

COOPERATIVES, DEMOCRACY AT WORK



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« La démocratie commence dans l'entreprise et n'existe pas si elle n'est pas organisée, d'abord sur les lieux de travail. En revanche, si elle est mise en forme au plan économique global, c'est-à-dire au niveau de l'entreprise et à celui où les orientations sont données à l'économie, elle a toutes les chances d'être totale ou de le devenir ... ». [Democracy starts in the enterprise and it cannot exist if not organized at first at the workplace. On the other hand, if shaped on the overall economic level, i.e. at the enterprise level and at the level where directions are given to the economy, then there is a high chance that it is or will be a success ...]. »
(François Partant) ¹

¹ Partant, François, La guérilla économique. Les conditions du développement, Paris : Seuil 1976, 159.
Translation by the author.

1. INTRODUCTION

Being members of the International Cooperative Alliance (ICA) or members of these members, the large majority of cooperatives around the world ² have to be democratically controlled by their members. More precisely, the members of cooperatives “meet their common [...] needs and aspirations through a [...] democratically controlled enterprise.” Article 12.2, in connection with Appendix “A” of the Articles of Association of the ICA, ³ an association under Belgian law, obliges them legally in this respect. The words are cited from the definition of cooperatives as contained in this Appendix. Besides the definition, this Appendix reproduces also the other parts of the 1995 ICA Statement on the cooperative identity (ICA Statement), ⁴ namely a set of six cooperative values, a set of four ethical values of the members and seven principles. Together, these parts compose the identity of cooperatives. Through inclusion into the Articles of Association of the ICA, the text of the ICA Statement has thus become a legally binding text for the ICA, its members and the members of these members. ⁵

By stating that “[i]n primary cooperatives members have equal voting rights (one member, one vote) [...]” - the so-called ‘one member, one vote rule’ - the 2nd ICA Principle (Democratic member control) refers to the etymological meaning of the word ‘democracy’. All too often, however, stakeholders and academia are satisfied with the reduction of this meaning to the ‘one member, one vote rule’. The objective of this article is to first demonstrate that the text of the ICA Statement, respectively the text of Appendix “A” of the Articles of Association of the ICA, as annexed, carries the much wider notion of member democratic participation (2.). Thereafter, it discusses the relevance of member democratic participation (3.) and the difficulties cooperatives encounter when operationalizing it (4.). The article concludes (5.) on some general remarks on the conditions for this participation to become effective.

² According to its own information “[t]he International Cooperative Alliance is one of the largest non-governmental organisations in the world today by the number of people it represents: more than **1 billion cooperative members from any of the 3 million cooperatives worldwide**” (see <https://www.ica.coop/en/cooperatives/facts-and-figures>. Visited 13.11.2023). The total number of cooperatives world-wide is not known. Even estimates are difficult to come up with as the notions of cooperative vary and as statistics are not harmonized. For an effort to remedy the situation, see the efforts of the Cooperative Branch of the International Labor Office at https://www.ilo.org/Search5/search.do?sitelang=en&locale=en_EN&consumercode=ILO (visited 23.11.2023).

³ Text of the Articles of Association of the ICA (<https://www.ica.coop/en/about-us/our-structure/alliance-rules-and-laws> (visited 13.11.2023). See also Annex to this article.

⁴ Text of the ICA Statement (<https://www.ica.coop/en/cooperatives/cooperative-identity> (visited 13.11.2023)).

⁵ The article does not discuss the question of whether the Articles of Association of the ICA are indeed also binding for the members of the members of the ICA; it assumes they do.

While taking into consideration the preparatory work which led to the adoption the ICA Statement and subsequent tools for its interpretation, the article focusses on a textual interpretation of the ICA Statement, mirroring it almost exclusively against legal instruments and not discussing the relevant literature in any detail.⁶ The article also includes some suggestions for a rewording of the Statement in view of strengthening the aspect of member democratic participation in cooperatives.

2.

MEMBER DEMOCRATIC PARTICIPATION IN COOPERATIVES

Reducing member democratic participation in cooperatives, including control, to the ‘one member, one vote rule’ is an obvious shortcoming and it ignores the very distinctive quality of member democratic participation as a Meta principle which permeates all parts of the identity of cooperatives. This Meta principle sets cooperatives aside from other types of enterprises, especially the capital-centered enterprise. It is an obvious shortcoming, as indeed democracy is mentioned explicitly as one of the values on which, according to the text of the ICA Statement, “[c]o-operatives are based” and it is mentioned twice in the 2nd Principle and once in the 3rd and 4th ICA Principles.

The quality of member democratic participation as a Meta principle reveals by using two interpretation keys to the understanding of the ICA Statement, the intention of the members of the ICA when they adopted the ICA Statement and the systematic link between the various parts of its text. As for this intention, the explanatory notes to the ICA Statement underline the mutually

⁶ *Preparatory work:* Resolution from the ICA Board to the ICA General Assembly on “The Statement on the cooperative identity” and the Declaration on Co-operatives towards the 21st century” in connection with the Introductory comments to the principles in the Background paper to the ICA Statement on the cooperative identity, as well as MacPherson, Ian, Co-operative Principles for the 21st Century. All texts available in pdf format from the ICA.

Interpretation tools: Following the 2012 ICA Congress in 2012, which was to celebrate the United Nations International Year of Cooperatives, the ICA issued the International Cooperative Alliance Blueprint for a cooperative decade 2011-2020 (available at:

ica.coop/sites/default/files/media_items/ICA%20Blueprint%20%20Final%20version%20issued%207%20Feb%202013.pdf) and in 2015 the International Co-operative Alliance Guidance notes to the co-operative principles (<https://ica.coop/en/media/library/the-guidance-notes-on-the-co-operative-principle>).

Select, incomplete bibliography on the cooperative principles: Monographs are rare, the classic being Watkins, W.P., Co-operative Principles. Today and Tomorrow, Holyoake Books 1986 (1990). Articles mainly on single principles have especially been published in the Boletín de la Asociación de Derecho Cooperativo. International Association of Cooperative Law Journal (see its Volumes 23 and 24/1995, 2014, 2017, 53/2018, 55/2019, 57/2020, 59/2021 and 61/2022), in Deusto Estudios Cooperativos (see its Volumes 8/2016, 11/2018, 13/2019), and in Revista Jurídica de Economía Social y Cooperativa 20/2009, 25/2014, 27/2015). For a recent monograph on the 7th Principle see Hernández Cáceres, Daniel, El principio cooperativo de interés por la comunidad en derecho español y comparado. Especial referencia a las cooperativas sociales, Tesis doctoral, Universidad de Almería 2023.

regenerative, reinforcing and interdependent nature of the ICA principles.⁷ As for the link between the various parts of the ICA Statement, the sentence that introduces the principles needs contextualizing. It then reads “The [seven] cooperative principles [as listed and explained in the text of the Statement] are guidelines by which cooperatives [as defined in the Statement] put [the six] values [on which they are based and as they are separated from the four ethical values of the members] into practice.” This is the meaning this article gives to the words “the cooperative principles”.⁸ Thus, none of the parts of the identity of cooperatives stands alone, nor do the various elements of these parts. They constitute a complex whole similar to that of a spider web, in which the values are central. They delimit the definition of cooperatives as “[c]ooperatives [have to be] based on the values [...]” and the cooperative principles have to pass their test, as they are to do no more than to put the cooperative values into practice.

As will be demonstrated in what follows, member democratic participation permeates the cooperative values and principles and it crystallizes in the definition of cooperatives.

THE COOPERATIVE VALUES

Apart from the value of democracy, the cooperative values of (joint) self-help and self-responsibility, as well as equality and equity point to democratic participation.

THE COOPERATIVE PRINCIPLES

The 1st Principle: Voluntary and open membership. By starting with the words “Cooperatives are [...]” the text of the Principle reveals itself as a hybrid in the sense of containing elements of a definition and further explanation thereof. It unnecessarily repeats that cooperatives are “voluntary” organizations, as this is already said in the definition, and by replacing the word “association” in the definition with that of “organization” and by not referring to that entity as acting through an enterprise, as specified in the definition, this wording nourishes the opinion that cooperatives do not necessarily belong to the world of enterprises. Either characterization of

⁷ See Point 5 of the Resolution from the ICA Board to the ICA General Assembly ..., op. cit., and the Declaration on Co-operatives towards the 21st century” in connection with Point 3 of the Introductory comments to the principles ..., op. cit..

