

Co-operative Legislation

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Introduction

When discussing co-operative legislation, this means in many countries discussion of Co-operative Societies Acts specially designed for co-operatives as a legal pattern of its own. In other countries, where co-operatives are not seen as a legal pattern, but rather as a special way of doing business, co-operative law means general corporation law applied to co-operatives. In this case, any standard form of incorporation, such as company or society, can be modified by its founder members in the by-laws (articles of incorporation or rules) in such a way that it suits the needs of a co-operative society in terms of a people centred, member/user-driven self-help organisation, following co-operative principles.

Member/user-driven organisations are different from ordinary commercial business organisations which are usually investor-driven and in which all rules of operation are geared to attracting and protecting investors' capital and to safeguarding investor control. Rights and obligations of members are linked to their membership as persons and not to the amount of their capital contribution.

Member/user-driven organisations pursue different objectives and function in a different manner. In such organisations all rules are geared to user orientation of management, the object of member/user-promotion and member/user-control.

In this presentation some questions regarding the role of law in co-operative development will be discussed, eg:

- Are laws governing co-operatives known and understood by members and are they applied in practice?
- Are laws governing co-operatives useful for their development or have they become a burden of the past, a handicap as compared with the commercial competitors?
- Are there shortcomings in current co-operative legislation and if so, how can they be overcome?

Law Governing Co-operatives

Laws governing co-operatives cover much more than just a Co-operative Societies Act and Regulations made under such Act.

As a special form of private business organisation, co-operatives are subject to the provisions of the general law (eg regulating contracts, torts, offences, damages), if not expressly replaced by special provisions of the Co-operative Societies Act. The same applies to commercial law, tax law, labour law and competition law. Accordingly, for someone to understand co-operative law thoroughly, it is not sufficient to know the Co-operative Societies Act. Especially persons having the task to explain co-operative law to others must have at least a basic knowledge of the national legal system of which co-operative law is an integral part. On the other hand, lawyers in charge of drafting co-operative legislation must be familiar with co-operative theory and practice.

This integration of co-operative law into the national legal system sets certain limits for the way in which the Co-operative Societies Act of a country has to be drafted.

Although there are internationally recognised co-operative principles which the national co-operative law should respect, the national legal system reflects the existing political and legal system, which in turn will determine the interpretation given to the international co-operative principles in national co-operative law.

This is an area where open or hidden conflicts may arise.

For Whom is Co-operative Law made?

Unlike Company Law which is mainly made for the business community and in the developing countries also for the so-called "formal sector", ie for persons having either knowledge of and experience in legal matters or access to professional legal advice, the main target group of co-operative law are persons without such knowledge, experience or access to advice.

Very often, workers, consumers, housewives or tenants join together to form co-operatives or operators of the "informal sector" formalise part of their economic activities by establishing or joining registered co-operative societies.

When drafting co-operative legislation, this difference

regarding the target group of the legal provisions should be kept in mind. However, it should not be overlooked that co-operative societies are not only formed and operated by persons of limited means, but also by owners of small and medium sized enterprises and, for instance, by the liberal professions (medical doctors, pharmacists, tax consultants, etc) and that co-operatives may develop from small and simple socio-economic units with voluntary leadership into large, professionally managed enterprises.

Accordingly, co-operative law must cover the full range of economic group activities and has to contain provisions meeting the requirements of the small and simple as well as the large and complex co-operative societies. This is why in some countries several co-operative laws exist for different branches of activity or for co-operative societies at different stages of maturity and size.

To be accessible to persons with a relatively low level of education and persons of limited means, the co-operative law must as far as possible be written in clear and simple language. The legal draftsmen will have to realise that when making co-operative legislation, the aim should not be to draft a law for lawyers but rather a law for the ordinary citizens.

This is important because the co-operative law aims at introducing a set of new rules to form and operate a successful, member/user driven group enterprise, which are different from what the citizens usually know and do.

The target population has to know and to understand these new rules and to accept them as reasonable and useful, otherwise they are not likely to apply them in future in their day-to-day work.

Certainly, a law cannot be written like a text-book for beginners. However, there is a vast difference between a law conceived as a purely technical document on a high level of abstraction, full of cross-references and written in "legalese" (ie the technical language of lawyers) on the one hand, and a law deliberately drafted to be within reach of the ordinary citizen on the other.

What should be in the Co-operative Law?

A Co-operative Societies Act has to offer the legal framework

within which co-operatives can be formed and developed. This means that first of all the organisational pattern of a co-operative society has to be set out in the law: What are its special features, distinguishing it from other forms of organisation. How it is established, registered, run, financed, governed and controlled and what role the members have to play in such an organisation.

At the same time, the Co-operative Societies Act has to reflect the co-operative principles which on the one hand are the operating rules of member/user-driven organisations and on the other hand the expression of a distinct co-operative value system.

