung]".

Chapter 5 is about a "member promotion adequate organizational structure [Förderzweckgerechte Organisationsverfassung]". The author weaves the threads he spun in his previous chapters into an ideal organizational structure for cooperatives in Germany. The chapter sets out to clarify which structural rules in the law are indispensable, so that a registered cooperative may promote the user interests of its members without running the risk of degenerating into a capitalistic or a general interest enterprise. The questions raised include: how autonomous may management be? How much member participation is needed? What (additional) control mechanisms must be in place in order to secure the purpose? The chapter then addresses the question of how management and control should be designed in order to allow for an optimal realization of the purpose. The author implies that the path to this optimization should be left to the members to lay down in the byelaws, which might differ according to type, size and structure of the individual cooperative.

The author suggests that the matters left to be regulated by law include several specific structural elements. To be mentioned three of them: The first one is the right of the general assembly to instruct the board on management issues. This means that the general assembly should not only be the highest decision-making body, but also the highest management body. The second specific element is the limitation on transacting non-member business, with a further limitation that it must not be conducted on the same terms as member business. The third such element is the non-admission of investing members. The matters that should be left to be regulated through the byelaws include various models for a more effective participation, such as the attribution of plural voting rights, information and reporting, and a cooperative specific audit. Member-control should be strengthened, but it should remain the second best choice after participation. These proposals ensue from the author's recognition that the pursuit of the members´ interests will only be effective if members (are allowed to) participate.

III. Questions

I have already acknowledged that I found this book to be extraordinarily thought-provoking. My discussion of the following three points is my response to that provocation. They are formulated as questions to indicate my doubts as to their pertinence. The questions are:

i.) Is the way (method) on which the author proceeds from the current state of the German cooperative law to his proposals for change tenable?

ii.) Is the "German case" (to be) unique?

iii.) Is the notion of "governance" adequate for cooperative law?

ad i.): The author develops his proposals for changes to the German cooperative law by criticizing the legal form it prescribes for cooperatives on the ground of a "non-positivist [überpositiv] … German cooperative legal type [deutscher Rechtstyp Genossenschaft, pp.15, 117]". On the same page (15) he equates "cooperative legal type" with "normative guide [normatives Leitbild]", and "cooperative idea [Genossenschaftsidee]"; on pp. 117 and 190 respectively with "cooperative legal idea ["Rechtsidee" Genossenschaft]" and "legal notion of cooperatives [Genossenschaftsrechtsverständnis]".The origin and justification of this "German legal type" are not entirely clear. The equation of "legal type" with "cooperative idea" (the term also used for the title of the book) might lead to a methodological trap. If the "legal type" is the measure by which the current law is criticized, rather than an extra-legal criterion, then at least one element of this legal type must be a non-negotiable given. Indeed, the author tries to protect himself from falling into this trap by setting the cooperative's purpose of serving the members´ user interests as an absolute, i.e. absolved from the need to be justified (cf. p. 117: "Unveräusserlicher Kern der deutschen "Rechtsidee" Genossenschaft ist damit nur ihr spezifisch mitgliederbezogener Verbandszweck [the only unalienable kernel of the German cooperative legal idea is its purpose to serve the members´ user interests]"; and on p. 119: "Absolut und damit zeitlos und inhaltlich unveränderbar [absolute, hence timeless and with immutable content]".

Surprisingly, the author does not avoid the trap by using either one or both of the escape routes that he had already identified: The first route would have been to build on the fact that there are (according to him) "two notions of cooperatives, the positive one as laid down in the cooperative law and a universal or non-positivist one" (p.18). 3 Instead, he reduces the meaning of "Genossenschaftsbegriff [notion of cooperative, p. 18 et passim] to that of "Genossenschaftsrechtsverständnis [legal notion of cooperatives]". The second one would have been to follow the example of Schulze-Delitzsch, the master-mind behind the German cooperative law in the 19th century who derived the purpose of serving the members´ user interests from sociological findings and the legal form of cooperatives from principles distilled from practice.What was valid at the time when Schulze-Delitzsch designed the German cooperative law is equally valid now: Without disregarding reciprocal later effects, the legal notion of cooperatives flows from the non-legal one. 4 By attributing the status of "absolute", "timeless" and "immutable" to the purpose of cooperatives and declaring it the "unalienable kernel of the … cooperative legal idea" one creates indeed a "genossenschaftlicher Grundtypus [cooperative basic type, p. 15]". By doing so the author may have disregarded social facts and he may have unnecessarily tried to circumvent the common

3 Translation by the undersigned.
4 Cracogna, Dante, Estudios de derecho cooperativo [Studies in cooperative law], Buenos Aires: Intercoop Editora 1967.

problem of having to build a bridge from the non-legal to the legal. Do people choose to be/come members in big cooperatives [Grossgenossenschaften], e.g. consumer and banking cooperatives because of the kind of purpose the author suggests? Or is it because of the capital structure, the profit/surplus distribution criteria and the potential for participation, or simply because of the potential for a better `deal´?

