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Co-operative Societies, *in* THE LAW OF BUSINESS ORGANIZATIONS IN EAST AND CENTRAL AFRICA

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P. Winship, Co-operative Societies

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Chapter XIII

Co-operative Societies

In this Chapter we introduce the co-operative society. We have divided our presentation into three main parts: (1) a general examination of co-operative societies as economic organisations—their goals, their relation to the Government, and their operation in the Eastern African context; (2) a survey of the main attributes of co-operative societies legislation in Eastern Africa; and, (3) a brief examination of the rules governing the settlement of co-operative society disputes by arbitration.

Although the co-operative society is well worth studying for its own sake because of its growing economic and social importance in Eastern Africa, we are interested here primarily to contrast the co-operative society with the trading partnership and commercial company which we have studied in the preceding chapters. Reluctantly, we must leave to others the study in depth of co-operative societies legislation and of how societies established under this legislation actually function. Part I of this Chapter, however, suggests some of the themes which might underlie this further study.

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PART I—INTRODUCTORY

A. BASIC PRINCIPLES OF CO-OPERATION

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(i) International Co-operative Alliance, *Twenty-third Congress Report* (1966), pp. 180-181 (excerpt from report of the Commission on Co-operative Principles):

Part III—Recommendations and Conclusions

Summing up the commission's examination in Part II of this report of the seven principles enumerated in the report of 1937, it may be said that the following should continue to be considered as essential to genuine and effective co-operative practice both at the present time and in the future as far as that can be foreseen:

1. Membership of a co-operative society should be voluntary and available without artificial restric-

tion or any social, political or religious discrimination, to all persons who can make use of its services and are willing to accept the responsibilities of membership.

2. Co-operative societies are democratic organisations. Their affairs should be administered by persons elected or appointed in a manner agreed by the members and accountable to them. Members of primary societies should enjoy equal rights of voting (one member, one vote) and participation in decisions affecting their societies. In other than primary societies the administration should be conducted on a democratic basis in a suitable form.

3. Share capital should only receive a strictly limited rate of interest, if any.

4. Surplus or savings, if any, arising out of the operations of a society belong to the members of that society and should be distributed in such manner as would avoid one member gaining at the expense of others.

This may be done by decision of the members as follows:

- (a) By provision for development of the business of the co-operative;
- (b) By provision of common services; or,
- (c) By distribution among the members in proportion to their transactions with the society.

5. All co-operative societies should make provision for the education of their members, officers, and employees and of the general public, in the principles and techniques of co-operation, both economic and democratic.

To these we have thought it important to add a principle of growth by mutual co-operation among co-operatives:

6. All co-operative organisations, in order to best serve the interests of their members and their communities, should actively co-operate in every practical way with other co-operatives at local, national and international levels.

In submitting the above Formulation the commission would add certain remarks. The first is that these principles are not associated arbitrarily or by chance. They form a system and are inseparable.

They support and reinforce one another. They can and should be observed in their entirety by all co-operatives, whatever their objects and area of operations, if they claim to belong to the co-operative movement. The second remark is that, although the principles originated as rules governing the relations of the individual members of co-operatives with one another and with their societies, their application is not confined to primary societies. They should be loyally observed by secondary organisations also, with such modifications as are necessary or desirable for institutions which represent the co-operation of co-operative societies rather than of individual persons. The third remark is that those principles, accepted in 1937 but not retained by the present commission, are not lightly to be disregarded or thrown aside. The fact that they are not of universal application in our time does not mean that they are no longer appropriate, particularly for co-operative societies which, by reason of their youth and inexperience, cannot afford to risk strains on either their finances or the unity of their membership.

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Notes:

1. The recommendations set out in the Commission's Report were adopted by the Twenty-third Congress with the addition of the word "racial" to the first recommendation on non-discrimination in membership. Among the principles which the commission no longer thought fundamental are the principles of "political and religious neutrality" and "cash purchase and sales only". When reading the materials in this Chapter you should ask yourself whether existing Eastern African legislation is compatible with the commission's list of fundamental principles.
2. The Commission's Report describes the activities of the International Co-operative Alliance in the following words, (p. 159):

"The Co-operative Movement is world-wide. The International Co-operative Alliance is becoming steadily more and more representative of it. Although co-operative organisations of many countries in Africa, Asia and Latin America have yet to join it, the alliance grows in membership from year to year and its membership becomes better balanced because it is more inclusive of the diverse types of co-operative society. Consumers' and agricultural co-operatives greatly predominate, as is inevitable, but it is significant that a growing number of unions and federations operating in the field of credit, housing, fisheries, etc., are being admitted. Sharp divisions formerly existing between co-operatives of various types can no longer be maintained. In the newly-developing regions especially, multi-purpose societies tend in several cases to replace co-operatives of specialised types which may be too small or otherwise ineffective. More important still is the fact that despite the obvious differences between the economic and social systems under which co-operatives carry on their work, the alliance

maintains its unity, as the only international organisation dedicated entirely and exclusively to the propagation and promotion of co-operation."

3. For an historical survey of the co-operative movement since World War I and the evolution of co-operative principles, see J. Orizet, "The Co-operative Movement Since the First World War", *Int'l Labour Rev.*, Vol. 100 (1969), pp. 23-50. The author reduces the generally accepted principles to four: open membership; democratic control; limited interest on capital; profits distributed according to patronage.

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Problem:

Can you state "company principles" for a private enterprise trading company?

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(ii) H. Calvert, *The Law and Principles of Co-operation* (Calcutta: Thacker, Spink & Co., 1926 (3rd Edition)), pp. 12-13, 18-20 (footnotes omitted):

[T]he movement owes its origin to poverty and to the desire for some way out of all the distress and hardships that poverty entails. The common bond that held the members together, or that induced them to combine, was poverty or economic distress, first amongst factory workers, and later amongst farmers. As all lacked a sufficiency of capital, capital could not be the basis of association. The only other basis was the human individual, and accordingly the first principle of co-operation is that the members join as human persons and not as capitalists. The second principle follows from the first; for if persons meet to satisfy the common need, there should be no distinction between them in the satisfaction of this need. They must meet on a basis of equality. The third principle is not peculiar to co-operation, but its importance in the life of a society is so very great that it deserves a special place. The act of association must be voluntary. The fourth principle is that the members join to promote the economic interests of themselves, and not of anybody else.

Above all else, however, it must be clearly remembered that co-operation is a form of organisation. Experience seems to show that it is the only system of voluntary organisation suitable for poor people. *Co-operation, then, is a form of organisation, wherein persons voluntarily associate together as human beings, on a basis of equality, for the promotion of the economic interests of themselves...*

The chief danger, and almost the universal one, to be avoided is that he, with more capital, should gain from the need of him with less. Co-operation recognises that capital is entitled to a fair interest;

but it refuses to admit any other right attaching to its possession or claimed by its owner, and more especially the claim to a controlling voice in the enterprise. If from the activities of the association there results any divisible surplus, this must be divided amongst those from whom it has been derived in proportion to their contribution to it. As a matter of ordinary business caution, it is usual to allow for contingencies that may not happen: goods are sold for more than the actual cost price; interest may be charged at a higher rate than is necessary to cover expenses; the producer may be given less than his crop has brought; in all these cases, the resulting surplus is not regarded as ordinary business profit but as an overcharge which belongs to those from whom it has been derived and to whom it should be returned.

People, nowadays, have grown so accustomed to the capitalistic form of organisation that they experience difficulty in freeing themselves from some of the ideas associated with that form when dealing with co-operation, which is not a modification of capitalism but an alternative to it. Questions of profits, control, voting power, transfer of interest, rights of members and dealings with non-members, etc., are dealt with from a point of view quite different from that under the capitalist system. Thus co-operation is the form of organisation most suitable for small people and small enterprises. In agriculture, it appears to be the only form that is of practical value, for most cultivators are men of limited means, and from the nature of their calling, are unable to combine their efforts in the factory system. They cannot collect their raw materials and their capital inside a mill. ^{they} They cannot adopt the established methods of mass production, they cannot carry specialisation so far as the manufacturer and they cannot reduce costs by the methods familiar to him. At the same time, it is recognised that organisation is the key to success and to be successful agriculture must be organised. Accordingly it is found that, in practically every civilised country, governments are endeavouring to promote co-operation. Agriculture is still not only the most essential but the most important and the biggest industry in every country except England, where it has only recently lost its premier place. The war has drawn attention to its position as the paramount factor in the life of any people, and it is not exaggerating to say that co-operation is now recognised as necessary if any country is to get the best out of its land. It is regarded as the panacea for the most rural ills,

and throughout the civilised world it is being strenuously advocated at the expense of the State.

