

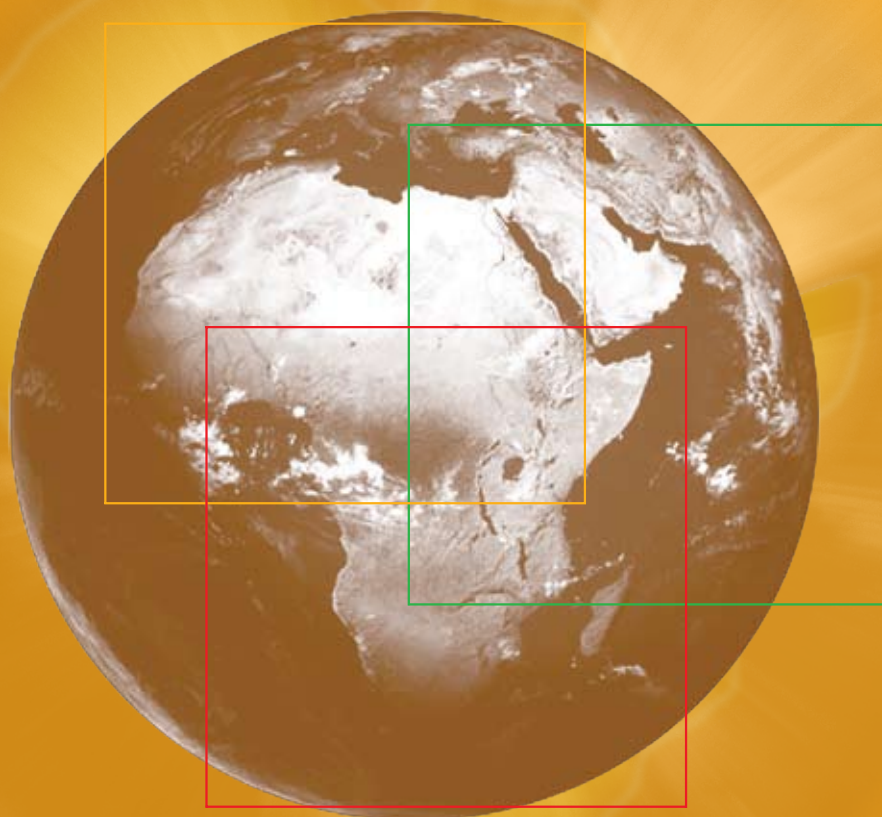


International
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Coop^{AFRICA} Working Paper No. 18

Cooperative policy and law in east and southern Africa : A review

Jan Theron



COOP
AFRICA



The Cooperative Facility for Africa (Coop^{AFRICA}) is a regional technical cooperation programme of the ILO contributing to the achievement of the Millennium Development Goals and the promotion of decent work in Africa by promoting self-help initiatives, mutual assistance in communities and cross border exchanges through the cooperative approach.

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Coop^{AFRICA}
Cooperative Facility for Africa

ILO Country Office for the United Republic of
Tanzania, Kenya, Rwanda and Uganda

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List of acronyms

AGM	Annual General Meeting
ICA	International Cooperative Alliance
ILO	International Labour Organization
SACCOs	Savings and Credit Cooperatives
SME	Small and Medium Enterprise

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Executive summary

The objective of this paper is to conduct a comparative analysis of the policy and legal framework for cooperatives in the countries of East and Southern Africa. The benchmark for the purpose of this analysis is the International Labour Organization's (ILO) Promotion of Cooperatives Recommendation, 2002 (No. 193).

Although such an investigation is necessarily complex, the paper advances two arguments as to why a comparative analysis is useful. The first is essentially a political argument, namely: cooperatives represent a response "from below" to a set of economic problems that beset the entire region. Due to a common colonial heritage, among other reasons, there is already a degree of convergence between cooperative legislation in different countries of the region. It is therefore relatively easy to begin a dialogue regarding different policy and legislative approaches, and the ways in which different models of cooperative development are relevant to the problems of the region.

The second argument concerns the importance of regulation in promoting development in general, and cooperative development in particular. A policy and legislative framework for cooperatives is regarded as the *sine qua non* of cooperative development, for precisely the same reasons as the development of the company as a legal entity would have been inconceivable without a policy and legal framework that recognized it as such.

The reason this paper is concerned with the ILO's Recommendation on the Promotion of Cooperatives is because this represents the most recent and most authoritative statement of international law regarding cooperatives. What Recommendation No. 193 regards as an appropriate policy and legislative framework for cooperatives is one that is "consistent with the nature and function of cooperatives and guided by the cooperative values and principles..." (ILO, 2002: para 6).

The new emphasis on cooperative values and principles (as outlined in Recommendation No. 193) reflects a reaction to an approach that saw cooperatives in developing and post-command economies regarded as accountable to the state rather than their membership. In the African context, this approach also meant that cooperatives were often utilized as instruments of government policy, and cooperative autonomy was often severely compromised.

Cooperative autonomy must thus be regarded as representing the litmus test for evaluating the policy and legislative framework. However cooperative autonomy should not be used as a fig leaf by governments to avoid doing more to promote cooperatives. The current global economic crisis coincides with mounting evidence and public concern regarding the potentially devastating impact climate change may have on the countries of sub-Saharan Africa, and food security within the region. This underscores the need to re-evaluate government's role in this regard.

Most policies considered in this paper were adopted subsequent to the adoption of Recommendation No. 193, and vary in sophistication and complexity. The policies also adopt diverse approaches in the way they are formulated, and in their approach to cooperative development. However, most policies contain some analysis of the national situation in which cooperatives are operating, and an explanation as to why a formal policy is needed. This is followed by a statement of objectives for cooperative development. In all instances the policies reaffirm cooperative principles.

The paper cautions against a formalistic approach to the evaluation of policies. It highlights that what is more important than a statement affirming cooperative principles is how well an understanding of cooperative principles is integrated into the approach taken in the policy. The analysis undertaken finds that it is also possible to have a policy affirming cooperative principles when the legislation does the reverse.

The paper analyses the provisions of the legislation with regard to four essential points, namely:

- Cooperative autonomy and government-cooperative relations;
- The principle of democratic member control and issues of good governance;
- Member economic participation and the question of reserve funds;
- The institutional framework for registering cooperatives and cooperative structures.

The paper concludes by identifying some weaknesses in the policy and legislative framework. It highlights that what is needed in policies is both an acknowledgment of past policy failures and a more frank assessment of existing short-comings in the cooperative movement. What is in general lacking is a clear articulation of the specific social and economic needs to which cooperatives are best able to respond, and a well-conceived argument as to why particular kinds of cooperatives can better meet these needs when compared to other forms of enterprises in specific sectors or value chains.

In regard to the question as to what forms of support the state can provide or are indeed appropriate, there are no easy answers in countries where there are limited resources within the cooperative movement or in civil society capable of providing services such as education and training, entrepreneurial advice and the like. At the same time cooperatives are often either disregarded within existing developmental programmes, or in a situation where their potential is not sufficiently realized.

Despite the shortcomings of cooperative policy in many countries, there can be no doubt that countries with formal policies are better off than those without them, both in that policy represents an opportunity to engage, and in that no matter how deficient the policy, it provides a foundation on which an improved policy can be built. It is also apparent that certain provisions in the older laws are out of keeping

with the contemporary approach to cooperative development. Such provisions are obstacles to the development of cooperatives.

This investigation suggests there is a complex interaction between policy and law within national boundaries, and also within the region. This paper contributes to unraveling the interaction between law and policy, and seeks to stimulate debate as to how countries in the region can collaborate in strengthening the cooperative policy and legislative framework. The benefit of a comparative analysis is thus to develop a regional perspective, to identify common problems and to begin to look for common solutions.

1. Introduction

The potential of cooperatives to respond to the social and economic needs of communities, and to constitute a distinctive and dynamic sector of the economy, has been recognized internationally.¹ This paper concerns in particular the Recommendation on the Promotion of Cooperatives, 2002, (No. 193) adopted by the International Labour Organization (referred to as “Recommendation No. 193” and “the ILO” respectively). This instrument was framed in response to “the pressures, problems, challenges and opportunities for cooperatives” created by globalization (ILO, 2002). It also emphasizes the importance of establishing a supportive policy and legal framework for cooperative development.²

The objective of this paper is to conduct a comparative analysis of the policy and legal framework in the countries of East and Southern Africa in the light of the provisions of Recommendation 193. This region (referred to herein as “the region”) covers a vast area; each country in it has its own history, and been subject to diverse social and economic influences. Obviously one must be therefore careful in regard to generalizing about a policy and legal framework of the region. There are also limits as to what one can learn from a comparative investigation of this kind. These limits also concern the methodology adopted in this investigation, and which aspects of the policy and legal framework one focuses on, as well as the motivation for this focus.

In this regard it is important to emphasize that this paper does not seek to assess the *impact* of policy and legislation on cooperative development. Such an assessment would necessarily entail considering a constellation of other factors impacting on cooperative development, including the tradition within which cooperatives have evolved, both at a national level and within the region (Develtere, 2008). The legal tradition within a country would be an important component of such an assessment, as well as the institutional capacity of the government. That is because, when conducting such an impact assessment, the question one would ultimately have to address is how policy is applied in practice, and how legislation is interpreted and enforced.

The legal tradition of a country concerns how particular provisions of the legislation are interpreted in practice. This in turn concerns the relationship between cooperative law and the domestic legal system of which it is part. On the one hand, cooperative law has to be understood in relation to certain other statutory provisions, in the context of the national constitution and in the context of international law.³ On the other hand, it is important to have regard for the common law or the customary

¹ Articles 3(h) and 6 of ILO Recommendation 193, 2002. See also 2001 UN guidelines aimed at creating a supportive environment for the development of cooperatives.

² Preamble, ILO Recommendation 193, 2002.

³ As Henry (2005: 8) puts it, “cooperative law is constituted by all national, supranational and international normative, administrative and judicial acts and the praxes commonly accepted amongst cooperators as they bear on the formation, the structure, the operations and the dissolution of cooperatives.”

law context. Customary law, for example, may play an unacknowledged role in determining the participation of women and youth in cooperatives in an African context.⁴

Other legal provisions relevant to cooperative legislation and policy include the following:

- provisions relating to taxation;
- provisions relating to the registration of other corporate entities, such as companies, and provisions relating to the promotion of other business forms, such as small and medium enterprises;
- provisions relating to the registration of associations, and whether associations having an economic objective are prohibited;
- provisions regulating unfair competition and provisions relating to procurement.

The provisions of labour law are also of particular relevance to the workers' cooperative, which for present purposes can be regarded as a cooperative whose primary objective is to provide employment to its members. There are also other provisions that are customarily dealt with in terms of policy, of which procurement policy, policies toward small and medium enterprises (SME) and agricultural policy are examples with obvious relevance for cooperatives.

