

Trade Unions and Cooperatives: Challenges and perspectives

Enabling Transition to Formality Through
the Promotion of Cooperatives.

A legal perspective based on the International Labour
Organization Promotion of Cooperatives Recommendation, 2002
International Journal of Labour Research,
Bureau for Workers Activities and EMP/COOP, ILO

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Recibido: 18-04-2013
Aceptado: 12-06-2013

Sumario: I. Introduction. II. Methodological caveats. III. ILO R. 193, cooperative law and the informal economy. 1. Guiding principles. 2. Selective presentation of relevant paragraphs of ILO R. 193. IV. Conclusion.

Resumen: Basado en la Recomendación 193 de la Organización internacional del trabajo (OIT) sobre la promoción de las cooperativas en 2002 (R. 193) ese artículo trata de la transición de los actores informales a lo formal por la formación de cooperativas. La OIT tiene una larga tradición en el tema de la economía informal. Ya en 1972 comienza a cernir la problemática y con la R. 193 (Párrafo 9) propone «la transformación de lo que a menudo son actividades marginales de supervivencia (a veces designadas como «economía informal») en un trabajo amparado por la legislación y plenamente integrado en la corriente principal de la vida económica.» La noción del (in)formal de la OIT es una noción jurídica. El objetivo del artículo es demostrar en que medida varios de los Párrafos de la R. 193, que el autor considera parte del derecho público internacional cooperativo, su traducción por los legisladores y su implementación sirven efectivamente la formalización de lo informal. Aunque el

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número de los actores en la economía informal esta creciendo en todas partes del mundo, el autor no comparte las dudas en cuanto a la efectividad del derecho para la formalización. Por otro lado, cabe señalar que la complejidad de las cooperativas debería atenuar cierto entusiasmo relativo al potencial de esa forma para resolver los problemas económicos, sociales y humanos relacionados con la informalidad.

Palabras clave: Actores informales y formación de cooperativas.

Abstract: Based on the International Labour Organisation's Promotion of Cooperatives Recommendation 2002 (no. 193), this article examines the transitioning from informal to formal players by forming cooperatives. The ILO has a long tradition of work on the subject of informal economies. The problem was first addressed in 1972 and Recommendation no. 193 (paragraph 9) proposes « transformation of what are often marginal survival activities (sometimes called «informal economy») into legally protected work, fully integrated into the mainstream of economic life». The ILO's idea of (in)formal is a legal concept. This article examines several of the paragraphs in Recommendation no. 193, which the author considers to form part of Public International Cooperative Law. He aims to study the way they have been interpreted by lawmakers and to what extent their implementation has effectively served to transition from informal to formal. Although there are a growing number of players in informal economies across the world, the author does not have doubts as to the effectiveness of the law in formalising these economies. It is also important to note that the complex nature of cooperatives should temper enthusiasm concerning the potential of solving economic, social and human problems related to informal economies in this manner.

Key words: Informal players and forming cooperatives.

I. Introduction

In 1972 the International Labour Organization (ILO) alerted the international community to the decent work deficits related to informality¹. Since then it has continuously addressed the issue, amongst others by refining the analysis of the phenomenon in terms of economic and social exclusion and juridical failures and by suggesting cooperatives as one means for actors in the informal economy to transit to formality². In legal terms this analysis and suggestion found its strongest expression so far in the ILO Promotion of Cooperatives Recommendation

¹ 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), in which the ILO underlined the importance of including the «informal sector», as it was called then, into its work program. 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. ILO, Decent work and the informal economy, Report of the Director-General, International Labour Conference, 90th session, Report VI, 2002, Geneva (http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/---reloff/documents/meetingdocument/wcms_078849.pdf); Resolution and Conclusions concerning decent work and the informal economy, International Labour Conference 2002, Geneva: International Labour Office 2002, Paragraph 13, and reiterated by the Governing Body of the ILO (GB) in 2007 (cf. GB298-ESP-4-2007-02-0118-1-En.doc, Paragraph 1).

The term «decent work deficit» had not yet been coined at that time and it refers to a broader set of issues than the informal economy.

² For example, «Decent work and informal economy», *op.cit.*, p.92: «Where there are major constraints to informal economy operators or workers joining existing employers' organizations or trade unions or establishing their own organizations, the most effective membership-based organizational structure may be that of a cooperative [...] « and: «Organizing in cooperatives could also be seen as one step on the path towards formalization.» Cf. also Governing Body Geneva, November 2002, SEVENTH ITEM ON THE AGENDA. Effect to be given to resolutions adopted by the International Labour Conference at its 90th Session (2002) (b) Resolution concerning *decent work and the informal economy*», at: http://www.ilo.org/public/libdoc/ilo/GB/285/GB.285_7_2_engl.pdf. Cf. also GB298-ESP-4-2007-02-0118-1-En.doc, Paragraph 14; «Decent work and the transition to formalization: Recent trends, policy debates and good practices.» Report of the Tripartite Interregional Symposium on the informal economy: Enabling Transition to Formalization (Geneva 27-29 November 2007), 41 and «Extending the Scope of application of Labour Laws to the Informal economy. Digest of comments of the ILO's supervisory bodies related to the informal economy, p.102, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_125855.pdf. (2010).