⁸ The words ‘values’, ‘principles’ and ‘identity’, or any combination thereof, are often used in an interchangeable way. The wording of the ICA Statement is however clear. Whereas the words ‘cooperative identity’/‘identity of cooperatives’ mean the definition of cooperatives, the two sets of values and the cooperative principles, the words ‘cooperative principles’ can mean either the principles as intertwined with the definition of cooperatives and their values or the seven cooperative principles only, always including the explanations of the principles.

cooperatives - organization or enterprise - has however a specific incidence on member democratic participation.

The remainder of the text enshrines the democratic member participation. Membership in cooperatives is open to any person - of whatever means. It is a case where the 'demos' may aspire to the satisfaction of economic, social and cultural needs. The mentioned grounds on which negative discrimination must not be based are not exhaustive. In fact, the Principle does not allow for any discrimination. The stated grounds on which discrimination may not be based are given by way of example, as they could then - at the time of the adoption of the ICA Statement - and can still be found in too many circumstances. The stated conditions whereby only persons who are able to use the services of the cooperative and who are willing to accept the responsibilities of membership may be/come members, does not constitute a limitation. Membership makes only sense if the members can actually use the services - a condition which is challenged by those who want to accept non-user (investor) members; and the main responsibility of members, which is transacting with the cooperative and contributing financially to its activities, if necessary, is a way to co-determine the services the cooperative is to provide for according to its definition and it is a show of self-responsibility, which is a cooperative value.

While much of the discussion concerning the principle of democratic member participation revolves around the extension of the notion of 'member' to that of stakeholder and might lead to non-manageable openings, a more precise interpretation of the 1st Principle could yield more adequate results. Indeed, in practice the 1st Principle is interpreted either too widely or too restrictively. Frequently, the term "open to all persons" is construed to mean the door is open for everybody. This is partly due to the persisting view in many instances that cooperatives are rather charities or associations than enterprises, nourished, as mentioned, by the first sentence of the Principle which deviates somewhat from the definition. This view can easily be refuted by a reference to the explanation of this principle. On the other hand, the term "person" is often interpreted in the sense of natural person, excluding legal persons from membership in primary cooperatives,⁹

⁹ Examples: Mexico, Peru.

This restriction reflects an outdated approach whereby cooperatives were a means for a specific stratum of society. It is an obstacle to social and economic development. This can be seen from those countries where mixed membership cooperatives (natural persons and legal person) or cooperatives composed of legal persons only are allowed (see Göler von Ravensburg, Nicole, Economic and other benefits of the entrepreneurs' cooperative as a specific form of enterprise cluster, Dar es Salaam: International Labour Office 2010). Also, it is not in line with law. The ICA Statement, the 2001 United Nations Draft guidelines aimed at creating a supportive environment for the development of cooperatives (Annex to the 2001 Report of the Secretary-General of the United Nations on "Cooperatives in social development" (A/56/73-E/2001/68)) and the 2002 International Labor Organization Promotion of Cooperatives Recommendation No. 193 (ILO R. 193) (available at: www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R193) do not distinguish between natural and legal persons, but rather use the term "person" only. The term "person" is internationally understood as comprising both natural and legal persons. It is commonly accepted that the Human Right of

often foreign nationals are not admitted as members ¹⁰ or their membership is limited to that of ‘simple’ members not allowing them to hold positions of responsibility, and women are admitted de iure, but in violation of international, regional and national law ¹¹ a lot remains to be done to make their participation possible in real terms. ¹² A similar issue relates to young people, who, not having been taught anything about cooperatives will not choose to become members or to found a cooperative (see below on 5th Principle).

The 2nd Principle: Democratic member control. Like the text of the 1st Principle, the text of this Principle is a hybrid as far as its opening wording defines cooperatives as “democratic organizations”. Insofar the comments on the 1st Principle apply.

The 2nd Principle refers to democracy already in its title. It reiterates that cooperatives are controlled democratically by their members who all - regardless of their financial contribution and regardless of the extent of their transactions - participate in setting the policies and in making decisions. Leaders are accountable to all the members. The attribution of equal voting rights to all members in primary cooperatives has been mentioned already.

Given the definition of cooperatives in the ICA Statement, the words “cooperatives at other levels” are imprecise and might need replacing with a wording to the effect of ‘organizations of cooperatives at other levels’ in order to allow for the structuring of these entities according to their powers/duties which might not necessarily coincide with those described in the definition of

association, as granted through binding instruments (for example the 1966 International Covenant on Civil and Political Rights (ICCPR)), and through international soft law is a right of both natural and legal persons. Regional texts do not distinguish between natural and legal persons as far as membership in primary cooperatives is concerned. See for example for Europe, the European Union Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE); for Latin America, Article 21 of the 2008 Ley marco para las cooperativas de América Latina (Framework law for the cooperatives in Latin America (<http://www.aciamerica.coop/IMG/pdf/LeyMarcoAL.pdf>); and Articles 1 and 2 of the 2009 Mercosur Common Cooperative Statute (Estatuto de las Cooperativas (Mercosur/PM/SO/ANT.NORMA 01/2009); for Africa, Article 7 of the 2010 Uniform act on cooperatives (Acte uniforme relatif au droit des sociétés cooperatives (<http://www.ohada.org/droit-des-sociétés-coopératives>) and Article 11 of the 2015 Uniform Cooperative Act of the East African Community.

¹⁰ For example Fiji, Myanmar, Mexico, Peru.

¹¹ Public international law: for example, the CCPR, especially its Articles 3 and 26. Regional/supranational law: for example, Article 23 of the European Charter of Fundamental Rights (Art.23), and Articles 2 ff. of the African Charter on Human and Peoples’ Rights. National laws: for example Art. 3 of the Basic Law (Constitution) of Germany.

¹² For general references on gender and law, see for example Facio, Alda, *Género y Derecho*; Idem, *El derecho a la igualdad entre hombres y mujeres*; and Estudios sobre los diversos aspectos jurídicos del trabajo de la mujer (Dúo), Coordinador Rosa Moya Amador, Cizur Menor: Editorial Aranzadi 2016.

As for the distinction between formal and real equality, see Senent Vidal, María José, Aspectos de la perspectiva de género en la regulación jurídica de las cooperativas, in: Marianna Ferraz Teixeira/Marília Ferraz Teixeira (organizadoras), *O Pensamento Feminino na Construção do Direito Cooperativo*, Brasília: Vincere Editora 2017, 227- 246 (228 et passim).

cooperatives and to ensure that, whatever the form under which they would be established, the cooperative principles would apply.

The 3rd Principle: Member economic participation. Whereas the 2nd Principle may be read as a pendant to political democracy, the 3rd Principle corresponds to economic democracy. The explanation of the Principle lacks however clarity. The main activity, through which members participate economically, namely transactions, is mentioned only as a measure for the individual share of the surplus. Although member transactions are a logical consequence of joining a cooperative, this might not suffice to clarify that they are a condition for the very existence of cooperatives and might therefore have to be formulated as an obligation, at least in the same way as the obligation to participate financially is. Furthermore, contrary to what the title of the Principle announces, its explanation deals exclusively with the composition, the control and the distribution of capital, and this in a rather rudimentary way.

However, as concerns member democratic participation related to capital, the 3rd Principle is explicit. “Members contribute equitably to [...] the capital”, i.e. to the extent the individual member is able to do so, which reinforces the 1st Principle. The capital is “democratically control[led]” by the members. This democratic control is reinforced by that capital being - at least in part - the “common property of the cooperative”.

The Principle does not detail what is meant by “[m]embers contribute [...] to [...] the capital.” This sustains the impression that internal financing were limited to the subscription of membership shares. This is somewhat surprising as the question of whether cooperatives are enterprises had been debated for a long time before the adoption of the ICA Statement, as internal financing is often insufficient and as external financing bears risks and is therefore subject to limitations (see the 4th Principle) and as it meets limitations inherent in cooperatives, such as, in principle, it cannot be assorted with voting rights and commercial banks are often not able to assess the creditworthiness of cooperatives. This might contribute to the wide-spread confusion of cooperatives and other capital-centered enterprise types. Capital is necessary as cooperatives are enterprises or have an enterprise. But it is not central. “[C]apital subscribed as a condition of membership” can be - and often is - of a symbolic value only. This demonstrates the purely auxiliary role of the financial contributions of the members, as also implied by the objective of cooperatives according to their definition. The definition does not refer to any financial purpose.