Principles might be more solid building bricks than a legal type to bridge between the non-legal and the legal. These principles do exist. They have been international from the start in the 19th century. As can be seen from the rivalry between Schulze-Delitzsch and Raiffeisen, there were several sets of principles in what is now Germany. These and other sets of principles are all expressions of a wider, indeed "universal" (p. 18), but not uniform set of principles. They were written down for the first time by the Rochdale Equitable Pioneers in 1844 and then they developed and were systematically and constantly reinterpreted by the International Cooperative Alliance (ICA). 5 Their current version is laid down in the 1995 ICA Statement on the cooperative identity (ICA Statement). Several initiatives are underway to translate these principles into cooperative legal principles.6 Besides facilitating the translation of the cooperative principles into law, these legal principles may help to avoid an undue harmonization/unification of cooperative laws, something the author also opposes.

A more extensive look across national borders and a more intensive consideration of international texts related to cooperative law may have helped the author to question the uniqueness of the German cooperative law. It may also have helped him to critique the current German cooperative law using the criterion of flexible cooperative principles, rather than the inflexible notion of a "legal type".

ad ii.): The purpose of cooperatives according to the current German cooperative law might be unique.7 But only comparative studies, including a comparison of purposes as well as a comparison of legal forms, will reveal whether a specific purpose may be pursued only through one form.

As concerns international texts, which could serve as guide for cooperative law, the author briefly refers to and cites from the ICA Statement and the International Labour Organisation Promotion of Cooperatives Recommendation, 2002, No. 193 (ILO R. 193). But he may not have sufficiently exploited

5 Cf. International Cooperative Alliance, Blueprint for a cooperative decade 2011-2020, at: ica.coop/sites/default/files/media_items/ICA%20Blueprint%20%20Final%20version%20issued%207%20Feb%2013.pdf and International Co-operative Alliance, Guidance notes to the co-operative principles, at: http://ica.coop/sites/default/files/attachments/Guidance%20Notes%20EN.pdf

6 Cf., for example, the Rules of the ICA Cooperative Law Committee and Gemma Fajardo, Antonio Fici, Hagen Henrÿ, David Hiez, Deolinda Meira, Hans-H. Münkner and Ian Snaith (eds.), Principles of European Cooperative Law. Principles, Commentaries and National Reports, Cambridge et al.: intersentia 2017, XII + 721 pp..

7 Different opinion for example Antonio Fici. Cf. Fici, Antonio, An Introduction to Cooperative Law, in: Dante Cracogna, Antonio Fici and Hagen Henrÿ (eds.), International Handbook of Cooperative Law, Heidelberg et al.: Springer 2013, 3-62 (18).

the significance of these texts for his own arguments. The ICA Statement forms part of the byelaws of the ICA and the ICA is an association under Belgian law. It follows that the ICA Statement is legally binding upon the members of the ICA, and indirectly on the members of these members. Consequently, it should not be qualified as "unverbindliche Richtlinie [non-binding guidelines, p. 191]". Through their membership of either of the two German cooperative federations, which are members of the ICA, many German cooperatives are bound by the ICA Statement. For the national legislator, the legal relevance of the ICA Statement is established by the fact that its content has been integrated into the ILO R. 193 (albeit with modifications that are not relevant here). Under its Constitution (Article 19) the ILO is empowered to adopt recommendations as well as conventions. Germany is a member state of the ILO. Its government, employers´ and workers´ representatives voted in favour of the adoption of ILO R. 193 in 2002. The principles laid down in the ICA Statement and included in the ILO R. 193 are principles and not "Charakeristika [characteristics, p. 169]", "vage Programmsätze [vague programmatic sentences, p. 191], nor are the cooperative values laid down in these texts "Bekenntnisse [creeds, p. 249]".

The ICA and ILO position may be less distant than the author is prepared to admit.8 This also applies to his assertion (p. 191) that the ICA and the ILO do not mention the promotion of the members´ user interests as the purpose of cooperatives. Even if otherwise at times vague, the ICA Statement and the ILO R. 193 define a cooperative as 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".9 The wording "persons … meet[ing] their … needs …" is understood as member promotion in the sense proposed by the author.

ad iii.): My third question 'Is the notion of "governance" adequate for cooperative law?' relates to three issues: the title and the content of the book; the scope of "governance"; and the use of the term "governance" for cooperative law.The title does not indicate the strictly legal content of the book and the content is not limited to governance issues. There is hardly any part of the subject of cooperative law that this book does not address. Words like "Rechtsform [legal form, pp. 9, 15 et passim]", "form follows function" (pp. 21, 67), "Unternehmensverfassung [enterprise structure, p. 9]", "Organisationsverfassung [organizational structure, pp. 331 ff.]" indicate that the author is taking a wider scope than just "governance" (pp. 6 ff. et passim) when searching for a solution to the principal/agent conflict. Chapters 1 and 2 deal with more than "governance", yet the titles suggest that the content is limited to that topic. In contrast, while Chapter 5 deals only with "governance" its title suggests that it will do more. Noticeably,

8 Cf. material referenced in footnote 4 and Paragraph 10. (1) et passim of the ILO R. 193.
9 On p. 191 of the book these definitions are cited in two different versions.

the titles of Chapters 1 and 2 use the English word "governance", while Chapter 5's title is entirely in German.