Given the complexities involved, it is fair to ask whether a comparative investigation serves any useful purpose. This paper poses two arguments as to why it does. The first is essentially a political argument. Cooperatives represent a response "from below" to social and economic problems that are common throughout the region. A comparative investigation will contribute to developing a common understanding as to how to strengthen that response, based on a dialogue between the different countries of the region regarding models of cooperation that have proved sustainable.

In fact there is already a degree of convergence between cooperative legislation in different countries of the region⁵. This is due to the fact that most of the countries of the region have similar legal traditions, as a result of a common colonial heritage.⁶ It is therefore relatively easy to commence such a dialogue, while not neglecting to engage with the experiences of countries from different legal traditions.⁷

⁴ See for example the discussion of the question of women's title to land in the Tanzanian policy discussed below. Tanzanian policy, pages 15 to 16.

⁵ The fact that countries in the region that do not share a common border such as Uganda, Malawi and Swaziland have adopted similar approaches in their cooperative laws on a number of issues, even though these laws were all adopted in the post-colonial era, is strongly suggestive of there being similar legal traditions. All these countries were former British colonies, and the court system and systems of legal training were modelled on the British system. Even countries such as South Africa, Namibia and Zimbabwe which adopted or have been influenced by Roman-Dutch common law have also adopted the British court system.

⁶ This is what has been described as the "Classical British-Indian Pattern of Cooperation." See Münckner and Shah (1993: pages 8 -10) for an account of its introduction in Kenya, Tanzania, Zimbabwe, Mauritius as well as an account of the model of cooperation introduced in French-speaking countries, including Madagascar (1993: pages 11-12).

⁷ Madagascar, Ethiopia, Eritrea and Mozambique are examples of such countries.

The second argument concerns the importance of regulation in promoting development. Notwithstanding the difficulty of determining the impact of the policy and legislative framework, the existence of such a framework is clearly a *sine qua non* of cooperative development, for precisely the same reasons as the development of the company as a legal entity would have been inconceivable without a policy and legal framework that recognized it as such. It is therefore obviously important to assess and re-assess the policy and legislative framework of cooperatives in the light of current circumstances. In the process of doing so, governments are making an important symbolic statement, just as the adoption of a law can be regarded as making a symbolic statement, which is in this instance, a statement of commitment to the cooperative form of enterprise.

Perhaps the clearest demonstration of the effect such a statement can have has been a proliferation of cooperatives since the adoption of a new policy and legislation in South Africa (Theron, 2008; Theron, 2009). This proliferation of cooperatives will almost certainly prove problematic, as (amongst other reasons) many of the cooperatives being established have not been sustainable (Theron, 2008; Theron, 2009). It nevertheless underscores how the adoption of policy and legislation can capture the public imagination, and create new opportunities.

It is therefore necessary to reject categorically an approach to regulation that had been much in vogue until the recent global economic crisis. Regulation is not an obstacle to economic development or employment creation, as has been consistently argued by advocates of the notion that markets somehow regulate themselves. On the contrary it is now generally accepted that it was a lack of regulation, specifically of financial institutions and financial markets, that was one of the principal causes of the global economic crisis, and the massive increase in unemployment it has precipitated.⁸

It is rather the absence of appropriate regulation that is a constraint to growth. Kenya realized this in the case of its savings and credit cooperatives (SACCOs), in respect of which it had this to say (at a juncture prior to the crisis breaking): “the greatest impediment to SACCO growth and development is the lack of an appropriate legal and regulatory framework...”⁹ What is and what is not an appropriate framework for SACCOs is of course part and parcel of a broader dialogue that needs to take place. Comparative studies are needed to begin such a dialogue.

The scheme of this paper is as follows: the section that follows, section two, concerns the international law context and the provisions of Recommendation

⁸ On 16 September 2009 the OECD Secretary General reported that unemployment in OECD countries had reached a post World War 2 record high, corresponding to an increase of more than fifteen million persons since October 2007. See www.oecd.org, accessed November 2009. The impact on developing countries, most would agree, is likely to be far more devastating. Birchall and Ketilson (2009: 16) quote the former US Federal Reserve Chairman acknowledging that it had made the error of supposing that banks and other financial institutions would “self-regulate” themselves.

⁹ The Government of Kenya’s Ministry of Cooperative Development and Marketing, Cooperative Development Policy, July 2007, pages 32-33.

No. 193, reflecting what has been termed the “new consensus” on cooperative development. The methodological approach adopted in this investigation has been informed by this analysis. This approach is outlined in Section three. In section four there is an overview of the existing policy and legislative framework in East and Southern Africa. Section five covers the policy provisions of a selection of countries in the region in more detail, focusing in particular on developments since Recommendation No. 193 was adopted in 2002. Section six comprises an evaluation of the provisions of the legislation. The paper concludes with section seven.

2. The international law context

The reason this paper concerns primarily Recommendation No. 193 is because it represents the most recent and the most authoritative statement of international law regarding cooperatives.¹⁰ Recommendation No. 193 “revises and replaces” Recommendation No. 127.¹¹ Two essential differences in the approach adopted in Recommendation No. 193 and its predecessor must be noted. Firstly, Recommendation No. 193 is broader in its application, insofar as it applies to all member states at all stages of development as opposed to developing countries only. Secondly, it is narrower in range of measures it seeks to address, and arguably also less prescriptive.

Recommendation No. 127, for example, has detailed proposals regarding the contents of cooperatives laws.¹² Many of its proposals in this and other respects have already been incorporated into national policies and laws, and accordingly it remains authoritative as a source of law. The significance of two other sources of international law must also be noted. The United Nations Guidelines aimed at creating a supportive environment for the development of cooperatives adopted in 2001 are not binding on governments, but nevertheless represent an authoritative source of international law. So too does the “Statement on the Cooperative Identity” adopted by the International Cooperative Alliance (ICA).¹³ The ICA is a non-governmental body representing the international cooperative movement. Its statements represent a source of international customary law.

What Recommendation No. 193 regards as an appropriate policy and legislative framework has in any event been shaped by the ICA’s “Statement on the Cooperative Identity.” This is a framework that is “consistent with the nature and function of

¹⁰ Although a recommendation is not binding on the member states in the same way a Convention is, if ratified, member states are obliged in terms of the constitution of the ILO to have regard to its recommendations and conventions, even if not ratified. The fact that the Recommendation was adopted by an overwhelming majority, with only two abstentions, lends it authority. See Henry (2005:5-6).

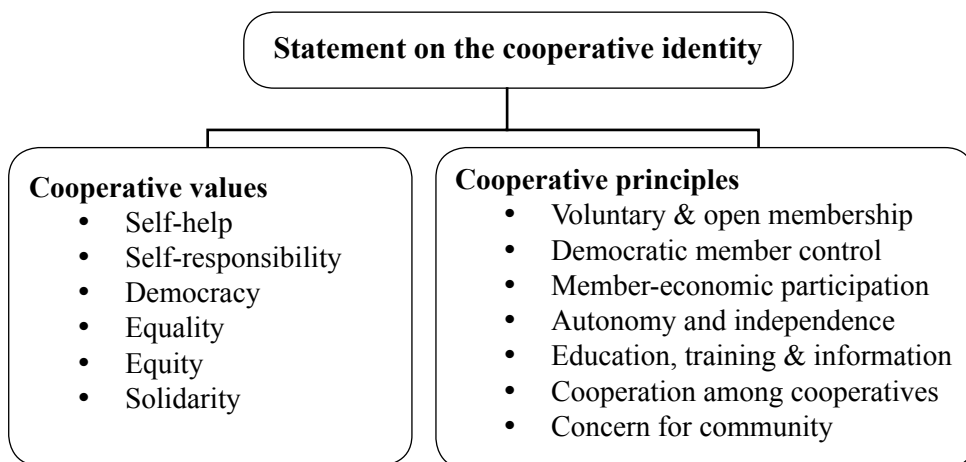
¹¹ Article 19, Recommendation 193. See the Cooperatives (Developing Countries) Recommendation 127 of 1966.

¹² Article 10 to 13, Recommendation 127, 1966.

¹³ International Cooperative Alliance, 1995. “Statement on the Cooperative Identity”, adopted in Manchester, UK. For an account of the background to the adoption of this statement, see MacPherson (1995:pages 5 –10)

cooperatives and guided by the cooperative values and principles...¹⁴ These are the values and principles adopted by the ICA (see Figure below). The seven principles are conveniently referred to by their titles. That is also the approach adopted in this paper.¹⁵

Figure 1: The values and principles of the cooperative identity



Source: ICA, 1995; ILO, 2002

The emphasis on cooperative values and principles reflects a reaction to an approach that saw cooperatives in developing and command economies regarded as accountable primarily to the state rather than their membership (Clarity, 2006: 1). In the African context, this approach also meant that cooperatives were often utilized as instruments of government policy, and cooperative autonomy was severely compromised (Münckner and Shah, 1993:24; Develtere, 2008: 13-15; Wanyama, 2009: 6).¹⁶

The emphasis in Recommendation No. 193 on cooperatives as being “autonomous and self-managed” enterprises, which is consistent with the fourth cooperative principle, is apt in this context.¹⁷ Given the history of cooperatives in Africa, cooperative autonomy must be regarded as representing the litmus test for evaluating the policy and legislative framework. Measures for the oversight of cooperative autonomy should be “no less favourable than those applicable to other forms of enterprise and social organization.”¹⁸ Any legislative measure calculated to erode cooperative autonomy goes too far.

¹⁴ Article 6, Recommendation 193. The Statement on the Cooperative Identity is annexed to Recommendation 193.

¹⁵ In this text a reference to “cooperative principles” or internationally accepted cooperative principles should, unless the context indicates otherwise, be understood to refer to these principles.

¹⁶ Regarding the “instrumentalization” of cooperatives, see more generally Henry (Henry, 2005: pages 12-14).

¹⁷ Article 6(e) Recommendation 193.

¹⁸ Article 6 (c) Recommendation 193.

However, the principle of autonomy cannot be considered in isolation from other cooperative principles. Surprisingly, apart from advocating the promotion of “best practice on corporate governance in cooperatives”, Recommendation No. 193 has nothing to say about the second member principle, of democratic member control.¹⁹ This is perhaps because it is self-evident that without democratic member control cooperatives cannot be autonomous or independent. By the same token, cooperatives cannot be genuinely autonomous or independent if they are not economically self-sufficient.

