Cooperative Law and Sustainable Development

Match or Mismatch?

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Draft paper prepared for the UNRISD Conference

Potential and Limits of Social and Solidarity Economy

6–8 May 2013, Geneva, Switzerland

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I Introduction

The current volatility of global development is marked by growing ecological, economic, social[1] and political imbalances and insecurities. These trends point to the very opposite direction of sustainable development. Sustainable development has become *the* development paradigm. Accordingly, public and private policy measures and actions must be designed and put into practice so as to further all of the interdependent and mutually reinforcing aspects of sustainable development, and especially those which are commonly discussed, namely economic security, ecological balance and social justice. [2] A fourth aspect is to be considered: political stability, both as an aspect of and as an overall objective of sustainable development.

The awareness of the need to act and the readiness to act according to the sustainable development paradigm are not but the other side of the perception of the world as one global world. This perception is induced by experiencing the world as such through modern (tele)communication. In turn, the thinking behind this modern (tele)communication is the same as the one behind perceiving the world as one global world. [3]

The Social and Solidarity Economy (SSE) unites people who are aware of the urgency to act. Given globalization with its current political power yielding economic imbalances, [4] governments will have to rely more than before on enterprises for the implementation of policies and laws which aim at achieving sustainable development. An additional argument is this: [5] One of the underlying objectives of international labour standards is to avoid social

[1] as for social imbalances cf. Alain Renaut, Un monde juste est-il possible ? Contribution à une théorie de la justice globale, Paris : Stock 2013.

[2] Cf. recently Pufé, Iris, Nachhaltigkeit, München: UVK 2012, in line with major international instruments (cf. footnote 22.

[3] Cf. Dürr, Hans-Peter, Das Lebende lebendiger werden lassen. Wie uns neues Denken aus der Krise führt, München: oekom 2011.

[4] Cf. Geissler, Heiner, "Wo bleibt Euer Aufschrei?", in: Die Zeit, 11.11.2004, 26. As for the political power yielding concentration of capital, cf. Henrÿ, Hagen, La promoción del modelo empresarial cooperativo por la Alianza Cooperativa Internacional y la Organización Internacional del Trabajo en el nuevo orden económico global, in : aci. Revista de la Cooperación Internacional, Vol. 42, No.1-2009, 7-24; Becerra Santiago Nino, El crash del 2010, 6th ed., Barcelona: los libros del lince 2009; Vidal-Beneyto, José, De la mundialisacion a la globofobia, in: El Pais, 29.9.2007, 10.
The words "global" and "globalization" stand for the process of abolition of barriers to the movement of the means of production, especially capital and labor (cf. Becerra, op. cit., 145). The words stand less for an empirical fait accompli than for the rapid transformation of the production where, because of new technologies, capital can be de-localized instantly and capital and labor can be drawn from anywhere and "used" everywhere, including in a virtual manner. I.e. they stand for a situation where space and time are losing their conditionality for the economy and where, hence, classical legislation becomes insofar ineffective (cf. below). As for a differentiation in French between "globalisation", "mondialisation ", and "universalisation", cf. Ost, François, Mondialisation, globalisation, universalisation : S'arracher, encore et toujours, à l'état de nature, in : Le droit saisi par la mondialisation, sous la direction de Charles-Albert Morand, Bruxelles : Bruylant 2001, 5 ff. (6 f.).

[5] Cf. Henrÿ, Hagen, Labour Law and Co-operatives? Co-operative Law and Labour!, in: Journal of Co-operative Studies Vol. 31:1 (No. 92), May 1998, 12-23.

dumping in a world of free trade. Today, globally acting enterprises are in many ways outside the reach of (international labour) law. Therefore, the objective to avoid social dumping must be pursued through additional means, including structuring enterprises legally in a way that social justice, the key aspect of sustainable development, can be done. Surprisingly, little is said about whether the legal type of enterprise matters in this context. [6] While the Corporate Social Responsibility (CSR) addresses sustainable development, it concerns the behavior of enterprises. The objective of this paper is to complement the CSR approach [7] by demonstrating that there is a functional relationship between sustainable development and the legal structure of enterprises. [8]

The approach is legal normative. [9] It is based on the premise that law is at all relevant for the subject matter. [10] In an effort to create coherence among already existing legal instruments, the paper attempts to bring together Human Rights, the legal concept of sustainable development and the legal structure of enterprises. It thus pays respect to the Human Rights based principle of the rule of law governing the policy/law nexus. Law is not policy; it is the