In terms of the attention given to governance and given the emphasis the author rightly puts on member participation as the mechanism to ensure compliance with the member-user purpose, he might have considered some additional issues. The author insists that participation is increasingly important, the more the (economic) activities of the members are integrated into the activities of the cooperative enterprise, for example, in agricultural cooperatives. But he does not consider the consequences for member participation of factors such as the adherence of most cooperatives to federated structures (unions and/or (con)federations of cooperatives),10 the existence of cooperative groups, the increasingly intensive organizational integration of enterprises, cooperative enterprises included, as part of (global) value chains composed of different enterprise types. He also neglects the impact of mechanisms which empower members to participate, such as adequate education and training, as well as relevant and understandable information delivered by the auditors to the members.

The author's contention that there is a need for a cooperative specific governance model is convincing. In making his case, he criticizes the common practice of copying figures from the capitalistic enterprise model (cf. for example pp. 199 and 489 ff.). In my view, he may not be radical enough. Registered cooperatives are bodies corporate. In practice they (may) experience governance problems and cooperative law allows for that. However, if (good) governance is a response to the potential principal/agent conflict, it should not be an issue for cooperatives at all because, according to the cooperative idea, principals and agent are the same persons. The author himself defends this position, e.g. on pp. 84, 87 ("principle of identity"), and on pp. 117, 223 et passim.

The challenge of a more radical approach is two-fold: epistemological and methodological. The epistemological challenge consists in having to conceive cooperatives as bodies corporate, independent of their members and managed by them at the same time, i.e. to conceive them as an Übersumme and the sum total at the same time. This conceptual contradiction is accepted in many countries, at least so far as worker cooperatives are concerned. Because members of worker cooperatives are also their own employers, labour laws (i.e. those rules which regulate the relationship between employer and employee/worker)11 which have been developed to solve the capital/labour conflict, do not apply. 12

10 This is the meaning behind the sixth of the seven ICA Principles cited by the author on p. 191 as "vague programmatic sentences". Given the specifics of cooperatives´ unionizing and federating, such adherence is part of the structure of primary cooperatives. Cf. Paragraph 6. (d) of the ILO R. 193 and Henrÿ, Hagen, Unioes, federacoes e confederacoes, en: Deolinda Meira e Maria Elisabete Ramos (coord.), Código Cooperativo Anotado [Unions, Federations and Confederations. Comments on Articles 101-108 of the Portuguese Cooperative Code, Lei no.119/2015, de 31 de agosto], Coimbra: Almedina 2018, 548-566.
11 In many jurisdictions the term "labour law" covers also rules on workplace safety and social security.

Some jurisdictions conceive cooperatives as representing members in their relationship with third parties. Most Latin American countries tend to deal with this challenge for all types of cooperatives through the figure of the "acto cooperativo". 13

The methodological challenge follows from what the author evokes (p. 160) in terms of an autonomous cooperative law. He justifies his emphasis on a wide byelaw autonomy with the Leitbild [model] of an autonomous human being (pp. 159/160). Whether or not it is a universal, this Leitbild reminds us of the fact that, as opposed to economics, legal science is a normative science. The "dogma of economic efficiency and rationality of economics (p. 160)" also underlies the common practice of copying figures from the law on capitalistic companies, instead of testing their suitability for cooperatives, as does the author.As much as can and must be learnt from a comparison of the different enterprise types, as incomplete and inadequate this comparison is. The establishment of an autonomous cooperative law in our global world requires us to start from the assumption that cooperative enterprises are not different from capitalistic companies, but that they are a sui generis type of enterprise. The tendency to harmonize (cooperative) laws, the integration of cooperative enterprises into global value chains, and the dissipation of value chains into global networks of actors requires two super-imposed sets of comparisons. Firstly, cross-border comparisons of cooperative laws in the widest sense, including, for example, taxation of cooperatives. This must be conducted against the background of the cooperative principles. Secondly, comparisons of different enterprise types at national levels. This comparison should not be conducted using the definitional criteria of one of the compared types, as is mostly the case now (secundum comparationis), but rather by using a tertium comparationis. For example, by looking at purpose, efficiency or relevance to sustainable development of the compared enterprise types. As far as (these) methods are concerned, the comparisons ought to benefit from the experience of comparative law and they ought to be informed by a continuous dialogue between economics and law.

