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The Legal Nature of the Cooperative Principles

by

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I Introduction

The aim of this short presentation is to contribute to the debate on the legal nature of the cooperative principles. By cooperative principles I understand the principles as enshrined in the 1995 International Cooperative Alliance Statement on the cooperative identity (ICA Statement), i.e. those principles, which constitute the identity of cooperatives according to the ICA. The ICA Statement also contains the cooperative values and a definition of cooperatives.

The legal nature of these principles is debated (again) as national, regional (European Union) and international cooperative law (makers), continue to infringe upon this identity by "companionizing" cooperatives. By cooperative law I understand all those legal rules, as well as administrative and court acts which regulate the organization and/or operations of cooperatives, i.e. not only the law on cooperatives proper, but also the statutes/byelaws of the cooperatives and, for example, taxation rules, labour and competition law, book-keeping and accounting standards.

The infringement upon the identity of cooperatives is to a large extent made possible by the relationship between the cooperative principles, legal principles and law being a rather unexplored and, hence, unknown field of law. This is relevant from a legal point of view, if and to the extent to which the cooperative principles are legally binding, whence the title of this contribution ("The legal nature of the cooperative principles"). As the ICA is an association under Belgian civil law, we must distinguish the legal effects of the ICA Statement on the members of the ICA from those on other actors.

I shall therefore briefly discuss the legal nature of the cooperative principles as concerns the members of the ICA and then, in more detail, the legal nature of the cooperative principles as concerns other actors.

II The legal nature of the cooperative principles

1. The legal nature of the cooperative principles as concerns the members of the ICA

As part of the bye-laws of the ICA, the ICA Statement, thus the cooperative principles, are legally binding for the members of the ICA and, indirectly, also for the members of the members of the ICA.

The ICA Statement establishes explicitly a hierarchical relationship between the cooperative principles and the cooperative values by stating that "The cooperative principles are guidelines by which cooperatives put their values into practice." I leave aside whether cooperatives must see to it that their members abide by the ethical cooperative values, as this sentence mentions only the values of the cooperatives – a divide which is made in the value section of the ICA Statement and to which I shall come back.

The hierarchical relationship between the cooperative values and the cooperative principles means that even if cooperatives abide through their actions by the cooperative principles, these actions must still pass the test of complying with the cooperative values.

The ICA Statement separates the values, on which cooperatives "are based", from "ethical values", in which cooperative members "believe". From the preparatory reports leading to the adoption of the ICA Statement in 1995 it is clear that all values listed in the ICA Statement are ethical values. The distinction between values and ethical values, as well as the respective attribution to different actors, are therefore not more than a linguistic imprecision, without further influence on the legal nature of the principles.

2. The legal nature of the cooperative principles as concerns other actors

As concerns other actors, not members of the ICA, the search for an answer to the question of the legal nature of the cooperative principles is much more complex. I limit myself here to law-makers in the widest sense.

The question is: Are, and if so, to what extent, the (ethical) cooperative values part of (cooperative) law in the sense that they have to be respected by law-makers. For most of the 20th century the answer would have been that there is no room for ethical/moral values in law. Austin, Kelsen and Hart, to name but the most well-known legal thinkers on the matter in the Euro-American legal tradition, agreed, albeit with different arguments, that law is a self-referential system (cf. also Luhmann on what he called "Ausdifferenzierung des Rechts"). As of the 1970ies Dworkin and Alexy have convincingly argued that social ethics/moral values enter the world of law via principles, the twin of rules in any legal system. They thus reject earlier attempts to counter the positivist position of Austin, Kelsen and Hart with claims to recognize the social sources of law as legal formants. In a recent article Moreno Fontela (REVESCO 2017) follows Dworkin and Alexy and discusses ways in which the cooperative principles (could) become part of law as legal principles. However, in his argumentation it is not clear how the cooperative principles, i.e. the principles developed and adopted by a particular group of private law organizations (cooperatives), should acquire significance/ relevance beyond that group. My answer to this question is: The cooperative principles are significant/relevant beyond the group of cooperatives, because they are part of the (binding) public international cooperative law, the nucleus of which is the 2002 International Labour Organization Recommendation No. 193 concerning the promotion of cooperatives (ILO R. 193), as the cooperative principles are part of this recommendation.

