

Quel projet de société pour demain ?
Coopératives, mutuelles et territoires : Enjeux, défis et alternatives
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La contribution des coopératives au développement durable

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Table de matières

Introduction

Les coopératives, le développement durable et le droit coopératif

En guise de conclusion : Que faire ?

Introduction

1. Le titre de ma contribution se veut réponse à la question principale de Votre conférence « Quel projet de société pour demain ? » :

- Une société qui ne sera pas la copie de la société actuelle, irrespectueuse du principe de diversité et donc incapable de mettre en œuvre le développement durable ! Car, comme nous le rappelle cet inlassable et fin observateur et philosophe qu'est Michel Serres dans son dernier ouvrage ¹ « Si vraiment nous vivons une crise, ... alors nul retour en arrière ne vaut. » et
- Une société où les entreprises, y inclus les coopératives joueront un rôle sociétal !

2. Certes, si nous vivons une crise, nul retour en arrière ne vaut. Mais nul progrès (en avant !) dans le domaine socio-politico-économique ne sera possible sans égard aux institutions existantes, à repenser en fonction de la réponse à la question s'il y a et quel type de crise il y a ?

3. A en croire les médias, les politiciens et même quelques chercheurs, la crise serait de nature financière, économique, d'emploi etc.. Mais n'est-ce pas, au fonds, une crise sociale ? Et plus précisément: N'est la « crise » sociale que le symptôme d'une pensée qui ne nous laisse pas voir au-delà du financier et qui confond symptômes et raisons,

¹ Serres , Michel, Le temps des crises, Paris: Le Pommier 2009, p. 8

qui donc, elle-même, serait en crise ? Cette pensée unique est raison et résultat d'une triple abstraction du financier du monde réel, à savoir l'abstraction de la production de l'état des ressources naturelles, l'abstraction de la production des besoins des êtres humains et l'abstraction de la finance de l'économie réelle.²

4. La situation sociale : Environ 500 entreprises contribuent à raison de 47 % au produit brut mondial. Ces 47% représentent l'équivalent du double de la somme des PIB des 107 pays à bas et moyen revenu. Dans ces pays vivent 4 milliard de personnes. 400 des plus riches familles gagnent autant que 3 milliards de personnes.³

5. L'interprétation : Cette situation n'est pas le résultat des « crises » affichées, mais bien le résultat de cette pensée unique qui imprègne tous les domaines de notre vie.⁴ Quand la soi-disant crise arrivait dans les médias en 2008 Walter⁵ parlait d'une "omniprésence de la finance dans la société", ... d'un "encastrement (qui serait) aussi cognitif dans le sens où le langage scientifique pénètre le corpus réglementaire, comme les normes comptables internationales ou les réglementations de Bâle II et de Bruxelles sur la solvabilité des établissements de crédit."

6. Cet encastrement a induit la tendance, surtout en politique et droit, vers un isomorphisme de tous les types d'entreprise calqué des caractéristiques de l'entreprise capitalistique au sens économique du terme. Les caractéristiques des coopératives en sont les premières victimes. J'y reviendrai.

7. En général, le mot « entreprise » est associé à l'entreprise capitalistique et ne déclenche pas de différenciation dans notre penser. Quoique le homo oeconomicus n'ait probablement jamais existé,⁶ la forme coopérative d'entreprise ne figure que rarement dans les programmes d'éducation, de formation ou de recherche, ou dans la

² 2 données: Le volume des transactions financières est estimé à être 300 fois celui des transactions de l'économie réelle; le volume financier dépasserait le PIB mondial par le facteur 25. Voir Becerra, Santiago Niño, *El crash del 2010*, 6. ed., Barcelona: los libros del lince 2009, 29; De Soto, Hernando, *Revenir aux sources de la finance*, in: *Le Temps* 21 mai 2010, 15

³ As for the hyper concentration of capital (and thus the weight put on growth yielding returns), cf. Vidal-Beneyto, José, *De la mundialización a la globofobia*, in: *El País*, 29.9.2007, 10); Becerra, op.cit.; Geissler, Heiner, "Wo bleibt Euer Aufschrei?", in: *Die Zeit* 11.11.2004, 26

⁴ Instructif dans ce sens Arcand, Jean-Louis, *Les pays en développement, victimes durables de la crise*, in : *Le Temps* 13.10.2009, 13

⁵ Walter, Christian, *Finance, maths et humanités*, in: *Le Monde*, 19 septembre 2008, 19

⁶ Il s'agit tout probablement d'une erreur. Voir Simon, Fritz B., *Der Untergang findet nicht statt*, in: *Frankfurter Allgemeine Zeitung*, 6.8.2009, 29; Gray, Richard T., "Money Matters". *Economics and the German Cultural Imagination, 1770-1850*, University of Washington Press, Seattle, London 2008. Toujours plus d'auteurs discutent la figure d'un homo reciprocans. Voir Beck, Hanno, *Angriff auf den Homo oeconomicus*, in: *Frankfurter Allgemeine Zeitung* 2.3.2009, 10; Heuser, Uwe Jean, *Humanomics: Die Entdeckung des Menschen in der Wirtschaft*, Campus 2008; Heuser, *Wirtschaft mit Gefühl*, in: *Die Zeit* 2.4.2009, 34. La Prix Nobel en science économique 2009, Elinora Ostrom, défend son idée d'un homo cooperans. A lire Freud sur Darwin (*Das Unbehagen in der Kultur*, 1930), à la lumière de Darwin (*Die Abstammung des Menschen*, 1871), la prévalence d'un homo cooperans sur un homo oeconomicus devient plausible

pratique des avocats, des chambres de commerce etc.. Les médias n'en font que rarement mention, quoique la situation est enfin en train de changer.

8. Cette pensée unique nous a enchevêtrés dans une contradiction irréductible. Cette contradiction consiste en le fait d'en faire du développement durable un paradigme⁷ et de réduire le principe indivisible de la diversité à son aspect de diversité biologique, tout en faisant sauter son nécessaire corrélat, à savoir la diversité culturelle par, entre autres, cet isomorphisme des formes d'entreprise. La durabilité se nourrit de la diversité, elle en est une des expressions. Par une pensée unique nous ne parviendrons pas au développement durable. Elle nous fait *protéger* la diversité biologique, mais seule une diversité culturelle peut *préserver* la diversité. La preuve en est que nous perdons chaque année quelques 30 espèces animales et florales et quelques 50 langues.⁸ Cette parallèle n'est pas une pure coïncidence.⁹

9. Nous ne surmonterons cette contradiction que si - entre autres, évidemment - nous parvenons à (re)créer les conditions nécessaires pour que les entreprises puissent évoluer dans la plus grande pluralité et diversité de leurs types. La pluralité et la diversité des types d'entreprise ne sont donc pas seulement les réponses à des besoins, désirs et préférences divers, privés ou publics, mais elles contribuent également à la

⁷ the history of the notion of sustainable development goes back to the 18th century when Hans Carl von Carlowitz advised the Saxon king on a more sustainable use of the forests for industrial use (cf. his "Sylvicultura oeconomica oder Anweisung zur wilden Baumzucht", Leipzig 1713). In the eighties of last century a consulting company in Basel Switzerland (Prognos) came up with the definition as it was later used by the UN Conference on the Environment and Development in 1992 (cf. 1992 Rio Declaration on Environment and Development). The World Commission on Environment (cf. so-called Brundtland Report, 43) and others further refined the notion.

The cooperative principles elaborated by the ICA (reproduced in: International Co-operative Review, Vol. 88, no. 4/1995, 85 f) include that of "concern for the community", according to which cooperatives "work for the sustainable development of their communities through policies approved by their members" (7th ICA Principle). Rec. 193 recognizes "the significance of cooperatives for the attainment of sustainable development goals ... " (cf. Paragraph 4 et passim). The 96th session of the ILC 2007 endorsed this goal in its wider sense, integrating the economic, social and environmental aspects (cf. ILC 96-PR 15-2007-06-0102-Fr.doc., Introduction, Paragraph 8 ; Conclusion Paragraph 3) and linked it to the enterprise promotion by the ILO. The Conference frequently referred to peace as a prerequisite for sustainable development. Political stability, which is generally mentioned as the 4th element of sustainability, must therefore have been implied by the Conference as well. Furthermore, as part of the Green Economy the ILO has now a so-called Green Jobs Program.