IV. Conclusion

One might not share all the author´s tenets. But one cannot but recognize the high value of the book and his critical stance. He argues firmly and he fairly and thoroughly discusses different and often opposing views. Besides being thought-provoking, the author's scientific approach makes the book an invaluable

12 For an instructive example, cf. ICA, Framework law for cooperatives in Latin America, Article 91 at: http://www.aciamericas.coop/Framework-Law-for-the-Cooperatives

13 Cf. Pastorino, Roberto Jorge, Teoria general del acto cooperativo [General theory of the acto cooperativo], Buenos Aires: Intercoop Editora 1993; Torres Morales, Carlos, El reconocimiento del acto cooperativo en la legislación peruana [The recognition of the acto cooperativo in the Peruvian legislation], Lima: Grafimag 2014; and ICA, Framework law for cooperatives in Latin America, op. cit., Article 7.

and much needed contribution to the renascent cooperative legal theory.14 As part of legal science, such theory is international. If Chapter 6's summary of the book was available in English, those who do not read German would also be allowed the privilege to draw upon its wealth.

Miribung, Georg, The Agricultural Cooperative in the Framework of the European Cooperative Society

I. Introduction

In the book under review, Georg Miribung discusses the law applying to the establishment, governance and the financing of agricultural European cooperative societies or SCE 15 in Italy and Austria. Title and subtitle of the book indicate a peculiarity. SCEs are cross-border cooperatives with members from at least two European Union (EU) member states. They are regulated by the (EU) Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (EU Reg. 1435/2003). The regulation is directly applicable in the EU member states, but is incomplete in the sense that the law applicable to a SCE is a combination of its rules and of the national law of the EU member state where the SCE is to be registered (seat country). Hence, any legal study on SCEs involves comparing different laws. In this study, two national legal systems are considered and the question is whether the EU Reg. 1435/2003 leads to one form of SCE or to as many forms as there are EU member states. This leads to six comparisons between laws applicable to :

-Italian SCEs and Italian cooperatives

-Austrian SCEs and Austrian cooperatives

-Italian SCEs and Austrian SCEs

-Italian cooperatives and Austrian cooperatives

-Italian SCEs and Austrian cooperatives; and, finally,

-Austrian SCEs and Italian cooperatives. The comparisons are further complicated by the fact that the article is concerned with agricultural SCEs. This adds another set of comparisons and, because of the double nature of agricultural law (private and public), an extra degree of complexity.

14 Cf. Henrÿ, Hagen, Una teoría del derecho cooperativo. ¿Para qué? [A theory of cooperative law. What for?], in: José Eduardo de Miranda, Leonardo Rafael de Souza, Enrique Gadea, (organizadores), Direito cooperativo e identitdade cooperativa. Derecho cooperativo e identidad cooperativa, Cristo Rei – Curitiba: Brazil Publishing 2019, 175-191.
15 SCE is the acronym for their Latin name Societas Cooperativa Europaea.

By imbricating the cooperative and the agricultural laws of Austria, Italy, and the European Union, the author embarks on a high-risk journey. However, his ties to universities in both countries and his being bilingual help him to navigate the intricacies of the law on the SCE and to reach the port of better understanding.

II. Summary of the content

The book is divided into an introductory section and three main parts of unequal length. The preliminary section and Part I account for more than one third of the book. The central themes of governance and financing in Part II take up most of the balance. The unequal distribution of weight between each part is a consequence of the specific comparative approach, which requires a substantial amount of preliminary explanation.

The *introductory section*, entitled "Research Background", includes sub-sections on comparative legal methods and on the Economic Analysis of Law. *Part I*, entitled "The European Cooperative Society (SCE) and Agricultural Cooperatives", deals with the EU and the national laws of Italy and Austria on the establishment of an SCE. It also contains explanations of the SCE and of agricultural cooperatives/SCEs. A prerequisite of these comparisons is some common understanding of what is understood by the terms 'cooperative' and 'agriculture'. Contrary to Christian Picker, who only deals with Germany, the author is confronted with three different main views on (the purpose of) cooperatives – the Austrian view, similar to the German; the Italian view, which also allows for public interest or general interest cooperatives (social cooperatives); and the EU view. As an arbiter or tertium comparationis, 16 Georg Miribung introduces the Principles of European Cooperative Law (PECOL), developed by the Study Group on European Cooperative Law (SGECOL). 17 The introduction of a tertium comparationis is an indispensable, yet seldom applied approach in comparative law. The answers to the question "what is agriculture"? also differ in the three legal systems involved.

For readers without knowledge of EU law, the author's recount of the history of the EU Reg. 1435/2003 is a practical illustration of law-making without considering its impact on those who are to apply the law. 18 It is an attempt to square the circle, by regulating a cross-border cooperative, the SCE, while

16 In comparative law the "tertium comparationis" means the quality that the two things which are being compared have in common and the criterion or criteria used to assess their functionality as related to a specific legal question. For example, does the respective law make the risk management in plc more efficient than in cooperatives? This "arbiter" is necessary to avoid flaws in the comparison which inevitably occur when using the "secundum comparationis" as the measure.
17 Cf. Fajardo et al. (eds.), Principles of European Cooperative Law …, op. cit..
18 Similar to the EU Reg. 1435/2003 the 2009 Estatuto de las Cooperativas del Mercosur regulates cross-border cooperatives. Membership of foreigners may not exceed 50% and national members must hold more than 50% of the capital. Other than the EU Reg. 1435/2003 the text is not directly applicable in the member states of the Mercosur (Argentina, Brazil, Paraguay, Uruguay, Venezuela (suspended)). It is technically simpler. Whether it will be used, remains to be seen. It has to be integrated into all the respective national laws in order to come into force. So far, only Uruguay has done so.