An overview of the numerous documents concerning the informal economy is contained in the ILO «Resource guide on the informal economy», available at: <http://www.ilo.org/public/english/support/lib/resource/subject/informal.htm>

tion, 2002 (ILO R.193)³. Its Paragraph 9 reads: «Governments should promote the important role of cooperatives in transforming what are often marginal survival activities (sometimes referred to as the «informal economy») into legally protected work, fully integrated into mainstream economic life.» According to Paragraph 4. (a) it is important «[...] to promote the potential of cooperatives in all countries [...] in order to assist them and their membership to [...] create and develop income-generating activities and sustainable decent employment [...]» And Paragraph 5 adds that «[...] special measures should be encouraged to enable cooperatives [...] to respond to their members' needs and the needs of society, including those of disadvantaged groups in order to achieve their social inclusion.»

Paragraph 6. links the issue to cooperative law. It states that «[...] Governments should provide a supportive policy and legal framework [for cooperatives.]»⁴ One may assume that this is valid for potential cooperatives and members as well. According to Paragraphs 10.(2), 14 and 15 it is a right and an obligation of employers', workers' and cooperative organizations to play an active role in this in addition to governments.

This paper relates Paragraph 9 to those paragraphs in ILO R. 193 which deal with cooperative law and summarily discusses the extent to which legislators have given effect to them⁵. The objective is to assess whether these paragraphs, their translation by legislators and their implementation further the aim behind Paragraph 9 and to identify possible shortcomings.

Before doing so, a number of methodological caveats are introduced to clarify the approach as it is not uncommon to overestimate the potential to transit to formality through the formation of cooperatives.

³ The Promotion of Cooperatives Recommendation, 2002. ILC 90-PR23-285-En-Doc, June 20, 2002 (ILO R.193), *available at*: www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312531:NO.

⁴ Cf. also Paragraph 10.(1).

⁵ Obligation under Article 19 of the Constitution of the ILO. Cf. also General Survey concerning employment instruments in the light of the 2008 ILO Declaration on Social Justice for a Fair Globalization, Geneva: International Labour Office, Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Report III (Part 1 B), International Labour Conference, 99th Session, 2010, Paragraphs 437-510, *available at*: <http://www.ilo.org/public/libdoc/ilo/P/09661/09661%282010-99-1B%29223.pdf>

II. Methodological caveats

As the origin of modern cooperatives⁶ may also be read as the history of transiting to formality through organizing joint self-help in the form of cooperatives, and as the ILO has promoted the development of cooperatives practically since its inception⁷, it seems consequential to suggest cooperatives as one means to transit to formality. This is all the more so as the suggestion meets the observation that cooperatives address the decent work deficits in a relatively efficient way⁸.

⁶ It is commonly accepted to date the origin of modern cooperatives to the formation of a cooperative by the Rochedale pioneers in 1843. Their statutes inspired to a large extent the now universally recognized cooperative values and principles as enshrined in the International Cooperative Alliance Statement on the co-operative identity (ICA Statement), cf. *International Co-operative Review*, vol. 88, no. 4/1995, 85 f.

These cooperative values and principles are part of ILO R. 193 (cf. paragraph 3 and Annex) and have thus been transformed from standards of a nongovernmental organization to legal standards set by an international organization.

Reportedly, prisoners in a camp in Siberia set up a cooperative in the 1830ies already, but failed to obtain recognition by the Tsarist government because of their prisoner status.

⁷ Almost immediately after the International Labour Office (Office) had become operational in 1920 in Geneva, its first Director General, Albert Thomas, convinced the GB to establish the Cooperative Branch, cf. ILC Report VII (1), 1965, Introduction.

⁸ As far as **income generating effects** are concerned, it is estimated that among the some 100 million jobs provided by cooperatives worldwide, a large number is provided to people who had formerly worked in the informal economy.

As for **economic security**, lacking in the informal economy, cooperatives create and maintain through their specific structural and operational features a high level of economic security. Cooperatives create economic security mainly through their economic stability. Their economic stability (indicated by their longevity and a low number of bankruptcies, cf. 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\(currentCat Uid\)=75](http://www.mdeie.gouv.qc.ca/index.php?id=187&tx_ttnews(tt_news)=1069&tx_ttnews(backPid)=2206&tx_ttnews(currentCat Uid)=75)).

Concerning **social protection**, and in line with the cooperative self-help principle, cooperatives have traditionally catered for the social security of their members, their employees, and the dependants of these where there is no other social security coverage available. Where the members so decide, cooperatives have to provide social security as the definition of cooperatives refers also to the social needs of the members.

Cooperatives provide for social security coverage by setting aside money for the access to health care and education and for the payment of pensions, by setting aside money to take out group insurances, benefiting from their greater negotiating power as that of the individual members or employee or by negotiating insurance conditions on behalf of their members and employees, again by using their greater negotiating power.

Some legislations provide for the allocation of parts of the positive results of the economic activities of cooperatives to be spent for these purposes, if not by prescribing it, at least by giving tax or other incentives to this effect. Cf. for example Article 42 of the 2008 Ley marco para las cooperativas de America Latina. An account of how coop-

However, some figures give reason to doubt. One third to one half of the world population derive at least in part their income from membership in a cooperative⁹ and yet: 80% of the world population continue remaining without protection by labour standards, such as for example the right to unemployment benefits, protection against undue retrenchments and social protection¹⁰. Furthermore, the informal economy has become a universal and expanding phenomenon¹¹, covering all countries and all sectors¹².