Co-operation differs from its rival, capitalism, in that it promotes peace and not strife, unselfishness and not self-seeking. Both are forms of economic organisation; but with the great body of European co-operators, especially among the leaders, co-operation means something more than a device for enabling a farmer to save or to make more money. Many of its most ardent apostles look upon it as a sort of social reform, indeed, in some cases, as a religion. They consider it not only as an economic, but also as a moral, movement. And there is little doubt that many helpers are attracted by the evidence they see on every hand of social improvement wherever co-operation has obtained a firm foothold. It seems impossible to study the progress of the movement in any country in the world without being impressed by the great moral gain accompanying the spread of these societies for self-help through mutual help. But the American Commission spoke wisely when they said that co-operation should be entered upon at the outset, because it promises to be a more profitable way of doing business than the old way of every man for himself. Co-operation is more than this, but to be successful it must be built on a business, and not on a sentimental, basis. The sentiment will come later and will help to maintain the co-operative scheme.

It may be advisable to sum up here the result of the above discussion. Co-operation is an alternative form of organisation to capitalism; it is specially suitable to people who have no capital sufficient for the full satisfaction of their needs on a joint stock basis; it is essential to the best progress of agriculture, so much so that it is practically impossible for a country of small holdings to achieve prosperity without it.

The absolutely necessary principles are that people should agree to associate voluntarily on terms of equality in order to secure the satisfaction of some common need. Human beings, and not capitalists, bind themselves together to "work each for all and all for each". From these premises there follow a series of subsidiary principles in a perfectly logical manner, but to the ordinary mind, biased by daily experience of capitalism, it is sometimes difficult to follow this logical sequence. In consequence, there is apt to be doubt as to the amount of support that should be accorded to the propagation of the movement. Briefly, an agricultural state cannot pro-

gress without it, and it is for the Government to decide whether they desire prosperity or not. If there be any who dispute the above assertions, they may well be asked, in view of the voluminous evidence in support, to produce some alternative method of making a country of small-holders prosperous.

Furthermore, it is the experience of every country that has any experience to record, that cooperation stands out for moral uplift, for honesty and for the homely virtues that count for so much in the daily lives of the people. It possesses the peculiar faculty of making virtue pay. All human beings are continually striving after the satisfaction of some material need. Co-operation holds out the prospect of success in this effort, provided the persons concerned possess certain moral qualifications. Without these, failure is inevitable. Through co-operation morality is taken out of the copy-book maxim and placed in the forefront of human action as absolutely essential to success in the most ordinary affairs of life. Moreover, the morals of an individual cease to be a purely private matter for his own conscience, they become of importance to the whole community to which he belongs.

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Notes:

Although the above excerpt is taken from a textbook which is somewhat dated, courts may still turn to it when examining fundamental questions. See, for example, the decision of Simpson, J., in *Gatanga Coffee Growers' Society Ltd. v. Gitau*, p. 222 *infra*, where the learned judge quotes from the 5th Edition. As mentioned in the Editor's Introduction, a more recent textbook is B. J. Surridge and Digby, *A Manual of Co-operative Law and Practice* (Cambridge: Heffer, 1967 (3rd Edition); paperback edition published in 1972 by the Plunkett Foundation for Co-operative Studies).

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Problems:

1. Does Calvert's definition include the same fundamental principles adopted by the International Co-operative Alliance at its Twenty-third Congress?
2. Are the historical conditions in 19th Century England which gave rise to the Co-operative Movement—in particular, the poverty of factory workers—relevant when evaluating the role of co-operative societies in 20th Century Eastern Africa? Are the co-operative principles universal or must they be adapted to local conditions?
3. Is the co-operative organisation described by Calvert a "socialist" organisation?
4. Do you agree that "co-operation should be entered

upon at the outset, because it promises to be a more profitable way of doing business than the old way of every man for himself?"

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(iii) M. Digby, *Agricultural Co-operation in the Commonwealth* (Oxford: Blackwell, 1970 (Rev. Edition)), pp. 206-207:

Indeed the strongest impression derived from a study of the movement in a field as diverse as the British Commonwealth may well be of precisely this duality of function [economic and social], with the emphasis laid here on the business, there on the social side. The social character of the co-operative movement is well-known; it appears in the early fervour of the consumers' movement in Britain, in the disinterested propagation of village co-operation in India and elsewhere, in the credit unions and study circles of Canada, in neighbourly feeling and communal pride of achievement throughout the world. It is a commonplace to observe, what indeed cannot be pointed out too often, that its influence extends beyond its own purposes, and educate men and women for social progress and political responsibility.

What is not so frequently observed, perhaps because it is taken for granted, is that co-operation is a new form of business organisation, invented by and for groups of people, especially but not exclusively farmers, entering the modern business world for the first time. In this aspect the comparison is with the joint stock company invented not so long before the co-operative by the men of commerce and industry, which, whatever its social defects, was remarkably fruitful in developing the resources of the world. The comparison shows co-operation to be not only more equalitarian, more satisfying to those engaged in it, less exclusively bent on gain, but also so devised that it can succeed in the hands of people who do not make business their career, while by its very closeness to the needs of primary producer and ultimate consumer it can avoid many of the inefficiencies and distortions inherent in business regarded as an end in itself.

Co-operation, then, is a relatively new economic technique and in reviewing its origins it is of interest to note how often, if not invariably, it has arisen in a society whose traditional forms have been broken either by a revolution in technique, by transplantation to a new continent or by contract with an alien civilisation.

It is not, however, the only new form which has been devised to replace disintegrating societies or

the oppressions of unrestricted individual enterprise. The alternatives to co-operation, apart from private industry, are the state in business, the public corporation with statutory powers and collective enterprise (either voluntary or compulsory) which absorbs the whole economic and in some cases the social life of its members. All these forms (the collective least) have developed to some extent, somewhere in the Commonwealth. It is not necessary to look upon them as inevitable rivals of the co-operative method. There may be economic spheres to which they are more appropriate. The co-operative method can, however, claim to be the oldest and most widely tested. It has a record of substantial and long standing success in dealing with problems and situations of great diversity. The study of that success should encourage, if they need encouragement, all those who are engaged in the movement, whether in the prairies of Canada or the coral islands of the Pacific. It should also be studied intensively by those economic planners who seek a system, not only theoretically just and capable of efficient wealth production, but actually adapted to the capacities of ordinary intelligence and the broad needs of human nature.

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Problem:

The excerpt from the work of a leading scholar of the co-operative movement suggests that economic organisations—such as public corporations—are alternatives to co-operative societies in some contexts and may be more “appropriate” in some economic spheres. How does a planner determine which form of economic organisation is most appropriate for carrying on a specific economic activity? Is the decision of “appropriate” subject to scientific determination or is it always a political issue?

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(iv) Refer back to J. K. Nyerere, *Ujamaa—Essays on Socialism* (Dar es Salaam: Oxford University Press, 1968), pp. (???)?, *supra*, and to further comments by the same author on the organisation of agricultural production in Tanzania, p. (???) *infra*.

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Problem:

Do you agree with the author's analysis? Note that he is speaking only about *marketing* co-operatives. Would his conclusion also hold for *agricultural production* co-operatives?

* * *

(v) Co-operative Principles

Re-read the *Zambian Co-operative Societies Act*, s.2 (reproduced at p. (???) *supra*), which defines co-operative principles.

* * *

Note:

Although other Eastern African Acts do not define “co-operative principles” they do incorporate this phrase. See, for example, section 2 of the *Uganda Co-operative Societies Act*:

Subject to the provisions of this Act, a society which has for its object the promotion of the economic interests of its members *in accordance with co-operative principles*, and which in the opinion of the Registrar is capable of promoting those interests, may be registered under this Act with or without limited liability.... (Emphasis added.)

* * *

Problems:

1. Are these co-operative principles compatible with those adopted by the International Co-operative Alliance at its Twenty-third Congress?
2. What advantages and disadvantages do you see in including a formal definition of “co-operative principles” in a Co-operative Societies Act?

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(vi) O. Gkereke, “The Place of Marketing Co-operatives in the Economy of Uganda”, in C. G. Widstrand (ed.), *Co-operatives and Rural Development in East Africa* (N.Y.: African Publishing Corp., 1970), pp. 153-154 (footnotes omitted):

Advantages of Co-operative Enterprise, with Particular Reference to Agricultural Marketing Co-operatives

Some of the potential advantages which have prompted the formation of agricultural co-operatives in Uganda are as follows:

- (1) They provide opportunities for earning higher farm incomes. It is assumed that by combining as co-operatives, peasant farmers can provide themselves with processing and storage facilities which they cannot own individually, without outside aid, and by handling their members' produce, they may be able to obtain increased supply and reap some economies of scale which would reduce marketing costs and result in higher returns to the members.
- (2) They are a way of replacing the middlemen and, therefore, passing on the growers the profits that would otherwise go to the middlemen, thus improving the bargaining position of the growers.

