East African Journal of Social and Applied Sciences (EAJ-SAS)
Vol.3, No.2 Publication Date: November. 25, 2021
ISSN: (Online) 2714-2051, (Print) 0856-9681
The current issue and full text archive of this journal is available at: http//www.mocu.ac.tz

Cite this article as: Rutabanzibwa, A. (2021). National co-operative laws versus international co-operative legal norms: A case for compliance in Tanzania, *East African Journal of Social and Applied Sciences,* 3(2), 52-65.

NATIONAL CO-OPERATIVE LAWS VERSUS INTERNATIONAL CO-OPERATIVE LEGAL NORMS: A CASE FOR COMPLIANCE IN TANZANIA

Audax Rutabanzibwa
Department of Law
Moshi Co-operative University, Moshi-Tanzania
Email: rutta05@gmail.com

ABSTRACT
Globalisation which generally means a phenomenon through which ideas, goods and services are allowed to spread freely worldwide, without being constrained by time and geographical space, created an environment for establishment of several extra-territorial business organisation relations, which necessitated widening the scope of international business laws to include legal norms governing cross-border co-operative societies. International co-operative norms denote global standards, comprised of values and principles established by the International Co-operative Alliance (ICA) and endorsed by the International Labour Organisation (ILO) which guide establishment and operation of co-operative societies as independent legal entities. National co-operative laws need to incorporate ICA standards to be able to account for a normative system that accommodates cross-border co-operative societies which are incorporated in various countries or states. This paper analyses factors which have contributed to the developing of international co-operative norms such as ideological transformation, globalisation and regional co-operative laws codification with a view of determining their influence on enacting national co-operative laws that are compliant to international co-operative legal norms. The discourse advanced in the paper is that, attempts to translate global standards into national co-operative legislation can only be achieved if national co-operative laws are directed towards creating an environment which ensures that co-operative values and principles guide potential members and regulators at the stages of formation, registration and operation of co-operative business organisations. The paper makes an analysis of the co-operative laws of Tanzania with a view of determining its level of compliance to the ICA standards and finds out if they still have substantial non-compliant elements which need to be addressed. The paper then recommends awareness creation to cooperators and policy makers about the importance of values and principles of cooperatives as the country embarks on making amendments aiming at removing mismatches between national co-operative laws and international co-operative norms.

Key words*: Compliance, International co-operative legal norms, national co-operative law, co-operative values and principles.*
Paper type*: Research paper*
Type of Review: *Peer Review*

1. INTRODUCTION

Current developments in science and technology cumulatively known as "globalisation", have witnessed advances in Information Communication Technology (ICT) thereby facilitating an environment that brings closer several extra-territorial business organisation relations. This, trend necessitates the widening

of the scope of international business laws to include some laws which were once considered purely national or domestic. Among such laws are laws governing co-operative business organisations. The said developments have reversed the fear that co-operative business organisations would become extinct with increasing developments in globalisation[1].The move to develop an international dimension of co-operative law was 'kick-started' by the International Co-operative Alliance (ICA) which prescribed necessary elements for a co-operative society to be regarded as an independent enterprise with an identity which is capable of existing internationally[2]. This was done through the "Statement on Co-operative Identity" which was issued at the ICA centenary conference of Manchester, England in 1995. The Statement tends to suggest that the co-operative identity is deciphered after consideration of the co-operative definition, values and principles[3]. An exposition of the theoretical underpinnings of the statement which has been attempted by some economists and legal co-operative theorists[4], paves a way towards a thorough legal understanding of the concept of co-operative identity. The International Labour Organisation (ILO), at its 90th Conference held in June 2002 in Geneva, Switzerland was the first international organisation to endorse the ICA statement on co-operative identity[5]as an international co-operative statement that is capable of providing a normative guide to the establishment and operation of cooperatives, at all levels–from domestic to international levels. The ILO recommendation was issued after realising that, better structures of peoples' cooperation at territorial and extra-territorial levels were necessary to contain the social pressure exacerbated by globalisation. On the positive side, ILO acknowledged that globalisation created new opportunities for cooperatives to play a key role in the equitable allocation of opportunities, which could be exploited if appropriate legal frameworks were provided[6].To this end, at the United Nations level, initiatives have been underway to develop 'International Guidelines' aimed at creating a supportive environment for the development of cooperatives[7].

Despite the above ILO position, the debate on whether there is what may be termed as 'international co-operative law' is still developing. One group of legal scholars argues that national laws are changing due to the effects of globalisation, as they try to accommodate extra-territorial business relations[8]. According

---

1 According to Henry Hagen (2018) because of "companisation of cooperatives" from 1970s, the co-operative idea was being questioned, See Henry Hagen "Trends in Co-operative Legislation What Needs Harmonization?", 5 *Journal of Research on Trade, Management and Economic Development,* Issue 1(9)/ 2018 at pp. 9 – 10 available at: http://jrtmed.uccm.md accessed last on 15 June 2021, See also Henry Hagen, "Guidelines for Co-operative Legislation, 3rd revised edn. ILO, 2012

2 The introduction of the sixth principle, that is "cooperation among cooperative" enables a co-operative registered in one country to join a co-operative established in another country and establish a secondary co-operative which may be referred to as 'an international co-operative society'. We argue further in this paper that due to development in information communication technology 'an international primary co-operative society' could as well be established between individuals residing in more than one territory.

3 See the International Co-operative Alliance Statement on Co-operative Identity, 1995

4 See for example, Nilsson Jerker (1996), "The Nature of Co-operative Values and Principles: Transaction Cost Theoretical Explanations,"*Annals of Public and Co-operative Economics*, pp. 633-653. See also Münkner H.-H. (2015), Co-operative Principles and Co-operative Law, 2nd Edition, LIT Verlag Berlin, Münster-Wien-Zürich-L. See also Birchall J. (2008) Co-operative Principles Ten Year On. *Review of International Cooperation*, Volume 98 No. 2 of 2008, pp.76; See also David Hiez, "Voluntary Membership: Up to which point do Cooperatives Support Liberalism?" *International Jpurnal of Co-operative Law* , page 8

5 See paragraph 3 of the ILO Recommendation No. 193/2002 available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_code:R193 last accessed on 21st June 2021.

