WHO MAKES THE LAW?
PARLIAMENTS, GOVERNMENTS, COURTS OR OTHERS?
- SOCIAL JUSTICE THROUGH COOPERATIVES AT STAKE -*

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Based on the participation of the author in numerous cooperative legislation projects in different parts of the world, the article seeks an answer to the question whether our general notion of law is compatible with cooperative law. This notion has evolved from general, democratically set rules, abstracting from individual cases and filtering individual identities through manifold citizen-relationships, to casuistic decisions on individual claims, without regard to the relational character of law. The article argues that this notion of law is incompatible with a law that is to institutionalize the idea/identity of cooperatives. Law institutionalizes this identity inasmuch as it translates the universally recognized cooperative values and principles into legal rules. These rules must reflect the legal principle of solidarity. This, in turn, is a condition of the capacity of cooperative enterprises to contribute to social justice, hence to sustainable development.

SUMMARY: I. Introduction - II.Cooperatives, solidarity, cooperative law - III. Who makes which kind of law? - IV. Conclusion

I. INTRODUCTION

The objective of this short article is to show that our very notion of law has become incompatible with cooperative law and, as a consequence, the capacity of cooperatives to contribute to social justice has weakened. By "cooperative law". I understand all those legal rules - laws, administrative acts, court decisions, jurisprudence, cooperative bylaws/statutes or any other source of law, which regulate the structure and/or the operations of cooperatives as enterprises in the economic sense and as institutions in the legal sense. This notion of cooperative law comprises, hence, not only the cooperative law proper (law on cooperatives), but also all other legal rules and

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procedures, which shape this institution and regulate its operations. Our notion of law has become inadequate as it has evolved from general, democratically set rules, abstracting from individual cases and filtering individual identities through manifold citizen-relationships, to casuistic decisions on individual claims, without regard to the relational character of law. This notion of law is incompatible with a law that is to institutionalize the idea/identity of cooperatives. Law institutionalizes this identity inasmuch as it translates the universally recognized cooperative principles into legal rules, which reflect the legal principle of solidarity, i.e. law, which contains obligationes in *solidum*, obligations to do that the members of cooperatives accept without a legally protected expectation to receive an equivalent in return. Cooperatives are "institutionalized solidarities".

After this introduction and before concluding (IV), I shall present the arguments in two parts. Part II deals with the notions of "cooperative", "solidarity" and "cooperative law". Part III asks: Who makes which type of law? The article is a review of my publications over the years and of my participating in numerous cooperative legislation projects over a period of more than 20 years in different parts of the world.

II. COOPERATIVES, SOLIDARITY, COOPERATIVE LAW

According to the sociological classification, cooperatives are secondary groups, communautés d´adhérence, as opposed to communautés d´appartenance. The internationally recognized and legally binding definition qualifies cooperatives as assciations. The defintion reads: "[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." In the logic of enterprise law, the three-fold objective (purpose) of cooperatives, namely the satisfaction of the economic, social and cultural needs and aspirations of the members, differentiates cooperatives from other enterprise types. The salient aspect of this purpose is the satisfaction of the social needs and aspirations of the members. The pursuit of this purpose requires a specific legal form. This form should shape by a number of distinctive legal features as far as the nature and the structure of the capital, as well as the governance are concerned.

As for the nature and structure of the capital, eight distinguishing elements are to be mentioned: i.) in principle, no investments, but contributions to the capital by the

members; ii.) (as a consequence), the amount of capital varies with the number of members; iii.) these member contributions, "shares" in English, are refundable upon termination of membership at nominal value, they receive limited remuneration, if at all, and are in principle neither transferable, nor are they negotiable; iv.) apart from the share capital, the next most important part of the capital are indivisible reserves; v.) no distribution of profits (generated on transactions with non-members on commercial terms); vi.) limited distribution of surplus (generated on transactions with members on cooperative terms) in the form of patronage refunds, i.e. in proportion to the transactions a member had with the cooperative over a certain period of time (financial year or otherwise), while sharing the overhead costs among all members equally (not in proportion to the transactions); inter-cooperative guarantees; viii.) joint and several liability of the members in case the cooperative incures losses.

As for the governance, understood as the democratic participation of the members in the administration, management and control of the cooperative, five distinguishing elements need mentioning: i.) no opposition of those who govern to those who are governed, with consequences not only for cooperative law, but also for labour law, competition law, tax law etc.; ii.) allocation of equal voting rights, independently of the volume of transactions and/or the amount of capital contributed by any one member; iii.) distribution of surplus in proportion to transactions; iv.) right of the members to be served by the cooperative is delinked from their financial contributions; v.) democratic participation of the members materializing in all organizational and operational aspects of the cooperative.

These features make for cooperatives to be "institutionalized solidarities". The consensus that these features should translate into law has faded over the past four to five decades. This has led to what I call the companization of cooperatives through law. By companization I understand the ever more pronounced approximation of the legal features of cooperatives with those of capitalistic companies through law in the wide sense as used here. As the legal form is a function of the objective, the metamorphosis of cooperatives through law makes it ever more difficult for them to pursue the social aspect of their objective.