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- (3) They provide a useful channel for propagating ideas for the improvement of methods of cultivation and marketing. This is especially so where co-operative societies consist of "progressive farmers" whose influence is likely to bear upon other co-operative members.
- (4) They serve as a useful means of extending credit to farmers and thereby enforcing programmes of technical assistance and advice. Due to the urgent credit needs of the farmer both for capital investment and working capital, co-operative societies are a powerful means of channelling the efforts of peasant farmers towards co-operative practices. Credit extension by Government, for example, to co-operatives, for distribution to their members, is contingent upon the societies and members fulfilling certain obligations, such as sale of crops through the societies by the members, and the societies keeping accurate accounts and records of members' crop deliveries to them.
- (5) Where co-operatives are linked to a marketing board set up for the purpose of overseas sale of the cash crops handled by the movement, it may be possible to raise the prices obtainable from such crops to the benefit of growers if such crops form a large part of world supply to the extent that their prices can be raised by withholding output. However, it is possible that such higher prices obtained may be withheld from farmers through a series of deductions, such as export tax, cess, and payments into a buffer fund or a Price Assistance Fund for the purpose of cushioning/subsidising prices of such commodities in the event of a fall in the world market. Such was the case in Uganda with coffee and cotton which fetched high prices in the 1950s on the world market, but growers, however, received lower prices, until the funds were exhausted, and they were exposed to the vagaries of the world market.

Problems:

1. Do the advantages of co-operative enterprise set out above bear any relation to the principles proclaimed by proponents of co-operation?
- *2. Are the above advantages also available through private enterprise by groups of farmers, for example, forming partnerships or companies?

(vii) Re-study the table on *Differences Between Co-operative Societies and Other Forms of Business Organisation* reproduced at p. (???) *supra*.

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- (c) *Tanzania (Mainland)*
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(Note: For a comparative table of the contents of the above laws, see Appendix (??).)

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(Note: Consult also Government Reports on agricultural marketing and land settlement policies as well as the relevant paragraphs in development plans.)

(3) Further Reading

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B. CO-OPERATIVE SOCIETIES AND TRADITIONAL EASTERN AFRICAN SOCIAL AND GROUPINGS

Legislation for both co-operative societies and companies has been introduced into Eastern Africa from models developed by West European countries, principally the United Kingdom. This section raises the question whether either or both forms of economic organisation are compatible with traditional economic groupings in Eastern Africa. It is impossible to give exhaustive examples from these traditional societies so you must bring to bear your own experience when examining this question.

(i) *Some examples of traditional groupings in Uganda.*

Refer back to Chapter 1 (pp. ??????, *supra*) where extracts from J. H. Driberg, *The Lango: A Nilotic Tribe of Uganda*, F. K. Girling, *The Acholi of Uganda*, and N. Dyson-Hudson, *Karamajong Politics* were reproduced. Re-study those extracts and then proceed to consider the following two extracts.

(ii) J. K. Nyerere, *Ujamaa—Essays on Socialism* (Dar es Salaam: Oxford University Press, 1968), p. 106:

The traditional African family lived according to the basic principles of *ujamaa*. Its members did this unconsciously, and without any conception of what they were doing in political terms. They lived together and worked together because that was how they understood life, and how they reinforced each other against the difficulties they had to contend with—the uncertainties of weather and sickness, the

depredations of wild animals (and sometimes human enemies), and the cycle of life and death. The results of their joint effort were divided unequally between them, but according to well-understood customs. And the division was always on the basis of the fact that every member of the family had to have enough to eat, some simple covering, and a place to sleep, before any of them (even the head of the family) had anything extra. The family members thought of themselves as one, and all their language and behaviour emphasised their unity. The basic goods of life were "our food", "our land", "our cattle". And identity was established in terms of relationships; mother and father of so-and-so; daughter of so-and-so; wife of such and such a person. They lived together and they worked together; and the result of their joint labour was the property of the family as a whole.

(iii) S. E. Migot-Adholla, "Traditional Society and Co-operatives", in C. G. Widstrand (ed.), *Co-operatives and Rural Development in East Africa* (N.Y.: Africana Publishing Corp., 1970), pp. 17-19, 32, 34, 35-37 (footnotes omitted):

In this ongoing debate [about traditional society and co-operatives] two major views predominate: one, a somewhat capitalistic and individualistic outlook; the other, a somewhat romantic-socialist viewpoint. In a study of a co-operative farming scheme in Kisii District in Kenya, Holmquist argues that private land tenure, cash cropping and the expansion of the money economy have "released the individual peasant from a great deal of his traditional dependence on the local community". Co-operation is explained in this study by observing that the individual Gusii peasant is today more dependent on new relationships trust arising from new cleavages in the community. Holmquist then draws the conclusion that "the most powerful attraction the scheme has for the individual is profit". This interpretation suggests that participation in the money economy is incompatible with the traditional social structures. In its extreme, this view sees modern agricultural co-operatives as having nothing to do with the indigenous co-operative forms.

But perhaps the most popular view today is that which sees mutual assistance and co-operation as an essential ethic of indigenous African life. Those who hold this view are among the strongest advocates of the promotion of co-operation among peasants. To them, the principle of co-operation is so obviously "natural" to the African peasants that its adoption is thought to be nearly axiomatic. Indeed, the three

East African Governments have all launched vigorous campaigns for the promotion of co-operatives, arguing that the principles of mutual assistance stem from the traditional past. Co-operatives are thus seen as the necessary vehicles for the realisation of a socialism resembling the traditional African social order.

Although the two views toward co-operation appear contradictory, they both have some approximate validity as explanations of the economic organisations of the pre-capitalist African societies and the modern African peasantries. However, their partiality renders each of them inadequate, for on confronting empirical situations one encounters seemingly "non-traditional" men playing active roles in co-operative societies whose day-to-day activities may also involve "traditional legitimisation". Or, on the other hand, some co-operatives in regions most affected by the money economy are riddled by conflicts and interkinship group rivalries almost to paralysis. However, lineage alliances and membership of kinship groups as such are clearly not the most critical factors determining the peasants' participation in agricultural co-operatives. The appeal by the promoters of co-operation in East Africa to traditional ideals of mutual assistance may be expedient for mobilising the peasants and enlisting their participation in the development effort. But, exhortation on the basis of such ideology has to be complemented by real economic incentives to ensure continued participation.

Some Western scholars, however, have chosen to interpret the "samaritan" appeals characteristic of the current politics of modernisation as an indication of the African's inherent reliance on archaic traditions.

Indeed, there appears to be a persistent professional bias in studies of African social phenomena which exaggerate the natives' respect for the endurance of ancestral beliefs and practices. Typically the major inadequacy of such studies is their failure to take into consideration the "environmental" contexts in which change is taking place. Particularly relevant in the explanation of economic change in Africa is the nature of international economic relations, especially under the colonial situation. Any approach to economic change in present-day Africa which only engages in abstract discussion of "traditionality" in explaining "receptivity" or "resistance" to change is clearly mindless to say the least...

The new organisations are governed by laws first enacted during the thirties. The regulations retain the same general principles although they have undergone revisions. While these legislations may differ

in the fineries of detail, they all embody a common principle: The theory is that an isolated and powerless individual can only be associated with others, through mutual support, obtain his own degree of material advantage. Thus, where co-operation was obtained by coercion in the autochthonous [i.e., traditional] order, it is now induced by considerations of individual benefit. Modern co-operatives had been intended as essentially organisations of economic benefit to be secured through trading. In this sense then co-operatives in East Africa today can be seen merely as economic institutions with specialised marketing functions, only tangentially affecting the peasant family's life.

Whereas the indigenous communal spirit of sharing took place as an inseparable part of social life, modern co-operatives confine themselves to specific functions and are intended to have "rationalistic legitimisation"...

But despite these inefficiencies, it is clear that co-operative development has met some success in East Africa which has led some people to the hasty conclusion that the most crucial variable must, therefore, be a favourable "traditional" disposition toward co-operation. It is, of course, not so easy to isolate mere association of factors from their casual relatedness. It is clear enough that modern co-operatives are not a direct continuation of the native communal forms, even [if] they may appear to be so. The movement has obviously taken advantage of the given social structures, and its success may be partly attributable to the participants' familiarity with certain ideas of co-operation. Such familiarity, however, can only be a minor factor in explaining the co-operative success in parts of East Africa. The strength of this contention is perhaps best revealed by the examination of deviant cases of co-operative failures or non-existence. The relative absence of co-operative organisations in certain societies where the indigenous organisational forms are still relatively intact only reveals the inadequacy of tradition-based explanations...

The main concern of this discussion has been to determine the relevance of traditional co-operative organisational forms to the present marketing and service co-operatives in East Africa. In attempting to identify any continuities popular notions of "traditional" *Gemeinschaft* and "modern" associational relationships have been approached rather warily. This is prompted by a number of considerations, the most important of which is the gross simplifica-

tions inherent in such typologies. There is a primary difficulty in recognising the traditional social forms relevant to co-operation. The transience of social developments in East Africa further makes aspects of "traditionality" and "modernity" inseparably intertwined. The effect is that attempts which rely on natural explanations for identifying the variables determining the success of co-operatives often miss the real crucial factors.

