LEGAL FRAMEWORK ANALYSIS

SOUTH AFRICA NATIONAL REPORT

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1. Introduction

This national report forms part of a Legal Framework Analysis (LFA) undertaken for Alliance Africa, in terms of an agreement between the International Cooperative Alliance (ICA) and the European Union to which Alliance Africa is a co-signatory. The agreement is entitled "Cooperatives in Development – People Centred Businesses in Action".

The objectives of the LFA are set out in the following statement:

"Cooperatives benefit from regulations acknowledging their specificities and ensuring a level playing field with other types of business organizations. The absence of a specific legal framework for cooperatives or a weak legal framework may damage cooperatives, while in contrast a supportive regulation may allow their development. This is the reason why knowledge and evaluation of cooperative legislation is a necessary tool for ICA offices and members to support their advocacy and recommendations on the creation or improvement of legal frameworks, to document the implementation of cooperative legislation and policies, and to monitor their evolution. Against this background, the objectives of the LFA are: (i) to acquire general knowledge of the national legislation on cooperatives, including but not limited to the legislation in force in the 107 countries represented by ICA members, as well as of supranational cooperative legislation if existent; (ii) to evaluate the national jurisdictions covered by the LFA according to their enabling environment for cooperatives, in order to compare national cooperative laws with pre-determined indicators, based on a scale of "cooperative friendliness" of the national legislation; and (iii) to provide recommendations for eventual renewal of the legal frameworks in place."

The writer has long advocated that cooperatives should play an important role in the economy of South Africa, first as an activist in the struggle for democracy, then as a researcher and as a legal practitioner. In the latter capacity, after the transition to democracy, he was engaged by the government's Department of Trade and Industry (DTI) to prepare draft legislation which eventually resulted in the Cooperatives Act of 2005. This Act is until today the principal legislation regulating cooperatives, and an extraordinary number of cooperatives have been registered since it was enacted. Despite this fact, there are no indicators to support an argument

that cooperatives in South Africa have thrived. This suggests it is important not to view the legislation in isolation from the processes by which it was enacted and implemented, as well as the social and economic context locally and globally. This perspective also informs this report.

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2. Outline of the legal framework for cooperatives in South Africa

2.1 General context

South Africa is the most industrialised country on the African continent, and cooperatives played a significant role in its industrialisation. In particular, secondary and tertiary cooperatives in agro-processing were able to challenge the ascendancy of the company, leading to complaints by companies that there was not a 'level playing field' on account of what was perceived to be favourable tax treatment for cooperatives. Tax legislation was amended in response to these complaints in 1977, and soon after that the predecessor of the current Act was adopted.[1] Although it recognised other forms of cooperative—referred to collectively as trading cooperatives—its focus was on agriculture and agro-processing, and it was administered by the Department of Agriculture.

There were various unsuccessful attempts to establish cooperatives outside the framework established by the 1981 Act, in the period prior to and subsequent to the transition to democracy in 1994. During the same period important secondary and tertiary cooperatives converted to companies. Consequently, there was no cooperative movement to speak of when the national constitution was adopted, and cooperatives are not mentioned in that document.[2] There was also no cooperative movement to consult with when the government decided in about 2000 to transfer cooperatives to the Department of Trade and Industry (DTI) and draft new legislation.

Unlike its predecessor, the 2005 Act makes explicit reference to the cooperative principles, which are defined with reference to the ICA. The purposes of the Act include the promotion of cooperatives that comply with the cooperative principles, and a section of the Act headed 'compliance with co-operative principles' attempts to give an objectively ascertainable meaning to the different principles.[3] The Act also applies to all kinds of cooperatives, and a schedule to the current Act contains special provisions for four kinds of cooperatives, as defined: worker

[1] Act 91 of 1981.
[2] Constitution of the Republic of South Africa, 1996.

[3]Sections 1 and 2(a), Act 14 of 2005. The term ‘cooperative’ is hyphenated in South African legislation and policy.

cooperatives, housing cooperatives, financial service cooperatives and agricultural cooperatives.[4] The approach of government to its role as regulator is also very different from that of the previous Act. In short, government is called upon to regulate with a lighter hand than previously.

