THE MÜNKNER SERIES

An online series of articles and tributes to celebrate Professor Hans-H Münkner's scholarship and contribution to cooperative law and cooperative development

ISSUE 3

THEME:COOPERATIVES AND THE ROLE OF THE STATE

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The Münkner Series is an online and open-access series of publications contributed to honour and celebrate the scholarship and contribution of Professor Hans-H. Münkner with special reference to his work on cooperative law and development. The series will be published monthly, and at the end of the series the works will be combined to produce an e-book. Each volume in the series will include an editorial, scholarly contributions on a theme relevant to Professor Münkner' scholarshops, as well as personal tributes from those who knew him personally. It will also include extracts from a bibliography that relate to the monthly topics.

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Foreword/Editorial

A brief introduction and editorial by Akira Kurimoto and Ann Apps, members of the Editorial Committee

It is our privilege to introduce the third issue in the Münkner Series. We thank contributors for their patience, and we are pleased to now share their important work. The theme of this issue is ‘Cooperatives and the Role of the State’. This theme has been explored in detail by Professor Münkner and at the end of this Issue, you will find a list of Professor Münkner’s publications that are related to this theme. In one of his most important systematic works, ‘Ten Lectures on Cooperative Law’, Professor Münkner deals directly with the issue of the relationship between the State and cooperatives and analyses the role of law in mediating between cooperative autonomy and state control. This theme has been taken up by the authors who have contributed to this issue.

In the first article in this issue, Professor Emanuele Cusa considers the role of law in preserving the cooperative’s unique ‘structural and functional peculiarities’ though external supervision or audit. Drawing on comparative analysis across five European countries, he highlights differing approaches to oversight—from the UK’s minimalist model to Germany’s system of mandatory auditing associations and Italy’s strong state-led framework. Professor Cusa discusses the role of public international law, through ILO Recommendation 193 and the ICA’s *Statement on the Cooperative Identity*, in shaping a country’s legal response to their obligation to adopt measures for the oversight of cooperatives that preserve the integrity of the cooperative identity. The article also pays attention to the recommendations on cooperative supervision found in the *Principles of European Cooperative Law* (PECOL) and conceived by Professor Münkner. Professor Cusa’s work provides a useful comparison of the different approaches to cooperative supervision in key European countries. He also makes a strong case for European countries who intend to introduce or update their laws relating to cooperative supervision to adopt the PECOL guidelines and recommendations.

The second article is by Professor Akira Kurimoto, a well-known expert on co-operative law in Japan and South East Asia. Professor Kurimoto begins his article with a recount of his long-time acquaintance and friendship with Professor Münkner. He notes Professor Münkner’s interest in the legal framework for cooperatives in Japan, and his view that it provided a positive example of state intervention that supported a flourishing cooperative movement. While they agreed on many points, Professor Kurimoto did not share Professor Münkner’s views on the prohibition on non-member trade. While such a prohibition is consistent with the mutualistic purpose of cooperatives, Professor Kurimoto notes that ‘much depends on the context in which the regulations are made and with what intention’. In the case of Japanese consumer cooperatives, the prohibition on non-member trade was originally introduced through political pressure from small retail businesses seeking protection. Its effect was to limit the ability of consumer cooperatives to expand their services, open large stores, or enter new sectors like energy supply. Nevertheless, Japanese consumer cooperatives have adapted creatively, developing a distinctive member-driven model. Kurimoto concludes that removing these outdated constraints is essential to enable innovation and meet contemporary social needs. He also advocates for the introduction of new legislation to enable general purpose and multi-stakeholder cooperatives and other innovative models to meet current needs.

The third article, published in Spanish, is authored by Professor Mónica Acuña from Argentina. Professor Acuña examines the tension between financing and autonomy in cooperative law. It looks at Latin American legislation, with a focus on Argentina and uses the lens of the theoretical contributions of Professor Münkner. It argues that while cooperatives are ideally financed through members' contributions (social capital and reserves) this model is often impractical. In practice, many cooperatives rely on external financing. This creates challenges for maintaining their cooperative identity through the application of the cooperative principles, particularly democratic control and autonomy. Professor Acuña explores how cooperative legislation in Latin America has responded to these challenges by adapting traditional financing structures. While traditional cooperative capital is flexible and member-oriented, it is often insufficient for growth. This has led to innovations such as investor members, hybrid capital instruments, and new financial mechanisms. In her article, Professor Acuña highlights variations across Latin American legal systems, noting that some, such as Uruguay's, provide more flexible and modern frameworks to balance financial needs with cooperative principles. Drawing on Münkner's perspective, the author cautions against overreliance on external capital solutions, advocating instead for 'cooperative' approaches to financial challenges. Ultimately, the study calls for more flexible but principled legal frameworks that enable cooperatives to access capital while preserving their autonomy and social purpose.

The fourth article, published in German is authored by Professors Hyeong-Soo Jeon and Yeon-Woo Kang from Korea. The article examines the political, economic and legal challenges involved in converting craft production cooperatives in the former German Democratic Republic following the reunification of Germany. The premise of this article follows a recommendation from Professor Münkner, that 'in the event of the reunification, much can be learned by Korean cooperatives from the German experience, and in particular from costly mistakes committed during German unification.' The craft production cooperatives (PGH), shaped by decades of socialist planning, faced the immense challenge of transitioning into a market economy. Deprived of state support and confronted with unfamiliar competitive pressures, many collapsed or were forced to transform into conventional business structures. The authors highlight how inadequate legal frameworks and rushed reforms contributed to their decline, underscoring the importance of clear identity, supportive institutions, and appropriate legal design—lessons relevant for countries such as Korea.

The fifth and final article in this series is authored by Professor Dominik Bierecki and examines how the principle of voluntary and open membership applies to German cooperative federations and Polish second-tier cooperatives and associating banks. It asks whether the functional objectives of these organizations can justify limits on voluntary membership. Drawing on Professor Münkner's work, the article emphasizes that while cooperation between cooperatives is essential, the application of cooperative principles to second tier cooperatives and federations is not always straightforward. Accordingly, maintaining the cooperative purpose must be central to the regulation of these structures. The article highlights that both German and Polish laws include forms of compulsory membership, particularly in relation to auditing systems. In Germany, the law requires cooperatives to belong to audit unions, though they may choose among several. In Poland, auditing is conducted by a single second-tier cooperative, to which membership is effectively mandatory. Professor Bierecki concludes that compulsory membership can be justified as a means of safeguarding cooperative autonomy, so long as federations remain democratically controlled by cooperatives and act in line with member rather than state interests.

The third issue concludes with two very special tributes to Professor Münkner. The tributes are authored by two very humble, but experienced and influential cooperative practitioners, who both knew Professor Münkner well and their stories add to our collective memories of his extraordinary legacy. The first tribute is authored by Garry Cronan, a former Registrar of Cooperatives in NSW, Australia, and Director of Communications and Director and founder of the Global Top 300 Project for ICA. His tribute highlights Professor Münkner's intellectual legacy and key insights from his work on cooperative law and policy. It emphasises two central themes: the importance of situating cooperative legislation within broader political and policy contexts, and the critical role of the Registrar of Cooperatives in both regulating and actively supporting cooperative development. Drawing on the Australian experience, he illustrates how shifting policy priorities have weakened institutional support for cooperatives, reinforcing Münkner's insight that legislation alone is insufficient without a supportive policy environment.

The second tribute is authored by Enzo Pezzini, formerly a Director of the European Digestus Project (Network for New Laws on Social Enterprises in Europe) and Director of the Brussels Bureau of the Confederation of Italian Cooperatives. Professor Pezzini describes three important moments in his many interactions with Professor Münkner that highlight his significant contributions to developments in cooperative law and policy. The first moment was his active involvement in the Digestus Project that led to significant steps towards introducing or improving social enterprise legislation, including revisions to Germany's *Cooperative Societies Act*. The second moment was Professor Munkner's involvement in an international seminar in Trento in 2003 'From Cooperative to Social Enterprise'. The third is an interview that Pezzini did with Professor Münkner for the Italian Credit Cooperative magazine in 2008. Professor Pezzini has kindly shared the full transcript of that interview together with a happy photograph of the interviewer and interviewee. The interview is well worth reading as it provides a history of Professor Münkner's involvement with cooperative law and the cooperative movement, as well as his memories of students that he taught in the four-year degree program in cooperative economics at the Institute for Cooperation in Developing Countries (ICDC). You might even recognise one of the students mentioned in this issue!

We hope this issue both informs and inspires, while cultivating a deeper appreciation of Professor Münkner's enduring contribution to cooperative law.

ARTICLES

Emanuele Cusa*

COOPERATIVE SUPERVISION THROUGH THE LENS OF INTERNATIONAL AND EU LAW, PECOL AND SOME EUROPEAN NATIONAL LAWS

Key words: Hans H.-Münkner; cooperative supervision, PECOL, cooperative law;

ABSTRACT: What is and should cooperative supervision be like? Are there legal constraints in International and European Union law in regulating cooperative supervision? What are the laws on this issue in Great Britain, Germany, France, Spain, Portugal, and Italy? What is Hans-H. Münkner's view on the matter, as expressed in The Principles of European Cooperative Law (PECOL)? This paper attempts to succinctly answer these questions.

1. The notion of cooperative supervision.

The legal order of many countries subjects cooperative societies to specific external control (i.e. conducted by persons other than members or components of corporate bodies). This control – hereinafter referred to as cooperative supervision,[1] – differs from other external controls to which cooperatives are subject (for example, by reason of the activity they undertake) for its necessary and main objective is to protect the structural and functional peculiarities of this form of enterprise.

2. International law and the International Cooperative Alliance.

All Member States of the International Labour Organisation ('ILO') must regulate cooperative supervision because of an international duty since 2002.[2]

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[1] The Italian legislator decidedly prefers the term 'supervision' to 'control' or 'audit' in referring to cooperative supervision, both in the Civil Code and legislation outside it. International organizations act similarly, such as the International Labour Organization ('ILO') with the now repealed Recommendation n. 127 of 1966 on the promotion of cooperatives in developing countries and the United Nations with the report of its Secretary-General of 14 May 2001 (A/56/73-E/2001/68), the annex to which corresponds to this important document for international law on cooperatives: the Draft guidelines aimed at creating a supportive environment for the development of cooperatives ('UN 2001 Draft Guidelines'). On the choice of the term to name cooperative supervision, see, on Italian legislation, V. Buonocore, Diritto della cooperazione, il Mulino, Bologna, 1997, pp. 338-339 and, on comparative law, Hans-H. Münkner, Germany, in AA.VV. Principles of European Cooperative Law. Principles, Commentaries and National Reports, Cambridge-Antwerp-Portland, Intersentia, 2017, pp. 320-321.

2 The ILO is a special international organization, the members of which may be States only, but each of its members appoints four delegates, two of whom must be representatives of the Government, one representative of the employers and one representative of the workers; these national delegates make up

By virtue of paragraph 10(1), the *Promotion of Cooperatives Recommendation, 2002* ('ILO Recommendation 193') – approved in Geneva on 20 June 2002 by the General Conference of ILO, of which Italy is a member, like all the other member states of the European Union – our State should (not shall, nor could),[3] devise a legal regulation of cooperatives in accordance with both their nature and function, and the cooperative values and principles indicated in paragraph 3 of the ILO Recommendation 193.[4] Cooperative supervision is dealt with in paragraphs 6(c) and 8(1)(b) of the ILO Recommendation 193 and requires ILO Member States *(i)* to adopt 'measures for the oversight of cooperatives on terms appropriate to their nature and functions, which respect their autonomy ... and which are no less favourable than those applicable to other forms of enterprise and social organisation', *(ii)* to ensure 'that cooperatives are not set up, or used for, non-compliance with labour law' and *(iii)* to combat 'pseudo cooperatives violating workers' rights'.

The ILO Recommendation 193, paragraph 3, refers to the cooperative values and principles as set out in the *Statement on the Cooperative Identity* approved by the General Assembly of the International Cooperative Alliance (ICA) in Manchester on 23 September 1995 ('ICA Statement').[5] The ICA Statement also binds for all ILO Member States.[6] The ICA Statement is mostly silent on cooperative

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the General Conference of the ILO and from among these delegates the members of the following other organ of the ILO are chosen: the Board of Directors. The Board is, in turn, made up of fifty-six people, of whom twenty-eight represent national governments, fourteen represent employers, and fourteen represent workers. The ILO, established in 1919, since 1920 has a specialized service in the promotion of cooperatives in the world.

[3] Not 'shall', because the ILO Recommendation 193 is not a ratified ILO convention; nevertheless, as an ILO recommendation, ILO members should act in coherence with the guidelines and policies contained in the ILO Recommendation 193 (even if there is no sanction in case of national law or praxis that are incoherent with it), because they approved it, and they are obliged to bring it 'before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action' (art. 19, paragraph 6, ILO Constitution).

[4] The ILO Recommendation 193 is considered to be the international standard for promoting and regulating cooperatives. This standard is binding (as a legal guideline and policy, not as an imperative law) on all ILO members. According to H. Henrÿ,' Public International Cooperative Law' in D. Cracogna, A. Fici, A. Henrÿ (eds.), *International Handbook of Cooperative Law*, Springer, Berlin-Heidelberg, pp. 73-76, the ILO Recommendation 193 is also binding on States that are not members of the ILO, since it integrates public international law on cooperatives, indeed being its core, thanks to the fact that it represents the first and only universal application instrument on the law of cooperatives adopted by an international organization. On the ILO Recommendation 193, it is suggested to read the following three volumes, all published by the ILO and available on www.ilo.org: (i) H. Henrÿ, *Guidelines for Cooperative Legislatio*n, third edition, 2012, p. 47 ff.; (ii) S. Smith, Promoting cooperatives: an information guide to the ILO Recommendation No. 193, second edition, 2014; (iii) The Story of the ILO's Promotion of Cooperatives Recommendation, 2002 (No. 193). A review of the process of making the ILO Recommendation No. 193, its implementation and its impact, 2015. The opposite opinion is expressed, among others, by S. Smith, *Promoting Cooperatives*, cit., p. 28, who believes that the ILO Recommendation 193 'provides non-binding guidelines in drafting and/or revising national policy and legislation'.

[5] The ICA is a non-governmental organization recognized by the United Nations, founded in 1895 and currently made up of more than three hundred organizations (national and international) representing the cooperatives of the world operating in all sectors of the economy.

[6] Hans-H. Münkner, *Co-operative Principles and Co-operative Law*, second edition, LIT Verlag, Zürich,

supervision (having as its objective the characteristics required of a true cooperative). However, in the passage elaborating its fourth principle (called *Autonomy and independence*) it refers indirectly to cooperative supervision: cooperatives 'ensure democratic control by their members and maintain their cooperative autonomy', even by the public authorities.[7] The ICA, in explaining this principle,[8] stresses the importance of cooperative supervision – which can be modelled according to the nature, activity and size of the supervised entity – to be conducted in such a way as to ensure primarily that the cooperative remains a business organization democratically governed by its members and aimed primarily at responding to their economic, social and cultural needs. According to ICA, this supervision can be conducted in accordance with rules, either conceived by the cooperative itself and/or by the representative association to which it voluntarily belongs or imposed by the public authorities.

International law provides another binding guideline for Italy (as an ILO member), contained in paragraph 10(2) of the ILO Recommendation 193: it 'should consult cooperative organizations, as well as the employers' and workers' organizations concerned, in the formulation and revision of legislation, policies, and regulations applicable to cooperatives'. This guideline is reiterated even more strongly by the United Nations, with Resolution 56/114 (*Cooperatives in social development*) adopted by its General Assembly on 19 December 2001. This resolution invites Member States to take into consideration the UN 2001 Draft Guidelines[9] in the event of any changes to their law on cooperatives. It indicates that

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2015, pp. 1-21, highlights the ambiguity of the term 'principle' contained in the ICA Statement, since it is used to indicate both an idea (abstract and invariable, regardless of the time, place and circumstances in which it is applied, accepted as true after being deduced from enduring observation and experience) and a practice (variable, depending on the time, place and circumstances in which it applies); this author, in listing the principles-ideas and principles-practices contained in the ICA Statement, warns that cooperative law in compliance with the ICA Statement should, respecting the former (which do not correspond to operational rules), identify the latter (i.e. conceive coherent dispositive or mandatory legal rules). Therefore, only the principles-ideas (the cooperative principles in the strict sense) indicate the indefectible characteristics of cooperatives (i.e. their identity), but they need the principles-practices to become cooperative law; this explains the reason why national legislations that comply with the ICA Statement can be different, having legitimately translated the principles-practices differently into their respective legal systems.

[7] On the relationship between the principle of autonomy and public intervention in cooperatives, cf. Hans-H. Münkner, Co-operative Principles, cit., pp. 119-141, where many examples come from different continents.

[8] With the ICA *Guidance Notes to the Co-operative Principles*, Brussels, 2015, pp. 22, 23, 25, 50 and 51, available on www.ica.coop.

[9] The UN 2001 Draft Guidelines were most recently referred to in the report of the UN Secretary-General of July 2021 (Cooperatives in social development, A/76/209) and the consequent UN General Assembly resolution 76/135 of 16 December 2021 (A/res/76/135) as a relevant source of international law on cooperatives, supplementing the ILO Recommendation 193. In the UN 2001 Draft Guidelines, paragraph 11 (entitled General law on cooperative or the general section of a single law on cooperative) also specifies that the law on cooperatives should define cooperatives using the ICA Statement. Finally, with regard to the United Nations, I would like to point out the report of the Secretary-General of the United Nations of 17 July 2023 (Cooperatives in social development, A/78/187) and the consequent resolution 78/175 of the United Nations General Assembly of 19 December 2023 (A/res/78/175), where, among other things, Member States are invited to support cooperatives more decisively as effective and sustainable forms of business.

representatives of the cooperative movement should ‘participate fully’ and ‘in an effective and equal partnership’, *(i)* in drafting and monitoring law and practice and *(ii)* in formulating and carrying out of public policy regarding cooperatives.

3. European Union Law.

European Union law does not require its Member States to have specific legislation on cooperative supervision, nor has it envisaged harmonizing national legislation on this topic, as it has done repeatedly for statutory audits.[10] The European Union has not prescribed specific cooperative supervision for cooperatives set up in accordance with Regulation 1435/2003/EC on the Statute for a European Cooperative Society (SCE), although it clearly distinguishes such supervision from statutory auditing in artt. 70 and 71 s. In fact, art. 8(2) Regulation 1435/2003/EC merely provides that the SCE is subject to specific supervision, including cooperative supervision, only if this is required for cooperatives established in accordance with the law of the Member State in which the SCE has its registered office; to be understood as both head office and registered office, since both shall be located in the same Member State, pursuant to the combined provisions of artt. 6 and 8(1)(c)(ii) Regulation 1435/2003/EC.[11] For example, the cooperative supervision of an SCE established in Germany must be conducted in accordance with §§ 53 ff. *Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften* (better known as GenG), in exactly the same way (also in view of the principle of non-discrimination laid down in art. 9 Regulation 1435/2003) as it would be conducted if it were a cooperative established under German law.[12] However, the entry into EU law of the optional model represented by the SCE has had the indirect effect (so-called spillover effect) of influencing the law on cooperatives conceived by some Member States.[13]

On the other hand, EU law has affected the national rules of Member States that require or allow non-profit private law entities to supervise their member cooperatives through both cooperative supervision

[10] D. Hiez, Introduction, in AA.VV. Principles of European Cooperative Law. Principles, Commentaries and National Reports, Cambridge-Antwerp-Portland, Intersentia, 2017, pp. 11-12, together with the other experts in cooperative law who drafted the Principles of European Cooperative Law (on which see infra, § 5), expressed their opposition to a harmonization of the national laws on cooperatives imposed by the European Union.

[11] On this point, cf. E. Cusa, Die Verwendung des Betriebsergebnisses, in Handbuch der Europäischen Genossenschaft (SCE), edited by R. Schulze, Nomos-Verlag, Baden-Baden, 2004, p. 166 ff. Regarding the supervision of cooperatives based in Italy, it is worth reading the Ministry of Economic Development (now called the Ministero delle imprese e del made in Italy) circular n. 19203 of 39 June 2006, according to which these SCEs shall be equated with Italian cooperatives also regulated by the Italian law on joint-stock companies.

[12] On the subject, see, among others, M. Schöpflin, sub artt. 8 and 71 SCE, in V. Beuthien, R. Wolff, M. Schöpflin, Genossenschaftsgesetz, sixteenth edition, München, C.H. Beck, 2018, pp. 1263 and 1339.

[13] One of the most significant examples of this phenomenon is offered by the German law on cooperatives; with the 2006 reform of the GenG, two innovations inspired by the SCE law were introduced: (i) the possibility that the cooperative no longer has as its purpose only that of responding to the economic interests of the cooperators (‘[der] Erwerb oder die Wirtschaft ihrer Mitglieder’) through the mutual enterprise, but also to respond to the social or cultural interests (‘[die] soziale oder kulturelle Belange’) of the members themselves (art. 1, section 1, GenG); (ii) the provision of the financing shareholders (named ‘investierende Mitglieder’ in art. 8, section 2, GenG).

and statutory auditing. Under Directive 2006/43/EC (see recital 11) and Regulation 537/2014/EU (see recital 6 and art. 2, paragraphs 3 and 4), auditors appointed by the aforementioned entities shall appear and be independent of the supervised cooperative. As a result, some cooperative systems – both national,[14] and regional,[15] – have had to reform legislation regulating cooperative supervision, requiring the entities in question to have an internal organisation suitable for guaranteeing the independence of those who carry out the statutory audit.

However, if a EU Member State provides promotional measures in favour of cooperatives (as must happen, for example, in Italy, Spain and Portugal, by virtue of their Constitutions), it must guarantee effective control over such cooperatives. Otherwise, it would favour entities that do not respect the requirements justifying such promotion. This would be in breach of the principle of coherence derived from art. 107 of the Treaty on the Functioning of the European Union, as interpreted by the Court of Justice of the European Union.[16]

4. British, German, French, Spanish and Portuguese law.

To frame the Italian model of cooperative supervision, it is very interesting to compare it to some European States, including Great Britain (no longer in the Union, but the creator in 1852 of the first legislation on cooperatives, the *Industrial and Provident Societies Act*). Germany, France, Spain and Portugal are also compared. These States have in common the fact that they devised a specific supervision of their cooperatives in order to safeguard their structural and functional characteristics, and they must provide for supervision of their cooperatives, being required to respect the examined duty deriving from being members of the ILO.[17]

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[14] Such as the German (art. 55, sections 2 and 3, GenG) or Austrian (see especially art. 19, section 2, Bundesgesetz über die Revision von Erwerbs- und Wirtschaftsgenossenschaften, or Genossenschaftsrevisionsgesetz 1997, better known as GenRevG 1997)) that impose on cooperative auditing associations – genossenschaftlichen Prüfungsverbände in Germany that shall be in the form of registered association and Revisionsverbände in Austria that shall be in the form of association or cooperative – to also conduct statutory audits of the cooperatives belonging to them. On the above-mentioned German law see. M. Schöpflin, sub art. 55, in V. Beuthien, R. Wolff, M. Schöpflin, Genossenschaftsgesetz, sixteenth edition, München, C.H. Beck, 2018, pp. 695 ff.

[15] Such as that of the Trentino Alto-Adige Region (see art. 39, sections 4 and 5, regional act n. 5 of 9 July 2008), which permits recognized entities (in the form of association or cooperative) representing cooperatives also to carry out statutory audits of the cooperatives adhering to them. On this point see E. Cusa, Die Regelung der Genossenschaften in der Autonomen Region Trentino-Südtirol: ein Beispiel für Italien?, in Genossenschaften auf dem Weg in die Zukunft, Münstersche Schriften zur Kooperation, Shaker Verlag, Aachen, 2011, pp. 35–37.

[16] As E. Cusa has attempted to demonstrate in 'Il diritto delle organizzazioni imprenditoriali nell'accertamento del requisito di selettività in materia di aiuti di Stato' in *Rivista delle società*, 2025, pp. 104-106.

[17] One of the most interesting cooperative supervising systems exists in the country with the highest number of citizens, poor people and cooperatives (around 800,000, slightly less than a third of all cooperatives in the world): India. With the establishment in 2021 of the Ministry of Cooperation, the Indian regulator (rectius, the Indian regulators, since the Union, the States and other territorial entities that make up this immense federal State are competent in this matter, as expressly provided for in the Indian Constitution) is trying to create a well-designed system, in compliance with the ACI Declaration,

4.1. *Great Britain*.

In Great Britain, cooperative supervision has been conducted by the Financial Conduct Authority ('FCA') since 2001.[18] The supervisory regime applies to British cooperatives registered under the *Co-operative and Community Benefit Societies Act* 2014 ('CCBS'),[19] which are the bona fide co-operative societies pursuant to section 2(2)(a)(i) CCBS ([20]). The FCA's supervision of British cooperatives is set out in its *Registration Function under the Co-operative and Community Benefit Societies Act 2014 Guide* ('RFCCBS'), periodically updated.[21]. The RFCCBS states that the FCA merely monitors British cooperatives to ensure that they comply with the CCBS but does not assist them in complying with the same legal framework.[22] The RFCCBS is very relevant since it integrates the key concepts around which cooperative supervision revolves, which are only evoked, in the case of the bona fide co-operative society,[23] or partly defined, in the case of the co-operative society by the CCBS.[24]. In any event, if the

capable of knowing (especially through widespread digitalisation), monitoring (also on the side of their internal democracy, with newly established special public authorities), promoting (also with education and training, thanks to a widespread network of specialized public entities) and sanctioning Indian cooperatives; all of that, in collaboration with the Indian cooperative movement and its entrepreneurial component, made up of consortium cooperatives at city, district, state and national levels (some of the latter, in terms of turnover, among the largest in the world).

[18] FCA is the registering authority for the mutual societies in the UK. The activity as a registrar is separate from the FCA's role for financial services firms under the Financial Services and Markets Act 2000. Mutual societies are (i) building societies, (ii) community benefit societies, (iii) cooperative societies, (iv) credit unions, and (v) friendly societies. On the FCA as a registering authority of mutual societies, see the Financial Services Act 2012 (Mutual Societies) Order 2018.

[19] Not, for example, on cooperatives registered as a company or a limited liability partnership. On 1 October 2024, 85% of cooperatives (6,258 out of 7,360 mutual societies) are registered under CCBS.

[20] On this point, cf. I. Snaith, United Kingdom, in AA.VV 'Principles of European Cooperative La'. *Principles, Commentaries and National Reports*, Cambridge-Antwerp-Portland, Intersentia, 2017, pp. 699-706. In June 2023, the British Treasury Minister asked the Law Commission (an institution governed by law, tasked with promoting the reform of British law) to submit a draft reform of the CCBS; in September 2024, the Law Commission published the Review of the *Co-operative and Community Benefit Societies Act* 2014. Consultation Paper, in which no changes on cooperative supervision are envisaged; the final recommendations that the Law Commission will present to the British Treasury Minister to reform the CCBS are now awaited.

[21] In writing this essay, I used the version dated July 2025.

[22] See RFCCBS 2.1.1, RFCCBS 2.2.1 and RFCCBS 2.2.2.

[23] The above concept is defined by RFCCBS 4.3.1 ('an autonomous association of persons voluntarily united to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise'); moreover, the FCA specifies, on the one hand (RFCCBS 4.3.2), that this definition is also used in the ILO Recommendation 193 and in the ICA Statement, but, on the other hand (RFCCBS 4.3.5), that there can be a bona fide co-operative society even if the fifth, sixth and seventh cooperative principles contained in the ICA Statement are not respected and that, in any case, 'this guidance is not exhaustive. We recognise the flexibility in the principles [contained in the ICA Statement] which are themselves intended as guidelines. There may well be other indicators that a society is a bona fide co-operative society' (RFCCBS 4.3.7).

[24] Section 2(3) CCBS only delimits the above definition when it states that 'co-operative society" does not include a society that carries on, or intends to carry on, business with the object of making profits

British cooperative does not qualify as a bona fide co-operative society, the FCA may remove it from the Mutuals Public Register pursuant to section 5(5)(a) CCBS.[25]

British cooperatives are required to submit their annual financial statements to the FCA, within seven months of the end of their accounting year, in accordance with section 89(1) CCBS, accompanied by the report of the auditor (not necessarily qualified if the financial statements are for a small company within the meaning of section 83 CCBS) and other information required in the relevant annual return form (AR30), as set out in RFCCBS 7.1.8. This model is particularly interesting, since it contains the information that the British law requires to be transmitted to the FCA to verify that the transmitting society can still be qualified as a bona fide co-operative society.[26]

In conclusion, the main features of the British model of cooperative supervision (quite distinct from the statutory audit of accounts) are based only on the intervention of a public body, which is recognized as having a wide discretion and strong powers of intervention over irregular cooperatives. However, the cooperative data and information, on which the FCA relies on to supervise cooperatives, is minimal and is mainly provided by the cooperative itself. Arguably, the effectiveness of this approach to supervision is limited, especially if the voluntary supervision of the cooperative aspects by the associations which represent the British cooperative movement is inadequate.[27]

4.2. *Germany*.

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mainly for the payment of interest, dividends or bonuses on money invested or deposited with, or lent to, the society or any other person'; the interpretation of this provision is analytically illustrated in RFCCBS 4.2.1-4.2.4.

[25] The FCA publishes on its website a detailed annual report to show how it used its authoritative powers on British mutual societies.

[26] The AR30 model asks these five questions: (i) '7A.1 What is the business of the society? For example, did you provide housing, manufacture goods, develop IT systems etc.'; (ii) '7A.2 Please describe the members' common economic, social and cultural needs and aspirations. In answering this question, please make sure it is clear what needs and aspirations members had in common'; (iii) '7A.3 How did the society's business meet those needs and aspirations? You have described the society's business answer to question 7A.1, and in question 7A.2 you have described the common needs and aspirations of members. Please now describe how during the year that business met those common needs and aspirations'; (iv) '7A.4 How did members democratically control the society? For example, did the members elect a board at an annual general meeting; did all members collectively run the society'; (v) '7A.5 What did the society do with any surplus or profit? For instance, did you pay a dividend to members (and if so, on what basis); did money get reinvested in the business; put into reserves; used for some other purpose?'.

