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## Registration by a Court of Justice or by an Administrative Authority?

### A Contribution to the History of Co-operative Law in Europe in the 19th and 20th Centuries\*

#### 1. Introduction – Difficulties in the Legal Identification of Co-operatives

The co-operative is at the present time a legal category spread throughout the world. There is indeed no legal system which does not provide for, or at least recognize, this institution. It is more universal than a commercial company because it has been adopted even in the most "orthodox" Communist legal systems which fully reject (or rather rejected) any mention of commercial law and companies. This means also that there is such a field as co-operative law, tending quite naturally to gain an autonomy within a legal system.

The aim of the present article is to shed light on the shaping of co-operative law in Europe in the 19th and 20th centuries from a very special point of view, that of the nature of the authority registering co-operatives and of its powers in this field. As registration means, at least at the present time, giving legal personality to a co-operative, the article can contribute to revealing the actual legal nature of this institution.

Obviously, the nature of the registering authority and of its powers connected with registration depends largely upon the general legal tradition of a given country, very different for instance, in England and in Germany. Nonetheless, one problem which concerns only co-operatives must not be left out. It is a question of the complex nature of co-operatives. In fact, co-operatives cannot be regarded only, as is generally assumed on the Continent, as a strange combination of a personal partnership (*société de personnes* in the French terminology) and a com-

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pany founded on capital (*société de capitaux*).<sup>1</sup> They are also and even above all a strange combination of two other legal categories still more distinct in the 20th century. One of them is a partnership or company pertaining to private law (hence the problem of shares, distribution of surplus or inheritance), the other a non-profit association (*association* in France, *Verein* in Germany), an institution of the public law distinguished besides its non-profit orientation by the general democratic principle "one man one vote", that has also become the principle of co-operatives.

A French author who asked in 1902 the question whether the co-operative was, for these reasons, a partnership or company at all was not the only one to notice the strange nature of the co-operative.<sup>2</sup> Nevertheless, associations were generally shaped as a particular legal category much later than commercial partnerships and companies, although the problem of their legal existence and nature had been frequently put during the 19th century.<sup>3</sup> Since that formative period associations have also been registered in many legal systems in order to gain legal personality. In this case their registration had to be either administrative or judicial. Generally, the mode of registration applicable to co-operatives approaches to that shaped before for commercial companies, in particular share companies, and sometimes is identical to them. It happened and it still happens that it is, however, much closer to the mode of registration of associations.

Accordingly, while studying the beginnings of the registration of co-operatives, it is impossible not to study the general history of registration treated as a means of giving legal personality, or at least, because of the very complex history of the emergence of the concept of legal personality, as a means of legal recognition. Since the courts of law here

<sup>1</sup> Choosing the appropriate translation of foreign terminology is one of the most difficult problems of comparative law and/or history. In this article, English equivalents of Continental legal terms as proposed in: Company Law in Europe, (S. N. FROMMEL and J. H. THOMAS, eds.), Deventer 1975, are used.

<sup>2</sup> J. SURCOUF, *Sociétés coopératives de consommation en France*, Reims 1902, 125 ff. This problem, largely discussed in French doctrine especially after the enactment in 1901 of the Associations Law, was the subject of some judicial decisions. In particular, in the judgement of March 11, 1914 the Court of Cassation recognised that in the particular case the co-operative had to be regarded as an association – see L. COUTANT, *L'évolution du droit coopératif de ses origines à 1950*, Reims 1950, 138 f.

<sup>3</sup> See H. COING, *Europäisches Privatrecht*, 2: 19. Jahrhundert. Überblick über die Entwicklung des Privatrechts in den ehemals gemeinrechtlichen Ländern, München 1989, 137 ff., and TH. VORMBAUM, *Die Rechtsfähigkeit der Vereine im 19. Jahrhundert. Ein Beitrag zur Entstehungsgeschichte des BGB*, Berlin 1976.

play a significant role, the study can contribute to the general history of judicature. History of registration, whether it be judicial or administrative, moreover, has not been sufficiently studied.<sup>4</sup> On the other hand, the history of the emergence of the concept of legal personality is well researched, and there is a rich literature on the subject.<sup>5</sup>

The most difficult introductory problem is to define a co-operative, the very subject of the study. An English author suggests the simple answer to this question. A co-operative is "any organisation which is registered as such".<sup>6</sup> The problem is, however, that in England there has never been a registration of co-operatives as such, and the term "co-operative" itself was not known to the legislation up to 1939.<sup>7</sup> The same author must, moreover, note that "a co-operative with less than 20 members may operate as a partnership, [and] if members want their co-operative to have legal personality, they choose between registration under the Industrial and Provident Societies Act".<sup>8</sup> The latter act is generally identified with co-operative law, registered co-operatives normally taking the form of Industrial and Provident Societies, but it is in no way the sole legal basis for the setting up of co-operatives.

This double meaning of co-operatives in England is nothing strange when compared with many other countries, and historically is even quite natural. In the 19th century, when modern co-operative was shaped, it represented a very complex – ideological, political, economic, and legal – phenomenon. It was shaped in a way counter to the existing law, making the law change to conform to co-operative facts.

<sup>4</sup> As regards the history of registration, the only larger study to be found is M. RINTELEN, *Untersuchungen über die Entwicklung des Handelsregisters*, Stuttgart 1914. This book, however, did not cover the 19th century. In this respect one must resort to works pertaining to positive law, including historical introductions. The most recent among them is: V. AFFERNI, "Registro delle imprese. Cenni storici e di diritto comparato", in: *Novissimo Digesto Italiano*, (A. AZARA and E. EULA, eds.), 15, Torino 1968, 178 ff. The problem, it is noteworthy, has not been sufficiently studied either in books of comparative co-operative law. See, for instance, most recently, K. H. EBERT, *Genossenschaftsrecht auf internationaler Ebene*, 1, Marburg/Lahn 1966.

<sup>5</sup> See, for instance, contributions to *Itinerari moderni della persona giuridica*, in: *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno* 11–12 (1982–1983); H. COING (note 3), 336 ff.; W. HENKEL, *Zur Theorie der juristischen Person im 19. Jahrhundert. Geschichte und Kritik der Fiktionstheorien*, Göttingen 1972; A. R. J. GROOT, "Rechtspersoonlijkheid in rechtstheoretisch perspectief", in: *Handelsrecht tussen "koophandel" en Nieuw BW*, (J. G. C. RAADMAKERS et. al. eds.), Deventer 1988, 39 ff.; F. M. HUISSEN-DE GROOT, *Rechtspersonen in de 19e eeuw. Een Studie van privaatrechtelijke rechtspersonen in de 19e eeuwse wetgeving van Frankrijk, Nederland en Duitsland*, Zwolle 1976.

<sup>6</sup> P. YEO, *Co-operative Law in Practice*, Oxford – Manchester 1989, 15.

<sup>7</sup> See *infra*, 34–35.

<sup>8</sup> P. YEO (note 6), 26.

Co-operatives started, in England and in France, as a by-product of the working-class oriented Utopian Socialism. The term "co-operatives" was used, in particular, by Robert Owen. Owen presented in 1817 a program of social transformation by means of creating "Villages of Unity and Mutual Co-operatives", and in 1821-22, in order to implement his program he set up a Co-operative and Economical Society. In the 1820s there were many examples of the use of the term among the Owenites including a journal, *The Co-operator*, edited in 1828-30 by William King who was linked also with some of Fourier's disciples. The term was then imported to France by Joseph Rey, who in 1826 published, in the Saint-Simonist journal *Le Producteur*, "*Lettres sur le système de la coopération mutuelle et de la communauté de tous les biens d'après le plan de M. Owen*". Co-operative was meant as an opposition to competition which early socialists despised. The term, however, was to be largely adopted in France only after 1851. Before that, it had been overshadowed by the Saint-Simonist and Blankist *association* emphasizing the producers' community. Even later it was very difficult for the French co-operative movement to free itself from its original attachment to the producers' co-operative ideal, as well as to fully accept the term "co-operatives". The term appeared definitively in the French legislation only in an act of 1915, relative to the *société coopérative ouvrière de production*.<sup>9</sup>

Nonetheless, the rapid development of English co-operatives inaugurated by the establishment of the famous Rochdale Equitable Pioneers society in 1844, was not a result of the impact of Utopian Socialism. The Equitable Pioneers set up the principle of their political and religious neutrality and the co-operative movement was to be influenced at the same time by various ideological approaches. In particular, in the 1850s it was highly influenced by the anti-Owenite Christian Socialist movement grouping around Lincoln's Inn. Some barristers, in particular

<sup>9</sup> Historiography of co-operative ideology and its impact on co-operative development is extremely rich. See, for instance H. FAUST, *Geschichte der Genossenschaftsbewegung. Ursprung und Aufbruch der Genossenschaftsbewegung in England, Frankreich und Deutschland sowie ihre weitere Entwicklung im deutschen Sprachraum*, 3rd ed., Frankfurt am Main 1977, and W. W. ENGELHARDT, *Allgemeine Ideengeschichte des Genossenschaftswesens. Einführung in die Genossenschafts- und Kooperationslehre auf geschichtlicher Basis*, Darmstadt 1985. For history of the term, see V. A. TOTOMIANZ, "Genossenschaft", in: *Internationales Handwörterbuch des Genossenschaftswesens*, (V. A. TOTOMIANZ, ed.), Berlin 1929, 327 f.; L. WALDECKER, *Die eingetragene Genossenschaft. Ein Lehrbuch*, Tübingen 1916, 5 ff., and H. DESROCHE, *Solidarités ouvrières, 1: Sociétaires et compagnons dans les associations coopératives (1831-1900)*, Paris 1980, 19 ff. It must be noted, however, that the term "co-operative" was used in 18th century England; thus in 1795, the Oldham Co-operative Supply Company was established.

John Malcolm Forbes Ludlow, were strongly involved, which explains why a relatively easy legislative solution of co-operative problems was then possible. There were also several other ideological influences on co-operatives and what was very typical of Britain, instinct, spontaneity, pragmatism, and common sense altogether guided co-operatives as well as legislators.

The Utopian and early Socialist connection of the co-operative movement, so important in England and especially in France was, however, rather short-lived and weak in Germany.<sup>10</sup> The rapid creation in the 1850s of a powerful co-operative system, with the *Allgemeine Verband der auf Selbsthilfe beruhenden Deutschen Erwerbs- und Wirtschafts-genossenschaften*, set up in 1864, at its apex, was due to the liberal, middle-class oriented thought and activities of Hermann Schultze-Delitzsch, the only lawyer among all the outstanding European pioneers of co-operatives, helped occasionally by a conservative thinker, Victor Aimé Huber.<sup>11</sup> Another branch of German co-operatives, that is to say the agriculture co-operative bank, was founded by conservative-minded Friedrich Wilhelm Raiffeisen.<sup>12</sup> Instead of a sharp class orientation the German co-operative movement was oriented towards the promotion of class solidarity, and could neither fight against the state nor act as if there were no state at all. It had thus to look for convenient legal solutions within the framework of positive law.

Though the co-operative movement was emerging in the time of liberal individualism, rejecting corporate bodies, especially old communitarian institutions of the *ancien régime*, it developed in Germany with a certain reference to the ancient community tradition, dating back from the feudal era. The German word used from 1858 to describe co-operatives (and introduced in this meaning by Schultze-Delitzsch to replace the French-derived *Assoziation* which he had originally used), has been *Genossenschaft*. This word had a very wide meaning, covering numerous phenomena of ancient community institutions, and its wide sense was not to be completely abandoned. In particular, Otto von Gierke started

<sup>10</sup> See CH. EISENBERG, *Frühe Arbeiterbewegung und Genossenschaften. Theorie und Praxis der Produktivgenossenschaften in der deutschen Sozialdemokratie und den Gewerkschaften der 1860er/1870er Jahre*, Bonn 1985.

<sup>11</sup> See, for instance, R. ALDENHOFF, *Schulze-Delitzsch. Ein Beitrag zur Geschichte des Liberalismus zwischen Revolution und Reichsgründung*, Baden-Baden 1984.