Like its predecessors, the 2005 Act applies nationally, and any association purporting to be a co-operative is therefore bound by it. However, this does not preclude government at a provincial or local level from adopting its own policies toward co-operatives, as some have done. There are today about 140,000 registered cooperatives on government's books, but it would be wrong to suggest that this proliferation was due to the 'enabling environment' the Act has created.[5] In the absence of any other credible data about these cooperatives it would be safe to say that the vast bulk of them exist on paper only. Many registered for opportunistic reasons – mainly to access government grants. Yet others formed cooperatives as a survivalist response to de-industrialisation and rising unemployment. All indications are that the attrition rate amongst these cooperatives has been extraordinarily high, and their contribution to economic development has been negligible. They have also not formed secondary cooperatives, without which a coherent cooperative movement cannot begin to emerge.[6]

The only other law which applies specifically to cooperatives is the Co-operative Banks Act of 2007, which provides for the registration of deposit-taking financial service cooperative which meet a specified threshold as cooperative banks.[7] This Act, which is administered by National Treasury, also provides for the establishment of a Co-operative Banks Development Agency. This agency was in fact established and is operational, in contrast to the advisory board for which the 2005 Act provided.[8]

In 2013 the government adopted a number of far-reaching amendments to the 2005 Act. One of the amendments concerned the particular provisions relating to worker cooperatives, in response to pressure from organised labour, as I will later explain. The rationale for the other amendments

[4]Parts 1-4 of Schedule 1, Act 14 of 2005.
[5]This claim is made by J. Ndumo, 2019. Co-operative Development in South Africa. In "Co-operatives in South Africa: Advancing solidarity economy pathways from below". V. Satgar (Ed), University of Kwazulu-Natal Press: 51
[6]There is a newly established secondary cooperative for financial service cooperatives. But this replaces a secondary cooperative of SACCOs that pre-existed the 2005 Act.
[7]Section 2, Act 40 of 2007. The threshold a financial service cooperative has to meet is that it has 200 or more members and holds deposits to the value of R1 million.
[8]Chapter 12, Act 14 of 2005.

is less clear. Some provisions address weaknesses in the 2005 Act - provisions that ease the burden on small cooperatives of having to have their financial statement audited, for example.[9] Yet they also introduce a level of complexity which seems to be unwarranted and inappropriate for a relatively unsophisticated cooperative movement. Thus, the provisions regarding the financial statements of small cooperatives are premised on a controversial categorisation of primary cooperatives according to size that is likely to be difficult to apply in practice (see below).

It is perhaps not coincidental that not long after these amendments were adopted but before they had come into force, the department responsible for cooperatives changed from the DTI to a newly established Department of Small Business Development. Remarkably, these amendments have only come into force now, as this report was being drafted, and nearly six years after they were adopted. Some two weeks afterwards government published amended regulations to the Act, as well as a Code of Good Practice.

2.2 Specific elements of the legislation

Definition and objectives of cooperatives

The definition of a cooperative in the Act conforms with the internationally accepted definition of a cooperative. However this definition contains so many elements – some of which are open to interpretation - that it is a recipe for legal confusion.[10] Accordingly, the definition is not of much practical help in differentiating genuine from pseudo cooperatives, or cooperatives from other legal entities such as a for-profit company. A simpler definition would be more useful: for example, that a cooperative is an enterprise organised and operated on cooperative principles.

In terms of the definition in the Act, the objective of a cooperative is to meet the common economic and social needs and aspirations of its members. This is obviously not a precise objective, although one would expect a cooperative to describe its primary objective with a degree of precision in its constitution.[11] However, the 2005 Act leaves it up to the co-operative

[9]Section 47, Act 14 of 2005 as amended by section 35, Act 6 of 2013.
[10]The definition contains at least six elements: a cooperative is a voluntary association; it must also be autonomous; it must meet common economic and social needs and aspirations; it must also be jointly owned and democratically controlled; it is an enterprise; it must also comply with co-operative principles (which also encompass some of the elements already mentioned).
[11]This is the term used for what in some other jurisdictions is referred to as a statute or by-laws.

itself as to how it describes its objectives as well as its business. It also gives a cooperative latitude within the broad parameters of the Act as to how it constitutes itself.[12] Since cooperatives being established often do not have the resources to frame an appropriate constitution themselves, the unintended consequence of this approach has been for co-operatives to rely on draft constitutions prepared by government.