As for the history of the notion of sustainability, cf. Grober; Ulrich, Die Entdeckung der Nachhaltigkeit – Kulturgeschichte eines Begriffs. Cf. also Cretienuau, Anne-Marie, Economie sociale et solidarité et développement durable: pensée et actions en conjonction, in: Economie sociale et solidaire. Nouvelles trajectoires d'innovations, sous la dir. de Sophie Boutiller et Sylvain Allemand, Paris: Harmattan 2010, 31 ff.

The 1989 ILO Indigenous and Tribal Peoples Convention 169 had already enshrined the sustainable development paradigm in its text

⁸ Wie die Pflanzenvielfalt unter Überhitzung leidet, jom, in: Frankfurter Allgemeine Zeitung 5.5. 2010, N2; Kriener, Manfred, Weg ist weg, in: Die Zeit, 22.4.2010, 20; Artenvielfalt nimmt weltweit weiterhin ab, apa, in: Neue Zürcher Zeitung, 30.4.2010, 26; Steiner, George, Tritons, in : Avec George Steiner. Les chemins de la culture, Paris : Albin Michel 2010, 16

⁹ Voir Henry, Hagen, Kulturfremdes Recht erkennen. Ein Beitrag zur Methodenlehre der Rechtsvergleichung, Helsinki: Hakapaino 2004, surtout pp. 98 s. et Marti, Felix, u.a., Palabras y mundos. Informe sobre las lenguas del mundo, in: El Pais, Babelia, 24.2.2007, 12

préservation de la nécessaire diversité culturelle, corrélat générateur de la diversité biologique, toutes deux source du développement durable.
Parmi ces types d'entreprise se trouve l'entreprise coopérative.

Les coopératives, le développement durable et le droit coopératif

10. Nous sommes en droit de constater que les entreprises coopératives respectueuses des principes coopératifs univesellement reconnus résistent bien la crise actuelle.¹⁰ Rappelons que pendant la Grande Crise des années 20 et 30 du siècle passé les coopératives faisaient aussi preuve de solidité. Cet argument devrait déjà suffire pour réclamer, selon les cas, la restitution, la préservation ou la création de conditions favorables au développement du type coopératif d'entreprise.

11. Mon hypothèse est la suivante : La structure juridique des coopératives,¹¹ basée sur les principes coopératifs, les empêche de participer à la triple abstraction susmentionnée du financier du monde réel. Et ceci pour les mêmes raisons pour lesquelles les coopératives sont bien capables de contribuer au développement durable. En avril 2009 les membres du Committee for the Promotion and Advancement of Cooperatives (COPAC)¹² étaient invités parmi d'autres experts à donner leur avis au Secrétariat des Nations Unies à New York quant au pour et contre d'une année internationale des coopératives. A cette occasion j'ai attiré l'attention à ce phénomène¹³ et j'ai présenté une liste des éléments structurants les coopératives et relatifs à chacun des quatre *aspects*¹⁴ de la durabilité, à savoir sécurité économique, justice sociale, balance écologique et stabilité politique.¹⁵

¹⁰ Resilience of the Cooperative Business Model in Times of Crisis, prepared by Johnston Birchall and Lou Hammond Ketilson, Geneva: ILO 2009

¹¹ Il est évident que la structure juridique n'équivaut pas réalité. L'écart entre cette structure et la réalité est surtout fonction de l'effectivité d'un système juridique

¹² dont les membres sont les Nations Unies, la FAO, l'OIT, l'ACI et la International Federation of Agricultural Producers, IFAP

¹³ Voir Henry, Hagen, Cooperatives, Crisis, Cooperative Law (manuscript).

¹⁴ "aspects" à l'opposition de "éléments"

¹⁵ Dans une contribution à l'Assemblée Régionale de l'ACI à Pékin il y a 3 semaines intitulée "ILO Recommendation 193: its heightened importance for the 21st century" j'ai retravaillé cette liste. Je la copie ici dans sa version originale :

- **Sustainability through economic security**

Cooperatives create economic security mainly through their economic stability, not the least in times of crises (Resilience of the Cooperative Business Model in Times of Crisis, prepared by Johnston Birchall and Lou Hammond Ketilson, Geneva: ILO 2009). Their economic stability (indicated by their longevity and a low number of bankruptcies, cf. for example, study by Ministry of Economic Development, Innovation and Export, Government of Quebec, at: [http://www.mdeie.gouv.qc.ca/index.php?id=187&tx_ttnews\(tt_news\)=1069&tx_ttnews\(backPid\)=2206&tx_ttnews\(currentCatUid\)=75](http://www.mdeie.gouv.qc.ca/index.php?id=187&tx_ttnews(tt_news)=1069&tx_ttnews(backPid)=2206&tx_ttnews(currentCatUid)=75)) stems from the following structural features, among others:

- as capital requirements are low and the acquisition of skills (where necessary) is possible in most instances, cooperatives are a rather easily accessible organizational form which may be registered as a legal entity, thus adding an element of stability
- registration not only confers recognition as legal entity by business partners, it operates also a widely unknown and underestimated shift of economic risks, which boosts entrepreneurial behavior. To my knowledge, the link between the attribution of legal status to entities and (economic) development has not been researched. Only Fikentscher (Wolfgang, Modes of Thought, Tübingen: Mohr 1995, 183, 219, 258 ff., 359, 372, 379, 387, 470 f. et passim) frequently mentions this link. Similar Wenke, Hans, Geist und Organisation, Recht und Staat, Heft 241, Tübingen: Mohr 1961. Cf. also the writings of Mary Douglas; Javillier, Jean-

Claude, Responsabilité sociétale des entreprises et Droit: des synergies indispensables pour un développement durable, in : Gouvernance, Droit International & Responsabilité Sociétale des Entreprises, Genève : OIT (forthcoming), 54 ff.

