

Ensuring Supportive Legal Frameworks for Co-operative Growth

Paper presented at the ICA 11th Regional Assembly, Nairobi,

17-19 November 2014

by Hans-H. Münkner, University of Marburg, Germany

*I have the impression
that the movement which the local authorities try to develop,
is established on a bad foundation,
where education is sacrificed to profitability,
inventive effort to guided organization,
patient and difficult work to automatism,
forgetting that their role is to assist in doing things
and not to do things themselves
nor to order these things to be done.*

Mamadou Dia, 1952

Source: Contribution à l'étude du mouvement coopératif en Afrique noire, in : Le mouvement coopératif en territoires tropicaux arriérés, Deuxième symposium international d'économie rurale tropicale, Gent 1952, Leiden 1953, pp. 151, 152.

Contents

*1. Introduction; 2. How to improve the legislative environment of co-operatives?
3. The place of co-operative law in the hierarchy of legal norms; 4. Law and Policy;
5. What kind of law? 6. Development trends in co-operative law; 6.1. Approximation to the company model versus type-specific differentiation strategy;
6.2. Economic efficiency and effective member-promotion; 6.3. Special financial structure;
6.4. Growth by vertical integration; 7. New forms of co-operatives and fields of business;
7.1. New forms of co-operatives; 7.2. New fields of business for co-operatives;
7.3. New legal frameworks for village groups and pre-co-operatives;
7.3.1. Village groups in Upper Volta/Burkina Faso, 1983; 7.3.2. Common Interest Groups (CIG) in Cameroon, 1992;
8. Is there an African Co-operative? 9. Co-operative Education; 10. Knowledge of law;
11. Conclusion; 11.1. What to do next? 11.2. What to avoid? References*

1 Introduction

In a resolution in its fifty-sixth session (56/114), the General Assembly of the United Nations approved under the heading ‘Co-operatives and social development’ that it “encourages Governments of Member States to keep under review, as appropriate, the legal and administrative provisions governing the activities of co-operatives, with a view to ensuring a supportive environment for them and to projecting and advancing the potential of co-operatives to help them achieve their goals”.

These goals and how to reach them are defined in the ‘Statement on the Co-operative Identity’ of the International Co-operative Alliance (ICA) - a statement of an international Non-Governmental Organisation (NGO) - consisting of a definition of co-operatives, a list of co-operative values and seven co-operative principles turned into public international co-operative law (Henry 2012, pp. 47-51; Henry 2013, pp 65 f.) by integration into the ILO Recommendation 193 of 2002 on the Promotion of Co-operatives (par. 2 (Definition) and par. 3 and 7 (Values and principles)).

In ILO Recommendation 193 of 2002 it is stated under the heading ‘Policy’ (par. 4) that “measures should be adopted to promote the potential of co-operatives in all countries, irrespective of their level of development, in order to assist them and their membership to:

- (c) develop their business potential, including entrepreneurial and managerial capacities,
- (d) strengthen their competitiveness as well as gain access to markets and to institutional finance,
- (e) increase savings and investment ...
- (h) establish and expand a viable and dynamic distinctive sector of the economy, which includes co-operatives, that responds to the economic needs of the community”.

From this list it appears that co-operatives would need in the first place an enabling legal framework, giving them autonomy to develop their own potential as self-help organisations (SHOs), while support could lead them into dependence on those giving such support.

2 How to improve the legislative environment of co-operatives?

In this paper ways are discussed how to improve the legislative environment in which co-operatives can survive and thrive. The task is to explore, how to establish a legislative framework for the appropriate development of co-operatives.

In the ICA Blueprint for a Co-operative Decade of 2012, the legal framework is contained as one of five pillars on which co-operatives are built. But should a good legal framework for co-operatives be comprehensive or concise? Should as much as possible be regulated in the law or only what is indispensable?

The answer given by Montesquieu (a French philosopher and lawyer of the 18th century) is still valid: “Where it is not absolutely necessary to make a law, it is absolutely necessary not to make such law”. Accordingly, the trend should be to keep a co-operative law as short and concise as possible.

The role of co-operative law is to shape and protect the co-operative model of organisation, defined by the internationally recognised co-operative principles, and to protect co-operators and the public. The law should encourage good practice and prohibit bad practice. It should give co-operative societies autonomy to adjust the general provisions of the law to the needs of the individual society. Despite such autonomy to make by-laws, co-operatives should be obliged to remain within the type-specific organizational model and should be discouraged to deviate from this model.

The law-makers have to offer a type of organisation that works and to translate co-operative principles into legal norms. For those who want to form co-operatives, existence of such model saves effort and cost for legal advice.

An appropriate method for drafting co-operative law is participatory law-making, i.e. knowledge-sharing between theory and practice, between representatives of the co-operative movement and law-makers (Münkner 1986, pp. 123 f.).

Governments see co-operatives as interesting and important agents of development, because they can mobilise member’ own resources for their members’ own benefit and if they are successful, they also have general positive effects on the community in which their members live and work. It is their self-propelling force that makes co-operatives interesting as change agents. It is known from experience that state-supported co-operatives are not a viable alternative. No government can afford to support a co-operative movement for ever.

Co-operatives need a clear profile that distinguishes them from commercial companies and social organisations. They must be flexible to adjust themselves to changing conditions while keeping their profile and following their principles. Deviations from these principles should only be allowed within limits. There must always be a clear message to members and to the outside world defining the nature, role and purpose of co-operatives and their mission. The economic and social benefits derived from co-operation must be demonstrated to members, to the public and to governments, e.g. by presenting cases of successful societies.

According to the UN guidelines of 2001 (A/56/73, par. 9) “Appropriate provision is necessary within legal, judicial and administrative practice if co-operatives are to contribute positively to improving the lives of their members

and the communities in which they operate. ...”. The task of the law-makers is to give co-operative societies a legal framework that fosters innovation without compromising co-operative values and principles and to spread the message that co-operatives are not an outdated and marginal model but a modern and important type of organisation.