The 4th Principle: Autonomy and independence. Like the text of the 1st and the 2nd Principles, the text of this Principle is a hybrid as far as its opening sentence defines cooperatives as “autonomous, self-help organizations controlled by their members [...]”. Insofar the comments on the 1st Principle

apply. The characterization as “autonomous” and “controlled by the members” is repetitive of that is contained in the definition of cooperatives; the one as “self-help”, taken from the list of values, begs the question why it is not complemented with the value of self-responsibility. If these characterizations have particular weight, then they should be included in the definition.

While the 4th Principle singles out two cases which risk jeopardizing the autonomy and independence of cooperatives particularly, namely “agreements with other organizations, including governments”, and “[raising] capital from external sources [...]”, it does not mention equally “risky” cases and it does not explain what “autonomy” and means. As concerns “agreements with other organizations”, the Principle might require precision in order to warn against the loss of autonomy and independence when cooperatives integrate into value chains and/or become parts of networks of interconnected actors. The article alludes to these issues when discussing the 6th Principle. As concerns “[raising] capital from external sources [...]”, the Principle complements the 3rd Principle as far as financing is concerned. While subjecting any external financing explicitly to the principle of autonomy, the principle recognizes the reality that internal financing mechanisms are more often than not insufficient and any external financial contribution bears the risk of infringing upon member control. As with internal financing, the ICA Statement falls however short of going into details concerning possible types of external financing.¹³

An, albeit indirect, financing instrument is an adequate income taxation of cooperatives. The principles of such taxation derive from the general principle of equal treatment, which is a universal principle recognized under Article 38, 1. c. of the Statute of the International Court of Justice (ICJ Statute) as a source of public international law. This principle is reinforced by Paragraph 7. (2) of the Promotion of Cooperatives Recommendation, 2002 (No. 193) of the International Labour Organization (ILO R. 193). Among others, it can be justified by taking into account the structural differences between cooperatives and other enterprise types and the wide objective of cooperatives which, if pursued correctly, will lead to reducing public expenditures as concerns, for example, health care costs. Such a special tax treatment, in legal terms ‘equal tax treatment’, is seldom.¹⁴ It presupposes an effective audit that produces reliable information for the tax authorities on whether a specific cooperative has acted according to the cooperative principles during the financial year. Such audit systems are seldom in place.

¹³ The ICA Blueprint and the ICA Guidance notes, *op. cit.*, as well as [The capital conundrum for co-operatives \(http://ica.coop/sites/default/files/media_items/ICA%20The%20Capital%20Conundrum%20for%20Co-operatives%20EN.pdf\)](http://ica.coop/sites/default/files/media_items/ICA%20The%20Capital%20Conundrum%20for%20Co-operatives%20EN.pdf) suggest internal and external financial instruments which do not infringe upon the autonomy and independence of cooperatives. See also the [ICA Survey of cooperative capital \(https://www.ica.coop/en/survey-co-operative-capital\)](https://www.ica.coop/en/survey-co-operative-capital) and the laws on cooperatives of New Zealand, Portugal and Spain, for example.

¹⁴ Exceptions are, for example, the laws on cooperatives of Italy, Portugal and Spain.

As concerns the meaning of “autonomy” and “independence”, the explanation of the 4th Principle repeats the word “autonomy” twice without explaining it, whereas it seems to explain implicitly the word “independence” without mentioning the word at all. The etymological meaning of the word “autonomy”, namely the power to set one-self the norms/rules one has to apply,¹⁵ be it in addition to or in the framework of heteronomously set norms/rules it has to respect, indicates the need to further explain the statutory freedom of cooperatives and the need to specify the relationship between autonomously and heteronomously set norms/rules and hence that between those empowered to set them. The reality concerning the power of cooperatives to regulate their affairs autonomously demonstrates this need. On the one hand, cooperatives are regulated in great detail through laws and government instruments, often expressed in a multitude of texts and coupled with an attribution of powers to the government which leave no room for autonomy. On the other hand, cooperatives are granted an ever more extensive autonomy that, in extremis, allows them to determine freely the objective of their organization.¹⁶

The 5th Principle: Education, training and information. The 5th Principle does not deal with member democratic participation as such; it rather deals with necessary prerequisites which enable members to exercise their rights and obligations effectively. For a number of reasons, the wording of the Principle is not clear. The first sentence does not include “information” as a means to empower the members to “contribute effectively to the development of their cooperatives”. The duty to inform the members - and their duty to get informed, for that matter - is however part of their right and duty to control. Furthermore, education and training (1st sentence) and the information of the public (2nd sentence) are the more effective, the more the subject of cooperatives is integrated “[...] at all appropriate levels of the national education and training systems [...]” according to Paragraph 8. (1) (f) of the ILO R. 193.¹⁷ According to the principle of equal treatment, cooperatives have a right to be treated on an equal footing with other types of enterprises the knowledge of which is researched and taught in the education systems. Currently, this right is not honored.¹⁸ It should be claimed for in the 5th Principle. This would more effectively link the internal world of cooperatives to the outside beyond mere information. And besides, as mentioned, reinforcing the power of the members to control their cooperative, it would also provide for the

¹⁵ See meaning of the Greek words “auto” and “nomos”.

¹⁶ See for example the Finnish law on cooperatives, Chap. 1. Section 5.

¹⁷ See also Paragraphs 4. (b) and 8. (1)(k), 16. (h) of the ILO R. 193.

¹⁸ See Villafañez Perez, Itziar, *Algunas reflexiones en torno a la necesidad de integrar la perspectiva cooperativa en el estudio y desarrollo del ordenamiento jurídico*, in: Hagen Henry, Pekka Hytinkoski and Tytti Klén (eds.), *Co-operative Studies in Education Curricula. New Forms of Learning and Teaching*, 2017, 54-71 (University of Helsinki Ruralia Institute: Publications Series No. 35).

knowledge necessary to audit cooperatives adequately, external cooperative specific audit being a prerequisite for effective control through the members.

The 6th principle: Cooperation among cooperatives. Like the 5th Principle, the 6th one does not address member democratic participation explicitly, nor does its meaning reveal immediately.

The fact that this Principle is included in the ICA Statement indicates that it must have a meaning beyond that of collaboration to which cooperatives as legal persons are empowered as are any other types of enterprises and which they would do as part of normal entrepreneurial behavior when and if necessary. The risks involved in doing so as concerns their autonomy and independence are addressed in the 4th Principle.

The meaning of the Principle discloses by looking at the reason for and ways of cooperation. The reason for cooperation is determined by the objective of cooperatives as laid down in their definition, namely “to meet [the] common economic, social and cultural needs and aspirations” of the members. The ways to cooperate are horizontal collaboration and vertical integration.¹⁹ Horizontal collaboration is not mentioned in the Principle. Vertical integration is not mentioned in the 6th Principle neither, but it is mentioned in the 2nd Principle with the wording “cooperatives at other levels are also organized in a democratic manner. “This “manner” may depart from the ‘one member, one vote rule’ of the 2nd Principle. But it must allow complying with the obligation to effectuate the service to the members of the primary cooperatives. Paragraph 6. (d) of ILO R. 193 specifies this in the following words: “[...] Governments should provide a supportive policy and legal framework consistent with the nature and function of cooperatives and guided by the cooperative values and principles [...], which would [...] facilitate the membership of cooperatives in cooperative structures responding to the needs of cooperative members [...].”²⁰ In order that “[c]ooperatives serve their members most effectively”, to the exclusion of own interests, it is important that higher-level structures be set up, financed and controlled by their members and not by external actors.

Where cooperatives run a relatively low risk as concerns their autonomy and independence (4th Principle) when entering into horizontal collaboration, additional safeguards might have to be foreseen when they integrate vertically. One such safeguard is the mentioned objective of cooperatives. In the absence of cooperative specific audits and given that the question of whether

¹⁹ The terms “vertical” and “horizontal” in this context must not be confused with the meaning they have in economics related to the collaboration along the value chain, vertically from the production to the consumption and horizontally between actors exercising the same activity.