- cooperatives have low transaction costs because the members are also the main users (cf. Seiser, Michaela, “Wissensbilanzierung erhöht die Kreditwürdigkeit“. Bericht über das Humankapital gewinnt an Bedeutung/Imagevorteil für Unternehmen, in: Frankfurter Allgemeine Zeitung 21.7.2004, 18; Watkins, W.P., Co-operative Principles Today and Tomorrow, Manchester: Holyoake Books 1986 (54 ff.)). This point was emphasized during a panel discussion organized by the UK Cooperative Party at Westminster on October 6, 2008 by one of the panelists, Mr. David Anderson, Chief Executive, Co-operative Financial Services UK
- the costs caused by complex decision making processes are outweighed by the advantages of these processes (cf. infra “Political stability”) and they may be held low by providing for an efficient power-sharing between the different organs of the cooperative
- cooperatives can generally count on member, and hence user loyalty and commitment
- cooperatives have an inbuilt early warning system through regular cooperative specific financial, management, social (cf. Seiser, op.cit.) and societal (Cf. Münkner, Hans-H., Die « Bilan sociétal » - ein neuer Ansatz zur Messung des Erfolgs von Genossenschaften in Frankreich (forthcoming)) audit and professional advice
- cooperatives avoid the negative sides of the conflict between investor and member-user interests through the limitation put on the admission of investors, be they members of the cooperative or not
- cooperatives are to prefer the production of surplus (on transactions with members according to special cost calculation schemes) over that of profit (on transactions with non-members according to profit maximization principles)
- most cooperatives are human being-centered. This helps them adjusting to changing circumstances (cf. supra as for their stability in time), especially to the current change of the production pattern from that of goods and services to that of knowledge. While it is true that cooperatives face difficulties when it comes to capital intensive activities, such as the production of knowledge, as their capitalization suffers from drawbacks (voting rights are not proportional to the investment and non-member investments, and even non-member business, are restricted), it is equally true that the production of knowledge depends on human beings, as knowledge is generated, applied and transmitted by them and here cooperatives have a comparative advantage. Cf. the highly inspiring article by Snaith, Ian, “Virtual” Co-peration: The Jurist’s Role, in: Genossenschaften und Kooperation in einer sich wandelnden Welt, Festschrift für Prof. Dr. Hans-H. Münkner zum 65. Geburtstag, ed. by Michael Kirk, Jost W. Kramer und Rolf Steding, Münster: LIT 2000, 391 ff.. Similar, but limited to the argument that knowledge intensive enterprises will have an advantage in the future, if they do not have it already now, Bernardi, Andrea, The Co-operative Difference: economic, organizational and policy issues, in: Co-operative Management, Vol. 3/no. 2, November 2007, 11 ff. (18)
- cooperatives are often tied into - legally structured - inter-cooperative solidarity mechanisms, for example guarantee funds which operate in case of financial difficulties. Cf. Frankfurter Allgemeine Zeitung, 7.10.2008, 21: “Nach 1930 hat kein Kunde oder Gläubiger einer Volksbank durch Bankinsolvenz Geld verloren.”); “Die verschärften Eigenkapitalregeln werden weh tun”, in: Frankfurter Allgemeine Zeitung 18.8.2010, 12
- cooperatives have a capital structure which guarantees that the main constituent parts of it, namely member shares and reserve funds, are not mobile: usually, member shares cannot be transferred and traded and reserve funds are indivisible/locked-in. Both factors add to local stability (Cf. Jeantet, Thierry, Die französische Idee der ‘économie sociale’: Grundansatz und unternehmerische Umsetzung, in: Die Zukunft der Genossenschaften in der Europäischen Union an der Schwelle des 21. Jahrhunderts, Hrsg. Wolfgang Harbrecht, Nürnberg 2001, 83 ff.. The same point is also stressed by the World Commission on Fair Globalization (cf. A Fair Globalization. Creating Opportunities for All, World Commission on Fair Globalization, Geneva: ILO 2004)
- cooperatives tend to reinvest the positive results of their activities at the local level where there members are, thus impacting positively on local economies. This, in turn, helps them to develop themselves. As an example one may cite the Italian legislation whereby the members of cooperative banks must have a territorial bond. For further examples, cf. Bernardi, op. cit.

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- voting rights, and thus control, cannot be acquired by buying shares, but only through membership
 - the locked-in capital of cooperatives (indivisible reserves), while controlled by the members, cannot be accessed by them
 - cooperative managers must ensure that the reserves serve both current and future members. This intergenerational solidarity adds in most cases to the economic security of local communities
 - as those depositing their savings with a cooperative bank or a cooperative savings and credit institution are potentially also borrowers, and as they participate in the decision making processes, their risk assessment, concerning both lending and investments, differs from that in investor driven banks (the rather stable situation of cooperative financial institutions in the current crisis might be partly explained by this (not only in times of crisis. Cf. Hesse, Heiko and Fonteyne, op.cit.) and,
 - in general, risk assessment is facilitated through policies which limit financing to local projects. Cf., for example, the statutes of the Raiffeisen banks in the Canton de Genève, reported by the daily newspaper Tribune de Genève, 25.3.2009, 9.

* Sustainability through social justice

The overarching objective of the ILO is peace based on social justice. It is worth citing the opening sentence of the Preamble to the Constitution of the ILO. It reads: “Whereas universal and lasting peace can be established only if it is based upon social justice; ...” Social justice may be seen as having two aspects: Social needs satisfaction and social equality.

Among others, the following features ensure that cooperatives take **social needs** of their members into consideration:

- the universally recognized definition of cooperatives requires them to satisfy the “economic, *social* and cultural needs and aspirations of the members.” (R.193, Para. 2)
- the members themselves define these needs and the ways to satisfy them. The extent to which cooperatives are successful in achieving this objective is being assessed through the aforementioned cooperative specific audit
- the objective of cooperatives is member promotion, not the maximization of financial returns on investments
- the “growth or equity” alternative is leaning towards equity, as the role of capital is de-emphasized
- decisions are taken according to the one member/one vote principle, independently of the amount of capital invested by the members
- profits are not distributed. Surplus is distributed, but not in proportion to the investments, but in proportion to the transactions with the cooperative
- the characteristics of the main constituent parts of the capital, member shares and reserves, prevent - as mentioned - delocalizations and allow therefore for a better account of local social needs
- many cooperatives provide for social security coverage for their members by setting aside parts of the surplus for this purpose. Cf. for example Article 42 of the 2008 Ley marco para las cooperativas de América Latina

Cooperatives render **social equality** through, among other means,

- an equitable cost, risk and benefit sharing and co-control by the members, independently of the capital invested by them
- the open door principle (the so-called “open door principle”, the 1st ICA principle, is frequently construed as meaning that anybody can join a specific cooperative. It is therefore worthwhile recalling the full text of this principle. It reads: “Voluntary and open membership. Cooperatives are voluntary organizations, 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.”) which allows to create economies of scale and, given the objectives of cooperatives as well as their surplus distribution schemes, for a more wide-spread

distribution of wealth and thus social equality. This is a structural means for an effective materialization of the right to participate in political decision making processes: Create the necessary economic power, which is necessary to enable people to make meaningful use of this Human Right, through the production of well-being for the greatest possible number of citizens. The need to reduce poverty is therefore for cooperatives a sign of failure as they might not have been successful in preventing their members from falling into poverty in the first place. Their approach is one of poverty prevention. Development cooperation seems to have forgotten about this nuance.

- the focus of cooperatives on their members, mainly natural persons
- the direct access of members to the knowledge, as well as the research and development results engendered by their cooperative and through
- the balance of cooperation and competition.

- **Sustainability through ecological balance**

The last mentioned feature of cooperatives - their balancing of cooperation and competition - goes a long way in preparing the ground for a heightened concern for keeping the ecological balance. Meyer-Abich (Klaus Michael, *Leiblichkeit im natürlichen Mitsein*, in: *Scheidewege 2008/2009* (38), 43-58, (56)) writes: "Mitsein und Verwandtschaft deuten demgegenüber auf Kooperativität in spezifischer und individueller Verschiedenheit hin." Cooperatives further contribute to maintaining the ecological balance through the following characteristics, among others

- being member-centered. This ensures that decisions concerning the operations of the cooperative enterprise are more comprehensive than those in capital-centered companies. Cooperatives do not allow for "economy *or* ecology" solutions. They have to find rather "economy *and* ecology" solutions
- being member-user driven. Members constantly redefine their needs and, in doing so, most probably include their concern for a healthy environment and the sustainable use of natural resources. Members are likely to make decisions that balance their welfare with the need for profitability. The example of Migros Cooperative and its consideration for bio-diversity in the supply chains of its consumer cooperatives may serve as an example. Cf. Migros magazine, 8.9.2008, 37
- neutralizing the role of capital. Growth is commonly defined as the result of a favorable combination of capital, technology and labor. The finite character of natural, non-renewable resources, which are at the basis of most of our production, is not part of the "equation". Where the role of capital is neutralized, i.e. where the financial return on the investment, which is taken as the main indicator of growth, is not the primary goal of the enterprise, and where production is demand-driven instead of supply-driven, the pressure to utilize these resources to achieve growth lessens. Cf. also 7th ICA principle. Despite of environmentally more friendly technologies, which have been developed over the past decades and which have allowed for productivity gains by using less resources per unit, the fact remains that the energy consumption per capita continues to rise and, as world population increases, so does the energy consumption
- intergenerational solidarity. Another element which helps maintaining the ecological balance is the intergenerational solidarity achieved by the nature of the reserve fund being indivisible, it being fuelled by the totality of the profit and parts of the surplus, as well as by the obligation of the responsible persons to manage the assets also for future members. It might be interesting to note that at its origin the debate on a responsible management of natural resources turned around the notion of intergenerational solidarity
- pooling activities. For example, the common transport of goods diminishes pollution. Transport cooperatives, like the Swiss cooperative "Mobility", are examples where this is a side effect of their main objective. Idea borrowed from Andreas Kappes
- introducing a societal audit which comprises ecological assessments of the performance of the cooperatives.. Cf. Münkner, *Die « Bilan sociétal » ...*, op. cit.