3 The place of co-operative law in the hierarchy of legal norms

There is a hierarchy of legal norms: International agreements, national constitutions, laws, regulations and by-laws. Problems arise where this clear hierarchy of legal norms is blurred, e.g. in case of co-operatives by prescribing every detail in the law and in regulations made under the law, leaving little to be regulated by co-operatives in their by-laws or by making model-by-laws compulsory and imposing them on co-operatives rather than offering them as a real model for inspiration of those in charge of making by-laws.

The legitimacy of co-operatives and the co-operative movement could be acknowledged in national constitutions. A general law on co-operatives or laws under which co-operatives fall should ensure that co-operatives enjoy real equality with other types of associations and enterprises and not be discriminated against because of their special character. The utility of the co-operative approach to association and enterprise and its contribution to national life and the status of the co-operative movement should be publicly recognized as well as its role as a significant stakeholder within society (UN Guidelines 2001, par. 10).

The definition of co-operatives in the “Statement on the Co-operative Identity” adopted by the International Co-operative Alliance in 1995 and the unique nature of the values and principles of co-operation are internationally recognised by the UN Guidelines 2001 (par. 11), where it is stated that “no law or practice should restrict the rights of citizens to full participation in the co-operative movement in any capacity consistent with its values and principles”. ...“Full autonomy and capacity for self-regulation of the co-operative movement” should be recognised together with “acknowledgement that intervention by Governments in the internal affairs of the movement should be strictly limited to measures applied generally to all associations and enterprises equally in order to ensure their conformity with the law” (UN Guidelines 2001, par. 11).

Practical experience with state-controlled co-operatives has not been encouraging. In its studies of the 1970s the United Nations Institute for Social Development (UNRISD) spread a misconception in 1976 that is still in many peoples’ minds and continues to cause a lot of confusion, by stating that “co-operatives are not suitable as change agents”. UNRISD used formal criteria like: *“All organisations calling themselves co-operatives, which are legally recognised as such, which are subject to organised supervision and which claim to follow co-operative principles”* as a basis for this assessment (UNRISD 1975:

pp. 23, 27). In the Philippines in the 1980s a sarcastic slogan circulated that “co-operatives are not organisations by the people, for the people and of the people, but rather buy the people, fool the people and off the people”.

4 Law and Policy

Law or policy - what comes first? Without a clear policy there can not be a good law. The UN Guidelines of 2001 contain advice on institutional arrangements for preparing a good co-operative development policy: “It is advisable that a single department or office assume central coordinating, focal and liaison functions for elaboration of a single national comprehensive policy in respect of co-operatives ... and for collaboration with legal departments in drafting the general and any special laws ... “ (par. 23).

Knowledge-sharing was recommended as the adequate method of making co-operative laws. “Provision must be made that representatives of the co-operative movement participate fully in drafting special laws or judicial or administrative regulations and guidelines concerning practice”, “avoiding any infringement of the autonomy of the movement and any diminution of its capacity for responsible self-regulation ...” (par. 11). “An institutional arrangement which enables regular consultation and effective collaboration between Governments and the co-operative movement would be valuable” (par. 25).

Equal level playing field: According to ILO Recommendation 193 of 2002 concerning the promotion of co-operatives (par. 7 (2)), “Co-operative should be treated in accordance with national law and practice and on terms no less favourable than those accorded to other forms of enterprise and social organisation”. ILO recommends to offer incentives to social co-operatives such as “tax benefits, loans, grants, access to public work programmes etc.” This implies that co-operatives could be used as agents for implementing government’s policy and be rewarded for this work, a role in which co-operatives have rarely fared well in the past.

5 What kind of law?

There are different models of co-operative law and different approaches. As an answer to the development of a global economy, trans-national co-operative laws were made, e.g.:

- European Co-operative Societies (SCE) Regulations of the European Union (1435/2003), offering a set of rules for cross-border European Co-operatives with members coming from two or more member states. The SCE Regulations contain common rules for SCEs but also many cross-references to the national co-operative laws of the country in which the SCE has its registered office (Fici (2013), pp. 115-151).

- the Mercosur Common Co-operative Statute 2009, a *law for cross-border co-operation* like the EU SCE Regulation directly applicable in the Member-States to facilitate cross-border establishment of co-operatives. Like in the case of SCE Regulation, application in the Member-States requires transformation into national law, which in 2012 only Uruguay had done (Henry 2012, p. 47).
- Co-operative Law of OHADA (Organisation for the Harmonisation of Business Law in Francophone Africa) (2010) made to replace national co-operative laws by a uniform model but not including financial co-operatives (Hiez/Tadjudje (2013), pp. 91 f.).
- *Model laws or prototypes* like the Model Credit Union Act with Commentary of the CUNA/WOCCU (1987 Edition), offering national law-makers a source of inspiration. Or a Framework Law like that of MERCOSUR (first edition 1988, new edition 2008), which translates modern co-operative thinking in Latin America into legal norms, offering national law-makers recommendations and a commentary on each article (Henry 2012, p. 47; Cracogna 2013b, pp. 165 f.).
- Development of a harmonised East African Co-operative Societies Bill as currently done.

6 Development trends in co-operative law

There is a general trend of ‘uniformisation’ and ‘companization’ of all forms of business organisations (Henry 2012, p. 5) and more specifically a trend to adjust co-operative laws to the needs of large co-operative societies and to include special provisions for small co-operatives. Provisions for large co-operatives are becoming increasingly complex, with special needs regarding governance and financial structure. With growing size and complexity of co-operative enterprises, there is a trend to allow deviation from the principle of identity of owners and users by offering services at equal conditions to members and non-members. Such practice devaluates membership and encourages free-riders. To keep co-operatives strong, membership has to be made meaningful by offering a tangible co-operative advantage exclusively for members.