[6] The 2011 European Commission "[…] renewed EU strategy 2011-14 for Corporate Social Responsibility", (COM(2011) 681 final), although moving CSR from purely voluntary to a mix of voluntary and compulsory, continues being limited to this aspect. The same critique applies for example to the OECD Guidelines for multinational enterprises, the ISO 26000 norm and the UN Global Compact.
The newer, so-called development literature is virtually void of references to institutions. On the other hand, we observe a peculiar phenomenon: enterprises and other private institutions are required to satisfy general interests, whereas public institutions are increasingly required to conduct themselves like private enterprises. Requiring private business to assume social and societal responsibilities in the legal sense and public institutions to adopt entrepreneurial behaviour are but two aspects of the dysfunctionalities we have established for both. It might be worthwhile to research whether the waning interest in institutional issues has to do with the dwindling importance of the concept of Übersumme (Aristoteles), as a possible consequence of the technology available to manage enormous amounts of data/information with the help of computers. The concept of Übersumme is the foundation of the legal person concept.

[7] As concerns this complemetary function, cf. Javillier, Jean-Claude, Responsabilité sociétale des entreprises et Droit: des synergies indispensables pour un développement durable, in : Gouvernance, Droit International & Responsabilité Sociétale des Entreprises, Genève : OIT (forthcoming), 54 ff..

[8] Cf. my previous paper "The Legal Structure of Cooperatives: Does it Matter for Sustainable Development?", in: Beiträge der genossenschaftlichen Selbsthilfe zur wirtschaftlichen und sozialen Entwicklung, Hrsg. Hans Jürgen Rösner und Frank Schulz-Nieswandt. Berlin: LIT 2009, Bd.1, 199-229; Idem, La promoción …, op. cit.

[9] For lawyers, the questions are whether the structure of cooperatives, prescribed by law, is compatible with sustainable development, whether cooperative law orients cooperatives to work towards this end and whether cooperatives can be compelled through legal means to do so where deviations give rise to concerns by legally interested parties. Cf. Henrÿ, Hagen, Where is law in development? The International Labour Organization, cooperative law, sustainable development and Corporate Social Responsibility, in: Governance, International Law & Corporate Social Responsibility, Geneva: International Institute for Labour Strudies 2008, 179-190.

[10] This raises the more general question of the functionality of law in development processes. It needs raising as through globalisation the position of law among the various types of norms is being debated rather controversially and this functionality is being challenged (cf. below and Henrÿ, Where is law …, op. cit.). We cannot define law, cf. for example Assier-Andrieu, Louis, Le droit dans les sociétés humaines, Paris : Nathan 1996, 40; Hart, Herbert L.A., The Concept of Law, Oxford: University Press 1961, 1; Tamanaha, Brian Z., A Non-Essentialist Version of Legal Pluralism, in: Journal of Law and Society 2000, 296 ff. (313). However, we may note the following: We find law almost everywhere. Doubts expressed by Sinha, Surya Prakash, Non-Universality of Law, in: Archiv für Rechts- und Sozialphilosophie 1995, 185 ff.. Their legal structure allows economic institutions to deploy a great, if not their greatest, potential. To my knowledge, the link between the attribution of legal status to entities and (economic) development has not been researched. Only Fikentscher (Wolfgang, Modes of Thought, Tübingen: Mohr 1995, 183, et passim) frequently mentions this link. Similar Wenke, Hans, Geist und Organisation, Recht und Staat, Heft 241, Tübingen: Mohr 1961. Cf. also Javillier, op. cit.. Blackburn, Nadine, Desarrollo de nuevas herramientas para asegurar la continuidad de las entidades cooperativas financieras, in: Revista de la Cooperación Internacional, Vol. 32, no. 2/1999, 39 ff. (39 f.) and, without mentioning law, Gervereau, Laurent, Pour une écologie culturelle, in: Le Monde, 3.10.2008 are positive as concerns this functionality.

means par excellence to implement policies [11] until such time when a political process establishes new legal rules according to procedures established by law.

Because cooperatives constitute the bulk of the enterprise actors in the SSE, [12] because of the relative high number of their members – circa one billion, as compared to some 330 million holders of shares of capitalistic companies, – [13] and because of multiple congruencies between the objects of Human Rights and sustainable development, on the one hand, and the objectives of cooperatives, on the other hand, the paper takes cooperative law as an example.

These introductory remarks determine the outline of the paper. Part II establishes juridical coherence between the central notions of this paper, namely "cooperatives", "cooperative law" and "sustainable development". Part III deals with the functional relationship between the legal structure of cooperatives and sustainable development and it points to the effects of cooperative legislation on this relationship. Part IV outlines major challenges facing cooperative law-makers in the global world.