<sup>12</sup> See H. RICHTER, *Friedrich Wilhelm Raiffeisen und die Entwicklung seiner Genossenschaftsidee*, Erlangen-Nürnberg 1966, and B. FINIS, *Wirtschaftliche und außerwirtschaftliche Beweggründe mittelständischer Genossenschaftspioniere des landwirtschaftlichen Bereichs. Am Beispiel von F. W. Raiffeisen und W. Haas*, Berlin 1980.

in 1868 the publication of his treatise *Das Deutsche Genossenschaftsrecht*, presenting the history of German community institutions from their origins to the beginning of the 19th century. His introductory definition of the *Genossenschaft* was that it meant all "associations (*Vereine*) with autonomous legal personality".<sup>13</sup> He suggested a variety of roots of modern co-operatives and other types of voluntary associations. Earlier, the *Privatrechtliches Gesetzbuch fuer den Kanton Zürich*, elaborated by a conservative lawyer Johann Caspar Bluntschli, utilised the term *Genossenschaft* as an equivalent of a *Korporation* which did not make its members lose their particular rights.<sup>14</sup> In the Saxon Legal Persons Act of 1868 a *Genossenschaft* was defined as every "personal corporation" (*Personenverein*) endowed with legal personality.<sup>15</sup> In both cases, one of the categories of *Genossenschaft* was the share company. That is why the official German term to describe co-operatives, introduced by Schultze-Delitzsch, was *Erwerbs- und Wirtschaftsgenossenschaften* which can be translated as production and trade *Genossenschaften*. The existence of other categories of *Genossenschaften* was thus explicitly suggested.

The fact that the development of co-operatives was relatively easy in Germany and in Switzerland – although different in both countries – resulted, in a way, from the possibility of referring to the ancient tradition, even if this tradition had not a direct influence on the formation of co-operative law.<sup>16</sup> In England, co-operatives began to be set up within the framework of a relatively traditional category of Friendly Societies existing since the 18th century. On the other hand, in France, where

<sup>13</sup> OTTO VON GIERKE, *Das deutsche Genossenschaftsrecht*, 1: Rechtsgeschichte der deutschen Genossenschaft, Graz 1954, 5. It is well known that Gierke developed the theory of Georg Beseler. It must be emphasized, however, that a sketch on *Genossenschaften* was presented in 1812 by C. J. A. MITTERMAIER – see J. SCHRÖDER, "Zur älteren Genossenschaftstheorie. Die Begründung des modernen Körperschaftsbegriffs durch Georg Beseler", in: *Itinerari moderni* (note 4), 451 ff.

<sup>14</sup> *Privatrechtliches Gesetzbuch für den Kanton Zürich mit Erläuterungen*, (J. C. BLUNTSCHLI, ed.), 1: Personen- und Familienrecht, Zürich 1854, 33, 40 ff. (notes to §§ 19, 28 and 29); see also J. SCHRÖDER (note 13), 405 f.

<sup>15</sup> *Gesetz die juristischen Personen betreffend* of June 15, 1868, – Gesetz- und Verordnungsblatt für das Königreich Sachsen, 1868, 328 ff., § 6 b, and § 10 ff.

<sup>16</sup> It seems that there is no essential divergence of opinions between W. SCHUBERT, "Zur Entstehung der Genossenschaftsgesetze Preußens und des Norddeutschen Bundes (1863–1868)", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germ. Abt.* 105 (1988), who denies the influence of the *Genossenschaftslehre* on German co-operative legislation (101), and U. KORNBLUM, "Das Weiterleben der Genossenschaft", in: *Recht, Gericht, Genossenschaft und Policy. Studien zu Grundbegriffen der germanistischen Rechtshistorie*, (G. DILCHER and B. DIESTELKAMP, eds.), Berlin 1986, 168 ff., who finds basic analogies between ancient and modern *Genossenschaften*.

after the 1789 revolution an attempt was made at radically rejecting any corporate tradition, there were no propitious conditions to shape an autonomous co-operative law.<sup>17</sup>

In this situation it even seemed natural that every 19th century definition of co-operative was questionable, the more so as the ideological and political approach to co-operatives varied according to time and country. A French author could then state that "it is impossible to define a co-operative company and even to describe it".<sup>18</sup> Moreover, having stated this, he presented perhaps the best comparative study of co-operative law of the 19th century. The problem was complicated by the fact that co-operatives, regarded as a means of attenuating social tensions, were granted some substantial privileges by the law, in particular in the field of taxation. The appropriate definition of co-operative was therefore a very practical problem, difficult to solve not only because of the nature of the co-operative itself but also because of frequent attempts made by capitalist speculators at exploiting this legal category for purposes very distant from co-operative ideals and principles. In the 20th century, although political and ideological aspects of co-operative have been less susceptible of heated discussions, except for the particular mutation of co-operatives represented in socialist countries, it is still not easy to formulate any generally accepted definition of co-operative.

Even if such definitions are elaborated, like those of the International Labour Organisation<sup>19</sup> or of the Principles issued by the International Co-operatives Alliance, being a modernised version of the the Rochdale Principles of 1844 (both definitions date back to 1966), they do not often correspond to the legislative definitions of numerous countries. Belgium gives a striking example of the restrictive role of a universal definition with respect to the given legal situation. The country has known, since 1873 such a definition of "co-operative company" (*société coopéra-*

<sup>17</sup> It is possible to speak of a French attempt because some traditional institutions particularly *sociétés fromagères* in the Jura mountains had to be preserved. They were the subject of highly diverging judicial decisions during all the 19th century – see "Sociétés coopératives ou à capital variable", in: Répertoire général alphabétique du droit français, (A. CARPENTIER and G. FRÈREJOUAN DU SAINT, eds.), 34, Paris 1904, 876 ff., and L. COUTANT (note 2), 137 n. 2.

<sup>18</sup> P. HUBERT-VALLEROUX, "Etude sur les lois relatives aux associations coopératives en France et dans les principaux Etats étrangers", Bulletin de la Société de Législation comparée, 20 (1891–92), 251.

<sup>19</sup> "Associations of persons who have voluntarily joined together to achieve a common end through the formation of a democratically controlled organisation, making equitable contribution to the capital required and accepting a fair share of the risks and benefits of the undertaking in which the members only participate."



*tive*), provided by the amended Commercial Code: commercial company "composed of partners whose number and assets brought into it are variable, and whose shares are not transferable to a third party"; the definition corresponds to a large extent to the French formula of a "company with a variable capital" (*société à capital variable*) introduced in 1867. In 1955, however, the Belgian legislative power had to restrict the access of "co-operative companies" to the National Council of Co-operatives then created by demanding that by-laws and activities of those companies should comply with the "co-operative principles", enumerated in the same act, and corresponding to the Rochdale Principles. Moreover, the problem how to distinguish between "true" and "false", i.e. capitalist, co-operatives is regarded in Belgium as still unsolved.<sup>20</sup>

In the present article, we must always be aware of all those problems. Nevertheless, we have to focus on co-operative organisms registered as such or on other corporate bodies whose co-operative nature is legally recognized. In an article which concerns the registration of co-operatives it is the only possible solution. As the foundations of modern co-operative law were shaped in the 19th century, special attention must be paid to the last century. This fact is reflected in the composition of the article. It is composed, besides the introduction and conclusion, of three chapters. The first one deals with problems of the legal identification of co-operatives before the passing of co-operative legislation. The second chapter concerns the nature of registering authority and of the registration of co-operatives itself as it was provided for by the first co-operative acts. The third chapter is a sketch of the later evolution of European models of registration, shaped in the second half of the 19th century. The main contribution of the 20th century to the history of co-operative law has been its spreading all over the world rather than substantial modifications of the 19th century models. Many modifications, however, have been introduced, and the process of transformation of co-operative law has accelerated in the last twenty years, which is the subject of the concluding remarks.

<sup>20</sup> Iura Europae. Droit des sociétés – Gesellschaftsrecht – Company Law, 1, München, Paris 1989, 20.60.

## 2. Attempts at Legal Identification of Co-operatives Before the Co-operative Legislation

The first legislative acts relative to co-operatives were passed in the second half of the 19th century.<sup>21</sup> The first English, and at the same time European, act, whose full title was *An Act to Legalize the Formation of the Industrial and Provident Societies*, dated from 1852 (15 & 16 Vict. c.31). Technically, it provided only a mutation within a large, genuinely mutualist category of Friendly Societies, and referred directly to the Friendly Societies Act of 1850. The first almost separate Industrial and Provident Societies Act dates back to 1862 (25 & 26 Vict. c. 87)<sup>22</sup>, and the status of those societies was fully regulated only in 1876 (39 & 40 Vict. c.45). In the meantime, there were several amendments of the Industrial and Provident Societies acts, so one must say that co-operative legislation was shaped, as all English law, in an empiric way, with gradually growing accuracy. This process of gradual shaping was not, however, achieved in 1876. The 1876 act was replaced by the consolidation act of 1893 (56 & 57 Vict. c. 39).

The first German act was the Prussian *Gesetz betreffend die privatrechtliche Stellung der Erwerbs- und Wirtschaftsgenossenschaften* of 1867<sup>23</sup> which, with some modifications, became a year later the law of the first modern German federation, the *Norddeutsche Bund*.<sup>24</sup> As such,

<sup>21</sup> For the general history of co-operative law, see H. COING (note 3), 130 ff., and contributions of W. WAGNER concerning German, Austrian and Swiss co-operative law, in: *Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte*, (H. COING ed.), 3-3, München 1986, 3035 ff., 3080 ff., 3147 ff. Comparative analysis pertaining to positive law are also very useful, in particular: P. HUBERT-VALLEROUX (note 18); "Sociétés coopératives" (note 17), 879 ff.; L. WALDECKER, *Der Stand der Gesetzgebung über Erwerbs- und Wirtschaftsgenossenschaften in den wichtigsten Kulturländern bei Kriegsausbruch 1914*, München, Leipzig 1919, and K. H. EBERT (note 4 with the remark made in this note).

<sup>22</sup> The 1862 act was almost separate because it referred to the Friendly Societies Act, and, moreover, five years later another act laid down that the dispositions of the Friendly Societies Acts concerned Industrial and Provident Societies unless it was explicitly excluded by the acts on the latter (30&31 Vict. c. 117).

<sup>23</sup> L. PARISIUS, *Das preussische Gesetz [ . . . ] mit Einleitung und Erläuterungen*, Berlin 1868.

<sup>24</sup> L. PARISIUS, *Die Genossenschaftsgesetze im Deutschen Reiche*, Berlin 1876, 159-502 (with the 1871 amendment). For the history of German co-operative law, see besides W. SCHUBERT (note 16), also G. ROTTHEGE, *Die Beurteilung von Kartellen und Genossenschaften durch die Rechtswissenschaft*, Tübingen 1982, 273 ff., and H. PAULICK, *Das Recht der eingetragenen Genossenschaft*, Karlsruhe 1956.

it was replaced in 1889 by the new federal Co-operatives Act.<sup>25</sup> Some individual German states tried to enact their own co-operative legislation. Bavaria did so in 1869, and Saxony in a more general way in the Legal Persons Act, in 1868.<sup>26</sup> This legislation was, however, ephemeral, at least with respect to co-operatives, and had to be replaced by imperial German laws, in 1873 and 1874 respectively. Only Austria, which had found itself outside the German Empire, could enact a particular Co-operatives Act, which it did in 1873.<sup>27</sup>

The Prussian act of 1867 was passed only four months before the French Companies Act, amending the Napoleonic Commercial Code. The French 1867 act introduced a category of "company with a variable capital", identified with the co-operative but never completely identical with it. The "company with a variable capital" was not, technically, a distinct category of commercial company but a genuinely hybrid institution, to be applied with respect to every category of commercial company, and even non-commercial (i.e. civil-law) partnership.<sup>28</sup> The French model of co-operatives in a commercial code, though not necessarily the French concrete solutions, was followed by the Belgian Companies Act passed in 1873<sup>29</sup>, and then by the commercial codes of Hungary (1875), Italy (1882), Rumania (1887), Portugal (1888), and Bulgaria (1897). In Switzerland, co-operatives were subject to the 1881 Code of Obligations, merged in 1911 with the 1907 Civil Code. All these acts, however, used the term "co-operative company", instead of the French *société à capital variable*.

The English and Prussian model of separate co-operative legislation was followed before World War I in the Netherlands in 1876<sup>30</sup>, Sweden in 1895<sup>31</sup>, Finland in 1901<sup>32</sup>, Bulgaria (thus coming out of the model of

<sup>25</sup> L. PARISIUS and H. CRÜGER, Das Reichsgesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften [...] Kommentar zum praktischen Gebrauch für Juristen und Genossenschaften, 2nd ed., Berlin 1895. The 1889 act was amended several times, first in 1896, and again in 1898.