Governments’ are enjoined by Recommendation No. 193 to adopt policies “allowing the creation of appropriate reserves, part of which at least could be indivisible, and solidarity funds within cooperatives.”²⁰ This relates to an aspect of the third principle of cooperation, member economic participation. At the same time the institutional framework should allow for cooperatives to be registered in “as rapid, simple, affordable and efficient a manner as possible.”²¹ Policy and legislation should also aim to facilitate the membership of cooperatives in cooperative structures that respond to the needs of cooperative members.²²

Recommendation No. 193 proposes that governments introduce support measures for cooperatives that “meet specific social and policy outcomes” (2002:Para 7(2)), such as employment promotion or the development of activities benefiting disadvantaged groups or regions. Measures advocated include tax benefits, loans, grants, access to public works programmes and special procurement provisions. It also advocates special consideration should be given to increasing women’s participation in the cooperative movement at all levels, particularly at management and leadership levels.²³

Amongst a number of specific issues, Recommendation No. 193 proposes that policies address, education and training. Issues relating to education and training include:

- developing the “technical and vocational skills, entrepreneurial and managerial abilities...of members, workers and managers...”;
- “promoting education and training in cooperative principles and practices..” both in the national education and training systems and in the wider society;
- providing for “training and other forms of assistance to improve the level of productivity and competitiveness of cooperatives and the quality of goods they produce.”²⁴

¹⁹ Article 8(2)(c), Recommendation 193.

²⁰ Article 6(b) Recommendation 193.

²¹ Article 6(a) Recommendation 193.

²² Article 6(d) Recommendation 193.

²³ Articles 7(2) and (3) Recommendation 193.

²⁴ Article 8(1)(e),(f) and (h), Recommendation 193.

Measures to facilitate cooperatives' access to investment finance and credit are advocated,²⁵ as well as to facilitate access to markets. Policies should also seek to promote the dissemination of information on cooperatives, and seek to improve national statistics on cooperatives with a view to the formulation and implementation of development policies.²⁶

But Recommendation No. 193 is also a product of its time.²⁷ While an emphasis on cooperative autonomy is correct, for the reasons indicated, it is also expedient, in a context in which governments world-wide have been under intense pressure from the same advocates of the notion that markets regulate themselves to reduce expenditure and limit their involvement in the economy. A stock-taking regarding how global economic crisis has affected the conception of governments' role has yet to take place. However, over the past year we have seen governments worldwide intervene in domestic economies to an extent that would have been unthinkable previously. In this context, cooperative autonomy should not be used a fig leaf by governments to avoid doing more to promote cooperatives, in ways that do not constitute interference.

In the above regard, some of the support measures proposed by Recommendation No. 193 appear of questionable relevance in developing countries, where there are few if any resources that cooperatives can look to other than the state. All the countries of the region, including South Africa, are in this category and this must be borne in mind in assessing the policy and the legislative framework in the region. Some of these measures can also be attributed to the tripartite character of the ILO. For example, cooperatives are enjoined to join employer organizations and workers employed by cooperatives can join trade unions. However it is questionable, at least in the case of workers' cooperatives, whether it is appropriate to do so.²⁸

On the other hand one of the consequences of globalization is that even the most poorly resourced countries are compelled to look for niches in which they may have a competitive advantage. Sector specific policies are thus imperative. Cooperatives may have the potential to play a critical role in a sector, but may be disregarded in such policies.²⁹ By the same token cooperatives could be accommodated within existing social policies, such as care for HIV/AIDS patients, but it may be that their potential

²⁵ Article 12, Recommendation 193.

²⁶ Article 8(1) (i) to (l). Recommendation 193.

²⁷ The previous recommendation was Recommendation 127 of 1966. For a comparison of the provisions of this Recommendation with the current one see Smith. (Smith, 2004: pages 28-29)

²⁸ The applicability of labour legislation to workers' cooperatives has been a vexed issue. The members of a workers' cooperative are both owners and workers. Arguably they should not be regarded as employees. Labour legislation in general applies only to employees, although in certain jurisdictions certain provisions are extended to workers who are not employees.

²⁹ The marketing of cloves, the product with which Zanzibar was once associated, provides a case in point. This has been the exclusive function of a state corporation, the Zanzibar State Trading Corporation, with adverse consequences for the production as well as marketing of this crop. The government is now contemplating privatising this corporation. A cooperative of clove growers would be ideally suited to fulfil the marketing function. However it remains uncertain whether this possibility is even being contemplated.

is not being explored. It is therefore possible to do more to support cooperatives within available resources. In this context, it is important to note that Recommendation No. 193 requires that cooperatives “be treated ...on terms no less favourable than those accorded to other forms of enterprise and social organization.”³⁰

3. Methodological approach

The nature of this investigation necessitates comparing the different policies and laws of the region. However it is not possible or useful to compare all the substantive provisions of the different policies and laws. That is because it is not only what a policy or law states that needs to be considered, but how it deals with the issue in question, and in what context. This point can be illustrated with reference to the proposal that special consideration be given to increasing women’s participation in the cooperative movement at all levels, particularly at management and leadership levels and, more generally, the other proposals made in Recommendation No. 193.

“This policy is cognizant of the ILO Recommendation No. 193...” states one of the policies in the region.³¹ Such statements are not without value. At the same time they cannot be taken as meaning that the policy complies with Recommendation No. 193. By the same token a statement in another policy reiterating what Recommendation No. 193 says about increasing women’s participation in the cooperative movement can also not be taken at face value. The fact that this other statement appears alongside a set of proposals lifted almost verbatim from Recommendation No. 193 may detract from its worth.³²

Compare this last provision with yet another policy provision that analyzes the issue as follows:

Under the current environment women perform minor roles in cooperative affairs, which are largely dominated by men. In some agricultural marketing cooperatives, women are not registered members because they do not own land...³³

The measures the policy proposes to address the issue are fairly weak, namely:

- “government will advocate for cooperatives to allow women to be members...”;
- “women will also be encouraged to take up leadership positions...”³⁴

However the statement of the issue compensates for this.

³⁰ Article 7(2), Recommendation 193.

³¹ Ugandan policy, page 11.

³² South African policy, page 12.

³³ Tanzanian policy, page 15

³⁴ Tanzanian policy, pages 15 –16.

The task of evaluating and comparing becomes even more complex when one is dealing with issues that concern both policy and legislation, such as cooperative values and principles. Values are clearly not legally enforceable. Principles, while having a meaning that is determinate, allow a degree of flexibility in their application. It is therefore appropriate that the values and principles should be dealt within the policy. At the same time principles may give rise to legal provisions that are enforceable, and many laws contain such provisions. It is entirely conceivable and in fact occurs that a country affirms a principle in its policy and undermines it in its legislation.

Clearly, therefore, there is more art than science in an evaluation of policy and legislation. However in an endeavour to be transparent about the manner in which this evaluation has been conducted, the paper has adopted the following methodological approach. The paper has tried to focus on the *opportunities* for cooperative development that the policy and legislative framework provides, or fails to provide. The focus is then directed on criteria used for the purposes of evaluating the opportunities that policy and legislation provides, on the understanding that the kind of opportunities each creates are different. This focus is justified on the basis that cooperatives are autonomous enterprises that are capable of utilizing what opportunities exist to further their own interests.

Policy, as understood here, informs legislation. However, the particular significance of a formal policy is that it provides cooperatives (and civil society in general) with the opportunity to engage with government regarding a broad approach to cooperative development. The opportunity to engage is present both in the process of formulation of policy and in its implementation. To facilitate a process of engagement, a policy needs firstly to be transparent. Secondly, the substantive provisions must also be relevant given the particular needs and circumstances of the country concerned.

Relevance is difficult to evaluate without a detailed knowledge of the country concerned. The most pressing problem confronting women, for example, may not be that they are not registered as members of agricultural marketing cooperatives. However because the statement of the issue is specific, some assessment is possible.

At the same time it is also clear that a policy should not merely be a cooperative wish-list, with no relation to its potential to be realized in practice. A policy therefore needs to be credible. To be credible it needs to be focused, while also indicating (implicitly or explicitly) what practical steps need to be taken to implement it. These are sometimes expressed in terms of a separate statement of strategy. The criteria used to evaluate policies in this paper are thus relevance, credibility and transparency, as well as the extent to which the policy itself reflects and promotes a process of engagement. Such an assessment is based both on what is expressly dealt within the policy and what is omitted.

Legislation, in contrast to policy, creates rights and duties that are legally enforceable. The opportunities created continue to exist even if cooperatives have not utilized them. One is necessarily concerned, to a greater extent than with policy, with the substantive provisions. But there are of course substantive matters with which one would expect the legislation to deal, but are not necessarily relevant for this investigation, including, provisions dealing with insolvency, for example. Amidst the various provisions, including provisions in subsidiary legislation such as regulations published in terms of the enabling legislation, the question is which legislative provisions are relevant and which are not.

In considering which substantive provisions are relevant, both in policy and legislation, this paper has been guided by the provisions of the Recommendation No. 193 and the “new consensus” on cooperative development already mentioned. In general it has not been possible to take into consideration the provisions in subsidiary legislation. It is undoubtedly necessary for the relevant government minister (or in some instances the registrar, or his or her equivalent) to have the power to make rules or regulations. At the same time, it is desirable that legislation should be comprehensive and deal with all the important issues affecting cooperatives, so that there is transparency regarding the rights and duties that cooperatives have. Rules or regulations should preferably be reserved for practical issues relating to the implementation of the legislation.³⁵

4. An overview of the policy and legislative framework

As of 2009, Ethiopia, Mozambique, Mauritius and Comoros had no formal policy regarding cooperatives or cooperative development. Zanzibar and Uganda were both in the process of finalizing a policy, while Kenya was in the process of finalizing revised policies. Zambia introduced a draft policy in 2002, but it has yet to be adopted.

The following countries have pre-2002 policies: Malawi (1997), and Swaziland (2000). Countries that adopted policies in 2002 or subsequently, or are in the process of doing so, include Tanzania (2002), South Africa (2004), Madagascar (2006), Southern Sudan (2007), Rwanda (2007) Uganda (2009) and Lesotho (2009).

Almost all the countries in the region have a cooperative law. Comoros and Eritrea are exceptions, while in the case of Southern Sudan, there is a draft bill of 2008 that is now before its legislative assembly.³⁶ The cooperative laws currently in force, with the date of adoption indicated in brackets, are provided in Table 1.

³⁵ In the case of Kenya, for example, section 91 of the Act has been utilized by the minister to make rules regarding a wide range of matters, such as the institution of supervisory committees. See Act 12 of 1997.

³⁶ Government of Southern Sudan, Ministry of Legal Affairs and Constitutional Development, Legislative Explanatory Note and Cooperative Societies Bill of 2008.