The driving force of co-operatives is self-help, self-interest and mutual interest of their members. In co-operatives, the **self-help cycle** has to be put into motion and to be kept in motion: Members feel promoted by their co-operative, others are attracted and join, the co-operative grows ‘organically’ and not only by merger. Self-help is the engine of co-operative societies: members are ready to mobilise their own resources for their own benefit in order to achieve together what the individual cannot achieve alone, as some proverbs illustrate: “It is easy to break a match but not a matchbox” or “one finger cannot make a fist”.

To preserve the special co-operative enterprise culture in growing co-operatives and in search of a response to the changing business environment in the African continent, conflicting elements of the co-operative model have to be balanced. Four problem areas can be identified:

- Approximation to the company model versus a type-specific differentiation strategy,
- Economic efficiency and effective member-promotion,
- Special financial structure,
- Vertical integration.

6.1 Approximation to the company model versus type-specific differentiation strategy

Co-operatives are characterized by democratic member participation through ownership. Typically co-operative governance sees the members in general meeting – being at the same time owners and users – as the ultimate authority electing and removing office-holders ideally from among the members. With growing size and complexity of the co-operative enterprise, general meetings of members are replaced by meetings of delegates and professionals are appointed as ‘external’ directors from outside the membership group to manage the affairs of co-operatives. Success criteria from the company model (short-term profit) are replacing co-operative criteria to measure effective and long-term member-promotion. With a growing distance between directors and user-members, the autonomy of directors is growing and democratic member-control is losing weight. Such development may lead to a “loose-loose situation” in which co-operatives are losing their internal driving force as self-help organisations of their members without gaining the economic strength of investor-driven and profit oriented enterprises. A long list of what by-laws of co-operative societies under European co-operative laws are allowed to do in order to “companyize” co-operatives is given by Hagen Henry in his guidelines for Co-operative Legislation 3rd Ed. 2012 (p. 12, Footnote 35).

6.2 Economic efficiency and effective member-promotion

Democratic management structures and a de-emphasised role of capital are seen by many as weaknesses of co-operatives compared with companies. To overcome such presumed weaknesses there is a trend to allow deviation from co-operative principles in the by-laws and in practice, despite defining them in the law as guidelines:

- deviation from identity of owners and users, by admitting investor-members, non-using members, supporting members and deviation from the objective of member-promotion by allowing unlimited transactions with non-members.

- deviation from democratic management and control by admitting plural voting, external directors, an autonomous board, replacing the general meeting of members by a meeting of delegates thereby reducing the rights of the individual member.

All this is done to increase economic efficiency of co-operative enterprises by stabilising membership and the capital base. In this reasoning it is overlooked, that economic efficiency of the co-operative enterprise and effective member-promotion can be and have to be combined to make co-operatives successful. However, this has to be achieved by using type-specific co-operative tools rather than copying what companies do.

6.3 Special financial structure

A de-emphasised role of capital is seen by many as another weakness of the co-operative model compared with companies. Co-operatives are often undercapitalised with limited access to finance, because many co-operatives solely depend on members' shares to build the capital required. Experts recommend the introduction of new financial instruments from the tool-box of companies in the co-operative law to stabilize and strengthen the variable share capital of co-operative societies. This amounts to more deviations from co-operative principles:

- deviation from identity of owners and users when raising capital by admitting, non-using investor-members or supporting members, while at the same time restricting the rights of such non-using members in order to ensure, that user-members remain in control of the co-operative society, However, such arrangement may not attract but rather deter investors from becoming members of such co-operative societies.
- deviation from the de-emphasised role of capital by offering interest on capital, preferred non-voting shares and other company-specific financial instruments such as participation certificates and divisible reserves.

Where government exercises control over co-operatives, providing funds or using co-operatives as agents for the implementation of government's policy, both elected directors and members lose power, even though co-operative principles, and government's policy emphasise co-operative autonomy. The resulting situation was described in the East African Nordic Project in the 1970s as follows: "Government wants us to be democratic but we are left with little to be democratic about". In Africa, especially in rural areas, co-operative governance is under pressure from two sides: by old hierarchical structures and by government's influence.

Control follows money. The key role of self-financing in co-operative societies is rightly stressed in a resolution of the Fifth Asia-Pacific Co-operative Ministers' Conference Beijing 1999.

“When seeking to raise capital, co-operatives should be encouraged to adopt the following strategy: first seek capital from members; if further capital is required it should seek capital funds from other co-operatives within the country and/or co-operatives in other countries; and if further capital is required only then should it be sought from other non-co-operative sources” (ICA Regional Office for Asia and the Pacific (ROAP), Joint Declaration of the Fifth Asia-Pacific Co-operative Ministers’ Conference Beijing 1999, Resolution No. 6 on Capitalization, par. (c), New Delhi 1999, p. 15).

The same message is contained in the UN Guidelines of 2001 under the heading ‘Provision of public funds’: “Financial self-reliance, total responsibility and full independence are vital for an effective co-operative enterprise” (par. 21).

6.4 Growth by vertical integration

Co-operatives have a specific way to grow, not by merger (external growth) but by horizontal and vertical integration (organic growth) by forming unions, federations, consortia etc. E.g.: The former director of ICA West Africa office Kibora’s plan in the 1980s to create a West African Co-operative Commodity exchange.

Co-operative federations often remain weak for lack of funds. If federations are depending on members’ fees, such resources are usually insufficient to sustain their activities. African policy-makers, law-makers and co-operators could learn from the Singapore model of establishing a Central Co-operative Fund (CCF) generated by a special tax scheme for otherwise tax-exempt co-operatives.