Obviously different kinds of cooperatives will have different objectives. The Act lists nine kinds of cooperatives without limiting their number. These are as follows: housing, worker social, agricultural, co-operative burial society, financial services, consumer, marketing and supply, and service.[13] Each is defined with reference to a broad objective relating to the sector in which it operates, but a cooperative may meet the requirements of more than one definition. Also, there is no distinction drawn in the Act between user-owned and worker-owned cooperatives, even though cooperative policy prior to the adoption of the Act envisaged such a distinction.[14] As a consequence, the categorisation of cooperatives is somewhat arbitrary.

The problem of how cooperatives are to be categorised is compounded by the fact that, when the Act came into force, government did not have different draft constitutions for different kinds of cooperatives. This was particular a problem for the worker cooperative, which were often categorised according to the sector in which its members worked. This meant the particular provisions applicable to worker cooperative in the Act were disregarded, and that the data concerning categories of cooperatives was corrupted from the outset. Government now has draft constitutions for different kind of cooperatives. Even so, it is often not obvious which draft constitution is applicable. Also, these draft constitutions are inevitably generic in nature and not always appropriate to the circumstances of the cooperative concerned. All indications are that government itself lacks the capacity to evaluate the appropriateness of particular provisions of constitution for a given co-operative.

The Act also leaves it to the co-operative itself to determine how it furthers or promotes members interests, subject to proviso that it complies with the mechanisms in the Act intended to

[12]Section 13 stipulates that a cooperative must adopt a constitution that complies with section 14. Section 14 (1) lists 34 topics for which a cooperative must provide in its constitution. It lists a further ten topics for which a cooperative may provide in section 14(2), as well as provisions applicable where members are required to hold shares (section 15) and provisions for secondary and tertiary cooperatives (section 16).
[13]Section 4(2), Act 14 of 2005.
[14]A Cooperative Development Policy for South Africa, Department of Trade and Industry, 2004.

guarantee accountability and to protect the interests of members. Similarly, the Act leaves it to the cooperative itself as whether it wishes to restrict the amount of business allowed with non-members in its constitution.[15] Members are not obliged to transact with their co-operative (although there was such a provision in predecessor legislation) or the cooperative with the members. There is also no specific term for transactions between such co-operatives and their members.

Arguably the common economic and social needs and aspirations of members should not be so narrowly conceived as to exclude activities which, although outside the scope of its primary objective, are nevertheless in the members' interests. These activities could include engagement in political and civic issues. Arguably cooperatives are obliged to be open to such engagement, in terms of the seventh cooperative principle. There was also nothing in the 2005 Act which precluded a cooperative from doing so, subject to any limitations imposed by its constitution. However, the more permissive wording of the 2005 Act has been substituted by a prohibition on the pursuit of any objective not authorised by its constitution.[16]

Reference has already been made to the social cooperative, which is defined as one which 'engages in social services for its members, such as care for the elderly, children and the sick.' The 2013 amendments have now amended this definition to refer to it as a 'non-profit' cooperative. This is presumably to assist such cooperatives obtain the preferential tax treatment for which certain non-profit organisations qualify. It has also added a new part to schedule 1, containing particular provisions for this kind of cooperative.[17]

South Africa has specific legislation regulating banks (Banks Act, 94 of 1990), the provision of long-term insurance (Long-term Insurance Act, 52 of 1998), short-term insurance (Short-term Insurance Act, 53 of 1998) and medical aid fund or medical schemes (Medical Schemes Act, No 131 of 1998). The Act provides that the registrar may direct any cooperative to which any of the

[15] Section14(2)(b), Act 14 of 2005. This position is somewhat changed by the 2013 amendments, which introduce a provision allowing a cooperative to state whether it is a cooperative 'that concludes transactions with both members and non-members' or one that 'does not conclude transactions with non-members.'

[16]This prohibition is linked to a draconian penalty for cooperative or directors guilty of contravening it. Section 19(2) of Act 14 of 2005, as amended by Act 6 of 2013.