Table 1: Cooperative laws in east and southern Africa

Country	Cooperative law
Botswana	Cooperative Societies Act (No 5 of 1989)
Ethiopia	Proclamation 147 of 1998 (amended in 2004)
Kenya	Cooperative Societies Act (No 12 of 1997) (amended in 2004) SACCO Societies Act (No 14 of 2008)
Lesotho	Cooperative Societies Act of 2000
Malawi	Cooperative Societies Act (No 36 of 1998)
Mauritius	Cooperatives Act (No 12 of 2005)
Mozambique	New legislation was adopted in 2009 (This replaces colonial-era legislation that was not repealed and post-independence legislation based on a Soviet-era model of cooperative.)
Namibia	Cooperatives Act (No 23 of 1996)
Rwanda	Law No 50 of 2007
South Africa	Cooperatives Act (No 14 of 2005) Cooperative Banks Act (No 40 of 2007)
Southern Sudan	Cooperative Societies Bill of 2008
Swaziland	Cooperative Societies Act (No 5 of 2003)
Tanzania	Cooperative Societies Act (No 20 of 2003)
Uganda	Cooperative Societies Statute (No 8 of 1991)
Zambia	Cooperative Societies Act (20 of 1998)
Zanzibar	Cooperative Societies Act (No 3 of 1986)
Zimbabwe	Cooperative Societies Act (No 6 of 1990) (amended in 2005)

Source: Author's own compilation

The above laws are of general application to all kinds of cooperatives. In addition there are two countries that have a special law consistent with the general law, that apply to certain cooperatives providing financial services.³⁷ These are South Africa and Kenya.

³⁷ See paragraph 11, UN Guidelines, note 1 above.

5. An evaluation of the policies of the region

Policy, as indicated, should inform legislation. Most policies considered in this study were adopted prior to or at the same time as the legislation, or amendments to the legislation. However in most instances the policies do not indicate, except in the broadest terms, what kind of legislation would best give effect to their recommendations.

In the case of Uganda, for example, the policy states that the law does not adequately address “some of the emerging issues within the cooperative movement”. However there is little attempt to explain the relevance of the issues listed in the policy³⁸. No new legislation has been adopted (as yet) in Uganda, although there is a strong case for doing so. In the case of Kenya, the legislative focus of the policy was not so much a revision of the legislation as a whole, rather it sought to provide specific provisions for regulation of SACCOs. New legislation for SACCOs has now been adopted, as noted.³⁹ It is proposed to address problems of good governance in the case of Kenya, through more rigorous enforcement of the existing legislation and strengthening existing governance institutions.⁴⁰ In the case of Eritrea, there is a policy, but as yet no legislation.

Sometimes it appears that the policy is not well integrated or at odds with the legislation. This may be because recommendations in the policy were not adopted, or because there was insufficient coordination between the processes through which policy and legislation were derived, or for other reasons.⁴¹ One example of this apparent lack of integration is where there are the different kinds of cooperatives identified in the legislation, and there is little or no mention of these kinds of cooperatives in the policy.⁴² This calls for an explanation. If, for example, certain kinds of cooperatives are not viable, the policy should say so.

As one would anticipate, the policies in the region vary in sophistication and complexity. The policies also adopt diverse approaches in the way they are formulated and in their approach to cooperative development. However, most policies contain some analysis of the situation in which cooperatives are operating in the country and an explanation as to why a formal policy is needed, as well as statements outlining objectives. In one instance the objectives are framed in terms of a vision and mission, followed by specific objectives. The vision is “improved

³⁸ The policy states, without elaborating, that the law is inadequate on such issues as “governance, education fund, dispute settlement, offences and penalties, ethics and code of conduct.” See Ugandan Policy, page 7.

³⁹ Uganda and Kenya respectively. In the case of Kenya the adoption of the Sacco Societies Act was an outcome of the new policy.

⁴⁰ Kenyan policy, pages 19 – 20. Existing governance institutions are the Cooperative Tribunal and a Cooperative Ethics Commission.

⁴¹ Swaziland’s policy advocates the establishment of a Cooperative Advisory Board, whereas the legislation does not provide for this structure.

⁴² For example Zimbabwe’s policy makes no reference to workers’ cooperatives whereas the legislation does. The different kinds of cooperative listed in South Africa’s policy do not altogether correspond with those listed in the Act. The Tanzanian legislation lists various kinds of cooperative, as discussed below, but these are not mentioned in the policy.

and sustainable cooperatives that are capable of fulfilling members' economic and social needs."⁴³

Most policies are premised on the definition of a cooperative as adopted in Recommendation No. 193, and all affirm cooperative principles and values. It sometimes appears, however, that this affirmation of cooperative values and principles is somewhat formulaic. Also policies do not always clearly outline how cooperative principles can best be fulfilled in practice.

The clearest example of this is in relation to cooperative autonomy. The importance of cooperative autonomy, given the history of cooperatives in Africa, has already been stressed. Most policies situate themselves in an historical or situational analysis of cooperative development, and therefore include some reference to past policies toward cooperatives, whether formal or not. However there is nothing like a frank acknowledgment that cooperative autonomy was not respected, or that members were not able to exercise democratic control over the cooperatives.⁴⁴ Without an acknowledgment of past mistakes, there is a likelihood they will be made again.

The question of cooperative autonomy relates to a proper understanding of what the government's role in relation to cooperative development is or should be. Most policies acknowledge a crisis precipitated by the adoption of trade liberalization policies in the 1990s. Kenya, for example, refers to a decline of the cooperative movement due to "the misconception of the government's role in a liberalized economic environment..." and the "withdrawal from direct supervision of cooperative societies."⁴⁵ Tanzania records a decline for essentially the same reason, resulting in a position where small producers were "left with almost no form of collective organization to operate at the grassroots level." This in turn had a domino effect, ultimately detrimentally affecting the economy as a whole.⁴⁶

There is no necessary contradiction between governments respecting cooperative autonomy and supporting cooperative development. In a globalized economy, the need for government support is arguably greater than ever before, particularly to advance women and marginalized groups. However it is also clear that government resources are limited and that support cannot be provided in ways that will create dependency. It is also necessary to avoid confusion concerning government's role that could lead to infringements of autonomy.

⁴³ Tanzanian policy, page 5.

⁴⁴ The Tanzanian policy, for example, refers to cooperatives being utilized "as instruments for implementing the policy of socialism and self-reliance" (page 1). There are also oblique references to the "problem of inherited structures and attitudes from the past" (page 3). However there is no explicit acknowledgment that utilizing cooperatives as instruments of government policy undermined cooperative autonomy. In the case of Uganda, there is reference to cooperatives being "interfered with, and alienated from membership"(page 1). However it is not clear to what extent this situation, "beginning with the 1970s", persists.

⁴⁵ Kenyan policy, page 7.

⁴⁶ Tanzanian policy, pages 3-4.

One way to address the aforementioned problem is to separate the role of government as regulator (in the form of the office of the registrar, or his equivalent) and government's developmental role, including the provision of support. Seeking to delegate the support role to the higher structures of the cooperative movement and other institutions, both private and public, represents another response to this problem. However, in many countries the cooperative movement lacks the capacity to fulfill this role. It is necessary to acknowledge this state of affairs, so as to devise appropriate measures that can enhance the capacity of the movement, without interfering in its operation.

Apart from educational institutions, there is also a dearth of other institutions capable of providing support to the cooperative movement. For example, the South African policy advocates making support measures for SMEs available to cooperatives, as well as the participation of cooperatives in structures that represent small business.⁴⁷ In the case of Zimbabwe, it appears that cooperative development is seen as part and parcel of SME development.⁴⁸

Clearly cooperatives should have access to the same level of support that the government provides to SMEs, and this is acknowledged in policies of the region. At the same time the term SME is imprecise. In an African context it may include a broad swathe of the private sector, including established businesses that arguably are not deserving of targeted support. It is also problematic if cooperatives have to rely on institutions designed to support SMEs, without access to personnel with expertise in cooperatives. SME support institutions as a general rule do not have such personnel, and are not necessarily proponents of the benefits of association.

The benefits of association are clear enough in the case of the small producers in the agricultural sector. As the Tanzanian policy puts it, small producers need "economically strong organizations at the grassroots...to build up resource capacity to efficiently conduct their business activities and withstand competition from other players in the market."⁴⁹ Agriculture is of course the most significant economic sector in the region, with the exception of South Africa. Given the established track-record of cooperatives in reducing input costs and marketing agricultural products, coupled with the increased difficulty of accessing markets in a globalized world economy, one would expect a detailed consideration of cooperatives in this sector.⁵⁰

There is a detailed consideration of cooperatives operating in a variety of sub-sectors of agriculture in the case of Kenya. But what is surprising about the policies of other countries in the region is a lack of attention to the agricultural sector.⁵¹

⁴⁷ South African policy, page 13.

⁴⁸ Zimbabwean policy, page 7.

⁴⁹ Tanzanian policy, page 6.

⁵⁰ For present purposes agriculture is regarded as including livestock and fisheries, but excluding agro-processing, which forms part of the secondary sector.

⁵¹ The exception here is Kenya, which has detailed provisions relating to cooperatives in various sub-sectors of agriculture.

In the case of South Africa this can be ascribed to the historical dominance of what are characterized as “established cooperatives”, which were predominantly white-owned in the commercial sector.⁵² However there are also emergent small farmers that could benefit from cooperatives. These are not mentioned. The failure to address the potential of cooperatives in this sector seems even more curious in the case of an agricultural country like Rwanda.⁵³

This failure may be due to the fact that the most prevalent form of cooperative in Rwanda is the savings and credit cooperative (SACCO), so much so that it is suggested this reflects a “skewed development of cooperatives”.⁵⁴ It may also have to do with the fact that in Rwanda, as in South Africa and Uganda, the government ministry where cooperatives are located is not focused on agriculture, but has more to do with industry and commerce. In Zimbabwe cooperatives fall under the ministry concerned with youth development and employment creation, while in Kenya cooperatives have their own ministry. The location of the ministry clearly has important policy implications. However, it is generally not a question that is raised in policy documents.

Most policies credit SACCOs with promoting a culture of savings and with facilitating access to financial services for “unbanked sections” of the population, especially women and people in rural areas. As SACCOs tend to have a large membership relative to most other kinds of cooperatives, they probably represent the largest proportion of cooperative members in the region. However in this and other respects there is dearth of authoritative statistical data on cooperatives. This is an issue that is not addressed in the policies of the region.⁵⁵

For example, in Swaziland agriculture and multipurpose cooperatives account for the largest proportion of cooperatives (approximately 71 per cent), but SACCOs have nearly four times the number of members.⁵⁶ The policy of Uganda refers to a drive to establish at least one SACCO for each sub-county.⁵⁷ In Tanzania, where SACCOs have been mainly urban based, it is proposed that primary agriculture cooperatives be encouraged to establish SACCOs in their areas of operation.⁵⁸

In Kenya, SACCOs already have an estimated 15 per cent of the financial services market, and there is still potential for SACCOs to expand, in response to a recent trend by commercial banks to centralize and automate their operations.⁵⁹ As already noted, the lack of an appropriate legal and regulatory framework was identified as the primary obstacle to further growth. The introduction of such a framework is envisaged as being not only a safeguard of members’ savings, but as an opportunity for expanding membership, increasing efficiencies and improving products and services.⁶⁰

⁵² South African policy, page 6.

