THE IMPORTANCE OF CO-OPERATIVE LAW AND ITS INTERPRETATION IN THE POSTNATIONAL CONSTELLATION

Robert Dobrohoczki.
Centre for the Study of Co-operatives
University of Saskatchewan.
101 Diefenbaker place.
Saskatoon Saskatchewan.
CANADA. S7N 5B8.
Rob.Dobrohoczki@usask.ca

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Abstract

This paper highlights the importance of legislative and policy regimes for the co-operative movement in fostering spaces of resistance to the dominant form of the transactional corporation. Co-operatives are perceived internationally as an efficient means to alleviate the negative side effects of structural adjustments of economies and strengthen popular participation in national decision-making. As democratic enterprises, they reconnect and re-engage citizens in the democratic process at a time when globalizing forces are restructuring welfare states and leaving many citizens alienated from the global capital that shapes their economies. In an increasingly integrated world dominated by supranational trade arrangements and global capital, co-operatives represent one means providing opportunities for “a fair globalization” that reinvigorates local economic development. Co-operatives address the dilemma of the Habermas’s postnational constellation where, “power can be democratized; money cannot.”

This paper examines the potential of co-operatives as public policy instruments under international law, including the place of co-operatives under international trade arrangements and international conventions and the possibility that transnational co-operatives may represent avenues for “fair trade” globalization. While international agreements such as NAFTA and the WTO restrict preferential policy based on national treatment provisions, this paper argues they do allow for policy innovation through differential regulatory regimes based on corporate form. Such innovation is supported by international conventions that promote the role of co-operatives in strengthening dialogue and governance while addressing market failures, enhancing corporate social responsibility, and combining social and economic purposes. As governments are increasingly bound by international conventions and supranational trade arrangements, co-operative legislation may represent an alternative social policy instrument to support the benefits of promoting local economies yet remaining bound to global trade arrangements and the project of a globalized economy. However, the possible conflation of corporate and co-operative models in the jurisprudence of legislative, treaty, and judicial interpretation leads to the potential of problematic precedents and implications for such policies that represent both an opportunity, and a challenge, for the co-operative movement.
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Co-operative Law and Social Policy

Legislative and regulatory regimes are inherently tied to the realm of social and public policy. The need for suitable co-operative legislative is no such exception. In one sense it is impossible to divorce an analysis of legislative and regulatory regimes from an analysis of public policy considerations; public policy is why such legislative regimes were initiated in the first place. Even in circumstances where legislative and regulatory structures are aimed at providing for well functioning markets, level playing fields, and minimizing state intervention and so forth; such a policy itself is not a neutral policy but implies an analysis of how such structures impact the social good (efficiency of markets, robustness of capitalism, etc). A non-policy is a policy. Politics is an inescapable reality. Analysis of co-operative legislation within the regulatory frameworks of international trade arrangements must therefore be undertaken against the backdrop of an inescapable background of social policy decisions by legislators and national governments. Given the elite nature of the decision making bodies of trade structures such as NAFTA tribunals and the WTO, it is appropriate to take a critical legal theory approach to analysing the potential outcome of such decisions in discussing the challenges and importance of jurisprudence of co-operative law in the twenty-first century.

Ever since the first Rochdale principles of co-operation were advanced by the 1844 Rochdale Society (Fairbairn, 1994) co-operatives have struggled for legislation that recognized its unique features. An examination of the legislation from early English legislation until the present shows a struggle for equal recognition in legislation between the co-operative model and what became the dominant corporate model. According to the literature co-operatives typically are key players in filling market niches where traditional market structures, specifically those characterized by the traditional corporate sector, fail or are inadequate in meeting peoples social or economic needs (Fairbairn et al, 1991; Fairbairn, 2000).

The co-operative movement and the principles it espouses demonstrates that co-operatives are different from other business organisations acting as alternatives to the traditional capitalist business structure of the corporation (McGillivray and Ish, 1992). They often act as means of acquiring economic power for disadvantaged or marginalized groups. Often they arise in some
area that private sector has failed: co-operatives usually arise from a market failure, a social or economic need not met. Prairie grain co-operatives in the Canadian province of Saskatchewan, for instance, succeeded in breaking into highly monopolised market sectors. Such co-operatives may continue to operate within markets long after addressing the market failure, continuing to meet its members needs in a competitive market and becoming an established market player. The primary objective is to serve the needs of its members unlike corporations where the primary motivation is profit maximization and a return on investment. Any measure of efficiency must be judged by the service and benefits received by its members rather than the return on investment. Therefore cooperatives may well have greater resiliency, or sustainability, in communities by continuing to operate to serve member needs even in times of low margins while investor owned firms would find no profit in doing so. It is clear then that co-operatives may have significant economic sustainability and may engage in prolonged periods of sustained competition with the corporate sector.