<sup>26</sup> L. PARISIUS (note 24), 428-430 and 443-450.

<sup>27</sup> Reichs-Gesetzblatt 1873, n° 70, 273-295 with an important amendment of 1901.

<sup>28</sup> Recueil général des Lois et des Arrêts [...] fondé par J. B. Sirey, further cited as Sirey), 1867, 204 ff.

<sup>29</sup> Pasinomie, n° 59, 252-275.

<sup>30</sup> The French translation in: The Annuaire de Législation étrangère (further cited as ALE), 6 (1877), 531-536.

<sup>31</sup> ALE, 25 (1896), 622-635. This act was, however, passed together with three other acts relative to partnerships and companies.

<sup>32</sup> ALE, 2nd ser., 1 (1902), 451-459.

commercial-law regulation) in 1907<sup>33</sup>, and Greece in 1915. The Netherlands, however, followed the English and Prussian model more in appearance than substance. The Dutch draft act, dating to 1875, provided for a category of "companies with a variable capital". In spite of changing this term in the co-operatives act itself, the French, and Belgian, influence is clear.<sup>34</sup>

As in the field of company law, co-operative legislation of particular countries was nowhere indigenous in the sense that it should develop without any foreign influence. On the contrary, national legislation was modelled after some internationally recognized standards.<sup>35</sup> The enactment of special co-operative legislation or a commercial-law legislation relative to co-operatives clarified – sometimes very much, as in Germany, sometimes partially, as in France – the question of the legal status of co-operatives. Before that, the status had been quite precarious, especially if the fact that co-operatives were largely suspected to represent socially dangerous Socialism is taken into account. In fact, by definition, they contested the anti-competition ideology and legislation of the first half of the 19th century.

The problem was complicated by the fact that co-operatives were frequently treated as something between partnership or company and non-profit association. So, on the one hand, they were not easily compatible with the existing civil and commercial law, which did not provide for variability of persons and of capital. The principle of contractual freedom of parties was meant in the 19th century more and more as the right to choose a category of partnership or company prescribed by the law, and not as a complete freedom of shaping at will collective subjects of commercial law. The problem became peculiarly difficult when it was a question, first, of limiting partners' liability, and second, of giving legal personality to a company or other collective body. In both cases it was generally assumed in the first half of the 19th century that, at least with respect to share companies, an authorisation act of the state was needed ("concession" system – *Konzessionsprinzip* in the German terminology,

<sup>33</sup> Summary in ALE, 2nd ser., 7 (1908), 892–893; amended in 1911 (ALE, 2nd ser., 10, 763–764). The Bulgarian act was modelled after the 1904 draft Co-operatives Act for Hungary – Gesetzesentwurf über Genossenschaften [ . . . ] Mit einem Auszug aus dem Motivenbericht, (F. NAGY, ed.), Budapest 1904 (see M. ANDREEV and F. MILKOVA, "Bulgarien", in: Handbuch der Quellen und Literatur der neueren europäischen Rechtsgeschichte, (H. COING, ed.), 3–5, München 1988, 288).

<sup>34</sup> F. M. HUSEN-DE GROOT (note 5), 107 ff.

<sup>35</sup> See H. COING (note 3), 133.

as opposed to the more modern "normative" system where state authorities were enabled only to control the conformity of the deed of settlement to the law). Even for this reason, without taking into consideration the notorious fact of capital shortage, the form of commercial company, in particular the share company, was not accessible to the first co-operatives. On the other hand, there were as yet, with very few exceptions, no modern acts on non-profit associations, which would rely on the principle of freedom of association.<sup>36</sup> Rules applicable in this field were often made by criminal courts, when they applied the respective provisions of penal codes. In France, according to section 291 of the Penal Code, every association of more than twenty persons was punishable if it had not been authorised to operate by the local administration authority. This kind of administrative (or rather police) recognition was quite general. From both points of view, the legal position of co-operatives had to be uncertain, even if absolute monarchy had been giving way to a constitutional regime and the rule of law.

Peculiar difficulties were met by the first French co-operatives.<sup>37</sup> The French legal system assumed a total atomisation of society, and every coalition, especially of workers, was prohibited. The term *association* itself – which meant it must be remembered, producers' co-operatives – was treated as dangerous and susceptible of penal repression. "Associations" were therefore formed as partnerships of commercial law (specifically as general commercial partnerships) which were distinguished only by some special provisions of their by-laws relative to the existence of an indivisible fund, and by particular rules relative to profit sharing, wages and admission and retirement of members.<sup>38</sup> Existence of an indivisible fund, which was never to be divided among partners, even after the winding up of the "association", was in no way compatible with the letter of the Commercial Code. It represented, however, an important feature of the co-operative nature of "associations". In spite of all this,

<sup>36</sup> The most important exceptions before the 1880s (when legislation on associations began to be more natural) were the *Privatrechtliches Gesetzbuch* of the canton of Zurich of 1853 and the Saxon Legal Persons Act of 1868, both attempting to regulate generally the status of various legal persons, as well as the Dutch *Wet tot regeling en beperking der uitoefening van het recht van vereeniging en vergadering* of 1855 (see F. M. HUSSEN-DE GROOT (note 5), 102 ff.), and the Austrian and Bavarian Associations Acts, dating respectively from 1867 (*Reichs-Gesetzblatt*, n° 134) and 1869 (*Gesetz-Blatt*, 1866–1869, 1197–1216).

<sup>37</sup> See P. HUBERT-VALLEROUX, *Les associations coopératives en France et à l'étranger*, Paris 1884; H. DESROCHE (note 9), 36 ff., and, for history of legislation and judicial decisions, L. COUTANT (note 2).

<sup>38</sup> See the 1831 "Manifesto" of Phillipp Buchez, H. DESROCHE (note 9), 33.

administrative authorities often made co-operatives apply for an authorisation to operate, referring to the clauses of the Penal Code. The 1848 revolution having created a kind of *démocratie associationniste*, it permitted "associations", backed by the revolutionary Government, to spread. This happened, however, only in Paris and some other big cities. Under the revolutionary Government, the by-laws of "associations" applying for Government loans had to be transmitted to the Ministry of Trade before their adoption. A special legal category was being shaped, all the more so when the first draft law relative to "associations" was elaborated.

After the coup d'Etat of Napoleon Bonaparte, "associations" were harshly persecuted. In Lyon, all "associations" were administratively dissolved and prohibited in 1851. Those few which still existed operated under the cover of general commercial partnership, and generally neglected their own by-law provisions concerning the indivisible fund. The new wave of co-operatives began, however, to appear from the end of the 1850s. This time co-operatives took the form of limited partnership (*société en commandite simple*). This legal form, as the previous one, was not convenient for co-operatives, because each admission and retirement of partners – a fact natural in a co-operative – required acts corresponding to those needed within the framework of the settlement of the partnership. The other form of commercial company, that of share company (and of limited liability company, introduced in 1863) was, as elsewhere, in practical terms beyond co-operatives' reach. It needed, up to the acts of 1863 and 1867, the Government's concession, and, above all, it needed capital. The new wave of co-operatives concerned much more banking than traditional producers' co-operatives. After primitive persecutions, imperial authorities recognized the co-operative movement, and even to a certain extent supported it. Thanks to that, legal recognition of the co-operative, as a "company with a variable capital", was possible, and was carried into effect in 1867.

In the first draft Companies Act, which aimed at amending the respective provisions of the Commercial Code, there was a part relating to *sociétés de coopération*. This idea was objected to by the representatives of the co-operative movement, bearing in mind its difficult past. They did not know the text itself, and thought that *sociétés de coopération* would be a distinct category of companies. Mistrustful co-operators argued against their special treatment on the ground that "it would be an aggravation of our situation, and not its improvement, to confine the co-operative movement within a special act. These kinds of acts being susceptible

of easy repeals, associations by this very fact, could always be menaced with a general dissolution"<sup>39</sup>. The merit of the 1867 Companies Act, in the eyes of co-operatives, lay in making way for establishing co-operatives in the form of share companies, and not in regulating the whole phenomenon of co-operatives. In fact, the great majority of co-operatives established after 1867 took the form of share companies. It must be noted that in France the problem was not to gain legal personality (which was generally assumed for all commercial companies and partnerships, but, until 1901, not for associations), but to obtain limited liability and to be free from formalities, peculiar to partnerships, relative to admission and retirement of members.

In Russia, and especially in the Polish territory occupied by the Russian Empire as a result of Poland's partitions, there was no sufficient co-operative legislation up to the end of the Empire.<sup>40</sup> Under those circumstances, establishing co-operatives needed state authorisation, conferred by the central administration in a discretionary way. In the 1890s, however, ministerial arbitrariness became limited by the publication of official model by-laws for certain categories of co-operatives. Some co-operatives could be set up in Russia also within the framework of "work artels", regulated by a decree of 1902. The term "artel" referred to a very long-lasting traditional community institution, comparable with the European ones of the previous epochs.<sup>41</sup> Draft by-laws of the "work artel" had to be transmitted to the province governor, and, if he did not accept it, to the Ministry of Finance. Certain co-operatives could also operate under the 1906 Associations Act, the result of the revolution of 1905. The Polish language, it is noteworthy, distinguished itself by the fact that it did not absorb the international term "co-operative", applied in almost all languages, except for German. The appropriate term, shaped after some hesitation, that is to say *spółdzielnia*, had nothing to do with the *Genossenschaft* either. It is a neologism, expressing an idea of co-sharing rather than co-responsibilities.

<sup>39</sup> Letter of 48 managers of Paris co-operatives, published in March 1865 in the *Association* – quoted by P. HUBERT-VALLEROUX (note 37), 230. The first draft Companies acts are published in: Sirey, 1867, 205–207, and 207–208.

<sup>40</sup> See A. D. BILIMOVIC, *Kooperacija v Rossii do, vo vremja i posle bolševikov*, Frankfurt am Main 1955, 5 ff.; E. R. BERKE, *Die Genossenschaftsbewegung im Königreich Polen*, Warschau 1913; R. BIERZANEK, *Prawo spółdzielcze w zarysie*, 3rd ed., Warszawa 1984, 30 f.

<sup>41</sup> ALE, 2nd ser., 2 (1903), 591–595; for the history of "artel", see A. ULITIN, "Artell", in: *Internationales Handwörterbuch des Genossenschaftswesen* (note 9), 39 ff.

Austrian co-operatives had at first also to apply for administrative authorisation to operate. It resulted from the 1852 Associations Act, concerning also "industrial associations" (*Erwerbsvereine*).<sup>42</sup> The 1852 act lost its force with respect to non-profit associations by virtue of the 1867 Associations Act. The latter did not, however, concern associations operating in the field of economy. An Austrian particularity was that the 1859 Industrial Law introduced also "compulsory *Genossenschaften*" as a public-law category of organisation of arts and crafts, renewing to a certain extent the ancient tradition of handicraft corporations. There were therefore two types of *Genossenschaften*: compulsory and "free". However, only "free" *Genossenschaften* represented true co-operatives, and they battled against state intervention in their affairs. In 1873, they obtained legal recognition but, although there was no more administrative concession, the state administration preserved some important current control powers.

In the Netherlands, there was a dispute about the proper legal classification of co-operatives. The Ministry of Justice held co-operatives subject to the 1855 Associations and Meetings Act, making them apply for an administrative authorisation, if they wanted to be granted legal personality. It changed its opinion after almost two decades, and recognized the special nature of co-operatives which led to the elaboration of the act of 1876.<sup>43</sup> The official term used to describe the co-operative, that is to say *coöperatieve vereeniging*, preserved up to 1976 (at present it is simply *coöperatie*), emphasized the primitive nature of the Dutch co-operative. Spain, although generally following the French solution, did not transplant the French model of legal approach to co-operatives in its 1885 Commercial Code. Spanish co-operatives were subject to the Associations Act of June 30, 1887, and registered by administrative authorities. One must remember, however, that the commercial register was also maintained in Spain by the administration. In Sweden, co-operatives were also regarded as something more administrative than proper to commercial law. The official term to describe co-operatives has been, since the first legislation in this field, "associations for economic activities" (*föreningar för ekonomisk verksamhet*). At first Swedish co-opera-

<sup>42</sup> Imperial Patent of November 26, 1852 (Reichs-Gesetzblatt, n° 253); for the early history of Austrian co-operatives, see L. WALDECKER (note 21), 25 ff.