6 As noted in the preamble to the ILO Recommendation 193/2002 ibid.

7 Resolution A/56/73, E/2001/68, appended inHenry Hagen, "Guidelines for Co-operative Legislation, 3rd rev. edn. ILO, 2012 at pp. 109 -113 held in Ulaanbaatar, Mongolia, 15–17 May 2002, available at https://www.un.org/esa/socdev/social/documents/coop_egm_report.pdf, last accessed on 21st June 2021.

8 See Eric C. Ip, Eric C. (2010), "Globalisation and Future of the Law of Sovereign State*",* 8 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW*, Issue 3, July 2010, pp. 636–655, available at https://doi.org/10.1093/icon/mog033 accessed on 12 September 2021 ; See also Berman P. S (2007) "Pluralist Approach to International Law"*,* Vol. 32 *The Yale Journal of International Law*: 301 – 329; See also Berman P. S (2005) "From International Law to Law on Globalization"*43 Columbia Journal of Transnational Law* 485, available at https://scholarship.law.gwu.edu/faculty_publications, accessed on 29 April 2021

to this group the increase in sector dedicated areas of international laws such as co-operative law,that extends to domestic policies, and the rising prominence of transnational regulatory bodies passed by non-governmental organisations has multiple effects on the future of national laws[9]. Thus, under the current globalisation era international law may represent more than official rules which are made by the government authorised regulatory bodies. It may include "unofficial" legal rules that in most times bind in ter-territorial business organisations and communities[10]. Therefore, there is a need of taking an inclusive approach in analysing international law under the globalisation era. This is because:

> *"Without a broader conception of law that acknowledges non-sovereign (and even non-governmental) articulations of norms, we are apt to ignore such articulations altogether or deny them the status of law and thereby miss the real force these norms have and the way in which they interpenetrate official legal doctrines"*[11].

The second group in favour of international co-operative law argues that the ICA Statement on Co-operative Identity and the ILO recommendation, form a foundation of public international co-operative legal norms and that ILO member countries should comply with them through their respective national co-operative legislation[12]. Henry for example, is of the view that the ILO recommendation constitutes what he calls 'a binding public international co-operative law' because according to Article 38.1 of the Statutes of the International Court of Justice, international resolutions and recommendations may be sources of international law[13]. Further that like ILO, several regional organisations and many national co-operative legislation have adopted the ICA Statement on Co-operative Identity, which may be regarded as an act of domesticating it[14]. In another literature Henry observes that:

> "*Whatever the meaning and scope of sovereignty of states is in the global world, as far as co-operative law is concerned, legislatures are connected in a close net of supranational and regional governmental instruments, model laws and rules established by private entities. These rules vary as to their juridical value. They are interrelated by the fact that their respective juridical value contributes to the argument that a public international co-operative law exists…*"[15]

In the similar context, this study defines 'international co-operative legal norms' to mean global standards which were established by the International Co-operative Alliance and endorsed by the International Labour Organisation, which define and guide the establishment and operation of a co-operative society as an independent legal entity[16] and which are increasingly being recognised by various regional legislation[17], courts[18] as well as national policies and legislation[19].

---

[9] Eric ibid. at pg. 637

[10] Berman P. S (2005) *From International Law to Law on Globalization*43 Columbia Journal of Transnational Law 485 (2005) op cit fn. 8 at pg. 550

[11] Eric op cit. fn. 9

[12] See for example, Antonio Foci, "Co-operative Identity and the Law", Working Paper No. 023/12 available at…; See also Hagen Henry (2012) in ILO "Guidelines for International Co-operative Legislation*", International Labour Office. – 3rd rev. edn.* - Geneva: ILO, 2012 at pp. 47-49 where he makes convincing 10 "arguments to support the opinion that ILO R. 193 constitutes binding public international co-operative law".

[13] Henry Ibid. at pg. 47 - 48

[14] He mentions regional organisations such as the EU Regulation 135/2002, the OHADA Uniform Act among the regions which have embraced the ICA Statement on Co-operative Identity, ibid. at page 50.

[15] HenryH. (2013), "Public International Co-operative Law" in Dante Cracogna et al (Eds.) *Handbook on International Co-operative Law* pp. 65 – 88 in his abstract at pg. 65

[16] According to Henry Ibid. at p 47 he is of the view that resolutions and recommendations of international organizations may constitute a part of public international lrgalnorms. We propose therefore in this study to use "statement on co-operative identity" to denote what has been defined as 'international co-operative legal norms'.

[17] For example, the European Union Regulation 1435/2003 on the Statute for a European Co-operative Society (SCE), the 2010 OHADA Uniform Co-operative Act and the East African Co-operative Society Act as discussed infra on pp. 8 – 10.

[18] Henry op cit. fn.15 under footnote 145cites several regional and national cases that were decided based on ILO R. 193 including the European Court of Justice (EJC) which based its decision in the cases C-78/08 to C-80/08 on the SCE Regulation and on the 2004 EU Commission Communication on the promotion of co-operative societies to specify what it sees as the characteristics of cooperatives.