⁵³ Rwandan policy, 2007.

⁵⁴ Rwandan policy, page 16.

⁵⁵ See note 21 above.

⁵⁶ Swaziland policy, page 3.

⁵⁷ Ugandan policy, page 5.

⁵⁸ Tanzanian policy, page 32.

⁵⁹ Kenyan policy, pages 32-33.

⁶⁰ See note 27 above, page 24.

Most policies assign cooperatives an important role in furthering the objectives of national development and poverty alleviation policies, because of their capacity to incorporate women and vulnerable section of the population, among other reasons. However, while it was not possible to consider the provisions of such national development and poverty alleviation policies in this paper, the indications are that little regard is given to cooperative in such policies. In most countries it appears that cooperatives have a low profile in government.

In some countries there is also a general recognition of the need to broaden the scope of activities undertaken by cooperatives. Other forms of cooperative mooted include transport, small-scale manufacture and handicraft, consumer and marketing and supply cooperatives. In one instance the formation of multi-purpose cooperatives has been advocated as a strategy.⁶¹

However in the absence of a well-conceived strategy, it is unlikely that attempts to broaden the scope of activities undertaken by cooperatives will succeed. In this regard it is notable that, except in the case of South Africa, policies do not differentiate between cooperatives providing services (referred to as user-owned cooperatives) and workers' cooperatives. These two categories of cooperative fulfill different objectives, and the regulation of workers' cooperatives raises particular issues. It is therefore problematic to advocate forming cooperatives in sectors such as mining or construction without specifying whether these will be cooperatives providing services or workers' cooperatives.⁶²

This in turn relates to a tendency to underestimate the importance of feasibility studies being undertaken, or business plans being developed, prior to the registration of cooperatives. Whether or not this is a requirement for registration (a matter discussed in the next section), it is obviously prudent that cooperatives are assisted in developing such plans. This, and the system of provisional registration some countries have, is a matter largely ignored in policies.

Notwithstanding a definition of a cooperative as meeting common economic, social and cultural needs, the tendency is to focus only on the economic objectives of cooperation. This is despite the fact a number of policies refer to housing cooperatives, whose focus is on social as well as economic needs. It is also only in Kenya that the policy concerning housing cooperatives is elaborated in any detail.⁶³ One policy refers to a "non profit social cooperative", but does not attempt to elaborate on this conception or relate it to pressing social needs such as care for HIV/AIDS patients that such a cooperative could address.⁶⁴

⁶¹ Eritrean policy, page 14.

⁶² The policy for Zimbabwe, for example, lists eleven sectors in which cooperatives feature, including the aforementioned sectors, with no indication as to how they operate. See Zimbabwean policy, pages 12 to 13.

⁶³ Kenyan policy, pages 39-40. The policy recommendations concern issues relating to access to finance and the revision of cooperative by-laws, amongst others. However the absence of legislative provisions for housing cooperatives is not addressed.

⁶⁴ South African policy, page 7. This term is problematic, in that it implies there are "for profit" cooperatives.

The issue of education and training is pertinently raised in Recommendation No. 193, and there is a need for education and training of both existing cooperatives and newly established cooperatives. It would also be incorrect to assume that existing cooperatives do not need education in cooperative principles. Due to the top-down manner in which cooperatives were sometimes introduced, members may have little awareness of these principles (Wanyama, 2009: 6). However education and training, as with other support measures, raises the question of resources. That may be why it is dealt with in a cursory manner in a number of policies.⁶⁵

The policy situation in Tanzania is described as follows:

Since the 1990s Government support to cooperative education has been declining due to limited resources. On the other hand cooperatives have been unable to fill the gap left by the Government withdrawal. As a result cooperative education to cooperative leaders, cooperative members as well as the general public has diminished.⁶⁶

The same situation prevails in many other countries. However, Botswana, Ethiopia, Kenya, Lesotho, Mauritius, Swaziland, Tanzania and Uganda have established institutions that are responsible for education and training. In other countries there are no such institutions. In the case of South Africa, the Government takes the lead in regard to developing materials for education and training, but it is not clear which actor will provide the service.⁶⁷ It is proposed to transfer education and training and other support services to “specialized cooperative institutions” in the case of Zimbabwe. However in the absence of any detail as to how such institutions will be established and funded, such a proposal is not credible.

Amongst the measures proposed in Recommendation No. 193 that relate to facilitating the access of cooperatives to investment finance and credit, are measures “to allow loans and other financial facilities to be offered” and measures to “facilitate an autonomous system of finance for cooperatives” (2002: para 12 (a) and (c)). In the case of Kenya, Ethiopia, and to a lesser extent Tanzania, cooperative financing institutions or cooperative banks already exist. Here policies advocate expanding the scope of existing cooperative financial services or enhancing existing institutions.⁶⁸ The more common scenario is where no such specialized institutions exist. Some propose the establishment of a specialized facility.⁶⁹ However this may be easier said than done, and in the case of Lesotho it is a question of putting into operation a provision for such a facility that already exists, but has hitherto not been implemented.⁷⁰

⁶⁵ The policy of Rwanda deals with it cursorily and Eritrea only mentions the issue of technical training.

⁶⁶ Tanzanian policy, page 25.

⁶⁷ South African policy, page 15. The failure to address the issue of who will provide the education and training is all the more striking because of the existence of Sectoral Education and Training Authorities, established in terms of legislation, which could be entrusted with the function of coordinating training.

⁶⁸ Kenyan policy, pages 33 to 35; Tanzanian policy, pages 31 to 35.

⁶⁹ Rwanda, for example, at page 20.

⁷⁰ Lesotho policy, pages 20. The facility in question is the Central Cooperative Fund (CCF).

Whether such specialized institutions exist or not, cooperatives should also be able to access credit from conventional sources. In this regard there are policies that affirm the right of cooperatives to the same financial support as SMEs and other enterprises, although perhaps not sufficiently.⁷¹

The taxation of cooperatives appears to be a topic that is neglected in policies. The exceptions are Rwanda,⁷² which moots the granting of tax exemptions “from time to time”, and Kenya, which argues for maintaining a distinction between members’ income and the income of a cooperative in order to avoid a situation of double taxation.⁷³ This is clearly an aspect of policy that requires further consideration.⁷⁴

6. An evaluation of the legislative framework in the region

The difficulty with incorporating cooperative values and principles into the legislation is, as already indicated, that values are not legally enforceable and that there is a degree of flexibility in how principles are applied in practice. Some of the older laws do not refer to cooperative principles, either explicitly or at all, whether for this reason, or because there was insufficient acknowledgment of their significance at the time the legislation was adopted.⁷⁵

Amongst the more recent cooperative laws adopted, three approaches can be discerned. The first is for the legislation itself to define cooperative principles.⁷⁶ The problem with this approach is that these are principles developed by the cooperative movement itself, at the international level, and from time to time the principles will be amended. From a jurisprudential perspective, to seek to appropriate them in this manner gives rise to a potential conflict between international and domestic legislation.

The second approach is to entrust the definition of cooperative principles to the individual cooperative, seeking approval of its bylaws or constitution.⁷⁷ The problem with this approach is, firstly, that it entrusts a complex legal task to the members, and secondly it leaves it to the registrar or other functionary entrusted with registering the cooperative to determine whether there has been compliance. The implications of this approach will be discussed in more detail when considering legislative approaches to registration.

⁷¹ For example the South African policy, page 19.

⁷² Rwandan policy, page 15. It is unclear, however, what form of exemption is envisaged.

⁷³ Kenyan policy, pages 35-36.

⁷⁴ In the case of Uganda, section 41 of the Statute (No 8 of 1991) gives the minister responsible for finance the power “by statutory order” to reduce or remit the duty or tax that may be payable by a cooperative in respect of its accumulated funds or by members in respect of dividends received. However this provision is not discussed in the policy.

⁷⁵ For example the Ugandan and Namibian legislation.

⁷⁶ The Ethiopian legislation, for example, defines the “guiding principles of cooperative societies, which are in fact the internationally accepted cooperative principles. See section 5, Proclamation 147 of 1998. In Mauritius cooperative principles are defined to “include”. See section 2, Act 12 of 2005.

⁷⁷ In the case of Kenya, for example, it is requirement of a society seeking registration that it incorporate “the following cooperative principles.” There follows a listing of the principles, but not their full description. See section 4, Act 12 of 1997.

A third approach is to legislate particular provisions relevant to cooperative principles.⁷⁸ This approach is also the approach of those laws that do not refer to cooperative principles, but contain provisions that, to some extent, pertain to cooperative principles. For example, the principle of democratic member control is addressed, insofar as legislation acknowledges the general members meeting as the highest decision-making body of a cooperative and prescribes rules for the conduct of these meetings.⁷⁹ It is partly therefore a question of the weight that is given to cooperative principles in legislation that is at issue.

But whether or not the legislation contains an explicit reference to cooperative principles affects how it is interpreted, by cooperative tribunals and courts, and also how it is applied in practice. For example, Recommendation No. 193 is concerned that policy should counter the establishment of “pseudo cooperatives”, specifically with reference to workers’ cooperatives.⁸⁰ A determination as to whether a workers’ cooperative is operating according to cooperative principles provides a more suitable basis for differentiating between what is “pseudo” and bona fide.

It should also be noted that it is possible that two or more of the approaches outlined above may be combined. Tanzania arguably provides such an example.⁸¹

6.1 Cooperative autonomy and government-cooperative relations

The Zimbabwean legislation illustrates the first of the three approaches to cooperative principles that were outlined above. It has a separate section headed ‘cooperative principles’ that requires cooperatives to operate in accordance with the principles identified. However these do not purport to be the internationally accepted principles, even though they are derived from them. There is also a notable omission from the list: the principle of cooperative autonomy. The significance of this omission is evident from the section that follows, dealing with the objects of societies. These include “promoting the economic and social interests of its members **in accordance with Government policy**” (Author’s emphasis).⁸² To the extent that cooperatives are required to define their objectives with reference to government policy they can obviously not be regarded as autonomous.

⁷⁸ In the case of South Africa, for example, a cooperative is regarded as complying with cooperative principles if it meets six criteria, which are derived from the internationally accepted cooperative principles.

⁷⁹ Most of the older laws also provide that members of primary cooperatives may have only one vote in such meetings, as discussed below.