<sup>43</sup> See R. E. KRÄMER, *Wettelijke Regeling der Coöperatieve Vereeniging*, Utrecht 1913, 65 ff., and F. M. HUISSEN-DE GROOT (note 5), 105 ff.



tives were not persecuted, the Scandinavian law generally being liberal with respect to any kind of collective economic activities.

Some grave problems were met by the first German co-operatives, although the Prussian co-operative movement of the 1850s was in no way linked with working class radical assertions.<sup>44</sup> Administrative authorities made Schulze-Delitzsch's banking co-operatives apply for a licence. Although freedom of association had been guaranteed in Prussia since 1848, it did not relate to associations "tending to influence public affairs" (*welche eine Einwirkung auf öffentliche Angelegenheiten bezwecken*). That is why Schulze-Delitzsch always emphasised the private-law nature of the co-operatives he founded. His co-operatives were thus "permitted private partnerships" (*erlaubte Privatgesellschaften*) in terms of the 1794 Prussian Landrecht.<sup>45</sup> This fact permitted not only an escape from the danger of classification as associations but also from classification as incorporated companies, because incorporation had to be accorded by the Government's act. As Schulze-Delitzsch was a lawyer and, moreover, Prussia represented a *Rechtsstaat*, the pretensions of administration were refuted by the courts of justice which Schulze-Delitzsch had appealed to.

The problem was that Schulze-Delitzsch's co-operatives, so classified, could not at first enjoy legal personality. Obtaining a kind of legal personality – but without limiting members' solidary liability, treated as the very essence of this type of collective economic activity – was the main target of the founding father of the German co-operative.<sup>46</sup> His first legislative draft, elaborated in 1860, referred to the "need to facilitate the capacity of advance and credit associations to sue and to be sued, and to enter into legal transactions." Having to change his mind because of the passing, in 1861, of the German General Commercial Code (ADHGB), he elaborated a more complex draft which, after modifications, was transformed into the act of 1867.<sup>47</sup> Co-operatives were endowed with special rights which were generally recognized as a "personality of commercial law", and their legal status became quite clear.

<sup>44</sup> See L. PARISIUS (note 24), 6 ff., 85 ff., and L. WALDECKER (note 9), 16 ff.

<sup>45</sup> See TH. BAUM, "Einführung", in: Gesetz über die Aktiengesellschaften für die Königlich Preussischen Staaten vom 9. November 1843. Text und Materialien, Aalen 1981, 16 f., 27 ff.

<sup>46</sup> See W. KLEIN, Schulze-Delitzschs Kampf um die Anerkennung der Erwerbs- und Wirtschaftsgenossenschaften als Rechtssubjekt vor dem Hintergrund der politischen Verhältnisse in Preußen mit einer vergleichenden Darstellung der englischen und französischen Entwicklung, Heidelberg 1972.

<sup>47</sup> See W. SCHUBERT (note 16), 102 ff.

On the other hand, English co-operatives, although emerging in the difficult years of the political struggle for workers' political rights, did not face too severe legal obstacles.<sup>48</sup> Co-operative pioneers were, in a sense, condemned to apply the well-established institution of Friendly Societies. Incorporated companies were beyond their reach for the same reasons as for co-operatives in other countries. Up to the 1830s, incorporation was very rare. In comparison with other countries, it was also, up to the 1850s, too vague as a legal category.<sup>49</sup> Even after the 1844 act enabling the formation a joint-stock company without special authorisation (7 & 8 Vict. c.110) it was too difficult to be established by workers themselves. The mutualist category of Friendly Societies, set up for the mutual relief and maintenance of its members, dated back to the 18th century, so it could be applied by the Rochdale Equitable Pioneers. Originally it was a very local institution. Under the earliest Friendly Societies Acts, the rules agreed by members were allowed and registered by justices of the peace. A registration of societies, in fact, was taking place. Later, a barrister was appointed to examine and certify rules before their enrolment. Such was the legal status of Friendly Societies when the Equitable Pioneers applied for enrolment. An act of 1846 (9 & 10 Vict. c.27) expressly permitted the establishment of a society also "for the frugal Investment of the Savings of the Members for better enabling them to purchase Food, Firing, Clothes, or the Tools or Implements of their Trade or Calling"; the previous act, under which the Equitable Pioneers were registered (4 & 5 Will.4 c.40), generally enabled Friendly Societies to be established for any legal purpose.

The 1846 act set up several conditions to be fulfilled for the registration of a society, including the limitation of the value of one person's share to £ 200, and untransferability of shares. What was still more important, it instituted the office of the Registrar of Friendly Societies, separately for England, Scotland and Ireland. The Registrar was a successor of the barrister appointed to certify rules of societies. Rules which had been enrolled with the clerk of the peace of each county were returned to the respective Registrar. This Registrar was only partially comparable with the Registrar of Joint Stock Companies, instituted two

<sup>48</sup> See B. POTTER-WEBB, *La coopération en Grande Bretagne*, Paris 1950, 80 ff., and Halsbury's *Laws of England*, 3rd ed., London 1957, 18, 9 ff., 21, 3 ff.

<sup>49</sup> See P. STEIN, "Nineteenth Century English Company Law and Theories of Legal Personality", in: *Itinerari moderni* (note 5), 504 ff., R. R. FORMOV, *The Historical Foundations of Modern Company Law*, London 1923, 31 ff., and W. R. CORNISH, "England, Commercial Law", in: *Handbuch* (note 21), 3-2 (1982), 2244 ff.

years earlier by *An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies*. Both represented an administrative mode of registration, but the powers of the Registrar of Friendly Societies were larger, and were soon to be much larger. He had never to apply the procedure, proper to the other Registrar up to 1856 (19 & 20 Vict. c. 47), of double registration, provisional and complete.

In 1850 (13 & 14 Vict. c. 115), the Registrars of Friendly Societies were given the formal power of registering. According to the 1850 Act, registration took place as the Registrar had found "the [...] Rules to be framed in conformity with Law and that no Rule or Part thereof [were] repugnant to another, and that the same [were] reasonable and proper." In 1852, a formal legalisation of Industrial and Provident Societies took place which meant the beginning of the formation of co-operative law. The 1852 act declared that "various Associations of Working Men have been formed for the mutual Relief, Maintenance, Education, and Endowment of the Members, their Husbands, Wives, Children or Kindred, and for procuring to them Food, Lodging, Clothing, and other Necessaries, by exercising or carrying on their respective Trades or Handicrafts", and permitted the establishment, under its provisions and the provisions of the Friendly Societies Act, of an Industrial and Provident Society "for the Purpose of raising by voluntary Subscription of the Members thereof a Fund for attaining any purpose or object for the time being authorised by the laws in force with respect to Friendly Societies, or by this act, by carrying on or exercising in common any labour, trade or handicraft [...]" For the first time, this category of Friendly Societies was enabled to sell to non-members, which was of great importance for the development of genuinely consumers', i.e. trading co-operatives.

The 1852 act laid down the necessary contents of the society's rules, imposing in this way a co-operative character. The Registrar of Friendly Societies – at the same time the Registrar of Industrial and Provident Societies – was given the power to dispense the society from an inconvenient provision of the act, which meant that co-operative law could be shaped not only by statutes but also by administrative practice.

Nevertheless, Industrial and Provident Societies could be endowed with legal personality, as "bodies corporate", only from 1862. Only from this date, too, could they rely on the limited liability of their members. Limited liability was, in the English situation of developing consumers'

co-operatives, much more important than in France, still attached to producers' co-operatives.<sup>50</sup>

Like the category of "company with a variable capital" in France after 1867, and unlike the German *Genossenschaft*<sup>51</sup>, the Industrial and Provident Society granted only the possibility of choice, and was not the only legal solution of the phenomenon of co-operatives. Co-operatives could resort, if it was more convenient for them, to the form of a company, without losing the co-operative character of their undertaking. Since 1855 (18 & 19 Vict. c. 133) there had been, in fact, legislation authorising the setting up of companies with a limited liability, and prohibiting at the same time the formation of large unincorporated business partnerships. The category of Industrial and Provident Society, with some financial privileges attached, was, however, already sufficiently established to be replaced in practice by the commercial company following the French example.

The contractual freedom of co-operatives was still larger in the Scandinavian countries which, having not been subject to the influence of the Roman law, had neither modern civil codes nor commercial codes. For instance, in Denmark, where there is, up to now, no co-operative legislation, corporate bodies since the 18th century have been able to be formed without the authorisation of the state, and legal personality had been liberally conferred by judicial decisions. The freedom of association, guaranteed by the 1849 Constitution, has also been very important in developing co-operative autonomy.<sup>52</sup>

Nonetheless, in the Scandinavian countries the local administration traditionally enjoyed some powers with respect to corporate bodies. Its powers related, however, to administrative aspects of the problem rather than to civil-law ones. Thus in Denmark registration made by administrative authorities still determines the legal existence only of share companies and limited liability companies (the latter known only from 1973), because for the other "firms" subject to it by virtue of the

<sup>50</sup> P. HUBERT-VALLEROUX (note 18), 257.

<sup>51</sup> German law assumed, however, that there were also "unregistered co-operatives", taking the form of commercial companies or even associations; they were treated as *Kooperativgesellschaften* other than registered *Genossenschaften* - L. WALDECKER (note 9), 120 f.

<sup>52</sup> See B. LAVERGNE, *Les fédérations d'achat et de production des sociétés coopératives distributives. Essai sur les origines et le développement actuel de la coopération distributive en Europe*, Paris 1908, 370 ff., *Iura Europae* (note 20), 3, 70.00. 1 ff.

1889 *Lov om Firmaer*, it is an administrative duty, without effect on the validity of the contract of partnership or company.

The special co-operative legislation passed in Sweden and Finland contributed, however, to a change in the nature of registration, bringing it closer to some other European countries. Since the Scandinavian countries develop their legal systems in a similar way (and, as regards commercial law, even in a synchronised way), in Denmark and Norway too there were attempts at enacting special co-operative laws in 1910 and 1925 (and 1937) respectively.<sup>53</sup> In this case, however, there was no evolution in the same direction in all the Scandinavian countries. Moreover, Denmark and Norway are very rare examples of the lack of legal recognition of co-operatives at the present time.

### 3. Registration Under the First Co-operative Acts

From 1846 English co-operatives, if they did not represent a partnership or a company, were registered by the Registrar, who had to have legal qualifications. He was a Government official, not a judge, appointed by the Commissioners for the Reduction of the National Debt, and holding his office "during the pleasure of the said Commissioners". The Registrar for England, unlike his colleagues in Scotland and Ireland was paid by salary instead of fees. From 1852, co-operatives were registered as Industrial and Provident Societies. The 1852 act did not change the powers of the Registrar as they had been specified by the act of 1850. The Registrars in Scotland and Ireland, however, began to be paid in salary too and they became in this way regular public officials. The Registrar certified the rules and amendments of the rules of societies keeping a copy of these rules and of his certificates. He was given resolutions of societies concerning appointment of trustees, and annual "General Statements of the Funds and Effects". The 1852 act gave to the Registrar the power to dispense with inconvenient provisions of the law in a given case. The same act stipulated that the Joint Stock Companies Act did not extend to Industrial and Provident Societies. The distinction was thus clearly made between companies and societies. This distinction was from the beginning a characteristic feature of the English system. Generally, English courts of law emphasised a clear distinction of particular categories introduced by acts of parliament, as joint stock companies,

<sup>53</sup> See K. H. EBERT (note 4), 95 ff.

Industrial and Provident Societies or Building Societies, and even particular unregistered departments of Industrial and Provident Societies.<sup>54</sup> For practical reasons, the sharp distinction could be sometimes attenuated.<sup>55</sup>

The powers of the Registrar of Friendly Societies were always larger than those of the Registrar of Joint Stock Companies. The latter, according to the 1856 Joint Stock Companies Act (19 & 20 Vict. c. 47), registered the memorandum of association and company's articles of association (the 1856 act was the first to introduce this modern manner of company constitution), permitted the changing of the registered name, was given annual lists of shareholders and obviously issued the certificate of incorporation recognised as conclusive evidence that all the requisites of the act in respect of registration had been complied with. His role was thus that of a guardian of legality and a source of information on each joint stock company accessible for everybody, and he was not therefore a factor in shaping the law.