II The juridical coherence of cooperatives, cooperative law and sustainable development

The starting point of this Part are the following legally valid connotations of the three notions contained in the title of this paper, namely "cooperatives", "cooperative law" and "sustainable development".

Paragraph 2. of the International Labour Organization (ILO) "Promotion of Cooperatives Recommendation, 2002" (ILO R. 193) [14] defines cooperatives as "[...] autonomous association[s] of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise." ILO R. 193 constitutes binding public international law. Two main arguments [15] support this opinion. The first one is the democratic legitimacy of ILO R. 193. The definition, as well as the cooperative values and principles enshrined in ILO R. 193 are those of the 1995 International Cooperative Alliance Statement on the co-operative identity (ICA Statement). [16] The ICA represents the mentioned one billion members of cooperatives in a great number of countries. The cooperative values and principles, as developed over time, give guidance to legislators when specifying the elements of the definition. [17] The main features differentiating

[11] Assier-Andrieu, op. cit., 39 f.; Barnes, William S., La société coopérative. Les recherches de droit comparé comme instruments de définition d'une institution économique, in : Revue internationale de droit comparé 1951, 569 ff. (574) ; Kemmerer, Alexandra, Ordnungskraft, in : Frankfurter Allgemeine Zeitung, 11.1.2007, 40, referring to Eberhard Schmidt-Aßmann. Cf. also Wassermann, Rudolf, Sprachliche Probleme in der Praxis von Rechtspolitik und Rechtsverwirklichung, in : Zeitschrift für Rechtspolitik 11/1981, 257 ff. (258).

[12] A good number of cooperatives reject all together the idea of them belonging to the SSE; others claim that cooperatives are the very incarnation of this economy.

[13] They are members of cooperatives of all sizes and types and in all sectors of the economy. Together with their dependents they make up circa one third of the world population that improves its livelihood through cooperatives. Cooperatives contribute substantially to the Gross Domestic Product of their countries. As for global data, cf. Birchall, Johnston, People-Centred Businesses. Co-operatives, Mutuals and the Idea of Membership, Palgrave Macmillan, London 2011, 9 ff., and the website of the International Cooperative Alliance (ICA) at: http/www.ica.coop/al-ica/.

[14] Recommendation 193 concerning the promotion of cooperatives, ILO document 90-PR23-285-En-Doc..

[15] For a detailed argumentation cf. Henrÿ, Hagen, Public International Cooperative Law: The International Labour Organization Promotion of Cooperatives Recommendation, 2002, in: International Handbook of Cooperative Law, ed. by Dante Cracogna, Antonio Fici and Hagen Henrÿ, Heidelberg: Springer 2013 (forthcoming).

[16] International Co-operative Review, Vol. 88, no. 4/1995, 85 f..

[17] To the author´s knowledge, little has been published on the subject in recent years. But cf. Hans-H. Münkner (ed.), "Nutzer-orientierte" versus "Investor-orientierte" Unternehmen, Göttingen: Vandenhoeck & Ruprecht 2002. For a preliminary and summary list, cf. Henrÿ, Guidelines for Cooperative Legislation, 3rd ed., Geneva:

cooperatives from stock companies (as a pars pro toto for capitalistic enterprises) is that cooperatives are member-user driven, whereas stock companies are investor driven; their capital serves the objectives set by the definition, i.e. it is not investment capital; and control is exercised democratically, i.e. financial interests and control power are not linked. The second argument to support the opinion that ILO R 193 constitutes binding public international law is that more and more legislators respect the obligation put on them by the ILO R. 193 [18] to guarantee these distinctive features of cooperatives and they thus create a source of public international law which, in turn, is co-constitutive of the legal value of ILO R. 193. [19]

The objectives of the members of cooperatives according to the cited definition, namely "[to] meet [their] common economic, social and cultural needs and aspirations" are the same as those which the legally binding International [Human Rights] Covenant on Economic, Social and Cultural Rights [20] assorts with legal value. These objectives also cover two out of the four aspects of sustainable development. [21] Besides having evolved into a policy paradigm, sustainable development has also evolved into a concept of public international law. [22] This evolution of the notion of sustainable development into a legal concept is one of the results of a shift in emphasis in the development debate from goals to action. The commitment of almost all United Nations Member states to the Millennium Development Goals (MDG) in 2000 [23] marked also the end of the "developed"/"developing" countries-divide. This is reflected in ILO R. 193. It is a prerequisite for approaching the issue of sustainable development according to its global nature.
Furthermore, the definition of cooperatives predetermines the notion of "cooperative law" underlying this paper. By cooperative law I understand all those legal acts - laws, administrative acts, court decisions, jurisprudence, cooperative bylaws/statutes or any other source of law - which regulate the structure of cooperatives as institutions in the legal sense. [24] Cooperative law thus comprises not only the cooperative law proper (law on cooperatives),

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ILO 2012, 37 ff. (also available at: www.ilo.org/empent/Publications/WCMS_195533/lang--en/index.htm); Idem, Public International Cooperative Law …, op. cit..