One major weakness of culture-based explanations is that they tend to have a static view of social life. Thus, many scholars trying to specify what makes the African peasant "tick" tend to treat the existing peasantries as some exotic social type characterised by a basic benevolence and by being relatively undifferentiated. But these assumptions do not obtain in actuality. Socio-economic differentiation and kinship-neighbourhood loyalties emerge into prominence among factors affecting differential participation by individuals in the co-operative organisation. At the same time other variables such as ecology, transportation and availability of market for agricultural goods affect the development of co-operatives. Many of these factors clearly did not pertain under the traditional system. In addition, they represented an expansion of the scale of the activities in which the African peasants are involved today. These factors alone point to the fact that there is no direct continuity between the autochthonous co-operative forms and modern marketing co-operatives.

The rapid development of the co-operative movement in East Africa during the post-war years and after political independence raises a number of problems. One such problem relates to questions of social control, specifically the problem of balancing social justice (democracy) and efficiency. This question, however, ultimately relates to the wider national socio-political environment within which co-operatives are operating. In Tanzania, for example there is an attempt to ensure the effective participation of the peasants by an ideology that invokes certain features of the African past-adapted to modern conditions. But ideology alone may not ensure such participation. While enthusiasm may be sustained by the nostalgic respect to the past, effective participation will ultimately be kindled by perceived benefits. But these need not be seen purely in economic terms for according to the *Ujamaa* ideology, value encompasses an expression of a relationship as well as a measurement. In propagating the newlook co-operatives, the paradox to which planners must address themselves raises the problem of how

to communicate to the peasants the Government's long range goals while sustaining their enthusiasm by granting some of their immediate wants.

* * *

C. GOVERNMENT POLICY TOWARDS CO-OPERATIVE SOCIETIES IN EASTERN AFRICA

In this section we examine the relation of the Governments to the co-operative movement in Eastern Africa. Here the major themes are (1) the extent and forms of Government involvement in the movement, and (2) the compatibility of Government control of the movement with the principle of voluntary personal participation in co-operative enterprises. When reading the following materials contrast the attitude of the present Governments towards co-operative societies with their attitudes towards companies.

* * *

(i) *The Traditional Stance of the Co-operative Movement Towards Government Involvement*

R. C. Gates, *The Principles and Practice of Co-operation* (Kampala, 1966 (2nd Edition)), pp. 22-23:

2. RELATIONS WITH THE GOVERNMENT

Generally the co-operative movement welcomes Government intervention to assure decent conditions of labour and fair wages, to curb monopolistic tendencies of the private (capitalist) sector of economy, and to provide reasonable control of prices by marketing boards. By the stress, however, that the movement places on the voluntary principle in its organisation, it prefers that the Government should remain in economic affairs a referee or umpire to ensure fair play rather than that it should take over the complete management of economic affairs.

In most countries co-operative societies come under the semi-judicial supervision of a Government Department which enforces the registration of co-operative societies, their correct audit and their dissolution, if they fail to maintain their business in accordance with the law of the country. In the developed countries this Government Department keeps strictly in the background and only intervenes in the affairs of a co-operative society if there is a breach of the law. But in developing countries the officers of the department are very active in promoting co-operatives in order to raise the economy of the country and the standard of living of the people. They give constant supervision to the working of the co-operatives. They perform the audit of their accounts. They settle disputes between

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co-operatives and their members and between co-operatives and co-operatives. Where co-operatives fail in their business, the officers of the department carry out their liquidation.

Altogether the officers act as nurses to the infant movement. However as the movement grows in stature and in strength, these officers should withdraw more and more from active intervention in the affairs of co-operative. They should become more active intervention in the affairs of co-operative. They should become more the "guides, philosophers and friends" of their co-operators, so that they become capable of managing their own business. The officers will tend to become more and more in position similar to those in the same department in the developed countries. The co-operators themselves will tend to take over the promotion, supervision and audit of their own co-operatives.

By so doing, it is sometimes argued that the co-operative officers will put themselves out of a job. But that has not been the actual experience anywhere in the world. There is, and always will be, a vast field of work for such officers in the field of co-operative education. As the movement grows in a country, so do the demands for technical training in the management of business and in the skills required to operate the banks, workshops, factories, ginneries, transport, etc., which that growth of the movement always brings about.

* * *

Note:

The co-operative movement does not accept that a Government may limit legitimately the principle of voluntary participation. See, for example, the Report of the Commission on Co-operative Principles submitted to the Twenty-third Congress of the International Co-operative Alliance (p. 161):

In the nature of things, this freedom [of an individual to join or not to join a co-operative society] can rarely, if at all, be absolute. It can be modified or overridden by other considerations of wider application and greater essential validity. A Government which is assisting a farmer to reclaim [and on which he is to settle may not unreasonably impose membership of a supply or marketing co-operative, at least for a limited time, as a condition of its assistance or support, in the interests of the farmer himself. A producer or group of producers may in effect sabotage the efforts of a voluntary co-operative to improve the marketing position and incomes of producers by refusing to join it and so giving a foothold to opposing, maybe reactionary, economic interests. In order to counteract this Government may intervene with legislation compelling all producers to join a co-operative or at least to market their product through it, if a prescribed majority of the producers vote in favour of such measures. Other examples may be cited, where the refusal of a small minority of individuals, after every effort has been made to persuade them to join a co-operative, say, for managing an irrigation scheme

or for providing and using pesticides or adopting a new system of cropping with the prospect of much higher yields, may frustrate the whole plan of action. In such cases, refusal to join the co-operative is essentially anti-social and can be justifiably overridden in the interests of the whole community, provided that all the circumstances of the case are taken into account and safeguards adopted against the abuse of power through the extension of compulsion in circumstances where it is unnecessary or inappropriate.

* * *

(ii) Increasing Government Involvement in Eastern Africa

(a) Kenya, Co-operative Societies Bill, 1944, Memorandum of Objects and Reasons: "It is considered that different types of societies need different degrees of help and guidance. It is, therefore, considered necessary to provide for the full measure of control which any society, especially in its infancy, may need and to give the Governor the power to exempt from the operation of certain clauses of the measure societies or classes of societies for which such intensive supervision, as the measure seeks to impose, should not be appropriate."

(b) Tanganyika, Co-operative Societies (Amendment) Bill, 1944, Objects and Reasons: The Bill is "designed in the main to increase the supervisory powers of the Registrar and to make other provisions of a practical nature in accordance with co-operative principles which experience has shown to be necessary and which it is hoped will improve the machinery of management of co-operative societies. It is the Government's intention to encourage and stimulate the co-operative movement..." Measures introduced by the Bill include: approval of membership by the Registrar; grounds given for refusal to register, subject to an appeal to the Governor; consent of Registrar necessary for reward for services to managers; both the Registrar and the auditor authorised to give directions to the management; Registrar must approve loans to members in a commodity supply society; Registrar's approval of the balance-sheet necessary.

(c) Anonymous protest concerning the Ugandan Co-operative Societies Ordinance, 1946 (n.d., Archives, Plunkett Foundation, Oxford, England): "The main objection to this Ordinance is the amount of restriction placed upon the co-operative societies. Whilst it is appreciated that we still have a lot to learn about the functioning of such societies, very little effort has been made by the Government to train Africans in this direction. If the Government is allowed such autonomy over the societies, they are literally being run by the Government, and this

is not what the people want. They want to run their own co-operative societies, with freedom to establish their own trading concern run on an economic basis, and freedom to operate its finance so that the maximum amount of development can result from such operation." Examples given by the writer of objectionable clauses include:

—ss. 33-35 (restrictions on loans): societies would "not be able to transact their business with reasonable freedom";

—s. 41 (inspection of society's affairs): "a direct encroachment on the rights of members. Allowing for the fact that the inexperience of the African warrants some sort of supervision, it is a mistake to assume that this fact is not recognised by the African himself. There is no doubt that he would take steps to see that adequate assistance is obtained, but he strongly objects to having supervision thrust upon him, particularly as he has no voice at all in the appointment of such a supervising manager. Neither, although he is expected to provide the wherewithal, does he have any voice in the salary he shall be paid";

—s. 58 (rule-making power): "puts the running of the organisation completely into the Government's hands, and runs contrary to every principle of the co-operative movement as such".

(d) Memorandum (3rd July, 1970) submitted by H.E. E. M. Babumba of the Ugandan Co-operative Societies Bill: "The object of this Bill is to give Government more powers for the guidance, direction and control of co-operative societies in general, and in matters of finance and management of their affairs, in view of the increasing responsibilities being given to the co-operative movement in the social and economic development of the country."