[27] On the British cooperative law see, among others, I. Adderley, *Co-operatives: Linking Practice and Theory, Co-operative Press Limited,* Manchester, 2025.

The German model of cooperative supervision (*Prüfung*) is different from the British model in many respects. Since at least 1934,[28] it has been characterized by being centred on the *Prüfungsverbände*.[29] In fact, the current German law *(i)* gives exclusively to these associations the power to conduct cooperative supervision (art. 55, section 1, GenG), under the strict control of the state supervisory authority (*Aufsichtsbehörde*) (artt. 56 and 63-64b GenG), *(ii)* requires any cooperative to join at least one *Prüfungsverband* (artt. 11, section 2, n. 3, 54 and 54a GenG), *(iii)* makes the registration of any cooperative subject to a prior assessment by a *Prüfungsverband* on the entity to be registered (artt. 11, section 2, n. 3 and 11a, section 2, GenG), so as to provide the court with all the information it needs to decide whether to enter it in the register of cooperatives (*Genossenschaftsregister*), with the consequent acquisition of legal personality (artt. 11a and 17 GenG)[30], and *(iv)* subjects each cooperative to the cooperative supervision conducted by the *Prüfungsverband* to which it belongs (artt. 53, section 1, 53a, section 1 and 55, section 1, GenG).[31]

In a way that can be shared, the common German law modulates the object and frequency of cooperative supervision on the basis of the size of the enterprise exercised by the cooperative: *(i)* it is normally biennial, but becomes annual for cooperatives with total assets on the balance sheet exceeding 2,000,000 euros (art. 53, section 1, GenG)[32]; *(ii)* has a simplified content for micro cooperatives (*Kleinstgenossenschaften*) (art. 53a GenG), inter alia with total assets on the balance sheet not exceeding €450,000, total revenues not exceeding €900,000 and not more than an annual average of ten employees (artt. 267 and 336 *Handelsgesetzbuch* to which art. 53a GenG refers); *(iii)* includes statutory auditing for cooperatives with total assets on the balance sheet exceeding €1,500,000 and total revenues exceeding €3,000,000 (art. 53, section 2, GenG).[33]

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[28] As W. Grosskopf, Hans-H. Münkner, G. Ringle, *Our Co-op. Idea - Mission - Achievements*, AG SPAK Bücher, Neu-Ulm, 2010, pp. 134-135, who also points out that since 1889 all German cooperatives have been subject to due cooperative supervision. On the German way to supervise cooperatives and its influence on other jurisdictions cf. Hans-H. Münkner, 'Legal framework analysis. National report: Germany, 2020' available at https://coops4dev.coop.

[29] In the near future, some amendments to the German rules on cooperative supervision could come into force, aimed at combating false cooperatives more effectively, without however losing the centrality of the Prüfungsverbände in this supervision, if the bill – called Gesetz zur Stärkung der genossenschaftlichen Rechtsform and introduced in Parliament by the Government twice (the first in July 2024 and the second in June 2025 by the government that succeeded the previous one) – is definitively approved.

[30] On the advantages and disadvantages of this necessary opinion of the Prüfungsverband cf. Hans-H. Münkner, Germany, cit., pp. 322-323, which highlights, among other things, the fact that this opinion allows both to obtain only 0.5% of insolvent cooperatives among the newly established ones, and to preserve the reputation of the cooperative form and of the entire cooperative movement.

[31] If the cooperative is a member of more than one Prüfungsverband, the cooperative supervision is carried out by the Prüfungsverband to which it first belonged, unless otherwise agreed between the cooperative and the Prüfungsverbände concerned (art. 55, section 4, GenG)

[32] However, the Prüfungsverband has the power to subject the cooperative to extraordinary inspections whenever it deems it appropriate (art. 57, section 1, GenG)

[33] In 2024, there were around 7,000 German cooperatives with around 20 million members.

Artt. 57-60 GenG are well thought out in providing for the relations among *(i)* the administrative and supervisory bodies of the cooperative,[34] *(ii)* the members and *(iii)* the supervisory *Prüfungsverband* during the execution of the cooperative supervision, which is obviously conducted by experts.[35] At the end of this audit, the corresponding report (*Prüfungsbericht*) will indicate whether the cooperative has actually pursued the mutual purpose (art. 58, section 1, GenG). In the event of irregularities, the members are also promptly informed and possibly summoned to the meeting by the *Prüfungsverband* itself.

The ordinary object of cooperative supervision is threefold: *(i)* to verify the correct keeping of documentation (including, first and foremost, accounting books and financial statements[36]; *(ii)* to verify the economic, equity and financial situation of the cooperative, with particular reference to its economic sustainability; *(iii)* to verify the management of the cooperative (the peculiar element of cooperative supervision) in order to ascertain that it is conducted in pursuit of the mutualistic purpose (*rectius*, the *Förderzweck* pursuant to art. 1, section 1, GenG).[37] The third and last verification is facilitated if the administrative body draws up a plan to pursue this purpose (*Förderplan,* not required by law)[38] and a subsequent report on the pursuit of this purpose (*Förderbericht*).[39]

If the cooperative does not pursue the mutual purpose, it can be dissolved by the decision of the competent territorial tribunal (*Landgericht*) at the request of the competent highest State authority*,* pursuant to art. 81, section 1, GenG.

4.3. *France*.

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[34] The necessary cooperation between the supervisory body (Aufsichtsrat) and the Prüfungsverband is very much insisted on by W. Grosskopf, Hans-H. Münkner, G. Ringle, Our Co-op, cit., p. 140.

[35] Pursuant to art. 55, section 1, GenG, natural persons performing cooperative supervision shall be sufficiently trained and experienced in cooperative supervision. An increasing number of persons qualified to exercise cooperative supervision are also statutory auditors.

[36] Hans-H. Münkner, Germany, cit., pp. 321 and 329-331, highlights the danger that cooperative supervision, also due to the inadequate preparation of cooperative auditors, will come closer and closer to an ordinary statutory audit, also because the law of business organizations tends to reduce the differences between cooperatives and companies.

[37] On the peculiar object of the cooperative supervision of German cooperatives, I refer to the following authors: (i) Hans-H. Münkner, Germany, cit., pp. 319-331; (ii) W. Grosskopf, Hans-H. Münkner, G. Ringle, *Our Co-op*, cit., pp. 135-138; (iii) M. Schöpflin, sub art. 53, in V. Beuthien, R. Wolff, M. Schöpflin, *Genossenschaftsgesetz,* sixteenth edition, München, C.H. Beck, 2018, pp. 660-674. On the other hand, about the differences between external control over cooperatives and external control over joint-stock companies and associations in the German legal system, even diachronically, cf. A. Donschen, *Die genossenschaftliche Pflichtprüfung*. Vergleich mit Vereins- und Aktienrecht, Shaker Verlag, Aachen, 2008.

[38] As C. Picker, *Genossenschaftsidee und Governance*, Tübingen, Mohr Siebeck, 2019, p. 419, to which I refer (pp. 456-470) for a series of observations on cooperative supervision.

[39] Hans-H. Münkner, 'Germany', cit., pp. 326-328, explains how the two documents mentioned in the text should be drawn up and the relative parameters for measuring, but also warns that some of these Berichte incorrectly report not the pursuit of the mutual purpose but the sole altruistic allocation of a part of the operating profits.

It was not until 2014 that French law imposed cooperative supervision on all cooperatives.[40] Previously, it was only prescribed for certain cooperative sectors.[41]

Cooperative supervision (*révision coopérative*) is governed by art. 25-1 to art. 25-5 of *loi* 47-1775 *du 10 septembre 1947 portant statut de la coopération* (containing the general law of French cooperatives). These provisions regulate the *révision coopérative* as follows: *(i)* it critically and analytically examines the organisation and functioning of the cooperative on the basis of the cooperative principles, as defined in loi 47-1775, and the specific rules that apply to it, comparing it with other similar cooperatives and, if necessary, proposing corrective measures for the cooperative;[42] (ii) it shall be conducted every five years, unless the bylaws provide for a lower frequency, or it is required by at least one-tenth of the shareholders, or by one-third of the members of the administrative, or supervisory body, or by the competent state authority; (iii) it shall be executed at the end of three consecutive loss-making financial years or if the losses of one financial year are at least equal to half of the highest amount reached by the cooperative's share capital; (iv) it is carried out by a réviseur coopératif specifically authorised by prefectural decree, following the reasoned opinion of the Conseil supérieur de la coopération, and is appointed together with a deputy auditor by the general meeting of cooperative members;[43] (v) it concludes with a special report (rapport de révision) to be presented and discussed at the general meeting; (vi) if the rapport indicates significant irregularities and they are not spontaneously eliminated by the cooperative, it risks the payment of a fine until a compulsory dissolution is decided by the competent Minister.

4.4. *Spain*.

The Spanish legal system, at least as regards the State legislation represented by *Ley* 27/1999, *de 16 de julio, de Cooperativas*, does not provide for cooperative supervision, understood as periodic external control of the organizational and functional peculiarities of the cooperative. However, art. 1, paragraph

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[40] More precisely, pursuant to the decree of the Conseil d'Etat n. 2015-800 of 1 July 2015, only the cooperatives with (i) at least two cooperators and (ii) the total revenues, net of taxes, for two consecutive accounting years, exceeding 30,000 euros, are subject to the necessary cooperative supervision.

[41] On the general and special law on French cooperative supervision cf. D. Hiez, *Sociétés coopératives*, third edition, Paris, Dalloz, 2023, pp. 370-387. In 2022, there were 22,410 cooperatives in France with about 31 million members.

[42] That is stated in the Révision coopérative. Principes et normes. Cahier des charges pour les sociétés coopératives non régies par un statut particulier ; this document was approved on 18 March 2016 by the Conseil supérieur de la coopération. This Council – chaired by the Ministre de l'économie sociale et solidaire or his representative and composed of four parliamentarians, twelve representatives of the public administration and thirty representatives of the cooperative organizations – defines the principles and draws up the rules on the révision coopérative, pursuant to the last section of art. 5 of Article 47-1775. The document in question specifies that the révision coopérative examines the legal, administrative and governance aspects of cooperatives, while it is not an audit or certification of accounts, nor an analysis limited to ascertaining the main management and financial balance ratios.

[43] The decree of the Conseil d'Etat n. 2015-706 of 22 June 2015, implementing art. 25-5 loi 47-1775, regulates the qualification, appointment, termination and independence of the réviseur coopératif, together with how the révision coopérative shall be carried out.

2, *Ley* 27/1999 prescribes that each Spanish cooperative conforms its structure and functioning with the cooperative principles, as consolidated in the ICA Statement and incorporated into the said *Ley*.

In fact, the cooperative is required to publish some information about these peculiarities in the financial statements and in the directors' report. However, the statutory auditors are only required to carry out a classic statutory audit[44] and not a cooperative supervision.[45]

The absence of cooperative peculiarities may, however, be ascertained by the *Inspección de Trabajo y Seguridad Social* (always *ex officio*, following its own initiative or after a request or complaint by third parties), at least if the irregularity relates to the '*normas del orden social*' in relation to working members, pursuant to art. 19(1)(f) *Ley 23/2015, de 21 de julio, Ordenadora del Sistema de Inspección de Trabajo y Seguridad Social*. However, I would like to point out that, by virtue of art. 113 *Ley* 27/1999, the said *Inspección* must ensure compliance with the aforementioned law and its implementing regulations and that, pursuant to art. 116 *Ley* 27/1999.[46]. In compliance with a regular administrative procedure the *Ministro de Trabajo y Asuntos Sociales* may decide on the disqualification (*descalificación*) of the cooperative (with the consequent necessary liquidation), if the cooperative has committed '*infracciones muy graves de normas imperativas o prohibitivas*' of *Ley* 27/1999.[47]

A similar situation to Spanish state legislation is found in some autonomous legislation on cooperatives, such as that of the Basque Country. Indeed, in this *comunidad autónoma* the cooperative inspections referred to in art. 158 *Ley 11/2019, de 20 de diciembre, de Cooperativas de Euskadi* are conducted by the *Inspección de Trabajo del País Vasco*, which is enpowered to establish if any of the cooperative infringements listed in art. 159 *Ley 11/2019* occurred. These infringements may result in the imposition of the administrative sanctions provided for in artt. 160 and 161 *Ley 11/2019*.[48] Among these sanctions, in the event of manifest, repeated and significant violations of the cooperative principles recognized in *Ley 11/2019*, there is the *desalificación* of the cooperative and, consequently, its forced liquidation or transformation.

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[44] However, considering some specific provisions of accounting law valid only for cooperatives, contained in the Orden EHA/3360/2010, de 21 de diciembre, por la que se aprueban las normas sobre los aspectos contables de las sociedades cooperativas.

[45] On this point I refer to G. Fajardo, Spain, in AA.VV. 'Principles of European Cooperative Law' *Principles, Commentaries and National Reports*, Cambridge-Antwerp-Portland, Intersentia, 2017, pp. 595-602 and, from the point of view of administrative law, M. Burzaco Samper, 'La intervención pública en las sociedades cooperativas' in *CIRIEC-España. Revista Jurídica*, 27/2015, pp. 333 ff.

[46] The above-mentioned article will be modified, if it is approved the government bill, presented to the Spanish Parliament in October 2024 (Proyecto de Ley integral de impulso de la economía social); on this bill cf. G. Fajardo, 'Reconocimiento legal y social de los valores y principios cooperativos como rasgos de identidad de las cooperativas' in *Deusto Estudios Cooperativos*, n. 25, 2025, pp. 93-94.

[47] The inspection function exercised on Spanish cooperatives is examined, inter alia, by L. Á. Díez Ácimas, 'La función inspectora en materia de sociedades cooperativas' in *Deusto Estudios Cooperativos*, n. 5, 2014, pp. 43 ff.

[48] The inspections and the administrative procedure by which the penalties indicated in the text are imposed are governed by Decree 12/2024, de 13 de febrero, sobre la inspección y el procedimiento sancionador en materia de cooperativas.

4.5. *Portugal.*

The Portuguese model of cooperative supervision revolves around the following singular cooperative, established in compliance with *Decreto-Lei n. 282/2009, de 7 de outubro*: the *Cooperativa António Sérgio para a Economia Social - Cooperativa de Interesse Público de Responsabilidade Limitada* ('CASES').[49] Among the tasks that the law assigns to CASES is the one set out in art. 115, paragraph 1, *Lei* n. 119/2015*, de 31 de agosto* (corresponding to the *Código Cooperativo*): to monitor the Portuguese cooperatives, so that they comply with *Lei* n. 119/2015 and the cooperative principles consolidated in the ICA Statement (as specified in art. 3 *Lei* n. 119/2015) ([50]).

This supervision is periodically exercised by examining the articles of association of the cooperatives and their amendments, the financial statements (to which the report of the administrative and control bodies, the related minutes of the approval of the shareholders' meeting and any report of the statutory auditor shall be attached) and the social report. The cooperatives are required to transmit this documentation to CASES, pursuant to art. 116 *Lei* no. 119/2015. Following this transmission and its satisfactory review, CASES issues an annual certificate proving the establishment and regular functioning of the cooperative (art. 117, paragraph 1, *Lei* n. 119/2015).

CASES must also apply to the competent court for the dissolution of the cooperative. It may do so, if the cooperative does not comply with cooperative principles, or uses illegal means to carry out its activities, or has chosen the cooperative form only to unduly benefit from tax benefits (or other benefits granted by public bodies), or carries out activities other than those indicated in the corporate purpose (art. 118, paragraphs 1 and 2, *Lei* n. 119/2015).

5. The Principles of European Cooperative Law.

When examining the European framework for cooperative supervision, the *Principles of European Cooperative Law* ('PECOL') cannot be disregarded, although the relevant legal rules have no binding effect in any State (thus being *soft law*).

In my opinion, the PECOL should be consulted when the Member States of the Union intend to introduce or update their laws relating to cooperative supervision, for at least the following two reasons. Firstly, the PECOL offers more stringent legal content to the cooperative principles contained in the ICA Statement and why they need to be respected.[51]. If it is true that the States in question should comply with the ICA Statement as it is included in the ILO Recommendation 193, together with the content of the latter (inter alia containing specific rules on cooperative supervision), the PECOL will assist the

[49] In CASES, at least sixty per cent of the share capital must always be subscribed by the Portuguese State and the remainder by representative bodies of the Portuguese cooperative movement and social economy; in addition, in this cooperative, the chairman and vice-chairmen of the board of directors and the chairman of the supervisory body shall be appointed and dismissed by the Portuguese Government.

[50] On the subject I refer to D. Meira, Portugal, in AA.VV. Principles of European Cooperative Law. *Principles, Commentaries and National Reports*, Cambridge-Antwerp-Portland, Intersentia, 2017, pp. 487-502, and D. Meira, 'A fiscalização das cooperativas à luz do novo Código Cooperativo português' in CIRIEC-España, *Revista jurídica de economia social y cooperativa*, 28/2016, pp. 281 ff.

[51] The ICA Statement is, in fact, in some points, too general and flexible, thus risking losing consistency to the cooperative identity (in the sense of its distinctiveness); the PECOL, therefore, can contribute to making the cooperative identity clearer and more up to date (so D. Hiez, Introduction, cit., pp. 13-14).

legislators to verify that the domestic legal system is consistent with these two international documents.[52] Secondly, the part of PECOL on cooperative supervision was conceived by Hans-Hermann Münkner, one of the world's most respected scholars of cooperative law and a renowned consultant on the same subject for the ICA, other international organizations and many legislators around the world. It follows that his reflections in the PECOL are particularly well qualified to indicate whether a certain national discipline of cooperative supervision is in line with the ILO Recommendation 193, the ICA Statement and the UN 2001 Draft Guidelines on the subject of cooperative supervision.

Based on Münkner's assessment of the importance of cooperative supervision in the PECOL, the following is a summary of four recommendations to improve the model of cooperative supervision in Europe:

(i) The cooperative supervision should be conceived as a duty and a right for the cooperative,[53] in the sense that such supervision should not only control but also assist the cooperative;[54]

(ii) The main purpose of cooperative supervision should be to verify that the cooperative pursues its specific purposes (therefore, at least the mutualistic purpose, understood as the management of services to cooperators through cooperative enterprise), as defined by law and outlined in the articles of association and has a structure and exercises activities that are consistent with the ICA Statement (i.e., the activities carried out primarily respond to the interests of the cooperative members);[55]

(iii) Cooperative supervision should be carried out by professionals who are familiar with the peculiarities of this form of business,[56] whether or not they belong to public bodies (State or other public administration authorities) or private entities (such as associations representing the cooperative movement).[57] In any case, supervision should be conducted in such a way as to ensure the autonomy of the cooperative (including from external public authorities), thus guaranteeing members the last word in the organization and operation of the cooperative;[58]

(iv) Cooperative supervision should also verify (in a modular way, depending on the size and activity carried out by the cooperative)[59] the economic sustainability of the mutual enterprise by auditing its

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[52] In fact, one of the PECOL aims is to offer legislators a coherent model of cooperative law, as D. Hiez, Introduction, cit., pp. 11-13.

[53] 'Cooperatives are obligated and entitled to be audited' (Hans-H. Münkner, Cooperative audit, in AA.VV. Principles of European Cooperative Law. Principles, Commentaries and National Reports, Cambridge-Antwerp-Portland, Intersentia, 2017, p. 97).

[54] Assistance addressed to the managers, to the components of the corporate bodies and to the cooperative members, as Hans-H. Münkner, Cooperative audit, cit., p. 117, explains.

[55] Hans-H. Münkner, Cooperative audit, cit., p. 100.

[56] Hans-H. Münkner, 'Cooperative audit' cit., pp. 103-104.

[57] Ibid, pp. 114-116.

[58] Ibid, cit., p. 97.

[59] Ibid, cit., pp. 104-106.

accounts, in order to guarantee the interests of both the members and the corporate creditors, unless the audit is already carried out by another external auditor (the statutory auditor).[60]

6. The history of Italian law on cooperative supervision.

In Italy, there were several attempts (1894, 1896, 1905, 1920) to provide for the compulsory cooperative supervision of all cooperatives, including allowing the associations that represented the cooperative movement to carry it out in favour of their members.

However, it was not until 1926 that a general supervisory power was established for the *Ministero per l'economia nazionale*, which supervised cooperatives through a specific entity (*Ente nazionale per la cooperazione*); the law authorising supervision to only be conducted by the State was completed in the years 1930-1931 and in 1942 was finally integrated into artt. 2542-2545 Civil Code.

Before 1926, a series of provisions imposed cooperative supervision on specific categories of cooperatives (including worker and agricultural cooperatives), which received preferential treatment in public contracts. For this category of cooperatives, an articulated law of cooperative supervision was introduced by Royal Decree n. 278 of 12 February 1911.

After the fall of fascism in 1945, the General Directorate of Cooperation was established at the Ministry of Labour, and in 1946 the *Ente nazionale per la cooperazione* ceased to exist. The golden year of cooperative supervision, however, was 1947, with the approval first of the so-called Basevi Law (Legislative Decree provisional Head of State n. 1577 of 14 December 1947) and then of the Italian Constitution, with its fundamental art. 45, paragraph 1, for the matter examined here.[61] By virtue of the said provision, the Italian Constitution, the State (and, if competent, also the Regions and the Provinces) shall ensure, 'through appropriate control mechanisms', the 'character of mutuality' and the absence of 'purposes of private speculation' of the private entities included into the 'cooperation' having the 'social function'.

After the Basevi Law, amended several times and still partially in force, the state legislation on cooperative supervision now revolves around Legislative Decree n. 220 of 2 August 2002.

7. The Italian model.

The current Italian model of cooperative supervision is based on the necessary control conducted by the State, assisted by the associations representing the Italian cooperative movement. More precisely, cooperative supervision is carried out by the State (through its employees) on all cooperatives (except for those which are expressly exempted from the type of supervision examined here, such as insurance cooperatives), in an ordinary way (through *revisioni cooperative*) and extraordinary way (through *ispezioni straordinarie*). The *revisioni cooperative* may be conducted by cooperative associations on their own member cooperatives if they have been authorized to do so by the State, which also controls their activity.

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[60] In this way, the operational efficiency of the cooperative is monitored, as well as its member-oriented effectiveness (Hans-H. Münkner, 'Cooperative audit', cit., p. 108).

[61] On the history of Italian legislation on cooperative supervision, cf. P. Verrucoli, 'La società cooperativa' *Giuffr*è, Milano, 1958, pp. 437 ff. and G. Bonfante,'La legislazione cooperativa. Evoluzione e problema' *Giuffrè*, Milano, 1984, pp. 48 ff.

Cooperative supervision *(i)* shall combine consultancy and control, *(ii)* is aimed at the internal organs of the cooperative and *(iii)* has as its object the ascertainment of the functional and structural characteristics of the cooperative, and includes an examination of the cooperative's administrative-accounting management and the ascertainment of the consistency of the balance sheet (art. 4 of Legislative Decree n. 220/2002). The content of the supervision in question does not change with the size of the cooperative. The controlling organ and/or the statutory auditor work alongside the executors of cooperative supervision in the cases provided for by law or by the articles of association.

In the event that irregularities are discovered (including failure to pursue the mutual purpose) any measures to be imposed on the cooperative are decided by the *Ministero delle imprese e del made in Italy*; in the event of a crisis (a critical situation other than insolvency) or insolvency of the cooperative, the cooperative is subject to measures decided by the Ministry itself or by the territorially competent court, depending on which of these authorities arrives first.

According to Italian law, cooperative supervision can be defined as an activity of general interest, which, in implementation of the principle of horizontal subsidiarity, can be exercised by private entities, such as the associations representing the Italian cooperative movement, pursuant to art. 118, paragraph 4, of the Constitution.[62]

8. Conclusion.

This review of cooperative supervision in Italy and several other European States demonstrates diverse approaches to the cooperative supervisory function and the role of the State. Cooperative supervision plays an essential role in safeguarding the identity and proper functioning of cooperatives. Among the models of cooperative supervision examined here, the Italian model is the most statist and centralized; moreover, the role of the public administration is the most marked both in the execution of supervision and in the imposition of sanctions or measures that affect the activity and organization of the cooperative.

In terms of approaches by other European countries, at one end of the spectrum, the model in Great Britain relies on the minimalist approach to cooperative oversight by a public body, the FCA, with no legislated role for cooperative associations or federations. In stark contrast, Germany has a highly structured and association-based model centred on the Prüfungsverbände. In 2014, France introduced the five-year mandatory révision coopérative, with provision for external review under specific circumstance. In Spain, the absence of a public body specifically dedicated to cooperative supervision has meant that oversight occurs mainly through labour inspections and sanctions for severe violations of the cooperative principles. In Portugal, supervision is centralised in the public cooperative supervisory body CASES in Portugal. These systems reveal differing balances between State intervention, cooperative autonomy and the role of representative associations.

All countries respond in some way to the international expectation – reflected in the *ILO Recommendation 193*, the *UN 2001 Draft Guidelines* and the *ICA Statement* – that cooperatives be monitored to ensure their conformity with cooperative values and principles. However, it has been argued that these documents alone are too general and flexible and that in the specific area of cooperative

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[62] Art.118 provides that: 'The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity'.

supervision, countries will benefit from a more stringent and comprehensive set of guidelines and greater uniformity in their approach. These guidelines are available in the PECOL and were conceived by Hans-Hermann Münkner.

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HOW NON-MEMBER TRADE REGULATIONS HAVE AFFECTED THE EVOLUTION OF JAPANESE CONSUMER CO-OPS: REFLECTIONS FROM POLITICAL ECONOMY AND LEGAL ASPECTS

Key words: consumer cooperatives, Consumer Co-operatives Act, anti-cooperative campaign

ABSTRACT Prof. Hans Muenkner and I shared views on many legal issues concerning cooperatives. He agreed that the contemporary legal framework for co-operatives in Japan is an example of state intervention that is not necessarily negative in effect but rather it has created an order where individual and group interests can develop freely, and at the same time be protected against potentially dangerous and unfair business practices. Much depends on the context in which the regulations are made and with what intention.[1] However, our opinions differed when it came to regulations that ban non-member trade. In my view, these regulations are still hampering the autonomous development of Japanese consumer co-operatives in many ways. By way of background, this paper explains the political process that was driven by small retailers against consumer co-operatives. It then analyzes the legal rationale behind the prohibition on non-member trade and compares it to legislation in other jurisdictions. Finally, it describes how consumer co-operatives have made efforts to remove this handicap while strategically using the system to grow its membership.

Glossary:

CCA Consumer Co-operatives Act

CLJ Co-operative League of Japan

J-CCI Japan Chamber of Commerce and Industry

JCCU Japanese Consumer Co-operative Union

LRSA Large-scale Retail Stores Act

LDP Liberal Democratic Party

MITI Ministry of International Trade and Industry

METI Ministry of Economy, Trade and Industry

MHW Ministry of Health and Welfare

MHLW Ministry of Health, Labor and Welfare

1. Introduction

The late Professor Hans Muenkner was a world-renowned specialist and teacher of co-operative law. He was a reliable source of information on cooperative legislation in many Asian and European countries. I was fortunate to have collaborated on several occasions with Professor Muenkner. We met at ICA Research Conferences on many occasions and enjoyed discussing practical and theoretical questions arising from our shared interest in cooperative

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[1] Hans Muenkner (2013) *Worldwide Regulation of Co-operative Societies: An Overview*, EURICSE Working Paper no. 53.

law. While we agreed on most legal issues, we had different opinions on the effect of non-member trade regulations. He was of the view that the legal restrictions on non-member trade had *helped* Japanese consumer co-operatives to develop in both their associational and business aspects. I argued that they had developed *despite* those restrictions. Perhaps, our disagreement reflects perspectives from opposite sides. Non-member trade restrictions still hamper autonomous co-operative development in Japan in many ways. For instance, consumer co-operatives are unable to develop large stores that might attract non-members use or enter the power grid to sell renewable energy as that may also lead to non-member's use. This is why co-operatives make are keen to remove the handicap imposed by these restrictions.

The article starts with a description of the regulations that disadvantage consumer co-ops, with a focus on the total prohibition of non-member trade. It explains the background to these regulations including the campaigns against co-operatives by small retailers. Then, it analyzes the legal rationale behind the non-member trade prohibition and compares it with legislation in the other jurisdictions. Finally, it describes how consumer co-operatives have evolved into autonomous organizations that have used the system to their own advantage.[2]

2. Regulations banning non-member trade

There are a number of regulations that disadvantage consumer co-ops in Japan. For example, they were excluded from trading licenses for retailing rice and liquor to protect the vested interests of existing retailers. The *Corporate Tax Act* allowed a lower rate of tax to be applied to all types of co-ops discriminated against the largest consumer co-ops. The *Consumer Co-operative Act* (CCA) of 1948 imposed impediments from its outset, including the total banning of non-member trade, confining the trading area within a prefecture and the exclusion of credit business.

Article 12 of CCA provides for the utilization of businesses (texts are partly abridged, and underlined by the author):

> 1. No member shall be compelled to use the business of the Co-operative Society against its will.
>
> 2. Unless otherwise specifically provided for in the Bylaws, a person who belongs to the same household as a member shall be deemed to be a member with respect to the use of the Co-operative Society's businesses.
>
> 3. <u>A Co-operative Society may not allow persons other than its members to use its businesses</u>. However, this shall not apply in the following cases
>
> > (i) If the Co-operative Society has entered into an automobile liability insurance contract as provided for in Article 5 of the Automobile Liability Insurance Act (Act No. 97 of 1955) (hereinafter referred to as "liability insurance") with its members….
> >
> > (ii) In the event of the occurrence or threatened occurrence of an earthquake, windstorm, flood or other disaster or other emergency, if such

[2] Agricultural Cooperatives Act allows agricultural co-operatives to trade with non-members up to 20 percent of trade amount with members for the relevant business year in accordance with provisions of their bylaws. Some exceptions are provided; allowance of 25 percent for loans and savings, that of 100% for health care, no limits to loans for municipalities or nonprofits (Art.10, Sec.17 ff).

goods are supplied in an area where there is a temporary shortage in the supply of goods necessary for daily life.