Independently of their accuracy and the kind of conclusions one may draw from them, these figures are however no argument against the suggestion by the ILO to transit to formality through, amongst other means, cooperatives, as one must not infer from empirical data to normative conclusions. Reference to the origin of cooperatives to support this statement does not suffice. While the formation of cooperatives was then certainly a way to integrate into mainstream economy, which is one of the goals of formalization¹³, the concerned groups had not to be brought into the realm of law. Today legal ex-

eratives have traditionally catered for the social security of their members and their families is documented in one of the preparatory reports to the ILC 2002 which adopted R. 193. Cf. »Promotion of Cooperatives Report V (1), 2001, pp.47 ff.. Cf. also van Ginneken, W., Social security for the informal sector.

Issues, options and tasks ahead, Interdepartmental Project on the Urban Informal Sector Working Paper (IDPINF/WVP-2, Geneva: ILO 1996.

Concerning social dialogue the specific governance structure of cooperatives, their system of co-determination and of co-control by the members (one member/one vote, independently of the amount of equity held. Cf. below) allows for social dialogue.

For more details cf. Henry, Hagen Sustainable Development and Cooperative Law: CSR or CoopSR?, available at: <http://ssrn.com/abstract=2103047>. To be noted that this source reports on a summary and incomplete research only.

⁹ The number is the sum of one billion members of cooperative worldwide (cf. International Cooperative Alliance (ICA), at: <http://ica.coop/en/search/facts%20and%20figures>. Visited 16.1.2013) and the number of on average 2-3 economic dependents.

¹⁰ The social protection floor as defined by the ILO, the ILO Social Protection Floor Recommendation, 2012 (ILO R. 202).

¹¹ According to estimates 50-70% of the working people around the world work in the informal economy. Cf. also Hussmanns, Ralf, defining and measuring informal employment, Geneva: International Labour Office, Statistics Bureau 2004. GB 3/2007, Committee on Economic and Social Policy: «informality is gaining ground and remains a great challenge». Cf. also Resolution concerning decent work and the informal economy. International Labour Conference 90th session, 2004, Paragraph 2.

¹² An issue especially highlighted by the 2008 World Bank Development Report (p. 143). The universal application of ILO R. 193 according to its Paragraph 4 is therefore pertinent.

¹³ Cf. Not the least Paragraph 9 of the ILO R. 193. Cf. also the 2006 United Nations Economic and Social Council (ECOSOC) Ministerial declaration.

clusion is a major issue and law is one means of formalization and reaching social justice¹⁴. Indeed, according to the definition by the ILC in 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 inappropriate, burdensome, or imposes excessive costs.»¹⁵ And the Governing Body of the ILO (GB) saw also in its March 2007 session as informal activities «[a]ll activities falling de facto or de jure out of the reach of law.»¹⁶ However, it also had some doubts as to the effectiveness of the emphasis on the «regulatory framework» in the 2002 ILC «[...] characterization of the informal economy [...] in terms of the relationship to law [...]»¹⁷.

Despite of this, the paper takes a legal perspective. In a paper prepared for the ILO in 2007

Victor Tokman identified 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.»¹⁸ The latter strand is commonly associated with the name of de Soto¹⁹. His and the approach of authors close to him focus on the question of whether legal rules, especially labour law and taxation²⁰ are «inappropriate, burdensome, or impose excessive costs» in terms of the ILC and

¹⁴ Cf. below.

¹⁵ Cf. «Resolution and Conclusions...», *op.cit.*, Paragraph 3.

¹⁶ GB298-ESP-4-2007-02-0118-1-En.doc, Paragraph 14.

¹⁷ GB298-ESP-4-2007-02-0118-1-En.doc, Paragraph 14 and Paragraph 45 respectively.

¹⁸ Tokman, Victor E., *Informality: Exclusion and Precariousness*, Interregional Symposium on the Informal Economy: Enabling transition to formalization, Geneva, 27-29 November 2007, 1 ff.

¹⁹ 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.

²⁰ Cf. for example, Lobo Ívica Ahmada, review of »Informality: Exit and Exclusion«, in: *Revue internationale du Travail* 2008 /2-3, 316-320.

therefore cause barriers to the transition to formality²¹. This approach is similar to that of legal sociologists concerned with the economic consequences of regulatory burdens, i.e. with empirical aspects of *laws*, and similar to an approach which in the aftermath of Posner became known as 'economic analysis of law'²².

This paper adopts an approach which is to complement the economic analysis of law by a legal analysis of the economic²³. It focuses on the normative aspect of *law*²⁴ in order to avoid premature inferences from the economic consequences of regulatory burdens to the inadequacy of *law* as a means for formalization. The ILO R. 193 itself supports this approach through its Paragraph 6. and subsequent paragraphs which refer directly or indirectly to cooperative law. Furthermore, ILO is a standard setting institution; among today's general public policies, the establishment of the rule of law stands out²⁵; and law is the instrument par excellence to implement other public policies²⁶.

²¹ Cf. The informal economy: enabling transition to formalization, Background document to the Tripartite Interregional Symposium on the Informal Economy: Enabling Transition to Formalization, Geneva 27-29 November 2007 (ISIE/207/1), Paragraph 44 ff. and at footnote 28.