* * *

Note:

For an analysis of the colonial legislation and the implications of the recent amendments to the colonial model, see Hans-H. Munker, *New Trends in Co-operative Law of English-speaking Countries of Africa* (Marburg/Lahn: Institute for Co-operation in Developing Countries, 1971 (Paper No. 4)).

* * *

Problem:

* The post-World War II Co-operative Societies Bills were introduced by the colonial British administrations while the Ugandan Co-operative Societies Bill was presented by an independent African Government. Do the statements of the colonial officials and the independent Government officials have any themes in common? Would the anonymous Ugandan protestor, protesting against the Ugandan Ordin-

ance of 1946, have similar complaints today about the Ugandan Co-operative Societies Act, 1970?

* * *

(iii) *Present Government Plans for the Development of Co-operative Societies*

(a) Tanzania, *Tanzania Second Five-Year Plan for Economic and Social Development*, 1st July, 1969, to 30th June, 1974 (1969), Vol. 1, pp. 26-28, 30, 31-33:

CHAPTER III THE RURAL SECTOR

The fundamental principles guiding the plan in relation to the rural sector are:

- (i) The rural development receives top priority, as most of our latent wealth lies in our under-utilised land and in the energies of the rural people;
- (ii) That during the second plan significant progress will be made towards the goal of socialist organisation of rural economic activity, both through the application of the principles of *Ujamaa Vijijini* and through the expansion of other forms of co-operative productive activity;
- (iii) That the desired social change will be achieved in the context of a programme of planned output expansion, based upon a system of crop priorities and the improvement of productivity through energetic promotion of modern agricultural techniques.

A. *Ujamaa Vijijini*

2. By building on the principles of the traditional extended family system, within its emphasis on co-operation and mutual respect and responsibility, a society will be built in which all members have equal rights and equal opportunities, when there is no exploitation of man by man, and where all have a gradually increasing level of material welfare before any individual lives in luxury.

3. The objective is to farm the village land collectively with modern techniques of production, and share the proceeds according to the work contributed. People who are farming together can obtain the economic advantages of large-scale farming in the better utilisation of machinery, purchase of supplies, marketing of crops, etc. It becomes easier to supply technical advice through agricultural extension officers who can teach a group more easily in one place, rather than travelling from one small *shamba*

to another. It is also easier to provide social facilities like water supplies, medical and educational services, to farmers who live in groups rather than in scattered holdings.

4. The equality of farmers in *ujamaa* communities, with no divisive class distinctions, creates a healthy and stable social system where corruption, exploitation and inequality of wealth unrelated to work done can be eliminated.

5. Until recently the trend has been in the opposite directions, away from extended family production and social unity, and towards the development of a class system in the rural areas. The immediate objective of the Second Five-Year Plan is to reverse this trend and to search out all possible avenues of advance towards *Ujamaa*.

6. The inputs required to make a success of an *Ujamaa* Village are:

- (i) Good local leadership.
- (ii) Adequate land with good potential for development or expansion.
- (iii) Adequate water for human, animal use.
- (iv) Knowledge of agricultural or other techniques by which production can be increased.
- (v) Availability of the necessary resources for implementing these techniques.
- (vi) Markets for disposal of the surplus production.
- (vii) Planned programmes for the productive re-investment of the surplus produced.

7. The best advertisement for *Ujamaa* is a successful *Ujamaa* Village. The first essential for successful *Ujamaa* is that it should come from the people, rather than being imposed from above. The Government will, therefore, leave decision-making with the people, but will strengthen the people's own endeavours.

8. Although the *Ujamaa* programme is founded on the principles of voluntary democratic activity, the Party and Government are not relieved of the responsibility of mounting a vigorous programme of promotion. Indeed, the tendency towards capitalist development in the rural areas is unlikely to be checked without a vigorous initiative being mounted.

9. There is a choice which must be made between two alternative strategies:

(i) *Selective*

10. To concentrate attention on limited areas which are capable of making movement to complete *Ujamaa* living over a short period of time; that is, to concentrate *Ujamaa* development on the existing *Ujamaa* Villages and such new efforts which seem

capable of full application of the desired principles.

11. The advantages of this approach is that in the *Ujamaa* Villages a concentrated effort can be made to transform the economic and social life of the people in all its aspects. The few make a major change in their way of life.

12. The disadvantages on this plan is that while a few thousand families in Tanzania are living, or learning to live *Ujamaa*, the rest of the population continues to live on single-family peasant *shambas*. Although this first option has the advantage of being selective and of providing a high level of service to a small number of *Ujamaa* communities and, therefore, of guaranteeing limited success over a narrow range of activities, we might end up with a situation in which a small lively, high quality *Ujamaa* movement co-exists with a basically stagnant rural economy.

(ii) *Frontal*

13. The alternative approach is to move towards *Ujamaa* on all possible fronts, mobilising the full range of governmental and political institutions behind the principles of *Ujamaa*. Under this approach we would seek, in the next five years, to ensure that large segments of the society will make some movement towards socialism. All rural and urban institutions will be expected to seek out a variety of socialist solutions to the range of development problems that present themselves, although not all will achieve complete commitment to fully fledged *Ujamaa* production during the plan.

14. The advantage of this approach is that the whole society will be mobilised to pursue the goals of socialist production and living. This will require mobilisation of all existing institutions. The aim will be to move all to make at least some movement towards *Ujamaa*.

15. The frontal, or broad-based, approach has been chosen because of the desire to mobilise the widest possible participation in socialist activity throughout the rural society.

16. The task of Government and other institutions is to explain and encourage fledgling *Ujamaa* Villages and production co-operatives which need help in getting on their feet. The kind of help they need is ideological and organisational as much as material. They need to know how an *Ujamaa* Village works, to discuss the concrete problems of organisation, to recognise the importance of savings, and to learn improved agricultural techniques.

17. *Ujamaa* Villages need services such as health, education and communications. The relevant Government Departments will give priority to groups which have committed themselves to *Ujamaa* development. Embryo villages may need some type of material assistance, but experience has shown that where this is given indiscriminately or too lavishly it can have adverse effects, diverting the community from its true objective. It is vital that, whatever encouragement TANU, Government or parastatals give to this type of group, they must not try to run it; they must help the people to run it themselves.

18. The specific contribution which Government and other organisations can make towards the development of *Ujamaa* Villages can be summarised as:

- (i) Education to explain as widely as possible, the underlying principles of *Ujamaa* Villages.
- (ii) Promotion of good leadership among the farmers and commitment among the Government leaders and officials.
- (iii) Adequate planning (sites, food cultivation and provision of services).

31. *Ujamaa* will become the basis for the transformation of the rural society; however, its achievement will require sustained effort. Co-operative farming is not without difficulties. A high level of responsibility, commitment and discipline is required of members to improve the means of production and expand resources available to the *Ujamaa* community. The major benefits will not all be immediate but will depend upon the expansion of productive capacity over the years through the community effort.

C. Co-operative Development

37. One of the most significant developments in recent years has been the growth of the co-operative movement. In 1952, there were 172 registered co-operative societies; by 1961, there were 857 and by September, 1968, the number had increased to 1,696, handling over half a million tons of produce annually and paying more than Shs. 500 million to farmers. In addition to playing the principal role in primary marketing of agricultural produce, co-operative unions have recently been encouraged to assume increasing responsibility for processing, and, in collaboration with the N.D.C.A., for the supply of agricultural credit. These past successes of the co-operative movement indicates the possibilities of fast

expansion in new rural institutions. Many of the problems the movement has had to face will provide insights into the challenges which will arise in the extension of *Ujamaa*.

38. The co-operative is basically a socialist institution. However, a marketing co-operative, the members of which are small-scale capitalists and which itself becomes a large-scale employer of labour, will increasingly take on a capitalist character. The co-operative movement in Tanzania is a source of considerable strength for the growth of socialism—it represents a major advance over a private, capitalist trading system. However, if it remains purely concerned with marketing, with the development of commercial farming amongst its members, it will become an increasingly capitalist institution.

39. A central part of the development of rural socialism in Tanzania must be played by the co-operative movement; for it to fill a progressive role, however, it must be revolutionised. Two changes are required:

- (i) The societies must become production oriented—through the development of co-operative farming units from amongst their members at the primary level.
- (ii) The increased democratic participation of the membership in the control of all co-operative activities.

40. Despite the leading role in primary marketing which has been assigned to the co-operative movement, there are many commodities in respect of which co-operatives as yet provide few if any services. In regard to the principal commodities presently handled, there is substantial room for rationalisation and greater efficiency in buying, handling, grading, storage and transportation. In addition to moving towards a more production oriented role for the co-operative movement, produce marketing activities will be consolidated.

41. The movement of the co-operative movement toward *Ujamaa* will be achieved in two directions—

- (i) through the formation of production based multi-purpose societies *de novo*, or from *Ujamaa* Villages or agricultural associations; and/or
- (ii) by orientating marketing based societies towards additional activities more directly affecting production (including the establishment of farming units).