- **Sustainability through political stability**

We may assume that political stability is a function of the degree of effective participation of the highest possible number of people in the making of decisions concerning their daily lives.

12. Je me permets de me limiter ici à l'étroite corrélation entre la justice sociale et la stabilité politique et de développer quelques idées supplémentaires relatives à ces deux aspects.

La justice sociale se distingue du « faire du social » comme la solidarité se distingue de la charité. C'est la différence entre 'obligatio in solidum' et 'caritas' que nous rappelle Alain Supiot.¹⁶ Les deux sont nécessaires, mais elles répondent à des principes différents. La charité obéit à un appel moral et vise à redresser une situation insupportable concrète. La solidarité, par contre, institutionnalise la justice sociale moyennant des institutions économiques et politiques où les concernés décident des règles de la production et de la distribution des biens, des services et du savoir.¹⁷

D'où l'importance d'entreprises à structure démocratique, comme par exemple les coopératives ; d'où l'importance de l'auto-nomie et de l'auto-détermination des coopératives - si elles sont appelées à contribuer au développement durable ! De telles entreprises réduisent la pauvreté. Plus important encore : Elles la préviennent !

Qui plus est, il y a une relation de cause à effet réciproque entre participation démocratique et stabilité politique.

Du point de vue des nécessiteux, la distinction peut paraître comme de l'acrobatie. Mais quant à l'action politique, cette différenciation importe.

Often people have no means to make their voice heard. As mentioned already, technological changes and deregulation processes (globalization) lead to the deterritorialization of political orders. Thus the space for democratic participation, for which states hitherto provided, is reduced. This comes after privatization of public services had already considerably reduced this space. In these situations people turn towards member-centered enterprises with a democratic structure and tradition, like cooperatives. The topic relates closely to that of social justice (cf. supra). It is discussed nowadays under the notion of "governance".

Without passing any value judgment on other forms of business organizations, one may argue that "good governance" is an inbuilt element of genuine cooperatives. Among others, the following elements may be mentioned:

- because of the identity principle, those who rule and those who are ruled in cooperatives are potentially the same persons. The division of roles underlying the governance concept with its potential conflicts does not exist in cooperatives, at least not as marked as it is in other business organizations
- another central structural feature of good governance is the division of powers and functions among the various groups within the cooperative and the reciprocal checks by these groups on each other, as well as the fact that the "ruled" have the right to elect their "rulers". This latter feature seems to be systematically overlooked when comparing the governance structures of different enterprise types
- democratic control of the cooperative enterprise by the members is required by the definition of cooperatives and by the universally recognized cooperative principles
- a specific, self-control mechanism at all levels (primary, secondary etc.), which not only ensures sustainability, but also autonomy and independence from whatever outside interference
- a democratic structure. Self-determination, autonomy through the setting of own rules (statutes, bye-laws), self-management, voting according to the principle of one member/one vote, participation of the members in all phases of the operations of the cooperative etc.

and finally

- a high Human Rights functionality of cooperatives. Cf. Partant, François, *La guérilla économique*. Les conditions du développement, Paris: Seuil 1976 ; Henry, Hagen *Co-operative Law and Human Rights*, in: *The relationship between the state and cooperatives in cooperative legislation*, ed. by ILO, Genève: ILO 1994, 21 ff.; Laville, Jean-Louis, *Un projet d'intégration social et culturel*, in : *le Monde diplomatique*, Octobre 2001, supplément, 1

¹⁶ "L'esprit de Philadelphie. La justice sociale face au marché total", Paris: Seuil 2010, 159 ss.

¹⁷ as for the relationship between law and social justice it is worthwhile reading Supiot, op.cit.

13. Souvenons-nous : La capacité d'œuvrer pour le développement durable est une fonction de la diversité, biologique et culturelle. En observant l'évolution du droit coopératif durant ces dernières décennies, je dois douter de sa qualité de sauvegarder les éléments structurels qui font des coopératives des entreprises capables de réaliser le principe de durabilité.

Pour fonder mes doutes je fais remarquer un triple processus d'approximation des droits relatifs aux différents types d'entreprise:

- une unification au niveau national des lois relatives aux différents types de coopérative ¹⁸
- une harmonisation, voire parfois une unification, aux niveaux régionaux des lois coopératives ¹⁹ et
- une approximation par transfert direct de règles du droit des sociétés capitalistiques au droit coopératif, surtout en matière de structure du capital, du management et du contrôle. ²⁰

¹⁸ for example in France. Cf. Münkner, Hans-H., Wege zu einer Vereinfachung des französischen Genossenschaftsrechts, in: Zeitschrift für das gesamte Genossenschaftswesen 1/2010, 64-69

¹⁹ A number of regional organizations have passed uniform laws, others have elaborated model cooperative laws or at least guidelines in view of harmonization:

- under a 1988 project for harmonizing cooperative legislations in Latin America (Proyecto de Ley Marco para las Cooperativas de América Latina), the Organización de las Cooperativas de América (OCA) elaborated a model law (Ley Marco). It became an important stimulus for the modernisation of cooperative legislations in several South American countries. It was reviewed and revised thoroughly in the light of socio-economic and political developments and adopted anew in 2008 through a process associating a vast gamut of stakeholders

- in 1997 the Inter-Parliamentary Assembly of the Community of Independent States (CIS) adopted a "Model Law on Cooperatives and their Associations and Unions"

- the Member States of the West African Monetary Union (UEAO) adopted a uniform law on savings and credit cooperatives, which has been transformed into national legislation by several West African States

- similarly, the "Organisation pour l'harmonisation en Afrique du droit des affaires" (OHADA) is about to adopt a uniform cooperative law

- the 1997 "Referential Cooperative Act" of India is influencing the harmonisation process among the Indian States

- the Member States of the South Asian Association of Regional Cooperation (SAARC) entertain permanent, quasi institutionalised consultations on cooperative law matters which have already had a harmonising effect on the cooperative laws in the region

- the Organisation of East Caribbean States and CARICOM elaborated a credit union legislation, which has been translated into national laws by several Caribbean States

- the Arab Cooperative Federation decided in 1999 to develop a model cooperative law to guide national legislators

- after almost four decades of discussions the European Union adopted in 2003 the Regulation on the Statute for a European Cooperative Society (Council Regulation (EC) No. 1435/2003) and Council Directive 2003/72/EC supplementing the Statute with regard to the involvement of employees

²⁰ By allowing for unlimited mergers and acquisitions, for investments, for plural voting rights and for entrusting more powers with non-member managers at the detriment to the members. Cooperative laws in Europe for example allow/require cooperatives

- to issue shares that are attractive to investors, cf. especially the following legislations: Sweden (1987) allows for debenture contributions from non-members which must not, however, exceed the amount of the ordinary share capital and not have voting rights attached to them. Finland (1990, 2002). France (1992): through bylaws non-member investments and revaluation of shares through incorporation of

14. S'y ajoutent d'autres approximations. A mentionner des approximations par le biais de règles ne faisant pas partie du droit coopératif au sens étroit du terme. A titre d'exemple on peut citer des règles du droit du travail,²¹ de la concurrence,²² de la fiscalité²³ et de la comptabilité,²⁴ dans la mesure où ces règles influent sur la structure

reserves. Italy (1992): financial backer members may have up to 33% of the total voting rights and 49% of the seats on the board of directors. Germany (1994)

- to issue freely transferable (even at the stock exchange) cooperative investment certificates, cf. del Burgo, Unai, La desnaturalización de las cooperativas, in: Boletín de la Asociación Internacional de Derecho Cooperativo. International Association of Cooperative Law Journal 2002, 51 ff. (71)

- to have unlimited business with non-members

- to hire professional, non-member managers and increase their power and autonomy vis-à-vis the board and the general assembly

- to reduce the role of the members to a minimum

- to grant members limited plural voting rights (up to five votes), cf. Chuliá, Francisco Vicent, El futuro de la legislación cooperativa, in: CIRIEC España, Revista Jurídica de Economía Social y Cooperativa 13/2002, 9 ff. (40), not based on capital contribution, however

- to arrange for delegate meetings, at times even with a free mandate for the delegates, cf. Chuliá, op.cit., 40

- non-member employees to sit on the supervisory board, like for example in Germany under certain circumstances

- to have minimum share capital

- to merge and acquire other enterprises

- to grant (non-user) investor members, and even non member investors, similar rights as members, cf. Chuliá, op.cit., 38; del Burgo, op.cit., 68 ff., 79 ff.