(iii) Where the State or a local public entity makes available services commissioned by the State or a local public entity.

(iv) When a business that supplies certain goods is made available as provided for in the MHLW Ordinance there are justifiable reasons for making such a business available to persons other than the members of the Co-operative Society

(v) If the Co-operative Society makes its members use sports facilities and other facilities owned by the Co-operative Society … that are appropriate to be made available to the general public to the extent that they do not interfere with the use of the Co-operative Society's members.

4. Notwithstanding the main clause of the preceding paragraph, in addition to the cases provided for in the proviso of that paragraph, the Co-operative Society may allow persons other than its members to use its businesses (…). …However, the total amount of the share of use of each of the businesses set out in each item …by persons other than members in one business year shall not exceed the ratio specified by the MHLW Ordinance for each of the following businesses.

(i) In the event that an association by workplace makes persons pertaining to such workplace and specified by the MHLW Ordinance use the Goods Supply Business.

(ii) In the case of supplying such goods in remote islands or other areas with inconvenient transportation, where there are obstacles to the smooth supply of goods necessary for daily life, and where permission has been obtained from the administrative agency.

(iii) In addition to the cases listed in the preceding two items, in the event that the business prescribed by the MHLW Ordinance as a business in which it is deemed appropriate to allow persons other than the partners to use the business as prescribed by the MHLW Ordinance, and in the event that the business is so allowed by the administrative agency.

5. In the event that an application for the permission set out in item (ii) or (iii) of the preceding paragraph has been filed, the administrative agency may grant permission for the business of supplying goods to a person other than a member of the cooperative. The same shall apply in the following paragraph). (2) An administrative agency shall not grant the permission set forth in item (ii) or item (iii) of the preceding paragraph if it finds that there is a risk of influencing the business activities of small and medium-sized retail traders and significantly harming their interests by allowing them to use the business of supplying goods to persons other than its members.

6. The administrative agency may, if it finds it necessary, order the co-operative carrying out the business of supplying goods to take the following measures

(i) to clearly indicate at the place where the Goods Supply Business is conducted that such business is not made available to persons other than its members; and

(ii) Except in cases where the Goods Supply Business is to be used by a person who is not a member pursuant to the proviso of paragraph (3) or paragraph (4), a person who is not clearly identified as a member shall not be allowed to use the Goods Supply Business unless he/she presents a certificate indicating that he/she is a member.

Section 1 (voluntary use) and Section 2 (family membership) can be seen as provisions that meet the cooperative values and principles. However, the provisions of Section 3 and Section 4 create obstacles to consumer cooperative organizations in meticulous detail. While non-member trade is banned in principle, the exceptions are precisely defined (Table 1). These exceptions include some that require government permission and the others that do not require permission, while the extent of allowance varies from 20% or 100% of member's patronage to unlimited. Every year, JCCU negotiates with the MHWL to increase the exceptions. Section 5 deals with the consideration of coordination with small/medium-sized retailers' interests while Section 6 prescribes concrete measures for co-operatives to comply with these regulations.

Table 1. Non-member trade allowed in consumer co-ops

Government permission	Cases in which non-member trade are allowed	Extent to be allowed
Not required	Statutory car insurance for compensation	Unlimited
	Goods supplied in case of emergency	Unlimited
	Sales of monopolies	Unlimited
	Use of gymnastic and cultural facilities	Unlimited
	Business commissioned by governments	Unlimited
	Health and social care business	100% of MP
	Sales to institutions where co-op operates	20% of MP
Required	Goods supplied to remote areas	20% of MP
	Meals supplied to day care and nursing homes	20% of MP
	Goods supplied between co-ops	20% of MP
	Goods supplied to visitors to workplace co-op	20% of MP
	Goods supplied to community exchange events	20% of MP
	Use of co-op's charnel house	100% of MP
	Use of co-op's facilities in remote areas	20% of MP

MP: Member's patronage

How are these regulations to be evaluated in light of co-operative principles? Although a co-operative's fundamental purpose is to serve its members and to meet their common needs and aspirations, non-member trade has existed for a variety of reasons. Reliance on non-member trade is a weakness, since it undermines the co-operative identity. But its extent must be decided by the members themselves. In many jurisdictions, non-member trade is allowed if the by-laws stipulate or to the extent that it does not interrupt members in using its services. In this regard, it can be argued that the legal provisions on the complete prohibition of non-member trade are a violation of the principle of autonomy. This is the core problem. How, on the one hand, not to restrict the autonomy of the members, while, on the other hand, not to jeopardize this autonomy by allowing unrestricted non-member business.

3. The political process of making commercial policy and regulations

The retail industry has long been a battlefield of larger and smaller operators in the market economy. Japan was unique in that the number of retailers continued to grow until the 1980s. Underlying pressures in the retail industry resulted in protectionist legislation such as the *Department Store Act* of 1956 and the *Large-scale Retail Stores Act* of 1974. The latter Act included the emerging supermarket chains as the targets and required companies to gain approval for opening any new store with sales space of 3,000 m^2 or more. It also requires large stores to conform to various restrictions on operating hours per day and a minimum number of closing days per month. This Act was further amended up to 1992 to strengthen restrictions while in larger cities, the threshold was raised to 6,000 m^2.[3]

The CCA's provisions that prohibit consumer co-operatives from trading with non-members have had long-standing effects on the evolution of consumer cooperatives. The CCA was adopted at the Diet on July 5th, 1948, when a clause prohibiting the transaction with non-members was introduced by an MP of the conservative party who opposed the enactment of the law itself to protect SMEs. Originally, the government proposed that the provision on the trade with non-members would be allowed to the extent of 10% of member's patronage as far as it may not affect member's use and the bylaws provide so. However, the political process at that time resulted in the inclusion of the provision on the complete prohibition of non-member trade.

Consumer co-operatives were the target of persistent anti-cooperative campaigns by retail associations which started in Yonago City (Tottori Prefecture) in 1953. Retailers saw the small department store that was opened by the trade-union based consumer co-op as a menace to their business. They responded by purging wholesaler-suppliers from the chamber of commerce and pushing local governments to crack down on co-op's non-member trade. This move spread into larger cities in the western part of Japan and finally involved the Japan Chamber of Commerce and Industry (J-CCI). J-CCI adopted an opinion on consumer co-ops and company's staff canteens in 1955. These moves led to the enactment of the *Retail Business Special Measures Act* in 1959 bringing further tightening of restrictions to non-member trade to the CCA (obligation to show signboard of prohibition at stores, penalties in case of breaches) and the introduction of a 'coordination clause' with a request by the Ministry of International Trade and Industry (MITI) not to infringe the interests of small retailers. The Ministry of Health and Welfare (MHW) also conducted administrative inspections from time to time to gauge the extent of non-member trade in co-op stores. Thus, the political process of anti-cooperative campaigns has involved retail associations, ruling party LDP and several government ministries. The stance was also supplemented from the opposite side of politics. *Zenshoren* (National Federation of Democratic Organizations for Commerce and Industry) also insisted that consumer co-operatives should comply with these regulations.

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[3] Consumer co-ops had been exempted from this Act but regulated by the corresponding ministry's administrative notices.

Consumer co-operatives had to fight back right up until the last anti-cooperative campaign was staged in 1985-1986. During this campaign the retail association resolved to strengthen regulations banning non-member trade while the LDP decided to submit a private bill to amend the CCA to intensify regulations banning non-member trade. JCCU and consumer co-ops strongly reacted to this move by means of conferences, petitioning and academic investigation. The MHW set up a panel to discuss the future of consumer co-ops, recognizing their role as a countervailing power. It did not recommend revising the CCA. Finally, in 1987, the MHW published an administrative notice on matters relating to the supervision of governance. These events coincided with a shift in the government's commercial policy away from protecting small retailers towards pro-competition with strong pressure from the United States. Since 1990 the commercial regulations under the *Large-Scale Retail Stores Act* (LRSA) have been eased and finally replaced by the *Large-Scale Retail Store Sites Act* of 1998.[4]

The Japanese Consumer Co-operative Union (JCCU) has worked hard to bring about an easing of these regulations to bring them in line with other co-operative laws and to be consistent with government policies on deregulation, but their requests have been ignored. The legal rationale might be found in Article 9, which incorporates the principle of maximum services for members. However, Article 12 was introduced as a peremptory or imperative norm (jus cogen) fortified with provisions that carry a penalty in case of non-compliance.

Amendments to the CCA were introduced in 2007, covering a variety of issues. It was often cited as the first "full-fledged" amendment in nearly 60 years, since it introduced some deregulation measures for the first time. There were some background issues that prompted the revision. The insurance industry had requested the application of rigid disciplines to co-operative *Kyosai,*[5] and the competent ministries needed to respond. The MHLW intended to strengthen the provisions pertaining to the governance of consumer co-ops following the revision of other co-operative laws after the *Companies Act* was enacted in 2006. JCCU set up a Working Group to discuss revisions to the CCA in 2003 and decided on its policy to modernize the law on governance and to request the removal of provisions dealing with limitations on the consumer coops operational area to a single prefecture and the prohibition of non-member trade in 2006. The MHLW Social Welfare Division set up the Panel to review the CCA. When the Panel conducted interviews from the J-CCI, the Life Insurance Association and the General Insurance Association, different views on deregulation were expressed. J-CCI took a positive attitude, while trade associations of insurance companies were strongly opposed and regarded *Kyosai* as emergent competitors. Finally, the panel submitted its report to the ministry expressing the following views:

- The Co-op's social contributions through a wide range of activities for food safety and people's welfare in communities were highly appreciated in view of the public benefits.
- A direction for deregulation was expressed on the limited operational area and the prohibition of non-member trade, reflecting socio-economic changes.

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[4] This new law focuses on the environmental impacts of large-scale retailing such as noise, traffic jam and garbage disposal rather than the coordination of interests among retailers.

[5] *Kyosai* means an insurance co-operative set up under the co-operative laws. The Insurance Business Act regulates only the stock company and the mutual company while same kinds of regulations are applied to *Kyosai* by the competent ministries. Historically the insurance industry opposed co-operatives to enter the insurance business while together with foreign insurance companies it requests them to be regulated on the "equal footing".

- The need to strengthen governance in response to increased responsibility as enterprises was expressed by positioning the board as a legal entity and empowering auditors' checking functions.
- The position of health/welfare businesses and activities were clarified while separate account keeping and a prohibition on the distribution of dividends were required. Members' welfare activities including caring for the elderly and children could be funded through the coop's reserves.
- The need to introduce a set of rules concerning *Kyosai* business to protect policyholders' interests was expressed. Its separation from other businesses was recommended to separate the risk.

The amendment of the CCA drafted by the MHLW based on these recommendations was approved unanimously in the Diet. Although the framework for the prohibition of non-member trade was maintained, the regulations were eased to some extent. Retail businesses of consumer co-operatives in adjacent prefectures could be merged (except for insurance business) and exceptional cases allowing non-member trade were added to the positive list. The Japanese CO-OP Insurance Federation (JCIF) was set up, separating from JCCU in 2008. Since there was no provision for the division of co-operatives in the CCA, the latter had to invest in the share capital of the former, otherwise it would have to pay a huge amount of gift tax for the transfer of accumulated premiums.

4. The legal rationale for the banning of non-member trade

Alex Laidlaw cautioned that cooperatives are faced with an ideological crisis in his seminal work *Co-operatives in the Year 2000*. It was a starting point for the discussions leading to the Co-operative Identity that we are now consulting on how to articulate, live, communicate and protect. He criticized the practice of many conventional consumer co-operatives, saying "Where a high volume of non-member business is carried on, it should be regarded as a source of weakness rather than of strength."

The *Principles of European Cooperative Law* (*PECOL*) distinguishes "mutual co-operatives" from "general interest co-operatives", advocating mutual transaction of members as a basic concept. It summarizes its views on non-member cooperative transactions as follows:

(i) "Non-member cooperative transactions" are transactions between cooperatives and non-members for the provision of goods, services or jobs of the same kind as those provided to cooperator members.

(ii) Without prejudice to section 1.4(1) "Mutual cooperatives pursue their objective mainly through cooperative transactions with their cooperator members for the provision of goods, services or jobs", mutual cooperatives may engage in non-member cooperative transactions unless their statutes provide otherwise.

(iii) Mutual cooperatives engaging in non-member cooperative transactions shall give those non-members an option to become cooperator members and inform them about it.

(iv) When mutual cooperatives carry out non-member cooperative transactions they shall keep a separate account of such transactions. General interest cooperatives may also do so.

(v) Profits from non-member cooperative transactions are allocated to indivisible reserves.

These principles have been incorporated into national legislation for consumer cooperatives in many jurisdictions in a variety of ways. The German consumer cooperatives were not allowed to make non-member trades, but it became possible if it was stipulated in their bylaws. When the Co-operative Law (GenG) was amended in 1954 they lost the advantage of lower corporate tax rates. In Italy, the general co-operative law (Codice Civile) was amended in 2003 introducing the classification of cooperatives as "predominantly mutual" or "not predominantly mutual". The former applies when non-member transactions constitute less than 50% of turnover and these cooperatives are eligible for a lower corporate tax rate. The South Korean CCA is modelling the Japanese CCA in terms of non-member trade (total banning), the *Framework Act of Cooperatives* of 2012 provides for non-member trade (Art. 46, Sec. 2):

> Any cooperative may allow persons other than members of the cooperative to use its services to the extent that does not interrupt its members in using its services with the exception of services prescribed by Presidential Decree, as prescribed by the articles of association.

In comparison with such legal provisions, the Japanese provisions on non-member trade in the CCA are peculiar or outstanding. They can be better explained by the political process rather than legal reasoning.

5. Consumer co-op's evolution outwitting regulations prohibiting non-member trade

When the CCA was first introduced, the Co-operative League of Japan (CLJ) was disappointed that it had impediments such as the banning of non-member trade and limited operating areas. It had made strenuous efforts to enact its own draft bill with assistance from New Dealers in the Allied Forces government. However, it could not reverse the political process in 1948 when a majority of buying clubs generated after WWII had been bankrupted because of an improved rationing system. It started efforts to revise the CCA and remove restrictions while helping primaries to register under the CCA.

JCCU was set up as a national apex body of consumer co-ops in 1951 as a successor of CLJ.

It petitioned the MHW to amend the CCA, often drafting bills but it was not successful. JCCU called on primaries to organize nationwide campaigns for Co-op Months (October-November) to recruit new members, increase patronage at co-op shops and invest in co-ops' share capital. In this way, consumer co-ops have outwitted regulations, involving all customers as members to comply with non-member trade regulations, and raising member share capital to compensate for the lack of credit business.

In the 1950s, consumer cooperatives worked with trade unions to set up labor banks (Rokin) and insurance co-ops for workers (Rosai), partly seeking to organize workers, and partly for creating a substitute for the credit business that was not allowed by the CCA. The first Rokin was set up by Okayama Consumer Co-op Union while the second one was established by Hyogo Trade Union Congress and followed by other prefectural TUCs. JCCU helped to enact the *Labor Bank Act* of 1953. JCCU also helped to set up Rosai co-ops and their National Federation in 1957. These organizations joined together to set up national /prefectural councils for worker's welfare (Rofukukyo). These worker-oriented co-ops brought about the second boom after the short-lived mushrooming of buying clubs during 1945-1947.

In the 1960s, Japan enjoyed rapid economic expansion and a retail revolution that brought drastic changes to consumers' lives. At the same time, they suffered from the widespread use of chemicals in food production and air/water pollution. Housewives were keen on food safety and asked reliable farmers to provide pure, unadulterated milk instead of the gimmicks offered by major dairy companies. They formed buying clubs that had grown to "citizen co-ops", often assisted by managers/employees of university co-ops since the mid-sixties. They invented "joint buying" in which *Han* neighborhood groups played a pivotal role in arranging transactions without shops. Only members can trade with co-ops without infringing regulations, and this type of business could bring consumer participation and efficiency in a compatible way. Thus, the Japan-style consumer co-ops were born, with housewives as a driving force and home delivery as a business model and the dimensions of a social movement. Consumer co-ops made a double-digit growth per annum in membership and turnover during the 1970s and the 1980s, bringing about the third boom of consumer co-operatives.

Since 1990, consumer co-operative consortia were formed beyond prefectural borders avoiding the CCA regulations that confined the operations of primary coops within a prefecture. The consortia enabled economies of scale that could not be achieved by individual co-ops, while maintaining the latter's autonomy and independence. The extent of integration differs from one consortium to another. Some consortia are delegated all business functions, while others are confined to the procurement of products.

Today, consumer co-ops are the largest non-governmental organizations, with 30 million members or half of all households belonging to a consumer coop. They are financially supported by member's share capital (JPY 30,000 per capita compared with just £ 1 in the UK). Co-op consortia and the largest co-ops account for more than 90% of turnover. They have evolved as autonomous and independent organizations with strong member's participation.

JCCU keeps a unique non-partisan political stance and communicates with all political parties from LDP to leftist parties. Recently, the Ministry recognized the consumer co-op's contribution to the rehabilitation of people's lives after natural disasters (in 1995 and 2011) while local governments increasingly recognize the co-op's role in maintaining consumer services in depopulating communities.

The legal framework for consumer coops has resulted in the movement's self-reliance and adherence to membership. Coops had to enrol all the customers as members, relying on their members patronage and capital. They have promoted various ways to involve members in their administration through *Han* neighbourhood groups,[6] district committees and various consumer panels, in addition to the legal requirements of the AGM and the Board. In this way, they have developed the Japanese model of member participation based on the identity principle of membership as owner-investor and user. This adherence to membership has resulted in independent organizations, which may have contributed to their image of being closed to the society at large.

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[6] Han means a small unit of organization. It involves 3 members living in the proximity to exchange views, receive information from co-ops or submit/receive orders for home delivery.

Co-ops have often been regarded as left-wing organizations as they were active in consumerism and even pacifist campaigns which were against the views of the conservative government. In fact, many co-ops were closely associated with the opposition parties, while a small number of co-ops maintained contact with the ruling party. Since the late 1980s, the government came to recognize their role as the "consumer's countervailing power" (MHW Report 1986) admitting they have been supported by a large number of consumers and had made efforts to foster a favourable relationship with all political parties. They have worked for the sustainable development of the communities in which they operate and have strengthened partnerships with local governments in the fields of environmental protection and social welfare. Now they are expected to promote mutual help together with self-help, and public assistance (MHW Report 1998).

Consumer coops also made a parallel development of single purpose co-ops (retail, health, insurance and housing). The retail co-ops operating in communities have a membership based on housewives while workplace coops are often organized by trade unionists. Health co-ops have both healthy and non-healthy members whose average age is relatively high. The retail co-ops are direct affiliates of the JCCU, while health, insurance and housing co-ops have their own national federations, which are affiliated with the JCCU. Now retail and health insurance co-ops are involved in social services while care worker's co-ops are also created. Originating from the grass roots, they were easily set up by groups of consumers (at least 300 members), resulting in the competition for better services among co-ops operating in the same area. They had to merge to create economically viable co-ops. They also face challenges caused by deregulation and competition. The consumer co-ops are also subject to the same regulations and face stiffer competition although they are not placed on a level playing field, since the restrictive legal provisions are still unchanged.

6. Conclusion

This paper explains how the non-member trade prohibition disadvantages consumer co-operatives in Japan. It describes the political process against consumer co-operatives as a background. Then, it analyzed the legal rationale for the prohibition on non-member trade and compared it with similar legislation for consumer coops in other jurisdictions. Finally, it described how consumer co-operatives have evolved to respond to the regulation using it to their own advantage.

Consumer co-operatives have been targeted by small retailers' anti-cooperative campaigns throughout their history since 1945. The prohibition on non-member trade still exists and hampers consumer co-ops from undertaking new businesses such as renewable energy production and sales through power grids that might induce non-member trade, or the provision of services to non-members in depopulating communities to secure their access to food, daily necessities and eldercare etc. The current legal framework is based on outdated industrial policies and only allows non-member trade where it complies with a precisely defined purpose, specific membership qualification, and enlisted business activities. These limitations hamper people from freely setting up new co-operatives to meet their economic, social and cultural needs and aspirations. I argue that the remaining impediments must be removed from CCA while a *General Co-operatives Act* or *Framework Act of Co-operatives* is also needed to modernize co-operative laws that are still divided by outdated industrial policies. These general co-operative laws will enable people to set up new multi-stakeholder co-operatives, renewable energy co-operatives and social/community co-operatives to meet currents needs.

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FINANCIAMIENTO Y AUTONOMIA EN LA LEGISLACIÓN COOPERATIVA Y EL PENSAMIENTO DEL PROF.

ABSTRACT: For several decades now, it has clearly emerged that the social capital of cooperatives as a means for the fulfillment of its purpose, the provision of service, is only possible in the field of a strict mutuality. This is a situation almost completely ideal, for many of them who are forced to resort to external financing, to which they access under the same conditions as any other enterprise, except for some specific mechanisms provided for in some legislations.

Since the latest reformulation of the ICA Universal Principles of Cooperation in 1995, the possibility is expressly admitted for cooperatives to raise resources from external sources, as long as their members do not lose democratic control of their entities, that us to say their autonomy.

Cooperatives around the world have faced these limitations in different ways, mutating from the traditional financing model towards the application of a set of alternative instruments to obtain additional capital.

The tensions between financing and legislative autonomy are the focus of this work, based on the legislations of certain Latin American countries and in particular the Argentine Republic, to which we add the thinking of Prof. Hans-H. Münkner through his recommendations.

RESUMEN: Hace décadas se reconoce que el capital social de las cooperativas como medio suficiente para el cumplimiento de su causa -la prestación de servicio- sólo es posible en el ámbito una mutualidad estricta. Situación de cumplimiento prácticamente irrealizable para muchas de ellas, que se ven obligadas a recurrir al financiamiento externo, al que acceden en las mismas condiciones que cualquier otra empresa, excepto algunos mecanismos específicos previstos en ciertas legislaciones.

A partir de la última reformulación de los Principios Universales de la Cooperación en 1995, se admite en forma expresa la posibilidad de que estas entidades capten recursos de fuentes externas, siempre que sus miembros no pierdan el control democrático de sus entidades, es decir su autonomía.

Las cooperativas de todo el mundo han enfrentado estas limitaciones de diferentes maneras mutando desde el modelo tradicional de financiamiento hasta la aplicación de un conjunto de instrumentos alternativos para obtener capital adicional.

Las tensiones entre financiamiento y autonomía legislativa son el objeto de este trabajo, tomando como base las legislaciones de determinados países de América Latina, en particular de la República Argentina, a lo que sumamos el pensamiento del Prof. Hans-H. Münkner a través de sus recomendaciones.

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SUMARIO: 1. Introducción. 2. Alianza Cooperativa Internacional. Principios Universales de la Cooperación. 3. Financiamiento cooperativo. Recursos propios.3.1. Capital Social. 3.2. Reservas. 4. Conclusiones

1. Introducción

"Las cooperativas nacen como un instituto jurídico signado por un marcado hibridismo, porque coexisten notas que reflejan el ideario socialista utópico en el que se inspiraron sus primeros realizadores con otras propias de las estructuras organizativas de las empresas de neto corte capitalista, que adopta con adecuaciones , para asumir su propia identidad en el mundo del derecho, exhibiendo a menudo las tensiones entre su originaria concepción como instrumento de transformación social al servicio de las clases más necesitadas y el moderno rol de un instrumento policlasista al servicio de todas las clases sociales, integrándose de hecho a la economía de mercado."[1]

Donde más se acentúa este hibridismo es en su régimen económico, ya que coexisten en ellas un régimen de propiedad individual y otro de propiedad colectiva, la primera congruente con la concepción de las sociedades y la segunda semejante a la concepción patrimonial de las asociaciones que se traduce en el tratamiento dispensado a las reservas asignándoles el carácter de colectivas, sustraídas a la propiedad individual de los asociados. Esto es así en la generalidad de las legislaciones latinoamericanas.

La necesidad de financiamiento es un tema de discusión de hace años que se concretó en reformas de varias de las legislaciones cooperativas en el continente europeo. No obstante, algunas de estas han sido incorporadas por la legislación de nuestra región.

Cuando nos referimos al financiamiento distinguimos en interno y externo, es decir, en primer lugar, al que se obtiene a través de sus recursos propios -capital y reservas- y en segundo lugar, al externo que la cooperativa puede obtener como cualquier otra empresa a través del endeudamiento. Específicamente me centraré en sus recursos propios, su primera fuente de financiamiento, tomando como referencia las legislaciones de algunos países del Cono Sur americano, con especial mención a la ley de Argentina Nº 20.337 vigente desde 1973.

2. Alianza Cooperativa Internacional. Principios Universales de la Cooperación.

A partir de la tercera formulación de los Principios Universales de la Cooperación – realizada en 1995 en el Congreso del Centenario de la ACI- se introduce por primera vez una definición de cooperativas, en cual se precisa su doble naturaleza,[2] una asociación de personas y una empresa económica; no cualquier empresa, sino una organizada y gestionada en base a los Principios Universales de la Cooperación que en su conjunto definen la

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[1] Althaus, Alfredo. (1992). 'Los Fondos Sociales de las Cooperativas.' En Derecho Cooperativo Actual, *Anales de las jornadas Nacionales de Derecho Cooperativo*. Buenos Aires, Intercoop editora Cooperativa Ltda. Buenos Aires. República Argentina p 41-63, p41; siguiendo al mismo autor puede ampliarse en Althaus, Alfredo. (1977). *Tratado de Derecho Cooperativo*. 2da. ed. actualizada. Zeus, Rosario, Argentina 2° ed. actualizada -1977 p 261-292.

[2] "Una cooperativa es una asociación autónoma de personas que se han unido de forma voluntaria para satisfacer sus necesidades y aspiraciones económicas, sociales y culturales en común mediante una empresa de propiedad conjunta y democráticamente controlada."

naturaleza de una entidad como cooperativa, independientemente de la forma jurídica que adopte.[3]

Como primera caracterización de las leyes cooperativas de la región se observa un mayor respeto o fidelidad a la identidad cooperativa que se fue afinando con el transcurso del tiempo, a medida que los principios fueron proclamados por la Alianza Cooperativa Internacional, fundamentalmente a partir de la primera Declaración formal (París 1937), ya que anteriormente sólo se conocían a través de la experiencia y de la obra de autores y pensadores.[4]

Su perfil económico se centra en el 3º Principio de Participación Económica de sus miembro,[5] exhibiendo un régimen de propiedad de naturaleza mixta diferenciándose de otras formas jurídicas de organización de la empresa.[6]

La posibilidad de captar capital de fuentes externas se incorpora en el 4° Principio de Autonomía e Independencia, siendo una de las novedades de la última reformulación. Sin embargo, en esa época varios países de la Unión Europea ya habían incorporado en sus legislaciones reformas en esta dirección: reforzar los recursos financieros de estas entidades posibilitando la incorporación del llamado socio inversor, con distintas denominaciones, y otros instrumentos financieros. De allí la importancia del 4° Principio marcando límites a los fines de que la cooperativa no pierda el control de su gobierno democrático, en definitiva, su naturaleza jurídica.

Sobre esta cuestión, y apenas pronunciada la última reformulación, el Prof. Hans-H. Münkner, refiriéndose a las grandes empresas cooperativas decía que los problemas financieros de éstas deberían resolverse de forma cooperativa. Hacer públicas las acciones de una cooperativa es un contrasentido. Reclamar el control de los socios-usuarios y buscar inversores externos que se comprometan a no ejercer el control no es un concepto realista. Es ilusorio creer que a largo plazo un inversor perseguirá otros intereses que no sean el beneficio y el poder. La única base confiable de las cooperativas es su grupo de membresía organizado, en el que los miembros asumen sus tres roles: co-propietarios, co-decisores y usuarios.[7]

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[3] En la República Argentina a partir de la entrada en vigencia del Código Civil y Comercial, ley N° 26.994, las cooperativas son un tercer género, conforme con el art.148 inc g, diferente de las sociedades y las asociaciones. Durante muchos años se había discutido si eran sociedades, asociaciones o asociaciones bajo la forma de sociedad, posiciones todas con fundados argumentos.

[4] Cracogna 2023, p2

[5] "Los miembros contribuyen de manera equitativa al capital de la cooperativa y lo gestionan democráticamente. Al menos una parte de dicho capital suele ser propiedad común de la cooperativa. En general los miembros reciben una compensación limitada, si la hubiera, sobre el capital aportado destinan los excedentes repartibles a cualquiera de los fines siguientes: al desarrollo de la cooperativa —posiblemente mediante la creación de reservas, una parte al menos de las cuales será de carácter indivisible—, a la retribución de los miembros de manera proporcional a sus transacciones con la cooperativa y a sufragar otras actividades aprobadas por los miembros."