The Central Co-operative Fund (CCF) is a trust fund regulated in the Singapore Co-operative Societies Act (CSA) of 1979 (section 71 (5)) under the control of the Minister in charge of co-operative development and managed by a committee wherein co-operatives are also represented. According to section 71 (1) of the CSA, the CCF is a fund “to which every society shall contribute five per cent of the surplus resulting from the operations of the society during the preceding financial year, except that the Minister may specify, from time to time, in any particular case, such maximum amount not exceeding five percent of the surplus that the society is liable to contribute.” “The CCF shall be used to further co-operative education, training, research, audit, and for the general development of the co-operative movement in Singapore.” (section 71 (4) CSA, Singapore).

The Singapore Model offers an interesting solution for dealing with the problems of government promotion (and control) of co-operative development. The CCF funded by a special tax scheme for co-operatives introduced in 1979 has laid the ground for a self-financed and sustainable machinery for co-operative development, managed by a co-operative federation in partnership with government. In their Critical Study on Co-operative Legislation and Competitive Strength for the ICA Regional Office for Asia and the Pacific,

Ibnoe Soedjono and Mariano Cordero highly recommend the Singapore Model to ensure a sustainable and self-financing co-operative development fund (Soedjono/Cordero 1997, p. 24).

7 New forms of co-operatives and fields of business

7.1 New forms of co-operatives

To cope with problems of financing large co-operative enterprises, e. g. capital intensive co-operative processing plants, hybrid forms of company style co-operatives, '*co-operative companies*' have been developed being a cross breed of company and co-operative society. The co-operative character of such co-operative companies can be safeguarded by applying the principle of identity of owners and users: allowing only producers of commodities processed by the plant to become members. The de-emphasised power of capital can be stressed by stipulating in the by-laws that shares are held in proportion to business done with the co-operative company and proportional voting rights are granted but their number is limited to avoid dominating positions of individual shareholders/members.

Another new and rapidly developing form of co-operative society is using the approach of public private partnership (PPP) for taking over social or communal tasks, a type of *multi-stakeholder co-operative*. In community co-operatives, many or all stakeholders in one community (residents, workers, volunteers, promoters, enterprises, public authorities) are working together to improve the economic, social and ecological situation of the community or region in which they live and work. In such co-operatives, self-interest of the stakeholders and general interest in the well-being of the community or region coincide. The self-help mechanism, mobilising members' resources for co-operative development can work. Otherwise, social co-operatives, general interest or community "co-operatives" will not be able to mobilise members' own resources and will depend for their work on external support.

7.2 New fields of business for co-operatives

In addition to their classical fields of operation in agriculture, trade, crafts and provision of services, new fields of co-operative business come into focus: renewable energy, environmental agriculture, value chain production, social services where the traditional extended family structures cease to function and taking over communal tasks in collaboration with public authorities.

7.3 New legal frameworks for pre-co-operatives and village groups

In 1983, legal provisions for village groups were made in Upper Volta (today Burkina Faso) and for in 1992 for Common Interest Groups (CIGs) in Cameroon

1992 – two interesting models to study: how they were made, what they contain and how they are applied.

7.3.1 Village groups in Upper Volta / Burkina Faso, 1983

The ‘Ordonnance portant statut des sociétés coopératives et des groupements villageois en Haute Volta’ (Ordinance governing co-operative societies and village groups in Upper Volta) came into force in 1983. This law was made in a process of participatory law-making during a period of four years, with several inter-ministerial meetings, three regional seminars and two national workshops. Representatives of the Ministries of Internal Affairs, Justice and Finance as well as government officials in charge of co-operative development, directors of co-operative development centres (ORD) and a legal consultant participated in this law-making programme.

In the preface of a booklet containing the text of the ordinance together with an alphabetical index, Kibora Ada S., Director of Rural Institutions and Credit, describes this law as follows: “This ordinance translates the political concepts for organised self-help of farmers into legal norms, being flexible enough to adjust to existing structures (village groups), very educational by using simple language rather than rigid legal technical terminology. It describes the working, responsibilities, composition and powers of the different organs of village groups and of their members as well as their objectives. It is adjusted to the reality of co-operatives in Upper Volta and to the goal of giving the movement autonomy. It is an innovation and a political engagement of the State of Upper Volta” (Kibora 1983, p. 9).

In Article 4 of this Ordinance, village groups and their local unions are defined in the following way: they are -

- (1) “voluntary groups of rural producers of economic and social nature, having common interests and the position of incorporated legal bodies.
- (2) Village groups have as their object to encourage, harmonize and coordinate all economic, social and cultural activities aiming at the improvement of the well-being of the members and of the community.
- (3) Village groups can transform themselves into co-operatives, if their economic activities grow and if they have proved their ability of social organisation.
- (4) Village groups can form local unions of village groups in order to strengthen their economic viability or their position in the market, taking account of the limits set by a social common bond.
- (5) The objectives of village groups are the same as those of co-operative societies defined in Article 2 of this Ordinance.

Village groups are classified as “pre-co-operative, temporary organisations (art. 65 (1)). For more details see Münkner 1983, p. 33 f.

7.3.2 Common Interest Groups (CIG) in Cameroon, 1992

In 1990-1992 a special law for pre-co-operative associations was drafted in a long process of participatory law-making (Tadjudje 2013, p. 108): In substance, Common Interest Groups (CIG) in Cameroon (1992) are simplified co-operative structures however, it is left to the members to decide whether they want to convert themselves into co-operatives or join co-operatives.

With the CIGs, a flexible legal framework was added as a separate chapter to the co-operative law of Cameroon (1992), allowing farmers to produce individually but to market their products collectively. Features of this new model are: a locally adjusted form, small membership (often below 20 members) and allowing operations with limited financial means (Guillermou 2005, pp. 26 f.).