Co-operative legislation is wide and varied from country to country. Some countries have strong co-operative legislation with separate legislative regimes and yet a weak co-operative sector. Other countries, Denmark for instance, have no separate co-operative legislation from other business associations and yet have developed a strong co-operative sector (Scheel, 1994). The nature of the legislation is less important than the actual vitality and functioning of the co-operative enterprises, the movement, and the principles they espouse.

The relationship between the state and the co-operative sector has always been a tenuous one, characterized by both a desire for facilitating legislation to encourage and support co-operative development and to secure a level playing field with the corporate organizational form, but also a desire on the part of co-operators to retain autonomy from the state. Fairbairn notes that mature co-operative sectors tend toward legislation that resembles the corporate form:

In general, the interaction of the interests of organized co-operatives and of the state over the last half-century has tended towards looser and more permissive co-operative legislation. Co-operatives, as they have matured, have been less forceful in insisting on a normative or protective element in co-operative legislation, and have become more inclined to treat regulation of the co-operative identity as an internal question to be handled by each co-operative through its bylaws and democratic processes. This change in perspective likely reflects the increased strength and confidence of mature co-operative organizations…. The interests of influential co-
operatives and of the state have both inclined towards more permissive legislation that increasingly resembles laws for other forms of corporations (Fairbairn, 1994: 55).

Co-operatives in the context of Globalization

Co-operatives increasingly face challenges in the context of “globalization”. John Tomlinson (1999: 2) suggests that we see the phenomenon of globalization as an empirical condition of the modern world that he terms complex connectivity: “the rapidly developing and ever densening network of interconnections and interdependences that characterize modern social life.” From Held et al. (1999) he maintains that with the global extensiveness of connections, the more regularized and institutionalized nature of its character, and the speed at which they take place, there is a growing enmeshment of the global and the local. What happens locally can have a significant impact somewhere else on the globe.

So what does globalization mean? Some of the popular considerations suggest it means, in essence, that events in one country are increasingly dependent on events in other countries. In the economic realm, free trade deals, transnational corporatism, and global capitalism are the surest manifestations of globalization. But all of this is due in large part to new technologies that allow person to person communication on a global scale. New communication technologies that increase the connectedness, institutionalized character, and speed of global connections vis-à-vis the local, all of the factors that Held et al (1999) and Coleman (2004) identify as factors of globalization.

This challenge to local identities through cultural and economic integration in globalization leads to increasing angst over the globalization process. Yet the very same forces that enable globalization allow new social movements on a global scale. With new communication technology, these new social movements are able to transgress national and cultural borders. Indeed, according to this working definition of what globalization is, we can see that even the resistance movements responding to the adverse aspects of globalization, such as global justice, or the “anti-globalization” movements are part of “globalization.” As Michel Foucault wrote “there are no relations of power without resistance.” (Foucault, 1980) Coleman (2004) writes that:

“More people than ever before think of the world as one place. Accordingly, even acts of resistance, whether these be attempts to prevent massive depopulation of agricultural areas or to
secure the traditional family in a strong religious community, are taken with an eye to what is happening during negotiations for an Agreement at the World Trade Organization (WTO) and co-ordinated with the protests of their counterparts with similar concerns in other parts of the globe.” (Coleman, 2004)

**Postnational Constellation**

Leading critical theorist Jurgen Habermas has called the modern age, particularly in Europe, the “postnational constellation” (Habermas, 2001). By this he means that national governments are increasingly ceding economic power to supra-national trade arrangements such as NAFTA, the EC, and the WTO. The size and strength of global capitalism has increased with such arrangements, as has the capacity for national governments to regulate it as capital with increasing fluidity flows across national boundaries. However, according to Habermas, transnational corporate power vis-à-vis the state leads to alienation, and a loss of empowerment.

Globalization has led to a ‘postnational constellation’: the relative inability of the nation state to control the globalized economy. For Habermas, what is needed is the development of some form of cosmopolitan solidarity and law that reconnect the social to the political. In other words: democratic empowerment.