[6] En Brasil rige la ley cooperativas N°: 5764 de 1971. A partir de la ley N° 10.406 de 2003 la reforma del Código Civil abre un capítulo para las sociedades cooperativas reguladas en los arts. 1093 a 1096, clasificando a las cooperativas como sociedades simples independientemente de su objeto. Al respecto ver (Krueger, Bellato Kaluf y Campos Alves 2009) p 61-79

[7] Münkner Hans H. 1996, p 88

Respecto del tercer principio se han señalado observaciones y dificultades,[8] propias de traducción e interpretación por contener aspectos que en la anterior formulación se los trataba de forma separada y de los que se han realizado estudios muy importantes,[9] en especial en el contexto europeo y también América Latina .[10] Este principio tiene como objetivo valorizar el trabajo de los seres humanos, hacer que estos se apropien de los resultados de su propio trabajo, eliminando así la figura del intermediario. Comporta que todos los miembros participan en la constitución de los recursos económicos de la empresa, en la medida en que lo determinen sus normas internas, lo mismo ocurre en relación con el destino que deba darse a los excedentes obtenidos en el curso de las operaciones sociales como en la liquidación.[11]

Otra distinción es en cuanto a los *modelos ius-cooperativos. S*iguiendo a Cracogna,[12] en América Latina coexisten dos modelos de desarrollo cooperativo que siguieron lineamientos diferentes: en los países del Cono Sur en general la experiencia cooperativa precedió a la aparición de las leyes en la materia, de manera similar a lo que ocurrió en Europa en el siglo XIX , y en el resto de la región, países de la zona andina, Centroamérica y Caribe, el movimiento cooperativo nació fundamentalmente de fuente externa y con eventual apoyo en la tradición indígena local. Y en un trabajo posterior agrega que en los países en vías de desarrollo es dónde la legislación cooperativa constituye un verdadero elemento de promoción.[13]

En relación a las legislaciones cooperativas de los Estados miembros de la Unión Europea se han realizado distintos intentos de sistematización de las grandes tendencias de la legislación cooperativa en modelos *ius cooperativos,* a saber: *mutualista*, *economicista, sociológico, y neutro o anglosajón*[14] . Y otra que considera que en Europa coexisten dos concepciones en pugna: la *cooperación funcional o economicista* y la *cooperación social* o conforme a los valores ínsitos en los principios cooperativos.[15] Siguiendo a este último autor, el paradigma del modelo funcional o economicista es la legislación alemana, que presta mayor atención a los intereses económicos de su base social. Los ejes del modelo son el acceso a la cooperación de cualquier colectivo que experimente una necesidad económica y su flexibilidad, cuando no directamente la remisión a la autonomía privada, el régimen de

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[8] Cracogna 2018, p 21-36

[9]De los que no se puede dejar de mencionar: “Las notas de Orientación para los Principios Cooperativos”, ACI 2015: “La aplicación de los principios cooperativos y de los presentes documentos de orientación no es una doctrina que respetar ni un molde que restrinja la innovación empresarial de las cooperativas en su búsqueda por satisfacer las necesidades económicas, sociales, culturales y medioambientales de los miembros. La innovación para satisfacer las necesidades de los miembros cooperativos siempre ha sido el origen y el motor de la empresa cooperativa, y así seguirá siendo. Se trata de directrices que deben poder ser interpretadas por las cooperativas y que junto con los ejemplos de buenas prácticas que se incluyen, pretenden contribuir a fortalecer el creciente sector empresarial cooperativo de la economía mundial. El movimiento cooperativo mundial representado por la Alianza es muy diverso.”

[10] Fajardo, y otros 2013, p 1-20

[11] García Müller 2009, p 48

[12] Cracogna 1992, p 10-11

[13] Cracogna 2019, sobre esta cuestión, referido a la experiencia de países en desarrollo de otras regiones, el autor hace referencia al Prof. Hans-H. Münker, quien ha tratado con amplitud en diversas oportunidades este tema, destacando como publicación más interesante *“100 years Co-operative Credit Societies Act India,1904, ICA Regional Office for Asia and Pacific, New Delhi*,2005. p 22-23

[14] Dabormida 1989, p 11 y ss.

[15] Paniagua Zurera 2005, p 39- 40

distribución de resultados del ejercicio económico, el destino del haber social en caso de liquidación y del socio que se da de baja.

Más recientemente el Prof. Hans-H. Münkner ha señalado[16] que la Ley de Sociedades Cooperativas alemanas de 1889, con sus modificaciones hasta 2006, sigue el diseño de Hermann Schulze-Delitzsch, que concibe la sociedad cooperativa como una forma jurídica especial de asociación empresarial con el objetivo de promover a los socios, regida por una ley aplicable a todos los tipos de cooperativas. La mayoría de las modificaciones de esta ley se realizaron para satisfacer las necesidades de las sociedades cooperativas en crecimiento en lo que respecta a los aspectos financieros, de membresía y de gobernanza. El importante papel de las federaciones, así como los mecanismos de auditoría y control, se mantuvieron en gran medida sin cambios, pero hay tendencias generales a aproximar el derecho cooperativo al derecho de sociedades y a reemplazar las disposiciones especiales diseñadas para tipos jurídicos especiales por una ley general aplicable a todas las formas de organización, independientemente de su forma jurídica. Se muestra cómo estas tendencias han desdibujado el perfil originalmente claro de las sociedades cooperativas como un modelo jurídico distinto. En 2006 se introdujeron nuevas disposiciones para las pequeñas cooperativas.[17]

El modelo de cooperación social es más cercano a los principios cooperativos formulados por la ACI, al que se le agrega un plus axiológico que trasciende a la causa y a la estructura organizativa del modelo societario.[18]

La Alianza Cooperativa Internacional, a partir de su última reformulación de los Principios Universales de la Cooperación, denominada Declaración de Identidad Cooperativa, ha dado cabida a la posibilidad de que las cooperativas incorporen capital de terceros, aquel que no viene a utilizar el servicio de la entidad sino a invertir, aunque con limitaciones: “si reciben capital de fuentes externas, lo hacen en condiciones que garanticen el control democrático por parte de sus miembros y respeten su autonomía cooperativa”(4º Principio).

Sobre el significado de este principio y su carácter heterogéneo, se ha señalado que abarca dos aspectos dentro de un mismo enunciado. La primera oración reafirma su esencia como entidades autónomas de autoayuda gestionadas democráticamente por sus miembros, y a continuación después de esta afirmación inicial el texto avanza en establecer los límites y recaudos que las cooperativas deben observar en sus relaciones con agentes externos: gobiernos, inversores y otras organizaciones en general.[19]

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[16] Münker 2013, p 414 y ss

[17] En Argentina la figura de las cooperativas simplificadas fue introducida en el proyecto de reforma de 1994, que no logró sancionarse. El organismo de contralor (INAES)a través de la Res. N° 1000/2021, habilitaba la constitución de pequeñas cooperativas con un mínimo de tres asociados: SECCIÓN II, para las cooperativas de trabajo y las cooperativas de provisión de servicios para productores rurales con tres integrantes. pudiendo, en casos excepcionales, extenderse esta posibilidad a otros tipos cooperativos. Esta posibilidad fue dejada sin efecto por una Res. posterior N° 2867/2024. En América Latina esta tendencia ha sido recogida en Ley N° 2.069 de la República de Colombia, al reducir el mínimo de fundadores de veinte a tres personas y las legislaciones de la República de Chile, la República Oriental del Uruguay y los Estados Unidos Mexicanos, que habilitan la constitución de dichas entidades con un mínimo cinco integrantes.

[18] Paniagua Zurera, op. cit p 40

[19] Cracogna 2019, p 22

Sobre los principios cooperativos[20]y las tendencias y perspectivas hay numerosos artículos escritos, de prestigiosos juristas en esta materia. En particular, Fici,[21] plantea que desde una perspectiva global no limitada a un particular ordenamiento jurídico, es posible identificar cinco tendencias: 1) una mayor conciencia del papel del derecho cooperativo en el éxito de las cooperativas y del movimiento cooperativo; 2) una orientación a adaptar por ley la identidad cooperativa a las exigencias concretas de las cooperativas; 3) una tendencia a la convergencia de los derechos cooperativos nacionales; 4) una inclinación hacia la normalización de la sociedad cooperativa frente al enfoque más ideológico que caracterizó tiempos menos recientes; 5) la privatización de funciones estatales relativas a las cooperativas y participación de los organismos representativos del movimiento cooperativo en el desarrollo de las mismas.

En el contexto latinoamericano no se observa la coexistencia de dos modelos en pugna, como ocurre en la Unión Europea donde parecen inclinarse al modelo economicista de la cooperación y al que se le han realizado varias críticas. Tampoco se reproducen las dificultades que precedieron al Estatuto de la Sociedad Cooperativa Europea, que acompaña casi simultáneamente la aprobación de la Directiva del Consejo en lo que respecta a las implicación de los trabajadores[22] .

El método de armonización de las legislaciones en los países de la Unión Europea fue un proceso que si bien se pretendía en un primer momento realizar por las autoridades comunitarias, nunca se inició. Se reconoció que, a pesar de las diferencias entre las legislaciones nacionales, no era viable su armonización por la vía clásica de las directivas, sumada a la reticencia de los gobiernos al proceso de armonización [23]

En nuestra región sin dudas la Ley Marco para Cooperativas de América Latina en sus dos versiones,[24] ha tenido una importante influencia en la aproximación de las legislaciones, hacia el modelo de cooperación social. A su vez, el Estatuto de las Cooperativas del Mercosur, que no logró entrar en vigencia[25], no suponía la creación de un nuevo tipo sino una forma más de integración[26], siendo Uruguay el único país que lo incorpora por vía legal mediante la Ley N° 18.723 de 2011.[27].Vistas estas cuestiones previas, pasamos al tema del financiamiento cooperativo.

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[20] Ver Vargas Vasserot 2024, desde una visión más crítica "Los principios cooperativos, su re latividad y su discutido valor como fuentes del derecho".

[21] Fici 2015, p 223-224

[22] Cracogna 2004, p 984

[23] Farjardo García y Cracogna 2007, p 481 y ss.

[24] Ley marco de cooperativas para América Latina, OCA- Bogotá 1988 ACI- 2008.-

[25] Es importante señalar que el diseño institucional del Mercosur, concentra en tres órganos su capacidad decisoria, siendo una diferencia fundamental su naturaleza intergubernamental y no supranacional, como en el modelo de integración de la Unión Europea.

[26] Cracogna 2009, p 17 y ss

[27] Souza 2023, El autor realiza un completo desarrollo sobre los antecedentes y perspectivas del Estatuto de Cooperativas del Mercosur, dónde señala que es importante reconocer que Brasil, a través de la Ordenanza del Ministerio de Agricultura, Ganadería y Abastecimiento (MAPA) N° 1.395, de 21 de junio de 2017, entiende que ha incorporado el Estatuto de las Cooperativas del Mercosur a su ordenamiento jurídico. Sin embargo, entendemos que este acto delegado al Poder Ejecutivo no exime la importancia de la incorporación de las Cooperativas del Mercosur a la Ley nº 5.764, p 329

3. Financiamiento cooperativo. Recursos propios

Cuando nos referimos al financiamiento cooperativo, distinguimos en interno (sus recursos propios: capital social y reservas) y externo (endeudamiento o recursos ajenos, al que las cooperativas recurren en las mismas condiciones que cualquier otra empresa).

3.1 *Capital social*

El capital social, en general, cumple una doble función: como fuente de financiamiento, para el desarrollo de la actividad económica constitutiva del objeto social y como medida de la participación social de los asociados. Nos referimos al capital desde punto de vista jurídico.

Debido a la naturaleza personalista de las cooperativas, el capital es indiferente para el ejercicio de los derechos políticos y los inherentes a la actividad mutualista, excepto cuando se establezca un capital proporcional al uso real o potencial de los servicios sociales. Sí califica en relación a los derechos de contenido patrimonial, cuando se disponga el pago de un interés o dividendo limitado al capital y el derecho al reembolso de las cuotas sociales.

No gobierna, rige la regla de un hombre un voto con las excepciones posibles, como admiten algunas legislaciones para las cooperativas de grado superior: un número de votos proporcional volumen de las operaciones o al número de asociados o a ambos. En definitiva, se propone otra forma de igualdad: la proporcionalidad.[28]

Debido a su variabilidad e ilimitación[29], puede aumentarse sin límite y sin necesidad de modificación estatutaria pero también puede disminuir. Consecuencia de ello es su relativa intangibilidad.

La variabilidad del capital se la ha señalado como un rasgo de debilidad con relación a la fijeza del capital de las sociedades, no cumpliendo cabalmente las mismas funciones que se le asignan al capital fijo de éstas, en especial la función de garantía, (desde hace tiempo en crisis en materia societaria) prevista en el régimen societario en protección de los terceros. No obstante, siempre se ha señalado que esta apuntada fragilidad es compensada con el tratamiento que se les asignan a las reservas de carácter irrepartible.

En cuanto a la función productiva - un capital adecuado para el desarrollo de sus actividades- tampoco sería cumplida y sólo podría hacerlo en el supuesto de un capital proporcional al uso real o potencial de los servicios sociales por parte de los asociados.

Por último, la función organizativa: los derechos de los asociados no se construyen sobre la geometría del capital ya que interesa el asociado como tal, y no como aportador de capital.

Hasta aquí hemos caracterizado lo que podríamos la configuración tradicional del capital social.

Si nos remitimos a la ley de Argentina Nº 20.337, tenemos que tener en cuenta que es una ley promulgada en una época inflacionaria, en la que se hallaba vigente un modelo de economía

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[28] Ley Argentina Art. 85.- Régimen. Las cooperativas de grado superior se rigen por las disposiciones de la presente ley Representación y voto. El estatuto debe establecer el régimen de representación y voto, que podrá ser proporcional al número de asociados, al volumen de operaciones o a ambos, a condición de fijar un mínimo y un máximo que aseguren la participación de todas las asociadas e impidan el predominio excluyente de alguna de ellas. Ley de cooperativas de Paraguay art.91, Ley de cooperativas de la República Oriental del Uruguay art 8 inc.6; Ley 5764 de Brasil art.4 inc 5.

[29] Argentina art.2 inc1, Brasil Art:4 II, Paraguay art. 5 inc. c, Venezuela art. 47, Chile variable e ilimitado, a partir de mínimo que fije los Estatutos art. 31, Uruguay art8 inc3, Ecuador art.49.

cerrada, con un estado altamente intervencionista, y dentro de este contexto el capital revestía relativamente poca importancia, por lo que su regulación se adecuó a los modelos tradicionales,[30] como se ha descripto. Cumplía una función de carácter instrumental, un medio para obtener el servicio que la cooperativa brinda y no en un fin en sí mismo.

Desde hace tiempo se viene sosteniendo que una función efectiva sólo es posible dentro del ámbito de una estricta mutualidad, en la que todos los asociados sean efectivamente usuarios de los servicios y con el agregado de que la magnitud de sus aportaciones individuales guarde relación con la extensión del goce de sus servicios, situación más ideal que real.

La realidad muestra que la cooperativa cuenta con asociados no usuarios, sea porque dejaron de utilizar el servicio o cuyas aportaciones no son suficientes para acceder al goce del mismo. Surge entonces la necesidad de morigerar el rigor mutualista, so riesgo de alejar a la cooperativa de capitales que pueden ser indispensables para su existencia y crecimiento. [31] El único aliciente estaría dado por la posibilidad de su retribución,[32] en una medida limitada, que tiene sus orígenes en las cooperativas de los Pioneros de Rochdale.

En la última reformulación de los principios cooperativos se señala que no es obligatorio pero que tampoco es prohibido pagarlo en una medida limitada que refleje la tasa prevaleciente en el mercado, señalándose que en los países económicamente desarrollados se requiere mayor flexibilidad, y que el problema del capital debe ser abordado de un modo más elástico.

Otra variante es el capital proporcional al uso de los servicios: el estatuto puede establecer un procedimiento para la formación e incremento del capital donde cada socio aporte en la medida de los servicios que requiera, alcanzando de esa manera la medida adecuada a las necesidades de la cooperativa. Así está previsto en la Ley Argentina art. 27, la ley de Brasil art 24 párrafo 1° y 27 párrafo 2°, Venezuela art. 47 Uruguay art.59, en forma optativa, dejando librado a que cada cooperativa resuelva su utilización. También el Proyecto de ley Marco para Cooperativas de América latina, en sus dos versiones, regula este procedimiento (OCA-Bogotá -1988 art. 37 y ACI -2008 art.37)

La capitalización de los intereses y excedentes, por su parte, si bien no implica un desembolso para el asociado, significa que algunos detentarán una participación en el capital desproporcionada en relación a los servicios utilizados; que no les generará ningún aliciente en cuanto al ejercicio de los derechos políticos ni en la actividad mutualista, lo que en la práctica puede tener un resultado contraproducente ya que se elimina la ventaja mutualista, esto es devolver por vía del retorno aquello que ha pagado de más o recibido de menos.

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[30] Cracogna 1996, p 7

[31] Althaus 1992, op cit, p 45

[32] En las legislaciones de Argentina: Art.2 inc 4 Art. 42 inc 4., Paraguay Art:38, denominados certificados de aportación y Art. 40 establece que el interés sobre el capital será siempre limitado, Brasil, Art. 24 párrafo 3°, Perú: art. 40 en general el pago del llamado interés al capital se encuentra subordinado a la existencia de excedentes. La diferencia en relación al resto la encontramos en la ley de cooperativas de Uruguay la que distingue: Art 65 (Participaciones subordinadas). - Son aquellos recursos financieros aportados por socios o no socios que se incorporan al patrimonio de la cooperativa, sujetos al riesgo de la gestión y cuya remuneración queda subordinada a la existencia de excedentes netos de gestión de la cooperativa, con arreglo a lo previsto por el artículo 70 de la presente ley. Art: 66 (Participaciones con interés). - Son recursos financieros aportados por socios o no socios que se incorporan al patrimonio de la cooperativa, sujetos al riesgo de la gestión, y reciben una remuneración con independencia de la existencia o no de excedentes netos de gestión.

(Leyes de Argentina art. 44, Ecuador art. 54 Perú art.48, Paraguay art.45, Uruguay art. 71 y Venezuela art: 54).

Algunas legislaciones prevén que la asamblea pueda resolver el aumento del aporte de capital de los asociados. En la ley argentina no está prevista esta posibilidad y entendemos que ello no sería viable en los sistemas que no contemplen esta posibilidad legal. Porque teniendo la suscripción naturaleza contractual dicha obligación no podría nacer sin el concurso de quien devendrá deudor de la integración, no resultando vinculante el acuerdo asambleario para los disidentes.[33]

Capital mínimo: es uno de los recursos a los que se recurre para corregir la distorsión del capital. En general no se fijan mínimos (excepto en las cooperativas que desarrollan actividad financiera y aseguradora, en países en que estas entidades pueden prestar este servicio, como es el caso de Argentina). La ley de Chile, art. 31, establece que será variable e ilimitado a partir del mínimo que fijen sus estatutos. La novedad la incorpora Brasil a través de la reforma del Código Civil de 2003, que posibilita la constitución de cooperativas sin capital.

El revalúo de cuotas sociales a efectos de ponerlas a cubierto del deterioro producido por la inflación y brindar la posibilidad que sus titulares conserven su valor real, es un mecanismo adoptado por las legislaciones de la región. En particular la Ley Argentina, arts. 39 y 45 establece que las cooperativas pueden revaluar conforme a las disposiciones que dicte la autoridad de aplicación.[34] Asimismo Chile art. 31, Paraguay art. 50 Uruguay art. 52 inc 6 y art. 68 Sección VII- Re expresiones contables. También está previsto en el Proyecto de Ley Marco para Cooperativas de América Latina.

Fondos rotatorios: la Ley de Perú, art. 50, autoriza que los estatutos o resolución de asamblea dispongan realizar retenciones en calidad de fondo rotatorio en operaciones productivas y con cargo de devolución, en las condiciones y plazos que se establezcan. Se retienen por un cierto número de años, al cabo de los cuales se van devolviendo; de esta manera los socios se van capitalizado permanentemente, pero al mismo tiempo van recuperando los aportes de años anteriores.

Según la Ley de Cooperativas de Venezuela (art. 46) las aportaciones son individuales, y podrán hacerse en dinero, especie o trabajo, convencionalmente valuados, en la forma y plazo que establezca el estatuto. De cualquier tipo de aportaciones se emitirán certificados u otro documento nominativo representativo de una o más de ellas. Estas aportaciones podrán ser para la constitución del capital necesario, rotativas, de inversión u otras modalidades. El estatuto establecerá las normas para cada tipo de aportación, cuáles podrán recibir interés y cuál será el límite del mismo.

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[33] Althaus 1992, op cit, p50

[34] En Argentina se han dictado varias la última Res. N° 996/21 sobre la base RT 51 “Normas contables profesionales: aspectos particulares de exposición contable y procedimiento de auditorías para entes cooperativos, reglamentando el art 39 LC”, siguiendo el criterio de la derogada Res. Nº: 247/09 resuelve, la clasificación del capital cooperativo, en su artículo 3º: El capital suscripto por los asociados y las sucesivas capitalizaciones de ajustes de capital y de excedentes repartibles que les fueran adjudicadas deben incluirse como parte integrante del Estado de Evolución del Patrimonio Neto resolviendo el conflicto que tuvo como disparador la denominada NIC 32, en adelante NIIF, que reabrió el debate sobre la naturaleza de las aportaciones de los asociados en las cooperativas. (Referencia: EX-2021-53361092- -APN-MGESYA#INAES - Aspectos particulares de exposición contable y procedimientos de auditoría para entes cooperativos. Reglamentación).

La Ley de Cooperativas de Bolivia N° 356 de 2013 (art. 41) distingue los certificados de aportación de los certificados de participación, otorgados éstos preferentemente a asociados, o a personas ajenas a las cooperativas.

La Ley de Cooperativas Nº 18.407 de la República del Uruguay es la que más ha avanzado en los aspectos económicos, patrimoniales y financieros. Estos fueron objeto de una prolija regulación y hay una completa definición de recursos patrimoniales y no patrimoniales con que pueden contar las cooperativas para el cumplimiento de sus fines. Permite, si así lo establecen los estatutos, la emisión de participaciones de interés, subordinadas y otros instrumentos de capitalización que puedan crearse, a cuyos tenedores no se les asignan derechos políticos ni posibilidad de integrar ningún órgano social, a excepción de la comisión fiscal, siempre que el estatuto lo prevea. En aras de mantener la autonomía de la cooperativa, establece que los recursos captados por esta vía no pueden superar el 50% de su patrimonio.[35] Tanto los socios como los no socios, en caso de liquidación estos instrumentos concurrirán a la misma en pie de igualdad con los socios comunes. Introduce la figura de las cooperativas mixtas (art. 90) en las que existen socios minoritarios cuyo derecho de voto en las asambleas se podrá determinar de modo exclusivo o preferente en función del capital aportado, estableciendo una regulada distribución de los votos: 51% a votos cooperativistas y el 49% en acciones con voto, que pueden ser libremente negociables en el mercado, lo que constituye una novedad en el contexto regional.

En Argentina hubo también intentos de reformas de la legislación en esta dirección en 1994, impulsada por el entonces INAC (Instituto Nacional de Acción Cooperativa) que designó una comisión para el estudio de las modificaciones integrada por representantes del gobierno y del movimiento cooperativo. Dicha comisión propiciaba que el estatuto pudiera prever la existencia de un capital cooperativo y un capital accionario y otras fuentes de financiamiento, tales como reservas facultativas para distintos propósitos, siempre que sean razonables y respondan a una prudente administración; la posibilidad que el estatuto previera la emisión de títulos de deuda cooperativa para la captación de ahorro de asociados o de terceros que vendrían a sumarse al régimen de obligaciones negociables vigente al que tienen acceso las cooperativas.[36]

Al no lograrse la proyectada reforma, la autoridad de aplicación dicta las Res. N° 349/95 (ex INAC) y Res. N° 593/99(ex INACYM), referidas a los TICOCA (Títulos Cooperativos de Capitalización) mediante las que se crea un capital complementario, con preferencias al pago de un dividendo, diferenciándose de la retribución tradicional. Disponen que para el caso de insuficiencia de excedentes su pago se diferirá a ejercicios futuros como así también prevén preferencias vinculadas al reembolso, pero sin derechos políticos para sus tenedores. La principal crítica a esta resolución es que vulnera normas imperativas de la ley vigente, que prohíbe todo tipo de ventajas y privilegios vinculados al capital. Por otra parte, la Res. N° 1027/96 prevé suspensión del reembolso de las cuotas sociales con la finalidad de dar mayor permanencia al capital. También hubo otro intento de reformas a través del llamado Anteproyecto de Ley Federal de Cooperativas y Mutuales de 2015, que se discutió en varios foros sin llegar al Congreso.

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[35] Reyes Lavega y Guitierrez Fiori 2009, p 160

[36] Cracogna 1996, op cit, p 10-11

La ley Marco Para Cooperativas de América Latina aprobado por OCA 1988, y su segunda versión 2008, da respuesta a esta demanda de más capital incorporando la figura del socio de apoyo.[37]

3.2 *Reservas*

Las reservas no constituyen una originalidad en las cooperativas ya que también existen en las sociedades. La diferencia está en el tratamiento que se les asigna en unas y otras: en las sociedades son utilidades de percepción diferida, el socio nunca pierde su derecho de propiedad, que se hace efectivo al momento de la liquidación, resolución parcial o la transferencia de su participación. En las cooperativas en general, son irrepartibles, participan de la naturaleza de las asociaciones civiles y en la ley argentina el único que tiene vocación al sobrante patrimonial es el Estado con fines de promoción del cooperativismo.

Como fuente de financiamiento, las ventajas de la constitución de las reservas en las cooperativas consisten en que cumplen un rol más relevante que en las sociedades. Habida cuenta de su irrepartibilidad no están sujetas a las contingencias del capital (retiro, receso o exclusión de asociados) no devengan costo alguno, no tienen un límite para su constitución ni están sujetas a una proporción del capital. Tal es el régimen en Argentina.

No obstante, sus ventajas, no son siempre la solución para los problemas de financiamiento de las cooperativas, porque su crecimiento es gradual y suponen una cooperativa en funcionamiento con resultados positivos.

También hay que tener presente que la cooperativa está obligada a la constitución de otros fondos sociales, formándose un patrimonio social irrepartible que implica una limitación a la distribución de los excedentes y a la retribución del capital-derivada de su propia naturaleza-que no se da en las sociedades.

En la ley argentina la irrepartibilidad también se manifiesta en el destino desinteresado del sobrante patrimonial en caso de liquidación (arts. 95-101), en los supuestos de retiro de asociados (art. 36) y en la prohibición de incrementar el derecho de ingreso, si lo hubiere, en compensación de las reservas (art. 18). También se expresa en la prohibición de la transformación de las cooperativas (art. 6º)[38], lo que sería una manera indirecta de apropiación y en la prohibición de capitalizarlas, que debe reputarse implícita cuando se le atribuye el carácter de irrepartible. El origen de su irrepartibilidad se remonta a las cooperativas pre-rochdalianas, y su fundamento es la causa no lucrativa, que se violaría si los asociados se apropiaran de excedentes que no contribuyeron a formar.

Conforme la Ley 20.337 las reservas se constituyen con una porción de los excedentes, estableciendo de manera imperativa la constitución de reserva legal, con el 5% de los excedentes provenientes de servicios prestados a asociados (art. 42 inc. 1) y con la totalidad

[37] "Socios de apoyo: Igualmente podrán ser socios los organismos cooperativos de cualquier grado, las entidades sin ánimo de lucro, las agencias nacionales e internacionales de fomento y el Estado, aunque no utilicen sus servicios, siempre y cuando se asocien para apoyar el desarrollo empresarial de la cooperativa. Los socios que se vinculen a la cooperativa para apoyar su desarrollo empresarial, podrán tener hasta el treinta por ciento de los votos de la asamblea y, si el estatuto lo permite, podrán formar parte del consejo de administración o de la junta de vigilancia en un porcentaje no superior a una tercera parte de sus integrantes. En ningún caso podrán formar la mayoría para adoptar decisiones."

[38] La ley de Cooperativas de Uruguay incorpora la posibilidad de la transformación de las cooperativas art. 11 sujeta a determinado requisitos y con anterioridad Venezuela art. 26 inc 8 Chile art. 46

de los generados por la prestación de servicios a no asociados, derivados a una “cuenta especial de reserva” (art. 42 in fine). Todas tienen carácter irrepartible.

En cuanto a la posibilidad de constitución de otras reservas, la Ley de Argentina guarda silencio. Por remisión expresa del art. 118 al régimen de las sociedades anónimas como norma supletoria, sería factible, siguiendo la tendencia de las legislaciones de la región. Sin embargo, la autoridad de aplicación se ha pronunciado a través de una antigua resolución con carácter restrictivo basada en que su constitución implica una reducción del excedente y por ende una disminución del retorno, desvirtuando uno de los preceptos básicos del sistema cooperativo. El proyecto de reforma a la ley vigente lo admitía, ofreciendo un modelo de configuración del capital y tratamiento de las reservas más flexible, brindando una mayor autonomía. El Proyecto de ley Marco para Cooperativas de América Latina, establece la posibilidad de constituir otras reservas, reflejando la tendencia actual en el contexto regional.[39]

4. Conclusiones

En este trabajo se ha tratado de referenciar la aproximación existente en cuanto a la regulación de los recursos propios en las legislaciones de la región y algunas de las variantes que exhibe dicho contexto.

La necesidad de más capital o de una configuración distinta, es siempre un tema de discusión. La legislación que más avanzó es le Ley de Cooperativas de la República Oriental del Uruguay, la que ha tomado como fuentes la Ley Marco para las Cooperativas de América Latina, la legislación española tanto nacional como autonómica, la ley de Argentina, y en menor medida las leyes de cooperativas de Paraguay, Brasil y Chile.[40] Es la que ofrece un mayor marco de autonomía en respuesta a las necesidades de estas entidades.

Las legislaciones europeas han iniciado la exploración de estos caminos, fundadas en la necesidad de mayor financiamiento frente a las limitaciones del capital en su configuración tradicional, incorporando hace tiempo distintas categorías de socios con distintas denominaciones y otros instrumentos financieros, posibilitando formar parte de los órganos de administración y fiscalización, aunque fijando limites que impidan su predominio.

La idea de acercar el gran capital financiero con una mera participación minoritaria en los órganos de administración y fiscalización es poco atractiva, porque de ninguna manera le asegura el control interno que sin duda apetecerá para asegurar el rendimiento de su inversión.

Pero también hay que tener presente que los riesgos de pérdida del control, pueden darse aún sin reforma de la legislación y podrían ser ejercidos por inversores por vía puramente contractual e inclusive de hecho, de la misma manera que la prohibición de la transformación en las cooperativas deviene ilusoria ante la posibilidad de enajenar su fondo de comercio, con la consiguiente descooperativización de la empresa.

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[39] Para ampliar en referencia al contexto regional ver (Cracogna 2013) “Armonización del Derecho Cooperativo en América Latina Desafíos y oportunidades” 25-33 https://doi.org/10.18543/dec-3-2013 p 25-33.

[40] Reyes Lavega y Gutiérrez Fiori 2009, op cit, p156

Quizás para la participación del gran capital financiero parecerían más favorables emprendimientos conjuntos de índole asociativa o contractual con mayores perspectivas de éxito y reciprocas seguridades, sin correr el riesgo de su desnaturalización.