The organisational structure of co-operative societies to be laid down in the co-operative law is the typical pattern of an organised membership group, financing, managing using and controlling a jointly owned enterprise (referred to as the dual nature of co-operatives and the principle of identity of owners, decision-makers and users) but it has also to respect the general principles governing business organisations under the national legal system.

Usually, only general minimum standards are set out in the law. The standard pattern prescribed by co-operative law for all co-operatives has to be adjusted to the specific requirements of the individual society. For this purpose, members need autonomy in drafting the by-laws of their society. Limits to such adjustments are either set expressly in the co-operative law or by the co-operative principles.

A good co-operative law should encourage good practices (allow what is in accordance with the requirements of member/user-driven organisations and with co-operative principles) and discourage or prohibit bad or risky practices (eg simple imitation of rules made for investor-driven business organisations as well as aberrations from or violation of co-operative principles).

Furthermore, it should make it possible to distinguish co-operative societies clearly from other forms of organisation (such as companies or public enterprises) by giving co-operatives their own distinct identity.

In the developing countries the trend to turn co-operatives practically into extensions of a government service by giving a government agency in charge of co-operative development stringent powers of supervision, direct interference and control

(dating back from colonial times and maintained after independence) is well known and has been identified as detrimental rather than helpful for the development of a viable Co-operative Movement. The new statement on the co-operative identity approved by the ICA Centennial Congress in Manchester in September 1995 includes a new principle on "autonomy and independence":

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

This new co-operative principle is a clear directive to governments, to cut back their influence over co-operatives, if they want to encourage self-propelled co-operative development.

During the past decades, another dangerous trend of adjusting co-operative legislation to present-day requirements in terms of strengthening the economic position of co-operatives can be observed. New provisions are introduced into co-operative legislation in Western European countries which are meant to increase the economic efficiency of co-operative enterprises and their capacity to compete with commercial firms, eg:

- to give management a wide range of powers and to increase the independence of management from member control;
- to open new possibilities for fund raising by enabling co-operative societies to admit investor-members and to issue non-voting, transferable preference shares to members and non-members, which may even be sold on the Stock Exchange;
- to offer ways and means for investment of large sums of money accumulated from undistributed surplus, which are solely controlled by the management and out of members' reach; and
- to encourage concentration and mergers in order to enable co-operatives to establish larger units and to improve their capacity to compete with their commercial competitors, while increasing the distance from their members.

All these new provisions weaken member/user control and

are to a greater or lesser degree in conflict with the co-operative principles. They have the effect of giving more power to management, reducing the roles of members in co-operative societies and bringing co-operative societies closer to the company model. This increases the danger of detaching the co-operative enterprises from their membership base, turning the members into mere customers without real powers of active participation and holding only symbolic amounts of share capital. In this way the co-operative societies lose their specific profile as member/user-based, member/user-financed and member/user-controlled organisations as well as their identity as self-help organisations. Such provisions should not be included in a good co-operative law.

The Relationship Between the State and Co-operatives

The Co-operative Law and other enactments applicable to co-operatives (eg tax law) have to define the relationship between the state and co-operatives. In many developing countries (but not only there) this relationship has been one of master and servant, with co-operatives being the servants, called upon to implement government's development policy, while being offered technical assistance and "guidance" by a government department as well as financial assistance, tax exemption and other privileges in return.

The role of government in promoting, supervising and controlling co-operative societies has been given a prominent place in co-operative legislation for many years and is perceived by some as indispensable. Very often the powers of government to control co-operatives are applied to all co-operatives, irrespective of whether they need such supervision or not, or whether they work with public loans and grants or with their members' own capital.

This paternalistic approach to co-operative development has created undue desires for privileges and concessions among co-operators while over-regulation, heavy government control and the use of co-operatives for non-co-operative tasks have tarnished the image of co-operatives in the eyes of their members and of the public.

For decades, to call for withdrawal of the state from controlling co-operatives was considered as a kind of taboo, even by

the ICA - the guardian of the co-operative principles.

Only in recent years the negative effects of over-regulation and excessive government control over co-operatives have been openly discussed. Financial constraints have forced governments to cut down expenditure and to trim down overstuffed and largely ineffective government departments. While in some countries of Africa, the Co-operative Departments were dissolved or reduced to simple registration services and most of their functions transferred to co-operative apex organisations (e.g. Senegal and Cameroon), in other countries the interventionist powers of government officials were deleted from the Co-operative Societies Acts (eg the requirement of prior approval by government officers for decisions of co-operatives concerning the use of their own funds).

Today, it is generally accepted that government assistance and government control often have more negative than positive effects on co-operative development, have prevented co-operatives from becoming self-reliant, autonomous self-help organisations serving their members and are in contradiction with co-operative principles.

After many decades of state-controlled co-operative development in the developing countries, policy makers and legislators finally agree that co-operators and their elected representatives have to be treated as adults who can decide for themselves how to run their affairs and who are responsible for their acts with the right to succeed or to fail. It is increasingly accepted that co-operative societies can only become self-reliant and mature if they are allowed to learn by making their own mistakes.