²² Cf. seminal work by Posner («Economic Analysis of Law», 1972).

²³ Doubts as to the validity of the economic analysis of law have been expressed recently by Gazal -Ayal, Oren, Economic Analysis of Law in North America, Europe and Israel, at: <http://www.bepress.com/rle/vol3/iss2/art1>. Cf. also Javillier, Jean-Claude, Responsabilité sociétale des entreprises et Droit: des synergies indispensables pour un développement durable, in: Gouvernance, Droit International & Responsabilité Sociétale des Entreprises (forthcoming), pp. 54 ff., text around footnote 128. Former ordo-political concepts seem to be discussed again by economists. Cf. Plickert, Philip, Gefangen in der Formelwelt, in: Frankfurter Allgemeine Zeitung 5.1.2009, 10.

²⁴ Distinction to be made between *laws* and *law*, *loi* et *droit*, *Gesetz* und *Recht*, *ley* y *derecho*, *legge* e *diritto* etc...

²⁵ Cf. «The informal economy...», *op.cit.*, Paragraph 45. Cf. also Arnaud, André-Jean, *Entre modernité et mondialisation. Cinq leçons d'histoire de la philosophie du droit et de l'État*, Paris: Librairie Générale de Droit et de Jurisprudence 1998, 33; Ghai, Yash, «The Role of Law in the Transition of Societies: The African Experience», in: *Journal of African Law* 1991, 8 ff.; Jain, Devaki, «Rights and Development: The UN's role in global governance», in: *development* 2002/3, 24 ff. (25); Making the Law Work for Everyone, Commission on Legal Empowerment of the Poor, pre-publication 2008; Miller, Steve and Livingstone Armytage, «Legal and judicial reform performance monitoring: the PNG approach», in: *The European Journal of Development Research*, vol. 20, No.1, 2008, 141 ff.; Seidman, Ann & Robert B. Seidman, «Drafting Legislation for Development: Lessons from a Chinese Project», in: *The American Journal of Comparative Law* 1996, 1 ff. (1); Valticos, Nicolas, «Fifty years of standard setting activities by the International Labour Organisation», in: *International Labour Review* 1996, 393 ff. (394).

²⁶ Assier-Andrieu, Louis, *Le droit dans les sociétés humaines*, Paris: Nathan 1996, 40 (39 f.); Barnes, William S., «La société coopérative. Les recherches de droit comparé comme instruments de définition d'une institution économique», in: *Revue internatio-*

This legal perspective must not be construed as reporting on the empirical implementation of cooperative law. It does not more than highlight the (legal) potential of cooperatives. For lawyers, the questions are whether the structure of cooperatives can be prescribed by law in a way which is compatible with the aims pursued through formalization, whether cooperative law orients cooperatives to work towards this end and whether cooperatives can be compelled through legal means to do so where deviations give rise to concern by legally interested parties.

This systematic «legal» reading of Paragraphs 6 and 9 also concludes a debate on the question of whether only legally recognized, formalized cooperatives may be considered as cooperatives. While this is not the case, ILO R. 193 suggests, however, that cooperatives be formalized and it carries a notion of cooperatives which is that of cooperatives having legal personality. Apart from Paragraphs 6 and 9 numerous other Paragraphs of ILO R. 193 do clarify this²⁷. To mention also that an increasing number of jurisdictions prohibit the use of the denomination «cooperative» by any entity which is not registered and recognized by law as such. The cultural complexity of the legal personality as a central figure in legal thinking is however persistently overlooked²⁸.

For the purpose of this paper, the term «law» is understood as comprising all those legal acts —laws, administrative acts, court decisions, jurisprudence, cooperative bylaws/statutes or any other source of law— which regulate the structure of cooperative enterprises as insti-

nale de droit comparé 1951, 569 ff. (574); Kemmerer, Alexandra, «Ordnungskraft», in: *Frankfurter Allgemeine Zeitung*, 11.1.2007, 40, referring to Eberhard Schmidt-Aßmann; Wassermann, Rudolf, «Sprachliche Probleme in der Praxis von Rechtspolitik und Rechtsverwirklichung», in: *Zeitschrift für Rechtspolitik* 11/1981, 257 ff. (258).

²⁷ Cf. Paragraph 2. («association», «jointly owned»); Paragraphs 5. and 6. (b) («solidarity»); Paragraph 6. (a) («registration»); Paragraphs 6. (b) («reserves»); Paragraph 6. (d) («membership», «members»); Paragraphs 7. (2), 4. (d), 8. (1)(i) and 11. (2)(c) («access to credit», «loans», «institutional finance», «investment»); Paragraph 8. (2) (b) («illegal obligations of cooperatives»); Paragraphs 10. (2), 11. (3), (4), 14., 17. (c), (e) («cooperative organizations», «affiliated cooperatives»); Paragraph 12. (c) (banking and insurance cooperatives») and, foremost, Paragraph 9.