La ley argentina 20.337 cumplió más de 50 años de vigencia. Por su técnica legislativa ha servido de antecedente para la reforma y sanción de otras de la región; no obstante, es perfectible. Dar respuesta a la necesidad de más instrumentos de financiación es una cuestión aún pendiente, sin perder el sentido que la actividad social de la cooperativa se orienta necesariamente a sus asociados que son los destinatarios principales de sus actividades económicas y sociales; en suma, una mutualidad más flexible.

Finalmente cabe cerrar esta colaboración reiterando algunas de las recomendaciones de nuestro homenajeado referidas a las grandes cooperativas: "en lugar de buscar una solución mágica en el mercado de valores, los problemas financieros de las cooperativas *deberían resolverse de forma cooperativa*; la única base confiable de las cooperativas es su grupo de membresía organizado, en el que los miembros asumen sus tres roles: co-propietarios, co-decisores y usuarios."

"Si la propiedad de los miembros se interpreta como proporcional al uso que los miembros hacen de las instalaciones y servicios de la cooperativa, se minimiza el conflicto entre usuarios y propietarios sobre la asignación de los resultados económicos."

"Sin propiedad miembro-usuario no hay autorresponsabilidad ni control efectivo miembro-usuario."[41]

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[41] Münker, Hans-H. 1996, op.cit 86-89

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Jeon, Hyeong-Soo*· Kang, Yeon-Woo+

TRANSFORMATION PROBLEMS OF CRAFT PRODUCTION COOPERATIVES (PGH) IN THE FORMER GERMAN DEMOCRATIC REPUBLIC (GDR) WITHIN THE FRAMEWORK OF THE REUNIFICATION OF GERMANY

----In memory of Prof. Hans-H. Münkner---

ABSTRACT: The reunification of Germany, characterized by a substantial system change from the socialist planned economy to the social market economy, was ultimately a political decision rather than an inevitability. It was a choice based on the expectation that the social costs of reunification would be no greater than those of maintaining Germany's division. Had this expectation not been fulfilled, the transformation would have been the wrong choice and would have gone down in history as a bad example. To prevent this outcome, it was essential to minimize the social costs of transformation as far as possible. This objective could only be achieved through the successful introduction and consolidation of the social market economy in the new federal states.

From this perspective, the paper examines the economic, political, and legal challenges involved in converting PGHs in the former GDR and highlights cost-reducing approaches to transformation as potential solutions to these problems. The German experience may offer valuable lessons for Korea if it ever succeeds in uniting North and South Korea. Münkner observes, "for Korean cooperatives in the event of unification of the country, much can be learned from German experience, and in particular from costly mistakes committed during German unification".[1]

KEYWORDS: German reunification, Craft Production Cooperatives (PGH), transformation problems, Social Market Economy.

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1 H-H Munkner, 2010.

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TRANSFORMATIONSPROBLEME VON PRODUKTIONSGENOSSENSCHAFTEN DES HANDWERKS (PGH) IN DER EHEMALIGEN DEUTSCHEN DEMOKRATISCHEN REPUBLIK (DDR) IM RAHMEN DER WIEDERVEREINIGUNG DEUTSCHLANDS
---Prof. Dr. iur. Hans-H. Münkner zum Gedächtnis---

KURZFASSUNG: Die durch einen wesentlichen Systemwandel von der sozialistischen Planwirtschaft zur sozialen Marktwirtschaft gekennzeichnete Wiedervereinigung Deutschlands war zwar eine politische Entscheidung, aber sie war kein Zwang, sondern eine Wahl, da zu erwarten war, daß die sozialen Alternativkosten der Wiedervereinigung zumindest nicht höher als die der Aufrechterhaltung der Teilung sein würden. Aber würden die Erwartungen in sie nicht erfüllt, so wäre die Transformation zur falschen Wahl geworden und sie wäre als schlechtes Beispiel in die Geschichte eingegangen. Um dies zu vermeiden, mussten die sozialen Alternativkosten der Transformation möglichst minimiert werden. Dies konnte nur dann realisiert werden, wenn die soziale Marktwirtschaft erfolgreich in den neuen Bundesländern eingeführt und dort konsolidiert wurde.

Unter diesem Aspekt werden die wirtschaftlichen, politischen und rechtlichen Probleme der Umwandlung ehemaliger PGH in der ehemaligen DDR beleuchtet und der Versuch gemacht, die kostenmindernden Möglichkeiten der Umwandlung als Problemlösungsansätze zu vermitteln. Davon könnte das geteilte Korea lernen, wenn es einmal gelingen sollte, auch Nord- und Südkorea zu vereinigen. In diesem Sinnzusammenhang ist Münkner der Meinung "for Korean co-operatives in the event of unification of the country, much can be learned from German experience and in particular from costly mistakes committed during German unification (Münkner 2010)."

KENNWÖRTER: Deutsche Wiedervereinigung, Produktionsgenossenschaften des Handwerks (PGH), Transformationsprobleme, soziale Marktwirtschaft.

1. Vorbemerkung

Mit dem Systemwandel von der sozialistischen Planwirtschaft zur sozialen Marktwirtschaft mußten sich die PGH dem Genossenschaftswesen in den alten Bundesländern anpassen. Die damit verbundenen Probleme konnten aber nicht zuletzt als die eigenen der PGH betrachtet werden. Auch wenn die PGH als ausführende Organe der sozialistischen Planwirtschaft fungierten, darf die Bedeutung der PGH im Handwerk der DDR nicht unterschätzt werden.

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Über 1/3 aller Beschäftigten des Handwerks waren in PGH tätig, womit sie 60% der Umsätze in diesem Bereich erbrachten. Gemeint ist damit, daß die PGH insgesamt das Handwerk der DDR verkörperten.

Die Umgestaltung der PGH hatte daher eine grundlegende Veränderung der Handwerksstruktur der DDR zur Voraussetzung. Die Befürchtung war, dass die staatlichen Betriebe der DDR in westdeutsche Konzerne überführt würden und dass das sich hieraus ergebende Monopol wiederum die ostdeutsche Wirtschaft beherrschen würde. Die Errichtung monopolistischer Strukturen ist und war keine Forderung der sozialen Marktwirtschaft und noch weniger ein Ziel der Wiedervereinigung Deutschlands. Wichtig war vielmehr, dass die mittelständischen Wirtschaften, die in der ehemaligen DDR nicht existierten, dort als Wegbereiter für die soziale Marktwirtschaft entwickelt und gefördert würden. Dafür war erforderlich, dass die wirtschaftliche Freiheit des Einzelnen, die in der sozialistischen Planwirtschaft unter Kontrolle gebracht worden war, wieder gewährleistet würde. Als der dafür geeignete Rahmen wurde die PGH-Verordnung (PGH-VO) erlassen,2 und zwar mit dem Ziel, die sozialistische Natur der PGH zu beseitigen und sie zugleich der neuen Marktwirtschaft anzupassen. Mit der PGH-VO wurde den PGH der Weg für ihre künftige Entwicklung gewiesen.

2. Besonderheiten der PGH

Im Handwerk und ebenso in der Landwirtschaft der ehemaligen DDR basierte die Genossenschaftspolitik auf Gedanken von Lenin. Diese wurden gezielt umgesetzt, um die sozialistische Planwirtschaft aufzubauen und damit den Sozialismus sicherzustellen (BIB, S. 353). Das Bedürfnis nach Bildung von Genossenschaften im Handwerk resultierte vor allen Dingen aus folgendem Sachverhalt: Das Handwerk war in der ehemaligen DDR “der einzige Wirtschaftsbereich, in dem nicht nur das Eigentum an Produktionsmitteln, sondern auch die Verfügungsgewalt in erheblichem Umfang in privater Hand war (BIB, S. 398).” Dies führte weiterhin dazu, “dass das Handwerk aufgrund dieser Eigenart ein zu großes Eigenleben entwickelte und damit die Rolle eines Fremdkörpers im sozialistischen Wirtschaftssystem übernehmen konnte” (ebenda). Dieser Aspekt des privaten Handwerks widersetzte sich der sozialistischen Ideologie. Daraus ergab sich die Notwendigkeit, das Individualeigentum des Handwerks an den Produktionsmitteln unter die ständige Kontrolle des Staates zu bringen und damit praktisch das private Handwerk in den sozialistischen Aufbau einzubeziehen. Aber diese ideologisch-politische Aktion führte aufgrund ihrer negativen Auswirkung auf die Leistungsmotivation der Handwerker schließlich zur Verknappung sehr unterschiedlicher Waren und Dienstleistungen des Handwerks. Das wiederum wirkte sich negativ auf den

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[2] Verordnung über die Gründung, Tätigkeit und Umwandlung von Produktionsgenossenschaften des Handwerks (PGH-VO) vom 8. März 1990 und ihre Änderung vom 22. 03. 1991. § 4 (Umwandlung) der ersten Fassung lautet: “PGH können sich in Personen- oder Kapitalgesellschaften, insbesondere Kommanditgesellschaften (KG), Offene Handelsgesellschaften (OHG), Gesellschaften mit beschränkter Haftung (GmbH) oder Aktiengesellschaften (AG) umwandeln.” Hierbei wird die alternative Rechtsform ‘eingetragene Genossenschaft (eG)’ nicht ausdrücklich in § 4 (2) geregelt. Das heißt, dass “... für eingetragene Genossenschaften das Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften gilt.” Damit ist gemeint, dass die Regelung keinen umwandlungsrechtlichen Inhalt für sich hat. Aus diesem Grund wurde der Absatz 5 des § 4 wie folgt neu gefasst: “Im Fall der Umwandlung der PGH in eine eingetragene Genossenschaft bedarf die Umwandlungserklärung keiner notariellen Beglaubigung.” Vgl. hierzu Sander, S. 140.

Aufbau des Sozialismus aus. Um die beiden gegensätzlichen Probleme zu lösen, musste die Genossenschaftsbildung im Handwerk forciert werden (ebenda, S. 399).

Hierzu wurde in zunehmendem Maße propagiert, dass der Sozialismus gut sei und um diesen zu erreichen die zentralstaatliche Planwirtschaft nötig sei. Daher sollten die ungerechten sozialen Konflikte beseitigt werden, die sich aus "der diskriminierenden Diskrepanz zwischen dem gesellschaftlichen Charakter der Produktion, der privatwirtschaftlichen Verfügungsgewalt über das Arbeitskräftepotential und einer unzulässigen Aneignung des durch die Produktion erzielten Mehrwertes" ergeben (Sander/Weitzel, S. 13). Es wurde betont, dass die Wirtschaft planmäßig kontrolliert werden müsste, da sie verschwenderisch mit knappen Mitteln umgehe und damit eine Massenarbeitslosigkeit herbeiführe. Diese ideologische Behauptung mit dem Ziel, die sozialistische Planwirtschaft zu bewahren, ist zugleich auch die Rechtfertigung für die Verstaatlichung der Produktionsmittel.

Darauf aufbauend, wurden vordringlich im Handwerksbereich Kollektive nach dem Modell der sowjetischen Gewerbegenossenschaften eingeführt. Daraufhin wurden die PGH organisiert, die durch Zusammenschluss ehemals Selbständiger aus Handwerk und Kleingewerbe sowie deren Beschäftigten entstanden (BIB, S. 399). Sie waren in ihrer Zielsetzung darauf ausgerichtet, eine größtmögliche Anpassung zu erreichen um das Handwerk in die sozialistische Ideologie leistungsmotivierend zu integrieren. Das heißt, dass die PGH dazu dienen sollten, die privaten Handwerksbetriebe in gesellschaftliches Eigentum umzuwandeln und die individuellen selbständigen Arbeitskräfte des Handwerks in von Kollektiven abhängige Arbeitnehmer zu überführen. Zugleich sollten die PGH auch dazu beitragen unvorhersehbare Mangelsituationen bei der Versorgung der Bevölkerung zu meistern und damit die Flexibilität der Planwirtschaft zu erhöhen.

Dass die PGH diese wesentlichen Funktionen übernehmen sollten, ist vor allem darauf zurückzuführen, dass in der sozialistischen Planwirtschaft eine Privatwirtschaft vorhanden war und dort noch eine bedeutende Rolle spielte. Wäre in der ehemaligen DDR der Privatbereich unwichtig und die Planwirtschaft voll funktionsfähig gewesen, so hätten die PGH dort keine Akzeptanz gefunden. Wenn die PGH nicht vorhanden gewesen wären, so hätte das nichts anderes als eine faktische Akzeptanz der privatwirtschaftlichen Tätigkeiten bedeutet. Hätten die PGH trotzdem weiter bestanden, hätte das bedeutet, dass die sozialistische Planwirtschaft selbst ihre Unvollständigkeit bzw. ihre Fehler eingesteht.

Es zeigte sich, dass die sozialistische Ideologie nicht immer zu bejahen war und dass der Aufbau des Sozialismus längere Zeit in Anspruch nahm als von den Ideologen gefordert. Um die zeitliche Diskrepanz zwischen Realität und Ideologie zu überwinden und den Weg zur Sozialisierung des Handwerks zu ebnen, wurden als besonderer Anreiz für den Eintritt des privaten Handwerks in die PGH Begünstigungen durchgesetzt, wie z.B. die fast völlige Steuerfreiheit der Genossenschaften (eingetragene Genossenschaft/en, eG) und ihrer Mitglieder, die bevorzugte Materialversorgung und eine höhere Vergütung in den PGH als in den volkseigenen Wirtschaften (Sander, S. 11; Klein, S. 22).

Diese Aktivitäten, verbunden mit politischen und moralischen Eingriffen, dienten der beschleunigten Bildung und Verbreitung von PGH. Sie waren wie Landwirtschaftliche Produktionsgenossenschaften (LPG) sozialistische Genossenschaften, in denen alle Mitglieder -

unabhängig von ihrer früheren Position als Selbständiger, Lehrling oder Beschäftigter sowie vom Umfang ihrer eingebrachten Mittel - den gleichen sozialen Status hatten und damit gleich behandelt wurden. Die Gleichberechtigung profitierte u. a. davon, dass das Kapital nicht über die Menschen herrschen, sondern ihnen dienen sollte. Die sozialistische Ethik diente dazu, dass alle Arbeits- und Lebensbedingungen der Mitglieder der PGH denen der Werktätigen der Volkseigenen Betriebe (VEB) angeglichen wurden. Das galt auch für die Planung und Vergütung der Mitglieder und die Ausarbeitung der Betriebsordnung. Danach hatten die PGH ihre Wirtschaftstätigkeiten so zu organisieren, dass sie die von den Staatsorganen erteilten staatlichen Planaufgaben sicher erfüllen konnten.[3]

Das Ziel der PGH war daher nicht die Erfüllung der Interessen ihrer eigenen Mitglieder, sondern die Bedarfsbefriedigung bei der Versorgung der Bevölkerung mit handwerklichen Gütern und Leistungen. Dies erfolgt in der westlichen Marktwirtschaft lediglich als ein Ergebnis der Mitgliederförderung. Hierin zeigte sich die Besonderheit der sozialistischen Genossenschaften. Sie wiesen auch nicht von der Idee her Ähnlichkeiten wie Selbsthilfe, Selbstverwaltung und Selbstverantwortung auf. Der - freiwillige - Zusammenschluss der Mitglieder diente nicht zu deren Vorteil, sondern war in erster Linie ein Instrument, um die sozialistische Kollektivierung durchzuführen und zu sichern.

Kurz nach der Grenzöffnung im Spätherbst 1989 waren rund 455.000 aller Berufstätigen der DDR (8.885.800.) im Bereich des Handwerks beschäftigt (Statistisches Bundesamt, S. 33 und 36). Das entsprach einem Anteil von weniger als 5% aller Berufstätigen. Davon waren ca. 280.000 in insgesamt 82.282 Privathandwerksbetrieben und die restlichen 175.000 (inklusive Lehrlinge) in 2.718 PGH tätig.[4] Im Durchschnitt waren nahezu drei Personen in privaten Handwerksbetrieben und über 60 in den PGH beschäftigt. Davon ausgehend, waren die PGH zu Beginn der Transformation als Großbetriebe zu bezeichnen. Der Handwerksbereich erbrachte beinahe 5% der gewerblichen und industriellen Gesamtumsätze in diesem Bereich. Davon machten die PGH 60% und die Privathandwerker 40% aus (Ruwisch, S. 7).

Die PGH hatten besonders im Baubereich und im Dienstleistungssektor große wirtschaftliche Bedeutung. Ca. 40% aller PGH waren mit mehr als 30% aller in den PGH Beschäftigten im Baubereich tätig, und fast 15% aller PGH mit rund 26% aller Beschäftigten im Dienstleistungsbereich. Die Handelsumsätze der PGH erreichten über 50% des Gesamtumsatzes im Bau- und über 60% im Dienstleistungssektor (Sander/Weitzel, S. 69 ff). In anderen Bereichen, besonders im produzierenden Gewerbe war die Bedeutung der PGH gegenüber dem Privathandwerk jedoch vergleichsweise gering. Dies ist vor allem darauf zurückzuführen, dass ca. 1.600 industriell produzierende PGH aufgrund der 1972 durchgeführten

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[3] Vgl. hierzu §§ 2, 3 und 10 (2) des Musterstatut der Produktionsgenossenschaften des Handwerks vom 21. Februar 1973.

[4] Vgl. Sander, S.29. Daneben waren 1,100 Einkaufs- und Liefergenossenschaften (ELG) tätig. Auch wenn die ELG nicht als sozialistische Genossenschaft in der sozialistischen Welt galten, übernahmen sie im Zuge des Aufbaus des Sozialismus jedoch eine zentrale Rolle der Auftrags- und Materialverteilung. Den ELG hatten sich die meisten der Privathandwerker durch Mitgliedschaft angeschlossen, da sie keine alternative Beschaffungsmöglichkeiten der Produktionsmittel zur Verfügung hatten (Vgl. BIB, S. 398; DG Bank, S. 109).

Verstaatlichungsmaßnahmen schon in VEB umgewandelt worden waren (BIB, S. 399). Nur im Bereich von Elektrotechnik/Elektronik und Konfektion steigerten die PGH ausnahmsweise die Produktion in deutlich stärkerem Umfang als im Dienstleistungs- und Reparaturbereich. Das bewirkte allerdings, dass die Regelpreise, die für die Güterherstellung staatlich festgesetzt wurden, erheblich höher waren, als die für die übrigen Leistungen des Handwerks (ebenda). Davon abgesehen, gibt es jedoch keinen deutlichen leistungsbedingten Unterschied zwischen beiden. Es zeigt sich zwar, dass die Leistung je Beschäftigtem in den PGH gegenüber dem Privathandwerk vergleichsweise höher war, dies beruht jedoch auf den Bedingungen der sozialistischen Planwirtschaft zugunsten dieser Betriebe.

Tabelle 1: Gegenüberstellung von systembedingten Besonderheiten der PGH und der marktwirtschaftlich orientieten Produktivgenossenschaften[5]

Beschaffenheit	PGH	Produktivgenossenschaft
Gründungs-motivation	Realisierung des Sozialismus	Realisierung der individuellen Idee
Gründungspolitik	Politischer und moralischer Druck. Ökonomische Begünstigung	Rechtliche und institutionelle Anerkennung
Beitrittsmotivation	Höhere Einkommens- und Selbstbestimmungsmöglichkeit	Selbstverwalteter Betrieb in Selbstverantwortung
Förderungspolitik	Intensive staatliche Intervention	Staatliche Neutralität
Genossenschafts-prinzipien	Staatlich beschränkt	Rechtlich gesichert
Organe	Im Musterstatut fixiert	Von gesetzlichen Rechtsregelungen der frei wählbaren Rechtsform vorgegeben
Mitgliederstruktur	Relativ ungleich	Relativ gleich
Genossenschafts-bewußtsein	Aufgrund der Staatseinmischung betrieblich unbedeutend	Aufgrund der freien Rechtsformwahl sehr wirksam
Rechtsform	Auf die juristische Person (als einziger Rechtsform der PGH) beschränkt	Frei wählbar

[5] Vgl. hierzu Sander, S. 101.

Rechtsfähigkeit	Im Statut beschränkt	Unbeschränkt – nach allgemeinem Zivilrecht
Statut	Staatlich bestätigtes Musterstatut	Satzungsautonomie im Rahmen gesetzlicher Grenzen
Leitung	Einhaltung staatlicher Planvorgaben	Selbstverantwortung
Eigentum	Vergesellschaftet	Privat

Insgesamt lässt sich sagen, dass diese Unterscheidung, die auf die Betriebs-, Beschäftigten- und Leistungsstruktur bezogen ist, im Großen und Ganzen die Arbeitsteilung zwischen den PGH und den Privatbetrieben in der DDR zeigt. Dabei waren die PGH ein wichtiger Bestandteil der örtlichen Versorgungswirtschaft und damit im Handwerksbereich der DDR stark vertreten.

3. Genossenschaftsversagen

Zunächst ist bei der Umwandlungsproblematik der PGH wie auch der LPG darauf hinzuweisen, dass die Begriffe Kooperation bzw. Genossenschaft in der sozialistischen Planwirtschaft insgesamt negativ besetzt waren. Die Genossenschaften sind ihrer Idee nach nichts weiter als eine autonome, gemeinsame Wirtschaftseinheit Einzelner, mit dem Ziel, ihre eigenen Bedürfnisse gemeinsam zu befriedigen. Aber in der Realität zeigen sich die Genossenschaften sehr unterschiedlich, da sie von der besonderen Ideologie einer bestimmten Gesellschaft beeinflusst und mit deren positiven Rechtsregelungen ausgestattet werden. Wenngleich es sicher richtig ist, dass dieses allein nicht unbedingt eine Entartung der Genossenschaft bedeutet, so kann nach den Erfahrungen in der DDR jedoch festgestellt werden, dass der Missbrauch der genossenschaftlichen Idee zwangsläufig zum Versagen der Genossenschaft führte.

In der DDR erfolgte die Bildung einer Genossenschaft bzw. der Beitritt zur Genossenschaft von vornherein mit dem Ziel, das sozialistische Staatsbewusstsein in der Gesamtbevölkerung zu entwickeln und damit die sozialistische Gesellschaftsordnung zu sichern. Dadurch entstanden Produktionsgenossenschaften, die dem sogenannten Demokratischen Zentralismus unterstellt (BIB, 188f) und damit den Bedingungen der zentralen Planwirtschaft angepasst waren und verbindliche Planaufgaben durch die Staatsorgane erhielten. Die sozialistischen Produktionsgenossenschaften der DDR dienten nicht dazu, Selbsthilfe durch Selbstverwaltung in Selbstverantwortung zu realisieren, sondern viel eher dazu, die Erfüllung der staatlichen Planauflagen zu sichern (Erwin, S. 23). Dabei trug die Kooperation durchaus dazu bei, die Privateigentümer für den Beitritt bzw. den Zusammenschluss zu Produktionsgenossenschaften zu gewinnen und damit die individuellen Produktionsmittel zu vergesellschaften.

Das dadurch entstandene negative Image prägte sich während der über 40 Jahre dauernden sozialistischen Planwirtschaft tief und nachhaltig in das Gedächtnis der Bevölkerung ein. Es ist daher kaum möglich, das Negativbild so einfach auszulöschen wie dies etwa mit dem Ersatz der alten politischen durch die neuen politisch-rechtlichen Institutionen geschah. Nach der

Wiedervereinigung kam der Verdacht auf, dass die machthungrigen sozialistischen Altkader (z.B. Parteifunktionäre) wie auch sonst überall so auch die Genossenschaften weiter leiteten (Hirsche, S. 11f). Deshalb wurde befürchtet, dass die neuen Genossenschaften versagen würden und zwar nicht wegen Fehlerhaftigkeit der Genossenschaftsprinzipien, sondern weil diese nicht beachtet würden. Deshalb war es erforderlich, das Leitbild der Genossenschaften neu zu gestalten, sie von ihrer entstellenden Vergangenheit zu befreien, damit sie ihre eigentliche Aufgabe und Funktion übernehmen und zugleich an dem neuen Marktgeschehen erfolgreich teilnehmen konnten. Hierfür war es allerdings nötig, die materiellen, rechtlichen und institutionellen Rahmenbedingungen zu schaffen und es war wichtig, die Rechte und Pflichten der Mitglieder neu zu definieren und damit das schon verlorene Vertrauen zwischen den Mitgliedern und ihren Organisationen wieder herzustellen, denn die Genossenschaft ist grundsätzlich eine Personenvereinigung, bei der das Systemvertrauen der Mitglieder einen entscheidenden Erfolgsfaktor darstellt.

4. Rechtsformwahl

In der sozialen Marktwirtschaft ist grundsätzlich die Vielfalt der Rechtsformen zulässig, und zwar um die Gewerbefreiheit zu garantieren und damit die Wettbewerbsfreiheit zu fördern. Dementsprechend wurde in der PGH-VO keine bestimmte Rechtsform festgelegt. Darüber hinaus ist darin auch keine bestimmte Umwandlungsform vorgeschrieben. Die Mitglieder der PGH dürfen die für ihre eigene Interessenverfolgung geeignete Rechtsform wählen.

Dabei kann entweder formwechselnde oder -übertragende Umwandlung vorgenommen werden. Sie unterscheiden sich im Wesentlichen dadurch, dass die formwechselnde Umwandlung nur auf einen Wechsel der Rechtsform bezogen ist, d. h., dass die Grundstruktur der umwandelnden Gesellschaft derjenigen, in die sie umgewandelt wird, gleicht. Die Identität der Gesellschaft setzt sich fort, so dass eine rechtsgeschäftliche Übertragung der Vermögen nicht erforderlich ist. Zudem ist die Gesellschaft selbst Grundeigentümerin, so dass der Grunderwerb nicht steuerpflichtig ist. Die stillen Rücklagen stellen auch körperschaftssteuerrechtlich kein Problem dar. Verluste können vorgetragen werden. Im Gegensatz zur Umwandlung in eine gleiche Grundstruktur erfolgt die übertragende Umwandlung dadurch, dass das Vermögen einer Gesellschaft auf eine andere übertragen wird. Dabei unterscheidet man die Umwandlung durch Neugründung von der Umwandlung durch Übertragung. Letztere setzt voraus, dass eine andere Gesellschaft schon vorhanden ist. Dagegen setzt die erstere voraus, dass die andere Gesellschaft vorher bereits gegründet worden ist (Weitzel, S. 23).

Die möglichen Umwandlungsformen beruhen auf verschiedenen rechtlichen Auffassungen. Beispielsweise hatten das Bundesjustizministerium und der Rechtsausschuss des Deutschen Bundestages eine positive Haltung für die übertragende Umwandlungsform eingenommen. Auch die Finanzbehörden waren derselben Meinung. Dagegen hatten die Genossenschaftsverbände besonders in den neuen Bundesländern vor allen Dingen die formwechselnde Umwandlung gefordert (Sander/Weitzel, S. 7). Die Wahl einer bestimmten Umwandlungsform und deren Anwendbarkeit hängen jedoch von der gewählten Rechtsform ab. Auch wenn die PGH ideologisch-politischen Zielen dienten und daher nach westlichem Genossenschaftsverständnis sehr ungewöhnlich waren, so hatten sie doch nicht alle typischen genossenschaftlichen Wesensmerkmale verloren. Bei den PGH war das Prinzip der Identität und Demokratie zumindest gesetzlich gewährleistet.[6] Beides lässt erkennen, dass zwischen den PGH und der eG nach dem Genossenschaftsgesetz der Bundesrepublik Deutschland - cum grano salis - eine strukturelle Artgleichheit bestand. Hierin lag ein triftiger Grund dafür, dass sich die PGH in die Rechtsform eG umwandeln und dabei die formwechselnde Umwandlung zugrunde gelegt werden sollte.

Die sich hieraus für die Umwandlung ergebende (und damit eng verbundene) Schwierigkeit lag jedoch darin, dass die Mitglieder der PGH aufgrund unzulänglicher Informationen und Kenntnisse nicht in der Lage waren, die Vor- und Nachteile der eG mit der der anderen Rechtsformen zu vergleichen und damit die Attraktivität der eG wahrzunehmen. Die Mitglieder hatten sich seit langem an sozialistische Einheitlichkeit gewöhnt. Deshalb war es für sie schwierig, die Effektivität der verschiedenen Rechtsformen des marktwirtschaftlichen Gesellschaftsrechts kritisch zu prüfen und die für die eigenen Zielsetzungen geeigneten Gesellschaftsformen auszuwählen oder zu schaffen.

Die Vielfalt der Rechtsformen ist zwar darauf ausgerichtet, größere Chancen bei der Wahl der optimalen Rechtsform zu eröffnen. Aber die Vielfalt allein verspricht nicht immer die richtige Wahl, und zwar dort nicht, wo Informationen und Kenntnisse über die Rechtsformen nicht hinlänglich verfügbar sind, da jede Rechtsform ihre eigenen Entwicklungschancen bietet. Für die Rechtsformwahl kommen unterschiedliche Kriterien in Betracht. Dabei ist zu beachten, dass die ökonomischen Ergebnisse der Betriebe u. a. von deren Managern abhängen, denn die gleiche Rechtsform garantiert nicht gleiche Betriebsergebnisse.

Die Manager (Mitglieder) der PGH verfügten nicht über genügend Kenntnisse der verschiedenen möglichen Rechtsformen. Es empfahl sich daher, jene Rechtsform zu wählen, die den Managern der PGH bereits relativ gut bekannt war. Auch wenn die Umwandlung der PGH ein Laborexperiment gewesen wäre, um alle Effekte der marktwirtschaftlichen Rechtsformen zu testen, so war es doch sicher nicht nötig, dieses mit den den Managern der PGH völlig unbekannten Rechtsformen (wie den Kapitalgesellschaften Gesellschaft mit beschränkter Haftung (GmbH) und Aktiengesellschaft (AG)) durchzuspielen. Wichtig war zunächst, dass die Rechtsform Genossenschaft wieder in ihrer besonderen Funktion und Rolle gefördert würde, denn sie hatte sich seit langem in Deutschland bewährt und hatte insbesondere für die Förderung der mittelständischen Wirtschaft und damit für die Entwicklung der Volkswirtschaft gute Leistungen erbracht.