²⁰ See also Paragraphs 11. (4) and 17 of the ILO R. 193.. As for the legal relevance of the ILO R. 193 as concerns cooperative law, see below Part 3.

the cooperation is pursued in the interest of the members is open for debate,²¹ other means need considering. Another such means is to structure the integrating entity both hierarchically in order to allow it to pursue the common aim of the joining cooperatives and heterarchically in order to reinforce and guarantee its serving the members of these cooperatives and to preserve maximum autonomy through which the members express their democratic participation and which presents an alternative to concentration. The structure of higher-level cooperative organizations must therefore reflect hierarchical elements without which joint work (cooperation) is not possible and heterarchical elements through which a growth strategy built on concentration may be avoided and the autonomy of the “cooperating”, i.e. integrated cooperatives is respected. This kind of “cooperation among cooperatives” is not compatible with the integration into value chains and/or with becoming part of networks of interconnected actors to which the article alludes to in Part 4.

Effective higher-level cooperative structures are often missing. This is one reason for the failure of primary cooperatives. That, in turn, often leads to undue external influence on primary cooperatives by government and/or other actors, infringing upon the 4th Principle. This occurs less because of malign political intentions than out of a genuine will to help cooperatives grow, be it through inadequate means. This explains also to a large extent why many laws prescribe – in violation of the 4th Principle - that higher-level cooperatives may only, or must be, established according to the administrative set-up of the country.

The 7th Principle: Concern for community. The 7th Principle deals explicitly with member participation. As it does not further qualify this participation and given the context with the other principles, it may only mean democratic participation. The freedom of the members to decide on the matter finds however its boundaries in the widening notion of ‘community’ beyond that immediately surrounding cooperatives and in the growing degree of juridification of the Corporate Social Responsibility (CSR) and its extension to include societal concerns (corporate social and societal obligation (CSSO)). “[S]ustainable development of their communities [...]” cannot be had without concern for the global community of human and non-human beings; as enterprises, cooperatives are bound by the CSSO. The question is therefore whether and how in this scenario cooperatives may still be distinguished from other legal types of enterprises. The answer given here is: they may by making member democratic participation a reality.

The definition of cooperatives. The above discussion was to demonstrate how member democratic participation permeates all the cooperative values and principles as a Meta principle and how the

²¹ As can be seen from the interpretation of the so-called “Business judgment rule”.

values and principles regenerate mutually, reinforce each other and are interdependent. As most of the Principles consist of various parts, the links may be multiple.

But the cooperative principles, as they put the cooperative values into practice, are not only linked to one another. They are also linked with the definition of cooperatives. A second reading of the definition from the perspective of member democratic participation reveals an even more radical notion of ‘member democratic participation’ than the one suggested so far, namely one that reaches beyond mere participation, i.e. being part of, having a share of, co-controlling etc.. While the definition explicitly sets the cornerstones for member democratic participation - the common economic, social and cultural needs and aspirations cannot be determined otherwise than through a democratic process and the control of the enterprise must be democratic -, it also hints to such more radical notion of member democratic participation, albeit covertly. This more radical notion reveals when asking ‘who is the entrepreneur according to this definition?’ Is it so that the cooperatives serve their members, as the principles explicitly (see Principles 5 and 6) or implicitly (see Principles 1 to 4) and the bulk of the literature suggest? According to the wording of the definition the members serve themselves jointly by means of the cooperative enterprise. The definition reads insofar “[cooperatives are associations] of persons [who] meet their common [...] needs and aspirations through [... an] enterprise.” This reading qualifies the members as co-entrepreneurs, a position beyond that of participants.²² It creates, however, a dilemma. If cooperatives are to be recognized as legal persons, they must be more than the sum total of their members. This requires reducing the latter’s status to that of participants.²³ This reduction must find then compensation in the widest possible interpretation/implementation of the Meta principle of member democratic participation.

²² Furthermore, contrary to the predecessor to ILO R. 193 (ILO R.127 - the Co-operatives (Developing Countries) Recommendation, 1966 - there is no hint to the liability of the members beyond that attached to their share contribution, which, more often than not, is symbolic. Paragraph 12. (1) (a) of ILO R. 127 stipulated that the members should accept “a fair share of the risks [and benefits] of the undertaking in which [they] participate [...]”. It thus contained an essential element of (co)entrepreneurship.

²³ The effects of this somewhat incomplete legal personality of cooperatives reappear in the debate on whether the income taxation regime, the labor law, the competition law and other laws and regulations which are tailored on the capital-centered enterprise model can be applied to cooperatives without adaptations to their specificities, as is the case in most, if not all jurisdictions.

3.

THE RELEVANCE OF MEMBER DEMOCRATIC
PARTICIPATION IN COOPERATIVES

Sociological, legal and political phenomena demonstrate the relevance of member democratic participation in cooperatives. These phenomena overlap; they mutually hinder or further their effects. The following discussion does not exhaust the issue.

The sociological phenomenon. However well practiced, democratic member participation is recognized by an estimated one billion members in three million cooperatives²⁴ as central to their identity. These cooperatives are direct or indirect members of the ICA; they constitute the bulk of cooperatives world-wide. This sociological phenomenon is all the more relevant as this self-identification shows a number of unique features. First of all, it is a unique case where a group of enterprises of the same type documents the identity of its members in writing, here the ICA Statement; secondly, it is unique as it is the current outcome of a continuous and continued process of theorized practice and practiced theory over a period of almost two centuries;²⁵ thirdly, by being members of the ICA, the mentioned cooperatives accept the text of the ICA Statement as legally binding for them as it forms part of the Articles of Association of the ICA; and, fourthly, the identity of cooperatives is heteronomously recognized in, respectively through, national, regional and public international law. This recognition completes the autonomous self-identification by the members of the ICA. This is the subject matter of the following part on the legal relevance of the cooperative identity.

The legal phenomenon. The legal phenomenon which demonstrates the relevance of member democratic participation in cooperatives derives from the recognition of the cooperative principles in, respectively through, national and regional, as well as public international law.

Reference to the cooperative principles in national and regional laws on cooperatives. The number of national and regional laws on cooperatives that refer in one way or the other to the cooperative

²⁴ See footnote 2.

²⁵ For the history of the ICA Statement and the preceding statements in 1937 and 1966, see C. Cano Ortega, *Una perspectiva actual del sexto principio cooperativo: Cooperación entre cooperativas*, in: CIRIEC-España. *Revista Jurídica* 2015, Vol. 27, 285–331 (288 ff.). Following the 2012 ICA Congress in 2012, the ICA issued the mentioned Blueprint for a cooperative decade and the Guidance notes to the co-operative principles. [Following its 33rd World Cooperative Congress under the theme of ‘Deepening our Cooperative Identity’ in 2021 the ICA set up the Cooperative Identity Advisory Group, CIAG, to explore whether the identity of cooperatives, as enshrined in the ICA Statement, needs deepening. The CIAG will report to the ICA Board in 2024.](#)

principles is rising.²⁶ Some laws do not refer explicitly to the cooperative principles, but they do translate them into rules;²⁷ some include the full list of the cooperative principles together with the explanations; most of these laws do not mention the ICA as author of the principles or leave doubts as to the authorship; some include the titles of the principles only without including the explanations given in the ICA Statement; some do not refer to all principles and/or change the wording somewhat, while others include additional ones.²⁸ These inconsistencies add to the difficulty of interpretation

²⁶ The following are random samples. For more examples see the Introductory chapters of the country reports in: Dante Cracogna, Antonio Fici and Hagen Henry (eds.), *International Handbook of Cooperative Law*, Heidelberg, Springer, 2013 and the *Legal Framework Analyses* commissioned by the ICA (<https://coops4dev.coop/en>).