42. The co-operative development programme will make a major contribution to the expansion of the technical skills which will be required for the

operation of the co-operative productive activities of the *Ujamaa* Villages. It will be among the responsibilities of the division to register productive co-operative and to supply them with the advice and help they need to handle the business side of their affairs. The training programme of the Co-operative Development Division has, therefore, a very high priority.

43. Quite apart from the new *Ujamaa* development the recent very rapid increase in the number of co-operative societies and their responsibilities, mainly in the field of marketing and credit has placed a heavy strain on the Co-operative Development Division and the Co-operative Movement itself. The main constraint has been trained manpower, for the division is seriously short of skilled staff at all levels. The movement requires access to substantially greater facilities for training of committee members and key employees, with a measure of direct assistance in some cases such as management and accounting.

44. The increased training programme proposed for the Co-operative Development Division would absorb about two-thirds of the existing capacity of the Co-operative College, Moshi. In order to cater for the needs of the co-operative movement for primary society secretaries and for the intermediate training of society and union staffs, accommodation will be increased at the college from some 150 to about 250.

EXPANSION OF CO-OPERATIVE DEVELOPMENT DIVISION—SUMMARY BY MAIN GRADES

Grade	Present Strength	1973-74 Target	Additional Requirements
Inspectors	192*	640	448
Senior Inspectors	50	210	160
Co-operative Officers	72	129	57
Co-operative Accountants	10	35	25
Senior Co-operative Officers	23	40	17
Principal Co-operative Officers	7	11	4
Assistant Commissioners	4	6	2
Commissioner/Registrar	1	1	—

*Plus an average of 162 trainees over the period of the Second Five-Year Plan.

45. A proportion of the Co-operative Inspectorate staff will be trained to serve more specialised requirements in such fields as co-operative production, produce marketing, credit of all kinds, commerce/distribution, processing and storage, and accountancy. There is a need to increase the capa-

city of societies to handle a rapidly expanding volume of agricultural credit. The handling of more agricultural inputs, and the wider entry of co-operatives into trade and distribution also requires that a limited number of staff should be trained for immediate posting to regions to assist unions which have reached a stage where they can effectively play a larger role in distribution.

46. The general staffing proposals already referred to will allow a steady development of specialization amongst the Inspectorate staff at district level to be backed by a strong co-operative development and extension team operating from each Regional Headquarters. The need for a higher proportion of graduates at senior levels than at present, will be met to a large extent from the growing output of Tanzania graduates in commerce and economics from existing courses at the University of Tanzania as well as from its Faculty of Agriculture. The basic degree and diploma courses in agriculture will be drawn upon increasingly by both the Co-operative Development Division and the Co-operative Movement.

47. In view of the great importance of improved management and accounting, special efforts will also be made to assist unions and societies in these fields. In-service training courses at diploma level will also be established in management. In addition to the training of ten accountants to professional level, some 25 co-operative accountants at intermediate level will be trained annually and of these up to 15 will be available for secondment to unions. Unless accounting at union level is improved there is little hope of achieving lasting improvement at primary society level. The same applied to management. Trainees successfully completing the new up-grading diploma level course in management will be available for secondment to unions as assistant managers.

48. One area in which progress has lagged is in co-operative marketing of livestock and of poultry, eggs, milk and fruit and vegetables, which, being highly perishable, require highly organised marketing facilities. A start has recently been made, however, in these fields and will be given high priority during the plan.

49. Special attention will also be given to increasing the participation of the co-operative movement in the distribution system, beginning with relatively standard, fast moving lines in everyday demand. While the registration of some new consumer societies can be expected, these, on their own, often tend to be vulnerable, and a substantial

increase in co-operative trade will almost inevitably involve the systematic development of co-operative distribution at the retail level and in wholesale trade as a complement to and in close co-operation with S.T.C.

50. Progress already achieved in the field of co-operative processing of agricultural produce will also be consolidated and expanded, together with the provisions of transport and storage. Recent studies indicate that losses in store products at village, primary society and, to a lesser extent, at union level are such that high priority must be given to the improvement of storage facilities and methods of pest control. The adoption of sound designs and standards of construction is particularly important. Sorting, handling and storage of products and their continuous protection from deterioration will form an increasingly important part of the training of all co-operative staff, particularly those who specialise in marketing development.

51. The provision of services to production co-operatives will become an increasing part of the work of the co-operative service. Production co-operatives are to be created in forestry and fishing; the development of small-scale industry will also create possibilities of production co-operatives of craftsmen. The main thrust of development of production co-operatives is to be expected, however, in agriculture as a result of the drive towards *Ujamaa*.

52. In summary, the Second Five-Year Plan will represent a transitional period during which the traditional marketing functions of the co-operatives will be made more efficient, for the benefit of the farmer, while new growth will be shifted sharply in the direction of production and multi-purpose primary societies. The responsibility of the Co-operative Development Division for *Ujamaa* will be to encourage the existing societies to move in the direction of production activities as well as to provide services to the *Ujamaa* communities as they develop.

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Problem:

How do you distinguish *Ujamaa* communities from co-operative societies (especially production co-operatives? (See Note 2 immediately below.)

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Notes:

1. Although the Tanzanian plan is given at length here, examples of the role that co-operative societies are to play in Government plans could equally well have

been taken from the plans of other Eastern African countries. The different plans have different emphases and a single Government's policy may evolve over time. See, for example, paragraph 200 of Kenya's *Development Plan for the period 1965-66 to 1969-70* (1966) at page 200:

"200. The foregoing difficulties in no way detract from the importance of a healthy co-operative movement to the progress of Kenya's agriculture. There is only one course of action open to the nation, and that is to strengthen the co-operatives to play their role adequately. Quite apart from social and political factors there is no doubt that a strong co-operative movement would maximise the incomes of Kenya's peasant farmers by, on the one hand, performing essential functions of processing and distributing on a much larger and more efficient scale than would be possible for the individual grower, and on the other hand, giving him a share in the profits associated with these operations rather than letting them accrue entirely to private middle-men. A strong co-operative movement would also facilitate the expansion of agricultural credit and the technological progress associated with it, among other ways by simplifying the collection of loan repayments, through deduction of repayments from a borrower's crops proceeds at co-operative society level."

Note the emphasis on the practical advantages of co-operative societies and the brief passing reference to "social and political factors".

2. For a fuller statement of the political vision of *Ujamaa* communities, read the following extract from the writings of a leading political thinker.

* * *

J. K. Nyerere, *Ujamaa—Essays on Socialism* (Dar es Salaam: Oxford University Press, 1968), pp. 124-126:

"*Ujamaa Agriculture*"

In a socialist Tanzania then, our agricultural organisation would be predominantly that of co-operative living and working for the good of all. This means that most of our farming would be done by groups of people who live as a community and work as a community. They would live together in a village; they would farm together; market together; and undertake the provision of local services and small local requirements as a community. Their community would be traditional family group, or any other group of people living according to *Ujamaa* principles, large enough to take account of modern methods and the twentieth-century needs of man. The land this community farmed would be called "our land" by all the members; the crops they produced on that land would be "our crops"; it would be "our shop" which provided individual members with the day-to-day necessities from outside; "our workshop" which made the bricks from

which houses and other buildings were constructed, and so on.

Obviously such community activities would need to be organised, would need to have a "manager" responsible for the allocation of tasks and their supervision. There would need to be a "treasurer" responsible for the money earned and its administration, and a "governing committee" which is able to take executive decisions in between general meetings. But all these people would come from among the community, and must do so if it is to be a real socialist unit. They would be members of the community, not outsiders, although at the beginning there may be an advantage in attaching to such schemes some technical and other advisers if the right kind of expert can be found.

Such groups are possible in Tanzania—indeed a few already exist. There is no need to wait for the Government to organise them and give all the instructions. Nor would it be sensible to expect everyone who joins such a group to be willing to think only of the community interest and never of his own. Such unselfishness is rare in man, and no social organisation should be based on the expectation that all members will be angels. What is required is a sensible organisation which can be shown to be to the benefit of all members. This can be done if every member has certain responsibilities to the community, and is able to see his benefits from it because they are benefits to himself and to his own village.

The essential thing is that the community would be farming as a group and living as a group: investment in the community farm would be investment in the farm of every member; investment in the village—such as a clean water supply—would be of benefit to every member. The return from the produce of the farm, and from all other activities of the community, would be shared according to the work done and to the needs of the members, with a small amount being paid in taxes and another amount (which is determined by the members themselves) invested in their own future. There would be no need to exclude private property in houses or even in cattle; some energetic members may wish to have their own gardens as well as share in the community farm. The extent of the private actions may well vary from one village to another, but always on the basis that no member is allowed to exploit another—nor to exploit a non-member—

and that all must play a fair part in the life of the community from which they all benefit."