- to divide their reserve fund upon liquidation or conversion into a stock company. As for the latter, cf. del Burgo, op.cit., 87 ff.

- to distribute their surplus according to the amount of capital invested by the members

- to transform into stock companies, cf. especially the legislation in Estonia, Finland, Germany, Latvia, Lithuania, Sweden.

The EU Council Regulation on the Statute for a European Cooperative Society (SCE), allows for/requires, for example,

- different categories of members with different rights and obligations (Articles 4, 1.; 5, 4.)
- limited plural voting rights, as long as not according to capital contribution (Article 59, 2.)
- investor (non-user) members (Recital (9); Article 14, 1.) who may, to a limited extent, sit on the board (Article 42, 2.) and the supervisory council (Article 39, 3.), who may participate in surplus distribution and have voting rights (not exceeding 25%, Article 59, 3.)
- the distribution of reserves upon liquidation (Article 75)
- sectoral meetings (Article 63)
- minimum share capital (Article 3, 2.)
- unlimited non member business (Article 1, 4.)
- capitalisation of the reserves and attribution of the new shares to the members in proportion to their share in the previous capital (Article 4, 8.) and the
- issuance of securities (other than shares) or debentures for members or non-members, without voting rights, however (Article 64, 1.).

Examples from other regions of the world could be added.

This trend started with the 1973 German cooperative law reform and continued throughout the 1990ies in most European countries. In Latin America the trend set in with the agreement on the 1988 Ley Marco para las cooperativas de América Latina. Münkner (Hans-H., Structural Changes in Cooperative Movements and Consequences for Cooperative Legislation in Western Europe, in: Structural Changes in cooperative movements and consequences for cooperative legislation in different regions of the world, Genève: ILO 1993, 57 ff.) described/foresaw this evolution already in 1993

²¹ undifferentiated application of labor law to the work relationship between member employees and any type of cooperative

²² inadequate application of competition law to the relationship between cooperatives and their members

²³ inadequate taxation of cooperatives and their members, not differentiating between surplus and profit

ou les opérations des coopératives. De plus, sous le couvert d'une soi-disant flexibilisation des règles, toujours plus de règles légales ont un caractère dispositif. Le domaine du normatif contraignant se rétrécit au profit de statuts des coopératives qui s'adaptent aux humeurs changeants du politique et aux pressions de l'uniformisation.

²⁵ Enfin, des juristes comparatistes tombent trop facilement et trop souvent d'accord avec des économistes qui ne voient dans le droit, et surtout dans la multitude et la diversité des ordres juridiques, rien d'autre que des coûts à réduire (bien entendu tout en réclamant la sécurité juridique pour les activités économiques et les investissements !).

15. Chacun de ces processus produit des effets positifs et négatifs. Accumulés ils renforcent leurs effets. A noter du côté positif que ces processus améliorent le côté entrepreneurial des coopératives. ²⁶ Du côté négatif l'approximation du droit coopératif au droit des sociétés capitalistiques réduit la diversité et donc la capacité de contribuer au développement durable. ²⁷

²⁴ application of company specific accounting standards to cooperatives by inadequately qualifying cooperative member shares; application of company merger rules to cooperatives, not considering the fact that member shares cannot be detached from membership; application of the requirements of the so-called Basel II and soon III to cooperatives. Cf. Cracogna (?), "Conclusiones sobre Normas Internacionales de Contabilidad", and "Conclusiones de la Red de Universidades", in: *Revista de la cooperación internacional*, Vol.39, No.1-2006, pp. 99 and 100 ff. respectively; Glanz, Stephan, René Krügel und Andreas Wyss, Lancierung eines internationalen Rechnungslegungsstandards für KMU, in: *Neue Zürcher Zeitung* 17./18.2.2007, 3; Luttermann, Claus, Rechnungslegung ist ein Rechtsakt, kein Marketing, in: *Frankfurter Allgemeine Zeitung* 26.2.2007, 20

²⁵ cf. for example, Bauchmüller, Michael, Ein grenzenloses Problem, in : *Süddeutsche Zeitung* 17./18.7.2010, 23

²⁶ i.e. to grow economically, to increase their capital through mergers (in addition, the total number of members tends to increase with a decrease of the number of cooperatives caused through mergers (cf. von Wild, Christian, *Credit Unions in den USA - ein historischer und aktueller Vergleich mit deutschen Genossenschaftsbanken*, in: *Genossenschaften in Europa - damals - heute - morgen*, Hrsg. Historischer Verein bayerischer Genossenschaften e.V., München: Bayerischer Raiffeisen- und Volksbanken-Verlag 2000, 264 ff. (266)), to lower their costs, to create economies of scale, to increase their reserves and to increase their profit, at times also their surplus

²⁷ The arguments are legal-normative in nature. For lawyers, the questions are whether the structure of cooperatives prescribed by law is compatible with sustainable development, whether cooperative law orients cooperatives to work towards this end and whether cooperatives can be compelled through legal means to do so.

This last point might well be a decisive distinguishing feature between cooperatives and other types of enterprises fulfilling the so-called corporate social responsibility or corporate societal responsibility. Cf. also infra argument "cooperative specific audit" as a legal obligation. Most of the arguments put forward must therefore not be construed as a report on the empirical behavior of cooperatives. They do not but underline the potential of the cooperative form of doing business.

The reason for this is the following: The possibility to invest in cooperatives, as allowed by many so-called modern legislations, creates a (potential) conflict between the investors (be they members of the cooperative or not) and the member-users. The management of investments differs from that of an entity which is centered on persons. Such changes are likely to ignite a metamorphosis of the relationship between member-users and their cooperative (transaction relationship) into a client-investor relationship; the finality of cooperatives, which is to satisfy the needs of their members, is being transformed into the search for market opportunities which allow maximizing the financial return on investments, as is the case in companies.

En guise de conclusion : Que faire ?

16. Cette année, 2010, nous vivons l'Année internationale de la biodiversité. En 2012 nous ne vivons non seulement l'Année internationale des coopératives, mais nous reverrons aussi les vingt ans écoulés depuis la Conférence de Rio par laquelle le développement durable faisait son entrée dans la coopération internationale,²⁸ ainsi que les 10 ans écoulés depuis l'adoption de la Recommandation 193 concernant la promotion des coopératives par la Conférence internationale du travail en 2002.²⁹

17. Nous devons nous garder de tout simplement communiquer des thèmes en préparation et durant l'Année internationale des coopératives. Il importe de radicalement reforcer la pesée économique et politique. N'est-ce pas cela le temps de crise : le temps de juger, de dé-cider ? La légitimité pour le faire ne fait pas de doute.³⁰

18. Revoyons les défis avant d'agir. Je ne mentionne que les six d'entre eux qui me paraissent particulièrement importants pour notre sujet:

- une urbanisation accélérée
- un changement de notre mode de vie qui entraîne des démographies variant d'un pays à l'autre, mais également à l'intérieur des pays, surtout en fonction de l'urbanisation
- des migrations
- un double déplacement des poids dans les activités économiques, à savoir de la production des biens et des services à la production du savoir intensive en capital, ainsi que de la globalisation des échanges des produits à la globalisation de la production elle-même
- l'urgence d'en faire du développement un développement durable et
- la globalisation/mondialisation de tous les aspects de notre vie.³¹