National laws on cooperatives: See for example the laws of

1. Argentina, Article 2 of Ley Nº 20.337, Ley de cooperativas de 1973 (<https://www.argentina.gob.ar/normativa/nacional/ley-20337-18462> (5.12.2022)).
 2. India, Article 3 of the Multi-State Co-operative Societies Act, 2002 (<https://www.google.com/search?q=indian+multi+state+cooperative+law+First+schedule&ei> (5.12.2022)).
 3. Madagascar, Article 3 of the Projet de loi n° 007/2023 du 03 mai 2023 Régissant les Sociétés Coopératives à Madagascar (validated by Parliament, but not yet promulgated).
 4. Norway (English, non-official language version at: https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=88380).
 5. Portugal, Article 3 of Código Cooperativo português (<https://dre.pt/dre/legislacao-consolidada/lei/2015-70147380> (17.1.2023)).
 6. Spain, Basque Country, Article 1 of Ley 11/2019, de 20 de diciembre, de Cooperativas de Euskadi (https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-615 (5.12.2022)).
 7. Spain, Canary Islands, Article 2 of Ley 4/2022, de 31 de octubre [de 2022], de Sociedades Cooperativas de Canarias (https://www.boe.es/diario_boe/txt.php?id=BOE-A-2022-19625).
 8. Tanzania, Zanzibar, Article 3 of Zanzibar Cooperatives Societies Act 2018 (<https://zanzibarassembly.go.tz/document/the-zanzibar-cooperative-societies-act-no-15/> (5.12.2023)).
 9. Uruguay, Article 7 of Ley Nº 18.407 de fecha 24/10/2008, Ley de cooperativas (<https://www.gub.uy/ministerio-vivienda-ordenamiento-territorial/institucional/normativa/ley-n-18407-fecha-24102008-ley-cooperativas-regulacion-constitucion> (5.12.2022)).
 10. Vietnam: Amendments to the law on cooperatives adopted on June 20, 2023, to come into force on July 1, 2024. According to information by the ILO “the Law has been amended in line with Viet Nam’s 2019 Labour Code and the values and principles of cooperatives as articulated in the Cooperative Identity Statement of the International Cooperative Alliance” (see at: https://www.ilo.org/global/topics/cooperatives/sse/WCMS_895494/lang--en/index).
- Regional laws on cooperatives. See
1. Articles 6 and 18 of the Acte uniforme relatif aux sociétés coopératives de l’Organisation pour l’harmonisation en Afrique du droit des affaires (OHADA) of 2010 (<https://www.ohada.org/actes-uniformes/>).
 2. Recitals (6) to (10) of the Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE).
 3. Article 4 of the Ley marco para las cooperativas de América Latina de 2008 – a model law elaborated by the ICA and, although not a law, of a considerable persuasive character (<https://www.aciamericas.coop/-Legislacion-Cooperativa-en-las-Américas->).
 4. Article 4 of the East African Community Cooperative Societies Bill 2014 (<http://www.eala.org/documents/category/bills/P16>) - not yet in force.

²⁷ For example the Law on cooperatives of Norway.

²⁸ For more details see Henry, Hagen, *Reflexiones en torno al derecho cooperativo desde una perspectiva global - homenaje a Dante Cracogna -*, in: *Congreso Continental de Derecho Cooperativo : San José de Costa Rica, 20 al 22 de noviembre de 2019 / compilado por Dante Cracogna. - 1a ed compendiada. - Ciudad Autónoma de Buenos Aires : Intercoop ; San José de Costa Rica : Cooperativas de las Américas, 2020. Libro digital, EPUB Archivo Digital: online ISBN 978-987-1596-59-1, 109-123.*

of these principles. Where they are part of the respective legal system and would have to be treated as are the legal principles of that system,²⁹ their inclusion by referring explicitly or implicitly to the ICA as author links them to an external authority and raises the question of whether their interpretation has to follow that of the ICA, including the one developed subsequently to the adoption of the ICA Statement in 1995,³⁰ and especially the question of what are the effects should the ICA change the text of the Statement. These questions are all the more relevant as the increasing reference to the cooperative principles in national and regional laws on cooperatives might constitute a source of public international law. This is the subject of the following part.

The recognition of the cooperative principles by public international law. Article 38, 1. of the ICJ Statute contains a non-exhaustive list of the sources of public international law.³¹ The question is whether the reference to the cooperative principles in national and regional laws on cooperatives and/or the integration of the text of the ICA Statement into the ILO R. 193 and in the Articles of Association of the ICA constitute such a source of law.

The reference to the cooperative principles in national and regional laws on cooperatives, a source of public international law under Article 38, 1.b. of the ICJ Statute? According to Article 38, 1.b. of the ICJ Statute the recognition of the references to the cooperative principles in an increasing number of laws on cooperatives as a source of public international law would require that being a general practice based on the assumption that a legal obligation to do so exists. Even if a greater number of laws than reported here should refer to the cooperative principles, these references would not, as mentioned, demonstrate a common pattern; and whether the respective legislators acted as they did assuming that they were legally obliged to do so, cannot be ascertained. An even stronger argument against this practice forming a source of public international law is the circumstance that the law on cooperatives is just one element of cooperative law. Other elements are competition law, income taxation, labor law etc., as well as any other legal rule and practice which impacts on the

²⁹ See Moreno, J.,L., *Los vaores según la Alianza Cooperativa Internacional (AC)*, in: CIRIEC-España, *Revista Jurídica* No. 25/2014, 371-393.

³⁰ As expressed through the ICA Guidance notes ..., *op. cit.*.

³¹ These are

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

objective of cooperatives and/or shapes their form.³² In most, if not all countries these other laws and practices are modeled on other types of enterprises, thus do not translate the cooperative principles.

The integration of the text of the ICA Statement into ILO R.193, a source of public international law under Article 38, 1. a. of the ICJ Statute. With modifications that are not relevant for this discussion,³³ the ILO R. 193 integrates the text of the ICA Statement and it links cooperative law to the cooperative principles.³⁴ As first measure concerning the implementation of public policies for the promotion of cooperatives ILO R. 193 states in its Paragraph 10. (1) the following: “Member States should adopt specific legislation and regulations on cooperatives, which are guided by the cooperative values and principles set out in Paragraph 3, and revise such legislation and regulations when appropriate.” The question is whether this Paragraph constitutes a legal obligation of legislators. Apart from previous contributions by the author of this article and answering it affirmatively, this question has not been dealt with so far.³⁵ General comments on the legal nature of recommendations of international organizations lead to conclude that Paragraph 10. (1) of ILO R.193 is not legally binding.

Obviously, ILO R. 193 is not a convention in the sense of Article 38, 1.a. of the ICJ Statute. One might also object to the ILO R. 193 being a source of public international law that the International Labor Conference could have chosen to adopt a convention under Article 19, 1. of the Constitution of the ILO had it wanted to make this instrument undoubtedly a legally binding

³² The term “cooperative law” comprises all sources of law such as laws, administrative acts, court decisions, jurisprudence, cooperative bylaws/statutes or any other source of law which regulate the objective or structure of cooperatives. I.e. it comprises not only the law on cooperatives, but also all other legal rules, principles and practices which shape this type of enterprise. The following areas, which are most likely to have this quality, need mentioning. As for legal rules: the constitution, labor law, competition law, land law, taxation, (international) accounting/prudential standards, book-keeping rules, audit and bankruptcy rules, as well as general enterprise law and laws regulating certain activities to the extent they impact the organizational structure of cooperatives. As for legal principles: the principle of equal treatment, related to cooperatives as compared with other types of enterprises and as related to the cooperative members. As for legal practices and praxes, those which relate to the making (legal policy) and implementation of cooperative law, such as for example regulations and praxes concerning prudential mechanisms, audit, and registration. In addition, where the law on cooperatives is explicitly or implicitly incomplete, rules on other types of enterprises or even rules of the general civil or commercial law may apply as default rules.

See also Article 6 of the Ley marco ..., op. cit..

³³ As for these modifications and their possible consequences see Henry, Reflexiones ..., op. cit..

³⁴ As for the integration of the text of the ICA Statement see Paragraphs 2 and 3 of and the Annex to the ILO R. 193. As for the link the ILO R. 193 establishes between cooperative law and the cooperative principles, see its Paragraphs 6. (a), (c) and (d); 7. (2), 1st and 2nd sentence; 10. (1) and 18. (d) and especially its Paragraph 10. (1).

