

Changing Co-op Law in the 21st Century: A Slow and Painstaking Process

Why Does Business Law Matter?

Areas of law such as criminal defence work, human rights and advice and advocacy for migrants, squatters or protesters are obviously relevant to activists. Business law seems less relevant and mainly useful as an aspect of a critique of neo-liberal capitalism. But creating and maintaining co-operatives, developing the commons, and building community and political associations are also important to the activist agenda and legal structures and the law around them are important to those aspects of activism.

This article outlines the problems faced by UK co-operatives about the legal rules around their structures and deals with how modest but helpful changes were introduced over the 20 year period from 1996 to 2014. The first society legislation in 1852 had developed into the Industrial and Provident Societies Act 1965 which has now been replaced by the modern Co-operative and Community Benefit Societies Act 2014. Lets look at how that happened.

From 1992, I was involved in that process as facilitator of the Legal Working Group of the United Kingdom Co-operative Council (UKCC) which brought together worker, consumer, and agricultural co-operatives before the consumer co-op based Co-operative Union merged with the Industrial Common Ownership Movement (ICOM) to become Co-operatives UK in 2001 and took on that role. In November 1995 we produced a final Proposal for a Co-operatives Act for the United Kingdom and in May 1997 UKCC presented a comprehensive draft Co-operatives Bill to the incoming Blair Government (see http://www.iansnaith.com/?page_id=120 for links to the 1995 Report). The Bill was never presented to Parliament due to reluctance to allocate Parliamentary time for a Government Bill. From then on the Co-operative Movement used piecemeal tactics to seek changes without Government legislation. That was done by using private members' Bills and secondary legislation.

Private Members' Bills are introduced by individual MP's or Lords and not by the Government. MP's draw lots for the right to do this and only the first five or six stand any chance of their Bill becoming Law. It will only do so if it is short, not politically controversial and not opposed by the Government. Co-operative Party MP's were fortunate in the draw in the early 2000's. Secondary legislation is made by Government Departments when they are authorised to do that by an Act of Parliament. They are subject to very little Parliamentary scrutiny. If authorised they can amend Acts of Parliament.

Co-operatives

Co-operatives emerged during the industrial revolution. They allowed ordinary people to meet their own needs, minimise exploitation by owners of capital and retailers and to pursue social change. Co-operatives differ from other enterprises through the dominance of a stakeholder group other than investors and the emphasis of people over capital. The members might be workers, customers, or suppliers. They can be small businesses or individuals. The group is in control and the purpose of the business association is serve those members rather than to make profits for the benefit of investors. Some co-operatives

go further and place their assets in common ownership by avoiding any distribution to members if they are dissolved when still solvent. Most co-operatives pursue the sustainability of the community in which they operate as well as member interests.

The definition from the International Co-operative Alliance (ICA) in its Statement of Co-operative identity, values and principles at <http://ica.coop/en/whats-co-op/co-operative-identity-values-principles> is:

“A co-operative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.”

The definition is followed by a fuller statement of values:

“Co-operatives are based on the values of **self-help, self-responsibility, democracy, equality, equity** and **solidarity**. In the tradition of their founders, co-operative members believe in the ethical values of honesty, openness, social responsibility and caring for others.”

The principles that apply to implement the definition are:

- voluntary and open membership for all members of the stakeholder group concerned;
- democratic member control, by one member one vote rather than by reference to capital stake;
- member economic participation is through limited returns on capital, profit distribution (if any) based on transactions and not capital invested, and often holding at least part of it in common;
- autonomy and independence from Government and suppliers of capital;
- education training and information;
- co-operation among co-operatives; and
- concern for community.

What Co-operatives need from Business Law

The co-operative definition and principles have implications for legal structure. Co-operatives as enterprises operate in the market like any other business and need to compete. But their particular identity also needs legal protection. In many countries the law requires co-operatives to use a particular business structure but in the UK they can choose any structure and tailor the constitution to reflect co-operative identity. Available structures include companies, partnerships and Limited Liability Partnerships (LLP's). However the co-operative society legal structure, formerly known as an industrial and provident society, was historically designed for co-ops and was widely used by UK consumer co-operatives from the Rochdale Pioneers onwards. A key feature of that structure is that continued registration as a society depends on being and remaining a “bona fide co-operative”. The society structure also allows “withdrawable” member shares which permit a fluctuating membership without a market in shares and easier reorganisation through amalgamation or

transfers of engagements which companies and LLP's do not.

Arguably, registration as a society protects co-operative identity more effectively than using a company or other legal structure. But it is also vital that the costs of doing business and the ability to operate in the market are much the same for societies and companies. The need for limited liability for co-operative members and the desirability of a legal entity to hold property and litigate in its own name generally limits the choice for co-operatives. Those features are available in both company and society structures (and since 2000 in the limited liability partnership (LLP) structure). But registration of a company or an LLP does not depend on having and maintaining co-operative identity, although rules with that effect can be “entrenched” by requiring unanimous agreement of members to change them.