[17]Part 5, Schedule 1 of Act 14 of 2005, as amended by Act 6 of 2013.

above laws apply to join a secondary cooperative, which will act as a self-regulatory body, in compliance with any exemption granted in terms of any of these laws.[18]

Establishment, cooperative membership and governance

Any entity that calls itself a cooperative must be registered in terms of the Act, and the registrar of cooperatives is responsible for maintaining a register of cooperatives.[19] The main requirement to register a cooperative is a constitution which complies with the Act, which has been adopted at a meeting of interested persons, and a list of founder members.[20]

Formerly a minimum number of five persons could form a primary cooperative, but the 2013 amendments have introduced a definition of juristic person, and provide that two juristic persons may form a primary cooperative. They also allow a combination of five natural and juristic persons to form a primary cooperative.[21] A minimum of two primary cooperatives may form a secondary cooperative. Two or more secondary cooperatives may form a tertiary cooperative. Where the membership of a registered cooperative is reduced to less than the minimum required number it has in effect six months to rectify the situation or face deregistration.[22]

Consistent with an approach in terms of which government regulates with a light hand, questions relating to the admission to membership are left to the cooperative concerned to determine. The Act merely requires a cooperative to specify the requirements for membership in its constitution, subject to section 3(2), as well as the procedure for admission.[23] Section 3(2) concerns compliance with the principle of "voluntary and open membership": a cooperative complies if its membership is open to persons who can use its services and who are able to accept the responsibilities of membership.[24]

A person who is refused membership despite being able to accept the responsibilities of membership would therefore have a claim against the cooperative concerned. However, the Act itself does not have a specific mechanism for determining such claims, although the 2013 proposes the establishment of a Co-operative Tribunal which could presumably fulfil this

[18]Item 6(1), Part 3 of Schedule 1, Act 14 of 2005.
[19]Section 12, Act 14 of 2005.
[20]Sections 6 (2) and 7, Act 14 of 2005.
[21]Section 1, Act 14 of 2005 as amended by Act 6 of 2013.
[22] Section 26, Act 14 of 2005. A cooperative in this situation could also convert to another legal entity.
[23]Section14(1)(k) and (p), Act 14 of 2005.
[24]Section 3(1)(a), Act 14 of 2005.

function. Such member might also be able to bring such a claim in the Equality Court, on the basis that he or she has been unfairly discriminated against.

The Act also requires that the constitution of a cooperative specify the conditions and processes for the termination of membership.[25] However, unless a cooperative determines otherwise, the withdrawal of a member does not release him or her from any debt or obligation toward the co-operative, or any contract between the member and a cooperative. Moreover, despite any provisions in the constitution, a co-operative is entitled to defer the repayment of shares if it would affect its financial well-being.[26]

Previously, each member of a primary cooperative had one vote in general member's meetings regardless of the amount of capital invested, and the Act did not allow any exceptions in this regard.[27] However in terms of the 2013 amendments, as noted, primary cooperatives are now to be categorised according to size. There are to be three categories, based on their annual revenue (or projected annual revenue): small (category A), small to medium (category B) and medium to large (category C). The principle of one member one vote will still apply in category A and B cooperatives, but in category C cooperatives members may have more than one vote (as is the case with secondary and tertiary cooperatives). There are, however, certain limitations on the number of votes a member may have.[28]

The highest-decision making body of a co-operative is the general meeting, to which the board of directors is accountable. In between general meetings, the board of directors is accountable to a supervisory committee.[29] But it is not a requirement of the Act that a cooperative has a supervisory committee.[30] The board of directors is responsible for the management of the cooperative, and directors are ordinarily elected at the annual general meeting. [31]

Only members may be appointed directors, but the 2013 amendments propose an additional distinction between 'executive' and 'non-executive directors', which presumably will only apply

[25]Section 14(1)(s), Act 14 of 2005.
[26]Section 25, Act 14 of 2005.
[27]Section 3(1)(b), Act 14 of 2005.
[28]Section 3(3), Act 14 of 2005 as amended by Act 6 0f 2013.
[29]Section 27, Act 14 of 2005.
[30]Section 14(2)(f) and the definition of 'supervisory committee' in section 1, Act 14 of 2005.
[31]Section 29(2), Act 14 of 2005.

in the case of large cooperatives. Only members can be 'executive directors'.[32] Non-members will thus be able to be 'non-executive directors', but only if they are 'associate members'. The concept of 'associate member' already existed in the Act but the 2013 amendments will give it new significance. It refers to someone who 'wants to provide support without becoming a member' of a cooperative or who 'may benefit without becoming a member.'[33]

The Act requires directors to disclose the nature and extent any interest in a contract or transaction, and he or she is subject to disqualification for failure to do so.[34] The Act also prohibits a director from accepting any commission or reward in connection with any transaction to which a cooperative is party. Breach of this provision is an offence.[35]

Cooperative financial structure and taxation

Members are expected to contribute the capital a cooperative requires in accordance with cooperative principles. This capital contribution, in terms of the Act, may comprise any of the following: entrance fees; membership subscriptions; the consideration for membership shares; member loans (i.e. a loan by a member to the cooperative); and funds of members.