In this paper the author argues that the justification for translating the concept of co-operative identity into national co-operative legislation should be derived from the understanding that co-operative identity as opposed to the identity of other forms of investor-owned firms (IOFs)[20] can only be achieved through consideration of co-operative business relations of members. Thus, the identity is attained through balancing members' interests which they can afford to attain together or mutually, while being directed by co-operative values and guided by co-operative principles. Further, the said identity is recognised and implemented through legal tools or instruments initially agreed upon by members and subsequently endorsed and enforced by the state. The role of co-operative legislation therefore should be to assist members to define precisely the scope of interests which can be attained mutually[21], facilitate their attainment and guard or protect them against non-compliant tendencies normally occasioned by some external interests or factors. Thus, co-operative by-laws or constitutions which are developed by members themselves[22] are the basic legal sources of the co-operative identity because they are member-initiated documents seeking to define the scope of member relations and map the balance of their mutual interests as well as agreement on modes of their enforcement and protection. The national co-operative legislation plays a function of providing legal recognition or endorsement of the agreed members' mutual interests and through that it demonstrates compliance to the statement on co-operative identity, which in that way demonstrates compliance to the developing international co-operative legal norms.

On the aspect of implementation of a compliant co-operative legislation, this paper argues further that compliance in implementation is attained by ensuring that provisions in the statement on co-operative identity are observed at all stages – from the stage of formation to operation of a co-operative society. That is, at the stage of initial and formation meetings, at the stage of agreeing and certifying the contents of the by-laws or constitution and at the stage of by-law enforcement. Otherwise, non-compliance may be induced by some co-operative members who would wish to go beyond the scope of mutual interests to pursue their individual interests[23] at the time of agreeing on the contents and scope of the by-laws, if not properly guided or supervised at the time of by-laws preparation and implementation. Non-compliance also may be occasioned by the regulators who are empowered by the co-operative legislation and sometimes who, whether knowingly or unknowingly, misinterpret those legislation to 'force in' interests which fall outside the scope of members' mutual interests. Some non-compliance may also be occasioned by legislation other than the co-operative legislation that affects co-operative societies, especially if enacted in ignorance of factors which influence existence of the co-operative identity[24].

Thus, when looked at from the perspective of the arguments this paper is trying to advance, the concept of compliance to international co-operative legal norms may look more complex. It may mean more than simply having the statement on co-operative identity included in the regional or national legislation or policies. It involves 'actualisation' of the statement at the stage of conception of the cooperation idea by potential members, at the stage of certification of documents used for obtaining state endorsement or

[19] For this reason, in this study the phrase "statement on co-operative identity" and "co-operative values and principles" wherever they appear will be connoting the phrase "international co-operative legal norms" as defined.

[20] For example, companies.

[21] In this regard, members' interests and their mutual attainment disregards the geographical location of members, disregards as well members colour or race, gender or status. Provided that members with mutual interests are able to get connected and be able to discover and agree on modes of attaining their joint business goals through pursuing the said mutual interests.

[22] This means that developed out of members' free will, not influenced or forced by non-members.

[23] Other than those mutually agreed by members.

[24] Since co-operative societies may be established in various sectors, some sector specific legislation such as financial sector, housing sector and mining, their respective legislation normally consider cooperatives established in those sectors as legal entities that exist upon being incorporated without paying due regard to their internal relations, which may affect their existence as independent co-operative legal entities. On the effect of financial sector legislation to SACCOS see DominikBierecki (2019), "Legal Consequences of Introduction of Elements of Public Law into Co-operative Law Polish Perception", International Journal of Co-operative Law, at page 88.

recognition (incorporation) and at the stage of implementation through supervision by the regulators[25]. Moreover, as it will be demonstrated later in this paper[26], all the above-mentioned stages of compliance should take cognizance of the international dimension of the co-operative legal norms[27].

Using a case study of the co-operative legislation of Tanzania, this paper shows the extent to which a national co-operative legislation may facilitate compliance to the international co-operative norms but also how the same may occasion a mismatch with the international norms, through various non-compliant provisions and actions. In the next part the paper analyses what has been termed as 'international co-operative legal norms' and why they should be complied with through enactment of co-operative legislation that complies with the statement on co-operative identity. The following part analyses co-operative legislation of Tanzania in light of the international co-operative legal norms. However, since Tanzania is a union of Mainland and Zanzibar, the part makes a comparative analysis of the co-operative legislation of the two sides of the union. The part also highlights on the level of non-compliance of the respective legislation.

2. THE INTERNATIONAL ASPECTS OF CO-OPERATIVE LAW

Co-operative law as one of business organisational law[28], was once considered as part of private law which could not acquire a public international legal character that needed to be developed into international norms or even a national law[29]. However, it is increasingly becoming true that several events that have taken place at the international arena are forcing countries to start looking at cooperatives as being a business phenomenon that needs co-operative efforts of more than one country or rather of members who may not be residing in the same territory[30]. This requires creating a conducive legal environment for co-operative business organizations of this nature that would enable their international organisational characters to be legally recognised at national, regional as well as at international levels. Several events or factors compel policy makers, legislators as well as legal scholars to look at co-operative law not exclusively from a national or domestic context, but also as a matter of global concern. This part analyses some of these factors.

(i) Global Ideological Transformation

At the turn of the twenty-first century, the ideological map for many countries changed from the traditional polarization of left and right to a liberalised policy environment. Most of the state-controlled economies of Central and Eastern Europe changed their policies to recognize the existence of private business initiatives under liberalised trade amosphere. Also, some Asian and African countries which were pursuing socialist ideologies such as Tanzania and Ghana began a process of implementing sustained structural adjustments and restructuring, which had a consequence of embracing free market and trade liberalisation policies. As for co-operatives all over the world, there was a shift from

---

[25] To this effect, relevant progress monitoring and evaluation reports such as supervision and audit reports, should be able to indicate existence of an active co-operative entity in operation through predetermined verifiable indicators."

[26] See infra at pp. 10 – 14.

[27] This means that when potential co-operative members are discussing and negotiating a co-operative agreement which may materialise into a co-operative society should do so while being fully aware of the internationally agreed co-operative values and principles that will define the scope of their mutual interests. Likewise, when the co-operative registrars are considering the co-operative establishment documents for legal endorsement or recognition before incorporation, should assure themselves that those documents are written in the language which, when construed holistically, reflect a statement on co-operative identity. The same approach should be utilised in the supervision and auditing of the co-operative activities, once in operation.