III. WHO MAKES WHICH KIND OF LAW?

My hypothesis is that the companization of cooperatives through law has to do - among other reason**s** - with the growing lack of democratic participation in law-making and the concomitant radical change of the very notion of law. As a secondary consequence this leads to weakening the mechanisms through which "institutionalized solidarities", like cooperatives, (re)generate social justice. Nowhere is "*Quod omnes tangit, ab omnibus approbari debetur*" as true as when it comes to the need to (re)generate social justice. "Ab omnibus" should be in national parliaments. The function of this high lieu of the demos has been limited for some time. I mention five phenomena: i.) the labour market partners setting general labour law, signifying the recognition of other law besides/beyond state law on the territory of states; ii.) the increasing recognition of legal pluralism, following the findings of anthropologists; iii.) the recognition of state regulation-free commons, self-regulated by the users; iv.) courts infringing, here and there, upon the powers if parliaments by setting, instead of interpreting and developing the law; v.) governments proposíng bills to parliament knowing that these do neither have the necessary knowledge, nor the time to acquire such knowledge which would allow them to reject the bill, and knowing that they often do not have the political will to refuse the ratification of international treaties, which have already been signed by the government.

In addition to these and other, rather sporadic and to retractible deviations from democratic law-making, we see now a system change toward ever less democratic participation in law-making, with considerable consequences for the (re)generation of social justice. Two main elements mark this system change: Firstly, the partly irreversible shrinking reign/domain of state law and, secondly, shifts in the division of political power. The shrinking reign/domain of state law, and by extension of inter-state (regional, international and, to a certain extent, also transnational) law as an expression of democratic participation is reduced by three phenomena: i.) the privatization of hitherto public services, like health and social care services, education, utility services, public transport, infrastructure, and even the privatization of hitherto genuinely state prerogatives, such as military, police and prison services; ii.) the transfer of legislative powers to regional, international and transnational organisations, without always securing democratic participation and/or at least control; iii.) the factors of globalization, namely digitalization and telecommunication, dissolve the unity/congruency of the economic

and political spaces of the state. Consequently, the state loses its financial means and its instrument par excellence, namely law, to act on certain policy areas. The ensuing legal void is filled by private standard setters. The transposition of these standards into state law is more often than not a mere formality. Examples in the field of cooperative law are the standard-setting by the International Accounting Standards Board (IASB) and the International Reporting Standards Board (IRSB), the standard-setting by the Basel Committee on Banking Supervision and, more generally, the standard-setting by the global financial market, the effects of which in terms of law-making are reinforced by a concentration of wealth in ever fewer hands and by the power of those few who have the technological know-how and the technical means to collect, appropriate, process and use data, inclusive of personal data (Big data). We are not equipped to exert political control over these phenomena, nor do we have yet invented new forms of democratic participation in global law-making. Innovative approaches to this effect do exist, though. To mention also an intensifying inter-governmental, inter-parliamentarian and inter-judicial cooperation with traits of global law-making. The shifts in the division of political power can be observed in a multi-facetted process whereby law-making is shifting from parliaments to governments and from governments to courts of law. This double shift of law-making without the demos is accompanied by two main, each other mutually reinforcing factors: i.) the changing style of law-making and ii.) the socio-psychological change in our societies. As far as the style of law-making is concerned and limited to cooperative law, the scope of default rules is increasing, i.e ever more legal rules in the cooperative law are ius dispositivum in the name of the autonomy of the cooperative members. In extreme cases the law allows the members to set an objective for their cooperative which differs from that set by law and hence to change the type of enterprise. The changing style of law making is also due to the complexification of society. The more complex societies become, the more detailed legal rules become and the more their validity is limited in time. More and more, legal rules resemble acts of intervention, listing political measures, rather than abstracting from single cases. As an example for both one may refer to the Finnish cooperative law, which allows to determine an objective in the byelaws that differs from the one set in the law. The first Finnish cooperative law, 1901, had 36 articles, the current, fourth Finnish cooperative law (2013) has 365 articles. The frequency with which new laws were passed has increased (1901, 1951, 2001, 2013), as has that of passing amendments whose number

has also constantly increased. This style of law-making deprives law of its function as a normative reference for the identification with larger groups whose members have heterogeneous, often conflicting interests. And, related to the second factor of the shift in law making, this style of law-making allows for identities to be broken down to the level of individuals, who strive to have their often self-determined identity protected by invoking human rights. The trans-subjective dimension of law, inscribed in institutions, is lost in the process. Courts to whom often hastily made laws on highly complex matters are increasingly being referred to for decision see therefore human beings increasingly as individuals with rights and less as citizens with rights and duties whose relationship with the state and society is mediate, not immediate.

The observable shift in conceptualizing the relationship between cooperatives and their members, from associative to contractual, matches the shifts from law by democratic processes to law by court decisions. And it matches the general change of our world view, from being anthropocentric with a preference for collectives to becoming egocentric with a preference for connectives, with consequences for organisations, like cooperatives, which for a long time had been conceptualized as solidarity generating collectives.

IV. CONCLUSION

As we reduce the function of parliaments to that of confirming decisions taken elsewhere, where we move toward governmental law-making, where we transform the state from a state of law (rule of law) into a state of magistrates/judges, where we reduce the role of the state to that of enforcing law made without its say, we make it impossible to pursue overall political goals, such as sustainable development, which has been recognized by the International Court of Justice since 1997 as a concept of public international law, unless we innovate in global law-making. Sustainable development cannot be had without global social justice, as political stability is conditioned by social justice and garantees economic security, which, in turn, makes people receptive for concerns related to the state of the biosphere. That is why we need "institutionalized soidarities", enterprises or other organizations, between citizens and the political order. For that we need re-socializing law.