In simplified form, his analysis posits that there is a tension between “system” and “lifeworld.” “Lifeworld” is essentially the socio-cultural system of communicative action, practical discourse, expression and aesthetics. Habermas maintains that this system is essential for the development of culture, morality, and genuine knowledge formation because only in the lifeworld can these things be transmitted through society. This is the realm of genuine democratic discourse and the “public sphere.” (Habermas, 1989) “System,” however, is instrumental and strategic dominant reason. Habermas identifies two steering mechanisms that comprise the “system”: the market and the state. The state is a steering mechanism through its medium of power: its use of laws, regulations, police, censorship etc. The market steers through its medium of money, marketing, propaganda, and influence. Important to Habermasian theory is that when the “system” dominates the lifeworld too much, the result is a crisis of legitimacy. In an increasingly pluralistic and multicultural world, with custom and tradition losing their authority, it is only with democracy that legitimacy is grounded (Habermas, 1996).
But with the collapse and withering of national sovereignty in the post-national constellation, there needs to be a “cosmopolitan politics” or governance through multinational structures such as NGO’s to counter the predominance of system dominant structures. The growing angst over free trade and the power of global capital, and the sense of powerlessness in the face of distant bodies like the World Trade Organization detached from the citizens, represents this call for cosmopolitan politics. A healthy socio-cultural system is one in which there is a robust public sphere with real democratic participation and debate.

**Spaces of Resistance**

If co-operatives, as economic enterprises and democratic associations, can act as key institutions in offsetting adverse effects of globalization, there is a social and economic policy interest in promoting the co-operative movement, a significant social movement shaping the social, economic, and political landscape. Globally, co-operatives have over 800 million members and employ 20 percent more people than large multinational corporations (ICA, 2006) across a range of sectors including consumer, wholesale, agriculture, energy, forestry, processing, marketing, arts and crafts, home and health care, financial services, housing, and worker co-ops. The International Co-operative Alliance (ICA) is the world’s largest Non-Governmental Organization (NGO) The United Nations estimated in 1994 that the livelihood of nearly 3 billion people, or half of the world's population, was made secure by co-operative enterprise (ICA, 2007).

In light of global forces such as communications technology, international commerce, and transnational corporatism that are no longer situated in, or connected to, particular communities (Friedman, 1999), the co-operative movement offers opportunities for “a fair globalization” (World Commission, 2004) that reinvigorates local and regional economic development. The democratic structure that distinguishes co-operatives from other business enterprises means that co-operatives are closely connected to the communities in which they are situated, resulting in greater emphasis on supporting local communities and sustainable development (Ole Bergen, 2001; Fairbairn, 1991; ICA, 1995). They are often quasi-public spheres of discourse and community activism energized by the seven co-operative principles (Melnyk, 1985; ICA, 1996) voluntary and open membership, democratic member control, member economic participation, autonomy and independence, co-operative education, co-operation among co-operatives, and concern for community.
Co-operatives represent one means of resistance against the dominant capitalist form. By being orientated to member needs, and democratically controlled, rather than being orientated toward and controlled by capital and its accumulation, co-operatives have a superior ability to make decisions that are seen as reflective of the communities’ concerns and as morally legitimate. It is the fact that they are *principled organisations* that adhere to a certain social philosophy, and whose overriding concern is satisfying member needs rather than profit or shareholder value, that gives them legitimacy in the community and loyalty among their clientele. They have the potential to act as public policy instruments promoting socio-economic and political engagement in the face of globalizing trends that entrench inequalities and weaken local autonomy, including “meaning-generating and meaning-negotiating capacity” (Bauman, 1998: 2, 3) and represent ways building intellectual and renewed co-operation to help “[win] back democracy from technocracy” and counter forms of forbidding fatalism (Bourdieu, 1998: 26, 96).

Co-operative principles blend a community *ethos* or spirit with a business structure. For this reason co-operation can be a viable alternative in offsetting adverse effects of globalization, they can democratize market structures and alleviate democratic deficits (Dobrohoczki, 2006; Dobrohoczki, 2007). While corporate directors have a fiduciary duty to the corporation, interpreted by the courts in some countries as a duty to shareholders and maximizing profit, co-operatives have more capacity to act in the public good by having co-operative principles reflected in legislation. The co-operative principles now include seven principles: open and voluntary membership, democratic member control in the form of one member-one vote, economic participation from limited return on investment, autonomy and independence to ensure democratic control, co-operation among co-operatives, co-operative education, and a concern for community. Underpinning these principles is a concept of community, of democracy, and equitable treatment (MacPherson, 1996). The principles have been modified over time by the International Co-operative Alliance (ICA) with their most recent formulation being in 1995 (International Co-operative Alliance, 1996). Co-ops, unlike corporations who have fiduciary obligations to shareholders, do not need to hide community works behind “public relations” but have a greater capacity to act in the public good.