I use two sets of arguments to support my opinion that the ILO R. 193 is legally binding as far as cooperative law is concerned. Firstly, the high degree of democratic legitimacy of this recommendation, as it integrates a text, namely the ICA Statement, which had been adopted by some 700 million cooperative members in 1995, and as the ILO, in addition to being a tripartite international organization, hence more representative than other international organizations, is also a transnational organization. Secondly, the repeated behaviour of the ILO member states who endorsed through the adoption of the ILO R. 193 a prior praxis and who continued this praxis after the adoption of the ILO R. 193, despite the mentioned trend to companize cooperatives through law.

The obligation of law-makers to pass and/or maintain a cooperative law which forms the identity of cooperatives (institutionalizes the idea of cooperatives), derived from the cooperative principles, is laid down in Paragraphs 3, 6, 7 and 10 of ILO R. 193.

The effects of the inclusion of the text of the ICA into public international law are not clear. We need answers to a number of questions, which arise from a detailed reading of the relevant parts of the ILO R. 193 in comparison with the text of the ICA Statement, from which the ILOR. 193 seems to have copied.

The ICA principles are included in Paragraph 3 of and in the Annex to the ILO R. 193. The ICA cooperative values are also included in Paragraph 3 of ILO R. 193. However, the ILO R. 193 does not distinguish between values and ethical values, addressed to different actors, as does the ICA Statement. Nor does the ILO R. 193 establish a link between the principles and the values, as does the ICA Statement by saying that "The cooperative principles are guidelines by which cooperatives put their values into practice." Therefore, the ILO R. 193 does also not establish any hierarchy between the cooperative values and the cooperative principles, as does the ICA Statement. Furthermore, the ILO R. 193, although borrowing the text of the values from the ICA Statement, does not refer explicitly to the ICA as the author of these values. Thus, the ILO R. 193 recognizes these values as general values and opens their interpretation to generally used criteria.

As concerns the cooperative principles, the ILO R. 193 proceeds differently by formulating "cooperative principles as developed by the international cooperative movement." What is meant by "as developed by ..."? What is the intertemporal dimension of this wording? The cooperative principles as they were at the time of the adoption of the ILO R. 193 in 2002? Or in the form as they develop and are interpreted over time, for example through the 2015 ICA Guidance notes on the cooperative principles, and are recognized by the cooperative movement? What is meant by "the cooperative movement"? The ILO R. 193 avoids mentioning the ICA, although during its 2001 and 2002 deliberations the International Labour Conference had no other movement in mind than the one represented by the ICA.

Both issues, the obligation to respect the possible interpretation of the cooperative principles by the cooperative movement/ICA, subsequent to the adoption of the ILO R. 193, and the possible recognition of the ICA, an NGO, as the (sole) representative organization of cooperatives world-wide, posed and

continues to pose basic questions for public international law.

Whatever the answers to these questions are, the integration of the cooperative principles into cooperative law (making) is further complicated by the fact that the ICA categorizes values and principles differently than philosophy and legal science do. For example, the ICA Statement qualifies "equality" and "solidarity" as values. In legal science, these are universally recognized legal principles. The cooperative ethical values of "social responsibility and caring for others" are rather moral norms in philosophy. The value of "democracy" is a legal principle under international Human Rights law.

We need to untangle this conglomerate of general values and principles, cooperative values and principles, general legal principles and law and elaborate cooperative legal principles, which can inform (cooperative) law-makers. The reference in an increasing number of national laws and regional texts to the cooperative principles is not enough. More often than not it is not clear what the reference implies. Does it transform the cooperative principles into legal principles of the legal order in question? If so, are these legal principles then limited as are other legal principles of this legal order are or do they apply in the form and as understood in public international law? Or are these legal principles then mere guides for the interpretation of the law of that legal order?

Further complications are brought about by cooperative law-making regionalizing, internationalizing and globalizing.

III Conclusion

There are more questions than answers concerning the legal nature of the cooperative principles. This is not the least due to the fact that there is no legal theory of cooperative law, i.e. a system of reciprocally referential notions, principles, rules, which would help to institutionalize the idea of cooperatives. However, the number of initiatives that are to contribute to the build-up of such a theory is growing. To mention, as examples, the Study Group on European Cooperative Law (SGECOL), which just published a compendium on "Principles of European Cooperative Law" and similar initiatives in other parts of the world; Iuscooperativum with its initiative to launch the first International Journal of Cooperative Law (IJCL); and the ICA Cooperative Law Committee.

However, it is difficult to imagine that law-makers will continue to ignore the identity of cooperatives and, thus, their capacity to contribute to sustainable development.