Subsequent legislation did not substantially change the nature of the functions of the Registrar of Friendly Societies, except for giving him powers which were highly differentiated in other fields: Literary and Scientific Institutions, Building Societies, Loans Societies and Trade Unions.<sup>56</sup> The Friendly Societies Act of 1875 (38 & 39 Vict. c.60) introduced a hierarchy of registrars similar in a way to that of the registrars of companies. The Registrar in England became the head of the Central Office, the other Registrars becoming his assistants for their respective regions. Registrars were thereafter appointed directly by the Treasury. The institution of the registry of Friendly Societies was established. These new solutions were transposed to the 1876 Industrial and Provident Societies Act. According to this act, the Registrar issued an ac-

<sup>54</sup> See, for instance, *In re Londonderry Equitable Co-operative Society* [1910], Mew's Digest of English Case Law, 2nd ed., 10, London 1926, 1068.

<sup>55</sup> For instance, it was stated (in 1940 it is true) that the regular change of an Industrial and Provident Society into a limited company subject to the Companies Act meant "a conversion, and not a dissolution. The old society and the new company are in one sense separate legal entities having a different legal structure and machinery. They must, however, for some purposes be treated as the same entity in a different legal costume" - *Ltd's Trust Deeds*, *Moreland v. Woodward*, Law Journal Reports. Digest of Cases 1936 to 1945, (G. T. W. HAYES, ed.), 2, London 1949, 1149. The problem of the transformation of a commercial company into a co-operative (and *vice versa*), though interesting, is too complicated to be included in the present article.

<sup>56</sup> 17&18 Vict. c.112 (1854), 37&38 Vict. c.42 (1874), 3&4 Vict. c.110 (1840), 34&35 Vict.31 (1871); see s.2 of the Act to Consolidate the Law relating to Friendly and Other Societies (Friendly Societies Act) of 1896 (59&60 Vict. c.25).

knowledge of registry when he stated that the society had complied with the provisions concerning registry under the act. Without registration a society could not enjoy any right conferred on Industrial and Provident Societies. The appeal to the competent court from the refusal of acknowledgment was expressly guaranteed. The new institution was the cancellation of the registry and its suspension. It happened particularly when the society "existed for an illegal purpose or [had] willfully and after notice from a Registrar [ . . . ] violated any of the provisions of the act", but it needed always the approval of the Treasury. Generally, acts of registry were not notified in a general way to the public by means of publication, which was one of the most characteristic features of the English system of registration relative to co-operatives and companies. Nonetheless, the notice of the cancellation and suspension proposed as well as executed had to be published in the appropriate journal. Another new solution was the power given to the Registrar upon the application of a given number of members of a registered society (one fifth of the whole number if the society had less than 1000 members), to appoint inspectors to examine into the affairs of the society and/or to call a special meeting of the society.

While the powers of the Registrar of Friendly Societies were gradually growing, those of the Registrar of Joint Stock Companies remained rather stagnant, if they were not, in fact, weakening because of the granting of some autonomy to companies controlled by courts of justice in altering their objects.<sup>57</sup> The difference in the roles of both kinds of registrars was therefore more and more manifest. An administrative mode of registration proper to associations rather than to companies was also provided for by the Schulze-Delitzsch draft of 1860. Its author directly referred to the English system. According to the draft, co-operatives, to be enabled to sue and to be sued (although without legal personality), should apply for an "attestation" (*Attest*) of the local administration authority, producing at the same time their by-laws. The attestation should be a proof of the existence of the given co-operative and of the conformity of its deed of settlement with the law. The 1861 German Commercial Code, applied in Prussia, introduced generally the institution of the commercial register maintained by each commercial court. All the merchants individually and collectively were subject to registration. Partnerships and companies therefore had to be regis-

<sup>57</sup> The Companies (Memorandum of Association) Act, 1890 (53&54 Vict. c.62); for a general view, see R. R. FORMOY (note 49), 130 ff.

tered. Generally, the commercial register of such a range was new, especially in Prussia.<sup>58</sup> This had to make Schulze-Delitzsch choose the same solution for co-operatives. So from 1863 in drafts relative to the co-operative law a co-operatives register, being a part of the commercial register, was always provided for. Such was the content of the respective provision of the government draft elaborated in 1863 but brought into Parliament only in 1866. Its preamble, however, spoke of a separate co-operative register, corresponding to the companies register in the commercial register.<sup>59</sup> The formula put in the 1867 Prussian act and in the 1868 German act was naturally that of a "co-operative register constituting a part of the commercial register". The 1889 act used, however, different terms, speaking of a separate co-operatives register which the respective provisions relative to the commercial register applied to. Because of it the executive regulation concerning the co-operatives register could be a comprehensive legal text of 21 articles.

The judicial registration was an essential condition of the legal existence of a co-operative. The registering court was therefore given the deed of settlement of the co-operative and each amendment of it. The court also had to be informed of the names of the co-operative's directors to enter their names in the register. Periodically, admissions and retirements of co-operators had to be reported. Besides the registration itself, an excerpt from the register, including all the basic data about a co-operative, had to be published in the appropriate journal. This was never regarded as a condition of gaining legal recognition.

As the co-operatives register up to 1889 was a part of the commercial one and the 1868 act (but not the act of 1867) expressly stipulated that the respective provisions of the ADHGB were applicable to it with respect to the access of the public, the legal nature of the registration had to be the same as in the case of the registration of companies.

Nonetheless, the participation of the public administration in the formation process of a co-operative was not completely abrogated in Prussia after the coming into force of the ADHGB. In particular, the Govern-

<sup>58</sup> The Prussian Share Companies Act of 1843 did not provide for registration. Royal authorisation followed by the publication of the deed of settlement was the only legal condition of gaining legal personality. In Austria, there was a certain tradition of commercial registration – see the *Verordnung* of May 13, 1860 relative to a *Handelsprotokoll* (Reichs-Gesetzblatt, n° 123). There were plans to introduce it in Germany in 1849 – see the preamble to the draft Commercial Code for Germany – Entwurf eines a. H. G. B. für Deutschland (1848–49). Texte und Materialien, (Th. BAUMS, ed.), Heidelberg 1982, 129.

<sup>59</sup> See W. SCHUBERT (note 16), 107 ff., and L. PARISIUS (note 23), 27 n.33.



ment is draft Co-operatives Act provided for a "positive opinion" (*Anerkennung*) of the provincial *Oberpräsident* and for his "attestation" before registration by the court. The government wanted co-operative law to be clearly different from commercial law. The government's basic argument for administrative prevention was that the control of the conformity of a co-operative's objectives with those provided by the law "was genuinely of an administrative nature". The proposed clause having been severely criticised in parliament, the government agreed to abandon it.<sup>60</sup> The administrative *Anerkennung* and *Attest*, if introduced should have been something between the state's concession granted to share companies (preserved to 1870) and a police recognition, applied to associations (to some associations even after the coming into force of the BGB, providing for a judicial registration of associations).

The Prussian formula of registration was transplanted to the countries which received the idea of a separate co-operative legislation with various, sometimes substantial modifications. Thus, only in Austria (and in Bavaria, according to the ephemeral act of 1869) were co-operatives registered in the co-operative register which, although corresponding to the commercial register, was not treated as a part of it.<sup>61</sup> In Bulgaria, registration was made in the commercial register. The same type of registration was provided by the Saxon act of 1868, but it was implied, as the act did not distinguish a special category of co-operatives. In Sweden, the registration of co-operatives (and also share companies) pertained to administrative authorities, that is to say with respect to co-operatives, to province governors with an appeal to the King. In Finland, a system corresponding to the Prussian government draft was chosen – registration taking place after the approval by the provincial governor, which was, however, in no way a discretionary act; the registration itself was also administrative. The Netherlands, taking over the idea of distinct co-operative legislation, did not introduce any formula of registration, and modelled their 1876 act on Belgian and French solutions. The Hungarian draft of 1904 too differed from the German formula. It laid down two necessary requirements to make a co-operative exist by law: registration, but also publication of the data of the register. The Swiss mode of registration, although it was introduced by the code of obligations and not by a special co-operatives act was on the contrary

<sup>60</sup> W. SCHUBERT (note 16), 113, and L. PARISIUS (note 23), 24 n.2.

<sup>61</sup> See A. R. v. RANDA, *Das österreichische Handelsrecht mit Einschluß des Genossenschaftsrechtes*, 1, Wien 1905, 116.

close to the German one. The chief difference was that there was a unique commercial register in each canton to register also co-operatives and even non-profit associations.<sup>62</sup> The commercial register, maintained in the way prescribed by cantonal legislation (which could provide and effectively provided in many cases for administrative registration), included every "commercial firm". The registration for share companies and co-operatives was a means of giving legal personality. The registration, which was also similar to that in Germany, had to be followed by official publication of the required data of the register. The publication had no constitutive importance, except for the date of the effectiveness of the entry in the register in respect of a third party.<sup>63</sup>

The French model of registration – generally concerning commercial companies, including "companies with a variable capital" – was on the contrary quite different from the German one. Needless to say, it also differed essentially from the English solutions. In the English and German cases, there was a question of a constitutive deed of registration to be made either by a special administrative authority or by a court of law, co-operatives like share companies, starting to legally exist only by virtue of this deed. The French model was not that of registration in the English and German sense. The term itself in its English meaning was unknown to French law. The author of a translation of the English Friendly Societies Act had to explain to his readers that the English registration had nothing to do with the French *enregistrement*, being a fiscal institution, and that it had no equivalent in French.<sup>64</sup> The French model thus rested on *publicité*, that is to say on an announcement, informing the public about a company. The idea of *publicité* was very deeply rooted in French legal history.<sup>65</sup> It dates back to the 16th century. Having found its expression in the *Ordonnance* on Trade of 1673, it was naturally received by the 1807 Commercial Code. The solutions of the Code were later modified, in particular by the 1867 Companies Act, but never abandoned up to the 1960s.

<sup>62</sup> A. CURTI, *Schweizerisches Handelsrecht. Nach Gesetzgebung und Gerichtspraxis für den praktischen Gebrauch*, Zürich 1903, 198 ff.

<sup>63</sup> E. HIS, *Handelsregister, Geschäftsfirmer und kaufmännische Buchführung*, Bern 1940 (Berne Kommentar zum Schweizerischen ZGB. Obligationenrecht, 7-4), 932.

<sup>64</sup> P. HUBERT-VALLEROUX, "Loi du 7 août 1896 sur les sociétés de secours mutuels et autres analogues. [Notice]", *ALE*, 26 (1897), 15.

<sup>65</sup> See CH. LYON-CAEN and L. RENAULT, *Traité des sociétés commerciales*, Paris 1892, 133 ff., and CH. BEUDANT, "De la publicité des actes de société d'après la loi du 24 juillet 1867", *Revue pratique de Droit français* 25 (1868), 306 ff.

According to the legislation in force before 1867, to legally constitute a commercial company three requirements had to be satisfied. The first requirement, relative to the particular written form of the deed of settlement, concerned only share companies. Their deed of settlement had to be written by a notary public. The requirement of a certain form, not necessarily of a notarial act, was normal and found also in other countries.<sup>66</sup> The second and the third requirements relative to the *publicité* were therefore much more characteristic. The partners were obliged to hand over excerpts from the deed of settlement (in the prescribed contents) to the clerk of the commercial code competent with respect to the place of the company's office (and to clerks of the other commercial courts where branches were to be installed). The same excerpts had to be posted up for three months in the court room as well as published in a legal journal. The clerk of the commercial court – excerpts were not presented to a judge – accepted documents he received without any examination and with no possibility of refusal, and he wrote down the excerpts in his register. Moreover if the form of the deed of settlement was correct the company legally existed from the date of its settlement. It was assumed that it enjoyed legal personality from the same date. The French texts did not put the question of legal personality of companies as it was regarded as obvious with respect to all commercial partnerships and companies.<sup>67</sup> A lack of any means of *publicité* meant naturally the nullity of the company, but first it had to be ascertained by a judge, and secondly the judge could not act *ex officio* but only after a motion of an interested person. Needless to say, under such rules the courts of law had to construct many detailed rules in this field, permitting subtle distinctions between cases of nullity and other infringements of the law which should not provoke a declaration of nullity.<sup>68</sup> They had also to decide whether, and if so how, the action for the ascertainment of nullity was susceptible of prescription. The views here were very differentiated, ranging from a prescription of three years to non-prescribibility.<sup>69</sup> The role of the court in the French system was therefore to ascertain within the framework of the normal procedure, the legal nullity of a company and not to confer, following a special procedure rather similar

<sup>66</sup> For instance, the ADHGB required the notarial (or judicial) form for both types of share companies.