Co-operatives are business enterprises where the three interests of ownership, control, and benefit all vest directly in the hands of the users making them “enterprises that put people at the centre of their business and not capital” (ICA, 2006). Social enterprises such as co-operatives are
an important source of entrepreneurial capacity, creativity, and democratic renewal. As
democratic organizations, they are one means to reconnect and re-engage citizens in the
democratic process at a time when globalizing forces are restructuring the welfare state and
leaving many alienated from political processes and unable to participate equitably. Co-
operatives operate within the social economy designed to combat poverty and exclusion and to
create new wealth where neither the state nor market players have been effective (Levesque and
Mendell, 2004) and therefore build social cohesion in society (Dobrohoczki, 2006). They have
the potential to act as public policy instruments promoting socio-economic and political
engagement in the face of globalizing trends that entrench inequalities and weaken local
autonomy, including “meaning-generating and meaning-negotiating capacity” (Bauman, 1998:
role of co-operatives in strengthening dialogue and governance while addressing market failures,
enhancing corporate social responsibility (Sommer, 1991), and uniquely combining the social
and economic domains.

International Trade and National Treatment Provisions
As co-operative sectors have both a capacity to alleviate democratic deficits and offset the
adverse effects of globalization, and a capacity to promote sustainable economics in the serving
of member needs rather than shareholder profits, there are social policy reasons for promoting
co-operatives. However, the co-operative sector inevitably will face challenges under
international trade agreements such as NAFTA (North American Free Trade Agreement, 1994)
and the GATT agreements under the WTO (World Trade Organization). It is contrary to these
agreements to impose tariffs and/or subsidies on certain economic sectors based on nationality,
the so-called “national treatment” provisions.

[The National Treatment] principle does not guarantee a specific level of protection or that
foreign products or investors will receive a “fair” or “reasonable” treatment. It simply guarantees
against States affording foreign products and investors less favorable treatment compared to that
granted to domestic products and investors. (Ortino, 2005: 4)
However, it is arguable that nothing may prevent national legislation from discriminatory
treatment on the basis of legal or corporate form. While the word “co-operative” does not in fact
fall under NAFTA’s definitions, it would clearly be read in given the open ended language of “other associations.”

**Article 201: Definitions of General Application enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association (NAFTA, 1994).

Indeed discrimination based on corporate form is commonplace in the tax status treatment for small businesses for instance. Such legislation policy would likely be exempt from the “national treatment” provisions, especially in circumstances where separate legislative regimes are established. The provisions under NAFTA are established to prevent against protective actions on the basis of nationality, not business form:

**Article 1102: National Treatment**

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, no Party may:
   
   (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or
   
   (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party (North American Free Trade Agreement, 1994).

Similar wording is found in World Trade Organization agreements, Article III section 4 of GATT reads:
4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product (World Trade Organization, 1999: 18).

Discrimination on corporate form has always been a viable policy instrument (i.e. small business, non-profit organizations) albeit one rarely used in terms specific to co-operatives vis-à-vis corporations. However, there is a reasonableness criteria that may mitigate against, for instance, a policy that looked specifically like it was protecting a specific industry or business; if the pith and substance of legislation was in fact to give some dominant co-operative a competitive advantage, specifically the intent if not the form was to provide for national treatment, it may fall victim to a NAFTA challenge.

[The] “reasonableness principle provides for an “absolute” standard of treatment, in as far as it requires States to recognize to foreign products and investors a certain (minimum) level of treatment, the determination of which does not have to depend on the treatment afforded to domestic products and investors…. usually refers to both substantive and procedural requirements, including concepts such as ‘suitability’, ‘necessity’, ‘proportionality’, ‘transparency’ and ‘participation’.” (Ortino, 2005: 7)

A challenge to any preferential legislation would need to be based around showing how treating co-operatives differently conferred a benefit on some specific “national” industry contrary to a “national treatment” clause. This would be difficult to demonstrate, for at the same time the Court would need to acknowledge the differences between co-operatives and corporations in cases where two different legislative regimes and Acts occur. Moreover, if co-operatives do indeed promote social cohesion, democracy, contribute to local economies and strengthen the public sphere, there is a policy interest in promoting them via legislative policy that mitigates against the raison d’être social policy of national treatment provisions (the benefits of competitive capitalism). Such public policy considerations provide for possible exemptions, on the basis of origin neutral differentiation:
If the less favorable treatment afforded to a foreign investor vis-à-vis a domestic one may be justified on the basis that such origin-neutral differentiation is related to a legitimate public policy, then there is no violation of the NT obligation” (Ortino, 2005: 24)