respecting all the national legal traditions within the EU. The outcome, as this book amply demonstrates, is a conglomerate of hierarchically ordered EU and national rules, whose correct application requires the expertise of a specialized lawyer. This is more likely to account for the low number of SCEs, even fourteen years after the coming into force of the EU Reg. 1435/2003 (cf. p. 160), than the often-cited reason of the minimum capital requirement of 30.000.- Euro. Reportedly, cross-border agricultural cooperatives do exist, but not in the form of an SCE. Apparently, the aim that the EU legislator pursued with Reg. 1435/2003, can also be reached through "purely" national cooperatives with members from several countries and/or cross-border activities.

Part II, entitled "Analysing Some Specific SCE Issues Comparing Relevant Italian and Austrian Legal Rules", compares the respective national and EU rules on cooperative governance and finance and submits them to an economic analysis, while insisting (p. 14) - consistently with the views of Christian Picker - on the need to maintain the fundamental difference between law and economics. On his way, the author compares the rules on agricultural SCEs to the rules on national agricultural cooperatives.

In the concluding *Part III*, entitled "One Agricultural SCE or Many Agricultural SCEs?" the author debates the question of whether there is just one form of SCE or whether there are as many SCEs as there are EU member states. Contrary to the findings of – very few – other studies, Georg Miribung's study argues, with abundant detail, that despite all the differences in terms of purpose, profit distribution, allocation (or not) to reserves and devolution of residual assets, there is reason to state that there is only one SCE.

III. Questions

In many ways, the author presents a unique study. He deserves respect for the application of his specific comparative approach to a complex subject, namely the law applicable to (agricultural) SCEs. The following discussion of two critical questions must not be construed as a contradiction of this opinion. They are intended to contribute to the general debate on cooperative law, beyond the legal traditions dealt with by Georg Miribung.

The questions posed are:

i.) Is the author's plea for a wide statutory freedom justified? and

ii.) Is it appropriate to analyse the governance of cooperatives by using the same yardstick used for public limited-liability companies?

ad i.): In accordance with wide-spread opinion, the author advocates an even wider statutory freedom than proposed by Christian Picker as the most adequate response to the diversifying world of cooperatives in terms of size (turnover, membership, geographical extension etc.), type (consumer, producer, worker/employee, primary or higher-level cooperative, producer organization etc.), and degree of homogeneity/heterogeneity of membership/member interests, which a law with mainly mandatory rules would not capture adequately. This approach is arguably based on an assumption that "the members know better".

Not everyone will agree with his statement that "[a]part from the feature of the legal personality, which can only be granted by law, the other four features [of a corporation] – limited liability, transferability of shares, delegation of management and ownership of capital providers – can simply be determined by contract" (p. 24). The positive effects of being granted legal personality come at the price of certain non-negotiable rules enshrined in law/legislation. For example, rules on the legal reserve (cooperatives) or on the minimum capital (stock companies) and rules on a governance structure that counterbalances the transfer of responsibilities from individual persons to impersonal corporate bodies. The minimum function of law/legislation is to provide for legal security. 19 Allowing such wide statutory freedom at least requires reliable legal mechanisms for contract enforcement, which are not a universal given. The author repeatedly emphasizes the central role of indivisible reserves and is critical about the admission of non-user investor members. In doing so, he attenuates his own initial plea and delivers arguments to be considered when debating this issue.

In this context Georg Miribung points to a crucial issue for legal science. The more that cooperatives are allowed to self-regulate through their statutes (by-laws), the less lawyers will know about the "real" lived cooperative law, as they are not trained nor used to exploring the content of the statutes. Additionally, any widening of statutory freedom shifts the burden of costs of legal security. The wider the statutory freedom, the more costs business partners bear for finding out about their respective legal standing as a matter of due diligence or risk management.

ad ii.): Georg Miribung takes as a starting point for his analysis "a **general model** of a modern corporation or public limited-liability company" (pp. 24, 166 et passim). From a didactical point of view this is a suitable way, as it allows him to build the specifics of cooperatives on a model that the reader is more likely to recognise.

19 Possible other functions of law/legislation are: facilitate a democratic access to law; serve as instrument for the implementation of public policies; ensure legal security for members, third parties and the public; satisfy a possible socio-psychological need to be publicly recognized by law; serve as a social tie (not only "ubi societas, ibi ius", but also "ubi ius, ibi societas").