Under Law n. 92/006 relating to Co-operative Societies and Common Initiative Groups, these new forms of co-operation are defined in section 3 as “autonomous private bodies belonging to their members, who shall manage, fund and control them. Their activities shall be carried out without state intervention.” “CIG are organisations of economic and social nature set up voluntarily by individuals having common interests and working together in a group” (Sec. 49) They shall be corporate bodies and regulate matters enumerated in a list in their articles of association (sec. 51 (2)).

Section 53 defines the power of CIGs to federate as follows: “A CIG or a union of such groups may become a co-operative society or join a co-operative society or a union of co-operative societies.” During the first two years after this law came into force, 1,794 CIGs had been formed in West Cameroon with 39 unions and one federation (Guillermou 2005, p. 31).

8 Is there an African Co-operative?

African Values include mechanic solidarity based on custom and hierarchical structures (extended family, clan, tribe), economy of affection with the obligation of sharing and a social order according to which the group is more important than the individual. These values differ from co-operative values and principles of the ICA based on organised solidarity, voluntary association/co-operation and the free decision of individuals, pursuing self-interest of members combined with group interest.

Co-operative individualism combines both value systems. While the role of the individual is different in the two systems, mutual aid and care for the community are common features of both systems. Co-operatives can bring together what is usually opposed: individualism and group solidarity, economic and social objectives, self-interest and group interest (care for the community), tradition and modern living. This is what makes co-operatives important as development agents in Africa.

It is more difficult to combine the democratic structure of modern co-operatives (following ICA values and principles) and the hierarchical order of autochthonous society where every member has his/her place. Rather than having equal rights like members in co-operatives, the position of the individual in the autochthonous system is determined by age, gender, profession and social rank. In autochthonous society, group interest ranges before individual interest. The group is like a tree and the individual like a leaf. When the leaf falls from the tree, the leaf is doomed to perish, when the tree loses leaves, it can grow new ones. The challenge is not to decide to follow one or the other system, but to find ways and means to combine them into a new model that works.

To promote co-operatives successfully, it is necessary to generate trust in the co-operative system, in the persons representing it and in the services offered by the system. Co-operatives will only have a future, if young people can be convinced of the importance and usefulness of co-operative values and principles as a way of doing business in a way different from that of profit-oriented commercial enterprise – aiming at satisfaction of human needs and sustainable development. People only trust organisations which they know and understand. Therefore co-operative education is a key condition for co-operative success, not only in Africa.

9 Co-operative Education

In the UN Guideline of 2001 it is stated that “given the important contributions of the co-operative movement to education, ... governments may consider the inclusion within national curricula at all levels of the study of the values, principles, history and current and potential contribution of the co-operative movement to national society and encouragement and support of specialized studies at the tertiary level” (par. 20). This opinion underlines what is contained in the 5th co-operative principle in the ICA Statement on the Co-operative Identity of 1995 and in the ICA Blueprint for a Co-operative Decade 2012 (p. 24):

“Co-operatives provide education and training for their members, elected representatives, managers, and employees so they can contribute effectively to the development of their co-operatives. They inform the general public – particularly young people and opinion leaders – about the nature and benefits of co-operation”.

10 Knowledge of law

For many citizens of African countries, written laws create several problems. Most legal texts are written in a ‘foreign’ language and are based on ‘imported’ norms, which people do not know. In contrast, autochthonous law is usually unwritten but known. It is communicated orally in local languages and

administered by local authorities and arbitrators. The Tanzania Village Land Act, n. 5 of 1999 is a good example, how local rules for local development can be made in African pluralist legal systems. (Münkner 2003, pp. 91-107).

In Tanzania, after experience with the Villagisation Programme in the 1960s, during which the Government tried to “capture an un-captured peasantry” (Hydén), a commission of inquiry mainly composed of Tanzanian research workers presented a report in the 1990s with recommendations how to improve the land law. Instead of accepting this report, government appointed a foreign expert to make new recommendations. This well versed and experienced expert integrated many recommendations of the commission in his report. The resulting Village Land Act (n. 5 of 1999) is a typical law for lawyers even though the text is available in Suaheli.

According to Tanzanian land law, all land is held in trust by the President and village land is administered by village councils (with a quota for women). Certificates of village land convey a right of occupancy according to rules based on a mix of autochthonous rules and customs and elements of the modern legal system. For the settlement of disputes over land, the commission had recommended a local council of elders (Baraza ya Wazee ya Ardhi). In the Village Land Act, a village adjudication committee allocates use rights and a village land council settles disputes over land, allowing the parties to go to court against arbitration awards.

Brun-Otto Bryde, a law professor who taught for many years at the University of Addis Ababa/Ethiopia and at German Universities and later became judge of the German Constitutional Court, distinguishes four typical cases for knowledge and application of law in Africa (Bryde 1984, pp. 132,133): At the one extreme, in a decreasing number of almost totally isolated and remote rural areas, autochthonous law is known and applied, while the new written law is unknown and totally ineffective. In the age of communication, few of such remote areas are left. At the other extreme, modernised groups are living in the formal sector, where social and economic conditions prevail under which they can work and live well with the new law.

The masses of the population between these two extremes live in a social system for which imported law is not suitable but for which it is ‘valid’ as official law of the state. This law is predominantly ineffective but effective enough to cause trouble, if it is invoked and applied in exceptional cases – accidental application – e. g. in co-operatives where members insist to follow the rules of quorum or procedures laid down in the law.

More problematic situations arise, where the imported law does not provide adequate solutions for social relations, while autochthonous legal structures are in the process of disintegration due to influences of modernization. This applies to the urban population not belonging to the elite, living and working in the ‘informal sector’. For the masses of the population, practical non-existence of

law – neither autochthonous law nor imported law – has the effect of “lawlessness” with only self-help remaining as a solution.