<sup>67</sup> CH. LYON-CAEN and L. RENAULT (note 65), 75.

<sup>68</sup> See "Sociétés commerciales", in: *Répertoire général* (note 17), 449 ff.

<sup>69</sup> CH. LYON-CAEN and L. RENAULT (note 65), 155.

to the administrative one, the legal status of a company. The 1867 Companies Act introduced a category of "company with a variable capital", treated as an equivalent of a co-operative. This category would take the form of any commercial company or partnership and even of non-commercial partnership, as was the case with consumers' co-operatives selling exclusively to their members. Non-commercial partnerships were not regarded then as legal persons; courts of law began to recognise their legal personality much later. That is why the act had to guarantee, although in a rather indirect way, all "companies with a variable capital" independently of their legal form, if the respective requirements of the law were satisfied.<sup>70</sup> The particularity of these companies consisted in the first place in facilitating admissions and retirements and changes in the capital, as well as in permitting ignoring the minimum capital requirements prescribed for partnerships limited by shares and share companies. It related, to a certain extent, also to the means of *publicité*.

Before passing the act, the existing mode of informing the public was criticised as inefficient if not illusory. Various proposals for a new arrangement were presented even in the parliamentary debate including setting-up a central office to preserve by-laws of all companies similar to the English Registrar's Office. The latter was, moreover, well known to French lawyers and Parliamentarians.<sup>71</sup> Any idea of it was nonetheless dismissed as impracticable and, if there had been a real Registrar with some preventive and control powers, incompatible with the general liberal tendency of the act.

As regards *publicité* the 1867 act in a way simplified its means. Following the provisions of the 1863 act on limited liability companies it eliminated the requirement of posting up in the court room and the requirement of notarial form with respect to the deed of settlement of a share company. It replaced the requirement of transmitting excerpts from the deed of settlement to the clerk of the commercial court by that of transmitting the deed itself in duplicate with some other documents. The clerk of the court meant since then at least two clerks: the first one of the commercial court, the second one of the court of the peace to whom the duplicate had to be handed over. The same applied to every important amendment of the deed, except for "companies with a variable

<sup>70</sup> These are also views expressed in the parliamentary debate and the preamble to the draft law – Sirey, 1867, 228.

<sup>71</sup> E. OLLIVIER, "Étude sur le droit commercial. [V]. Des sociétés anglaises", *Revue pratique de Droit français* 23 (1867), 291 ff.; Sirey, 1867, 229.

capital" which neither had to publish in this way changes in their capital resulting from admissions, retirements and contributions to shares and withdrawals of shares, nor retirements of partners other than managers and directors. As the clerk accepted the deed of settlement in duplicate there was no more any registration, even in the sense of the previous technical solutions.

Belgium had lived since the end of the 18th century under the French law and the influence of this law had not disappeared after the separation from France. The Belgian Companies Act of 1873 could therefore only rationalise in its own way, and not wholly dismiss the pre-1867 French model.<sup>72</sup> Generally, the means of *publicité* were to be taken in Belgium by the state authorities, partners being obliged only to start the procedure (they themselves did not even hand over the deed of settlement when it had been written by a notary public) and to pay its costs. Thus, partners of a general commercial partnership and a limited partnership had to transfer an appropriate excerpt from the deed of settlement, and partners of a share company, company limited by shares and co-operative transmitted the whole deed. Excerpts and texts, respectively, were published in the *Moniteur belge* and sent in the printed form to clerks of all courts of law in the country. According to the act, all commercial companies were endowed with legal personality. As the "company's publication" took legal force the fifth day after publication of the deed of settlement or excerpts from it, legal personality started automatically the same day. All this did not mean that the territorially competent commercial court had nothing to do with a company. This court was, by virtue of executive regulations, responsible for publishing the deed of settlement or excerpts from it and by virtue of the act itself, it had some other duties as well. As regards co-operatives, these companies transmitted to the clerk of the commercial court every balance sheet, every act of appointment of managers, and every six months an alphabetical list of members of the co-operative. Those documents were made accessible to the public.

The Belgian act served in turn as a model for the Dutch Co-operatives Act of 1876. Its chief particularities were the requirement of a notarial act and the announcement of the co-operative's settlement (indicating the date of the publication in the *Staatcourant*, an equivalent of the Belgian *Moniteur*) in a local newspaper. The act expressly stipulated that

<sup>72</sup> See CH. RESTEAU, *Traité des sociétés coopératives*, 2nd ed., Bruxelles 1936, 24 f.

the publication of the deed of settlement meant obtaining legal personality.

As to the *pubblicità* of co-operatives, the Italian Commercial Code of 1882 referred as in many other fields to the rules applicable to share companies. In this respect, the rules were rather similar to the pre-1867 French solutions. The substantial difference was that companies limited by shares, share companies and co-operatives were registered in the special register of companies only when the civil court had declared in its judgement that the requirements of the law relative to the settlement of the company had been satisfied. The courts construed these provisions in a broad way. Thanks to this, they enjoyed the right to control also a *finalità economica* of the enterprise and with respect to co-operatives to appreciate their "legal and economic character".<sup>73</sup>

The Portuguese and Rumanian Commercial Codes were closer to the French model. Portugal distinguished itself by the introduction, following the Spanish example of the joint register for trade and ships maintained by commercial courts. In Spain, co-operatives remained subject to the law of associations and distinguished from companies.<sup>74</sup> The lawfulness of their deed of settlement was verified by the provincial governor, registration taking place in the register maintained by the governor. It is noteworthy that the commercial register known in that country traditionally pertained to administrative authorities. It was maintained by *Registradores de la Propiedad*, controlled by a special general direction in Madrid.

#### 4. European Models of Registration of Co-operatives and Their Evolution to the 1960s

In spite of the variety of solutions applied in the first European co-operatives acts, it seems to be obvious that only a limited number of models of registration emerged during the second half of the 19th century. The solutions adopted in particular countries can therefore be grouped in four categories: the English model of administrative regis-

<sup>73</sup> Prima raccolta completa della giurisprudenza sul Codice di Commercio disposta sistematicamente articolo per articolo, (V. ANGELONI et al., eds.), 1, Milano 1918, 468 and 800.

<sup>74</sup> See J. PONSÁ GIL, *Sociedades civiles, mercantiles, cooperativas y de seguros. Tratado teórico-prático*, 2nd ed., Barcelona [1923], 2, 84 ff.

tration applied only to co-operatives, the German model of judicial registration, applied only to co-operatives within or at least corresponding to solutions concerning registering commercial firms, the French model of *publicité* relating generally to commercial partnerships and companies, with a substantial role to be played but only *ex post* by the courts of law, and the last model, geographically the most dispersed, of an administrative registration more or less corresponding to the legalisation of associations.

It is significant that this division had almost nothing to do with any other possible division of co-operative models, in particular with the division made from the point of view of the definition of what a registered co-operative (Industrial and Provident Society, *Genossenschaft*) was. The only common features of various national legislations were a variability within the co-operators group, guaranteed by easy admissions and retirements, in other words, the principle of "open doors", and, somewhat paradoxically, a similarity in the organisation of co-operatives to that of share companies.

The other elements of the definition varied very much even with respect to the Rochdale principle "one man one vote". For instance, in the French law as well as in the Belgian and Finnish law, there was no enumeration of categories of co-operatives or of the permitted field of co-operatives' activities<sup>75</sup>, whereas the Swedish act provided for a strict enumeration and the German and Dutch acts for an exemplary enumeration; the English act of 1893 abandoned the previous strict enumeration. Some acts, (France, Austria, the Netherlands) did not fix any minimal number of the members of a co-operative (general rules relative to the contract of partnership and company were applicable in the French system) whereas the other ones fixed it at seven (Great Britain, Germany, Belgium, Switzerland), but also five (Sweden, Finland), and ten (Portugal, later also Poland). Generally, there was no mention of the size of the capital required, nor on the value of a share (according to the German opinion, co-operatives had no initial capital at all), but the English legislation limited shares to be owned by one member (other than a registered society) to £ 200<sup>76</sup>, whereas the French act limited the capital of a co-operative (or its yearly increase) to FF 200.000<sup>77</sup>, fixing at the

<sup>75</sup> Such an enumeration, however, had been proposed in the French drafts of 1865 and 1866, but it was struck out in Parliament.

<sup>76</sup> This limit was not changed until 1952.

<sup>77</sup> This limit ceased to exist in 1947 – see *infra*, 41.

same time the minimal value of a share. Shares could be transferable (France) or not transferable (Belgium). The differences even within a given model are considerable. The enumeration of differences among legislative texts relative to co-operatives must therefore be left aside in order to focus attention on the models of registration. It must be noted in this respect that the above division into four models of co-operative registration is close to the traditional division of models of commercial registration into three groups: English, German, Latin.<sup>78</sup>

The English model was definitely shaped – or rather, because of its stability, consolidated – by the legislation of the end of the last century, that is to say, by the Industrial and Provident Societies Act of 1893 (56 & 57 Vict. c. 39), and with respect to the office of the Registrar, by the Friendly Societies Act of 1896 (59&60 Vict. c.25). The first act was in force up to 1965, and the second up to 1974, both naturally with some subsequent amendments. The most characteristic feature of the model were the extremely strong powers of the Registrar whose function was to register but also to exercise an initial and permanent control over co-operative societies. The acts of the end of the 19th century did not change this position of the Registrar, but actually strengthened it. By virtue of the act of 1893, the Registrar was empowered to appoint, on the application of ten members of the society, an accountant or actuary to inspect the books.

On the other hand a very important modification was introduced in 1939 (2&3 Geo. 6 c.16). Its aim was, according to the full title of the act, “to restrict the registration of societies under the Industrial and Provident Societies Act”. In order to assure the true co-operative character of Industrial and Provident Societies, and to exclude typically capitalist practices, the Registrar was given new powers of control. The act gave, moreover, a negative definition of the co-operative, stating that it did not include a society which carried on, or intended to carry on, business with the object of making profits mainly for the payment of interest, dividends or bonuses on money invested or deposited with, or lent to the society or any other person. The Registrar was enabled to register only a society being “a bona fide co-operative society” or a society whose business was intended to be conducted “mainly for the purpose of improving the conditions of living, or otherwise promoting the social well-being, of

<sup>78</sup> See V. FRIESE, “Handelsregister”, in: *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslands*, (F. SCHLEGELBERGER, ed.), 4, Berlin 1933, 195 ff.



members of the working classes, or otherwise for the benefit of the community", and in view of the latter fact there were "special reasons why the society should be registered under the [Industrial and Provident Societies] Act rather than as a company under the Companies Act". For newly registered societies, if the society had lost these qualifications during its existence, the Registrar was authorised to cancel the registration with the approval of the Treasury. For those existing before 1938 he might bring into the court a petition for the winding up of the society. He was also given the right to require a society to produce documents and to furnish information relating to the business. Moreover, the Registrar's refusal to register and his decision to cancel were not subject to judicial review. Subsequent legislation preserved these strict rules. The only change was to strike out the clause concerning "the social well-being of members of the working classes", but not "the benefit of the community". On the other hand, the Registrar was granted new, stronger powers in the field of control over the accountancy of co-operatives, which resulted also from a special act on that subject concerning Industrial and Provident Societies and Friendly Societies as well, passed in 1968. Nothing substantial has been changed either as to the organisation of the Registrar's office, except for the abolition of the post of the assistant registrar for Ireland. Nothing has changed either in the matter of the lack of publication of the acts of registry. England still does not know any *publicité* of the French type, with some exceptions continued from the 19th century.

The English model had a significant influence on many European countries during the 19th century. Nonetheless, it has not been received as such by any Continental country. However, thanks to the British Empire and the Commonwealth it still remains extremely important on a world scale.