Apart from doubts about equating the "corporation" with the "public limited-liability company" (plc), which stems from comparative legal considerations, the question here is whether an approach that involves looking at cooperatives in terms of their difference from the plc, instead of seeing them as another distinct type of enterprise, is adequate. 20 Principal-agent theory, the notion of ownership of the New Institutional Economics and the attempt to capture the governance problematic through ownership and contract, are all theories that have been developed with the plc in mind. For a comparatist, it would be interesting to consider how much Anglo-Saxon legal thinking went into the "instruments" used to analyse the "general model". Their application to cooperatives will at best lead to contradictions; at worst it might not allow a proper grasp of cooperatives and their underpinnings. To give an example: contrary to what the author states (p.85) and as he later corrects, a cooperative is not owned by its suppliers, workers or customers, if ownership in the economic sense signifies "the right to control and receive the firm's residual assets" (p.164), as indeed "… members of a cooperative have no individual ownership [… and] often have no claim to residual earnings" (p. 169). Neither the legal nor the economic notion of ownership comes to terms with the balancing of interests of the various stakeholders in a corporation in the sense of a separate legal entity because corporations own themselves.21 But as the author also demonstrates, it does not follow that in the absence of ownership as a control mechanism, there is no remedy to address the situation where the management promotes its own interests.

Using the plc as the measure might eventually lead to what Georg Miribing (and Christian Picker for that matter) want to avoid, namely the dilution of the legal form of cooperatives. The fact that "… cooperative[s are] moving to corporate governance models" (p. 316) might be a reason for any of them to transform into another form of enterprise, but it should not be a reason to accept the dilution of the cooperative legal form.

If cooperative law is to establish itself again as an autonomous field of legal science, 22 which is important for the sake of diversity engendering sustainable development, then we need to develop

20 For the distinction between "different" and "other" in this context, see Henrÿ, Hagen, Entreprendre autrement : le droit coopératif n'y est pour rien [The Decisive Role of Cooperative Law for Enterprising in a Radically Different Way], in : Revue Economique et Sociale. Bulletin de la Société d´Etudes Economiques et Sociales, Vol. 70, Septembre 2013, 93-103.
As for the methodological problems involved, see text around and in footnote 2.
21 Convincingly Stout, Lynn A., The Shareholder Value Myth, in: Cornell Law Library Scholarship@Cornell Law: A Digital Repository, 2013.
22 As of the beginning of the 1970ies cooperatives disappear from the textbooks on law and economics. See, for example, Villafañez Perez, Itziar, Algunas reflexiones en torno a la necesidad de integrar la perspectiva cooperativa en el estudio y desarrollo del ordenamiento jurídico [Some reflections on the need to integrate the cooperative perspective in the study and development of the legal system], in: Henrÿ/Hytinkoski/Klén (eds.), Co-operative Studies in Education Curricula – New Forms of Learning and Teaching, University of Helsinki Ruralia Institute, Publications Series No. 35, 2017, 54-71. Almost all other contributions in this publication confirm this.
The moment of this disappearance is no coincidence. A number of observations may explain it. See Henrÿ, Hagen, Quo Vadis Cooperative Law?, in: CCIJ Report No. 72/2014, 50-61 (in Japanese; original in English).

adequate and independent instruments to evaluate the governance and other issues experienced by different enterprise forms. There is a lot to be learnt in this respect from comparative law. And: we need more studies of the kind reviewed here.

IV. Conclusion

A five-page review cannot do justice to a study of more than 500 pages based on material listed on another 50 pages. The complexity of Georg Miribung's approach and its necessarily meandering technical style is demanding. But his book also compensates with enormous gains in understanding if one follows its flow. In many respects Georg Miribung's book is similar to Christian Picker's. Their common central theme is cooperative governance. Georg Miribung explicitly adds financing, which is a less obvious theme in Christian Picker's book. This raises the question whether financing should be considered as an integral part of cooperative governance. Georg Miribung's approach also differs from Christian Picker's. Whereas Christian Picker concentrates on German cooperative law, with sporadic outlooks toward other legal systems, Georg Miribung's book is conceived as a comparative study. His achievement in terms of applied comparative legal analysis is as interesting as the substantive content of the book. Of the two types of presenting comparisons, consecutive and simultaneous, he chose the latter and more challenging one. He knows where to search for similarities when everything looks so different, and he knows where and when to lay bare differences when things are apparently similar. That is what comparative law is about. It makes his conclusion in Part III convincing. In addition, he draws the reader's attention again and again to the many linguistic obstacles to overcome by any comparatist, including in this case the differences between the various official language versions of the legal texts of the EU.

Georg Miribung and Christian Picker both deplore the scarcity of studies on cooperative law (see pp. viii and 87). Given the sheer volume of their own publications within the space of one year, they have proved themselves wrong, or at least too impatient. The decades-lasting disinterest in cooperative law is over. But equalling or catching up with the amount of literature on the law of other enterprise types, especially the plc, will take time. It is also noteworthy that both authors took the last step on their academic career ladder by dealing with a still relatively marginal theme. Although some mainstream corporate lawyers might see in their focussing on governance an extenuating circumstance.