[28] Other business organisation laws include company laws.

[29] Indeed, there are countries such as Ireland which are still debating on codifying co-operative law into national law, See DE BARBIERI E.W*(2009).*, "Fostering Co-operative Growth through Law Reform in Ireland: Three Recommendations from Legislation in the United States, Norway and Brussels", in *42.1 Journal of Co-operative Studies, 2009, p. 37 ff. Also referred byFici, A. (2012),* "Co-operative identity and the Law",*Euricse Working Paper, N.023 | 12*at pg. 16 fn. 47available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2005014 accessed last on 17 June 2021 also available in *European Business Law Review*Volume 24, Issue 1 (2013) pp. 37 – 64

[30] For example, countries members of the European Union have developed the "European Co-operative Society Law" (ECS)

ideologically driven co-operative development policies and legislation to more rationally based policies that sought to model themselves along internationally accepted co-operative values and principles[31].

(ii) Globalisation of Business Relations

The second factor was globalisation of trade which incited some legal scholars to reconsider the appropriateness of national trade laws, which though domestically enacted would have effects on trade relations which go beyond national boundaries, including co-operative laws[32].Globalisation which is generally defined as the mechanism through which ideas, goods and services are allowed to spread freely worldwide, without being constrained by time and geographical space may have several connotations, depending on the discipline from which it is being analysed. In business, globalisation is used in an economic context to describe "an integrated economy marked by free trade, free flow of capital and corporate use of foreign labour markets to maximise returns and benefit the common good"[33]. Social scientists consider globalisation as the process that involves "the growth of 'supra-territorial relations' among people"[34]. Legal scholars consider globalisation as the process which has an effect of reducing the legal relevancy and meaning of geographical territoriality or sovereignty, and national boundaries, thus, posing a challenge to the definition of law as an exclusive creature of the state[35]. Conversely, to institutional and trade law scholars, globalisation sparked debates on the normativity of rules that govern legal relationships and extra-territorial business arrangements and institutions. To this end, some legal scholars have started to question the legality of relationships and institutions established out of globalisation, whether they can comfortably be accommodated by national or domestic laws alone or whether they need a legal framework of an international nature to justify their normativity[36].

As far as co-operative law is concerned, it is argued that globalisation has resulted in replacing 'collectivity' with 'connectivity' and 'homogeneity' with 'heterogeneity' and facilitates establishment of "abstract"or "virtual"bonds of co-operative business affiliations and alignments, regardless of geographical locations of cooperators. Consequently, the co-operative organisations which are established out of global interactions need universal acceptance and recognition of legal regimes that go beyond municipal or domestic laws. Thus, having domestic legal regimes which incorporate universally recognised rules and principles gives a normative justification to the internationally acceptable rules that govern inter-territorial co-operative relationships and therefore enables legislation enacted by countries or states which host the respective relationships and institutions to attain compliance requirements[37].

---

[31] Co-operative policies and legislation of several developing countries that followed socialist ideologies, such as those of the United Republic of Tanzania, included for the first-time statements acknowledging internationally accepted co-operative values and principles. See for example, Chapter Three of the Tanzania Co-operative Development Policy of 2002 particularly paragraph 3.1 which states, inter alia that: "with respect to International Co-operative Principles and values the Government recognises and adopts: - (a) Co-operative values….(b) Co-operative Principles…", URT (2002) at pg. 12. The same is reflected under section 3(1) of the Tanzania Mainland Co-operative Societies Act, 2013.

[32] See Berman P. S (2005),, "*From International Law to Law and Globalisation*", 43 COLUMBIA JOURNAL OF INTERNATIONAL LAW (2005), 485 - 557. According to Berman "studies conducted in the domestic arena offer important insights for international law scholars. Institutional bureaucracies are a fundamental part of both international organizations and the domestic governments that often implement international norms". available at https://scholarship.law.gwu.edu/faculty_publications accessed last on 12 June 2021

[33] Ibid.

[34] Coleman William D., "*Globalization and Co-operatives*" in Brett Fairbairn and Nora Russell (Eds.) CO-OPERATIVE MEMBERSHIP AND GLOBALIZATION, Centre for the Study of Co-operatives, University of Saskatchewan, Canada 2004, at pg. 5

[35] Berman, op.cit. fn. 9, see also Eric C, "Globalization and Future of the Law of Sovereign State",Volume 8, *International Journal of Constitutional Law*, Issue 3, July 2010, Pages 636–655, available at https://doi.org/10.1093/icon/moq033; See also Hagen Henry op.cit. fn. 12 at pp. 16-17

[36] According to Berman op.cit.fn.36 at pp.542 – 556.

[37] See the writings of Hagen Henry and Antonio Foci op. cit. fn. 12 and our discussion on pg. 3-4 infra.

(iii) Increase in Regional Codification Efforts

The third factor is increase in enactment of regional business organisation legislation that establish multi-national or multi-territorial co-operative legal frameworks, thereby creating environments for acceptability of cross-national or inter-territorial co-operative business relationships and their respective institutions. Although regional trade arrangements or agreements between countries have been existing for many decades[38], recent trends in those regional groupings have witnessed efforts of enacting legal instruments aimed at facilitating establishment and operation of cross-border business organisations which draw their memberships and conduct their operations in more than one-member country. Examples of efforts that aim at developing regional co-operative laws include Regulation 1435/2003 which provides for a Statute for the formation and operation of the European Co-operative Society (SCE)[39],the Organisation for Harmonization of Business Laws of Africa or known in French as *"Organisation pour l'Harmonisation en Afrique du Droit des Affaires"*[40]Co-operative Regulation[41], which provides for establishment of the African Co-operative Society(ACS) and the East African Co-operative Societies Act[42], which aim at establishing East African Co-operative Societies (EACS). The said regional co-operative legislation contain legal norms, which if domesticated through respective member countries' co-operative laws would enable compliance of national co-operative laws to international co-operative legal norms.