For people living and working together, the autochthonous law offers settlement of disputes by arbitration. After the arbitrators have decided, the parties to the dispute have to accept this decision and can continue to live together in relative harmony. Under “modern” law, where matters are taken to court, a judge decides, one party wins, one party loses, often creating a source of lasting conflicts. It is not surprising that according to the co-operative laws introduced in English-speaking Africa during colonial times, disputes within or among co-operatives could not be taken to court but had to be decided by arbitration.

Usually there is little interest to learn about law. For many citizens, law is a boring subject, a matter for specialists. Only in case of conflict with the law it becomes of interest. In his book “Practical Co-operation in Asia and Africa”, W. K. H. Campbell has the following advice: To many people “a discussion of detailed provisions of the law is likely to prove extremely tedious, and they are accordingly recommended to skip this chapter and go to the next” (Campbell 1951, p. 19).

In African countries, there is no easy access to legal texts, commentaries or textbooks. The Indian Civil Code introduced in East Africa in the 1930s was printed with commentaries after each section. The same approach is taken by the Credit Union Model Act with Commentary published by CUNA/WOCCU, Madison Wisconsin, USA 1987 Edition and by the Mercosur Framework Law of 2008 (Cracogna 2013a, pp. 153 f.).

There are few text books on co-operative law. Classics: Calvert, *The Law and Principles of Co-operation*, 5th Edition, Calcutta 1959; Surridge and Digby, *A Manual of Co-operative Law and Practice*, Cambridge 1967; old books like Gachanja, *How to make by-laws*, Marburg 1989; Münkner, *Ten Lectures of Co-operative Law*, Friedrich-Ebert-Stiftung, Bonn 1982; Münkner, *Co-operative Principles and Co-operative Law*, Friedrich-Ebert-Stiftung, Bonn 1979, two books reprinted many times and translated into many languages. New editions of these two books are forthcoming; Münkner: *The legal status of pre-co-operatives*, Friedrich-Ebert-Stiftung, Bonn 2nd edition 1983; Münkner, (Ed.): *Towards adjusted patterns of co-operatives in developing countries*, Friedrich-Ebert-Stiftung, Bonn (1984); Münkner/Wardenski, *How to form a co-operative Self-help Organisation. Manual prepared for UNDP Nepal*, Kathmandu/Marburg 1997. Most of these books are out of print.

There are new books on co-operative law like: Henry ILO *Guidelines for Co-operative Legislation*, 3rd edition, ILO Geneva 2012; Münkner (Ed.) 2005: *100 Years Indian Credit Co-operative Societies Act 1904, A worldwide applied model of co-operative legislation*, Marburg and New Delhi 2005; Cracogna et al. 2013, *International Handbook of Co-operative Legislation*; Minishi: *Understanding co-operatives in Africa*, Nairobi 2012; Chukwu, *Co-operative*

Education, Enugu 2012; Münkner/Vernaz: Annotated Co-operative Glossary (German-English-French), Marburg, a kind of text book explaining key technical terms in alphabetical order.

11 Conclusion

If we want autonomous co-operatives to develop their own strength, we should be looking more for an enabling than for a supportive environment. If support takes the form of financial support, the old rule is that ‘control follows money’.

“In order for co-operatives to grow and develop, they need to be autonomous, i.e. to take their own decisions and to pursue action programmes geared and determined to meet the needs of their members” (International Co-operative Alliance 1990, Third ICA African Ministerial Co-operative Conference and Exhibition, Proceedings and Strategies, Nairobi, Kenya, 14-19 May 1990, p. 6).

11.1 What to do next?

A programme of action for ensuring an enabling framework for co-operative growth would have to contain several elements: A clear policy stated in the national constitution, a policy paper and/or preamble to the law summarising this policy. A clear message what co-operatives are, how they work, what they can achieve and what is needed to make them work successfully. The ICA Blueprint for a Co-operative Decade contains such message, but not as clear as it could be.

What kind of law is needed? What can be done on trans-national level to draft good co-operative laws?

- A *model law or prototype* like the Model Credit Union Act with Commentary of the WOCCU/CUNA (1987 Ed), which national law-makers could use as a source of inspiration? Or a Framework Law like that for Latin America (first edition 1988, new edition 2008), which translates modern co-operative thinking in Latin America into legal norms. This framework law has no binding force, but offers national law-makers convincing recommendations and a succinct commentary on each article (Henry 2012, p. 47).
- A *uniform standard law* to replace national laws of member states like the OHADA Co-operative Societies Law in francophone Africa (2010) (Hiez/Tadjudje 2013, pp. 89 f.)?
- A *trans-national law to supplement national laws for European cross-border co-operatives* like the SCE Regulations of the European Union 2003?
- A law like the MERCOSUR Common Co-operative Statute 2009, a *law for cross-border co-operation* like the EU SCE Regulation directly

applicable in the Member-States to facilitate cross-border establishment of co-operatives? Like in the case of SCE Regulation, application in the Member-States requires transformation into national law, which in 2012 only Uruguay had done (Henry 2012, p. 47).

- A *harmonised East African Co-operative Societies Bill* being developed?

There are drawbacks and obstacles due to lack of understanding the potential of co-operatives and the perception prevailing in the minds of many actors and observers that co-operatives are an outdated and/or marginal form of enterprise.

11.2 What to avoid?

What kind of law is needed? A long and detailed law like the OHADA text with 397 sections, leaving co-operators with little to determine in their by-laws or a short and concise law, setting out general rules with autonomy of co-operatives to adjust such general rules to their needs by making their own by-laws, however, within clear limits.