ANNOUNCEMENT OF PUBLICATION: "COOPERATIVE LAW AND COOPERATIVE IDENTITY"1

by Leonardo Rafael de Souza[2], José Eduardo de Miranda[3]

Abstract

This short article aims to briefly present the book "Cooperative Law and Cooperative Identity", produced jointly with Professor Enrique Gadea Soler, from the University of Deusto, Spain, and officially launched during the last Continental Congress on Cooperative Law, in San José (Costa Rica) in. This review will make a brief presentation of the authors involved in the project and the topics covered in articles compiled in Spanish and Portuguese.

In the end, this work hopes to encourage researchers in Cooperative Law to read this collective work. This work will be translated in English which will allow these reflections on cooperative identity, to reach the wider world as an important tool for the study of Cooperative Law.

I. Introduction

While discussing the history of cooperativism and its prominent place in the economic and social activities of the world, in Bilbao three years ago, the idea of dedicating a work that would critically evaluate the cooperative identity and its premise which germinates Cooperative Law, was born. The idea was to provoke reflections between jurists and researchers about the legal framework (in Portuguese and Spanish) of the cooperative society and the relevance of the cooperative identity itself to the law, always with a practical vision.

Therefore, the idea of inviting recognized names of the Brazilian and Spanish academies to accept the challenge of presenting readers with the meaning, size and application of the legal norms concerning cooperatives in these countries arose. What would be an initially a project among two countries, became an important international reflection on cooperative law and cooperative identity in the several countries. Researchers and lawyers from Brazil, Spain, Argentina, Portugal and Finland reflected on the importance of strengthening the Theory of Cooperative Law, Cooperative Identity as a pillar for the future of the

1 Miranda, J.E., Gadea, E., & de Souza, L.R. (Org.) (2019). Direito cooperativo e identidade cooperativa | Derecho cooperativo e identidad cooperativa. Curitiba: Brazil Publishing, 197 pp.

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cooperative movement, Cooperative Identity in a market economy system, the secondary role of cooperative law in legislation and a Latin American vision of cooperative law and cooperative identity.

This work, edited and marketed by Brazil Publishing Editors, was officially launched at the Continental Congress of Cooperative Law, held in San José (Costa Rica) between November 20 and 22, 2019. A special tribute was accorded to the Professor Dante Cracogna for his historical contribution to Cooperative Law, during the launch.

II. Contents and authors.

The book seeks to unite recognized names of the international academy and is a specialized publication on Cooperative Law and Cooperative Identity, with an objective to develop an approach to an economic and social system based on the fundamentals of the cooperative identity. Additionally, it carries important reflections of experts on the need to build a theoretical basis for Cooperative Law as well as articles on current and historical realities of Cooperative Law worldwide.

The article “THE SECONDARY ROLE OF COOPERATIVE PRINCIPLES IN BRAZILIAN LAW AND ITS EFFECT ON THE AUTONOMY OF COOPERATIVE LAW”, by Brazilian authors

Leonardo Rafael de Souza and ***José Eduardo de Miranda*** presents a historical context of cooperative law in Brazil. In it, they reflect on how the case in Brazil, the complex and centuries-old cooperative legislation is not able to strengthen the cooperative identity, concluding that in addition to the simple existence of the law, it is essential to build a national cooperative identity that guides the act of cooperation and actions of cooperatives.

Also, on the theme of history, Argentine author ***Dante Cracogna*** in his article "COOPERATIVE LAW AND COOPERATIVE IDENTITY: A LATIN AMERICAN VISION" addresses the doctrinal evolution of Cooperative Law in Latin America for the theoretical construction of the "cooperative Act" as an expression of the cooperative legal identity. As a consequence, his contribution presents the current continental reality of Latin America, which, through its Framework Law for Cooperatives, contributes to the recognition of cooperative law in the legal universe.

In order to strengthen the fundamental aspects of Cooperative Law, in his article "A THEORY OF COOPERATIVE LAW, FOR WHAT?" Professor ***Hagen Henry***, from the University of Helsinki, Finland, presents important reflections on the necessary development of the Theory of Cooperative Law. In the author's view, a solid theory not only makes it possible to understand cooperative practice, but also authorizes the formulation of useful general statements capable of supporting the practice itself and understanding changes. When analyzing the fields of application of the theory of cooperative law, he concludes this theory will have to reconstruct Cooperative Law itself from the legal understanding of cooperative identity.

Continuing with ideas on theoretical foundation, Professor ***Enrique Gadea Soler*** in his article "A LEGAL ANALYSIS INTO THE IDENTITY OF THE COOPERATIVE SOCIETY IN A MARKET ECONOMY SYSTEM" discusses how in a market of strong competition the cooperative model, remodelled from Rochdale to face the challenges of the market, has renounced the plurality of its principles, solidarity and its social ends. After re-discussing the concept of cooperatives, its openness and democratic vision, the author reinforces that the cooperative identity is the foundation for reviewing the current objectives of the cooperative movement, in search of a transformation of the market based on sustainability.

The following articles reflect on the practical aspects of the cooperative reality and its legal dimension; these are important articles that address topics that, despite their relevance to their respective countries, present essential reflections and further foundations for the creation of a Comparative Cooperative Law.