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[6] Im Musterstatut der PGH vom 21. 03. 1973 waren die Wesensmerkmale der selbstorganisierten Produktivgenossenschaften deutlich geregelt. So z. B. dessen § 8: “In der PGH dürfen nur Mitglieder und Lehrlinge tätig sein.” Es galt auch das Demokratieprinzip: “Alle Mitglieder ... sind wahlberechtigt und nehmen mit beschließender Stimme an den Mitgliederversammlung teil (§ 11).” Dazu kommt noch, dass jedes Mitglied den Mindestanteil von 2 Monatsvergütungen einzuzahlen hat (§ 12). Das läßt erkennen, daß jedes Mitglied nicht mehr als eine Stimme hat, auch wenn es mehr einzahlt. Darüber hinaus ist der Vorstand als ein ausführendes Organ der Mitgliederversammlung an deren Weisung gebunden (§ 15).

Die PGH-VO hatte aber nicht die Wiederherstellung von Genossenschaften zum Inhalt. Nach § 5 (2) der PGH-VO besteht der Anspruch der austretenden Mitglieder, ihren eingebrachten persönlichen Anteil und den ihnen zustehenden Anteil an dem unteilbaren Genossenschaftsfonds ausgezahlt zu erhalten. Diese Regelung ist nicht darauf ausgerichtet, die PGH als Unternehmen weiter zu führen, sondern zielt eher darauf, die Auflösung der PGH möglichst schnell voranzutreiben. Dazu ist noch besonders zu beachten, dass der unteilbare gemeinschaftliche Fond, den im Normalfall kein Mitglied in Anspruch nehmen kann, teilbar gemacht wurde. Das bedeutete nichts weiter als dass die PGH ihre Existenzgrundlage verloren (Überschaer, S. 55).

Die Ansprüche der Mitglieder, ihr Privateigentum wieder zu privatisieren bzw. ihre persönlichen Anteile soweit wie möglich zurück zu erhalten, stiegen jedoch seit der Wiedervereinigung in unverminderter Stärke. Hinzu kam noch das negative Image der PGH und so wurde die Attraktivität der Genossenschaften gegenüber den anderen Rechtsformen besonders die der GmbH in erheblichem Umfang herabgesetzt. Dazu wirkte sich die Unsicherheit im Hinblick auf die Zukunft in verstärktem Maße aus. Nach § 5 (4) der PGH-VO ist es zwar auch den verbleibenden Mitgliedern möglich, ihren Anteil an dem unteilbaren Fond zu erhalten. Das war aber nicht ausreichend, um den Austritt der Mitglieder zu bremsen und damit die hohen Liquiditätsabflüsse einzuschränken. Der Grund dafür lag in der schlechten Perspektive der Betriebsergebnisse. Würde die betriebswirtschaftliche Situation der PGH in der Zukunft noch schlechter, so würde ihr unteilbarer Fonds durch Austritte weiter verringert und der individuelle Anteil der Mitglieder ebenso vermindert. Das heißt, dass je später ein Mitglied ausschied, desto geringer wurde sein Fondsanteil. Daher erschien es eher als unwahrscheinlich, dass sich die PGH in die Form einer eG überführen ließ.

Darüber hinaus ist zu beachten, dass die PGH, die bis zum 31. Dezember 1992 nicht in eine Personengesellschaft, eine Kapitalgesellschaft oder eine eG umgewandelt wurden, kraft Gesetzes aufgelöst wurden (§ 9a (1) der PGH-VO). Daher war die Umwandlung der PGH unbedingt notwendig, damit sie als Unternehmen fortbestehen konnte. Diese Regelung belastete die Umwandlungsproblematik der PGH erheblich und erschwerte auch die Förderung mittelständischer Betriebe. Der Druck der PGH-VO, die Umwandlung der PGH wider alle Vernunft schnellstmöglich zu vollziehen, führte zur raschen Errichtung von Betrieben, die nur auf die kurzfristigen Interessen der Mitglieder abzielten. Im Gegensatz dazu wurde es schwerer, die Rechtsform eG zu wählen, die für die Zukunft des Handwerks wichtig gewesen wäre und der Förderung der Mitgliederwirtschaften gedient hätte (Steding 1993, S. 153).

Die PGH-VO hat insgesamt dazu beigetragen, ungünstige Rahmenbedingungen für die Umwandlung von PGH zu schaffen und hat damit das Ziel verfehlt, das Problem der PGH durch deren Auflösung schnell zu lösen. Es war daher kaum zu erwarten, dass die Genossenschaften in der DDR wiederhergestellt bzw. gefördert würden. Für die einzelnen Handwerker und auch für die Volkswirtschaft wäre es erforderlich gewesen, die eigenen Interessen der Mitglieder vernünftig abzuwägen und dadurch einen gemeinsamen rationalen Konsens herauszubilden. Dafür wäre es auch dringend nötig gewesen, eine genossenschaftskompetente qualifizierte Wirtschafts- und Unternehmensberatung bereitzustellen (Überschaer, S. 64). Das war nicht der Fall. So entstanden chaotische Situationen durch Auflösung bzw. Insolvenz der PGH mit der Folge, dass alle Mitglieder ihr Vermögen verloren und die auf das Handwerk angewiesene örtliche Versorgungswirtschaft zusammenbrach. Die PGH bzw. der Mittelstand hatten in den neuen Bundesländern keine Zukunft. Insofern ist die PGH-VO selbst als das größte Handicap bei der Errichtung leistungs- und wettbewerbsfähiger Mittelstandsbetriebe bzw. Genossenschaften anzusehen.

5. Identitätsprobleme

Weiterhin war die Umwandlungsproblematik der PGH in der ihr eigenen Struktur begründet. Der eigenständige Typus der PGH als Produktivgenossenschaft war und ist in der allgemeinen genossenschaftlichen Struktur im Westen Deutschlands nicht oft anzutreffen. Bei der im Westen Deutschlands vertretenen Förderungsgenossenschaft besteht eine persönliche Identität von Mitgliedern (Teilhabern) und Nutzern (Kunden oder Lieferanten). Aus der so gegebenen Identität des Mitglieds folgt, dass die Aufgabe der Förderungsgenossenschaft im Wesentlichen darin liegt, bestimmte Funktionen für die ihr angeschlossenen, selbständig bleibenden Mitgliederwirtschaften wahrzunehmen und damit diese betrieblich zu ergänzen (deshalb auch die Bezeichnung Ergänzungs- und Hilfsgenossenschaft). Dabei wird die wirtschaftliche Selbständigkeit der Mitgliederbetriebe grundsätzlich nicht angetastet.

Im Gegensatz dazu war die PGH ihrer Ausprägung und ihrem Inhalt nach dadurch gekennzeichnet, dass die Mitglieder selbst die Teilhaber der Genossenschaft und zugleich deren Beschäftigte sind. Die so charakterisierten Genossenschaften werden in der westdeutschen Genossenschaftslehre als Produktivgenossenschaften bezeichnet. Dieses Charakteristikum lässt sich nur noch in der kooperativen Struktur erkennen, in welche die Mitglieder ihre eigenen Betriebe einbringen und als Beschäftigte ihres gemeinsamen Betriebs integriert werden. Dabei vollzieht sich die Mitgliederförderung dadurch, dass Arbeitsplätze für Mitglieder durch gemeinsamen Mitteleinsatz finanziert und gesichert werden und die Arbeitskraft der Mitglieder durch die gemeinschaftlich getragene Unternehmensführung verwertet wird. Hier besteht - anders als bei Förderungsgenossenschaften - keine Trennung zwischen dem Gemeinschaftsbetrieb der Produktivgenossenschaft und den Mitgliederwirtschaften. Die Produktivgenossenschaft arbeitet nicht für selbständig bleibende Mitgliederwirtschaften. Die Tätigkeit der Produktivgenossenschaft ist selbst die gemeinschaftliche Mitgliederwirtschaft. Anders gesagt, die Produktivgenossenschaft hat die unmittelbare Mitgliederförderung nicht zum Ziel, da sich Gemeinschaftsbetrieb und Mitgliederwirtschaft nicht voneinander trennen lassen (deshalb auch die Bezeichnung Vollgenossenschaft).7 Auch in diesen Strukturmerkmalen der Produktivgenossenschaft ist die Beschaffenheit der PGH vorhanden. In diesem Sinnzusammenhang wird daher im Folgenden die Bezeichnung Produktivgenossenschaft als gleiche Bedeutung der PGH weiter verwendet.

Allerdings entsprach das Modell der Produktivgenossenschaft nicht dem im Westen Deutschlands vorherrschenden Genossenschaftsbild. In struktureller Hinsicht stellt die Produktivgenossenschaft einen "Grenzfall" der Förderungsgenossenschaft dar (Dülfer, S. 99f). Dazu kommt noch, dass die Identität der Produktivgenossenschaft durchaus auf einer sozialistischen Grundlage aufgebaut ist. Aus diesen Gründen wird häufig der Versuch unternommen, Produktivgenossenschaften in Förderungsgenossenschaften umzuwandeln. Das ist der Vielfalt der Formen genossenschaftlicher Zusammenarbeit ebenso wenig förderlich wie der Sozialismus der DDR. Äußerst wichtig ist, ob und inwieweit die Identitätsstruktur der Produktivgenossenschaft faktisch mit der Marktwirtschaft vereinbar

[7] Vgl. hierzu Draheim, S. 17f.

ist. Dazu bedarf es einer kritischen Prüfung der strukturellen Vor- und Nachteile der Produktivgenossenschaft. Um die sozialwirtschaftlichen Effekte der Produktivgenossenschaft zu realisieren, müssen die dafür geeigneten Rahmenbedingungen geschaffen werden.[8]

Als arteigene Vorteile der Produktivgenossenschaft lässt sich zunächst ein Synergieeffekt in der Weise erwarten, dass die betrieblich relevanten Produktionsmittel kostenmindernd akkumuliert und kombiniert werden. Allerdings ist es hier auch möglich, die Arbeitsproduktivität der Mitarbeiter dadurch zu erhöhen, dass die individuellen Fähigkeiten der Mitglieder je nach Anforderung genutzt und eingesetzt werden. Bei der Selbstorganschaft ist es auch leicht, die Führungskräfte je nach den Leistungserfordernissen zu wechseln. Dazu kommt noch, dass ein entsprechender Konsens relativ reibungslos gefunden wird, der den Mitgliedern Arbeitsplätze zuordnet und damit ihre Verantwortung und Selbständigkeit begrenzt. Bei der Produktivgenossenschaft kommt hinzu, dass die Unternehmenskultur, die auf eine Wirtschaftsdemokratie zielt, aufgrund der besonders hohen betrieblichen Transparenz besonders gefördert wird. Hier lässt sich auch ein Solidaritätseffekt erkennen, der die individuelle Haftung der Mitglieder beschränkt und damit ihre soziale Sicherheit erhält. Außerdem ist zu bemerken, dass die Position der Frauen in der Gruppe durch die Frauenemanzipation verbessert und der soziale Stand der Mitglieder nicht nur als reiner Arbeitnehmer, sondern auch zugleich als Arbeitgeber erhalten wird.

Gegenüber den positiven Möglichkeiten der Produktivgenossenschaft ergeben sich auch negative Aspekte vor allem durch folgenden Sachverhalt: Bei den Mitgliedern wird im Prinzip der gesellschaftsrechtliche Arbeitgeberstatus mit dem arbeitsrechtlichen Arbeitnehmerstatus gleichgesetzt. Daraus folgt, dass die betrieblich relevante hierarchische Arbeitsteilung zu der egalitären Gesinnungsethik der Mitglieder im Widerspruch steht und somit der arbeitsteilig gegliederte Leistungserstellungsprozess beeinträchtigt wird. Die Gleichordnung der Mitglieder, die zwar theoretisch die betriebliche Demokratisierung bewirkt, stößt aber in der Realität besonders dort auf Schwierigkeiten, wo die ökonomischen Interessen hoch aktualisiert werden. Der Egalitarismus führt noch dazu, die aus verschiedenen Gründen entstehenden Leistungsmotivationen der Mitglieder unterschiedslos gleichzumachen und zwar auf niedrigem Niveau. Daraus entsteht kein Leistungswettbewerb unter den Mitgliedern. Ist in der Mitgliederstruktur Homogenität vorhanden, so wird die Rollenverteilung zwischen der Leitung und Ausführung schwierig. Werden zudem die verschiedenen Kompetenzen und Rechte der Mitglieder sowie ihre unterschiedlichen Interessen nicht in Betracht gezogen, so wird das Arbeitsteilungsproblem noch größer. Weitere Schwierigkeiten bestehen auch in der Heterogenität der Mitgliederstruktur, die zu einer Interessendivergenz bei der Gewinn- und Verlustverteilung führt. Das Konfliktpotential wird besonders dann in erheblichem Maße vergrößert, wenn die Besoldung der Leitungskräfte gegenüber den Ausführungskräften vergleichsweise hoch ist und ebenso umgekehrt.

Ein negativer Effekt tritt weiterhin im Prinzip der Identität und Selbstverwaltung auf. Damit ist gemeint, dass die Mobilisierung der qualifizierten Führungskräfte und guten Fachkräfte außerhalb des Mitgliederkreises nicht gut erfolgen kann. Dieses Problem zeigt sich deutlich, wenn die

[8] Vgl. zu folgenden Vor- und Nachteilen insbesondere Draheim, S. 110ff; Steding 1994, S. 26.

Tendenz zur Schließung des Mitgliederkreises steigt. Die vorhandenen Mitglieder verfolgen die Erfüllung ihrer eigenen Interessen. Sie nehmen deshalb keine neuen Mitglieder auf, die an der betrieblichen Leistungsverteilung teilhaben. Sind neue Arbeitskräfte erforderlich, so werden sie nicht als Mitglieder, sondern als übliche Arbeitnehmer aufgenommen. Mit einer solchen Entwicklung wird der Ein- und Austritt der Mitglieder schwieriger. Die Folge ist, dass die Betriebe ihre Anpassungsflexibilität im Hinblick auf die sich verändernde Markt- und Beschäftigungssituation verlieren. Die besonders dadurch entstehenden Defizite der konjunkturellen Anpassungsfähigkeit der Produktivgenossenschaft haben im Leistungswettbewerb vergleichsweise höhere Nachteile gegenüber anderen erwerbswirtschaftlichen Unternehmen zur Folge.

Die finanzielle Schwierigkeit der Produktivgenossenschaft liegt auch in der Abschließungstendenz. In den Genossenschaften bildet das Beteiligungskapital den größten Anteil am Gesamtkapital. Die Mitglieder haben häufig nur geringe Kapitalien zur Verfügung. Deshalb ist die Kapitalbasis meistens schwach. Um das Geschäftskapital zu vermehren, ist es zwar notwendig, neue Mitglieder aufzunehmen, jedoch ist dies wegen der Abschließungsneigung schwer erzielbar. Außerdem ist zu bemerken, dass das Prinzip der Gleichberechtigung, nach dem jedes Mitglied in der rechtlich als höchstes Willensbildungsorgan anerkannten Generalversammlung - unabhängig von der Höhe der Kapitalbeteiligung und unabhängig von seinen Fähigkeiten - nur eine Stimme hat, eine Ursache für die negative Wirkung auf die Erhöhung individueller Kapitalbeteiligung der Mitglieder ist. Aus diesen Gründen sind die Beschaffungsmöglichkeiten von Fremdmitteln ziemlich begrenzt. Greift man, um die schwache Finanzlage zu überwinden, auf staatliche Mittel zurück, so setzt man sich der Gefahr staatlicher Kontrolle aus. Zudem werden die Mitglieder rechtlich den Arbeitgebern zugeordnet. Insofern haben sie keinen Anspruch auf staatliche Sozialversicherung.

Nach Betrachtung der Vor- und Nachteile der Produktivgenossenschaft erweist sich ihr Positivprofil zwar als nicht unerheblich, aber ihre auf den negativen Aspekten beruhende Existenzgefährdung scheint zu hoch, so dass ihre Umwandlung in die nichtgenossenschaftliche, also kapitalgesellschaftliche Rechtsform erfolgte. In den Entwicklungsländern wurden einige PGH sogar in staatlich kontrollierte Unternehmen transferiert (Dülfer, 112). Deshalb wird auch das Argument angeführt, dass die PGH unbedingt die Identität der Förderungsgenossenschaft annehmen sollte, um sich den marktwirtschaftlichen Herausforderungen zu stellen (Pleyer, S. 304). Das Gegenargument lautet, dass die Wahl der Identität selbst für die genossenschaftliche Zusammenarbeit nicht von größerer Bedeutung ist. Entscheidender sei, dass die Mitglieder überhaupt dazu angereizt würden, ihre Genossenschaften durch Selbstverwaltung in Selbstverantwortung zu tragen. Dass die Motivation für das Modell der Produktivgenossenschaft geweckt und gefördert werden kann, ist schon theoretisch und historisch nachgewiesen und dadurch noch bestätigt, dass in heutigen kapitalistisch orientierten Volkswirtschaften auch mehrere Produktivgenossenschaften tätig sind.[9]

Zudem ist noch zu betonen, dass die Motivation in ihrer Realisierung nur noch auf die interpersonalen Beziehungen angewiesen ist. Deshalb wurde die genossenschaftlich relevante

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[9] Vgl. hierzu Kruck, S. 197-216; Beckmann, S. 217-231; Überschaer, 64f.

Motivation nur dann verwässert bzw. blieb sie aus, wenn andere Alternativen ohne Rücksicht auf die in 40 Jahren gewachsene eigene Genossenschaftskultur der DDR-Gesellschaft einseitig durchgesetzt wurden. Mit dem Zusammenbruch des Staates DDR ist aber nicht alles bis auf die genossenschaftliche Idee verschwunden. Wenn die PGH auch überwiegend mit sozialistischem Charakter ausgestattet war, so waren die zwischenmenschlichen Beziehungen der Mitglieder selbst nicht fehlentwickelt. In der sozialistischen Gesellschaft der DDR war die PGH eine über die ökonomische Kooperation der Mitglieder hinausgehende Lebensgemeinschaft. Bei ihr war die genossenschaftliche Gemeinsamkeit stark mit gewachsen. Die Mitglieder, auch wenn sie aus ihrer PGH austraten, wollten nicht die mit ihren PGH seit langem eng verbundenen sozialwirtschaftlichen Beziehungen verlieren. Wenn trotzdem der Versuch unternommen wurde, eine derartige genossenschaftliche Gegenseitigkeit zu ignorieren und die PGH ihrer Identität zu berauben und stattdessen mit einer Förderungsgenossenschaft gleichzusetzen, so entstand die Gefahr, dass die kooperative Ethik verwirrt und damit die Qualität der genossenschaftlichen Zusammenarbeit gesenkt wurde.

Die Mitglieder der PGH waren Mittelstandsbetriebe der DDR und nur noch dort tätig. Es erschien daher ratsam, die Identität der PGH, die das Genossenschaftswesen der DDR vertrat und eine lange Tradition hatte, weiterhin zu fördern und zu erhalten, wenn die Entwicklung des Mittelstandes in den neuen Bundesländern notwendig war und dafür die Rolle und Funktion der Genossenschaft in Anspruch genommen werden sollte. Die hierfür geeigneten Rahmenbedingungen im rechtlichen, politischen und betriebswirtschaftlichen Bereich hätten geschaffen werden müssen. Als rechtliche Vorgabe hätte die Maßgabe aufgestellt werden müssen, die Identität der PGH in dem ausdrücklich in der PGH-VO genannten GenG zu erfassen. Wichtig wäre gewesen, dass die Mitgliedschaft und das Arbeitsverhältnis in der eG voneinander übersichtlich getrennt und damit die korporativen und vermögensrechtlichen Rechte und Pflichten der Mitglieder und Arbeitnehmer eindeutig geregelt worden wären.

Wesentlich ist noch, dass die so zweckbestimmte rechtliche Unterstützung in ihrem Erfolg im Wesentlichen auf politischer Entschlossenheit beruht. Im Verlauf der Umstrukturierungsphase der PGH seit der Grenzöffnung zeigte sich die unterschiedliche Auffassung bezüglich der Umwandlungsgesetzgebung je nach Interessengruppe. Das heißt, dass das Bundesjustizministerium, der Rechtsausschuss des Deutschen Bundestages und die Finanzämter eine positive Haltung zur übertragenden Form der Umwandlung eingenommen hatten, während die Genossenschaftsverbände des Ostens u.a. stark für die formwechselnde Umwandlung votierten. Um die so unterschiedlichen Rechtsauffassungen zu bündeln und zugleich eine einheitliche zu entwickeln, hätte eine klare politische Entscheidung getroffen werden müssen. Neben den politischen Maßnahmen wären umgehend finanzielle und betriebliche Unterstützung, Beratung und Betreuung erforderlich gewesen um die nachteiligen Auswirkungen der PGH zu überwinden und damit ihre Vorzüge erfolgreich zu demonstrieren. Parallel dazu hätte eine institutionelle Förderung auch für die Umwandlung der PGH in eine eG und ihre Weiterentwicklung konzipiert und praktiziert werden müssen.

6. Finanzierungsproblematik

Dass die Produktivgenossenschaften in den marktwirtschaftlich orientierten Volkswirtschaften besonders auch in der Bundesrepublik Deutschland keine große Bedeutung gewonnen haben, ist vor allem auf die vielfach unzulängliche Kapitalgrundlage zurückzuführen, die in den oben erwähnten Strukturmerkmalen und den damit verbundenen Nachteilseigenschaften der Produktivgenossenschaft zu sehen ist. Daraus lässt sich erkennen, dass die neuen Genossenschaften, welche die Identität von Mitgliedern und Mitarbeitern weiterhin bewahren, nur dann erfolgreich fortbestehen konnten, wenn ihre Kapitalbasis langfristig gesichert würde. Das bedeutet, dass das Eigenkapital, das sich aus dem Beteiligungskapital und den Rücklagen zusammensetzt, und die Kreditfähigkeit in genügendem Maße vorhanden sein müssen. Dazu ist noch anzumerken, dass die Mitgliederhaftung, die sich aus dem Wesen der eG als Personenvereinigung ergibt, als Sicherheit für die Bankkredite dient. Unter diesem Aspekt wird nun die finanzielle Problematik der Umwandlung der PGH beleuchtet.

Zum Zeitpunkt der Wende wurde die wirtschaftliche und finanzielle Lage der PGH als relativ gut angesehen. Schon vor der Wende hatten die PGH ein höheres Eigenkapital als die LPG. Dazu kam noch, dass sich die Konjunktur durch die Währungsumstellung verbesserte und damit der Auftragsbestand beträchtlich erhöht wurde. Davon profitierten besonders die bevölkerungsnahen PGH im Bereich der Elektroinstallation, des Sanitärwesens sowie des Bau-, Haupt- und Nebenhandwerks.[10]

Bei relativ guter Konjunktur kam durch die Geltendmachung der Auszahlungsansprüche der Mitglieder jedoch ein besonders unangenehmes Problem auf die PGH zu. Diejenigen PGH, die nach der PGH-VO bis zum 31. Dezember 1992 nicht in das Handels- oder Genossenschaftsregister angemeldet worden waren, galten kraft Gesetzes als aufgelöst. Damit einher ging die Mitgliederauszahlung, bei der sich entschied, ob die PGH überhaupt als Unternehmen fortbestehen konnten. Nach der PGH-VO, die den rechtlichen Rahmen für die Aufteilung des Eigenkapitals bildet, kommen insgesamt drei Alternativen der Mitgliederauszahlung in Betracht: 1) Die Mitglieder konnten die Mitgliedschaft der neuen Genossenschaft übernehmen. 2) Sie verzichteten auf die Mitgliedschaft und blieben stattdessen nur in einem Arbeitnehmerverhältnis zur Genossenschaft oder umgekehrt, d. h. 3) sie konnten auf ihr Arbeitnehmerverhältnis verzichten, behielten aber die Mitgliedschaft. Jede Alternative barg finanzielle Probleme für die PGH mit recht unterschiedlichen Aspekten.

Die erste Alternative hat die Beibehaltung der jetzigen Stellung der Mitglieder (zugleich als Arbeitnehmer) zur Voraussetzung. Dadurch ändert sich die finanzielle Lage der PGH nicht, da ihre Mitgliederzahl konstant bleibt. Im Fall der zweiten Alternative steht den ausscheidenden Mitgliedern der Auszahlungsanspruch des von ihnen gezahlten Anteils und auch des ihnen

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[10] Den konjunkturellen Aufschwung hatten etwa 3/4 aller PGH der DDR erfahren. Demgegenüber war das restliche Viertel eher von einem starken Auftragsrückgang betroffen. Dazu gehörten z. B. Reparaturdienstleistungen im Schneiderhandwerk. Ihre erheblichen Umsatzeinbußen waren hauptsächlich das Resultat eines Nachfrageausfalls bzw. der Änderung der Nachfrage. Das heißt, dass der durch die Währungsumstellung hervorgerufene Nachfrageschub und die gleichzeitige ablehnende Haltung gegenüber Ostprodukten die Konsumgewohnheiten in der Weise veränderte, dass z. B. generell der Neukauf der Reparatur, die Konfektion der Einzelanfertigung (bei Kleidern), der Neukauf einer Heizanlage dem Betrieb der alten Kohleöfen vorgezogen wurde. Vgl. hierzu Weitzel, S. 29.

zustehenden Anteils an dem unteilbaren Fond zu. Der Anspruch führt unmittelbar zum Abfluss von Eigenkapital aus der PGH. Mit der Reduktion der Mitgliederzahl wird zudem die auf sie bezogene Haftung verringert. Beides ist eine entscheidende Ursache für die Schwächung der finanziellen Fähigkeit der PGH. Demgegenüber erfolgt bei der dritten Alternative kein Austritt des Mitgliedes, sofern dessen Anteil nicht ausgezahlt wird, aber die Verringerung des unteilbaren Fonds ist möglich. In der PGH-VO ist nicht geregelt, dass der Auszahlungsanspruch des Mitgliederanteils an dem unteilbaren Fonds lediglich auf die ausscheidenden Mitglieder zu beschränken ist. Daher können die Mitglieder ihren Anteil an dem Fonds in Anspruch nehmen, ohne die Mitgliedschaft aufgeben zu müssen. Ist das der Fall, so sind Liquiditätsabflüsse unvermeidbar.[11]

Das finanzielle Problem der PGH verschärfte sich noch durch ihre Vermögensbewertung. Falls sich die PGH eine neue Rechtsform gab, einschließlich die einer eG, so musste sie auch nach der PGH-VO (§ 4 (5) ihr gesamtes Vermögen in einer DM-Eröffnungsbilanz angeben. Das Problem war dabei, dass kein Wertansatz verfügt worden war, der einen Vergleich der realen Kaufkraft der beiden Währungen ermöglichte. Die recht verschiedenen Interessen der Mitglieder erschwerten dazu noch die Neubewertung. Es wurden zwei Alternativen zur Bewertung des Eigenkapitals in Erwägung gezogen, entweder eine zu hohe oder eine zu niedrige. Zur Vermehrung des Werts betrieblicher Wirtschaftsgüter kann das Eigenkapital hoch bewertet werden. Dabei ist aber zu beachten, dass die sich dadurch erhöhende Mitgliederauszahlung die Mitglieder zum Ausscheiden motiviert. Die so bedingten Abflüsse des Eigenkapitals führen zur Auflösung der PGH. Um dieser Gefahr auszuweichen, d. h. um das Ausscheiden der Mitglieder zu beschränken und damit den hohen Kapitalabflüssen zu begegnen, wird das Vermögen niedrig bewertet. Dabei wird der gesamte Wert des Unternehmens verringert und dadurch die Bonität den Banken gegenüber gemindert. Sind in schlechten Zeiten die Zukunftsaussichten des Unternehmens zudem noch unklar, so wird sich die Zahl der ausscheidenden Mitglieder dadurch vergrößern. Das Ergebnis ist letzten Endes das gleiche wie bei der Hochbewertung. Man sieht, dass sich finanzielle Probleme bei der Neubewertung des Vermögens auf jeden Fall ergeben, ganz gleich ob diese hoch oder niedrig ausfällt.

Die skizzierte Problematik ergab sich nur aus dem ungewöhnlichen Sachverhalt der übereilten Transformation. Aber dieses Problem – einschließlich der Lösungsansätze – ist nicht zwingend. Wird dazu auch noch ein Rezept angeboten, das weit über die genossenschaftliche Dimension hinausgeht und mit dem genossenschaftlichen Werten inkompatibel oder sogar der eG schädlich ist, so wird die eG im Ergebnis versagen. Das Finanzierungsproblem der PGH ist im Grunde darauf zurückzuführen, dass das Eigenkapital unmittelbar mit dem fluktuierenden Anteilskapital

[11] In diesem Zusammenhang muss festgestellt werden, dass die Aufteilung des unteilbaren Fonds ungerecht ist. Der Fond wurde schon in der Zeit des Sozialismus gebildet und als genossenschaftliches Gemeineigentum im Rahmen des sozialistischen Eigentums anerkannt und den Mitgliedern lediglich zur Verfügung gestellt. Die Inhaber des Fonds waren daher nicht die Mitglieder, sondern die PGH selbst, die rechtlich selbständig waren. Deshalb sollte der Fond nicht an die ehemaligen Mitglieder verteilt werden. Daraus folgt, dass der unteilbare Fond einer PGH hätte unteilbar bleiben müssen. Bei ihrer Auflösung sollte der Fond nicht unter den Mitgliedern aufgeteilt werden, sondern als Sozialfond an die Gesellschaft zurückfallen. Vgl. hierzu Steding 1993, S. 153; Stange, S. 44.