The theoretical basis of justifying a privileged treatment for co-operatives in social policy could be premised on the benefits participation and democratic involvement needed for co-operative membership entails, and the degree to which this fosters an active and vibrant citizenry. Such participation fosters a sense of control and ownership of market forces that counters the disempowered feelings of alienation from the marketplace and the global economy. The growth of the power of transnational corporate structures has led many to a sense of alienation over the market forces that control their lives.

Economically, co-operatives are locally owned, and patronage dividends stay in the local economy. Such social policy considerations could promote local economies without running a foul of national treatment provisions. Furthermore, co-operatives are at a structural disadvantage when it comes to raising capital. As member based organisations the option of selling different classes of shares to generate investment is not as available to most forms of co-operatives that traditionally have needed to finance capital projects with debt. Recent changes in many countries Co-operative legislation have sought to alleviate this problem by allowing some limited means to raise capital through non-voting share issues. However, capital financing remains a significant problem for co-operatives vis-à-vis the corporate form.

**Supporting Arguments: International conventions**

It is accepted in international law and international convention that co-operatives have a significant role to play in economic and sustainable development (International Co-operative Alliance, 1995), particularly in developing countries. International Co-operative Alliance (ICA) is an independent NGO that seeks co-operation among co-operatives at the international as well as national and community level, and advocates co-operative principles (Abell and Mahoney, 1988: 5-6). The ICA has a longstanding relationship with the United Nations since 1946 when the ICA was accorded United Nations Consultative Status. The ICA also has ties to related organisations such as the International Labour Organization (ILO), a special agency linked to the U.N. by constitutional amendments in the U.N. Charter. Members of the ILO are obligated to take steps that support the various ratified conventions. It has been instrumental in advancing
economic and social policy initiatives about co-operatives as instruments for change. The *International Co-operative Alliance* in 1966 set out guidelines for co-operative legislation at the national level (International Co-operative Alliance, 1966). Today, the ICA holds consultative status with the *U.N. Economic and Social Council (ECOSOC)* (International Co-operative Alliance, 1998). The United Nations has adopted official conventions aimed at the development of co-operatives by member states. UN has a partnership with the ICA in the Committee for the Promotion and Advancement of Cooperatives (COPAC).

Examples of such conventions include the *Social Policy Convention (Basic Aims and Standards)* of 1962 (No. 117) discusses co-operatives by suggesting that their promotion could help the indebtedness of farmers in developing nations. It encourages member-states to seek "the reduction of production and distribution costs by all practicable means and in particular by forming, encouraging and assisting producers' and consumers co-operatives" (International Labour Organization, 1962). The *Co-operatives (Developing Countries) Recommendation of 1966 (No. 127)* addressing co-operative development (International Labour Organization, 1966) by advocating co-operatives as being pivotal institutions in social and economic development in developing economies. Nation-states are urged to adopt policies that encourage the development of economic co-operatives.

The convention goes so far as to suggest that any discriminatory regulations or undue tax burdens that would hinder co-operatives should be removed. It maintains that there “should be laws or regulations specifically concerned with the establishment and the functioning of co-operatives, and with protection of their right to operate on not less than equal terms with other forms of enterprise” (International Labour Organization, 1994: 1; International Labour Organization, 1966; Yeo, 1989). According to COOPREFORM an ILO-affiliated program, co-operatives are an "efficient means to alleviate the negative side effects of any structural adjustment and to strengthen the popular participation in national decision-making" (International Labour Organization, 2000a). There seems to be justification under international law and international convention for differential treatment based on co-operative legal form.

**Jurisprudential Challenges: A Canadian Example**
Given the possibilities for facilitating legislation regarding co-operative development, there is cause for diligence. Based on our discussion of the dilemma of the post-national constellation, the decision making bodies of NAFTA, the WTO or the EC are still in the realm of the elite without, according to the sentiment behind anti-globalization activism, sufficiently in the public sphere. Precedent that fails to reflect the co-operative principles may taint trade law. There is often an institutional bias in the judiciary against collective action and instruments of collective action such as co-operatives in favour of individualism and the corporate model. In large part this is because the corporate model is what Judges are most familiar with.