²⁸ As for the culture specific elements of legal persons, cf. Henry, Hagen, *Les « hors traduction » en droit. L'exemple des coopératives comme personnes juridiques en milieu africain*, (manuscript); Idem «Genossenschaften als juristische Personen – Konsequenzen für die internationale Beratung bei der Genossenschaftsgesetzgebung in Afrika», in: *Genossenschaften und Kooperation in einer sich wandelnden Welt*. Festschrift für Prof. Dr. Hans-H. Münkner zum 65. Geburtstag, Hrsg. Michael Kirk, Jost W. Kramer, Rolf Steding, Münster u.a.: LIT Verlag 2000, 417-428. Cf. also Supiot, Alain, *Homo juridicus. Essai sur la fonction anthropologique du Droit*, Paris: Seuil 2005, 53.

tutions in the legal sense or have a bearing on it²⁹. This limitation is deducted from Paragraph 7.(2), 2nd sentence³⁰. This notion of law is to be complemented by considering implementation rules and praxes as often the deficiencies of the law are found there and not in the text of the law as such, for example missing or failing prudential mechanisms, audit or registration³¹ procedures and mechanisms. The notion also includes law making procedures and mechanisms as well as legal policy issues.

III. ILO R. 193, cooperative law³² and the informal economy

1. Guiding principles

Before assessing specific paragraphs of ILO R. 193 as to their compatibility with the aims pursued through formalization, it is important to consider the nature of ILO R. 193. Its title is programmatic: ILO R. 193 «[concerns] the promotion» of cooperatives». Even those paragraphs which deal with government control of cooperatives suggest that this control be regulated and exercised in a way to promote the development of coop-

²⁹ The term thus not only comprises the cooperative law proper (law on cooperatives), but also all other legal rules which shape this institution. The following areas are most likely to have this quality in any legal system: labour law, competition law, taxation, accounting/prudential standards, book-keeping rules, audit and bankruptcy rules.

Among the various definitions of 'institution', the one given by North seems to be the most widely known. He writes: Institutions are «humanly devised constraints that structure political, economic, and social interactions. They consist of both informal constraints (sanctions, taboos, customs, traditions and codes of conduct) and formal rules (conventions, laws, property rights).» (North, Douglass, «Institutions», in: *Journal of Economic Perspectives* 1991, 97 f.). Granger, Roger, «La tradition en tant que limite aux réformes du droit», in: *Revue internationale de droit comparé* 1979, 37 ff.) defines differently: «L'institution peut être définie comme le regroupement de règles de droit, agencées selon un certain esprit, autour d'une idée ou fonction centrale dont elles sont les instruments de réalisation.» (pp. 44 and 106). North represents rather a sociological/economic view, whereas Granger comes close (especially p.106) to the General System Theory (cf. for example, Bertalanffy, Ludwig von, *Perspectives on General System Theory*, ed. by Edgar Tschdjan, New York: George Braziller 1975). I follow Granger's definition.

³⁰ As for other types of legal and institutional frameworks, which the ILO identified as constituting business regulations and as being important for the transition to formality, cf. «The informal economy...», *op.cit.*, Paragraph 28

³¹ Cf. for an example ILO R. 193, Paragraph 6.(a).

³² This is not an exhaustive discussion. For more detail cf. Henry, Hagen, *Guidelines for Cooperative Legislation*, 3rd revised edition, Geneva: International Labour Organization 2012. Also available at http://www.ilo.org/empent/Publications/WCMS_195533/lang-en/index.htm

eratives. This is a first guiding principle for the interpretation of these paragraphs, which is of particular relevance to actors in the informal economy. The second one has to do with the fact that ILO R. 193 does not regulate all aspects of cooperative law³³. Paragraph 6.(a) gives guidance as to how to fill the gaps by stating that the «[...] legal framework [should be] consistent with the nature and function of cooperatives and guided by the cooperative values and principles set out in Paragraph 3 [...]» Paragraph 10. (1) reiterates this. These values and principles are those enshrined in the 1995 ICA Statement on the co-operative identity³⁴. Furthermore, the legislator must be guided by the respect for the autonomy of cooperatives (4th cooperative principle), cf. Paragraphs 2., 3., 6.(e) et passim. This respect ensures the highest possible degree of flexibility which can be achieved despite formalization and which is important to maintain the comparative advantages of informality.

2. *Selective presentation of relevant paragraphs of ILO R. 193*

The following selective presentation of relevant paragraphs of ILO R.193 follows the numerical sequence of the recommendation.

Paragraph 1 calls upon legislators to allow cooperatives to be active in all sectors. Persisting restrictions concerning specific sectors are often justified with missing and/or failing implementation/prudential mechanisms. Despite Paragraph 12. (c) this is especially the case in the financial sector (cooperative insurance and banking)³⁵. Where this is due to missing or failing implementation/prudential mechanisms, these shortcomings must be addressed at that level.

Paragraph 1 is especially important from a business perspective. Because of the particularities of cooperatives, they often thrive only when their different sectors complement each other. Successful cooperative systems are generally marked by a diversity of types of cooperatives (cf. Paragraph 13).

Paragraph 2 defines cooperatives as «[...] autonomous association[s] of persons united voluntarily to meet their common economic, social

³³ To be mentioned that the ILO Co-operatives (Developing Countries) Recommendation, 1966 (ILO R. 127) was more comprehensive. Despite of Paragraph 19 of ILO R. 193 R. 127 may still be used for guidance as it was not formally abrogated so far.