As part of incorporating the international co-operative legal norms, the preamble of EU Regulation 1435/2003 provides for the basic principles of the European Co-operative Society (SCE) which are slightly different from those of the ICA[43]. Whereas unlike the EU Regulation, the OHADA Uniform Co-operative Act adopts the whole ICA Statement on Co-operative Identity. For instance, the Act defines a co-operative society as "*an autonomous group of individuals who willingly join together to fulfill their aspirations and meet their common economic, social and cultural needs so as to form a corporate body whose ownership and management are collective and where power is exercised democratically and according to the co-operative basis*"[44]. The Uniform Act also provides that cooperatives established in the territories of member countries should conduct their businesses according to 'universally accepted principles'[45]. The East African Co-operative Societies Bill on its part allows cooperatives from member countries to be established and registered under section 5 of the Bill. Section 4 of the Bill reiterates that the cooperatives that will be established under the Act "shall abide by the guiding principles … which shall be written in their respective bye-laws"[46]. Although the Act does not specify that the guiding principles should be the "universally

38 Normally arrived at through Treaties or Agreements which establish trading blocs or configurations such as EU, ECOWAS, SADAC, COMES and EAC, etc.

39 See COUNCIL REGULATION (EC) No. 1435/2003 OF 22nd July 2003 on the Statute for a European Society (SCE) (OJ L 207, 18.8.2003, p.1)

40 commonly abbreviated as "OHADA"

41 See "The Uniform Act for Harmonization of Business Laws in Africa", available at http://www.ohadalegis.com/anglais/telAUGB/Ohada-Uniform-Act-Cooperatives-en.pdf last accessed on 17 June 2021

42 For further discussion about the East African Co-operative Society legislation seeTadjudje W. (2018), The East African Community's Co-operative Regulation, Issue I *IJCL*, pp 148 – 166

43 As are provided under Paragraph (10) of the Preamble. An observation of these principles indicates that the 5th and 7th ICA principles are omitted. The rest 5 of the ICA principles could be construed from the SCE principles.

44 Article 4, of the Act. This definition does not differ in substance with the definition provided by ICA in the Statement on Co-operative Identity.

45 Implying the ICA co-operative principles, which are reproduced under Article 6 of the Uniform Act.

46 Note that the section uses the phrase that the guiding principles "*shall be written in their respective bye-laws*". However, it has been discussed supra on page 6 that it may not matter much to include the principles in the legislation or by-laws, what matters is the 'actualization' of the by-laws.

accepted principles"[47], the said guiding principles seem to be congruent to the ICA principles, except for principles number 9 and 10[48].

Generally, this part reveals that there are compelling factors such as ideological transformation, developments in communication technology and globalisation, which may have necessitated cross-business cooperation through establishment of cross-national co-operative organisations. Further, that measures for putting in place policy and legal frameworks to allow establishment of cross-national co-operative business relations have already been taken[49]. Their enforcement will depend on their acceptability by cooperators in member countries. However, at the center lays the factor of limited awareness by potential beneficiaries of the available cross-national co-operative opportunities. Awareness creation exercises should ensure that local people appreciate and put into practice ethos embedded in the international co-operative legal norms as they feature in their respective compliant national co-operative development policies and legal frameworks.

3. THE TANZANIAN CO-OPERATIVE LAW

The United Republic of Tanzania is a Union of two independent countries of Tanganyika and Zanzibar, which was forged on 26 April 1964 through Articles of Union signed by the late Julius Kambarage Nyerere and the late Abeid Aman Karume, the then presidents of Tanganyika and Zanzibar respectively. The Articles of Union, among other things, provide for union matters which are areas of cooperation and therefore under the jurisdiction of the Union Government and non-union matters. Under this arrangement, both Tanzania Mainland and Tanzania Zanzibar remained with the authority to make laws and policies over non-union matters[50]. For the time being, cooperatives are among the non-union matters.This part highlights on the level of non-compliance to international co-operative legal norms of the co-operative legislation of the two sides of the union.

3.1 Specific Elements of the Mainland and Zanzibar Co-operative Laws

Currently the establishment and regulation of cooperatives of Mainland Tanzania is governed by the Co-operative Societies Act[51]. The law also establishes the Tanzania Co-operative Development Commission (TCDC) which is a semi-autonomous government department responsible for coordinating, promoting and supervising cooperatives in Tanzania Mainland. The Registrar of Cooperatives is also TCDC's Chief Executive Officer. On the part of Zanzibar, cooperatives are governed by the Zanzibar Co-operative Societies Act[52], which also establishes within the Ministry responsible for co-operative matters, a Department of Co-operative Development (DCD) and the office of Director of Co-operative Development who heads the said Department and is the Registrar of Cooperatives. The functions of the Department, as per the Act, include regulation and promotion of co-operative societies[53].

The Mainland Act does not explicitly introduce the ICA co-operative values and principles. Nevertheless, it has a provision that requires every registered society to have objects which conform to those

[47] As the OHADA Uniform Co-operative Act does.

[48] Principle 9 is based on controlling cooperatives from 'trading with their members'. It emphasizes on cooperatives 'trading on behalf of their members'. Principle number 10 defines the role of employees of co-operative societies that they are not supposed to work as members of the societies, but as employees.

[49] It is noted that all the above regional laws are in force, except that the East African Co-operative Bill awaits member countries ratification before it becomes operational.

[50] For more on this constitutional set up see the Constitution of the United Republic of Tanzania (2005) Articles 1,2, & 4 and the Constitution of Zanzibar (2006) Articles 1 to 5.

[51] No. 6 of 2013 (Chapter 112 of the Laws of Tanzania)

[52] No. 15 of 2018 which repeals the 1986 Act.