19. Quant aux trois premiers de ces défis, à savoir l'urbanisation, démographies changeantes et migrations, j'aimerais tout simplement dire ceci : sans négliger les besoins des formes coopératives plus traditionnelles, il faudra développer plus des formes qui adressent ces défis. Ces nouvelles formes comprennent aussi les coopératives de production de savoir, c'est-à-dire une nouvelle forme de coopérative de travailleurs. Le type de travail qu'elle organise se distingue radicalement du travail

²⁸ Voir Rio Declaration on Environment and Development 1992

²⁹ ILC 90-PR23-285-En-Doc, June 20, 2002

³⁰ La Résolution (A/Res/64/136) déclarant l'Année internationale des coopératives fut adoptée par consensus. Depuis un certain temps la Banque Mondiale voit dans les coopératives de nouveau une forme d'entreprise (voir son Rapport sur le développement mondial 2008). De même le FMI (voir Hesse, Heiko and Martin Cihak, Cooperative Banks and Financial Stability, IMF Working Paper WP/07/2; Fonteyne, Wim, Cooperative Banks in Europe – Policy Issues, IMF Working Paper WP/07/159). En ce qui concerne le PNUD, voir "Creating values for all: Strategies for doing business with the poor", 2008

³¹ by "globalization" I understand those phenomena through which national borders are becoming irrelevant, especially for today's main means of production, namely capital.

qui donnait naissance au droit de travail classique.³² Beaucoup de ces nouvelles coopératives seront des entreprises virtuelles. Cause et effet de la globalisation/mondialisation, la connectivité y comptera plus désormais que la collectivité. Les coopératives auront des difficultés pour accéder à ces nouvelles formes, si nous continuons à réduire la compétitivité à son aspect financier.

20. Reconnaissances ensuite

- que l'approximation du droit coopératif au droit des sociétés capitalistiques constitue une violation du droit public international coopératif³³

³² cf. Henry, Hagen, Labour Law and Co-operatives? Co-operative Law and Labour!, in: Journal of Co-operative Studies Vol. 31:1 (No. 92), May 1998, 12-23; Henry, Hagen Las cooperativas de trabajo asociado y los postulados de la OIT para el trabajo digno, contribution to the XVII Encuentro de Cooperativas de Trabajo Asociado: "Nuevo escenario. Nuevas oportunidades. Otra imagen", organized by Alianza Cooperativa Internacional para las Américas, la Confederación de Cooperativas de Colombia y la Asociación Colombiana de Cooperativas, Cali/Colombia, May 27, 2010 (manuscript)

³³ The alignment of cooperative law on company law violates the public international cooperative law. The core of this law is, as mentioned, which the R.193 ILO. The following nine arguments are to demonstrate that despite of the classification of R.193 as recommendation it constitutes legally binding public international law:

- the ILO has a constitutional mandate to adopt standards on cooperatives
- resolutions and recommendations of international organizations may be sources of public international law. The sources of law listed in Article 38 of the Statute of the International Court of Justice, the guiding instrument in this context, is not exhaustive
- the International Labor Conference adopts conventions and recommendations. As to their respective legal value the difference may not be reduced to the former being legally binding and the latter not. Articles 19 and 30 of the ILO Constitution do not allow for such an interpretation ((cf. ILO Constitution, Articles 19 and 30. This may also be derived from the fact that the Committee on the Application of Conventions and Recommendations (Art.7 of the Standing Orders of the International Labor Conference) not only monitors the application of conventions, but also that of recommendations (cf. supra), is a further argument in this context)). The fact that the International Labor Conference opted for the adoption of a recommendation, instead of a convention, may therefore not be interpreted as opting out of the legal nature of the instrument
- the legal nature of R. 193 can be seen in the repeated behavior of the ILO Member states as in 1966 the International Labor Conference had adopted R.127, the so called Developing Countries Recommendation on cooperatives. Although addressed to the governments of those countries only, it was an expression of how the adopting states related to cooperative development. In 2001 the United Nations adopted the above mentioned "Guidelines aimed at creating a supportive environment for the development of cooperatives". These two instruments are similar to R.193
- the same is true for instruments adopted after R.193: in 2003 the European Union promulgated a Regulation on the Statute for a European Cooperative Society (SCE), EU Regulation 1435/2003; in 2008 ICA Americas adopted the Ley marco par alas coopeativas de America Latina; the countries of Mercosur have, since 2009 a common Cooperative statute
- R.193 merely concretizes legally binding international and regional Human Rights instruments. Cf. especially the
 - International Covenant on Civil and Political Rights, doc.999 UNTS 171 (1966) and the
 - International Covenant on Economic, Social and Cultural Rights, doc. 993 UNTS 3 (1966)

- que le développement durable n'est pas négociable. Les ressources naturelles non renouvelables ne sont pas des marchandises. Elles ne sauraient être intégrées comme variables dans les calculs économiques
- qu'il n'y a plus d'ordre économique. Même les marchés, sensés exercer un pouvoir d'ordre, n'existent plus. Qu'est-ce que peut un marché non régulé face à la hyper concentration de la production et des richesses ? Quel est le pouvoir d'ordre réel d'un marché financier global, dont nous avons d'ailleurs besoin pour pouvoir financer la production du savoir, quand ce marché se compose de plus en plus de sociétés capitaliste, c'est-à-dire quand ce marché est en train de se transformer d'un courtier neutre en agent/s économique/s ayant lui/eux-même/s des intérêts financiers propres? Et reconnaissons
- que nous ne saurons pas résoudre les *problèmes de nature global* au moyen de *structures politiques d'ordre national, régional et international*.

21. L'ordre global sera radicalement différent de ce que nous connaissons. La présomption de la possibilité d'une croissance illimitée des rentes sur le capital investi, alors que la quantité d'énergie renouvelable est limitée, n'était qu'une Fata

which contain all the basic legal guarantees for freely setting up and running a genuine cooperative (cf. Henry, Hagen, *Wartosci I zasady spółdzielcze w legislacjach spółdzielczych. Panstw Czlonkowskich Unii Europejskiej dotyczacy Statutu Spółdzielni Europejskiej*, in: *Miedzynarodowy Zwiasek Spółdzielczy Miedzynarodowa Organizacja Pracy, National Co-operative Council of Poland, Warsaw 2004, 3 ff.* (translation of: *Co-operative values and principles in the cooperative legislations of the EU Member States and in the EU Regulation on the Statute for a European Cooperative Society (SCE)* (contribution to the joint ICA/ILO meeting in Budapest, 1-2 April 2004))

- R. 193 was adopted with two abstentions only. In public international law such large majorities add (legal) weight to an instrument
- decisions of tripartite organizations such as the International Labor Organization are more representative than those of other international organizations and, finally,
- in a globalized world, characterized by diminishing democratic participation in law making (in multi-facetted and complex settings law making is shifting from parliaments to governments, and from governments to courts (as for the latter, cf. Israel, Liora, *L'arme du droit*, Paris : Presses de Sciences Po, 2009) and from national to regional, inter- and transnational levels) by a growing informalization of the economies and with an increased influence of private standard and law making on public law making, In our context for example in the areas of accounting standards and stock exchanges) the integration into R.193 of the definition, as well as the cooperative values and principles as enshrined in the 1995 ICA Declaration on the co-operative identity, i.e. the integration of a text of a nongovernmental organization which represents the democratically arrived at opinion of some 700 million cooperative members at the time, carries special weight when assessing the legal nature of an ILO recommendation.