⁸⁰ Article 8(1)(b), Recommendation 193.

⁸¹ The Tanzanian legislation states that a cooperative which has its objects in the promotion of the economic and social interests of its members and “which conforms to the cooperative principles” may be registered as such. It goes on to define cooperative principles in accordance with current internationally accepted definition. This may be regarded as a combination of approaches one and two. See sections 4(1) and (2), Act 20 Of 2003.

⁸² Sections 7 and 8, Act 6 of 1990.

This kind of provision can be regarded as a relic of the era when cooperatives were seen as instruments of government policy. At the same the existence of such a provision does not mean that in fact cooperatives have no autonomy or independence in the country concerned. Autonomy is never absolute, and the existence of cooperative autonomy cannot be gleaned from a single provision, but from the approach adopted by legislation in its totality.

The principle of democratic member control and the principle of voluntary and open membership are closely related to cooperative autonomy. The fact that cooperatives are entities that are controlled by their members in a democratic manner, and that their membership is voluntary and open, justifies their autonomy. The state would have a duty to intervene where, for example, cooperatives operated along racial lines, in breach of the principle of voluntary and open membership.⁸³ Arguably this should be in terms of a legal process before the ordinary courts, in terms of a claim of unfair discrimination.⁸⁴

Similarly, the state has a duty to intervene when cooperatives do not operate democratically. Such intervention should be calculated to restore democratic standards. It could be argued that the powers registrars have in certain jurisdictions to convene a general members meeting are consistent with this end.⁸⁵ On the other hand the exercise of such powers reinforces a paternalistic relationship to the state, and weakens cooperative autonomy.⁸⁶ It is also questionable whether government has the capacity to exercise such powers. In other jurisdictions government's powers to intervene in the affairs of cooperatives appear more limited.⁸⁷

However in the final analysis cooperative autonomy probably has as much to do with the existence of a culture of political tolerance, and a legal tradition in which it is possible to hold government to account for violations of cooperative autonomy, as the provisions of the legislation.

⁸³ In 1965 the Revolutionary Government of Zanzibar abolished cooperatives, ostensibly for this reason.

⁸⁴ In South Africa, for example, the Promotion of Equality and Prevention of Unfair Discrimination Act (No 4 of 2000) provides that every High Court, and designated Magistrates Courts (lower courts) may act as an equality court capable of determining a claim of unfair discrimination.

⁸⁵ In the case of Tanzania, for example, the part of the Act that concerns the "management of registered societies" contains a provision that empowers the Registrar "or any other person authorized by him" to summon a special general meeting "in such a manner and at such time and place as he may direct." In the same part, in a section headed powers of the Registrar, he is empowered to remove the Board of Directors and appoint a caretaker Board if he (sic) is "satisfied that it is in the interests of the members and the public." See sections 61(4) and 67, Act 20 of 2003.

⁸⁶ In general, the registrar in Tanzania has quite extensive powers. A person aggrieved with a decision of a General Meeting may appeal in writing to the Registrar, and if not satisfied with the Registrar's decision, to the Minister. Section 61(8), Act 20 of 2003.

⁸⁷ In Rwanda, for example, there may be an enquiry whose findings must be reported to the General Assembly of the cooperative concerned. The government authority conducting the investigation may also make an award of costs arising out of the investigation, including against the officers or former officers of the cooperative concerned. See articles 89 and 91, Law 50 of 2007.

6.2 *The principle of democratic member control and issues of good governance*

There are various ways in which one can gauge how adequately cooperative legislation deals with the principle of democratic member control. First there is the question as to whether important provisions underpinning democratic member control, such as provisions regulating the conduct of general meeting, are included. Second there is the question of the prominence accorded to these provisions in the legislation.

The older laws are often quite unsatisfactory in this regard. In the case of Zambia, all provisions relating to the holding of general meetings and special general meetings are left entirely to the cooperative to determine in its by-laws.⁸⁸ There is not even a clear statement that the general meeting is the highest decision-making structure in the cooperative.

In Uganda there are provisions regulating the conduct of general meetings. However, these provisions are contained in the regulations made by the minister responsible for cooperatives, rather than in the Act itself.⁸⁹ Putting these provisions in regulations makes a statement: provisions regarding the holding of general meetings are of lesser importance than the provisions included in the main Act. It is also significant that in this instance the provisions included in the main Act begin with the section dealing with the registrar's office.⁹⁰

The priority accorded provisions concerning the office of the registrar or its equivalent is consistent with an approach in which cooperatives are accountable to the state rather than their members.⁹¹ But there is another and arguably no less potent threat to democratic member control, and that is where cooperatives are in effect controlled by their management or board of directors, and accountability is formal rather than real. In some laws, the proceedings of the board (or management committee) are dealt with in considerable detail. This is in contrast to the lack of detail concerning general meetings.⁹²

More recent laws, however, clearly affirm the importance of general meetings. For example, "the general meeting shall be the supreme authority of the society", begins that part of the law of Mauritius that deals with the "organization of societies."⁹³

⁸⁸ Section 29(1), Act 20 of 1998.

⁸⁹ Section 17 to 23 Cooperative Societies Regulations, 1992. See also the discussion of subsidiary legislation in section 3 above.

⁹⁰ Section 2, Cooperative Societies Statute (No 8 of 1991), note 14 above.

⁹¹ In the case of Malawi a similar approach prevails. Section 3 of the Act concerns the office of the Registrar. The provisions regarding the holding of general meetings are dealt with in the regulations.

⁹² Contrast, for example, the lack of detail regarding general meetings in section 47 of Swaziland's Act with the far more extensive provisions concerning the management committee (sections 48 to 60). A similar criticism could be levelled at the Tanzanian Act, which also deals with general meeting in a single section (section 61) and in rather more detail with the Board of Directors (section 62 to 66).

⁹³ Section 39, Act 12 of 2005. Despite the criticisms of the approach in the case of Swaziland and Tanzania mentioned above, both contain similar statements.

This law provides for a first general meeting, annual general meetings, special general meeting, as well as questions concerning the procedure at meetings, the quorum and voting, including whether voting by proxy is permitted. A similar approach is adopted in the South African legislation, which deals with the office of the registrar in the eleventh of its thirteen chapters.⁹⁴

The quorum for general meetings is difficult to determine, because there are different issues affecting membership participation in different kind of cooperatives.⁹⁵ Nevertheless issues such as quorums and voting by proxy can have a crucial bearing on whether general meetings are able to function effectively. They also concern the issue of good governance, that in the case of other corporate entities such as companies are regulated. There can scarcely be a credible commitment to good governance if there is no standard as to how such meetings are conducted.

However certain laws may be too prescriptive. In Rwanda it is specified not only that General Meetings must be held twice a year, but the months in which they are to be held are also identified.⁹⁶ It is questionable whether it is possible to maintain this degree of uniformity, even in the context of a small country that has a centralized administration system.

The single issue concerning general meetings that has a direct bearing on the application of the principle of democratic member control is that in a primary cooperative each member should have only one vote. Almost all the laws of the region affirm this principle, either as a specific requirement of a cooperative applying for registration or by way of affirming cooperative principles. But Zambia admits an exception, by allowing a cooperative to provide in its by-laws for:

plural voting rights for...members who contribute above average to the development of the cooperative society, which may be determined in accordance with the patronage bonus such member...receives.⁹⁷

The vagueness of this provision completely undermines the purport of the rule, and is a recipe for abuse. So too are vague provisions in certain laws that allow a “meeting of delegates” to take the place of a general meeting.⁹⁸

Provisions regarding general meetings are of course not the only way in which the legislation can help to maintain the principle of democratic member control, and there are a number of provisions aimed at strengthening the position of the members vis a vis the management and board or management committee.

⁹⁴ General meetings are dealt with in chapter 4 and the management of cooperatives in Chapter 5. Act 14 of 2005.

⁹⁵ In Zimbabwe, for example, the quorum is set at 20 or one quarter the number of members (in the case of a primary society). See section 50, Act 6 of 1990. In Mauritius there is a more complex formula, where the quorum depends on the number of members. See section 44, Act 12 of 2005.

⁹⁶ Article 52, Law 50 of 2007.

⁹⁷ Section 29 (3), Act 20 of 1998.

⁹⁸ See for example section 61(6) of the Tanzanian Act which allows a society, “owing to its size and scope”, to make provision for a meeting of delegates in place of a general meeting.

These include limiting membership of the board to members⁹⁹ and the institution of a supervisory committee elected by members to monitor the board or management committee. Arguably a supervisory committee should only be necessary, where there is some distance between membership and the management or leadership in question. However in smaller countries, such as Swaziland and Rwanda, this is compulsory.¹⁰⁰ In Mauritius, instead of a committee, the Annual General Meeting (AGM) is required to appoint an “internal controller”, who reports on a quarterly basis to the board (and the registrar) and annually to the AGM.¹⁰¹

6.3 *Member economic participation and the question of reserves and solidarity funds*

The principle of member economic participation can be regarded as providing the material basis on which members exercise democratic control. It requires that members contribute equitably to the capital of the cooperative. It also provides that members receive limited compensation, if any, on capital subscribed as a condition of membership. The purposes for which surpluses generated by cooperatives can be utilized are specified, including through the establishment of reserve funds. As indicated above, it is the creation of reserve funds, a part of which is indivisible, and “solidarity funds within cooperatives” that are the specific focus of Recommendation No. 193.¹⁰²

Apart from the various approaches to cooperative principles adopted in the different laws, the contribution that members may make to the capital of the cooperative is generally specified, either as one of the duties that a member has toward the cooperative,¹⁰³ or in those sections of the law that deal with membership shares and the funds of cooperatives,¹⁰⁴ or both. So too there are generally provisions limiting the members return on capital, or a requirement that such limitations be specified in the constitution or by-laws.

As regards the creation of reserve funds, South Africa requires a cooperative to retain a portion of the reserve generated in the indivisible reserve fund in accordance with a requirement to comply with cooperative principles.¹⁰⁵ The more general approach is to deal with the question of a reserve fund in a separate part of the legislation, relating to finance. It is not always clearly stated that this reserve fund is indivisible. This means, as defined in the Kenyan law, “no members shall be entitled to claim a specific share of it.”¹⁰⁶

⁹⁹ See for example Kenya. Section 28(4), Act 12 of 1997.

¹⁰⁰ Section 62, Act 5 of 2003 and sections 70 to 73, Law No 50 of 2007.

¹⁰¹ Section 55 and 56, Act 12 of 2005.

¹⁰² Article 6(b), Recommendation 193.

¹⁰³ In the case of Ethiopia, for example (section 14.2(c), Proclamation 147 of 1998) and Kenya (section 17, Act 12 of 1997).