UK Legal problems

From the 1970's onwards changes and deregulation applied to companies were not applied to co-op societies. That was because the society legal structure was marginal compared to the company structure and co-ops had limited political influence because of their limited market share and low profile compared to other businesses. As a result, no government gave priority to co-operative law changes when deciding how to use limited parliamentary time and society law fell further and further behind company law in a number of ways. Rules surrounding transactions outside the society's “objects clause”, the formalities around contracts and other legal documents, requirements for filing and auditing small business accounts and the availability of insolvency rescue procedures in cases of financial difficulty all improved for companies but not for societies between the 1970's and the early 21st century. Gradual improvements were made to society law between 1996 and 2014 to deal with some of those issues.

How Changes Was Won

Under Blair and Brown from 1997 to 2010 “Private Members' Bills” supported by Co-operatives UK, the Co-operative Party (linked to the Labour Party) with informal Government help made some key changes but always slowly and gradually. Those Bills generally gave HM Treasury (the Department responsible for co-operative society law) limited power to change co-op law by regulations rather than Acts of Parliament. Then the co-op movement pressurised Ministers and civil servants to use those powers and eventually regulations were made.

The main changes made in that period included the Industrial and Provident Societies Act 2002, a private member's bill by Co-op Party MP Gareth Thomas which introduced a turnout requirement of 50% for demutualisation of societies and gave the Treasury power to change society law (apart from sections defining societies) by secondary legislation in line with future changes to Company Law. That power was used in 2006 to ease the audit requirements for small co-ops. In 2003 another private member's bill allowed secondary legislation (made in 2006) to introduce an optional “asset lock” to prevent any possible distribution of assets from a community benefit society. Co-operatives UK are still campaigning to get that for co-ops as well. The 2003 Act also improved the rules about

society contracts.

In 2010 the final private member's Bill renamed societies as co-operative and community benefit societies (instead of industrial and provident societies), applied director disqualification rules to society directors, and gave extra investigation powers to the society registrar.

Under the 2010 Conservative/LibDem Coalition, co-ops (through Co-operatives UK) persuaded David Cameron and the Cabinet Office of the political advantage of consolidating co-op law. Little Parliamentary time was needed as the process put most of the existing rules in modern language and in one place without changing them. But the Government and Co-operatives UK shared credit for the new Co-operative and Community Benefit Societies Act 2014 that emerged. Various government departments made changes using secondary legislation at the same time to raise the limit on some capital holdings in societies from £20,000 to £100,000, apply insolvency rescue procedures to societies and introduce the new investigation powers and director disqualification rules allowed under the 2010 Act. The result was the present comprehensive 2014 Act which deals with many but not all of the problems, lets people find the law in fewer places than before, and words the law in simpler and more modern language.

Lessons for Social Change and Legislation

Government and legislation move slowly. Solidarity and collective action between co-ops and persistent campaigns focused on clear outcomes are needed over many years if even modest legal changes are to be won. Co-operation with other movements such as trade unions and parties of the left (specifically the Co-operative Party which is closely linked to the Labour Party) may help but political independence allows agility and flexible tactics to achieve agreed aims and mobilise support across the political spectrum - sometimes based on mutual tactical opportunism.

The question of whether co-ops should directly link in to the established Labour Party by helping to fund it or should put independent political pressure on whoever has power has always been debated. To a degree, both tactics can be applied in parallel. The rhetoric of co-ops, social enterprise and similar concepts is often used by parties other than Labour – for example, the Cameron Big Society concept and Lib Dem talk of employee participation. However, another difficult question for co-ops is whether they are being used as cover for dismantling state services at the cost of the poorest and most vulnerable members of society and to the detriment of collective provision such as the national health service. The co-operative movement's federal and representative bodies have to navigate these issues with skill.

The lessons of the 1996 to 2014 period are ambiguous. The link to Labour did not win any Government legislation in the whole 1997 to 2010 period. However, access to Ministers for co-op delegations and representatives and government support for private members' bills was provided consistently under the Blair and Brown Governments. It was also the case that due to ministerial initiatives before 2010, HM Treasury worked with co-operative

representatives to review society law and develop what became the 2011 Legislative Reform Order over many years to make useful but minor changes to society and credit union law.

In 1992 Co-operative Party MP's negotiated some funding for a UK Co-operative Council (UKCC) from the Government when the Callaghan era national Co-operative Development Agency was wound up. The UKCC provided a forum for worker co-ops, agricultural co-ops, housing co-ops and consumer co-ops in the days before Co-operatives UK encompassed ICOM and co-operative developments bodies as well as its consumer members and became a voice for all UK co-ops. The UKCC's Co-operatives Bill met with resistance due to lack of Parliamentary time and political will but many of its provisions were the basis of the piecemeal changes introduced from 2000 onwards (see the Table)

Co-operatives and other radical movements need some structures with continuity over time to grasp and deal with law and policy issues that can harm co-operatives, the commons and other activist movements. Knowledge and understanding need to be built up over time and strategic and tactical plans must be developed to promote and protect the gains of the current movement and those gained in earlier struggles. Continuity should be combined with agility and adaptability.

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Editor of Co-operative UK's Handbook of Co-operative and Community Benefit Society Law available from <http://s.coop/handbook>.

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