[18] Cf. ILO R. 193, Paragraphs 2., 6., 8.(2), 9., 10., 18. (c) and (d) et passim.

[19] As for the term "legal value" in public international law, cf. Virally, Michel, La valeur juridique des recommandations des organisations internationales, in : Annuaire français de droit international, 1956, Vol. II, 66 ff. (174). As for the argumentation cf. Henrÿ, Public International Cooperative Law …, op. cit.

[20] Cf. UN Doc. 993 UNTS 3 (1966). Cf. also Henrÿ, Cooperative Law and Human Rights, in: The relationship between the state and cooperatives in cooperative legislation, ed. by ILO, Genève: ILO 1994, 21-47; Ost, op. cit., 33.

[21] The main cooperative relevant international instruments, namely the ICA Statement (7th Principle), the 2001 United Nations Guidelines aimed at creating a supportive environment for the development of cooperatives (UN doc. A/RES/54/123, Paragraph 2, and doc. A/RES/56/114 (A/56/73-E/2001/68; Res./56)) and the ILO R. 193 (Paragraph 3 and Annex; Paragraph 4.(g)) deal with the subject matter. The final declaration of the 2012 Rio Conference refers several times to the relevance of cooperatives for sustainable development (cf. UN Doc. "The Future we want", (Paragraphs 70, 110 and 154), available at: http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm

[22] Cf. Case Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment. I.C.J. Reports 1997, Paragraph 140. Cf. also WTO dispute settlement procedure WT/DS58/AB/R, Paragraphs 12 et passim (especially 152-154).
As for a detailed account of the history and (legal) status of the sustainable development concept, cf. especially the five reports of the ILA Committee on Legal Aspects of Sustainable Development and Gehne, Katja, Nachhaltige Entwicklung als Rechtsprinzip, Tübingen: Mohr Siebeck 2011. Summary in: Henrÿ, Hagen, Sustainable Development and Cooperative Law: CSR or CoopSR?, available at:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103047

[23] UN GA resolution A/RES/55/2.

[24] Granger, Roger, La tradition en tant que limite aux réformes du droit, in: Revue internationale de droit comparé 1979, 37 ff. (44 and 106) defines institutions as follows : « L'institution peut être définie comme le

but also all other legal rules which shape this institution. The following areas are most likely to have this quality in any legal system: labour law, competition law, taxation, (international) accounting/prudential standards, book-keeping rules, audit and bankruptcy rules. This systemic notion is to be complemented by implementation rules and praxes, for example prudential mechanisms, audit as well as registration procedures and mechanisms. It also includes law making procedures and mechanisms, as well as legal policy issues. While being wide, this notion is hence limited to the form of the cooperative enterprise. The paper only discusses the normative incidence of the legal structure of cooperatives on sustainable development. The laws on the SSE which have been passed over the past years, the latest as recently as in March 2013 in Portugal, [25] on the other hand, regulate the promotion of specific social activities or outcomes.

III The legal structure of cooperatives, sustainable development and cooperative legislation

The hypothesis underlying this Part is that the distinct legal structure of cooperatives capacitates them well to contributing to the goal of sustainable development [26] and that the current cooperative legislation weakens this capacity. This can best be demonstrated by depicting the rules and principles related to that feature which impacts most the four aspects of sustainable development, namely the democratic participation of the members. [27] Democratic participation in the decisions on what and how to produce and how to distribute the produced wealth is the most efficient mechanism to provide for social justice. [28] In times of ever fewer possibilities for democratic participation [29] enterprises with a democratic structure, like cooperatives, might address a shortcoming which otherwise threatens sustainable development. Social justice, in turn, is the single most important factor of political stability. [30] Without social justice and political stability it is most improbable that people can be convinced to care for ecological balance which, in turn, is a prerequisite for economic security.

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regroupement de règles de droit, agencées selon un certain esprit, autour d'une idée ou fonction centrale dont elles sont les instruments de réalisation. »

[25] Other examples: the 2004 British Act on Community Interest Companies, the 2003 Finnish Law on social enterprises (Law 1351/2003), the 1991 Italian Law on social cooperatives (Law No.381) and the Spanish Ley 5/2011 de Economía Social.