While speaking about the English Registrar it must be noted that although he is always "appointed by, and [holds] his office during the pleasure of the Treasury", he has not been a typical civil servant, working within the bureaucratic hierarchy and in a bureaucratic way. His functions being "semi-judicial"<sup>79</sup>, and the qualifications required being very special, he has been – we may quote the French expert from the end of the 19th century – "at the same time a lawyer and an economist, with a knowledge of practice [ . . . ], chosen because of his technical capacity

<sup>79</sup> P. YEO (note 6), 22.

and in no way for political reasons. His position is independent and he is a counsel for societies, especially for workers' societies, and a guide much more than an official destined to comply with some inflexible formalities".<sup>80</sup>

The German model also proved to be very stable in Germany, Austria and in Switzerland, even if the co-operative legislation was relatively changed, as in the case of the Swiss amendment of the Code of Obligations made in 1936<sup>81</sup>, and of the Federal Republic of Germany, where a substantial amendment of the 1889 act was passed in 1973. Moreover, it remained in force in the territories that belonged to Austria and Germany in the 19th century, that is to say in part of Czechoslovakia and in Poland. The latter country which regained its independence in 1918 had thus been acquainted with both forms of the model, the German one in the western part and in the south the Austrian one. On the other hand, the central and eastern parts of Poland, having belonged to Russia, had no co-operative law. One of the first acts of the Polish parliament in the field of business law was, it is noteworthy, the Co-operatives Act, passed in 1920.<sup>82</sup> It provided for the judicial registration of co-operatives made in the co-operative register which corresponded to the commercial register. The Polish particularity was lesser attention paid to a general publication of the data about a given co-operative.

In spite of the essential change of the economic system after World War II provoking also a disuse of the commercial register (although the respective provisions of the 1934 Commercial Code were never repealed), this rule has always been in force in Poland. For a decade Poland as well as Hungary has been restoring commercial law.<sup>83</sup> The existence of the commercial register and of the co-operative register contributes to facilitate a return to the market economy which is now observed.

The German model of registration, generally very clear, has had one aspect susceptible of doubt and discussion, especially as compared with the strong powers of the English Registrar and the completely passive role of the registering court in the traditional French model. It was a

<sup>80</sup> P. HUBERT-VALLEROUX (note 18), 262.

<sup>81</sup> See TH. GULL, *Das neue Aktiengesellschafts- und Genossenschaftsrecht der Schweiz*, Zürich 1937, 96 ff.

<sup>82</sup> See S. WRÓBLEWSKI, *Ustawa o spółdzielniach*, Kraków 1921, and S. JANCZEWSKI, *Prawo handlowe, wekslowe i czekowe*, Warszawa 1947, 260 ff.

<sup>83</sup> See my article "A Revival of Commercial Law in the Soviet Union and Other European Socialist Countries", *Review of Socialist Law* 15 (1989), n° 4.

question of the scope and intensity of the control over documents transmitted in order to register a co-operative.

The first relevant acts did not give an answer to this question. In theory, all kinds of solutions should therefore have been imaginable, ranging from the right to verify all aspects of the proposed co-operative or company from the point of view of the law and of the facts as well, to a very liberal approach to the documents produced close to the French passivity. Nevertheless, in juristic doctrine and judicial decisions it was assumed from the very beginning that the task of the registering court was relatively active. The scope of the judicial review was not sufficiently clearly specified. As was noted in one of the first commentaries of the ADHGB, "the commercial register publishes only facts, legal transactions, legal acts and not legal relationships" which distinguished it from other registers like the registry of births, deaths and marriages or the real estate mortgage book.<sup>84</sup> The task of the judge was therefore to decide on the existence and not on the validity of the acts to be registered. The question of validity was left to a possible action brought into the court by an interested person. Such an approach was generally shared by the author of the first commentary of the Prussian and German Co-operatives Act.<sup>85</sup>

The problem remained, however, how the judge could decide on the existence of the facts declared. Originally, it was assumed that he had to verify the identity of the persons producing the documents; for the rest he had rather to rely on declarations made to him. The posterior judicial decisions, in the field of commercial as well as co-operative law, contributed to a certain elucidation of the question and a certain enlargement of the powers of preventive judicial control. The courts were thus trying to find out a *via media* between a lack and an excess of judicial review tending to lay stress on its formal aspects.<sup>86</sup> It is rather more recently that some more profound preventive control seems to prevail.<sup>87</sup>

From the point of view of the texts, the problem was partially solved, as regards co-operatives, in the executive regulations to the 1889 Ger-

<sup>84</sup> A. ANSCHÜTZ and O. FRH. VON VÖLDERNHOF, *Kommentar zum Allgemeinen Deutschen Handelsgesetzbuch mit Ausschluß des Seerechtes*, 1, Erlangen 1868, 101. It is noteworthy that almost the same definition of the nature of the entry to commercial register is to be found in: F. SCHLEGELBERGER, *Handelsgesetzbuch. Kommentar*, (E. GESSLER et al., eds.), 1, München 1973, 95.

<sup>85</sup> L. PARISIUS (note 24), 213 f.

<sup>86</sup> See F. KLEINE, *Rechtsprechung im Genossenschaftswesen*, Berlin, Leipzig 1919, 35 f.

<sup>87</sup> "The registering court [...] screens [...] also for a material accuracy (*sachliche Richtigkeit*) of the proposed entry" - F. SCHLEGELBERGER (note 84), 98.

man Co-operatives Act which stipulated: "before the registration of a co-operative [ . . . ], the tribunal shall verify whether the deed of settlement conforms to the provisions of the law, in particular whether the ends of the co-operative specified in the deed conform to the provisions of the [ . . . ] act". The French comparatist, whom we cite frequently, regarded these provisions as a proof of giving to the court of law a "power similar to that of the English Registrar".<sup>88</sup> This opinion may seem to be exaggerated even if the powers of the Registrar with respect to the operation of co-operatives are not taken into account. Nonetheless, as regards the powers of registering authority the German system has been undeniably much closer to the English model than to the French one. The essential difference from the English model lies in the nature of the registering authority: administrative in England and judicial in the German model.

Some doubts concerning the role of the registering court, typical of the German model, were eliminated by the Swiss executive regulations and especially by the Polish Commercial Code of 1934 which the 1920 Co-operatives Act referred to in the matter of registration; the Polish Commercial Code was moreover modelled after the respective part of the Swiss Code of Obligations. According to the provisions of the 1934 Polish code, the registering court had to verify the conformity of the documents produced with the law "with respect to their form and their contents" and also when "justified doubts" had shown up to check whether the produced declaration conformed to reality; in the latter case, the judge was authorised to act *ex officio*.<sup>89</sup> It is noteworthy that a similar tendency had been displayed in the 1904 Hungarian draft Co-operatives Act. Its motives revealed it clearly. "Whereas, according to the Commercial Code and the practice resting on it, frequently very shallow, this verification is only of a formal character, the draft tends to make the court check the matter of the establishment process, to determine not only whether the legal requirements are formally satisfied but also whether they really exist".<sup>90</sup> Of the three great national models of registration, the French model proved to be the most unstable. Classifying co-operatives within commercial companies was not a very practical solution. Too large, it made room for litigations and judicial decisions. Too sophisticated, it was difficult to be understood by public servants as

<sup>88</sup> P. HUBERT-VALLEROUX (note 19), 310.

<sup>89</sup> S. JANCZEWSKI (note 82), 56 ff.

<sup>90</sup> Gesetzentwurf (note 33), 44 f.

well as by co-operatives themselves. Managers of the French producers' co-operatives, when asked in 1883 to express their opinion about the co-operative legislation, all answered that they did not know the law well enough to comment.<sup>91</sup> The problem was that co-operatives, as in many other countries, could be given some privileges in the field of taxation and contracting public works and many speculators tried to make use of this legal category because its definition was in no way clear.

Almost from the very beginning attempts were made in France to elaborate special acts either on co-operatives in general or on particular categories of co-operative companies. In 1888 the Government brought into Parliament a draft law on *sociétés coopératives* and the *contrat de participation aux bénéfices*. The draft, enumerating four categories of co-operatives with a differentiated status and simplifying the procedure of settlement (limited to making the deed of settlement and its procedure) was passed by the House of Deputies in 1893. In 1896 the Senate did not agree to generalize fiscal privileges guaranteed in the draft, which meant, in effect, its rejection.<sup>92</sup> In the meantime, an act was passed in 1894 to regulate the situation of *sociétés de crédit agricole* as one of the categories of co-operatives.<sup>93</sup> This act simplified the means of *publicité* making credit co-operatives produce the documents required only to the clerk of the court of the peace, the clerk having to transfer a copy to the clerk of the commercial court. This precedent opened the way to other acts concerning a given category of co-operatives. In particular, in 1915 an act on *sociétés coopératives ouvrières* was passed, distinguishing between co-operatives of production and of credit.<sup>94</sup> It contained a definition of the category concerned (with the minimal number of members fixed at seven), and guaranteed important financial privileges. A similar act was passed in 1917 with respect to consumers' co-operatives.<sup>95</sup> There was a substantial difference between both acts in defining the co-operatives concerned: in the first case it was a question of all commercial companies if they conformed to the provisions of the act, whereas in the second case only companies with a variable capital were concerned.

<sup>91</sup> P. HUBERT-VALLEROUX (note 18), 254 f.

<sup>92</sup> See "Sociétés coopératives" (note 17), 883 f., and L. COUTANT (note 2), 35 ff.

<sup>93</sup> Sirey, 1895, 969 ff.

<sup>94</sup> Sirey, 1916, 117 ff.

<sup>95</sup> Sirey, 1917, 515 ff.

Finally, in 1947 a general law *portant le statut de la coopération* was enacted.<sup>96</sup> Its general motive was that "in spite of the proliferation of the co-operative movement all over the world during the past century no text of the French legislation [has] fixed the status of co-operatives. In fact the 1867 act had simply concerned companies with a variable capital to which to co-operatives too may belong."

The act defined co-operatives by specifying their purpose. It set up rules concerning the organisation of co-operatives, with the principle "one man one vote". It introduced certain new rules concerning shares and the minimal capital for companies with a variable capital, abrogating at the same time, but only with respect to co-operatives, the maximum value of the capital of those companies, fixed in 1867. It set up rules relative to the *publicité* of co-operatives and authorised the ministries to check the conformity of co-operative activities with the law. As regards *publicité* according to the 1947 act, a co-operative which was not subject to any other mode of *publicité* (that is to say which was neither a company with a variable capital nor any other commercial company or partnership) had to produce within a month after its settlement and before any operation its deed of settlement, with the other documents required, to the clerk of the court of peace. This clerk transferred a copy of the documents received to the clerk of the civil court. For the rest, the act referred to "particular acts concerning every category" of co-operatives and more implicitly, to the act of 1867. A series of new legislation was therefore planned, this plan being implemented only partially.

The French model proved to be unstable with respect to the general rules of registration too. The traditional means of *publicité* being regarded as insufficient, in 1919 a commercial register, maintained by the clerk of the commercial court, was introduced in France. The entry of the company in the register, although compulsory, was only of declarative character and by itself gave no legal personality. The 1919 act provided also for another register, central and purely informative, maintained in Paris by the National Institute of Industrial Property. The data were produced to it by the clerk of the commercial court. The French law thus received the institution shaped also by the Italian law and in another form by the legislations of Portugal and Spain. In Italy, however, besides the register of companies, another register was introduced in 1910. It was a register of commercial firms maintained by the chambers

<sup>96</sup> Sirey, 1948, 1127 ff.; see L. COUTANT (note 2), 167 ff.

of industry and trade. This register had not any civil law importance, the entry in it being an administrative law obligation. The commercial register, including all enterprises, was introduced by an act of 1918 in the Netherlands and by an act of 1927 in Belgium. In both cases, the entry was purely declarative but the Dutch register distinguished itself by the fact that it was maintained by the chambers of industry and trade and not by the courts.<sup>97</sup> The same solution was seriously taken into account after 1920 during the elaboration of the new Italian Commercial code.<sup>98</sup> According to the new Dutch Co-operatives Act, passed in 1925, a co-operative, although still regarded as a form of association, was registered in the commercial register.

The emergence of the commercial register in France, the Netherlands and Belgium thus did not substantially change the traditional model of *publicité*, only adding the new element. That meant that the traditionally passive role of the court of law or rather of its clerk as formed in the 19th century, remained the rule. Up to the 1960s the following words written almost a hundred years ago, remained quite appropriate to the rules of French positive law: "the documents produced must be received by the clerk with no examination. He can, no doubt, express his opinion in a purely informal way, notifying for instance, that in the deed of the company's settlement there are some grave omissions or the company has a business name or enseigne which might confuse it with an existing company. But he must not force the interested persons to conform to his opinion by refusing to accept the deed produced to him".<sup>99</sup>

Italy and Spain, differing from France in the 19th century, continue to differ also in the 20th century. In Italy, the general approach to co-operatives was, it is true, for a long time not too different from the French one.<sup>100</sup> There was thus a fragmented legislation relative to particular categories of co-operatives, starting with the act of 1886 on *società operaie di mutuo soccorso* (whose legal nature was especially susceptible of doubts)<sup>101</sup>, and the regulations concerning *società cooperative di produzione e lavoro*, and

<sup>97</sup> See P. GOTZEN, *Niederländisches Handels- und Wirtschaftsrecht*, Heidelberg 1979, 40 f.