Where a cooperative decides a member is required to hold shares, its constitution must comply with the applicable provisions of the Act. These include provisions regarding the minimum number of shares to be issued to each member, and the maximum percentage of the shareholding a member may hold (except in the case of a secondary or tertiary cooperative).[36] Different contributions are thus possible. The Act also permits a cooperative to provide for the whole or part of the patronage proportion of a member to be applied to purchase membership shares for the member. The patronage proportion is allocated in proportion to the value of transactions conducted by a member with a cooperative during a specified period.

The constitution of a cooperative must specify the period following which a member, after withdrawing his or her membership, becomes entitled to repayment of his or her membership shares.[37] It must also specify any other circumstances in terms of which membership shares may

[32]Section 14(c)(dd), Act 14 of 2005 as amended by Act 6 of 2013.
[33]Section 14(A), Act 14 of 2005 as amended by Act 6 of 2013.
[34]Section 37, Act 14 of 2005.
[35]Section 38, Act 14 of 2005 as amended by Act 6 of 2013.
[36]Section 15 (e), Act 14 of 2005.
[37]Section 14(1)(l), Act 14 of 2005.

be redeemed.[38] Despite what the constitution says in this regard, however, a cooperative my defer the repayment of shares if it determines that this would adversely affect its financial well-being. The maximum period for which repayment may be deferred is two years after the effective date of the notice of withdrawal of the member concerned.[39]

The Act requires that 'at least five percent of any surplus' must be set aside as a reserve in a reserve fund that is not divisible amongst its members.[40] The 2013 amendments have changed the percentage prescribed to not less than one percent and not more than five percent of its nett asset value.[41] Notwithstanding the percentage prescribed, a cooperative may stipulate a higher percentage in its constitution.[42] The constitution must also provide for the manner in which any portion of the surplus that is not transferred to the reserve fund is utilised.[43]

A cooperative may allocate and credit or pay to its members a portion of the surplus that is not transferred to a reserve fund. This portion must be allocated in proportion to the value of transactions conducted by a member with the cooperative during a specified period i.e. in accordance with the patronage proportion.[44] The Act also provides that a co-operative may provide in its constitution for the establishment of one or more funds of members in which amounts set aside for future payment to the member can be deposited.[45]

The Act provides that a cooperative may issue certificates in respect of membership shares issued to the member, and member loans made by the member.[46] However, these cannot be regarded as financial instruments, since they are not tradeable. Membership shares may be transferred, but only subject to the provisions of the constitution of the cooperative concerned.[47] The Act does not entitle a cooperative to issue tradeable shares, that may be purchased by investors.

[38]Section 15(f), Act 14 of 2005.
[39]Section 24, Act 14 of 2005.
[40]Section 3(1)(e), Act 14 of 2005. The term 'surplus' is defined as the 'financial surplus arising from the operations of a cooperative in a financial year.' The Act does not use the term 'profit'.
[41]Section 33, Act 6 of 2013.
[42]Section 14(1)(m), Act 14 of 2005.
[43]Section 14(1)(hh), Act 14 of 2005.
[44]Section 44(1), Act 14 of 2005.
[45]Section 43, Act 14 of 2005.
[46]Section 42, Act 14 of 2005.
[47]Section 41(6), Act 14 of 2005.

In the case of the dissolution of a co-operative, the Act provides that any residue after valid claims have been paid must first of all be applied to paying back the paid-up share capital of the members. If the residue is less than the paid-up share capital, members must be paid a proportion thereof. If the residue is more than the paid-up share capital, the balance must be distributed in accordance with the patronage proportion or the constitution of the cooperative concerned.[48] In the case of a cooperative converting to another entity, its capital and asset vest in the corporate body or unincorporated association into which it has converted.[49]

Since 1977 cooperatives in South Africa have been subject to the same tax regime as companies with minor exceptions (the most significant exception relates to bonuses to members in what used to be termed closed cooperatives).[50] The legislation relating to taxation of cooperatives has also not been amended since, even though it uses outdated terms (such as "cooperative society"). The current tax regime also does not adequately acknowledge the particular legal nature of cooperatives. For example, it does not state how amounts transferred to a reserve fund should be treated, or what the consequences of this fund being indivisible should be. The definition of dividend was also amended in 1977 to include bonusses distributed in accordance with the patronage proportion, whereas it should arguably be distinguished from dividends.