³⁴ Cf. footnote 7

³⁵ Cf. also Cuevas, Carlos E. and Klaus P. Fischer, *Cooperative Financial Institutions. Issues in Governance, Regulation, and Supervision*, World Bank Working Paper No. 82 (2006), 31.

and cultural needs and aspirations through a jointly owned and democratically controlled enterprise.» The three objectives —economic, social and cultural— are complementary and of equal legal weight. Legislators must not only strike an appropriate balance between these three objectives, but they must also take a balanced account of the two aspects of cooperatives, namely associations of persons and enterprises³⁶. Where too much weight put on the association aspect³⁷ prevents cooperatives from becoming competitive market participants, too much weight put on the enterprise aspect risks to dilute the characteristics of cooperatives³⁸.

In a number of jurisdictions restrictions as to the membership of entities in primary cooperatives can be found. They hinder especially the development of small and medium sized enterprises, i.e. the most prevalent actors in the informal economy, to form so-called entrepreneurs or shared services cooperatives³⁹.

The objectives and the association clauses are further important in two ways. First, the objectives clause translates one of the overall objectives of the ILO, which is to not let the economic and the social concerns drift apart⁴⁰, and it materializes the Covenant on Economic, Social and Cultural [Human] Rights⁴¹. As such, it contributes to the respect of the legal concept of sustainable development⁴². Second, the association element refers to the cooperative principle of democracy expressed in the 2nd cooperative principle as «one member/one vote»,

³⁶ ILO R. 193 underlines the importance of the enterprise aspect numerous times. Cf. Paragraphs 5.; 6. (c) and (e); 7. (2), 8. (1)(b); 16. (d).

³⁷ The explanation of this phenomenon might be that the introduction of the enterprise aspect into the definition of cooperatives is rather recent. Cf. also International Labour Conference, 89th session 2001, Report V(1).

³⁸ Cf. Henry, Hagen, «Basics and New Features of Cooperative Law - The Case of Public International Cooperative Law and the Harmonisation of Cooperative Laws», in: *Uniform Law Review. Revue de droit uniforme*, vol. XVII, 2012, 197-233. The discussion on social and community enterprises, as well as on social entrepreneurship, is partly a consequence of the preference of the economic objective over the other objectives in many cooperatives.

³⁹ Cf. Göler von Ravensburg, Nicole, *Economic and other benefits of the entrepreneurs' cooperative as a specific form of enterprise cluster*, Dar es Salaam: International Labour Office 2010.

⁴⁰ Cf. preamble of the ILO Constitution

⁴¹ International Covenant on Economic, Social and Cultural Rights, UN Document 993 UNTS 3 (1966), one of the legally binding Human Rights instruments.

⁴² Cf. Case Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment. I.C.J. Reports 1997, Paragraph 140. For more detail concerning sustainable development and enterprises, cf. Henry, «Sustainable...», *op. cit.* Paragraph 4 combines indeed the notions of «[...] income-generating activities and sustainable decent employment [...]»

i.e. it refers to member participation. Through member democratic participation social injustice, the essential descriptor of the informal economy, can be addressed effectively. Social justice materializes as the Human Right to participate in the decision making concerning the production and distribution of wealth materializes⁴³.

Enterprises with a democratic structure, like cooperatives, dispose of the necessary organizational set-up to organize this participation⁴⁴.

Political stability, a fourth aspect of sustainable development besides economic security, ecological balance and social justice is also a further result of democratic decision taking. If indeed the majority of the world population works in the informal economy and if that is characterized by social injustice, then democratic participation makes a difference⁴⁵. All the more so as the space to organize the participation of the demos has been shrunken constantly⁴⁶.

Paragraph 6. (d) directs governments to «facilitate the membership of cooperatives in cooperative structures responding to the needs of cooperative members [...]». Unionizing and federating in the interest of the cooperative members at primary level is a genuine cooperative way to reach economies of scope and scale, have representation and establish cooperative value chains which link the producer to the consumer. It is a way to maintain the autonomy of the affiliates, hence offers more possibilities to participate. Despite the success in many countries, vertical and horizontal integration are not a widely applied means to develop cooperatives and often cooperative laws lack translation of the idea that the unions and federations of cooperatives must serve the interests of the members at the primary level.

Paragraph 7. (2), regulates a central matter. Its 1st sentence («Cooperatives should be treated [...] on terms no less favourable than those accorded to other forms of enterprise [...]») introduces the prin-

⁴³ As for the relationship between law and social justice it is worthwhile reading Supiot, Alain, *L'esprit de Philadelphie. La justice sociale face au marché total*, Paris 2010; Idem, «Contribution à une analyse juridique de la crise économique de 2008», in: *Revue internationale du travail* 2010/2, 165-176. This relationship clarifies also the difference between social justice, on the one hand, and charity and CSR, on the other.

⁴⁴ For details cf. Henry, «Sustainable Development...», *op.cit.*

⁴⁵ A reference point has become the so-called Gini coefficient.