(aufgrund der variablen Mitgliederzahl und den damit gekoppelten Rückzahlungspflichten) verbunden ist. Das so bedingte Finanzierungsproblem lässt schon die strukturelle, traditionelle und allgemeine Problematik der eG erkennen. Daher sollten die Problemlösungsansätze durchaus nach genossenschaftlichen Prinzipien formuliert werden. Entscheidend dabei ist, das genossenschaftliche Bewusstsein der Mitglieder zu stärken und einen Konsens darüber zu finden, dass das aufgrund der genossenschaftlichen Solidarität der Mitglieder gebildete Vermögen der eG zugleich das der Mitglieder selbst ist und dass die Vermehrung dieses Vermögens gleichbedeutend mit der persönlichen Besserstellung der Mitglieder ist. Für die ausgeschiedenen Mitglieder ist dieses allerdings ein schwacher Trost.

7. Unternehmensführung

In der DDR wurden die PGH insgesamt aufgrund der staatlichen Erfordernisse entwickelt, in die Planwirtschaft einbezogen und gezielt streng kontrolliert. Als Gegenleistung wurde ihre Existenz jedoch zumindest sichergestellt. Gerade deshalb wurden die PGH während der Transformation auf eine harte Probe gestellt. Während der 40 Jahre der Planwirtschaft durften sich die PGH bei ihrer Führung keine noch so kleine Abweichung von ihrem Musterstatut und den staatlich vorgegebenen Betriebsordnungen erlauben. Um zu überleben, waren die PGH gezwungen, den staatlichen Anweisungen zu folgen. Außerdem hing die Auswahl der Führungspersonen von der Zustimmung seitens des Staates und der Partei ab.

Unter diesen Umständen war es nicht möglich und auch nicht erforderlich, daß die PGH selbst innovative Unternehmensstrategien entwickelten. Die Meinung war vielmehr, daß unternehmerische Aktivitäten, die nach Neuem strebten, von Übel seien. Das zurückhaltende Betriebskonzept prallte im Zuge des Transformationsprozesses mit den Herausforderungen einer aktiven und tatkräftigen Unternehmensführung der Marktwirtschaft zusammen. Das machte umfassende und rasch wirksame Hilfsaktionen für die PGH und deren Umwandlung in eine eG erforderlich. Hierbei ist zu beachten, daß das Betriebskonzept, das seit langem in der sozialistischen Welt gepflegt wurde und dort erstarrte, in der Umsetzung nicht so leicht geändert werden konnte wie die formalrechtlichen Rahmenbedingungen.

Mit der Transformation änderte sich auch das betriebswirtschaftliche (mikroökonomische) Umfeld der neuen Bundesländer rapide. Die PGH verloren ihren alten Kundenstamm. Besonders schlimm aus der Sicht der Betriebswirtschaft war es, daß preiswerte Produkte in relativ guter Qualität aus dem Westen massenweise die Märkte des Ostens überschwemmten und zugleich das negative Image der Ostwaren verstärkt wurde. Parallel dazu änderten sich die Konsumgewohnheiten der einheimischen Verbraucher in erheblichem Maße. So führte z. B. das Massenangebot an Konfektionskleidung und Schuhen zur Preissenkung all dieser Produkte. Dadurch ergab sich ein starker Auftragsrückgang z. B. im Bereich des Schneider- und Schuhmacherhandwerks, denn der Neukauf war - umgekehrt zu den Verhältnissen in der ehemaligen DDR - eher billiger als die Reparatur geworden. Fast alle Handwerksbereiche waren von der rapiden Trendverschiebung betroffen (Beyer 1991; Überschaer, S. 61f).

Im Bereich von Bau und Renovierung war die wirtschaftliche Situation der PGH zwar aufgrund der relativ guten Konjunkturlage der gesamten Branche günstig, jedoch waren die PGH in vielen Fällen weniger flexibel als ihre westlichen Konkurrenten, wodurch die PGH im Wettbewerb benachteiligt waren. Gründe dafür waren hier im Wesentlichen die veralteten Maschinen und Geräte, überholte Produktionstechniken, die schwache Finanzlage, schlechte Werkstätten, der Mangel an Fachkräften und das niedrige Ausbildungsniveau der Mitglieder.

Diese Probleme haben ihre Ursachen auf drei Ebenen, welche die Handwerker der DDR bzw. die PGH unabhängig von der Gewinn- und Verlustrechnung im Zuge der Transformation im Allgemeinen überwinden mußten: 1) Es gab nur wenige Werkstatträume. Nach der Wende wurde das Privateigentum an Grund und Boden und Gebäuden wieder zugelassen und zugleich deren Nutzungsmöglichkeit vergrößert. Daraus folgte, daß die PGH entweder hohe Mieten bezahlen mußten, um Werkstätten in Privathand weiter benutzen zu können oder sie mußten diese aufgeben. 2) Es gab wenig Fachkräfte und ihre Anwerbung war vielfach schwierig. Dieses Problem ist vor allem darauf zurückzuführen, daß das fachliche Bildungsniveau der Mitarbeiter im Allgemeinen zu niedrig war und die qualifizierten jungen Mitarbeiter in zunehmendem Maße abwanderten. 3) Die Finanzmittel waren unzulänglich. Die PGH waren meistens kaum kreditwürdig und deshalb gewährten die Banken nur selten Kredite. Auch wenn öffentliche Fördermittel (z. B. aus dem Gemeinschaftswerk Aufschwung Ost) zur Verfügung gestellt wurden, waren die Förderbedingungen kompliziert und die Bewilligung der Fördermittel mit hohem bürokratischen Aufwand verbunden. Deshalb konnten die Fördermittel nicht termingerecht erfolgreich eingesetzt werden. Darüber hinaus wurde es erforderlich, neue Maschinen und Geräte zu beschaffen und gegebenenfalls Arbeitsstellen abzubauen (Kieler, S. 37ff).

Beachtenswert ist dabei, daß sich die Überalterung der Mitarbeiter negativ auf die Produktivitätserhöhung auswirkte. Ältere Mitarbeiter verhielten sich bei der Einführung neuer Produktions- und Unternehmenskonzepte zurückhaltend, da sie sich vor neuen Arbeitsbedingungen und ungenügenden Finanzmitteln fürchteten. Des Weiteren sahen diejenigen, denen Bankkredite für ihren Betrieb zu DDR-Zeiten nicht aktuell und einfach überflüssig erschienen waren, Kreditfinanzierung auch nach der Wende als negativ für die Betriebe an (Überschaer, S. 53). Dadurch wurde die Finanzierungsschwierigkeit noch vergrößert. Außerdem war die Wahrscheinlichkeit eines Austritts bei den älteren Mitarbeitern aus ihren PGH besonders hoch. Von daher erschien es auch schwierig, daß die PGH ihr Eigenkapital auf jeden Fall erhalten konnte. Unter diesen Umständen war es kaum zu erwarten, daß die PGH eine besondere Flexibilität gegenüber den Bedingungen einer sich ändernden Umwelt entwickeln konnte.

Ausgehend davon, daß das Entscheidungsverhalten eines Unternehmens von der Vielfalt der Ziele und Zielsubjekte abhängt, muß ein Unternehmen bei einer Neuorientierung viele Anpassungsvariablen entwickeln um die komplexen Beziehungen zwischen Unternehmen und Zielobjekt in Betracht ziehen zu können. Die dafür angemessene Schonfrist hatte die rapide voranschreitende Transformation jedoch nicht vorgesehen. Der durch die PGH-VO geschaffene gewaltige Zeitdruck, die Umwandlung der PGH möglichst schnell zu vollziehen, hatte zudem zur Verstärkung der Reibungsschwierigkeiten bei der anpassungsgerichteten Entscheidungsbildung der PGH geführt. Um die so bedingten Probleme zu überwinden, mußten zur Unterstützung bzw. Beratung qualifizierte Spezialisten in unterschiedlichem Maße bereitgestellt werden. Besonders dringend erschien es, daß die Zielvorgabe des Unternehmens konkretisiert und der sich auf die Zielerreichung einstellende Plan aufgestellt bzw. seine Umsetzung kontrolliert wurde. Um die dafür relevanten Informationen rechtzeitig zu beschaffen, sollte das – handelsrechtlich vorgeschriebene und betriebswirtschaftlich ausgerichtete - Rechnungswesen erneut erstellt werden. Dazu ist noch zu bemerken, daß die Mitglieder im Allgemeinen geringe Kenntnisse über Produkte, Herstellungstechniken, betriebswirtschaftliches Know-how, Steuerrecht etc. hatten. Daher war es unumgänglich, daß die Verantwortung, Kompetenz und Leistungsverteilung der Mitglieder der neuen Marktstruktur angepaßt und umgestaltet und dadurch eine Verbesserung der Leistungsmotivation und Qualifikation der Mitglieder herbeigeführt wurde.

8. Schlußbemerkung

Die oben skizzierten Probleme lassen sich auf die Umwandlung der PGH in eine marktwirtschaftlich ausgerichtete eG beschränken. Die Lösung der Probleme hat auch die Entwicklung der neuen Genossenschaften zur Voraussetzung. Die grundlegende Ursache der Probleme war von vornherein auf die Fehlentwicklung der Genossenschaften und deren Mißbrauch in der DDR zurückzuführen. Von daher läßt sich sagen, daß die Problemlösung in ihrem Kern durchaus die Wiederherstellung der echten genossenschaftlichen Identität und die Erhöhung ihres Wertes darstellte. Hierfür kommt naturgemäß auch nichtgenossenschaftlichen Mitteln eine Bedeutung zu. Diese führen aber dann eher zur Herabsetzung des genossenschaftlichen Wertes und damit zu einem unerwünschten Resultat (z. B. zur Zerstörung der PGH), wenn die Mittel nicht für die Mitgliederförderung eingesetzt werden, sondern dafür, daß die eigenen Interessen einer bestimmten Zielgruppe erfüllt werden, oder wenn sie – freiwillig oder unfreiwillig - der politischen Argumentation geopfert werden, die darauf abzielt, die eigenen Interessen der Mitglieder zu verwässern und zugleich den allgemeinen Interessen des Staates unterzuordnen. Um dieser Gefahr zu entgehen bzw. sie zu meistern, ist es unbedingt erforderlich, die umwandlungsbezogenen Problemlösungsansätze in der genossenschaftlichen Zusammenarbeit herauszuarbeiten und sie in die Tat umzusetzen. Das läßt die Wiederherstellung des echten Genossenschaftskonzepts und eine Verbesserung des Ansehens der Genossenschaften erkennen. Zum Schluss kann noch einmal Münkner zitiert werden, wenn er sagt: “for Korean co-operatives in the event of unification of the country, much can be learned from German experience and in particular from costly mistakes committed during German unification.[12] ().

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Abkürzungen

Aufl.: Auflage

Bd. : Band

BIB : Bundesministerium für innerdeutsche Beziehungen

bzw : beziehungsweise

ca. : Circa

d. h. : das heißt

etc. : et cetera

f : folgende Seite

ff : folgende Seiten

GenG : Gesetz betreffend die Erwerb- und Wirtschaftsgenossenschaften

Nr.: Nummer

OHG : Offene Handelsgesellschaft/en

PGH-VO : PGH-Verordnung

S. : Seite

u. a. : unter anderem

Vgl. : vergleiche

Z. B : Zum Beispiel

ZfgG: Zeitschrift für das gesamte Genossenschaftswesen

Dominik Bierecki[*]

CAN COOPERATION BE COMPULSORY? LIMITS TO THE PRINCIPLE OF VOLUNTARY MEMBERSHIP IN POLISH AND GERMAN LAW

ABSTRACT: The article studies the relationship between the cooperative principle of voluntary membership and compulsory membership in cooperative associations and second-tier cooperatives under Polish and German law. It also considers autonomy and cooperative purpose and deliberates on the autonomy of cooperatives operating in financial markets. The study shows that the preservation of the autonomy of cooperatives justifies the compulsory character of membership in a cooperative association or second-tier cooperatives. It also supports the view that the autonomy of a cooperative from a state or another party should precede the principle of democratic member control. Democracy can only by fulfilled in an autonomous organization. At the same time, democracy and member control are essential features of cooperative autonomy in terms of self-organization, self-management and the representation of members in cooperative bodies.

KEY WORDS: compulsory cooperation, cooperative association, second tier cooperative, Poland, Germany

1. Introduction

In German cooperative federations (associations), Polish second tier cooperatives and associating banks cooperative membership is compulsory. This article considers whether the purpose of cooperative federations (association), second-tier cooperatives, or associating banks should precede the principle of voluntary and open membership? How are the fundamentals of these cooperative organizations linked to the Cooperative Principles?[1]

The article uses the dogmatic method of legal analysis to interrogate its thesis ‘does preserving the principle of cooperative autonomy justify the involuntary character of cooperative federations, second tier cooperatives and associating banks?’ In a landscape of public regulation, it is noteworthy that cooperatives are audited and represented by entities that share their core principles. Because the legal requirement of auditing and representation is linked to compulsory membership, cooperatives are able to remain mainly outside state supervision.

2. Legal forms of cooperation between cooperatives in Polish and German law

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[1] Because second tier cooperatives should share the nature of their members (cooperatives). See: Nileidys Torga Hernández and Orestes Rodríguez Musa, “La Cooperativa De Segundo Grado: Perspectivas Para Su Desarrollo En Cuba”, *Boletín De La Asociación Internacional De Derecho Cooperativo* 48 (2014): 84 – 89.

The late Prof. Hans-H. Münkner considered 'cooperation between cooperatives' in his work on cooperative groups,[2] a handbook on the German law of cooperatives,[3] and his lectures on cooperative law.[4] He emphasized the legal and cooperative point of view on cooperation between cooperatives and identified that not all legal ways of cooperation are acceptable for the cooperative purpose. When entering agreements, cooperatives should be guided by the cooperative's purpose. Accordingly, preserving the cooperative purpose should be reflected in the legal regulation of cooperative groups (enterprises controlled by cooperatives), cooperative federations, and second tier cooperatives.

German and Polish cooperative laws have some common features. Notably, the German Law on Cooperatives of 1st May 1889 *(Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften, so called Genossenschaftgesetz* applied in Poland due to the German occupation of the northern and western parts of Poland until 1918 and 1919. Common features between the laws include the regulation of cooperatives as a distinct type of legal entity alongside companies and partnerships. There are also similarities in their approaches to cooperative governance with both management boards and supervisory boards, and the requirement of strict adherence to the cooperative's charter.[5] These features were present in the first Polish law on cooperatives of 29th of October 1920 and still exist today in the Cooperative law of 16th of September 1982. However, there is a difference between Polish and German cooperative law in the way that 'cooperation between cooperatives' is regulated. German law provides for the possibility of cooperative federations in the legal form of associations (article 63b paragraph 1 of *Genossenschaftgesetz*). Cooperative societies are affiliated with auditing federations as compulsory members.[6] This does not mean that cooperatives are required to become members under public law. While the state grants auditing federations the authority to conduct audits, this does not make the federation an administrative body.[7] Cooperatives can belong to several auditing federations[8].

The German Federal Constitutional Court considered the compulsory membership of cooperatives in auditing associations in the resolution of 19th of January 2001 (case no. 1 BvR 1759/91).[9] The case was initiated by the constitutional complaint of a cooperative bank. The decision was that the constitutional complaint lacked the conditions of acceptance. The Court found that the complaint had no constitutional

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[2] Hans-H. Münkner, 2006. *German legislation with special emphasis on co-operative groups*, 2006.

[3] Werner Grosskopf, Hans-H. Münkner and Günther Ringle, *Our Cooperative, Idea – Mission – Achievements* (Zürich: Lit Verlag, 2016).

[4] Hans-H. Münkner, *Ten Lectures on Co-operative Law* (Zürich: Lit Verlag, 2016).

[5] Franci Avsec, "Ländliche Genossenschaften als Erzeugerorganisationen – Eine rechtsvergleichende Betrachtung," in Genossenschaften im Fokus einer neuen Wirtschaftspolitik 4, ed. Johann Brazda, Markus Dellinger, Dietmar Rößl, (Vienna: Lit Verlag, 2013): 286; Dominik Bierecki, Zasada swobody umów w prawie spółdzielczym (Warsaw: C.H. Beck, 2021): 87-89.

[6] Werner Grosskopf, Hans-H. Münker and Günther Ringle, Our Cooperative, Idea – Mission – Achievements, 152.

[7] Martin Schöpflin, "§ 54," in Genossenschaftsgesetz mit Unwandlungs- und Kartellrecht sowie Statut der Europäischen Genossenschaft, eds. Volker Beuthien, Reinmar Wolff, and Martin Schöpflin (München: C.H. Beck, 2018), 678-679.

[8] Martin Schöpflin, "§ 54," 679.

[9] https://www.anwalt24.de/urteile/bverfg/2001-01-19/1-bvr-1759_91 [access: 8th of September 2024].

significance. The Court concluded that the compulsory membership of cooperatives in auditing federations is justified by the scale of the audit which includes not only recalculation of the cooperative's balance sheet but also considers its economic circumstances and the proper conduct of its business. Therefore, auditing associations are designed to check on the fulfilment of the associated cooperative's purpose. Because auditing associations have greater experience in the activity of cooperatives than independent auditors, any interference with freedom of association resulting from compulsory membership is justified by the purpose of the supervisory audit.

However, according to the judgement of 10th July 1995 of the Federal Court of Justice (case no. II ZR 102/94),[10] member cooperatives are obligated to finance the audit associations' mandatory activity, i.e. the cooperative audit, but they do not have to finance optional tasks of the association, for example, the joint representation of the interests of cooperative members and maintenance of mutual business relations (article 63b paragraph 4 of *Genossenschaftgesetz*). Optional tasks of the audit association are voluntarily financed by its members (cooperatives).

In Polish law, the compulsory character regards the auditing activity. Auditing is conducted by a second-tier cooperative which associates the audited cooperative. However, there is no compulsory association in second-tier cooperatives. The cooperative can only be a member of one second-tier cooperative, which performs the audit.[11] In the case of cooperatives that are not associated in a second-tier cooperative, the audit is carried out by the National Cooperative Council, a statutory legal person. The National Cooperative Council is not an association of cooperatives. However, all cooperatives are eligible to participate in the cooperative congress, held every four years, and to select board members of the National Cooperative Council.

Polish cooperative law relies on the law of contracts i.e. cooperative consortium contracts to regulate 'cooperation among cooperatives' in the form of second-tier cooperatives. Second-tier cooperatives can be auditing associations or business cooperatives. They are cooperatives whose purpose is to serve the needs of their cooperative members under the statutorily prescribed subjects of activity (audit or business activity).[12] Cooperatives can conclude contracts of a different character or found commercial companies as a matter of the law of obligations (contract law) and commercial law. However, the Polish Supreme Court explained in its judgement of 20th of June 2007 (case no. V CSK 196/07) that a cooperative enterprise cannot be transferred to a commercial company because it would defeat the cooperative purpose of conducting a business activity in the interest of its members.[13] Also, commercial law and competition law regulate situations when a commercial company or other entities including cooperatives are entitled under agreements with cooperative members to appoint board members of the cooperative or influence the voting rights of the cooperative's general assembly. In these situations, the cooperative loses its autonomy, either because the acquisition of shares is treated as an acquisition by the commercial

[10] https://www.anwalt24.de/urteile/bgh/1995-07-10/ii-zr-102_94 [access:10th of September 2024].

[11] Krzysztof Pietrzykowski, *Prawo spółdzielcze. Komentarz do zmienionych przepisów* (Warsaw: Wydawnictwo Prawnicze, 1995): 216.

[12] Henryk Cioch, *Prawo spółdzielcze* (Warsaw: Wolters Kluwer, 2011): 108.

[13] On the cooperative purpose under Polish law see: Dominik Bierecki, "The Legal Nature of the Cooperative's Activity in the Interests of Its Members – Remarks Under Polish Law". *Boletín De La Asociación Internacional De Derecho Cooperativo* 61 (2022): 185-198.

company or because votes from shares of the dependent cooperative are added to the votes from shares of the dominant company. In both situations, the interests of external parties will prevail over the interests of the cooperative's members and compromise the principle of cooperative autonomy.

Associating as a second-tier cooperative and entering into cooperative consortium contracts is voluntary and based on the freedom to contract. However, in the case of a second-tier cooperative, the National Credit Union, voluntary membership is overshadowed by the obligation of credit unions to participate in the National Credit Union. The National Credit Union is a statutory second-tier cooperative and therefore cannot be dissolved or go bankrupt. Cooperative banks are another example where the compulsory cooperation of cooperatives transcends both cooperative and commercial law (in Polish law cooperative banks are a separate type of credit cooperative and distinct from credit unions). Cooperative banks have to participate as stockholders in an association bank. Association banks are established as joint stock companies and cooperative banks have to own at least one stock in an association bank.

3. Autonomy and cooperative purpose

'Autonomy and independence' is the fourth of the seven Cooperatives Principles. The Cooperative Principles are derived from the principles developed by the Rochdale Society of Equitable Pioneers, a consumer cooperative founded in 1844.[14] The seven Cooperative Principles are included in the 1995 Statement on the Cooperative Identity which has been adopted by the International Cooperative Alliance articles of association (Annex A). It has been argued that the Cooperative Principles should be considered by legislators around the world, because they are recognized in Recommendation No. 193 of the International Labor Organization (ILO), an instrument of public international law. Consequently, legislators of member states of the ILO have a legal obligation to impose them in their own state law.[15] In some countries, cooperative legislation directly includes the Cooperative Principles. This is the case in Portuguese[16] and Spanish law.[17] Other countries, including Poland and Germany law do not directly refer to the Cooperative Principles in their cooperative laws but include legal provisions that comply with these principles.

The principle of cooperative autonomy ensures that cooperatives are controlled by their members and are independent from the state and its agencies and also from external contracting parties (e.g. external investors)[18]. In my view, preserving the principle of autonomy and independence of cooperatives is

14 Rita Rhodes, Empire and Co-operation - How the British Empire used co-operatives in its development strategies 1900-1970 (Edinburgh: Birlinn, 2012): 25 – 30.

15 Hagen Henrÿ, "Cooperative Law – the translation of the cooperative principles into legal rules which respect the legal concept of sustainable development" (2021): 2 – 3.

16 Deolinda Meira, "The Most Relevant Trend Lines of Cooperative Share Capital Regime in the New Portuguese Cooperative Code," International Journal of Cooperative Law 1 (2018): 16.

17 Gemma Fajardo, "Spain", in Principles of European Cooperative Law. Principles, Commentaries and National Reports (Cambridge: Intersentia, 2017): 521.

18 Sonja Novkovic, „4th Principle: Autonomy and Independence", in Guidance Notes to the Cooperative Principles (2015): 45 – 47; Marianna Ferraz Teixeira, "The Limits of Cooperative Group Decisions when they Jeopardize the Cooperative Identity," in IV International Forum of Cooperative Law. Cooperation among cooperatives: a principle of the past or for the future? ed. Itziar Villafáñez Pérez, Aingeru Ruiz Martínez, Aitor Bengoetxea Alkorta (San Sebastián: Universidad del País Vasco,

essential to their ability to fulfil their core purpose of serving the needs of their members. It is not possible to put the interest of members ahead of the interest of external investors (not necessarily because of the need to fulfill contractual obligations but because of the need to attract investors). The state is more likely to use cooperatives to fulfil its duties towards society or its own agenda. This happened in Poland when it was under a communist regime and cooperatives were controlled by the state. The definition of the cooperative from the communist period in Poland explicitly stated that their purpose is to conduct: 1) economic activity accordingly to the national economic plan and 2) social and educational activity for the benefit of Polish People's Republic (article 1 of the act of 17th February 1961 on cooperatives and their associations).

It can be argued that in the social economy the purpose of cooperatives is to provide social services. In the case of housing cooperatives, their purpose complies with the state policy of providing homes to members of society. However, in both cases it is the cooperative's members who decide how and under what conditions they will implement the purpose of their cooperative. Therefore, it is necessary to autonomously determine the purpose of the cooperative, so that it does not serve external parties or the state. This determination is made under democratic rules with regard to the second Cooperative Principle, 'democratic member control'. Pre-World War II literature in Poland stressed that democratic member control is a rule that derives from the concept of cooperative enterprise and maintains other characteristics essential for the cooperative.[19] More recently it is argued that democratic member control is incorporated in the concept of cooperative autonomy and that a cooperative cannot be autonomous unless it is controlled by members in accordance with democratic rules.[20] There is historical evidence that shows how the democratic system can be manipulated when cooperatives are treated as instruments by external parties. The one member – one vote principle which is considered essential to democratic member control, was present in the cooperative law during the communist period in Poland (article 32 paragraph 3 of the act of 17th February 1961 on cooperatives and their associations).

In my opinion, the principle of autonomy should precede the principle of democratic member control. Democracy can only by fulfilled in an autonomous organization or society. A dogmatic interpretation of Cooperative law confirms this view. A second-tier cooperative can deviate from one member – one vote principle. In Polish law, this is also possible in the case of a farmers' cooperatives, even though this is a type of first-tier cooperative. However, a cooperative cannot abandon the principle of autonomy.

German literature notes that partly due to concerns about state supervision, Herman Schulze-Delitzsch stressed the need for recurrent audits at regular intervals.[21] It may therefore be concluded that the concept of audit federations was created to maintain cooperatives' autonomy from the state. Audit associations were formed as early as 1860.[22] From 1934 there was a legal obligation to affiliate with an audit

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2024): 89; Deolinda Meira and Maria Elisabete Ramos, "Projeções Do princípio Da Autonomia E da Independência Na legislação Cooperativa Portuguesa". Boletín De La Asociación Internacional De Derecho Cooperativo 55 (2019), 135-170.

[19] Stanisław Thugutt, Spółdzielczość. Zarys ideologii (Warsaw: 1937); 179.

[20] Novkovic, „4th Principle: Autonomy and Independence", 47

[21] Werner Grosskopf, Hans-H. Münker and Günther Ringle, Our Cooperative, Idea – Mission – Achievements, 156.

[22] Hans-H. Münkner, Ten Lectures on Co-operative Law, 185.

association was introduced.[23] In the cited resolution of the German Federal Constitutional Court of 19th of January 2001, the Court indicated that the audit system serves the purpose of maintaining the legal form of the cooperative as a means of self-administration and self-organization for those who tend to be economically weaker, and of creating the conditions for this legal form to exist in economic life. Moreover, the Court stated that these purposes can be attributed to the protection of private autonomy, which derives from article 2 of the German Basic Law. The obligation also derives from compulsory membership, only so far as it is necessary to ensure cooperative autonomy. Associated cooperatives have a statutory obligation to finance the association's mandatory audit activity. The financing of other activities of the association by the member cooperatives is voluntary. It must also be possible to have an association whose purpose is limited to the mandatory audit (judgement of 10th July 1995 of the Federal Court of Justice, case no. II ZR 102/94).

One of the reasons for maintaining audit autonomy is that state auditors or supervisors may impose standards that do not fit with the characteristics of the cooperative. This is what happened to credit unions in Poland after they came under the supervision of the state regulator of financial markets, namely the Financial Supervision Authority (FSA). After that, the number of credit unions reduced from 55 in 2013 to 19 in 2022 and the number of members declined from 2,660,075 in 2013 to 1,348,191 in 2022.[24] Prior to the introduction of state supervision, credit unions were supervised by the National Credit Union. During that period, no credit unions filed for bankruptcy. However, following the introduction of FSA supervision, in the period until 2017, 11 credit unions filed for bankruptcy and 8 credit unions were compulsorily taken over by commercial banks. Also in 2017, Articles 60 and 60a were introduced to the 5th of November 2099 Act on Credit Unions, according to which: 1) supervision over credit unions should be carried out in a manner appropriate to the level of complexity of the activities conducted by the credit union and the scale of risk involved in the activities of the credit union; 2) supervision of credit unions shall apply supervisory and remedial measures that take into account the scale of the credit unions' operations and apply milder measures if appropriate. This approach accommodates the limited scale of activity of credit unions (cooperatives) including providing non-complex financial services (loans, deposits) only to members who should be connected with a common bond.[25] These directions on supervision were fulfilled by the National Credit Union during the period that they were responsible for the supervision of credit unions. In my view, maintaining supervision by the National Credit Union would respect the principle of cooperative autonomy and protect credit unions from an overreach of supervision.

4. Autonomy and cooperation in financial markets

Financial markets are a specific area of economic activity, where aspects of both private and public law are applicable. Therefore, credit unions are subject to the dualism of the legal regulation of private and

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[23] Hans-H. Münkner, Ten Lectures on Co-operative Law, 186.

[24] World Council of Credit Unions statistical reports: https://www.woccu.org/about/statreport [access: 8th of September 2024].

[25] Dominik Bierecki, "New Regulation on Membership and Investor Shares in Credit Unions. Comparative Interpretation of Polish Law on Credit Unions," *Review of European and Comparative Law 56* (2024): 43–62.

public law.[26] This fact is reflected in the Model Law for Credit Unions,[27] developed by the World Council of Credit Unions for harmonizing credit unions laws worldwide.[28] A similar situation occurs in cooperative banks, which in Poland are a different type of credit cooperative than credit unions[29]. Because cooperative banks are partly subject to regulations that are applicable to commercial banks, they may apply solutions that are not available to credit unions. On the other hand, because the territorial scope of the activity of a cooperative bank will depend on their founders' funds, it may be limited to size of a credit union. However, credit unions do not have minimum capital restrictions or territorial activity restrictions. Because the is no statutory second-tier cooperative for cooperative banks (like the National Credit Union for credit unions) they are obligated to acquire stock in the associate bank in the form of a joint stock company. This allows cooperative banks to be a part of the financial settlements system as stockholders of the associate bank (who are founders of the National Settlement House, in the form of a joint stock company), alongside the National Bank and other commercial banks. Credit unions, on the other hand, conduct financial settlements for their members through the National Credit Union. Cooperative banks acquire shares in the association bank under the rules of commercial law and consequently the principle of one member – one vote is excluded. However, in the case of a cooperative bank, one stock only allows only one vote (in commercial law one stock can allow two votes). But there is no limit on the amount of stock that a cooperative bank can acquire in the association bank. Moreover, commercial banks can also acquire stock in the association bank although they cannot exercise voting rights for more than 24% of the stock at a general meeting.