¹⁰⁴ For example the Zimbabwean Act (section 81) describes the funds a member contributes to a society as comprising members’ entrance fees, shares subscribed for and paid up by members and any voluntary savings deposited with the society.

¹⁰⁵ Section 3(1)(e), Act 14 of 2005.

¹⁰⁶ Section 47(4), Act

The point of specifying a minimum amount to be retained in the reserve fund is not so that funds should sit idle, but to ensure that at least a portion of the surplus is utilized for purposes consistent with the longer-term sustainability of the cooperative. In the case of Kenya this amount may either be prescribed in rules made under the Act or specified in the by-laws of the cooperative. Tanzania and Malawi have adopted a similar approach.¹⁰⁷ But most countries specify an amount or, in the case of other compulsory contributions, amounts. It is not entirely clear what Recommendation No. 193 envisages by “solidarity funds”, but it would seem appropriate to regard funds retained for purposes of education and training or social services as such. In the case of Malawi, cooperatives must contribute one per cent of their “net profit” to a national cooperative education fund as well as any contribution they make to reserves.¹⁰⁸ To determine the financial impact on the cooperative one has obviously to consider the total contribution.

In the case of South Africa, the amount retained is at least five per cent of surplus. In the case of Namibia, there is a more complex formula, although it appears it is also only five per cent that is retained in the reserve fund.¹⁰⁹ In the case of Mauritius, it is ten per cent¹¹⁰ and in the case of Zimbabwe and Rwanda twenty per cent¹¹¹. In the case of Ethiopia, thirty per cent must be retained either for a reserve fund, or “for the expansion of work” or for social services. However, this amount is not divisible.¹¹² In the case of Swaziland, twenty five per cent must be retained in an indivisible reserve fund and a further ten per cent are to be allocated to an education and training fund.¹¹³

It is debatable whether cooperative principles are better served by prescribing a low minimum, or by making it more onerous. Arguably making the minimum more onerous will encourage creative accounting, to ensure that any surplus declared is as low as possible. In this regard it is perhaps significant that Kenya has proposed halving the percentage transferred to its “statutory reserve fund”, in order to make more funds available for the operations of cooperatives (even though the legislation has as yet not been amended).¹¹⁴

6.4 *Institutional framework for registering cooperatives*

The objective of establishing an institutional framework that is capable of registering cooperatives as efficiently and expeditiously as possible is probably not

¹⁰⁷ In Tanzania the amount transferred is determined by the cooperative in terms of its by-laws, except in the case of cooperatives with unlimited liability. See section 77, Act 20 of 2003.

¹⁰⁸ Sections 47 to 49, Act 36 of 1998.

¹⁰⁹ It is not clear whether this fund is indivisible. Sections 58 and 59, Act 23 of 1996.

¹¹⁰ Section 64, Act 12 of 2002.

¹¹¹ Article 83, Law 50 of 2007.

¹¹² Section 33, Proclamation 147 of 1998.

¹¹³ Sections 93 and 95, Act 5 of 2003.

¹¹⁴ Policy, page 35.

first and foremost a function of the legislation.¹¹⁵ Nevertheless in some countries the legislation sets time limits: within three months, in the case of Swaziland¹¹⁶; within thirty days in the case of Zambia¹¹⁷; within fourteen days in the case of Mauritius.¹¹⁸ These time limits of course relate to the processing of a complete application. Even so, it is necessary to be cautious about being too zealous in expediting the process.

Registering a cooperative that is not viable does no service to the cooperative concerned, or the cooperative movement. Rather it contributes to poor public perceptions of cooperatives. Some laws require a cooperative being registered to submit a feasibility study or business plan.¹¹⁹ If such a requirement is more than a formality, plans will need to be evaluated. It is difficult to see how a proper evaluation is possible if there is a statutory period of time for doing so that is as strict as this.

The same problem applies to the approval of a constitution or by-laws. In keeping with the new consensus on cooperatives and a greater emphasis on cooperative autonomy, the provisions of the constitution or by-laws have become increasingly important. Different kinds of cooperatives require different provisions, and it is not always possible to apply a standard template or model constitution. The South African legislation provides a case in point. There are certain provisions that a cooperative must include in its constitution, and there are certain provisions that are optional. However certain kinds of cooperatives, such as housing cooperatives, financial service cooperatives and/or workers' cooperatives have to comply with additional requirements in their constitutions, in order to deal with particular problems that may arise with the different kinds of cooperative.¹²⁰

The drafting of an appropriate constitution has thus become an increasingly complex and burdensome task. The danger of expediting the process is that a cooperative ends up with a constitution or by-laws that do not correspond with its objectives or adequately protect members' interests. There is, in other words, a need to strike a balance between an expeditious process and one that has regard to longer-term sustainability. This relates to a balance between the developmental or support role of government and its role as a regulator. This in turn relates to the need to separate these two roles, and the degree of discretion that the registrar has to register a cooperative or not.

¹¹⁵ Article 6(a)

¹¹⁶ Section 9, Act 5 of 2003. The section also provides that a cooperative will be deemed to be registered if it does not receive a response within the period prescribed.

¹¹⁷ Section 10, Act 20 of 1998.

¹¹⁸ Articles 14 to 16, Act 12 of 2005.

¹¹⁹ Mauritius, for example, requires "a project write-up on the activities of the proposed society." See section 14(1)(b) of Act 12 of 2005. Zimbabwe requires "a feasibility study, viability assessment and world programme..." See section 14(3)(c) of Act 6 of 1990. It is not altogether clear what a "world programme" means, but it suggests that the registrar would be able to reject an application by a cooperative that did not conform with a particular political programme or view.

¹²⁰ See sections 14 and 15 and schedule 1, Act 14 of 2005.

In some systems the registrar has considerable discretion. In Uganda, for example, the registrar may register a cooperative with or without limited liability if in his or her opinion the applicant is “capable of promoting” the social and economic interests of members.¹²¹ The registrar may also register a society on probation. Other laws similarly provide for provisional registration. In South Africa, the registrar must register a cooperative if its name and constitution complies with the legislation, and the application is made in the prescribed manner.¹²²

It is not clear whether the department responsible for cooperatives in South Africa is legally obliged to provide support to cooperatives in drafting a constitution that complies with the law. Arguably it is, as part of its developmental role. In this regard it is also worth noting that the department is obliged to provide support to certain cooperatives, namely those consisting of “black persons, women, youth, disabled persons or persons in the rural areas and [which] promote[s] equity and greater participation by [their] members.”¹²³ However there is no indication from this provision as to what form such support should take.

It is important that the list of registered cooperatives maintained by government is reliable and accurate. This is both for the benefit of third parties wishing to verify whether a cooperative is registered or not, and for the purposes of gathering data. In this regard it is also important that there is a mechanism for removing from the registry cooperatives that are no longer functional, or are not operating according to cooperative principles. There is no difficulty in removing a cooperative that is liquidated from the register, since it no longer exists legally. However because liquidation generally entails formal legal proceedings, it often happens that cooperatives simply cease operating, and are not liquidated. Consequently the register may be swamped with the names of cooperatives that are no longer functional or operating.¹²⁴

6.5 *Cooperative structures and extending the scope of cooperation*

Most laws provide for three or four levels of cooperative structure: the primary cooperative; the secondary cooperative or union; and at a tertiary level, either a federation, which in turn may affiliate to an apex body, or an apex body. The members of a primary cooperative are in almost all instances natural or individual persons, although some laws permit membership by a corporate body or an unincorporated association or group.¹²⁵ In all countries it is understood that the members of secondary cooperatives (or unions) are cooperatives. But different approaches are adopted in the different laws to describe cooperative structures at a tertiary level.

¹²¹ Section 3, Statute of 1991

¹²² Section 7, Act 14 of 2005.

¹²³ Section 8, Act 14 of 2005.

¹²⁴ This is the case in Zanzibar, for example, where the registrar does not have the power to remove cooperatives from the registry.

¹²⁵ In Namibia, for example, in terms of section 10(3)(b), Act 23 of 1996. It should be noted that a secondary cooperative or cooperative of a higher level cannot be a member of a primary cooperative.

In the case of Tanzania, for example, secondary cooperatives may form an “apex society”, and apex societies form a federation¹²⁶. What is termed an “apex society” in Tanzania is a tertiary society in Mauritius, which makes no provision for an apex body in its law. In the case of Kenya, however, the term “apex society” refers to what in Tanzania is called a federation. This is the body that serves as the political voice of the movement: it is defined in Kenya as a society formed at national level to promote cooperative development and represent the interests of cooperatives locally and internationally.¹²⁷This is also the more usual and appropriate use of the term (Yeo, 1989: 161).

More important than the terminology used to describe the body that serves as the political voice of the cooperative movement is whether it should be registered as a cooperative, and whether it is autonomous. In Zimbabwe this body (called a federation) can only be established with the approval of the responsible Minister, who in turn directs the registrar to register it.¹²⁸ In the case of Zanzibar, the equivalent body (called an apex body) is established by the legislation, creating a paradoxical situation whereby an apex body can exist without affiliates.¹²⁹ It is difficult to see how bodies established in these circumstances can be seen as autonomous.

In regard to the various kinds of cooperatives operating at a primary level, some laws make no attempt to categorize them. Some merely list the sectors in which they operate. Other laws describe different kinds of cooperative and their associated sectoral relation in more detail.¹³⁰ But a categorization according to sector, as already pointed out, fails to acknowledge the distinction between a workers’ cooperative and a cooperative providing services, and the fact that both may operate in the same sector. For example, the definition of agricultural cooperatives in Tanzania is broad enough to encompass both a farm operated collectively, and an agricultural marketing cooperative whose members have individual title to land.

The legal categorization of cooperatives in turn affects the accuracy of the national statistics on cooperatives, which in turn feeds back into the appropriateness of the policies. The kind of policy intervention that is appropriate in the case of agricultural workers’ cooperatives is likely to be different from that needed in the case of agricultural marketing cooperatives.

The only law that bases its categorization of different kinds of cooperatives on the distinction between workers’ and service cooperatives is that of Namibia.¹³¹ However, South Africa and Zimbabwe both have specific provisions that are applicable to workers’ cooperatives (called collective societies in Zimbabwe), including provisions restricting the employment of non-members. Such restrictions are necessary both to prevent abuses and to ensure this kind of cooperative is

126 Section 16(1), Act

127 Section 7, Act 12 of 2005 and section 2, Act 12 of 1997.

128 Section 89, Act 6 of 1990.

129 Section 2, Act 4 of 1986.

130 In Tanzania, for example. See section 22, Act 20 of 2003.

131 Section 8, Act 23 of 1996.

viable. Similarly other kinds of cooperative require specific provisions to ensure their viability.