⁴⁶ For example through privatizations of public services, privatization of law-making etc.. For more detail cf. Henry, Hagen, «Public International Cooperative Law: The International Labour Organization Promotion of Cooperatives Recommendation, 2002», in: *International Handbook of Cooperative Law*, ed. by Dante Cracogna, Antonio Fici and Hagen Henry, Heidelberg: Springer 2013 (forthcoming), especially at footnotes 21 and 43.

principle of equal treatment⁴⁷. Its wording seems to suggest that cooperatives might receive a more favourable treatment than other forms of enterprise. The risk to confuse, despite of the 2nd sentence of Paragraph 7.(2), the activity of a cooperative or the goals it pursues with its form is especially high as concerns informal economy actors. One cannot assume that the ILC agreed to a preferential treatment of cooperatives. The above-mentioned emphasis on the enterprise character of cooperatives, even in Paragraph 7 (2) itself, speaks to the contrary. Paragraph 7.(2) clearly distinguishes between activity and form. Furthermore, positive discrimination, i.e. the granting of privileges and advantages, prevents cooperatives from becoming competitive and it distorts market conditions. Competitors are not willing to enter into business relations with entities which are known to be spoon-fed by the state or other actors. In addition, positive discrimination requires additional monitoring. The borderline between such monitoring and infringing upon the autonomy of cooperatives is at times difficult to draw.

«Equal» treatment requires taking the structural differences as compared with other enterprise types in all fields of law into account. These structural differences may be derived from an interpretation of the cooperative values and principles⁴⁸. Taxation is an example which

⁴⁷ In the legal sense. Paragraph 6. (c) does so for a specific case, while Paragraph 7. (2), 1st sentence, contains the general principle.

⁴⁸ An abundant literature on the cooperative values and principles contrasts with a lack of material on the question of how to translate these into legal rules. As for exceptions, cf. Cracogna, Dante, *Problemas actuales del derecho cooperativo*, Buenos Aires: Intcoop Editora 1992; Idem, *Manual de legislación cooperativa*: Buenos Aires: Intcoop Editora 1998; Münkner, Hans-H., *Cooperative Principles and Cooperative Law*, Marburg: Institute for Co-operation in Developing Countries 1974; Idem, *Six lectures on cooperative law*, Bonn: Friedrich-Ebert-Stiftung 1977; Idem, *Neuf leçons de droit coopératif*, Bonn: Friedrich-Ebert-Stiftung 1982; Idem, *Ten lectures on cooperative law*, Bonn: Friedrich-Ebert-Stiftung 1982. More recently, Fici, Antonio, «Cooperative Identity and the Law», in: *European Business Law Review*, 2013, issue 1 (forthcoming) and Hans-H. Münkner (ed.), «Nutzer-orientierte» versus «Investor-orientierte» Unternehmen, Göttingen: Vandenhoeck & Ruprecht 2002.

The following summary of the structural features is based on Henry, «Guidelines ...», *op. cit.*: Cooperatives are people-centred, member-user driven, determined by transaction relationships, their capital varies with the number of members. The rationale behind this is to avoid a conflict between investor interests and member interests and to allow for the associative character of the member/cooperative relationship to take precedence over possible additional contractual relationships. Members are the main users of the services, the main clients or providers of their cooperative or they are the majority of the work-force in a workers' cooperative. Members' shares in cooperatives are membership shares. They do not represent a share in the assets, nor do they constitute an investment. Cooperatives do not seek market opportunities, but seek to service their members; they are interested in the use value of (their) products, not in the mar-

is of particular relevance for the informal economy actors. Adequate taxation of cooperatives (not: preferential tax treatment) is not only required by the principle of equal treatment, but it is also an incentive to refrain from tax evasion⁴⁹. The mandate of the Office to engage in this issue has not been made use of sufficiently so far. Another means to further economic and social inclusion is to tax exempt transfers from the surplus to social, pension and/or education funds⁵⁰.

Not addressing issues like tax evasion or the evasion of payments to social security schemes violates the principle of equal treatment in relation to those who do fulfill their obligations in this respect.

Paragraph 8.(1)(b) is another example of the application of the equal treatment principle. It states: «National policies should notably [...] ensure that [...] labour legislation is applied in all enterprises [...]» Where this clause repeats the very basic nature of labour law as *ius cogens*, which no actor must disrespect, it is not clear how this principle can be translated to cooperative law. National jurisdictions differ widely as to the extent of the notion of labour legislation: inclusive of social protection and work safety rules or not? These elements might have to

ket value. While cooperatives, as enterprises, need to also produce positive results, they are not-for-profit enterprises (to be distinguished from «non-profit enterprises») i. e. they do not seek this positive result per se, but seek a positive result in order to pursue their objective, which is to satisfy their members' economic, social and cultural needs. The positive result must serve this end. The positive result of cooperatives splits into two distinct parts: profit on transactions with non-members, if any, generated according to commercial terms; and surplus on transactions with members, generated according to cooperative terms. The difference between «profit» and «surplus» not only relates to the way they are generated, but also to the way they are distributed. Stock companies distribute profit to the shareholders in proportion to their investment. Cooperatives do not distribute profit and at least part of their surplus is to be distributed to the members and this in proportion to the transactions the individual members had with the cooperative during a specified period of time. Management of stock companies centres on that of the capital investments and their growth. In cooperatives, management centres on members. Assets must serve not only current, but also future members' needs and has therefore to be preserved over time. That is the reason why the main part of capital, the reserve fund, should be locked-in (indivisible) capital and not be distributed. «This is the consequence of the common ownership of the cooperative by its members: the community of cooperators owns the cooperative but no cooperator has any right on any element of the cooperative.» Hiez, David, «Cooperative Law in France, in: *International Handbook of Cooperative Law*, *op. cit.* As associations, cooperatives allocate equal voting rights to members, independently of their economic position, i.e. cooperatives are controlled democratically.