Based on the comparative study on the protection given to cooperatives in the Constitutions of Brazil and Portugal, Brazilian authors ***Amílcar Barca Teixeira Júnior*** and ***Marianna Ferraz Teixeira*** - in their article "THE GLOBAL CONSTITUTIONALIZATION OF COOPERATIVE LAW AS AN ALTERNATIVE FOR THE PRESERVATION OF COOPERATIVE IDENTITY "- write about the necessary involvement of the global cooperative movement in proposing and developing, in the domestic law of their respective countries, constitutional texts that reflect cooperative values and principles as an effective way to preserve cooperative identity. To this end, the authors argue that strengthening cooperative legal education is essential.

Still from the reality of Portuguese Cooperative Law, Professor ***Deolinda Meira*** in her article "COOPERATIVE IDENTITY, ADMISSION AND DISMISSAL OF COOPERATORS. CONVERGENT REALITIES IN PORTUGUESE LAW" addresses the adequacy of the legal regime for the admission and dismissal of cooperators (provided for in Portuguese law) in accordance with cooperative principles, as an essential aspect of cooperative identity. This, they argue is also defended by the Principles of European Cooperative Law (PECOL). In the author's view, there is a convergence between the Portuguese cooperative legislation, the cooperative identity and the legal regime of the employees' admission and dismissal rights. Proof of this is the mandatory dissolution, by the Portuguese State, of cooperatives that do not observe cooperative principles.

Writing about the possibility of state interference in cooperatives that do not observe the cooperative identity, Brazilian lawyer ***Paulo Roberto Cardoso Braga*** in the article "COOPERATIVE IDENTITY AND THE SANCTIONING ADMINISTRATIVE PROCESS" writes about the current reality of credit cooperatives in Brazil with the publication of Act No. 13,506 / 2017. Under the new law, he writes, cooperative managers who fail to comply not only with the legal orders in the Brazilian Financial System, but also with the rules of their own bylaws, will be subject to administrative and criminal penalties. However, the author warns that the lack of knowledge of the cooperative identity by the judges may impose more severe penalties on the managers of Brazilian credit cooperatives for not knowing the social and solidarity dimensions of the cooperative societies.

From the perspective of Spanish cooperative law, Professor ***Alberto Atxabal Rada*** defends, as the title of the article indicates, "THE COOPERATIVE IDENTITY AS A JUSTIFICATION FOR A DIFFERENT TAX TREATMENT". The author argues, despite recognizing legal principles such as equality in preventing special tax regimes, for special treatment to cooperative societies, with the following five areas of arguments: (1) the type of activity they perform, (2) the role of the people, (3) the special rules of operation of the cooperatives, (4) the lesser capacity of the cooperatives to contribute and

(5) the protection of the premises of the cooperativism in the Spanish Constitution. In addition, he argues that cooperatives integrate or replace the provision of social services, which are fundamental to citizenship. For these reasons, the author defends the cooperative identity as an instrument of a favorable tax regime that guarantees proportionality to the social value of the cooperatives.

Finally, in the article "THE COOPERATIVE IDENTITY AS A PILASTER OF THE FUTURE OF COOPERATIVISM - PUBLIC SERVICES PROVIDING COOPERATIVES: CONTRIBUTIONS TO COMMUNITY WELFARE FROM YOUR IDENTITY" the Spanish authors ***Vega María Arnáez Arce*** and ***Itxaso Gallastegi Ormaetxea*** argue that (by the 7th principle) Cooperative movement is essential for the provision of public services as a strategy for their improvement. In other words, by maintaining a strong commitment to society even in the current global context of systemic crisis and increasing inequalities, the authors conclude that only cooperatives essentially take cooperation as an agent of development and innovation, basic conditions for the new citizenship.

2. Conclusion

The book Cooperative Law and Cooperative Identity brings reflections from important South American and European authors from the cooperative fraternity, who analyze the legal regime of cooperative enterprise and the fundamental issues related to their identity. The objective is to raise the importance of consolidating and preserving cooperative identity as a central aspect of cooperative enterprise and form.

It is the cooperative identity that supports the socioeconomic aspect of cooperative companies and justifies, for instance, a differential tax treatment. In other words, the book highlights that cooperative values and principles are inseparable precepts of the cooperative business, and essential for understanding the differences between the cooperative form and the profit-oriented forms of bodies corporate, that often compete for the same space in the economic market.

Considering that twenty-five years have passed since the ICA Statement on Cooperative Identity in Manchester, the book, coordinated by Professors José Eduardo de Miranda, Leonardo Rafael de Souza and Enrique Gadea, preserves the latent debate on cooperative identity. The maintenance of the cooperative spirit is a transcendental element of Cooperativism, the only system that is concerned with the complete transformation of the person, whether in the economic, social and spiritual realms.

Finally, it is important again to thank each of the co-authors of this collective work. These theoretical essays represent responsible and modern scientific thinking on Cooperative Law. They will

provoke discussions, expose controversial points and clarify mistakes. Therefore, its reading is essential for lawyers, academics, practitioners, and others interested.