The Relationship Between Co-operatives and Their Members

With regard to the relationship between co-operative enterprises and their members, there is equally need for clarification of concepts. After a long period of approximating co-operative societies in their legal framework and in their management style to the rules governing investor-driven business organisations:

- giving economic growth, competitiveness and the attraction of investors' capital priority over member/user promotion and participation and

- turning members more and more into simple customers with little to win and nothing to lose in “their” co-operative society,

many successful co-operatives in the industrialised countries have come to a cross-road, where they have to decide whether to carry on with their approximation strategy towards the investor-driven company model or whether they want to reinvent the co-operative as a member/user driven organisation:

- by providing visible and tangible economic and non-economic advantages to their members, thereby making membership worthwhile and meaningful,
- by turning members/users from minimal shareholders into true stake-holders and
- by placing emphasis on effective member/user control.

How to improve existing Co-operative Laws

In the developing countries having experienced colonial rule, the current co-operative laws are often “imported” laws ie they are laws introduced from abroad and more or less adapted to local requirements as seen by the politicians and legislators, who usually do not have in-depth knowledge of the co-operative way of working and living, of the co-operative principles and their translation into legal norms.

In day-to-day life, many of the provisions of the co-operative laws remain largely theoretical, they remain “law on the books”, rather than to become “law in action”. The co-operators often do not know and understand the justification of the provisions and, therefore, look for loopholes or for ways and means of going around the law rather than applying it, only comply with certain provisions for fear of committing offences. Instead of applying the law, they regulate their affairs as they feel just (eg holding meetings without a quorum, without keeping proper minutes or without observing the agenda, working for years without keeping proper books and without audit).

If co-operative law is to serve its real purpose, namely to guide co-operators in their efforts to establish and operate successful co-operative societies and to discourage practices known to be risky and detrimental, members must see the

provisions of the co-operative law as reasonable norms governing their own organisation for their own good.

They must know and understand the rationale behind the provisions of the law and accept them because they agree with the underlying principles and values as being sound and useful.

In order to adjust the co-operative law to practical needs and to achieve a better understanding of its provisions, co-operators must be given the chance to play an active role in determining the contents of co-operative legislation. This can be achieved in a process of participative law-making, eg by organising series of workshops and public discussions among all parties concerned on the shortcomings of the existing law and by collecting recommendations for its improvement. Such discussions were for instance held during the preparation of the new Co-operative Code of the Philippines in 1990. The results of more than 10 provincial meetings were compiled in a paper presented to the legislators under the title: "What the Filipino Co-operators would like to see in their co-operative law".

Some of the recommendations contained in this paper were in fact adopted by the Filipino law-makers, eg concerning the procedure of making Regulations under the law, which now has to follow much stricter standards than practised before.

In many industrialised countries the process of approximation of co-operative laws and co-operative business practices to the rules of investor-driven organisations and in particular to the company model has proceeded over the years to an extent that only a deliberate and vigorous effort on the part of the national and regional federations can break this trend. Only if the co-operative leaders at national level agree to reconsider their policies and to turn from approximation strategies to differentiation strategies in terms of emphasising the specific character of co-operatives as member/user-driven organisations with strong member orientation and member/user control will it be possible to maintain the co-operative form of organisation as a special legal pattern or as a special form of doing business.

Conclusion

A well-conceived co-operative legislation, written in clear and simple terms (and, in case of developing countries, available in national languages), can contribute greatly to sound co-operative

development. Well-conceived in this context means that the provisions of the Co-operative Societies Act and relevant sections of the commercial law, the competition law and the tax laws have to respect the special character of co-operatives being member/user-driven self-help organisations based on tested co-operative principles and carrying on business according to their own philosophy "not for profit, not for charity, but for service to their members".

Where co-operative law pursues different objectives and turns co-operative societies either into semi-public institutions, into development tools in the hands of government, into organisations working in the interest of the general public or into management-dominated business organisations, co-operatives are deprived of that specific profile, lose their identity as member-based and member-oriented organisations and will be unable to mobilise members' own resources for co-operative development. Such legislation made to implement a wrongly conceived "co-operative" programme does not encourage but rather obstructs sound co-operative development.

Where co-operatives lose their characteristic profile as member/user-driven organisations, where they turn more and more into investor-driven enterprises:

- pursuing the objectives of growth, increase of market shares and of accumulation of unallocated reserves,
- being controlled by employed professionals rather than by elected member representatives,
- raising capital from investors rather than from members/users,
- paying dividend on invested capital rather than patronage refund in proportion to business done with the co-operative enterprise,

the justification of having a special legislation or of offering special treatment of co-operatives under tax law, labour law and competition law does no longer exist. In this case, co-operative enterprises are rightly treated like any other commercial, investor-driven business organisation and could very well work under ordinary commercial law.

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