Critical legal studies is a school of thought premised on critical theory, lead by such thinkers as Mark Tushnet, Roberto Unger, and Duncan Kennedy (Bauman, 1996). Sees the development of law as mere politics rather than idealized rationality. Provides a critical framework through which to analyze decisions and the jurisprudence. Most experts are versed in corporate law and corporate law precedent representing specific class interests. Using this framework we can see one example of how co-operative principles may fail to be reflected in the jurisprudence.

According to Daniel Ish, co-operative law in Canada has imposed a model of elite democracy on the co-operative movement. Democracy can mean many things; one meaning of democracy involves the principle of one-member one-vote elections. Yet this is the bare modicum of democratic model, and this, it can be argued, is all the legislation preserved. A richer fuller meaning of democracy involves an active membership with substantial powers actively engaged in the decision making process. Co-operative democracy is a participatory democracy. The model of democracy that would be consistent with co-operative principles is a model of democracy that is bottom up, where decisions emerge from the membership and the directors carry out their wishes. It is not a top down model of democracy where membership is subjected to the will of an elected elite.

Ultimately, however, the co-operative ideal can only be achieved where there is accountability to the membership and where membership can direct the affairs of the co-operative by majority control. (Ish, 1995: 65)

However the legislative regime tends to place the top down corporate model upon co-operatives when it comes to director and managerial control. Legislation and case law has been criticised

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by some scholars as imposing a number impediments when it comes to reading co-operative law in a consistent manner with the co-operative principles. The striking similarity between the co-operative and corporate versions of the legislation make it hard for a prudent minded conservative decision maker in the form of a Judge to stray into the uncharted waters of collective rights and co-operative principles.

Although a co-operative may allow for a more participatory style of democracy, the legislation insures nothing more than an elite style that places the decision-making power in the hands of a relatively few…. Perhaps somewhat surprisingly, the co-operative legislation of each jurisdiction mirrors completely the ordinary corporation legislation with respect to the powers of boards of directors. Typically, each act states that the directors shall “direct the management of the business and affairs” of the “co-operative,” in one case, and the “corporation” in the other. (Ish, 1995: 68)

Daniel Ish cites a number of paradoxes that make the legal situation of co-operatives contrary to their foundational principles. The first is that requiring that co-operatives elect a board of directors with wide powers creates a model of an elite democratic structure and formal hierarchies.

Co-operatives have a tradition as democratic and participatory institutions, yet in law and frequently in fact members have come to have little real power. In legal form and internal decision-making structure, co-operatives adopted many elements evident in the legal and commercial systems that prevailed in the era of their formation. (Fairbairn, 1990: 20)

In essence, in striving for the equality under the law with the predominant corporate form, co-operatives, partly due to their own lobby power, enabled legislation that had stark similarities to most corporation acts when it came to issues of director control vis-à-vis the membership.

Keeping in mind that much of the co-operative leadership that lobbied for co-operative legislation came from directors of powerful co-operatives, and it becomes clear that in mirroring co-operative legislation so closely to corporation law that an emerging model of elite democracy was inevitable.

The historical and legal development of the co-operative movement shows that co-operatives copied general associational and corporate developments and paralleled the evolution of private firms. (Fairbairn, 1990: 24)
A second paradox is that state controls, especially the liberty given to the discretion of the Registrar, and the rules concerning the business structure seem contrary to notions that co-operatives are self-generating self-governing institutions that operate apart from the state. This concentration of power in the hands of directors, and the large discretion under the act at the hands of the Registrar, detracts from the principles that co-operatives are self-sufficient autonomous member driven organisations in the community. Ironically, the discretion of the registrar is often in the legislation to ensure that the co-operative operates on a “co-operative basis.”