Some countries have provisions specific to SACCOs, although these are not nearly as comprehensive as one might expect, especially given the prevalence of this form of cooperative. A number of countries have provisions in the legislation relating to the “disposal” of agricultural produce. In effect these provisions validate a contract between the cooperative and the member obliging him or her to deliver some or all his or her produce to the cooperative.¹³² However in general there is insufficient legislative recognition of the particular needs of different kinds of cooperative.

South Africa is perhaps an exception in this regard. Certain kinds of cooperatives, as noted, require particular provisions. The case of housing cooperatives illustrate why. If a housing cooperative were to terminate the membership of a member, it would entail the member and his or her dependents vacating the housing unit in question. It is necessary for legislation both to safeguard the right of the cooperative to evict a member that is in arrears, and to protect the right of the occupant against arbitrary or unfair eviction.¹³³ A policy to promote housing cooperatives that does not have a mechanism for dealing with this situation is not credible. The most appropriate mechanism is legislative.

In this and other instances the absence of legislative provisions that provide the appropriate safeguards affects the viability of the cooperative concerned, and will operate as a deterrent to members considering joining such a cooperative.

7. Conclusions

The policies considered in this review that were adopted in the post-2002 period all attempt to address the issues identified in Recommendation No. 193, particularly the importance of compliance with cooperative principles. However, this paper has cautioned against a formalistic approach when evaluating policies in the light of the provisions in Recommendation No. 193, or when evaluating compliance with cooperative principles. A policy that attempts to mirror all the provisions of Recommendation No. 193 is not necessarily appropriate in the circumstances of the country concerned.

With respect to cooperative principles, what is important is how well these are integrated into the overall approach adopted in the policy. With regard to the various support measures proposed by Recommendation No. 193, it is necessary to be realistic in regard to what is attainable with the available resources, and it is therefore also necessary to be selective. The approach should rather be to focus in more detail on those substantive issues that are most relevant to the circumstances of the country concerned, than to attempt to adopt every measure that Recommendation

¹³² See for example section 31 of Statute 6 of 1991, in the case of Uganda, or Section 22 of Act 5 of 2003, in the case of Swaziland.

¹³³ See section 5, Part 1 of Schedule 1, Act 14 of 2005.

No. 193 proposes. To adopt proposals when there is no capacity or intention to implement them tends to discredit the policy as a whole.

While it is important and necessary that cooperatives assume greater responsibility for functions such as education, training and the provision of support, it must also be acknowledged that in some countries there is not only a legacy of disadvantage to be overcome, but also a legacy of mistrust, or apathy, due to past cooperative failures that were ultimately related to inappropriate or incorrect policies. It is not realistic to expect cooperatives to assume greater responsibility where the cooperative model is not well established or understood. The weakness of higher structures of cooperation also needs to be acknowledged.

It is therefore not coincidental that the countries where the cooperative movement is mostly firmly established also have the most credible policies. The policies of countries where cooperatives are clearly weak have less credibility. This underscores what should be an obvious point. Unless there are sustainable cooperatives operating within a country, there may be little opportunity for engagement regarding cooperative policy; in such contexts all other questions pertaining to policy become academic.

The vision expressed in one policy of “improved and sustainable cooperatives that are capable of fulfilling members’ economic and social needs” is attainable.¹³⁴ However, to realize this vision what is needed is not only an acknowledgment of past policy failures, but a franker assessment of existing short-comings in the cooperative movement. What is in general lacking in the policies in the region is a clear articulation of the specific social and economic needs to which cooperatives are best able to respond, and a well-conceived argument as to why particular kinds of cooperatives can better meet these needs when compared to other forms of enterprises in specific sectors or value chains as well as in local communities.

Policies need therefore to pay closer attention to the specific sectors or value-chains in which cooperatives operate. These considerations should be based on the maintenance of a clear distinction between workers’ cooperatives and cooperative providing services to members. This requires closer attention to the economic or business plan of cooperatives, whether or not this is a requirement for registration. It also requires that close attention be paid to markets, and how cooperatives access markets. The important role that secondary cooperatives can play in this regard is not sufficiently acknowledged.

The potential of cooperatives to provide opportunities for women and marginalized groups has not been satisfactorily addressed in any policy. Although there is much anecdotal evidence suggesting that women in particular are often the mainstay of many cooperatives, it is not realistic to expect cooperatives representing women and marginalized groups to become sustainable without some support from the state. Recommendation No. 193 provides some guidance here. Procurement policies and public works programmes can be utilized to promote such cooperatives.

¹³⁴ Tanzanian policy, page 5.

In regard to the question of what forms of support the state can provide or are indeed appropriate, there are no easy answers in countries where there are limited resources within the cooperative movement for providing services such as education and training, entrepreneurial advice and the like. At the same time cooperatives are often either disregarded within existing developmental programmes, or in a situation where their potential is not sufficiently realized. The global economic crisis that started at the end of 2008 has coincided with mounting evidence, and public concern, regarding the impact climate change may have on sub-Saharan Africa, and its food security. This represents an opportune moment to reaffirm the potential of cooperatives, and to review the adequacy of existing government support measures.

Despite the shortcomings of cooperatives, there can be no doubt that countries with formal policies are better off than without them, both in that policy represents an opportunity to engage, and in that no matter how deficient the policy, it provides a foundation on which it will be possible to build an improved policy. There is thus a need to review policies on an ongoing basis, in the light of experience.

It is obviously not as easy to review legislation, but this investigation shows a marked qualitative difference between the older and newer laws, in respect of compliance with cooperative principles and respect for cooperative autonomy. It is also apparent that provisions in the older laws are out of keeping with the “new consensus” on cooperatives in other respects. By failing to make appropriate provisions for SACCOs and other forms of cooperatives, the older laws represent an obstacle to cooperative development.

This investigation suggests a complex interaction between policy and law within national boundaries, and also within the region. Hopefully this paper will contribute to unraveling the interaction between law and policy, and help stimulate debate as to how countries in the region can collaborate in strengthening the policy and legislative framework. The benefit of a comparative analysis is thus to develop a regional perspective of this framework, in order to identify common problems and to begin to look for common solutions.

List of policies consulted

- Eritrea: National Policy for Cooperative Development in Eritrea (undated)
- Kenya: Ministry of Cooperative Development and Marketing, Cooperative Development Policy, July 2007
- Lesotho: Ministry of Trade and Industry, Cooperatives and Marketing, National Cooperative Policy, 2009
- Rwanda: Ministry of Commerce, Industry, Investment Promotion, Tourism and Cooperatives, National Policy on Promotion of Cooperatives, 2007
- South Africa: Department of Trade and Industry, A Cooperative Development Policy for South Africa, 2004
- Swaziland: National Cooperative Policy, 2000
- Tanzania: Cooperative Development Policy, 2002
- Uganda: Ministry of Tourism, Trade and Industry, National Cooperative Policy, 2009
- Zimbabwe: Ministry of Youth Development and Employment Creation, The Revised Government Policy on Cooperative Development, 2005

List of statutes and bills consulted

Ethiopia:	Proclamation 147 of 1998
Kenya:	Cooperative Societies Act (No 12 of 1997) Sacco Societies Act (No 14 of 2008)
Malawi:	Cooperative Societies Act (No 36 of 1998)
Mauritius:	Cooperatives Act (No 12 of 2005)
Namibia:	Cooperatives Act (No 23 of 1996)
Rwanda:	Law No 50 of 2007
South Africa:	Cooperatives Act (No 14 of 2005) Cooperative Banks Act (No 40 of 2007)
Southern Sudan:	Cooperative Societies Bill of 2008
Swaziland:	Cooperative Societies Act (No 5 of 2003)
Tanzania:	Cooperative Societies Act (No 20 of 2003)
Uganda:	Cooperative Societies Statute (No 8 of 1991) Cooperative Societies Regulations, 1992
Zambia:	Cooperative Societies Act (20 of 1998)
Zanzibar:	Cooperative Societies Act (No 3 of 1986)
Zimbabwe:	Cooperative Societies Act (No 6 of 1990)

List of references

- Birchall, J and Ketilson, L.H. (2009) *Responses to the Global Economic Crisis: Resilience of the Cooperative Business Model in Times of Crisis*, International Labour Office, Geneva.
- CLARITY (The Cooperative Law and Regulation Initiative) (2006) *Enabling cooperative development*, CLARITY and US Agency for International Development, Washington.
- Develtere, P. (2008) “Chapter one - Cooperative development in Africa up to the 1990s” in Develtere, P, I. Pollet and F. Wanyama (Eds) *Cooperating out of poverty: The renaissance of the African cooperative movement*, International Labour Office, Geneva.
- Henry, H. (2005) *Guidelines for Cooperative Legislation* (Second Edition), International Labour Office, Geneva.
- International Cooperative Alliance (ICA) (1995) *Statement on the Co-operative Identity*, International Cooperative Alliance, Geneva.
- International Labour Organization (ILO) (2002) *The Promotion of Cooperatives Recommendation (No. 193)*, International Labour Office, Geneva.
- MacPherson, I. (1995) *Cooperative principles for the twenty first century*, International Cooperative Alliance, Geneva.
- Münckner, H-H and Shah, A. (1993) *Creating a favourable climate and conditions for cooperative development in Africa*, International Labour Office, Geneva.
- Smith, S. (2004) *Promoting cooperatives: A guide to ILO Recommendation No. 193*, Cooperative College, Manchester.
- Theron, J. (2008) “Cooperatives in South Africa : A movement (re)emerging.” in P. Develtere, I. Pollet and F. Wanyama. (Eds) *Cooperating out of poverty poverty: The renaissance of the African cooperative movement*. International Labour Office, Geneva.
- Theron, J and Visser, M. (2009) ‘Remember me when your ship comes in’ : *Cooperatives and the need to shift from wage culture*, Development and Labour Monograph 1/2009. University of Cape Town, Cape town.
- Wanyama, F. (2009) *Surviving liberalization: The cooperative movement in Kenya*, *Coop^{AFRICA} Working Paper No. 10*, ILO Office for Kenya, Rwanda, Tanzania and Uganda, Dar es Salaam.

Yeo, P. (1989) *Cooperative Law in Practice*, Plunkett Foundation and Holyoake Books, Manchester.

Cooperative policy and law
in east and southern Africa :
A review

Jan Theron

This paper presents a comparative analysis of the policies regarding cooperative development and cooperative legislation for the countries of East and Southern Africa. It argues that there is a complex interaction between policy and law within national boundaries, and also between countries within the region. The benefit of a comparative analysis is to develop a regional perspective regarding the policy and legislative framework, in order to identify common problems with this framework and to stimulate debate as to how countries in the region can collaborate in strengthening the position of cooperatives.

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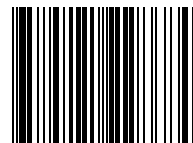
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