[53] According to section 4 of the Act

principles.[54] However, because the Act also exerts external government control over cooperatives, the rest of provisions do not fully interpret the ICA principles. The Zanzibar Act on the other hand, recognises the ICA principles and values and requires the Registrar, before registering a society, to ensure that such a society abides by, among other things, the ICA principles and values.[55] In addition, non-adherence to the values and principles may be one of the grounds for the cancellation of registration.[56]However, both Acts and their corresponding regulations do not expound on how the ICA principles and values should be 'actualised'. For example, they do not encompass provisions that would require the registrar, before he registers the society, to assure himself that members' relations reflect co-operative values and principles and are demonstrated in the by-laws and other establishment documents[57].

3.2 Definition and objectives of co-operatives

The Mainland Act does not precisely define a co-operative society; it only defines it as *"a society registered under the Act"*. Whereas the Zanzibar Act defines it as "*an association of persons who have voluntarily joined together for purposes of achieving a common need through the formation of a democratically controlled organisation and make equitable contribution to capital, required for the formation of such an organisation and who accept the risk and benefits of the undertaking in which they actively participate, and registered under the provisions of the Act*". The essential elements of the notion of co-operative as defined in the ICA Statement on co-operative identity, namely; member ownership, control and benefitting from its economic, social and the cultural undertakings are thus reflected in the Zanzibar definition.

The purpose of the Mainland Act is twofold: to regulate cooperatives (register, deregister, supervise and audit) and coordinate co-operative promotional activities. Co-operative promotion functions are supposed to be provided or coordinated by co-operative officers.[58] The purpose of the Zanzibar Act is also to regulate (register, deregister, supervise and audit) and promote cooperatives through facilitating training to cooperatives. The Zanzibar Act goes further to include provisions which require secondary societies to provide management, supervisory and promotional services to member primary cooperatives and the umbrella co-operative to provide promotion services to secondary member cooperatives.[59]The latter provisions, if practiced may lead Zanzibar cooperatives to self-regulation, thereby upholding the ICA Statement on Co-operative Identity.

Both Acts indicate that the main function of cooperatives should be to provide business services to their members. However, issues on handling of co-operative transactions/activities are stated in various by-laws of cooperatives but also in the regulations that are made under the Acts. Most by-laws provide that it is members' responsibility to transact business with their co-operatives and that it is the responsibility of the cooperatives to transact business on behalf of their members. The Mainland Act requires cooperatives to include in their respective by-laws provisions that compel every member to transact

[54] According to section 3 of the Act.

[55] Sections 3 and 17 of the Act.

[56] According to Section 22 of the Act.

[57] For example, evidence on provision of education on co-operative values and principles to the potential members, evidence that they participated in the drafting of documents for establishment of the cooperatives and that they were involved in the initial meetings and agreement to become members was made voluntarily.

[58] Provided under sections 50 and 69 of the Act. The Act defines "promotion" as *"provision of services to the general public and co-operative members that contribute to the formation, growth and prosperity of co-operative societies*". Section 25 also provides that one of the functions of the Co-operative Federation is to provide education, training and advisory services to its members.

[59] Sections 14 and 15 of the Zanzibar Act, thus bring up the concept of self-regulation. The Zanzibar Act does not define what promotion services mean, however, from the functions of those cooperatives, promotion could include collection of data and information on the activities of the members and also provision of consultancy services on the purchase, storage of member produce and on price bargaining.

his/her business activities through their cooperatives.[60] Although both Acts do not have provisions which compel cooperatives to transact with non-members, policies of both governments require non-members to sell some specified produce through cooperatives.

3.3 Member control in the establishment and governance of cooperatives

Both Acts require co-operatives to have specific registers for co-operatives which are maintained by respective Registrars of Co-operatives. Co-operatives are registered by law and certificates of incorporation are issued. Admission of new members is regulated by cooperatives' by-laws. The Mainland and Zanzibar Co-operative Acts require that a person must have a common bond or need (interest) with that of other members to qualify for membership[61]. Co-operatives are not obliged to accept third parties as members. However, according to the Mainland Act, registered cooperatives may establish co-operative joint ventures with other private or public companies upon being so approved by the Registrar[62]. Although the two Acts do not specify the citizenship requirement for individuals to be accepted as members of the cooperatives, requirements for members to have a common bond which is based on the same physical or geographical location, imply that members of a co-operative society have to be residents of the respective Tanzania mainland and Zanzibar parts of the Union to qualify for membership. So far, there are no cooperatives with members from both sides of the union.

In the two Acts, when the membership falls below the required minimum number for registration of a relevant co-operative, the Registrar is obliged to withdraw their certificate and that co-operative will cease to operate or to be legally recognised. Both Acts allow members to exit their co-operatives upon paying their liabilities and/or being paid their contributions. Their by-laws are supposed to outline the process and procedures that members need to follow before their liabilities or benefits are paid. Both Acts require that each member of a registered society should have one vote only as a participant in the affairs of the society, regardless of the capital he/she has invested in the co-operative. In any case where the votes are equally divided the chairperson may exercise a casting vote and the said voting powers of members are to be prescribed in the societies' by-laws.

3.4 Member Economic Participation

Both Acts require that capital contribution of the cooperatives should be governed by the societies' respective by-laws. For this reason, they do not prescribe any minimum share capital; the minimum share capital is as well stated in various by-laws. The Mainland Act requires that a member must contribute at least fifty percent of share capital before he/she starts enjoying membership rights and the other half should be paid within two years[63]. However, this requirement is never complied with as many members in cooperatives only contribute minimum capital which entitles them to become members and never complete the remaining contributions.

Contribution towards share capital varies from one co-operative to another, depending on its by-laws. It is based on the economic activities that are pursued by the co-operative but it is in the form of entrance fees, membership subscription, share contribution, deposits from members and non-members, and other

[60] Section 60 of the Act.