³⁵ This is why “[...] the teachings of the most highly qualified publicists of the various nations [...]” are not being discussed here as a possible subsidiary source of public international law according to Article 38, 1.d. of the ICJ Statute, nor are “[...] judicial decisions [...]” concerning the matter, as their number remains relatively low.

one. This objection overestimates the denomination of the ILO R. 193 as “recommendation”, which is not more than an indication for its classification as legally binding or not legally binding;³⁶ it ignores the fact that recommendations of the ILO do create legal obligations under Article 19, 6. of its Constitution, albeit not of the kind contained in Paragraph 10. (1) of the Recommendation; it unduly de-contextualizes the Recommendation, thus petrifying its initial legal nature to make it immune against supervening circumstances, questioning implicitly the exclusive decision-making power of the ICJ; and it overlooks the specific circumstances of the adoption of this recommendation,³⁷ the fact that it was adopted on the basis of similar instruments and that its content as far as cooperative law is concerned has repeatedly been endorsed through other instruments.³⁸ A last objection against the ILO R. 193 constituting a source of public international law concerns the relationship between national and public international law. Only if integrated into national law, either by a general clause to this effect in the national constitutional law or through a procedure foreseen by it, so the argument, it becomes legally binding. Thus, even if the ILO R.193 were legally binding to the extent discussed here, it would still have to be transformed into national law in order to bind the legislator. This objection may be refuted on the grounds that it confuses validity and enforceability or implementation. If the validity of public international law depended

³⁶ The denomination of an instrument of an international organization, such as ‘decision’, ‘resolution’, ‘guidelines’, might be indicative for the answer to the question whether it is legally binding, but it is not decisive for this answer. See Virally, M., *La valeur juridique des recommandations des organisations internationales*, in : *Annuaire français de droit international*, Vol. II (1956), 66-96 (reprinted, in : *Le droit international en devenir*, Paris, Presses Universitaires de France, 1990, 169-194). This is not undisputed. Some suggest considering the instruments of international organizations as elements of one of the sources listed in Article 38, 1. of the ICJ Statute. Agreeing with this view, especially considering the difference between ‘conventions’ and ‘recommendations’ of the ILO, Pellet, A., *Le rôle des résolutions des organisations internationales à la lumière de la jurisprudence de la Cour internationale de Justice*, in: G. Politakis, T. Kohiyama, T. Lieby (eds.), *Law for Social Justice*, Genève, International Labour Organisation, 2019, 149-160 (154 ff.). For another view see Politakis, G. et Markov, K., *Les recommandations internationales du travail: instruments mal exploités ou maillon faible du système normatif ? Les normes internationales du travail: un patrimoine pour l’avenir. Mélanges en l’honneur de Nicolas Valticos*, Genève, Bureau International du Travail, 2004, 497-525.

³⁷ In this respect several factors set the ILO R.193 aside from other “recommendations” or similarly denominated instruments of international organizations, such as ‘guidelines’, ‘decisions’, ‘resolutions’. These are

- its having been adopted by an unusual high majority (<http://www.ilo.org/public/english/standards/reim/ilc/ilc90/pdf/pr-23vote.pdf>);
- the democratic legitimacy of the ILO, being
 - a tripartite organization (see Article 3, 1 of the Constitution of the ILO) and
 - a transnational organization (see Article 4, 1 of the Constitution of the ILO), and having
 - integrated the text of the ICA Statement, endorsed at the time of the adoption of ILO R. 193 in 2002 by some 700 million members of cooperatives world-wide and now by an estimated one billion (see footnote 2).

³⁸ As for the time prior to the adoption of the ILO R. 193, see for example, the ILO R.127 and the UN Draft guidelines. As for the time subsequent to its adoption, see for example, the 2021 and 2023 United Nations Secretary-General Reports on “Cooperatives in social development” (Docs. A/76/209 and A/78/187, respectively). For a more detailed discussion see Henry, Hagen, *International Cooperative Law. Utopia, Realistic Utopia or Reality?*, in: *Revista Cooperativismo e Economia Social*, no. 42/2020, 25-56.

on its transformation into national law, it would depend on the behavior of governments/states, behavior which it is foremost to regulate. This argument would also lead to a split: valid public international law would be binding for states that follow the monist principle, and not binding for states that follow the principle of duality of national and international law.

Where the opinion that Paragraph 10. (1) of ILO R. 193 is legally binding as far as cooperative law is concerned, might not be commonly shared, the arguments put forward here, together with the ever more frequent reference in national and regional laws on cooperatives to the cooperative principles amount, however, to a reversal of the burden of argumentation should a legislator decide to not abide by Paragraph 10. (1) of ILO R. 193.

The inclusion of the text of the ICA Statement in the Articles of Association of the ICA, a source of public international law? The answer to the question whether the inclusion of the text of the ICA Statement in the Articles of Association of the ICA constitutes a source of public international law will be developed through a systematic reading of these Articles, of Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and the principle of the prohibition of contradictory behavior. This reading is as follows: If a State does not allow the cooperatives registered by its government to join the ICA as a member, it violates their right to associate protected under Article 22, 1. of the ICCPR. The ICCPR is a source of public international law under Article 38, 1. a. of the ICJ Statute. Article 22, 1 reads: “Everyone shall have the right to freedom of association with others [...]”. This is a right of individuals and legal persons alike ³⁹ and the right includes that of joining a foreign association. If, on the other hand, a State allows the cooperatives registered by its government to join the ICA as members, it must allow them to respect the Articles of Association of the ICA, failing which it violates said prohibition of contradictory behavior which is a universal legal principle recognized under Article 38, 1. c. of the ICJ Statute as one of “the general principles of law recognized by civilized nations [...]”. As these cooperatives would also have to respect their national cooperative law, that law has to be aligned on the text of the ICA Statement. If it is not aligned, that State must exempt these cooperatives from its application to the extent necessary so that they may respect the Articles of Association of the ICA. The consequence would be a cooperative sector split into two types of cooperatives, cooperatives which are organized and which operate according to the text of the ICA Statement and cooperatives which are not/do not. ⁴⁰

³⁹ See European Commission for Democracy Through Law (Venice Commission) and OSCE Office for democratic institutions and human rights (OSCE/ODIHR) Joint Guidelines on Freedom of Association Adopted by the Venice Commission at its 101st Plenary Session (Venice, 12-13 December 2014), Paragraphs 16. and 19.. The document contains also a listing of instruments from different legal traditions which protect the Right to associate (see its Paragraph 3.).

⁴⁰ This is the case in India, for example.

However, the choice of the State to align its cooperative law on the text of the ICA Statement is limited by the previously discussed phenomena demonstrating the relevance of the cooperative principles. Furthermore, this legal policy choice is to be balanced with the following political considerations.

The political phenomenon which demonstrates the relevance of member democratic participation in cooperatives. Two interrelated political phenomena demonstrate the relevance of member democratic participation in cooperatives: Firstly, the Meta principle of member democratic participation is the only remaining significant distinctive feature of cooperatives,⁴¹ the *raison d'être* of cooperative law, and, secondly, cooperatives as an “application” of the legal concept of sustainable development under public international law which is gradually permeating all areas of law.⁴² As concerns the Meta principle of member democratic participation as *raison d'être* of cooperative law, it is at risk to the extent the stakeholder value is recognized by economics as a value which supersedes the shareholder value (capital-centered enterprises) and the member value (cooperative enterprises) and to the extent this translates into the mentioned CSSO. Together with longstanding phenomena such as the companization of the legal features of cooperatives and making the governance structures of all enterprise types converge,⁴³ this might lead to a unification of enterprise laws, i.e. an end of organizational enterprise law that differentiates enterprises by specific objectives and specific forms ensuing from these objectives. These phenomena might be reinforced by the evolving de-centered and de-organized ways to perform economic activities that the factors of globalization, digitization, digitalization and teletransferability of data allow for and require. It might signal the disappearance of enterprises.⁴⁴ Whereas there is no legal reason to preserve cooperative enterprises through law, the ensuing loss of diversity would have both empirical and existential consequences in terms of sustainable development which the legislator might have to consider. The empirical consequences are obvious. People continue seeking legislative protection of their diverse needs and guidance as to the ways these can be met through

⁴¹ There are other forms of participation in enterprises, for example the enterprise co-determination under the respective laws in Germany and the Netherlands or worker-owned stock companies. But these and other forms are not as comprehensive as is member democratic participation in cooperatives.

⁴² As for the legal concept of sustainable development see Bekhechi, Mohammed Abdelwahab, *Quelques notes et réflexions sur le statut du droit international du développement durable*, in: Mohammed-Jalal Essaid (sous la dir.), *Variations sur le système international. Mélanges offerts en l'honneur du Professeur Mohamed Lamouri*, Casablanca: Najah Al Jadida 2010, 107-137; and Henrÿ, Hagen, *Sustainable Development and Cooperative Law: Corporate Social Responsibility or Cooperative Social Responsibility?*, in: *International and Comparative Corporate Law Journal* Vol.10, Issue.3, 2013, 58-75.

⁴³ Late Professor Hans-H. Münkner decried this phenomenon numerous times. See also Villafañez Perez, *Algunas reflexiones ...*, op. cit.; and Henrÿ, Hagen, *Guidelines for Cooperative Legislation*, 3rd ed. Geneva: ILO 2012, 9 ff.