⁴⁹ For the importance of such an approach cf. also «The informal economy», *op.cit.*, Paragraph 45.

⁵⁰ Education is another lacking factor in the informal economy and one which is required by the ILO R. 193, Paragraph 3 and by the 5th cooperative principle.

be delinked as emphasis of law shifts from the employment relationship to the employee/worker. It is also unclear how the potential conflict between labour law and cooperative law is to be solved in a situations where employer and employee/worker are the same person, as is the case in worker cooperatives and to a certain extent in other types of cooperatives as well. The ILO organized in the 1990ies two Expert meetings on the issue. The results of these meetings⁵¹ might be considered for future work, as the matter of bogus or «pseudo» cooperatives, which the ILO R. 193 addresses in its Paragraph 8.(1)(b) has become a burning issue in many countries.

Paragraph 8. (2)(b) concerning the cooperative specific audit («financial and social»)⁵² is part of an efficient control mechanism and a tool which enables cooperative members to effectively exercise their participation and control rights. Effective and efficient cooperative audit systems which scrutinize the performance as related to all three objectives of cooperatives, as well as to the association/participation element, are widely lacking. Again, this is often the result of failing implementation procedures/mechanisms, even where adequate legal rules do exist.

IV. Conclusion

The effectiveness of the transition to formality through cooperative law is not the least a function of the legal nature of ILO R. 193 itself. This specific recommendation, ILO R. 193, is more than just a «recommendation» in the general sense of the word; it requires more than the respect of the obligations under Article 19 of the ILO Constitution. This argument can be based on the contextualization of ILO R. 193 within similar acts and on its democratic legitimacy. This opinion is increasingly being shared⁵³.

The following additional points might have to be considered when implementing ILO R. 193 for the purpose of «using» cooperative law as a means to enable informal actors to transit to formality in the sense discussed here.

⁵¹ Labour Law and Cooperatives. Experiences from Argentina, Costa Rica, France, Israel, Italy, Peru, Spain and Turkey, Genève: International Labour Office 1995; Meeting of Experts on Cooperative Law, Final Report, Genève: ILO 1996.

⁵² To be added management and societal audit which have been developed on the basis of the cooperative principles.

⁵³ Cf. Henry, Hagen, «Public International Cooperative Law», *op. cit.*

First, however important social and economic inclusion through the formation of cooperatives is, formalization is not an end in itself⁵⁴.

Second, the so-called «open door principle», the 1st cooperative principle, is easily construed as meaning that anybody can join a specific cooperative and that therefore cooperatives are an easily accessible means for informal actors. While the latter is true and the entrance costs are low in terms of capital and other requirements, it must not be forgotten that the open door principle is also assorted with specific obligations. Furthermore, the ease of access to this form of enterprise contrasts with the complexity of its structure which requires special skills to manage and operate⁵⁵.

Third, the cooperative self-help approach to problem solving is not widely understood.

Furthermore, where in capital based enterprises capital hires labour, in cooperatives labour the reverse is true⁵⁶. The approach of cooperatives to poverty is one of structural poverty eradication. This must not be understood in the political sense, as it is limited by the self-help idea.

Fourth, emphasis in the implementation of ILO R. 193 might have to shift from the legal texts to their implementation.

Fifth, besides considering the under-researched question of why law is not being applied and hence informality is allowed to spread, one must consider that the notion of law itself is undergoing radical changes under the conditions of globalization. In its Preamble ILO R. 193 draws attention to the challenges of globalization. The word «globalization» stands here for the process of abolition of barriers to the movement of the means of production, especially capital and labor⁵⁷. It stands less for an empirical fait accompli than for the rapid transformation of the production where, because of new technologies, capital can be de-localized instantly and capital and labor can be

⁵⁴ Cf. for example Meinecke, Oliver, *Rechtsprojekte in der Entwicklungszusammenarbeit*, Berlin: Duncker & Humblot 2004, 94

⁵⁵ A number of jurisdictions have introduced simplified cooperative structures and/or have exempted «small» cooperatives from certain requirements.

⁵⁶ Cf. Cid, Mikel, «Making the Social Economy Work within the Global Economy», in: *Review of International Co-operation*, vol. 97, No.1/ 2004, 80 ff.

⁵⁷ Cf. Becerra, Santiago Nino, *El crash del 2010*, 6th ed., Barcelona: Los libros del lince 2009, 145. As for a differentiation in French between «globalisation», «mondialisation» and «universalisation», cf. Ost, François, «Mondialisation, globalisation, universalisation: S'arracher, encore et toujours, à l'état de nature», in: *Le droit saisi par la mondialisation*, sous la direction de Charles-Albert Morand, Bruxelles: Bruylant 2001, 5 ff. (6 f.).

drawn from anywhere and «used» everywhere, including in a virtual manner; it stands for a situation where space and time are losing their conditionality for the economy and where, hence, classical legislation becomes insofar ineffective. These changes bring global actors under the characterization of the informal economy actors by the ILO. The implications are as obvious as is the complexity of inventing global legal governance structures. This might be a reason to reconsider past attempts to see the large world of cooperatives with its impact in terms of social and economic inclusion represented within the ILO, not the least for the benefit of the informal economy actors.