[61] However, what constitutes a common bod or interests is not expounded by the Acts or regulations. It is very important for the laws to provide specific criteria that would assist existing members to determine congruence of interests with the incoming members, before accepting them into membership.

[62] According to section 26(3) of the Mainland Act.

[63] This is according to section 41.

contributions as may be provided in the by-laws. Some co-operatives contribute equally towards the capital base, while other co-operatives' contributions vary between members. But a member cannot contribute more than twenty percent or 1/5th of the total co-operative share capital. Although most by-laws provide that contribution has to be made in proportional to the volume of transactions within the co-operative, most cooperatives, especially agricultural marketing co-operative depend on loan capital from commercial banks to meet their operational budget requirements.

The Mainland Act does not provide directly for patronage refunds as profit that arise from members' transactions with the cooperatives[64]. But the by-laws and policies of some co-operatives recognise patronage refunds as a profit, stemming from transactions with members and provide for returns to the members in proportion to their transactions. Some by-laws, especially those of SACCOS make a clear distinction between patronage refunds and dividends. However, Regulation 47(3) of the Zanzibar Co-operative Regulations requires the distribution of the remaining surplus (that is, sixty five percent) to be based on patronage rebate of each member.

3.5 Co-operative Independence and Autonomy

As opposed to the principles of self-control or independence, co-operatives in Tanzania are subjected to external control by the governments of both sides of the Union. In the case of Zanzibar, the Department of Co-operative Development, within the Ministry responsible for cooperatives is mandated to regulate and promote the activities of co-operatives under the direction of the Director of Co-operative Development who is also the Registrar. In addition, the Minister responsible for cooperatives has been given appellate authority on decisions of the Director/Registrar of cooperatives pertaining to registration, cancellation and dissolution of co-operative societies[65]. In the Mainland, TCDC although established by law as a semi-autonomous public body, is fully controlled by the government. Generally, both Acts do not guarantee a required degree of autonomy and independence to cooperatives established in the respective countries. However, the Zanzibar Act gives the co-operative movement some responsibilities that allow secondary and tertiary level cooperatives to exercise supervisory as well as promotional responsibilities to lower-level cooperatives[66].

3.6 Cooperation among co-operatives

The principle of co-operation among co-operatives is addressed in both Acts. Both have provisions allowing cooperatives to affiliate through establishment of secondary co-operatives (unions) and tertiary co-operatives (apex and federation). According to the Zanzibar Act, at least five (5) primary cooperatives may form a secondary society and at least five secondary societies may form an Apex co-operative society[67]. According to the Mainland Act at least twenty primary cooperatives may form a secondary society and at least ten secondary societies may form a Federation[68]. The Mainland Act also allows financial cooperatives such as co-operative banks to be formed by cooperation between SACCOS and other types of co-operative societies[69]. The Mainland Act further allows two or more cooperatives to establish a co-operative joint enterprise (CJE) for the purposes of running a joint business or economic

[64] Both Acts refer to patronage refund as "bonus" under the respective definitions under sections 2 of the Acts. Further, the Zanzibar Act under section 24 mentions deferred patronage refund as one of the sources finance for cooperatives.

[65] According to sections 21, 23 and 47 of the Zanzibar Act. However, section 47(7) provides a right to a person who is not satisfied with the decision of the Minister to take the matter to the court of competent jurisdiction.

[66] For example, under section 14, secondary societies are supposed to assist the registrar in the process of registration of member primary cooperatives and also perform mediation and dispute resolution of member primary cooperatives. Equally under section 16 the Apex co-operative society is required to do the same to the secondary co-operative societies.

[67] Sections 13 and 15 respectively.

[68] Section 21 of the Act.

[69] Section 21(3).

enterprise. Such a CJE may form a joint board. However, it does not have a right to have a separate representation at the level of a secondary society or a federation.[70] The law is silent as to whether such a CJE may be formed between cooperatives from two different countries or for that matter, from two sides of the Union.

4. COMPLIANCE OF CO-OPERATIVE LAWS OF TANZANIA TO INTERNATIONAL CO-OPERATIVE LEGAL NORMS

Degree of compliance to international co-operative legal norms

An analysis of both the Mainland and Zanzibar Acts has demonstrated a legal environment that may not be conducive enough to encourage sustainable co-operative development as envisaged by the ICA Statement on Co-operative Identity. Instead of encouraging members to take lead in the establishment, regulation and promotion of cooperatives, the laws give respective governments powers to over-regulate cooperatives and therefore impair with almost all the ICA principles[71], but at varying degrees. The Mainland legal framework gives to the minister responsible for cooperatives power to give directives of general and specific nature to the Tanzania Co-operative Development Commission on matters pertaining to the development of cooperatives, thereby giving him direct control over co-operative affairs and rendering the Commission's function unnecessary[72]. He is also an appellate authority in all matters decided by the Registrar of Cooperatives.

Furthermore, the Mainland law gives too much power to the Registrar of Co-operatives who is the appointee of the President, to get directly involved in almost all co-operative decision- making matters. These include approving and, in that process, he may impose such limitations as he thinks fit, the establishment of co-operative joint business undertakings or co-operative business joint ventures[73] and directing a co-operative society which is seeking to be registered to amend its by-laws to conform to his directions as he may give[74]. The Registrar also controls the granting of loans by cooperatives[75] and investments of cooperatives out of reserve funds[76]. He also has powers to dissolve a Board of Directors of a co-operative society and appoint a care taker or temporary board which shall serve for one year[77].