The format of the OHADA law, the 10 years process in which it was made and its contents illustrate the problems which law-makers may encounter when making laws **for the people** rather than **with the people**, without knowledge-sharing and seeking the co-operative movements' advice (Hiez/Tadjudje 2013, p. 94). Dr. Willy Tadjudje, a specialist familiar with the process in which the OHADA law was made and with the contents of this law, who travelled to several countries of Francophone Africa in recent years, identifies three main problems, why the OHADA text is difficult to apply in practice and even meets with resistance:

- (1) The OHADA Regulation appeared as a surprise for many national law-makers and authorities. Some of them did not even know of the existence of such law.
- (2) There is resistance to apply this law, because:
 - national authorities are not yet ready and need more time.
 - they resist because national actors and authorities were not associated to the process of law-making (e.g. in Guinea).
 - they resist because the text of the law is too complicated and contains too many contradictions (e.g. in Chad and Burkina Faso).
- (3) In almost all countries there are problems with the registries prescribed in the OHADA Regulation. Registries are not functioning due to the complexity of the process of designation and because of confusing provisions in the law (Hiez/Tadjudje 2013, pp. 98, 107 f.; Tadjudje 2013, pp. 72 f.)

Another problem area in the OHADA law is the legal status of Savings and Credit Co-operatives (SACCOs). Originally it was planned to include rules on

SACCOs in the law, but in the final version such rules are not contained (Tadjudje 2013, pp. 72 f.).

Still another open question is, whether the OHADA law also applies to pre-co-operative groups like CIG in Cameroon or village groups in Burkina Faso, abrogating all national provisions dealing with such groups (Hiez/Tadjudje 2013, pp. 107, 108). Can such para-co-operative groups survive or will they be forced to convert into co-operatives? (Hiez/Tadjudje 2013, p. 111).

The degree of confusion created by the OHADA law is illustrated by the situation prevailing in Cameroon, where some of the 10 regions of the country apply the OHADA Regulations, while others still apply the 1992 Co-operative Law.

How could the knowledge about co-operatives and the co-operative law be spread? Access to information, education and training has to be organised. Competent and experienced promoters, lecturers and teachers have to be trained (Cf. the model the 4-years degree course for co-operative economists at Marburg University, 1964-2002 (Münkner (Ed.) 2012: Making of Co-operative Promoters, Marburg). More teaching and self-study materials have to be written and made available.

Young people could be brought on board by using the social media and a language which they understand, as recommended in the ICA Blueprint for a Co-operative Decade. Young people should “help to shape the identity of the message” (ICA Blueprint 2012, p. 23).

It is unrealistic to expect that an organisation which is not offering its members a tangible economic advantage, which does business with members and non-members alike, which tries to attract investing members and which is managed by professionals recruited as directors will work like a genuine co-operative society.

A clear message of what a co-operative society is and how it works has to stress the following features: Capital is deprived of its insignia of power. Voting rights and profit sharing are allocated not in proportion to contributed capital, but following other criteria. Co-operatives are organisations governed according to the democratic rule of ‘one member, one vote’, with the meeting of members as the supreme authority, deciding all important matters like: amendment of by-laws, allocation of annual surplus, merger, conversion or dissolution. These features reflect the model of a genuine co-operative society having as its principal object to promote its members, adhering to the principle of identity of owners and users, with office-holders elected mainly from among its members

For a clear message, the trend of “fading distinctiveness of co-operative legislation” needs to be reversed and the “co-operative difference” has not only to be defended, but has been stressed (Birchall 2003). This would require policy choices for which scientific advice is not readily available (Henry 2012, p. 105).

References

- Birchall, Johnston (2003): Rediscovering the Co-operative Advantage, poverty reduction through self-help, ILO Geneva.
- Bryde, Brun-Otto: Autochthonous and Imported Law in Africa, with regard to its importance for an “African Co-operative” (1984), in: Münkner, Hans-H. Ed. (1984), pp. 129-137.
- Calvert, H. (1959): The Law and Principles of Co-operation, 5th Edition, Calcutta.
- Campbell (1951): W. K. H.; “Practical Co-operation in Asia and Africa”, Cambridge.
- Chukwu, Samuel C. (2012): Co-operative Education, Enugu.
- Cracogna, Dante (2013a): The Statute of Mercosur Co-operatives, in Cracogna et al (2013), pp. 153-164.
- Cracogna, Dante (2013b): The Framework Law for the co-operatives in Latin America, in Cracogna et al (2013), pp. 165-186.
- Cracogna, Dante/Fici, Antonio/Henry, Hagen (Eds.) (2013): International Handbook of Co-operative Legislation, Heidelberg, New York, Dordrecht, London.
- CUNA/WOCCU (1987): Credit Union Model Act with Commentary, Madison Wisconsin, USA 1987 Edition.
- Dia, Mamadou (1952): Contribution à l’étude du mouvement coopératif en Afrique noire, in : Le mouvement coopératif en territoires tropicaux arriérés, Deuxième symposium international d’économie rurale tropicale, Gent 1952, Leiden 1953.
- Fici, Antonio (2013): The European Co-operative Societies Regulation, in: Cracogna et al. (2013), pp. 115-151.
- Gachanja, Chris (1989): How to make by-laws, Marburg.
- Guillermou, Yves (2005): Groupes de producteurs et ONG dans l’Ouest Cameroun, in: Revue Internationale de l’économie sociale (RECMA) N° 298, pp. 26-39.
- Henry, Hagen (2012): Guidelines for Co-operative Legislation, 3rd edition, ILO Geneva.
- Henry, Hagen (2013): Public International Co-operative Law, in: Cracogna et al. (2013), pp.65-88.
- Hiez, David/Tadjuje, Willy (2013): The OHADA Co-operative Regulation, in: Cracogna et al. (2013), pp.89-113.

International Co-operative Alliance (1990), Third ICA African Ministerial Co-operative Conference and Exhibition, Proceedings and Strategies, Nairobi, Kenya, 14-19 May 1990.