* * *

(b) Zambia, Co-operative Societies Act, s. 3.

3. The Minister shall take such measures as he deems advisable for the encouragement generally of co-operative development for economic, social and cultural purposes and human advancement on the basis of self-help and, in particular, but without limiting the generality of the foregoing, for the encouragement of the organisation of co-operative societies as a means of—

- (a) improving the economic situation of their members;
- (b) contributing to the economy an increased measure of democratic control of economic activity;
- (c) increasing personal and national capital resources by the encouragement of thrift, the prevention of usury and the wise use of credit;
- (d) increasing incomes and employment by a fuller utilisation of resources, including the bringing of new land into productive use, the marketing and processing of agricultural and natural products, the development of local industries and processing of raw materials;
- (e) improving social and cultural conditions and, where appropriate, providing supplementary services in housing, health, education and communications;
- (f) raising the level of general and technical knowledge of members of societies.

* * *

Problem:

Do you see any advantages or disadvantages in specifically delegating responsibility for the encouragement of co-operative development in the Co-operative Societies Act? Are there any limits placed on the Minister's discretionary power?

* * *

Note:

The Zambian Government has spelled out its goals and guidelines for co-operative development in its Second Development Plan. What is the relation between the plan and the duties placed on the Minister by section 3 of the Co-operative Societies Act?

* * *

Zambia, *Second National Development Plan*, January, 1972, to December, 1976 (Lusaka: Ministry of Development Planning and National Guidance, 1971), p. 81:

E. CO-OPERATIVE DEVELOPMENT

137. The development of the co-operative movement occupies a central place in the philosophy of humanism and the creation of viable forms of co-operative activity is seen as an essential element in rural development, as well as in Zambian enterprise in other spheres. At this stage, the promotion of effective co-operative societies depends heavily upon the Co-operative Department of the Ministry of Rural Development, but as further training is undertaken and established, and unions and societies gain in experience, the movement must make collective efforts to stand on its own feet.

138. During the FNDP, emphasis was given to the rapid establishment of co-operative farming societies supported by management and mechanisation service provided, where possible, by Government, together with subsidies for clearing land as well as generous loans from the Credit Organisation of Zambia, which many societies were not in a position to use effectively or repay. The process of amalgamating these societies into unions with prospects of achieving economic viability will be continued during the SNDP. At the same time, a start has already been made to shift emphasis towards the establishment of service co-operatives based upon existing marketing-orientated societies and those of the farming societies which show signs of viability. As already mentioned in the section dealing with marketing, it was only in the Eastern Province that the co-operative movement had made substantial progress at the time of independence. The lessons learned, however, indicate that the marketing function, properly managed, can be expanded to include supply of basic consumer goods as well as agricultural requisites, distribution of agricultural credit and, in some cases, transport and processing. It is in these fields that the multi-purpose co-operative has the greatest part to play.

139. Guidelines for the co-operative movement during the SNDP have been formulated and are as follows:

- (a) a co-operative society should meet a real economic need and have reasonable prospects for success as well as being of benefit to the members;
- (b) prospective members should receive adequate co-operative education and information about the operation of a society before registration takes place, and committee and member education should continue thereafter;
- (c) members must themselves contribute sufficient funds to enable operations to commence,

Government assisting with items such as water, roads, etc., in the case of a farming society, or with credit in other cases in accordance with the normal criteria for credit-worthiness;

- (d) there must be an assurance of competent management before the commencement of operations of a new society;
- (e) members should initiate and run co-operative societies themselves; Government's contribution should be to stimulate and promote self-reliance;
- (f) in the case of farming societies, sophisticated forms of mechanisation and capital-intensive techniques generally should be avoided unless it is within the competence of members themselves, the emphasis being instead on improved seed, correct use of fertilizer and animal-drawn implements;
- (g) more emphasis must be placed upon the selection and training of co-operative leadership, and there must be an adequate number of members able and willing to give their time and energies to committee work before a society is formed;
- (h) primary societies should be grouped into unions, and common services established wherever possible;
- (i) to deal with the vast reorganisation and consolidation of existing co-operative societies which is required, as well as to ensure that future societies are established on a sounder basis, there will be a comprehensive planning team in the Department of Co-operatives and improvement in the quality of provincial and district co-operative extension staff.

* * *

(iv) *Evaluation of Government Involvement in Eastern Africa*

G. Hyden, "Co-operatives and their Socio-Political Environment", in C. G. Widstrand (ed.), *Co-operatives and Rural Development in East Africa*, pp. 71-76 (footnotes omitted):

THE GOVERNMENT AND THE CO-OPERATIVES

The belief in Government circles in East Africa has been that the "consciousness" and the "will" of co-operative organisations can be strengthened by applying a mixture of regulatory and educational measures. The environmental obstacles can be overcome through legislative control and extensive education. Here I shall be concerned with some aspects of the experience gained in these efforts. In order to fully understand how Government actions affect co-operatives in different parts of East Africa, it is necessary to distinguish between three ways in

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which co-operatives were started: in opposition to Asian dominance in business, for local political reasons, e.g., a person wanting to show others that he is doing something useful for his community, and through Central Government initiative.

The first category belongs primarily to the period before independence, the second to the period just around independence, and the third to the time after independence. Though there are exceptions, the most successful in terms of survival and business expansion have been co-operatives belonging to the first category. Several factors have contributed to this: (a) they were started for economic and not political reasons, (b) they were able to lay a solid economic foundation for their activities, thanks to the favourable prices on the world market in the 1950s, and (c) many were able to benefit from proper economic advice from Europeans who had no political interest in these organisations as political platforms.

The vast majority of co-operatives belonging to the second category, at least in Kenya, have failed or are now dormant, because the economic feasibility of these societies was never seriously considered. Much the same applies to the third category, though a slightly higher proportion of those started by Governments have remained in existence. In some cases, this is due to adequate preparation. In others, however, co-operatives have been allowed to operate despite financial losses, because Governments have been reluctant to acknowledge their failures or for other reasons have allowed them to continue to function.

Though there are important differences between co-operative societies and unions within each of the three countries, Government control measures have usually been applied universally. This means that no distinction has been made between the, economically speaking, relatively successful unions and their opposites or between those which had previously developed an autonomous status *vis-à-vis* the Government and those which were partly or totally dependent on Government support for their survival. The explicit reason for increasing central control over co-operatives has been financial mismanagement and the feeling that the Government can save the poor peasants from exploitation by economically more active members of the rural communities. Implicit in the measures, however, has also been the desire to reduce the autonomous power of some of the larger co-operative unions.

The control measures applied have been most

extensive in Tanzania, the most drastic action being the Government "takeover" of 16 co-operative unions in the country in 1968 on the grounds of mismanagement and embezzlement. All the elected management committees were replaced by Government-appointed caretaker committees. Also in Kenya the powers given to the Commissioner for Co-operative Development (the principal Government employee concerned directly with co-operatives) are significant. The 1966 Co-operative Societies Act gives him the right to insist that all cheques written by a society be countersigned by a Co-operative Officer. He can also insist that small mono-crop or single-purpose societies be amalgamated into sufficiently large viable multi-purpose units. He has the right to dissolve society committees that are not performing their duties satisfactorily (though this particular right has been applied as frequently as in Tanzania). Co-operative societies also have to submit monthly trial balances for approval by the Department for Co-operative Development.

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Though there has been a decline in cases of deliberate mismanagement and embezzlement, this has been obtained at what seems a high cost. The new regulatory measures have considerably reduced the organisational autonomy of the co-operatives and made them "handmaidens" of the Governments. The character of co-operatives as voluntary associations, belonging to their members, has been lost.

This has become particularly serious in the case of those co-operatives that were founded long before independence and had developed a sense of autonomy, financially and otherwise. The tendencies toward centralised control have not been received favourably by co-operative institutions like the Kilimanjaro Co-operative Unions, the Bukoba Co-operative Union and the Victoria Federation of Co-operative Unions—now the Nyanza Federation of Co-operative Unions—in Tanzania or by the Meru and Nyeri District Co-operative Unions in Kenya. Though these control measures have had the effect of eliminating the most serious financial irregularities, they have in other respects had negative implications. At least in Kenya, staff in co-operative unions report that administrative overhead costs have increased as a result of the new control measures from above. Much more time is now spent on filling in forms or writing reports to satisfy the Co-operative Department. Much of the incentive to act as co-operative leaders has disappeared. The co-operative societies and unions are no longer theirs. External goal-setting has further reduced the

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capacity of these organisations to compete successfully with other institutions in the rural areas. They are unable to capture the attention and interest of the peasants.

It is no coincidence that self-help groups in Kenya are much more successful in mobilising support for their activities than co-operatives are. Particularly remarkable in this connection are the *mabati* groups. These consist exclusively of women, who jointly collect money to employ a local artisan to build a roof on somebody's house. (In the old days, women used to do this themselves, but nowadays the process is so complicated that a *fundi* must be employed.)