⁴⁴ I owe this idea to Prof. Carlo Borzaga, Director of the **European Research Institute on Cooperatives and Social Enterprises (Euricse) in Trento**.

entrepreneurial activity. As concerns existential consequences, it is to be considered that diversity in its two complementary aspects, namely biological diversity and cultural diversity,⁴⁵ i.e. bio-cultural diversity, is the only known source of development, hence sustainable development. Sustainable development is not an operationable objective; it is a goal which cannot be pursued effectively without relay stations, such as cooperatives.

The pursuit of such comprehensive, global, policy goals as sustainable development will not be friction-free. However, the contradictions it produces must and may be addressed. For example: To make governance structures of all enterprise types converge in the name of their sustainability is a contradiction in itself, because it produces isomorphic enterprises. Furthermore, where the factors of globalization lead to losses in state income (taxes), the social costs of enterprising need redistributing, among others to cooperatives. Yet, companization and convergence measures reduce the legal capacity of cooperatives to bear social costs. The reason is the following: As mentioned, enterprise law typifies enterprises by distinct objectives. The forms it suggests for the different types are a function of this objective. I.e. to each specific objective its specific form. This functional relationship between objective and form is not, however, a one-way street. Acting on the form of cooperatives, as companization and convergence measures do, will have an effect on the objective of cooperatives. That incapacitates them to pursue their three-fold objective (economic, social and cultural), as members' democratic participation as a mechanism which most effectively and efficiently regenerates social justice is weakened. Social justice is the central aspect of sustainable development.⁴⁶

⁴⁵ While the vital importance of the principle of biological diversity (see for example Willoughby, J. et al., The reduction of genetic diversity in threatened vertebrates and new recommendations regarding IUCN conservation rankings, in: *Biological Conservation* 191 (2015), 495-503) is general knowledge, that of cultural diversity is hardly recognized, despite the growing evidence that economies with diverse forms of enterprises seem to be more resilient against market and other shocks. See for example Burghof, H-P., *Vielfältiges Bankensystem besteht die Krise [A diverse banking system resists the crisis]*, *Wirtschaftsdienst* 2010/7, 435 ff.; Groeneveld, H., *The Value of European Co-operative Banks for the Future Financial System*, in: Johanna Heiskanen, Hagen Henry, Pekka Hytinkoski and Tapani Köppä (eds.), *New Opportunities for Co-operatives: New Opportunities for People. Proceedings of the 2011 ICA Global Research Conference*, Mikkeli and Seinäjoki/Finland. (University of Helsinki/Ruralia Institute Publications No. 27 (2012)), 185-199.

⁴⁶ „Central”, because without social justice world-wide (see Henry, Hagen, *Justice through Cultural Diversity. The Problem of Justice in a New International Economic Order*, in: *The Finnish Yearbook of International Law*, Vol. I (1990), 387-414), there will be no political stability; without that, there will be no economic security; and without economic security, people remain disinterested in the state of the biosphere. With the exception of political stability, these aspects of sustainable development are generally recognized. See, for example, European Union (https://ec.europa.eu/europeaid/sites/devco/files/communicatioenn-next-steps-sustainable-europe-20161122_e.); and Pufé, I., *Nachhaltigkeit [Sustainability]*, München: UKV Verlag 2012. As here, recognizing four aspects, UNESCO (http://www.unesco.org/education/tlsf/mods/theme_a/popups/mod04t01s03.html –). The word ‘biosphere’ is either used as a synonym for ‘nature’ or ‘environment’ or as comprising the three or four aspects of sustainable development. In this latter sense, see for example, Grinevald, J., *La Biosphère de l’Anthropocène. Climat et pétrole, la double menace. Repères transdisciplinaires (1824-2007)*, Genève : Georg 2007.

4.

OPERATIONALIZING MEMBER DEMOCRATIC PARTICIPATION IN COOPERATIVES

Operationalizing member democratic participation in today's cooperatives faces challenges which were unknown to the cooperative for which the “Laws and Objects of the Rochdale Society of Equitable Pioneers” were crafted and from which the ICA Statement developed over the history of modern cooperatives. The “Laws and Objects of the Rochdale Society of Equitable Pioneers” were based on the idea of a unity of the “governors” and the “governed”. Since then, the world and with it the world of enterprises has changed and continues changing.

The need to adjust the idea of cooperatives stems from two interlinked phenomena that impact member democratic participation, namely structural changes of cooperative enterprises, brought about not the least by the factors of globalization, and a continued insufficient understanding of what cooperatives are.

As concerns structural changes, some are rather endogenously induced, others are rather exogenously induced. The trend is from simple to more complex. This concerns the activities of cooperatives, the beneficiaries of these activities, the notion of member, the mixing of private and public interests and actors, as well as commercial and non-commercial approaches, for example in so-called cooperative groups, and of the figures of producer and consumer. Indeed, the dynamics of cooperative development has led from the Rochdale Society of Equitable Pioneers, a relatively small group of persons of the same social class and a set of similar basic (consumer) needs, to cooperatives being established by persons coming from all social strata, being active in virtually all sectors, including the production and supply of energy and other utilities (prosumer cooperatives, affecting consumer protection law), as agro-ecological food chains, being found in urban horticulture and farming, in education, health and care services (social cooperatives), as labor contracting cooperatives, mainly addressing the issue of a potentially conflicting relationship between labor law and cooperative law, as bio-data banks and data protection cooperatives etc.. Some cooperatives are active in several sectors (multi-purpose cooperatives), some have very high numbers of members, especially cooperative banks, insurance and consumer cooperatives; their memberships may be heterogeneous by interest, need, social background or profession or by the contribution members make to the production or provision of services, for example worker-members, volunteer workers, user-members, investor members and financing members or supporters, some of them or all in the

same cooperative;⁴⁷ they may not only serve their members, but also, or even exclusively, non-members, their community or the public at large (public or general interest cooperatives); they may (have to) take also other stakeholders' (than their members') legal interests into account, for example those of (non-user) investor members; and/or they may count among their membership, beside private law persons (natural and legal persons), also public law persons, municipalities for example, especially in the health, care, education and utilities sectors.

These changes prompt the need for a reinterpretation of the Meta principle of democratic member participation. Its adjustment requires reconceptualizing the loci of participation, the participants and the modes of participation. Concerning the loci of participation, the above discussion of member democratic participation as Meta principle may serve as a basis for adaptations to the various new types of cooperatives. Concerning the circle of participants, it must encompass members and possibly other non-member stakeholders without cooperatives transforming into a public service organization or into a charity. As for the modes of participation, deliberative modes of decision making must be explored, virtual participation, using latest secure technology, must complement physical participation.⁴⁸

As concerns the insufficient understanding of what cooperatives are, we observe the following: On the one hand, cooperatives are often still seen as unspecified 'organizations', whereas by their modern definition, as enshrined in the ICA Statement and the ILO R. 193, cooperatives are associations of persons who engage in (economic) activities through an enterprise. At the international level, the enterprise aspect of cooperatives has been recognized only by the current version of the identity statement of the ICA and since the adoption of the ILO R. 193 in 2002. This change from "organization" to "enterprise" is far from being generally consumed. On the other hand, cooperatives are put into the mass of enterprises by politics and academia without regard to their type specifics. This is not necessarily negative. However, as indispensable as it is to strengthen the enterprise aspect of cooperatives in view of achieving social justice, not the least by exposing cooperative enterprises to competition, as risk-prone it is when no distinction is made between the various enterprise types.⁴⁹ The indiscriminate approach to enterprise types, which violates the legal

⁴⁷ Heterogeneity of interests in cooperatives can also be described in other ways: by size, age of the members, product/service, etc. See: Grashuis, J. and Cook, M.L., *Members of cooperatives: More heterogeneous, less satisfied?* International Food and Agribusiness Management Association 24(5):2021, 434/IFAMR2020.0086.

⁴⁸ See, for example, Meira, Deolinda, *Cooperative Virtual General Assemblies and Cooperative Principles. A Legal and Empirical Analysis*, in: International Journal of Cooperative Law V/2023, 131-147.