Pour plus de details, voir Henry, Hagen, *The Contribution of the International Labour Organization to the Formation of the Public International Cooperative Law* (in print)

Morgana, passagère de part sa nature. ³⁴ Depuis longtemps déjà des voix, y inclus de scientifiques, se faisaient entendre dans ce sens. ³⁵

22. Au-delà des questions de durabilité et de diversité nous avons besoin du type coopératif d'entreprise pour réorganiser notre monde globalisé. ³⁶ Les nouvelles technologies de communication, de part leur capacité de négliger les conditions du temps et de l'espace, ont creusé un écart insurmontable entre le capital, d'une part, et les travailleurs, les moyens de production ainsi que les ordres économiques et politiques nationaux, régionaux et internationaux, de l'autre. Cela induit un non ordre, un vide politique. Cela explique pourquoi les disciplines qui devraient se concerter pour définir les principes de l'économie, à savoir les sciences économique, politique et juridique, ³⁷ se trouvent démunis face au marché global des capitaux. Ils leur manquent les moyens pour mettre en œuvre leurs principes. Les acteurs globaux – tout comme les acteurs du secteur informel d'ailleurs – ³⁸ agissent en dehors des

³⁴ Pour plus de détails se référer à mon article „La promoción del modelo empresarial cooperativo por la Alianza Cooperativa Internacional y la Organización Internacional del Trabajo en el nuevo orden económico global”, in : aci. Revista de la Cooperación Internacional, Vol. 42, No.1-2009, 7 ss.

³⁵ Aristoteles, Binswanger, Georgescu-Roegen, Hobson, Kapp, Myrdal, Quesnay, Turgot etc.. En 1713 déjà Carlowitz (Hans Carl von, Sylvicultura oeconomica oder Anweisung zur wilden Baumzucht, Leipzig 1713) démontrait la possibilité d'un progrès économique basé sur le principe de la durabilité. Je n'ai pas pu vérifier si l'ouvrage d'Agricola (Bauer, Georg), intitulé « De res metalica », 1556, peut être considéré comme antérieur dans ce sens

³⁶ neither the positivist recognition of the diversity of enterprise types, including cooperatives, in national (cf. for example the German law on societies and the one on cooperatives and the German Commercial Code) regional (for example the consolidated version of the EU Treaty, O.J. C115, 9.5.2008, Artt.48, 81, 82), international and transnational (example: R.193) laws, nor the principle of diversity guarantee the continued existence of specific enterprise types. There is, however, no other way of paying respect to the diversity principle than by including in social traditions the knowledge on the greatest possible number of business types. This knowledge needs continued consolidating and regenerating through practical experience. What seems to be a paradox is not one: the principle of diversity does not call for the preservation of specific existing types; it calls for the preservation of the possibility for different and diverse types of enterprises to exist. Because of the link between knowledge, tradition and experience, this possibility is maintained only through the knowledge of the greatest number of existing types.

³⁷ Dans ce sens déjà Karl Polanyi („The Great transformation“). Voir aussi Willgerodt, Hans, Von der Wertfreiheit zur Wertlosigkeit, in: Frankfurter Allgemeine Zeitung 27.2.2009, 12

³⁸ Cette parallèle serait à rechercher.

Tokman identifies two main research strands concerning the informal economy: one, which deals with its economics and another one, which allocates “a growing importance to the informal sector’s operation beyond the prevailing legal and institutional frameworks.” Tokman, Victor E., Informality: Exclusion and Precariousness, Interregional Symposium on the Informal Economy: Enabling transition to formalization, Geneva, 27-29 November 2007, 1 ff.. The latter strand is commonly associated with the name of de Soto. de Soto, H., Other Path: The Invisible Revolution in the Third World, New York: Harper and Row 1989. Cf. also Loayza, N.V., A.M. Oviedo and L.Servén, The Impact of Regulation on Growth and Informality: Cross Country Evidence, in: Basudeb Guha-Khasnobis, Ravi Kanbur and E. Orstrom (eds.), Linking the formal and informal economy: concepts and policies, Oxford: Oxford University Press 2006; Perry, G. et al., Informality: Exit and Exclusion, in: Washington D.C.: World Bank 2007

According to the definition by the International Labour Conference 2002, “(t)he term “*informal economy*” refers to all economic activities by workers and economic units that are - in law or in practice - not covered or insufficiently covered by formal arrangements. Their activities are not included in the law, which means that they are operating outside the formal reach of the law; or they are not covered in practice, which means that - although they are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is

ordres politiques et économiques, non pas par mauvaise intention, mais de part leur structure et de part leur mode de production.

23. Les attributions des ordres politiques nationaux, régionaux et internationaux se redéfiniront radicalement.³⁹ En quête d'une ré-régulation de l'économique et du politique de façon à encadrer l'économie globalisée, le politique global se constituera par et travers des unités, qui sauront réconcilier à nouveau l'économique, le social et le sociétal. C'est le moment des entreprises à structure de participation démocratique, telles que les coopératives. Mais, c'est aussi un moment d'une grande responsabilité.

24. En ce qui concerne le droit coopératif nous devons considérer les trois points suivants:

1. La production du savoir est intensive en capital. Dès lors, et à cause de leur structure, les coopératives éprouvent des difficultés dans ce domaine. C'est en partie la raison de l'approximation du droit coopératif au droit des sociétés capitalistiques. Il importe dès lors de faire preuve d'imagination pour, d'une part, inventer d'autres formes de capitalisation que celles des sociétés capitalistiques, rémunérer équitablement tous les facteurs de production et non seulement le capital et, d'autre part, développer des méthodes comparatives qui nous permettent de redécouvrir les avantages comparatifs des coopératives.
2. Les entreprises modernes reflètent de moins en moins l'unité d'action, du temps et de l'espace du théâtre classique.⁴⁰ La production, surtout celle du savoir, se globalise. Rien n'est moins sûr que les coopératives n'aient pas des avantages comparatifs dans ce domaine.
3. Les progrès technologiques ont aussi changé les temps et les espaces sociaux à l'intérieur desquels les droits se régénéraient jusqu'alors. Aujourd'hui nous

inappropriate, burdensome, or imposes excessive costs." Cf. Resolution and Conclusions ..., op.cit., Paragraph 3.

The efforts of the ILO to delimit the phenomenon of the informal economy date back to 1972 (cf. ILO, Employment, incomes and equality: a strategy for increasing productive employment in Kenya, Report of an inter-agency team financed by the UNDP and organized by the ILO, Geneva 1972) when the ILO underlined the importance of including the "informal sector", as it was called then, into its work programme. Since then, the notion has been refined and the new term of "informal economy" is to better reflect the scope (different sectors; rural and urban) and characteristics (mainly decent work deficits) of the phenomenon (cf. Resolution and Conclusions ..., op.cit., Paragraph 13, and reiterated by the Governing Body of the ILO (Governing Body), cf. GB298-ESP-4-2007-02-0118-1-En.doc, Paragraph 1)

Are to be seen as informal activities "(a)ll activities falling de facto or de jure out of the reach of law." GB298-ESP-4-2007-02-0118-1-En.doc, Paragraph 14

Thus, both the definition of "cooperatives" and the definition of "informal economy" relate to law. However, the referred to documents do not explain what they mean by law. The underlying assumption seems to be that only state law qualifies as law and that the delimitation of the realm of law, as opposed to the realms of other rules of behaviour, were fixed and the same the world over. Cf "internormativity" infra V

³⁹ Déjà Koizumi, Tetsunori, Cultural Diffusion, Economic Integration and the Sovereignty of the Nation-State, in: Rechtstheorie, Beiheft 12, 1991 (?), 313 ss.. Je ne partage pas l'avis (par exemple de Malz, Arié, Welt ohne Führung, in: Neue Zürcher Zeitung am Sonntag, 17.5.2009, 25) selon lequel l'Etat sortira plus fort de la crise qu'avant

⁴⁰ Idée empruntée à un article intitulé Perspectives, in: International Labour Review 1996, 93 ss. (102)

vivons dans des mondes interculturels où les cultures, et ainsi les cultures juridiques, ne se délimitent plus les uns des autres en occupant des espaces exclusifs, mais où ces cultures sont en contact permanent partout. Il importe de les articuler afin de garantir la stabilité politique. Vu les processus de privatisations des services publics, de régionalisation et d'internationalisation des décisions politiques, du transfert de pouvoir de décision des parlements aux gouvernements et aux tribunaux, ainsi que des gouvernements aux tribunaux,⁴¹ ainsi que la création d'espaces par des acteurs globaux⁴² et par des acteurs de l'informel où le droit étatique n'est pas effectif, tous des processus qui ont tous étreint de façon considérable les espaces de participation démocratique, la tâche des juristes doit être repensée.⁴³