<sup>98</sup> See minutes of the Commissione Ministerale per la Riforma della Legislazione commerciale, January 10, 1920 – *Rivista di Diritto commerciale* 18 (1920), 1, 126 ff.

<sup>99</sup> CH. LYON-CAEN and L. RENAULT (note 65), 136.

<sup>100</sup> For the history of the Italian co-operatives, see P. VERCELLONE, "Cooperazione e imprese cooperative", in: *Novissimo Digesto Italiano* (A. AZARA and E. EULA, eds.), 4, Torino 1959, 817 ff.

<sup>101</sup> A. MAFFI, *Previdenza e cooperazione nel riscioscimento giuridico e nel diritto comune*, Roma 1887.

later also *cooperative agricole*, which applied for small contracts of public works and other services for public-law persons.<sup>102</sup> This legislation did not cut the link with registration under the Commercial Code<sup>103</sup> but, with respect to producers' co-operatives, special requirements and state control were added, and a special administrative register (*registro prefettizio delle cooperative*) was introduced. As in France attempts were also made at elaborating a general law on co-operatives, for the first time in 1920<sup>104</sup>, and most recently in 1954.<sup>105</sup>

The Italian particularity did not result, however, from the fragmented co-operative legislation, but from the provisions of the Civil Code, absorbing also the matter of commercial law, which came into force in 1942. The Code defined in a new way the legal nature of co-operatives. The co-operative has become a distinct legal category, relatively separable from commercial companies. This was developed by a law-decree of December 14, 1947 which referred to the Civil Code as well as to the regulations of 1911. The law-decree concerned co-operatives intending to contract with public-law persons. Besides the question of state control and inspection, and some general requirements to be satisfied by co-operatives (including the minimal number of members fixed at nine), it obliged all the co-operatives concerned and their unions (except for some special categories of co-operatives, subject to particular acts), legally established, to be registered in the *registro prefettizio*, according to the rules introduced in 1911. The sanction, if a co-operative had not applied for registration, was the impossibility of taking advantage of privileges granted to co-operatives. The proper registration of co-operatives thus remained a question of the private law.

In this respect, the Civil Code changed substantially the mode of registration. Italy, although traditionally attached to the French legal tradition, was more and more influenced by German law. The Civil Code provided for the introduction of a register of enterprises (*registro nelle imprese*), modelled after the German commercial register, in which all economic subjects, including co-operatives, had to be entered. The prob-

<sup>102</sup> Regulations of May 12, 1904, and February 12, 1911 – Collezione Celerifera, 1904, 2493 ff., and 1911, 300 ff.

<sup>103</sup> In 1907, however, small agricultural co-operatives became exempt from the obligation to publish the excerpts in the Bolletino ufficiale delle Società per azioni.

<sup>104</sup> See E. BASSI, "La riforma della legislazione sulle cooperative", Rivista di Diritto commerciale 18 (1920), 1, 89 ff. The draft provided for the registration in the *registro prefettizio* unless a co-operative wished to be registered as a company with a variable capital.

<sup>105</sup> Progetto di codice della cooperazione. Parte generale – see P. VERRUCOLI, "Cooperative (imprese)", in: Enciclopedia di Diritto, (F. Calasso, ed.), 10, Milano 1962, 553 n.7.



lem is, however, that this register has still not been introduced, so that in the meantime mixed legal solutions of the 1882 Code and of the new Code still apply. This naturally allows for various interpretations and judicial constructions. The prevailing opinion is that the provisions of the new code are directly applicable with respect to the powers of the registering court.<sup>106</sup> That means that the registration gives legal personality to commercial companies and co-operatives. The deed of establishment of the co-operative, made in the form of a notarial act, has thus had to be produced to the court to be registered, for the time being, in the register of companies. The court checks the conformity of the documents produced with the law. The truthfulness of acts, and not their validity, are examined. The control, it is assumed, is of a formal nature, but it is not easy to limit it to merely formal aspects, since one of the legal requirement is to prove the "mutualist" character of the enterprise, the concept naturally requiring judicial construction.<sup>107</sup> Even if the French tradition stands to a certain extent in the way of fully introducing the commercial register, it is not possible to deny that the traditional French model has already been abandoned.

The last model, that of administrative registration, proved to be, especially when compared with the French model, relatively stable. It is preserved in the Scandinavian countries. In two of them (Sweden and Finland), having passed special co-operatives acts, the acts themselves were replaced by the new ones, in 1951 and 1954 respectively, but without introducing any substantial modifications of the mode of registration. In Spain, the law changed in this way that, definitely in 1942, co-operatives became subject to particular legislation.<sup>108</sup> Submitted to a strong administrative control, which was quite natural in the first period of Franco's rule, co-operatives were since then registered in a special central register, maintained by the Ministry of Labour. They gained legal personality only after the Minister of Labour had agreed to the registration, classifying at the same time a co-operative among one of the legal categories of co-operatives strictly defined by the law. The Scandinavian system has been typically "normative" whereas the Spanish system was

<sup>106</sup> E. BOCCHINI, "Registro delle imprese", in: *Enciclopedia di Diritto* 39, (F. SANTORO-PASSARELLI et al., eds.), Milano 1988, 518 ff.

<sup>107</sup> See A. GRAZIANI, "Società cooperative scopo mutualista", *Rivista di Diritto commerciale* 48 (1950), 1. 276 ff.

<sup>108</sup> Act of January 2, 1942 on Concept, Categories and Status of Co-operatives.

always marked by discretionary powers of administration, continuing the ancient "concession" system.

The administrative and genuinely discretionary registering of co-operatives was also a characteristic feature of Tsarist Russia. Just after the first revolution of 1917, the provisorial government enacted on March, 30, 1917 a general law on co-operatives and their unions which had been passed in 1916 by the State Duma but rejected by the other house of parliament. The act provided for judicial registration in a purely "normative" way.<sup>109</sup> However, the second revolution of 1917, led relatively quickly to a general liquidation of the old co-operative system. New Soviet co-operatives were organised and strictly controlled by the local soviets, which meant a return, under new circumstances, to the ancient model. Administrative registration remains the stable principle of the Soviet law. It has been preserved by the recent act on co-operatives of 1988, although it is regarded as the most liberal and radical step in reforming Soviet economic law up to 1989. An analyst observes that the 1988 act means a passage from what we call a "concession" system to a "normative" system.<sup>110</sup> If it is remembered that Poland and Hungary have been following their tradition of judicial registering in a co-operative register, this means also that there has never been any common principle of socialist law in this field. "Socialist laws" have been much more heterogeneous than assumed in the literature of comparative law.<sup>111</sup>

## 5. Conclusion – the Nature of Recent Changes in the Field of Registration

It may be concluded that the evolution of the modes of registering co-operatives has consisted, to a large extent, in a convergence of the national models of registration. First, an appropriate register, whether it be a special or general (in particular commercial) one, becomes more and more frequent, if not natural. Second, it becomes more and more frequent that the registration is the only means to give legal personality to a co-operative. Third, the registering authority ceases to be, in the

<sup>109</sup> See A. D. BILIMOVIĆ (note 40), 36 f.

<sup>110</sup> G. AJANI, "Riforme economiche, proprietà e cooperative in Unione Sovietica. La legge del 10 luglio 1988 "Sulla cooperazione in URSS", *Rivista di Diritto civile* 35 (1989), 161 f.

<sup>111</sup> See my article "La tradition et la changement en droit. L'exemple de pays socialistes", *Revue internationale de Droit comparé* 39 (1987), 839 ff.

countries where it had such a nature, a passive receiver of the deeds of settlement of co-operatives, a preventive review of possible defects in the documents produced becoming more and more natural. On the other hand, although the powers of the registering authority, whether it be administrative (as in England) or judicial, have been growing, the "concession" system, the starting point of the evolution of many European countries, and still popular on the other continents, is being replaced by the "normative" system. In the latter, the registering authority is not endowed with a discretionary power.

This convergence has been linked with a similar evolution of the registration of commercial companies. This fact is especially important in those legal systems which either traditionally treat a co-operative as a category within commercial companies (the French system, but also the Swiss one) or have modelled the distinct register of co-operatives after the commercial register, applying to it subsidiarily the respective provisions of a given commercial code (Germany). On the other hand, the separation of a co-operative as a distinct legal category and the formation of an autonomous co-operative law become more and more frequent.

If there is such a convergence, the problem of the nature of the registering authority, very acute at the beginning of the co-operative movement, loses its previous importance. Within the framework of the true "normative" system, an administrative authority may carry out the tasks in the field of registration in the same way and with the same effects as a court of law. Switzerland, where an administrative registration (typical of some German-speaking cantons) coexists with the judicial one, has given a striking example of the comparative irrelevance of this question at the present time. An administrative authority can now behave as if it were a tribunal.

All these processes have accelerated during the last twenty years. Particularly the French Companies Act of July 24, 1966 introduced definitively a true commercial and companies register. The register is true in the German and English terms. Entry in it means gaining legal personality. The EEC directive n° 151 of March 9, 1968, aiming at the protection of the rights of the third party, obliged the member states to introduce a system of official and efficient information about economic actors<sup>112</sup> which has made or will force national legislators to adapt their legisla-

<sup>112</sup> M. v. OMMESLAGHE, "La première directive du conseil du 9 mars 1968 en matière de sociétés", *Cahiers de Droit européen* 5 (1969), 495 ff., 619 ff.

tion to the new standard. It has been noted that the directive means a propagation of the German system and not the French one.<sup>113</sup>

Up to now, France where co-operatives always represent a category within commercial companies<sup>114</sup> is still distinguished by a lack of serious review by the registering court for defects in the memorandum. On the other hand, the 1973 amendment of the German Co-operatives Act consisted also in strengthening the powers of the registering court. The new § 11 a of the act obliges the court to verify the conformity of the co-operative's constitution with the law, and, moreover, to check whether, taking into consideration the personal and economic circumstances, the registration does not menace interests of members or creditors of the co-operative. German courts still emphasize the fact that it is not a question of a preventive control of opportunity, but limits between legality and opportunity have become much less clear than before.<sup>115</sup>

With respect to the autonomy of co-operative law, the French Co-operatives Act of 1947 did not eliminate the terminologic parallelism, consisting in the co-existence of two legal categories: the company with a variable capital which could be represented also by non-co-operative companies and the co-operative divided into several types. The parallelism to a large extent, however, ceased to exist in 1982. An act of December 30, 1981 prohibited clauses concerning the variable capital in corporations other than co-operatives and investment companies. Companies with a variable capital, still subject, besides the 1966 Companies act, to the respective provisions of the 1867 act, thus constitute at the present time a sub-category within co-operatives. Autonomy of co-operative law, emerging within national legal systems, is backed by a powerful factor from outside of any national organisation. The co-operative movement has had since its beginnings an international character. Originally, the international movement in the field of co-operatives was mainly ideological. Since the end of the 19th century it has been, however, taking more and more organised forms. Standards elaborated by the international co-operative movement must naturally have an influence on governments.

<sup>113</sup> R. M. BUXBAUM, *The Formation of Marketable Share Companies*, (*International Encyclopedia of Comparative Law*, XIII-3), 27.

<sup>114</sup> An exception was introduced by an act of 1972 relative to agricultural co-operatives. Since then they have been a category completely distinct from both non-commercial and commercial companies and partnerships.

<sup>115</sup> D. LANG and L. WEIDMÜLLER, *Genossenschaftsgesetz*. (*Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften*). Kommentar, 32nd ed., (E. METZ and J. SCHAFFLAND, eds.), Berlin, New York 1988, 199.

There is still another characteristic feature of the present period which must be noted. The whole problem of registration – if it is meant as a traditional entry in a register, followed possibly by a press announcement – becomes anachronistic in a period of rapid computerisation of all aspects of social and economic life. If the aim of the registration is to guarantee easy accessibility to registered data, this aspect must be seriously considered by legislators.<sup>116</sup> That, however, is a quite different story.

<sup>116</sup> E. BOCCHINI, "Pubblicità. (Diritto commerciale)", in: *Enciclopedia di Diritto* 37, (F. SANTORO-PASSARELLI et. al., eds), Milano 1988, 1024 ff.