On the part of Zanzibar, the law also gives to the Director of Cooperatives cum Registrar, who is the appointee of the President, powers to register and cancel registration of cooperatives, to license and cancel license of SACCOS, to appoint and control the liquidators of cooperatives and to audit/supervise cooperatives. Moreover, all Registrar's decisions are appealable to the minister responsible for cooperatives. Nevertheless, the Zanzibar legislation provides for functions of secondary and tertiary level cooperatives to carry out some regulatory functions such as supervision and audit, dispute settlement as well as promotional services to co-operative members.[78]

Generally, the law especially that of Tanzania Mainland creates an environment for co-operatives to operate as pseudo-public or quasi-governmental organisations, not as private sector organisations and this may be hindering them from utilising privileges provided by the international co-operative legal norms. When a balance is made between the "ICA compliant" and "non-compliant" legislation, among

70 Section 26 of the Act.

71 Despite of the fact that both pieces of legislation 'recognize' the ICA principles.

72 Section 17

73 Section 26(1-3)

74 Section31

75 Section 72

76 Section 74

77 Section 6 of the Third Schedule

78 Sections 14 and 15 of the Act.

the two pieces of legislation, the Mainland Co-operative Societies Act may be regarded as being more non-compliant while the Zanzibar Act may be limited compliant.

5. CONCLUSION

This paper aimed at showing the extent to which the Tanzania co-operative law complies with international co-operative legal norms. The paper has observed that, ideology depolarization and globalization have created an environment that has enabled internationally acceptable co-operative values and principles to provide a normative recognition to the already established or potential cross-border co-operative business relations among individuals as well as among cooperatives. This trend has been amplified with the international co-operative legal norms being translated into regional co-operative laws[79] and ultimately into national co-operative laws.

The co-operative laws of Tanzania which have been used as a case study of a national co-operative legislation have been found to produce cooperatives which may be referred to as pseudo-public or quasi-governmental organisations, not private sector organisations established through mutually beneficial business relations between members, which may be fully compliant to the internationally recognised values and principles. The implementation of the said co-operative laws may result in an 'institutional psychology' which prevents cooperatives from operating as independent vibrant and coherent private business associations with cross-territorial business potentials, and which adhere fully to international co-operative legal norms. Consequently, Tanzanian cooperatives stand a danger of being by-passed by the opportunities occasioned by globalisation and advancement in global science and technology. Under these circumstances, a proper reform in the co-operative law of both Tanzania Mainland and Tanzania Zanzibar that would result in amending the co-operative laws to recognise and translate the international co-operative legal norms into action, is necessary and should start with awareness creation to the policy and law makers to enable them appreciate the importance of co-operative values and principles in establishing sustainable and globally competitive cooperatives.

REFERENCES

Berman P. S. (2005), "From International norms to Law and Globalization", 43 *Columbia Journals Of International Law,* 486 – 557.

Berman P. S (2007) "Pluralist Approach to International Law",32*The YALE JOURNAL OF INTERNATIONAL LAW*: 301 – 329.

Beauchard R. and KodoMahutodji J. V., (2011) "Can OHADA Increase Legal Certainty in Africa?",*World Bank, Justice and Development Working PaperSeries*, No. 17/2011 at pg. 18 available at https://www.researchgate.net/publication/281438706

BiereckiDominik (2019), "Legal Consequences of Introduction of Elements of Public Law into Co-operative Law Polish Perception", Issue II, *International Journal of Co-operative Law*, pp. 88 – 96.

Birchall J. (2008) "Co-operative Principles Ten Year On".*Review of International Cooperation*, Volume 98 No. 2 of 2008, pp.76.

Coleman, W.D. (2004), Globalization and co-operatives. In B. Fairbairn and N. Russell (Eds.) *Co-operative membership and globalization: New directions in research and practice* (pp. 3 – 17). University of Saskatchewan: Centre for the Study of Co- operatives.

Eric C. (2010), "Globalization and Future of the Law of Sovereign State", 8 *International Journal of Constitutional Law*, Issue 3, July 2010, pp. 636–655, available at https://doi.org/10.1093/icon/moq033

[79] As has been a case in the establishment of the European Co-operative Society (CSE) in Europe or in the African Co-operative Society (ACS) of the OHADA countries and future East African Co-operative Society in East African Community countries.

Euricse et al. (2010) "Study on the Implementation of the Regulation 1435/2003 on the Statute for European Co-operative Society", available at https://op.europa.eu/en/publication-detail/-/publication/494bb15b-c34d-4bdf-8518- 75d6bde38cbb

Fajardo, I.G; et al.(2017) Principles of European Co-operative Law.Principles, Commentaries and National Reports.Intersentia.

Fici Antonio (2013), "The European Co-operative Regulation" in Cracogna Dante et al. (eds.) *Handbook on International Co-operative Law*, Springer pp. 115 – 151.

Hagen, H. (2013), "Public International Co-operative Law" in Dante Cracogna et al (eds.) *Handbook on International Co-operative Law,* Springer, pp. 69 – 115.

Hagen, H. (2012), "Guidelines for Co-operative Legislation, *3rd rev. edn. ILO, 2012*

Hiez, D. and Tadjudje W. (2013), "The OHADA Co-operative regulation", in Cracogna D. and al. (eds.), *International Handbook of co-operative Law*, Springer, pp. 89-113.

HiezDavid (2019),"Voluntary Membership: Up to which point do Cooperatives Support Liberalism?" Issues II, *International Journal of Co-operative Law*, pp. 8 -25.

MOULOUL Alhousseini (2009) Understanding The Organization For The Harmonization Of Business Laws In Africa (O.H.A.D.A.) 2nd Edition, available at https://www.ohada.com/uploads/actualite/1403/Comprendre-l-Ohada-en.pdf

Münkner H.-H. (2015), *Co-operative Principles and Co-operative Law*, 2nd Edition, LIT Verlag Berlin, Münster-Wien-Zürich-L.

Nilsson Jerker (1996), "*The Nature of Co-operative Values and Principles: Transaction Cost Theoretical Explanations,*" Annals of Public and Co-operative Economics, pp. 633- 653.

Tadjudje W. (2018), The East African Community's Co-operative Regulation, Issue I *International Journal of Co-operative Law*, pp 148 – 166.