ICA (1995): Statement on the Co-operative Identity, Manchester.

ICA Regional Office for Asia and the Pacific (ROAP) (1999), Joint Declaration of the Fifth Asia-Pacific Co-operative Ministers' Conference Beijing 1999, Resolution No. 6 on Capitalization, par. (c), New Delhi.

ICA (2012): Blueprint for a Co-operative Decade 2011-2020, Geneva.

International Labour Organisation (2002): ILO Recommendation 193 of 2002 concerning the promotion of cooperatives, Geneva.

Kibora Ada S. (1983), Preface of the 'Ordonnance portant statut des sociétés coopératives et des groupements villageois en Haute Volta' (Ordinance governing co-operative societies and village groups in Upper Volta), Ouagadougou.

Minishi, Labourn S. (2012): Understanding co-operatives in Africa, Nairobi.

Montesquieu (1758): De l'esprit des lois.

Münkner, Hans-H. 2nd Edition (1979): The Legal Status of Pre-cooperatives, Friedrich-Ebert-Stiftung, Bonn.

Münkner, Hans-H. (1982): Ten Lectures on Co-operative Law, Friedrich-Ebert-Stiftung, Bonn.

Münkner, Hans-H. (Ed.) (1984): Towards Adjusted Patterns of Co-operatives in Developing Countries, Results of a Symposium on "Ways towards an African Cooperative", Friedrich-Ebert-Stiftung, Bonn.

Münkner, Hans-H. (1986): Participative Law-Making: A New Approach to Drafting Co-operative Legislation in Developing Countries, in: *Verfassung und Recht in Übersee*, 19. Jahrgang, 2. Quartal 1986, pp. 123-137.

Münkner, Hans-H/Shah, Ashish (1993): Creating a favourable climate and conditions for co-operative development in Africa, ILO, Co-operative Development, Geneva.

Münkner, Hans-H. (1995): Basic Co-operative Values to Fill a Conceptual Vacuum – with special reference to Africa, Paper prepared for the ICA Co-operative Research Forum Manchester, September 17th and 18th, 1995, Marburg.

Münkner/Wardenski (1997): How to form a co-operative Self-help Organisation. Manual prepared for UNDP Nepal, Kathmandu/Marburg.

Münkner, Hans-H. (2003): Schaffung örtlicher Regeln für örtliche Entwicklung in pluralistischen Rechtssystemen Africas, in: *Recht in Africa, Law in Africa, Journal of the Association of African Law*, Cologne.

- Münkner, Hans-H. (2005): 100 Years Co-operative Credit Societies Act, India 1904, Proceedings of a Colloquium in Marburg, 10-12 September 2004, Marburg 2005 and full text: ICA Asia and Pacific, New Delhi 2005.
- Münkner (Ed.) (2012): Making Co-operative Promoters - 40 Years ICDC, Report on the degree course in Co-operative Economics and the Institute for Co-operation in Developing Countries (ICDC), University of Marburg/Germany, Special Edition, Marburg).
- Münkner, Hans-H./Ullrich, Gabriele (Eds.) (1981): Co-operative Law in East, Central and Southern African Countries - A Comparative Approach, Deutsche Stiftung für Internationale Entwicklung, DOK 1070 A/a, S 79-86-80, Berlin.
- Münkner, Hans-H./Vernaz, Catherine (2005) Annotated Co-operative Glossary, German-English-French, Marburg.
- Soedjono, Ibnoe/Cordero, Mariano (1997): Critical Study on Co-operative Legislation and Competitive Strength, International Co-operative Alliance, Regional Office for Asia and the Pacific, New Delhi.
- Surridge, B. J. and Digby, M. (1967): A Manual of Co-operative Law and Practice, 3rd Edition, Cambridge.
- Tadjudje, Willy (2013): La coopérative financière et la politique d'uniformisation du droit OHADA, in: Revue Internationale d'Economie Sociale (RECMA), N° 330, pp. 72-67.
- UN Guidelines (2001), aimed at creating a supportive environment for the development of co-operatives, A/56/73, E/2001/68, adopted at 88th plenary session, 19 December 2001, A.RES.56.114.
- United Nations Research Institute for Social Development, UNRISD (1975): Rural Co-operatives as Agents of Change, Vol. VIII, Rural Institutions and Planned Change, Geneva.

Further reading

- Münkner, Hans-H. (1972): Co-operative Law as an Instrument of State-sponsorship of Co-operative Societies, Co-operative information 1/1972, ILO, Geneva.
- Münkner, Hans-H. (Ed.) (1989) Comparative Study of Cooperative Law in Africa, 6 Country Reports and General Report prepared for the International Association of Legal Science, Paris, Marburg.
- Münkner, Hans-H. (1995a): Chances of Co-operatives in the Future, Institute for Co-operation in Developing Countries, Papers and Reports No.31, Marburg.
- Münkner, Hans-H. (1995b): Basic Co-operative Values to Fill a Conceptual Vacuum – with special reference to Africa, Paper prepared for the ICA Co-

operative Research Forum Manchester, September 17th and 18th, 1995, Marburg.

Münkner, Hans-H. (2005): 100 Years Co-operative Credit Societies Act, India 1904, Proceedings of a Colloquium in Marburg, 10-12 September 2004, Marburg 2005 and full text: ICA Asia and Pacific, New Delhi 2005.

Münkner, Hans-H./Ullrich, Gabriele (Eds.) (1981): Co-operative Law in East, Central and Southern African Countries - A Comparative Approach, Deutsche Stiftung für Internationale Entwicklung, DOK 1070 A/a, S 79-86-80, Berlin.

Münkner, Hans-H./Shah, Ashish (1993): Creating a favourable climate and conditions for co-operative development in Africa, ILO, Co-operative Development, Geneva.