Because democracy and member control is an essential feature of cooperative autonomy, it can be argued that the obligation to acquire stocks in the association bank trumps the autonomy of cooperative banks. As noted in the literature, integration into a company does not ensure equal participation in control over the entity, unlike the case of a second-tier cooperative.[30] In the case of a commercial company, cooperative stockholders do not have a guarantee of representation on the supervisory board. In a

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[26] Dominik Bierecki, "Podstawy prawne funkcjonowania spółdzielczej kasy oszczędnościowo-kredytowej," in System Prawa Prywatnego, Prawo spółdzielcze 21, ed. Krzysztof Pietrzykowski (Warsaw: C.H. Beck, 2020): 935.

[27] https://www.woccu.org/international_advocacy/model_law_for_credit_unions [access: 8th of September 2024].

[28] Dominik Bierecki, "Legal Status and Development Trends of Credit Unions in Polish Law and Its Compliance with the WOCCU Standards and the International Cooperative Principles",*Boletín De La Asociación Internacional De Derecho Cooperativo* 56 (2020), 19-45.

[29] The differences are in the capital sphere: credit unions do not have a minimum capital requirement but cooperative banks have a requirement of at least 1,000,000.00 Euro, and with regard to transactions: credit unions can only provide services to its members (every service is a cooperative transaction) but cooperative bank can also offer services to persons other than members of the cooperative.

[30] Antonio Fici, "Cooperation among Cooperatives in Italian and Comparative Law", Journal of Entrepreneurial and Organizational Diversity 4, no. 2 (2015), 79; Deolinda Meira, "Os Grupos económicos Cooperativos Na Encruzilhada Entre Os princípios Da intercooperação E Da Autonomia E Da Independência. Uma análise à Luz Do Direito Português", Boletín De La Asociación Internacional De Derecho Cooperativo 59 (2021): 177.

cooperative, the supervisory board is composed of its members or representatives of a legal person which is a member of the cooperative.

Because of the lack of democratic member control over the association bank, the autonomy of the cooperative bank may be violated in terms of its dependence on external entities that provide essential business to the cooperative bank. For example, the association bank 1) maintains current accounts of associated cooperative banks, in which the associated cooperative banks maintain mandatory reserves and conduct monetary settlements through them, and 2) calculates and maintains the mandatory reserve of associated cooperative banks in an account with the National Bank of Poland. Also, the association bank can file to the FSA for execution of public law sanctions against associated cooperative bank, for example: 1) fulfilling additional reporting obligations or increasing their frequency, including reporting on own funds, liquidity and financial leverage, or 2) compliance with additional liquidity requirements, or 3) suspending the creation of new organizational units until payment liquidity is restored or other standards of permissible risk in the bank's operations are achieved. In a situation where cooperative banks do not have equal influence in the governance of the associated bank, including appointments to the boards (management and supervisory) these private and public law affairs restrict the autonomy of the cooperative bank.

5. Conclusions

This analysis shows that a significant justification for the compulsory membership of cooperatives in their associating organizations - is the preservation of cooperative autonomy. If the associations are controlled by cooperatives under democratic rule, they can legally perform duties that would otherwise be performed by the state. Because of this, cooperatives can serve the needs of their members. This would not be possible without the autonomy guaranteed by the associating organizations due to their compulsory membership. Preservation of the principle of cooperative autonomy also happens by delivering to the compulsory associated cooperatives the infrastructure needed to perform cooperative transactions. This happens in the financial market because without the services provided by the second-tier cooperative (National Credit Union), credit unions could not perform financial settlements for their members. In the case of cooperative banks, they are forced to integrate with commercial companies (association banks) and abandon the principle of autonomy. However, Polish law raises concerns insofar as it requires the associating bank to be established as a joint-stock company, while permitting the entity responsible for managing the protection system, within the meaning of Article 113(7) of Regulation (EU) No 575/2013, to be formed as a second-tier cooperative.

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TRIBUTES

Garry Cronan*

Hans Münkner – a 'generational giant'

This paper takes the form of both a (brief) testimonial and an examination of two specific issues identified by Professor Münkner in his research. Firstly, the need to consider the larger policy setting in which co-operative legislation is developed and subsequently regulated. And secondly, and relatedly, the role of the co-operative registrar, both within co-operative legislation itself, and more broadly within the wider government policy framework.[1]

Hans Münkner belonged to a generation of co-operative researchers and thinkers who mixed academic discipline with real world practical co-operative experience. It is a generation that includes Prof Ian MacPherson, Prof Johnson Birchall and Dr Rita Rhodes, amongst others.[2] Sadly, in recent years, several members of this remarkable and productive generation have passed away. However, their influence and intellectual legacy lives on in the work of many present-day co-operative researchers across a range of disciplines, countries and research traditions.

My professional (and personal engagement) with Prof Münkner('Hans') is best expressed by the retelling of two separate events. In the first, I invited him to be a keynote speaker at the 1995 Co-operative Key Issues Conference in Sydney, Australia. In the second instance, the invitations were reversed, and Hans invited me to participate in a special colloquium in 2004, on *100 Years -Indian Co-operative Credit Societies Act 1904* at the University of Marburg, Germany.

The thread connecting these events can be found in the topics discussed. For the Colloquium in Marburg, Hans asked me to write and present on the role of the Registrar of Co-operatives in Australia, specifically in the state of New South Wales ('NSW').[3] Hans over many years, and in a number of papers, demonstrated that he clearly understood the importance of well drafted and well-informed co-operative legislation, and also, the almost equal importance of knowledgeable and committed implementation of that legislation by government officials, including (following the British tradition), the Registrar of Co-operatives.[4] In Hans' view the Registrar needs to be educated and mindful of co-operative principles, values, and practices, in their approach to the regulation and development of co-operatives under their charge.

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[1] An Australian example will be drawn on to help illustrate these points.

[2] Each of these researchers have had a special lecture series or book named in their honour. Through this special journal series and the subsequent book Hans Münkner rightfully joins this celebrated group.

[3] New South Wales (NSW) is one of the main states of the Commonwealth of Australia. In terms of co-operative legislation, development and regulation NSW has played a leading role in that country.

[4] In particular see Münkner M, 2006. *One Hundred Years: Co-operative Credit Societies Act in India – A Unique Experience of Legal Social Engineering.*

It is the need for experienced, committed and knowledgeable co-operative government officials that also connects with the first event mentioned above - the Key Issues conference in Sydney. Hans's address to this gathering followed an address by the leading (government) regulator for competition policy in Australia, Prof Allan Fels. As pointed out by Australian co-operative historian, Dr Gary Lewis, Fels noted in his address that co-operatives, were in fact *'anti-competitive'* by their very nature.[5] Hans immediately understood this was a clash, (and possible confusion) of legislative and policy objectives – organisational law clashing with competition law.

It is this aspect, the possible conflict of co-operative law,[6] with other (nationally or regionally based) legislative and policy aspects of government that Hans noted can either help or hinder the effectiveness of the co-operative law itself. Co-operative legislation is not an island, surrounded by indifferent, or irrelevant bodies of legislative, policy and political settings. It sits within this broader legislative and policy context and needs to be knowingly drafted and administered within this wider institutional context.

These two issues, for the Registrar, are connected – firstly, their role as regulator in the effective drafting and administration of co-operative law, and secondly, the equally demanding challenge, for the Registrar, of positioning and maintaining co-operative laws vis a vis other sometimes more dominant and ascendant policy and legislative paradigms. The registrar's role in both cases is equally critical.

The Australia experience is used to illustrate this observation.

1. Classic Indian Act and the role of the Registrar

Hans noted in his 2006 paper that the

'*Indian Co-operative Credit Societies Act and the government machinery devised for implementing this legislation became known as the "Classical British-Indian Pattern of Co-operation (CBIPC)".*[7]

He observed that this legislation and its accompanying administrative machinery was the model, not only for India, but other British dependencies in South Asia, subsequently spreading out to other Commonwealth countries , as well as having an influence in some French colonies. As a result, Hans has suggested that it was one of the first '*global laws'*.[8]

Importantly, Hans argued that the '*Registrar of Co-operative Societies is presented as a special feature and main innovation of the CBIPC'.* In other words, co-operative legislation is one thing, but, as he identified, you also need an (innovative) mechanism (or person) who knows how and why co-operatives need to be administered sympathetically, in the face of (possible) ignorance, indifference, or hostility.

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[5] See Lewis, G. (2016), The Democracy Principle – Farmer Co-operatives in Twentieth Century Australia. Co-operative Federation of NSW Ltd, Australia.

[6] This is regardless of how well conceived, drafted or harmonised it is with other countries' co-operative legislation.

[7] Münkner M, 2006. One Hundred Years: Co-operative Credit Societies Act in India – A Unique Experience of Legal Social Engineering.

[8] Münkner M, 2006. One Hundred Years: Co-operative Credit Societies Act in India – A Unique Experience of Legal Social Engineering.

The CBIPC provided legislative authority for the Registrar to fulfill this role, including the ability to function as a co-operative developer.

2. The long arch of co-operative legislation and regulation in Australia

As suggested above, the CBIPC also had an influence in Australia. The first consumer co-operative, based on the Rochdale model, had been formed in Brisbane in 1859. The first Australian friendly society was established even earlier in 1840's. Formal government regulation of co-operatives had commenced in 1865, when they were brought under the administration of the Industrial and Provident Societies Act. In 1873, a Registry of Friendly Societies, based on the English model, was established in Sydney, its purpose to supervise the expanding number of mutual and co-operative entities being formed. This Registry's role during the late 1890's and into the early part of the 20th century was not as an active developer of co-operatives. Rather, its focus was strictly on regulating the activities of co-operatives.[9]

The next stage of co-operative development occurred in the early 1920s, when the State Government of NSW was keen to improve rural conditions, including access to credit, and determined that a new Co-operation Act was needed. To help achieve this, the government undertook research into various international models, including the 'classic Indian' Act. The introduction of the NSW Co-operation Act 1923 heralded a definite policy shift in co-operatives towards development, while still within a regime of strict regulation.

Regarding the balancing role of the registrar as developer and/or regulator, it is worth noting Hans' 2006 paper had observed that the:

> 'Registrar of Co-operative Societies ….in his original role as development entrepreneur….always risks becoming a supervisor and policeman, rather than to retain his originally intended role as guide, philosopher and friend of co-operators'.[10]

3. Registrar system in NSW

The 1923 *Co-operation Act* provided for the creation of a separate Registry for Co-operatives in NSW. This meant that a group of government officials, committed to the development of co-operatives now existed. This was the beginning of what Münkner spells out as the start of the '*Registrar System'* in Australia.

The history of the next one hundred years, (up until 2025), after the introduction of the 1923 Act in NSW has been decidedly mixed. This reflects the reality for both the co-operative movement and its regulation and development throughout Australia, more generally. There have been periods of considerable development activity by the Registry in NSW, particularly in the period from the1940's to the1980's. Also, until the early 1990's, there was a separate NSW Government Department of Co-operative Societies, with upwards of 100 officials, who not only looked after co-operatives formed under the *Co-operation Act*, but also financial cooperatives including Credit Unions, Permanent Building Societies, and Friendly Societies, and Co-operative Housing Societies, each with their own legislative frameworks.

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[9] See Cronan, and Wickremarachchi, (2000)

[10] Münkner M, 2006. *One Hundred Years: Co-operative Credit Societies Act in India – A Unique Experience of Legal Social Engineering.*

However, the 1990's and 2000's saw significant administrative, regulatory, and legislative change in Australia.[11] These changes were largely driven by the adoption of neoliberal policies, including privatisation, deregulation (including agricultural marketing and financial services – all strong co-operative and mutual industry sectors), the opening of the Australian domestic market to more international competition, the adoption of competition policies driven by among others Prof Fels of the ACCC,[12] considerable corporate and other regulatory reforms (largely moving from State based to national schemes) along with a preference for investor owned models.[13]

Concurrently we also saw extensive demutualisation of mutually owned enterprises, resulting in Australia being labelled the *'demutualisation capital'* of the world (Cronan, 2018).[14] During this period, the national movement was also probably at its lowest point in decades.[15] This was the unfolding scene that confronted Hans when he addressed the Key Issues Conference in Sydney in 1995 and called out Prof Fels characterisation of the *'anti-competitive'* character of co-operatives.

Finally, it is worth noting that the key challenge for registrars in Australia during (and following) this period was not quite as Hans expected. He saw the challenge as the assumption of greater government control of the co-operative movement, rather than the registrar being a sympathetic and knowledgeable developer. Instead, the position of registrar in Australia has effectively been demoted within government ranks, both in terms of status and credibility. The appointed officeholder is left trying to argue the case for the importance of co-operatives and the co-operative movement to a largely indifferent and sometimes hostile group of government colleagues and Ministers.[16]

4. Is legislation the most important thing?

Hans travelled extensively and worked on co-operative legislation in many countries (with developed and developing economies). He understood the importance of good '*model or template'* co-operative

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[11] This period also saw a number of commercial failures by (large) co-operative and mutual businesses in Australia.

[12] Australian Consumer and Competition Commission

[13] Additionally, what was known as New Public Management (NPM) emerged in the late 1970s and early 1980s, in Australia, as governments sought to make public services more efficient and business-like, applying private sector management models to government operations. One result of this was to reduce the status of previously discrete, small specialist agencies such as the Department of Co-operative Societies. These bodies were transferred into larger more diverse departments which resulted in many officials and much expertise (institutional knowledge) being lost. Confirming this loss of status in NSW the separate ministerial position of Minister for Co-operatives also disappeared during this time.

[14] Cronan, G. (2018). Is Australia the demutualisation capital of the world? Presentation to University of Sydney, Cooperatives Research Group Symposium, November 2018

[15] Additionally, overall government officials with specific co-operative responsibilities, particularly at a state government level, were also reduced over these years.

[16] In some cases, supporting co-operatives in the context of a policy environment which may view them as inherently *'anti-competitive'* can be seen as being subject to '*industry capture'*.

legislation. He also understood the importance of that legislation having mechanisms for both regulation and effective co-operative development.[17] The CBIPC was an example of such a model .

The Australian experience outlined above shows the strength and the limitations of applying the CBIPC model in different institutional and (movement) historical contexts. The distilled wisdom that a model like the CBIPC (or its present-day equivalent) provides is to ensure that universal co-operative values, principles, and organisational strategies are freely available to be applied in various countries throughout the world via a *'model'* Act. However, as my recent research on the sustainability of the world's largest co-operative and mutual businesses, and the Australian experience, more generally) demonstrate, co-operative legislation is not always the most decisive factor. Other considerations may be even more important.18 The maturity (and resilience or otherwise) of the co-operative movement and the wider institutional (social and economic) and policy environment as reflected in other areas of legislation that may also be relevant to co-operative operation, including corporate regulation, competition policy, and taxation, can matter almost as much or more than co-operative legislation itself.19

5. Outstanding contribution

Prof Münkner was aware of the messier realities of co-operative legislation operating in the real world. His first-hand and direct knowledge gained from studying and advising many countries on co-operative legislation, combined with a sharp mind and academic rigour, resulted in some of the most influential legal texts, guides, histories and analysis. Hans knew the strength of the co-operative model and how and when it should be applied, and how and when it needed to be defended and distinguished from other forms of business or social organisations.

His legacy represents a generationally significant contribution to the movement's intellectual and practical development. Like many others, I have viewed the opportunity to work with and get to know Hans as one of the privileges of my professional life.

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[17] Prof Münkner is one of the few co-operative researchers who has an interest in the history (and mechanics) of the administration of co-operative legislation. This is a largely neglected area of co-operative research and as a former government official responsible for co-operative development, policy, regulation and legislation I would suggest a rich vein to be mined in terms of understanding why similar co-operative legislation in some countries can have, on occasion, different outcomes.

[18] These include the state and stage of the co-operative movement lifecycle in the particular country, See Cronan (2024) for more detail and explanation on the role and predictive potential of using co-operative movement lifecycles in co-operative research.

[19] See also Cronan (2024) where it is further argued that from a business history perspective looking back over maybe a hundred years (using the Top 300 dataset) one can actually see what co-operatives (and mutuals) have scaled, survived and been successful and relate this empirical (longevity) data to comparative legal analysis to see what if any significant relationships exit between co-operative performance and survival and (accompanying) legislative frameworks over the longer term.

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Enzo Pezzini*

More than fifteen years of collaboration, esteem and friendship with a truly unique personality.

I had the good fortune and privilege to have met and collaborated with Professor Munkner on several occasions over a period of more than 15 years. Among my many memories I would like to mention three particular moments.

The first moment relates to the European Digestus Project (Network for New Laws on Social Enterprises in Europe) ('Digestus'). I was the coordinator of the project from September 1998 to December 1999. During this time, the occasions of interaction and meeting with Professor Munkner were very frequent and intense.

The project, with partners from five countries (Belgium, Germany, France, Italy and Spain), involved two players in each country: a scientific partner, who was tasked with taking stock of the state of play of social enterprise and the prospects for legislative reform, and a grassroots organisation from the local area with an interest in taking action to promote social enterprise and legislative reform through political action and awareness-raising. The aim of the project was to contribute to taking significant steps towards introducing or improving social enterprise legislation in each of the countries involved. For Germany, the scientific partner was Professor Munkner. There were many contacts, meetings, seminars and international conferences during the project, and this allowed me to fully appreciate Professor Munkner's competence, precision, and punctuality in sending the research progress reports. In addition to exchanges of correspondence, we met at least three times in Rome and twice in Brussels.

In some countries, the project was part of an evolutionary dynamic that was already underway. However, it was also clear that, even within these dynamics, 'Digestus' catalysed and stimulated moments of encounter, reflection and proposal, and added the significant value of comparison with experiences in other countries and with the European dimension. Beyond the scientific results it enabled a dynamic to be set in motion and bore fruit in some countries. In France, promoted by the CGSCOP, the 'démarche collective d'innovation' project for the creation of a new form of collective enterprise SCIC (Société Coopérative d'Intérêt Collectif) commenced. In Germany, the revision of the *Co-operative Societies Act* was scheduled for 2002. A draft, which incorporated many of Prof. Dr. Münkner's suggestions, of the proposed revision was discussed at the national seminar and was being supported and promoted by the 'Verein zur Förderung des Genossenschaftsgedankens'.

The second moment to remember was the meeting we had in December 2003 in Trento, northern Italy at the international seminar, 'From Cooperative to Social Enterprises'. The seminar was attended by leading academics. In addition to Professor Munkner, guests included: Ian MacPherson (Canada), Carlo Borzaga (Italy), Roger Spear UK), and practitioners/field researchers such as Alix Margado (France) and Jean-Pierre Girard (Canada). For me as a practitioner it was a privilege to intervene in that context. The proceedings were published in, Borzaga C. & Spear R (2004), *Trends and challenges for Co-operatives*

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and Social Enterprises in developed and transition countries, Edizioni 31, Trento. The title of Professor Munkner's contribution was: 'Multi-stakeholder Co-operatives and their Legal Framework.'

The third moment is an interview I did with him for the Italian Credito Cooperativo magazine (*Credito Cooperativo,* Novembre – Dicembre, 2008, ECRA, Roma). Due to publication requirements, the interview was greatly reduced for publication. I have kept the original, and the transcript is reproduced below as a memento of the Professor, together with a nice picture.

"Hans-H. Munkner is one of the world's most respected and esteemed cooperative law scholars. To his competence, he also combines availability and friendliness, qualities that make him a truly unique personality. In this interview, Munkner recounts his cooperative experience, carried out both through an intense academic life and through the cooperative promotion and consultancy work he has undertaken on all continents, and traces the outlines of a possible future path for his studies and work in the cooperative field.

1. Professor, can you describe your long career at the University of Marburg?

I studied law at the Universities of Marburg, Mainz and Berlin (1955-1960) and obtained a first degree in law at the Faculty of Law and Economics at the University of Marburg (1961), followed by further studies in cooperative law in preparation for my doctorate. In 1962-1963 I participated in a two-year training programme for cooperative advisors for developing countries, offered by the Central Organisation of German Cooperative Federations in cooperation with the German Federal Government. In this programme 10 people from academia and 10 people from cooperative organisations were prepared to serve as cooperative advisors for foreign countries.

We attended numerous training sessions with co-operative specialists at both the ILO (International Labour Organisation) and the FAO and practical training periods both in Germany and abroad (I, for example, spent four months in an Israeli Kibbutz).

After completing this training, instead of working abroad I was offered the opportunity to become an assistant at the Faculty of Law and Economics at the University of Marburg, integrating myself with a team of four researchers in the fields of economics, business administration, agricultural economics and law. The task was to establish an Institute for Co-operation in Developing Countries (ICDC) and set up a four-year degree course in co-operative economics for students from developing countries mainly from Africa and Southeast Asia. After the completion of my doctoral thesis on co-operative legislation in English-speaking countries and many other publications both in Germany and in international journals, I was appointed in 1972 as Professor of German and International Business Law and Co-operative Theory and elected to the ICDC Board of Directors.

In the 1980s, I also served as Dean of the Faculty for two years and from 1991 to 2000 I was Director of the ICDC.

During the years as a Professor of Law and Co-operative Theory in Marburg, I was often called upon as a consultant for ILO, FAO, UNIDO, UNDAT and for German technical assistance in the revision of cooperative laws and policies. The first assignment (1974-75) was a work as ILO consultant to help the Singapore government to revise its Co-operative Societies Act. I later worked in the same capacity as a *legislative advisor in Burkina Faso, Guinea-Conakry, Cameroon, Mauritius, Zimbabwe, Thailand, the Philippines, Tuvalu and Malta.*

From 1980 to 1990, the ICDC team of Professors helped establish a university course in cooperative economics at the University of Padjadjaran (UNPAD) in Bandung, Indonesia. This involved one month of intensive teaching in Bandung every year for 10 years. Much of the work abroad was done in collaboration with former graduates of co-operative economics of the Marburg University.

Outside University, I was a founder member of the German African Law Association, established in 1973, which has today some 250 members, publishes its own journal and organises annual conferences.

A special experience was the participation in the working group of the International Cooperative Alliance, coordinated by Ian MacPherson, which reformulated the cooperative values and principles that were approved at the ICA congress in 1995.

I was a founder member of the co-operative society, Marburg Consult for Self-help Promotion, formed in 1985 and dissolved in 2000. During this period, I was continuously re-elected as Chairman of the Board. This co-operative society of research workers and consultants had, as its object, to carry out research work for German and foreign development organisations and to publish textbooks and conference reports.

I have been retired since 2000 but continue to publish works and provide consultancy services. The opportunity to combine academic teaching and direct consulting experience in various types of cooperative enterprises, as well as the presidency of a cooperative, have greatly helped me to understand the particularities of cooperative development and to teach based on my direct experience.

2. Your long experience as a professor has allowed you to train generations of students, from all continents, did anyone hold important positions?

From 1964 to 2002 about 250 students from about 100 countries passed the examination successfully. 10 percent of these graduates continued their studies for a doctorate at German and foreign universities, the same percentage as that of German students of economics. Many of those who took their doctorate later became Professors in their country of origin, for instance in the United States of America.

Another interesting case are the 11 Chinese students who graduated in 1996, I have been in contact with 5 of them, 3 are Professors at Xi'an University, one works in the China office of a German Foundation, and one works as a director of a German company in Shanghai.

About 30 percent of the graduates were employed in Co-operative Departments, co-operative colleges and co-operative federations, 12 percent by public development institutions, 6 percent by international organisations (ILO, FAO, World Bank), 15 percent work in public or private enterprises (in the fields of training, auditing and consulting or as entrepreneurs), 13 percent in universities, technical high schools and research centres, 3 percent in Ministries. With others the contact was lost. About 80 percent of the graduates sooner or later returned to their countries of origin.

To mention a few outstanding careers: two graduates from Burkina Faso graduating in 1976 became the regional director of the ICA for West Africa (Abidjan and Ouagadougou) and later for the whole of Africa (Nairobi, Moshi), after having served for some years as the head of the co-operative division of *the Ministry of Rural Development of what was then Upper Volta in the 1980s (from 1984 Burkina Faso). The other graduate became the director of the rural development bank of Burkina Faso and was later elected as Secretary General of the African Rural and Agricultural Credit Association (AFRACA) in Nairobi where he served several terms until his retirement.*

One graduate with a doctorate from Eastern Nigeria returned to his country of origin after several years of service in FAO. He was appointed Professor, became the Vice-Chancellor of his university and is now retired. Two graduates from Madagascar and Cameroon became Ministers. One graduate from Tanzania served as ambassador for his country in Japan and China. One graduate from Fiji topped his career in the Co-operative Department as the Registrar and Head of Department and just retired. One graduate from Senegal became the director of the co-operative section of the national academy for applied economics, where he served until his retirement and now works as a freelance consultant together with other Senegalese graduates from Marburg.

There were only a few women participating in the degree course. Two of them can be mentioned for their remarkable careers. The graduate from Malaysia became a high ranking official in the Ministry in charge of co-operatives. She later took a doctorate in the United Kingdom and returned to her Ministry. The other, a woman from Sudan, who took her doctorate in Marburg, has all the credentials to be appointed as a professor in a Sudanese University.

When working in Cameroon as a consultant for USAID in 1990 and 1992 to help to redraft co-operative legislation, I was assisted by two of my former students, one from English speaking West Cameroon, where he represented an international development institute and the other from French speaking Cameroon, who worked as a professor at the University of Douala. During the past several years, I have conducted research in South Korea and Germany together with a former graduate, now a professor in Daegu. The topics of joint research included among other things evaluation of the experience with co-operatives in the process of unification of Germany and lessons to be learnt from this experience in Korea.

3. Scientific reflection and analysis, university studies, training are essential for the cooperative experience. What is your opinion on the current state of cooperative studies?

From a German perspective, for the last decades, co-operative studies were a well-established subject matter in the curricula of degree courses in economics and business administration. But there is a decline. Many of the professors who were teaching co-operative subjects have retired and the younger colleagues often have different priorities. There are 10 research institutes for co-operative studies, some being part of the University, others being private institutes in the legal form of association and/or foundation close to the universities. These institutes work together in an association of co-operative research institutes (AGI), which publishes its own quarterly of co-operative studies (ZfgG) since 1960 and organises International Conferences on Co-operative Science every four years. The 16th conference was recently held on 7-9 October 2008 in Cologne. There is also a yearly meeting of young research workers, who are given the chance to present and discuss the findings of their research often in preparation of a doctorate. There is a vast volume of literature dealing with almost all conceivable problems related to co-operative societies.

However, there are signs of weakness. Economics of co-operation are a topical issue in business administration and management – referring to co-operation of commercial enterprises in various forms, reaching from franchising, networks, and strategic alliances to joint ventures. In this rapidly expanding new field of studies and research, the classical co-operative self-help organisations based on co-operative values and principles do not play any role – neither in textbooks nor in lectures – and are sometimes they are even expressly excluded.

This coincides with a trend of old established co-operatives like co-operative banks to adapt their business policies and strategies to those of their commercial competitors rather than to count on the uniqueness of co-operative identity as a source of strength. Clearly visible signs of this trend are to grow by merger and by trading with customers rather than with members, offering members and non-members the same conditions, thereby losing their local roots and defeating the reason for becoming or remaining a member.

The challenge is to attract a new generation of research workers and professors to take interest in co-operation the co-operative way. They have to be motivated to offer lectures in this field which attract students and to demonstrate that the classical model of co-operation based on self-help, self-responsibility, voluntary affiliation, internal democratic structures and equitable distribution of economic results are still relevant today. It must be demonstrated that in times of globalisation with high mobility of capital and labour, locally rooted co-operatives dealing with the object to cater for the needs of people rather than to make profit, can be a viable alternative to volatile enterprises owned by anonymous shareholders, operating on boundless markets as long as they can make profit and move on, leaving closed factories and unemployed workers behind.

Another trend is to discover new fields of activities like organising communal tasks by citizen's co-operatives, providing health services, day care centres for children and senior citizens, organisations for the joint use of alternative energy and for social inclusion of marginalised groups.

4. What is your view on the future of the cooperative movement?

For the co-operative movement to have a future it is essential that those who represent it have clear concept of the basic ideas on which co-operative societies are based. The core of co-operative activities is voluntary association of persons who want to reach their own objectives by working together with others having the same objectives. The key is the common purpose of promoting one's own interests by co-operating with others in a jointly owned and patronised enterprise (principle of identity of owners and users). How this can be done in detail and under prevailing circumstances is left to the individual society to regulate in its by-laws (self-regulation). There are tested 'best practices' that can be used, as long as they are accepted by the co-operators as useful and beneficial. To be effective, co-operatives have first of all to survive in the market and the members must be able to bring about tangible benefits by working together the co-operative way. The aim is not to implement co-operative ideology but rather to run successful co-operatives in fields where the state and the market do not offer valid alternatives. In this endeavour, co-operative principles can be useful guidelines, provided co-operative leaders 'walk their talk', i.e. that they live and act in accordance with what they preach.

Last but not least it can be stated that co-operative federations are increasingly open for promoting the formation of co-operative societies in new fields of co-operative activities responding to new needs of members due to far reaching demographic, ecological and technological change."

The last occasions for meeting with Professor Munkner were in the years 2012-2014 in the Brussels office of the Italian Confederation of Cooperatives that I headed. On several occasions I hosted the 'Study Group on European Cooperative Law' (SGECOL) of which Professor Munkner was a member, together with Gemma Fajardo, Antonio Fici, Hagen Henrÿ, David Hiez and Ian Snaith.

I retain memories of his great friendliness, cordiality, helpfulness, generous humility combined with his exceptional competence. He never let his enormous international prestige weigh heavily on young researchers or practitioners. These qualities made him a truly unique personality.

List of Professor Münkner's Publications Related to the Theme of Cooperatives and the Role of the State*

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*Was hätte Schulze-Delitzsch zu der Verordnung über die Europäische Genossenschaft gesag*t [What would Schulze-Delitzsch have said about the Regulation on the European Cooperative]? Förderverein Hermann Schulze-Delitzsch und Gedenkstätte des deutschen Genossenschaftswesens e.V. (Hrsg.), Schriftenreihe Heft 13, Delitzsch 2007

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* This list is a compilation of some of Professor Münkner's publications that are relevant to the theme of this issue. It is not intended to represent an exhaustive list. If you know if any publications which you believe should be included here, please contact the editorial committee.

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