Legislation providing special tax treatment for 'small business corporations' was introduced in 2001, and extended to cooperatives that comply with certain criteria in 2006.[51] This 'special tax treatment' includes preferential treatment with regard to tax allowances which are deductible. A progressive tax scale also applies.

Other features

Cooperatives are subject to state control on much the same basis as other corporate bodies and economic entities. However as already indicated, the state regulates with a lighter hand. This approach is not without its problems, which are exacerbated by the absence of cohesive cooperative movement. As already noted, the 2005 Act provides for two or more primary cooperatives to form secondary cooperatives, and tertiary cooperatives whose members are

[48]Sections 75(1)-(4), Act 14 of 2005.
[49]Section 62(7), Act 14 of 2005.
[50]The principal law regulating taxation is the Income Tax Act (58 of 1962). A specific section headed 'determination of taxable income of cooperative societies and companies' was introduced in 1977. The term cooperative society derives from the 1939 Act (Act 29 of 1939).
[51]Revenue Laws Amendment Act, Act 20 of 2006.

secondary cooperatives.[52] However, it did not prescribe how an "apex cooperative organisation" should be constituted, or require it to register in terms of the Act.[53]

In terms of the 2013 amendments, however, "three operational sectoral tertiary cooperatives and five operational multi-sectoral tertiary cooperatives that operate on a provincial, district and local level" may now apply to register a "national apex cooperative".[54] Also, an entirely new section 16A entitles the Minister to "publish guidelines for the functions of a national apex cooperative."[55] This implies a very different approach to regulation of cooperatives at the highest level, and is arguably in conflict with the requirement that a cooperative be autonomous.

3. Degree of "cooperative friendliness" of the legislation

The fact that tax legislation does not adequately acknowledge the particular legal nature of cooperatives does of course represent a legal obstacle to their development. On the other hand, there are other regulations that provide opportunities which cooperatives can utilise, such as procurement regulations favouring "broad-based black economic empowerment (BBBEE)," as well as the grants national government and some provinces give (or have given) newly established cooperatives.

However, government has evidently been powerless to prevent applications being made to register "cooperatives" for no other reason than to access the grant and divide the money amongst the "members". The lack of a coherent cooperative movement has also made this kind of abuse easy. The South African experience also suggests been that emergent cooperatives generally do not have the capacity to exploit legislative provisions that are intended to benefit them, probably because they are locked in a struggle to survive economically.

The particular provisions in the Act regarding worker cooperatives might be regarded as an example for legislators and lawmakers elsewhere, particularly in countries like South Africa with rising unemployment, and high levels of youth unemployment. These provisions address potential abuses of the worker cooperatives, such as where a relatively small number of members employ a relatively large number of workers who do not have the benefits of membership. The

[52]Section 4(1), read with section 1, Act 14 of 2005.
[53]Section 5(2), Act 14 of 2005.
[54]Section 6, Act 14 of 2005 as amended by6 of 2013.
[55]Act 14 of 2005 as amended by Act 6 of 2013.

number of non-members a cooperative may employ may therefore not exceed 25 percent of the number of members.[56]The provisions also address potential legal obstacles to the development of this particular form of cooperative, such as the risk that worker cooperative become embroiled in disputes with disaffected members over compliance with labour legislation.

Since the latter provision is one that the 2013 amendments address, with potentially far-reaching consequences for worker cooperatives, it is necessary to clarify the issues. Labour legislation clearly applies to the employees of any cooperative. The issue is rather whether the members of a worker cooperative are employees, given that they are co-owners of the enterprise. If they are, someone whose membership has been terminated in accordance with the constitution- a decision sanctioned by a general meeting of members – may refer a dispute in terms of labour legislation on the basis that he or she has been 'unfairly dismissed'. A statutory agency tasked with determining such disputes (but no knowledge of cooperatives) could then override the decision of a general meeting,

The position adopted in the 2005 Act is that a member of a worker cooperative is not an employee in terms of labour legislation, and the legislation concerning unfair dismissals (for example) does not apply.[57] However members are deemed to be employee for the purposes of certain legislation providing social protection to workers (unemployment insurance, for example). This approach had an unintended consequence. Sharp business lawyers (amongst others) realised they could avoid compliance with labour legislation by establishing bogus cooperatives. Consequently there has been a proliferation of bogus cooperatives in the clothing industry- a low wage industry with a history of non-compliance with labour legislation.