⁴⁹ Reference is made, obviously, to the distinction made by Draheim between necessary "Ökonomisierung [economization]" and harmful "Kommerzialisierung [commercialization]". See Draheim, Georg, *Die Genossenschaft als Unternehmenstyp [The cooperative as a type of undertaking/enterprise]*, 2nd. ed., Göttingen: Vandenhoeck & Ruprecht 1955.

principle of equal treatment, dissolves the ideal unity of governance, management and control of cooperative enterprises in the hands of the members. It triggers the requalification of the enterprise aspect of cooperatives and leads to cooperatives splitting into two elements, an association of persons and an enterprise, changing the originally thought dual character of cooperatives into a double character. The governed are now separated from the governors. But not only the cooperative governance is affected negatively by this, the management is as well - which for some purposes of management might however be beneficial. One of the reasons why the cooperative management is negatively affected is this: Competitiveness requires professional enterprise leaders. For cooperatives they would need a double qualification - one for leading an association of persons and one for managing an enterprise. Members might be able to lead an association, but generally they lack professionalism when it comes to leading an enterprise. Professional enterprise leaders are generally trained to run a capital-centered enterprise, but have no training to lead an association of persons who are called upon to hold the reins of the enterprise (see also above 5th Principle).

These changes in governance and management exacerbate the typical, potentially six-fold cooperative control risk in cooperatives. It is caused by an information, knowledge and know-how gap between the members and the general assembly; the members and the general assembly, on the one side, and the delegates (if any), on the other side; the members, the general assembly and the delegates, on the one side, and the surveillance committee (if any), on the other; the members, the general assembly, the delegates and the surveillance committee, on the one side, and the board, on the other side, especially where not all board members are members of the cooperative; the board and the administration/management, especially where managers are not themselves members of the cooperative; and between the board and the administration/management, on the one side, and the employees working in the administration, on the other side, especially where these employees are not themselves members of the cooperative. To a large extent, this control risk can be “controlled” through a cooperative-specific external audit system. The same is not the case for the risks caused by the following legislative phenomena that are mainly prompted by real or perceived competitive pressure. These phenomena are: not putting any cap on additional member financial contributions beyond the, possibly obligatory, membership share; allowing for unlimited non-member transactions (reducing members’ capacity to determine their needs and aspirations); allowing for investments by members and/or non-members; ⁵⁰ allowing for cooperative investment instruments

⁵⁰ The caution against investments relates to the following: Investors, be they members or not, pursue a double strategy. They are interested in the growth of the value of the enterprise and - that being uncertain - they are seeking periodical high returns on their investment. This will lead to transforming the aspects of the objective of cooperatives (“meet [the] common economic, social and cultural needs and aspirations”) of the members into elements, with a preference for the economic element, which, in turn, risks mutating into a financial one. Thus, the objective of the cooperative alters, hence its form.

to be traded on the financial market; allowing for limited admission of non-members, investors or not, as board members; not requiring specific qualifications for board membership and management; allowing for more and more surplus money to be spent on compensating capital contributions to the detriment of using it for the establishment of indivisible reserves, education funds and audit funds, as well as to the detriment of the payment of patronage refunds, thus reducing the incentive to transact, i.e. to participate economically (see 2nd Principle) and the possibility to establish a more substantial indivisible reserve; not distinguishing between ‘profit’ and ‘surplus’⁵¹ and allowing both to be distributed with effects on non-member business and taxation; opening the notion of participant-member to include other stakeholders.

Independently of the formal voting power (‘one member, one vote rule’), most of these phenomena lead to factual power shifts and put the Meta principle of member democratic participation at risk. This risk accentuates even further where members are given plural voting rights based on the volume of their transactions with the cooperative and/or their financial contributions. Often, the ‘one member, one vote rule’ is thought to detract members from transacting more with their cooperative and from being ready to contribute financially more substantially to the activities of their cooperative as these engagements do not improve their influence on the decision making of the cooperative. But they trigger covert power shifts, whether or not their exercise is limited to decisions on matters related to the enterprise activities.

In addition, enterprises of all types, cooperative enterprises included, change from being singular entities, linked operationally to each other by contract, to being organizational elements of more or less permanent global horizontal and vertical value chains. Some of the chain links are structured hierarchically, some heterarchically, some - like cooperatives - in a combination of the two; some of the chain links or of the value chains dissolve into global ephemeral and amorphic (de-organized) networks of actors (connectives). It is unclear how the Meta principle of member democratic participation, as outlined here, can materialize in such chains and networks composed of different enterprise types, subject to different regional and/or national laws and where the value chains are not regulated by any law but rather by the terms and conditions of the value chain leaders, and where the networks are probably not regulatable by law, but are regulated by algorithms of the anonyma.

⁵¹ ‘Profit’ being the positive result generated on transactions with non-members on commercial terms, ‘surplus’ being the positive result being generated on transactions with members on cooperative terms, i.e. according to the cooperative principles. While the words used to make this distinction may and do vary, the distinction between member and non-member business is essential. See, for example, the annotations to the Articles 99 and 100 of the Código cooperativo of Portugal in: Deolinda Meira e Elisabete Ramos (coord.), Código Cooperativo anotado, Alameda 2018.

5. CONCLUSION

As do the 1st, the 5th and the 7th ICA Principles Partant's reflections, which are cited at the beginning of this article, remind us of the fact that cooperatives must not and cannot thrive in vase clos. They need engaging with the public and they must be/come a res publica. Partant is not the only one to see the nexus between participation and social justice, between economic wellbeing and the effectiveness of human rights, between civil and political human rights, on the one hand, and economic, social and cultural human rights, on the other hand, as symbolized by and enshrined in the two respective Human Rights Covenants.⁵² However, while not having ignored this nexus, economists have failed so far to present an economic theory of cooperatives. This might not have allowed for, but it has facilitated, the wide-spread equating of financial success of enterprises with efficiency and of efficiency with economic success. If the goal of sustainable development is to be pursued, academic curricula and media might have to not only be concerned with the financial interests of the few, but also with the economic, social and cultural needs of the many - world-wide. However well the unity of the two Human Rights Covenants is recognized, human rights will not materialize as long as academic disciplines remain atomized, in contradiction to what is required by the concept of sustainable development, namely overcoming "The two cultures" divide,⁵³ the split between natural sciences and social sciences. The obstacle of atomized academic disciplines will exacerbate through a new split, that between biological life, conditioned by time and space, and the social organization of our life, which the factors of globalization relieve ever more from time and space constraints.

⁵² The mentioned 1966 ICCPR and the 1966 International Covenant on Economic, Social and Cultural Rights.

⁵³ Referring, of course, to Snow, C.P., *The Two Cultures and the Scientific Revolution*.

Annex: International Cooperative Alliance Statement on the Cooperative Identity

(Text identical with Appendix “A” of the Articles of Association of the International Cooperative Alliance)⁵⁴

Definition of a Cooperative

A cooperative is an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.

Cooperative values

Cooperatives are based on the values of **self-help**, **self-responsibility**, **democracy**, **equality**, **equity**, and **solidarity**. In the tradition of their founders, cooperative members believe in the ethical values of honesty, openness, social responsibility and caring for others.

Cooperative Principles

The cooperative principles are guidelines by which cooperatives put their values into practice.

1. Voluntary and Open Membership

Cooperatives are voluntary organisations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination.

2. Democratic Member Control

Cooperatives are democratic organisations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as elected representatives are accountable to the membership. In primary cooperatives members have equal voting rights (one member, one vote) and cooperatives at other levels are also organised in a democratic manner.

3. Member Economic Participation

Members contribute equitably to, and democratically control, the capital of their cooperative. At least part of that capital is usually the common property of the cooperative. Members usually receive

⁵⁴ <https://www.ica.coop/en/cooperatives/cooperative-identity> and <https://www.ica.coop/en/about-us/our-structure/alliance-rules-and-laws>, respectively (visited 13.11.2023).

limited compensation, if any, on capital subscribed as a condition of membership. Members allocate surpluses for any or all of the following purposes: developing their cooperative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their transactions with the cooperative; and supporting other activities approved by the membership.

4. Autonomy and Independence

Cooperatives are autonomous, self-help organisations controlled by their members. If they enter into agreements with other organisations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their cooperative autonomy.

5. Education, Training, and Information

Cooperatives 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.

6. Cooperation among Cooperatives

Cooperatives serve their members most effectively and strengthen the cooperative movement by working together through local, national, regional and international structures.

7. Concern for Community

Cooperatives work for the sustainable development of their communities through policies approved by their members.