Consistent with the philosophy that co-operatives should be self-generating and self-sustaining, legislation should provide a minimal framework which respects co-operative autonomy and reflects the unique structure of co-operatives without embodying restrictive rules and definitions. Nevertheless, co-operative legislation contains provisions which concentrate power in a board of directors and in a state official, usually called the registrar. And recent revisions of the various co-operative acts throughout the country have served to make co-operative law look as much like corporate law as possible. Somewhat ironically, one could argue that a more democratic co-operative can be organized under ordinary corporation legislation than under legislation specifically directed at co-operatives. [through the mechanism of a 100% shareholders agreement] (Ish, 1995: 66)

The third paradox identified by Ish is not the fault of the legislature but of the individualistic bias of the court accustomed to dealing with corporate law. Some key court decisions concerning co-operatives have favoured the corporate model of elite democracy. A lack of understanding emerges concerning the collective rights that the co-operatives principles embody. Despite the entrenchment of some of the co-operative principles in the legislation, the courts, rather than upholding and strengthening co-operative principles have tended to turn the opposite direction. In large part, this is a result of the legislation paying such a close resemblance to corporate legislation. The courts have seen fit to draw analogies to the corporate model when deciding issues concerning director control and in the search for precedent. “[C]ollective enterprises are regulated by a legal system that has a profound individualistic bias. The courts, in interpreting the legislation, have displayed a distinct lack of understanding for co-operative enterprise” (Ish, 1995: 66) As Apland and Axworthy write:
It seems clear that co-operatives and other organizations that justify their existence in terms of social or collectivist conceptions of human nature are at a fundamental disadvantage in a legal system founded on individualism. The legal structure that emphasizes the protection of individual interests in a capitalist society has put proponents of community on the defensive. (Apland and Axworthy, 1990: 206)

In one case, directors refused to call a special meeting under legislation that seemed quite clear about the power of the membership to call a meeting (Re Smyth et al and Anderson et al). A desire was expressed by the membership to call a special meeting to discuss an ongoing labour dispute. The directors refused on the basis of cost, and that it would be harmful to the negotiating position of the co-op’s management. The Court however, maintained that the power to direct and supervise the business included labour negotiations and collective bargaining.

The members cannot overrule or control the actions of the directors in this area. Subject to provisions of the act and the bylaws of the association, the only remedy of the members, if they are dissatisfied with the manner in which the directors are managing the business, is to remove them from office and elect new directors. (Ish, 1995: 65 citing Re Smythe para 507)

The court explicitly compared the position of members of a co-operative to that of shareholders in a corporation, the vesting of power in the board of directors was identical between the two Acts. The case was clearly decided wrongly given that the court was only asked to decide whether the requirements of the relevant section of the act was met, but "at the very least, it suggests a total and fundamental misunderstanding of co-operation; further, it suggests a strong bias in society’s regulatory institutions against co-operative and collective action.” (Ish, 1995: 70)

In this case and in others, Ish finds there is a bias in the Canadian Courts against collective action and analogies drawn to corporate models. In the corporate model, the notion of elite democracy makes more sense. Shareholders with a majority of the shares control the election of the board of directors and hence they inevitably have the power in the decision making process.

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This is no more evident than in the situation where a single shareholder controls over 51% of the shares. If the board of directors fails to carry out the shareholder’s wishes, they are simply removed by the majority shareholder. Yet even in company law it is clear that the power of the board of directors grows substantially the more diffuse the control of the shares becomes. This power of the directors is maximised in the co-operative situation, where every member has but one member share and can not accumulate shares to become a powerful voting shareholder. The irony behind the individualist interpretation of co-operative law is that co-operatives and community initiatives arise in precisely those areas that individual needs cannot meet. Judges have hence been reluctant to interpret co-operative legislation any differently than corporate legislation. In part this is because of a failure of understanding in the judicial system of the principled distinctions between co-operatives and corporations. Yet this is also a product of the mechanisms of judicial system itself. Courts look for precedent and past decisions. The corporate model is the model that is most familiar and closest at hand, and the model with the greatest amount of jurisprudence.

While in the corporate model majority shareholders elect the board and can remove them, this is not so easily done on the co-operative model. This vests control in an elite and small group of individuals, a notion that is contrary to the idea that power must ultimately rest in the membership. Yet given this imbalance in the form of the legislation, what has compounded the problem is that the courts have failed to empower the membership in key decisions where the participatory model of democracy could have been strengthened.

It would not be unreasonable to conclude on a perusal of a typical co-operative’s act that the membership can override the decisions of the directors by requisitioning a general meeting and passing the appropriate bylaw. Indeed a rudimentary knowledge of co-operative theory would lead one to conclude this should be a basic design feature of any legislative regime directed at co-operatives. However, somewhat surprisingly, this proves not to be the case. Canadian courts have consistently thwarted the participatory model espoused by co-operatives in dealing with legal issues pertaining to co-operatives. (Ish, 1995: 68)

The diffuse ownership in co-operatives, make them especially susceptible to this control by the powerful elite board of directors. Member based ownership is diffused ownership, directors have that much more power. Ironically they at the same time have the same degree of liability as corporate directors (Ish, 1996).
[T]he desirable type of law is a law outlining some broader frames for co-operative activities but avoiding the ambition of detailed prescriptions concerning almost all thinkable circumstances and matters…. [T]he law should be built upon the characteristics of co-operatives instead of copying the law concerning business limited liability companies (Bager, 1986: 51).