Bogus cooperatives are entities that obviously do not comply with the cooperative principles, let alone the particular provisions applicable to worker cooperatives. Government ought to have been able to close them down, but proved incapable of doing so. If there had been a coherent cooperative movement, it would surely have had something to say about this – specifically government's failure to correctly categorise worker cooperatives and apply the provisions of the Act from its inception. As it is, government has been prevailed upon by organised labour to make

[56]Item 3(1)(c), Part 1, Schedule 1 of Act 14 of 2005.
[57] The Labour Relations Act (No 66 of 1995) regulates unfair dismissal and collective bargaining. The Basic Conditions of Employment Act (No of 1997) regulates conditions of work.

all of labour legislation applicable to worker cooperatives.[58] Apart from the anomalies this will give rise to, the likely effect will be to confine worker cooperatives to the informal economy.

The example of worker cooperatives in South Africa illustrates why it is potentially misleading to view legislation in isolation from the manner in which it has been implemented. The same observation applies when considering whether legislation can be considered "cooperative friendly" or not. The claim of the 2005 Act to be "cooperative friendly" rests on four of its features. Firstly, it emphasises throughout the importance of compliance with cooperative principles, and provides an objective way in which to determine compliance. Secondly, it gives co-operatives considerable latitude to determine their own affairs, as already noted. Thirdly, it restricts the scope of government to intervene in the affairs of cooperatives. Fourthly, it is drafted in plain language, and seeks to be accessible to ordinary people.

As regards the first of these features, however, the 2013 amendments will make it more difficult to determine compliance with cooperative principles, at least insofar as they depart from the principle of one member, one vote in a primary cooperative. The supposedly "cooperative friendly" approach has also had unforeseen consequences, as already noted with regard to the second feature. As regards the third feature, although certain forms of government intervention are always undesirable there are also instances where intervention is called for. The establishment of bogus cooperatives is an example. With regard to the fourth feature, the approach adopted in 2013 amendments is to introduce greater complexity and more technical language.

It is also potentially misleading to compare the South African legislation with the legislation of other countries, without detailed knowledge of institutions and practices of the countries concerned. It is nevertheless worth noting that the 2005 Act was adopted after a detailed examination of the legislative trends that were current at the time.

4. Proposed improvements to the legal framework

Changing cooperative legislation is necessarily a lengthy process. In the case of South Africa – due in part to its own idiosyncrasies–the process is to be measured in years rather than months. This was the case with the adoption of the 2005 Act. It was also the case with the process leading

[58]Section 71, Act 6 of 2013.

up to the adoption of the 2013 amendments. Given the period of time that has now elapsed between the adoption of the 2013 amendments and their coming into force, it is politically inconceivable that it will be possible to reverse decisions such as allowing juristic persons become members of a primary cooperative, or the departure from the principle of one member, one vote. Indeed, it is politically inconceivable that there could be any substantive reform of the legislation for the foreseeable future, absent pressure from below, from a cohesive cooperative movement.

There are, however, things that could be done to change how the law has been implemented in practice, which would facilitate the emergence of a cohesive movement. A starting point would be to develop some consensus as to how cooperatives are best categorised. It would also be necessary to begin ruthlessly weeding out from the registry 'cooperatives' that only exist on paper. Other decisions that do not require legislative changes concern reviewing the kind of incentives government provides, and the location of cooperatives in a ministry which is primarily concerned with for-profit enterprises. The notion of "cooperative friendly" legislation is not helpful in this regard.

Much can also be done within the existing legal framework as regards specific sectors or types of cooperative. This is perhaps most striking in the case of agriculture, given that agriculture is the sector within which cooperatives have had the most success locally as well as globally. For one of the most pressing political issues in the country today - some would say the most pressing issue - is land reform. Yet it is only very recently that some in government have made the link between a land reform programme that benefits small farmers, and the establishment of agricultural cooperatives that would make small farming viable.

Conclusion

I have argued that the proliferation of cooperatives in South Africa since 2005 does not represent a vibrant or coherent co-operative movement, and has more to do with the political and economic context than the legislation. But to the extent that the legislation has been a factor, it has more to do with its application in practice than any provisions of the legislation itself. This is not to suggest that specific provisions do not matter – of course they do – but it is unrealistic to imagine that legislative reform is the key to turning this situation around.