⁴¹ Voir Israel, Liora, *L'arme du droit*, Paris : Presses de Sciences Po, 2009

⁴² Bogdandy, Armin von, *Gubernative Rechtsetzung. Eine Neubestimmung der Rechtsetzung und des Regierungssystems unter dem Grundgesetz in der Perspektive gemeineuropäischer Dogmatik*, Tübingen: Mohr Siebeck 1999; id., *Democrazia, globalizzazione e il futuro del diritto internazionale*, in: *Rivista di diritto internazionale* 2004, 317 ff.; Hecce, Jose A., Ana Mari Dominguez y Maria Romereo, *El cauce ancho de la internacionalización*, in: *El País*, 1.5.2010, 29 : « ...dichas empresas globales dominan el panorama corporativo mundial. »

⁴³ nowadays, in addition to profoundly changing the production patterns, globalization is also disrupting the notions of law and the processes of making law. The technological innovations of recent decades have been implying a reorientation within new time frames and a spatial reorganization of social life with considerable effects on law. While in the past, the conditions of time and space engendered a multitude of geographically separated internormativities, globalization makes us experience today what Emongo calls "interculture" (Emongo (Lomomba, *L'interculturalisme sous le soleil africain: L'entre-traditions comme épreuve du noeud*, INTERculture, no. 133, 1997, 10). He describes the intercultural as follows : « ... le fait interculturel n'a rien à voir avec la seule cohabitation plus ou moins harmonieuse, la coexistence pacifique sans plus. L'interculture ne s'épuise ni dans la recherche d'un consensus universel, ni dans un modus vivendi universel, qu'il soit éthique, social, du droit international, etc. Le fait interculturel est la toile d'araignée dans sa totalité, c'est le donné par excellence dont est concerné chaque fibre, chaque chose, tout ce qui est, le divin, le cosmique, l'humain. » Cf. also Obiora, L. Amede, "Toward an Auspicious Reconciliation of International and Comparative Analyses", in: *The American Journal of Comparative Law* 1998, 669 ff.). It entails an ever more frequent and intensive intermixing of radically different cultures and hence differing internormativities. By "internormativity" I understand two concomitant, constantly changing phenomena, namely the interconnection of the different "rules" (in quotation marks as the juridical is also to be found outside of "rules") of behavior and the processes of juridization and of dejuridization of these rules, i.e. their movement from law to non-law and vice versa (Sally Falk Moore (*Law as Process. An Anthropological Approach*, (London: Routledge and Kegan Paul). Also in: *Law and Society Review*, Vol.7, 1973, 719-746, cited by Bentzon, Agnete Weis, "Negotiated Law - the Use and Study of Law Data in International Development Research", *Access, Control and Management of Natural Resources in Sub-Saharan Africa - methodological considerations*, ed. by Christian Lund and Henrik Secher Marcussen, *International Development Studies, Occasional Paper no.13*, Roskilde: University Press 1994, 92-108) writes: "Processes of regularization give social reality permanent form (organization), order and predictability." Cf. also Diamond, Stanley, "The Rule of Law Versus the Order of Custom", *Social Research* 38, 1971, 42 ff.). These processes are neither good, nor bad per se. In addition, their direction does not depend on political will only. Cf. Prantl, Heribert, *In welcher Welt wollen wir leben?*, in: *Universitas* 6/2007, 555 ff. (558)). Within the space of countries several divergent internormativities meet daily.

The spatial reorganization of social life through technological changes has not only affected the law, but also the law-making and the sources of law. The state, which lawyers continue to consider as the main guardian of law, has become too small an entity for global actors, and too big to manage the intercultural. Cf. Koizumi, Tetsunori, *Cultural Diffusion, Economic Integration and the Sovereignty of the Nation-State*, in: *Rechtstheorie, Beiheft* 12, 1991 (?), 313 ff.. Villeneuve, Jean-Patrick, *L'Etat ne suffit plus pour réguler les jeux d'argent. La mondialisation des jeux de hasard et d'argent et les pressions exercées par les sociétés de jeu en ligne fragilisent les législations traditionnelles*, in: *Le Temps*, 13.4.2010, 16. I do therefore not share the view, expressed for example by Malz (Arié, *Welt ohne Führung*, in: *Neue Zürcher Zeitung* am Sonntag, 17.5.2009, 25) that the current crisis will

25. En guise de conclusion trois propositions:

1. Les caractéristiques des coopératives sont à renforcer, y inclus par des normes juridiques contraignantes, ne serait-ce que pour habiliter les coopératives à réaliser le principe de la diversité. Que d'autres règles que des règles juridiques, comme par exemple les règles désignées par le terme 'responsabilité sociétale des entreprises', viennent les renforcer, mais non pas les remplacer ! ⁴⁴
2. Comparons les formes d'entreprise selon des critères neutres et non pas selon les caractéristiques des sociétés capitalistiques, entre autres pour pouvoir compléter l'analyse économique du juridique ⁴⁵ par une analyse juridique de l'économique
3. Transmettons par la recherche, l'éducation et la formation des connaissances relatives à tous les types d'entreprise sans favoriser aucun.

26. Les coopératives ne sont pas une meilleure forme d'entreprise. Leurs membres les font délibérément différentes. Elles nous permettent d'entreprendre différemment.

Merci de Votre attention !
Hagen H e n r y

reinstates states in their traditional functions. National, international, supranational and transnational levels intermix and meet a growing body of standards set by private entities, who have their distinct ways of making rules and enforcing them. A clear distinction between these different rules is no longer possible. Cf. supra and Bogdandy, Armin von, *Gubernative Rechtsetzung. Eine Neubestimmung der Rechtsetzung und des Regierungssystems unter dem Grundgesetz in der Perspektive gemeineuropäischer Dogmatik*, Tübingen: Mohr Siebeck 1999; id., *Democrazia, globalizzazione e il futuro del diritto internazionale*, in: *Rivista di diritto internazionale* 2004, 317 ff.; Herce, Jose A., Ana Mari Dominguez y Maria Romereo, *El cauce ancho de la internacionalisacion*, in: *El Pais*, 1.5.2010, 29 : « ...dichas empresas gloables dominan el panorama coporativo mundial. »

Another example, which directly affects cooperative legislation, is the quasi standard-setting by the International Accounting Standards Board and the Financial Reporting Standards Board. The profound transformation of the system of production, from the production of goods and services to the capital intensive production of knowledge, can only be supported by a global capital market, to the rules of which other markets are increasingly being submitted (Kohler, Berthold, *Im Schatten der Krise*, in: *Frankfurter Allgemeine Zeitung*, 11.5.2010, 1: "Doch der globale Finanzmarkt kennt kein Erbarmen mit jenen, die anderen als seinen Regeln folgen wollen.") and which escapes, because of its globality, the reach of state law. There is a noteworthy and, maybe, also research-worthy parallel to the growing informal sectors in ever more countries.

The harmonization of economic law in general and of the laws on enterprises in particular, are both the desired preconditions for and the desired consequences of this evolution. If reversing the trend of cooperative legislation is indeed required, then this evolution must be considered.

Laws in the material sense are becoming global. This trend was already discernible in the 1950s. Cf. for example Jessup, Philip C., *Transnational Law*, Yale University 1956 and Schnorr, Gerhard, *Das Arbeitsrecht als Gegenstand internationaler Rechtsetzung*, München: Beck 1960. The rules of the global capital market are the most striking example. To be noted also the transformation of stock exchanges in the form of associations into stock companies having own financial interests.

⁴⁴ Javillier, Jean-Claude, *Responsabilité sociétale des entreprises et Droit: des synergies indispensables pour un développement durable*, in : *Gouvernance, Droit International & Responsabilité Sociétale des Entreprises*, Genève : OIT (forthcoming), 54 ff.

⁴⁵ Posner