The Court place the concept of deference to elected bodies not just to political democratic structures, but also to market democratic structures when it comes to deciding issues of the collective goals of the membership.

The co-operative movement needs to reassess the ways in which its so called democratic control structures do or do not work… Will form continue to prevail over substance, or will co-operatives return to their roots to meet the challenges of democracy. (Axworthy, 1990: 59-60)

**European Challenges**

The Canadian example demonstrates the tendencies for the judiciary to emulate corporate law, to privilege individualism over collective action, and to represent certain class interests of a managerial elite. Critical legal scholars would suggest this has much to do with the class, status and politics of the judiciary rather than merely its reliance on corporate precedence. It suggests there is a danger in jurisprudential interpretation increasingly conflating corporate with co-operative forms at the expense of co-operative principles. In part however, it is the co-operative movements struggle for equality with the corporate form and legislative parity that in part belies problem. As co-operative sectors are established they are content with stable workable legislation and tend to minimize the social rather than business nature of the venture. Once this occurs however, there is a risk of setting precedent toward a single model of business enterprise, particularly at the level of international trade dispute resolution, which are even more obtuse and one could argue fraught with risk in terms of precedent setting than the judiciary.

Recently in Europe a number of cases have been brought by private sector against co-operative organizations and involve differential taxation policies for Co-operatives from various countries and challenges it is “state aid” under EU competition law. A complaint by the Italian Distribution Federation (Federdistribuzione) against the Italian Government in relation to the fiscal regime of consumer co-operatives belonging to Coop Italia. An appeal from the “Federacion catalana de estaciones de servicio” against European Commission Decision C 2002-4378, of 11 12 02,
relating to measures in favour of the agricultural sector in Spain following a rise in the cost of fuel. A complaint of the “Confederation du Commerce en gros” against the French Government

Formal investigation from the Surveillance Authority of the European Free Trade Authority (EFTA) regarding Norwegian tax Law proposal that specifically tries to equate the tax treatment of co-operatives and corporations The Norwegian case is specific to the discussion earlier in this paper about differential tax treatment and the difficulty co-operatives have in capitalization:

[T]he Norwegian authorities proposed to introduce a scheme concerning special tax deductions for cooperatives. According to the scheme, cooperatives within the agricultural, forestry and fisheries sectors as well as consumer cooperatives and cooperative building societies will be entitled to corporate tax deductions on the basis of allocations to equity capital. The deduction is limited to a maximum of 15 % of the annual net income, and done solely from the part of the income deriving from trade with the members of the cooperative. The aim of the scheme is to grant a fiscal advantage to the co-operatives on the basis that the cooperatives are considered to have a more difficult access to equity capital than other undertakings. (EFTA Surveillance Authority, 2008).

These different complaints question three different regimes linked to the working methods of co-operatives and concern different sectors (consumers, banks, agriculture...) and three different countries (France, Spain, Italy). But the “common link between these cases is that they put in question a different fiscal regime for co-operatives linked to specific operating principles and objectives, different from the other type of societies.” (Co-operatives Europe, 2008)

The common thread in all these cases is the implication that co-operative organizations should be considered in the same regime vis-à-vis competition policy despite being in different legislative regimes based on their co-operative form of organization with the unique challenges of co-operative organizational form.

Conclusions and Recommendations

Co-operatives are uniquely situated to act as bulwarks against globalization and build the kind of cosmopolitan society that Habermas sees as the solution to the postnational constellation. There is room, it can be argued, within current international trade arrangements for co-operatives to be promoted and developed as social policy instruments to promote sustainable economies. However, the co-op sector needs to pay close attention to jurisprudential interpretation at
domestic and in particular international levels. The Canadian example provides a foreshadow of the kind of judicial interpretation that may sacrifice co-operative principles when the judiciary conflates co-operative and corporate forms. The co-operative sector must seek intervenor status before the courts and relevant tribunals where necessary, lobby policy makers and legislators, and articulate the social value of co-operative principles. Failure to do so could let decisions set dangerous precedents in international and hamper efforts to build an alternative globalization and global politics in response to the post-national constellation.
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