[26] For more, albeit preliminary findings, cf. Henrÿ, Sustainable Development …, op. cit.. and Baranchenko, Yevhen and David Oglethorpe, The Potential Environmental Benefits of Co-operative Businesses Within the Climate Change Agenda, in: Business Strategy and Environment 2012, 21, 197-210.

[27] It is important to not limit the view to those rules which deal explicitly with the participation of members, for example the one member/one vote principle which is a direct expression of cooperatives being associations of persons. The 4th principle (autonomy) does not only empower cooperatives, but also their members. Furthermore, rules relating to independent and cooperative specific audit (cf. ILO R. 193, Paragraph 8.(2)(b)) not only monitor whether all objectives of cooperates have been promoted, but the audit report also enables the members to exercise their democratic control rights in meaningful way. ILO R. 193, Paragraph 6.(b) recommends that primary cooperatives unionize and federate in order to create economies of scope and scale, whilst maintaining the autonomy of the affiliates.

[28] Concerning the link between law and social justice, cf. Supiot, Alain, L'esprit de Philadelphie. La justice sociale face au marché total, Paris 2010; Idem, Contribution à une analyse juridique de la crise économique de 2008, in: revue internationale du travail 2010/2, 165-176. It is also indicative of the difference between solidarity (obligatio in solidum) and charity (caritas).

[29] Privatizations, shifts in the division of political power and standard setting by private actors are more and more excluding the demos from decision-making. For details, cf. Henrÿ, Public International Law …, op. cit., footnotes 21 and 43 and Idem, Guidelines for Cooperative Legislation, op. cit., footnote 191.

[30] This is one of the reasons why an increasing number of institutions develop social justice indicators.

Current cooperative legislation shows two aspects. On the one hand, we observe a trend towards more [31] respect for the public international cooperative law. [32] On the other hand, law-makers have since long started a multifaceted, complex process of aligning cooperative law on the law applicable to capital-centered companies, [33] supposedly in an attempt to enable cooperatives to remain competitive. This alignment is all the more effective where it concerns harmonized or unified law. [34] Those additional rules which make up for the wide

[31] This started with the so-called adjustment programs in the 1980ies and gained impetus as of the adoption of the main international instruments on cooperatives, namely the 1995 ICA Statement, the 2002 ILO R. 193 and the 2001 UN Guidelines, op. cit..

[32] For example, the 2010 OHADA Uniform act on cooperative takes ILO R. 193 into consideration; so does the 2008 Ley marco para las cooperativas de America Latina. An increasing number of states do likewise. The Corte Suprema de Argentina refers to ILO R. 193 in the case Lago Castro, Andrés Manuel c/ Cooperativa Nueva Salvia Limitada y otros. Case and comment by Dante Cracogna, in: La Ley (t.2010 –A) 290 ff.. This results in a growing number of legally relevant texts reflecting a similar view of the role of government in the development of cooperatives as that expressed in ILO R. 193 (promoting without interfering, separating promotion from supervision/control), translating the cooperative principles into legal rules, respecting the autonomy of cooperatives, the rule of equal treatment of cooperatives by taking into account their specificities, and reflecting the organization of cooperation between persons (members) in view of promoting their economic, social and cultural interests through an enterprise, i.e. more and more texts incorporate the essentialia of the definition of cooperatives, and they limit the scope of application of the cooperative law to the form of organizing cooperation without regulating any specific activity, which is in line with ILO R. 193 (Paragraph 7. (2)). Cf. also European Court of Justice decision C-78/08 – C-80/08 concerning state aid.

[33] Laws allow, for example

- for different classes of shares, investment shares with limited voting power, freely transferable (at times even at the stock exchange) investment certificates,
- to require symbolic share contributions only and to limit, at times exclude, the liability of the members,
- to have unlimited business with non-members,
- to hire professional, non-member managers and/or to increase their power and autonomy vis-à-vis the board and the general assembly,
- to grant members limited plural voting rights, partly in proportion to the capital invested,
- to arrange for delegate meetings, at times even with a free mandate for the delegates,
- for non-member employees to sit on the supervisory board,
  for unlimited mergers/acquisitions/concentrations/fusions
- to grant (non-user) investor members, and even non-member investors, similar rights as members,
- to have minimum share capital,
- to distribute the reserve fund upon liquidation or conversion into a stock company,
- to distribute the surplus according to the amount of capital invested by the members,
- to transform into stock companies,
- for different categories of members with different rights and obligations,
- for the capitalisation of the reserves and attribution of the new shares to the members in proportion to their share in the previous capital
- for the issuance of securities (other than shares) or debentures for members or non-members, without