Co-operatives started by politicians at the time of independence or by the Government thereafter are often kept alive artificially by the Co-operative Department. This may be done by various means, bank overdrafts being the most common in Kenya. The notion is that they can overcome their crisis and eventually become economically viable. The prospects are very often bad and the experience gained so far in Kenya not particularly encouraging. The ordinary member has to pay a much higher price than if he sold to a private trader. Thus, it is not surprising that, where the opportunity exists, peasants prefer to sell to the trader rather than to their society or smuggle their produce across the border to a neighbouring country where the price is more attractive. The social and political costs of maintaining economically unviable units are also high. Opportunities for committee members and staff to learn management techniques are limited, as most important matters are decided by representatives of the Co-operative Department. The learning capacity of the co-operative societies under these conditions is limited; they act on "transfusion" from another institution. They never get opportunities to develop structural arrangements on their own. They become cripples with little ability to adjust to changing demands and supports.

Another aspect of the paternalistic or tutelary relationship to the Government under which co-operatives are expected to flourish in East Africa is the danger of administrative overload in the latter. Policies devised by the Co-operative Department are often such that they do not consider the administrative and managerial capacity of co-operative unions and societies. Very often these policies cannot be implemented, because there is not the qualified staff to execute them. This has been a serious problem in Kenya and may well be one

reason why the Government strategy now is to consolidate and improve the quality of already existing co-operatives. Over-ambitious targets have already created serious disappointments and reactions against the Government. Moreover, as usual, it is the peasant who has suffered.

The danger of giving the co-operatives more than they can swallow results either from a strong ideological commitment on the part of the Government to the promotion of co-operatives or from an institutional struggle between individual ministries or departments to boost their position *vis-à-vis* one another. In the first case, which applies to Tanzania, it is the general acceptability of co-operative values and the security of these organisations that cause administrative overload. In the second case, of which Kenya is an illustration, it is the marginal position of co-operative values and the insecurity of these organisations that create this problem.

The regulatory measures mentioned above have had a limited impact on the socio-political environment of co-operatives. The fundamental obstacles discussed earlier in this Chapter still remain. Though the control measures have relieved the co-operative management from some difficulties, they have created new ones, the more important of which have been outlined above.

It would be wrong, however, to discuss Government attempts to promote the growth of co-operatives without mentioning the supporting activities. Of these, co-operative education is the most important in all three countries. Educating staff in financial management and organisational techniques, as well as training committee members in committee procedures and other aspects of management have so far been the main educational activities. In all three countries a large number of co-operative leaders have been able to acquire new skills in running their organisations. At the same time, however, it must be noted that, with the exception of Tanzania, where extensive correspondence education is available to ordinary members, co-operative education has been confined to elected leaders and appointed staff only. Another limitation of co-operative education so far has been its exclusive emphasis on the transmission of knowledge, while little attention has been paid to strengthening the motivation to work for a co-operative purpose. There is also evidence that the newly acquired knowledge of several committee members and employees has not always been used for the common good of their organisation.

Though there are visible results of Government

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efforts to promote the growth of co-operatives, less embezzlement and greater familiarity with financial administration being most significant, neither the regulatory nor the supporting activities of the Co-operative Departments in the three countries have eliminated the fundamental obstacles to a strong co-operative movement. Factionalism in the committees remains prominent. So does the tendency for already privileged people to become leaders of the co-operative societies and unions, thereby preventing the latter from developing into a front of poor peasants against wealthier groups, both inside and outside the rural communities. There is also evidence that the Government control measures have the effect of reducing the commitment of members and leaders alike to their organisation. Goal-setting by Government institutions instead of by the co-operative leadership itself adversely affects the "consciousness" and the "will" of the co-operative institutions. The heavy load of duties imposed upon co-operatives by Governments in East Africa also reduces the capacity to store and use information adequately and limits the ability to recombine their parts in changing conditions of operation. Routine activities take precedence over creative thinking. The co-operatives become bureaucratic and inflexible—organisational cripples.

* * *

(v) Possible Legal Limits on Government Powers

J. P. W. B. McAuslan, "Co-operatives and the Law in East Africa", in C. G. Widstrand (ed.), *Co-operatives and Rural Development in East Africa*, pp. 109-110 (footnotes omitted):

Governments would do better to appreciate that the price of a viable co-operative movement may well be a few failures amongst primary societies, and should not seek to eliminate all of them.

This may, however, be a counsel of perfection, and a more realistic approach for the lawyer would be to ask how can the law be framed so that the Government has the power to act when necessary yet the enthusiasm and democracy of the co-operative movement is not crushed by the ever present threat of Government intervention. There are two possible solutions here. First a distinction should be drawn in the law between "ordinary" and "extraordinary" Government powers. The ordinary powers are those which can be used to assist and help the co-operative movement to supervise itself and they should be so drawn that their exercise takes place as an act of partnership between Government and

various organs of the co-operative movement—C.U.T. in Tanzania and the District Unions in Kenya as tends to be the practice already in those two countries. Thus the law should be phrased in such a way that the Central Government may not act until it has been invited to by, or consulted with the relevant part of the co-operative movement. The extraordinary powers of regulation and coercion are those which allow the Government to intervene on behalf of the State in the affairs of the co-operative movement when supervision in partnership has failed.

Special procedures should be required to be followed before these powers can be activated so as to ensure that they are exercised only for good reason. To put the matter succinctly, the greater the power the Governments have over the co-operative movement, the greater the need for procedural safeguards over the exercise of the power and the greater the need to explain and justify the exercise of the powers before it takes place. Although both the Kenyan and the Tanzanian Acts provide for some safeguards, there is a lack of consistency about them, and one may query the desirability of provisions allowing appeals to the Minister from a whole range of exercises of power by the Commissioner or Registrar since such provisions are a constant invitation to the Minister to intervene in the work of the Co-operative Department on no very clear principles at all. Here, too, a division should be attempted between exercises of the "extraordinary" interventionist power where there are good reasons for ensuring that the ultimate responsibility is on the Minister, and exercises of the "ordinary" partnership power where if formal appeals are needed at all, they could lie to a panel of persons drawn equally from the administration and the co-operative movement. Such a division of powers, clearly set out in the law could do much to restore the co-operative movement's faith in itself and maintain its democratic ethos.

Secondly, Governments could establish a system of compulsory co-operative insurance in which all primary societies would pay an annual premium in return for which the members would be covered against loss caused by the dishonesty or gross negligence of staff and/or committee members; naturally a society which had had to claim on the insurance fund would have to pay higher premiums in future so there would be a direct incentive on members to be active in the management of their society and the movement as a whole (for the general level of

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premiums is fixed by the degree of risk, involved (the insurance) which does not seem to exist at the moment where in the final analysis, the Government bails out the movement. Such a system might render less necessary the tight administrative control exercised over or proposed for the movement, and that, too, would help re-awaken members' interest in their primary society.

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D. PRIVILEGES GRANTED TO CO-OPERATIVE SOCIETIES

The co-operative societies legislation grants co-operative societies certain privileges not usually given business organisations. Three of these privileges are set out below. Why should co-operative societies be given these privileges? Are these privileges of any particular value to a co-operative society? Do the privileges give co-operative societies a competitive advantage over private trading companies? Note that some of these privileges are given the "produce company" permitted by the Kenyan Companies Act, s. 388, which is examined at p. ??? *infra*.

* * *

(i) Exemption from the Restraint of Trade Doctrine Kenya, *Co-operative Societies Act*, ss. 29 (2) 30 (1), (4):

29. ...

(2) No suit, claim, action or proceedings shall be maintained or contested by a registered society and any of its members on the ground that any by-law of the society constitutes a contract in restraint of trade.

30. (1) A registered society which has as one of its objects the disposal of any agricultural produce may enter into a contract which its members, either in its by-laws or by a separate document, binding the members to dispose of all their agricultural produce, or such amounts or descriptions of the same as may be stated therein, to or through the society, and the contract may bind the members to produce the quantities of agricultural produce therein specified, and the contract may also provide for payment of a specific sum per unit of weight or other measure as liquidated damages for any breach of the contract, and any such sum on becoming payable shall be a debt due to the society and shall be a charge upon the immovable property of the member (subject to registration of the charge under

the law under which the property is registered) and all stock then being thereon.

...

(4) No contract entered into under this section shall be contested in any court on the ground that it constitutes a contract in restraint of trade.

* * *

(ii) *Special Charges*

(a) Kenya, *Co-operative Societies Act*, ss. 32, 49:

32. (1) Subject to any other written law as to priority of debts, where a registered society has—

- (a) supplied to any member or past member any seeds or manure, or any animals, feeding stuffs, agricultural or industrial implements or machinery or materials for manufacture or building; or
- (b) rendered any services to any member or past member; or
- (c) lent money to any member or past member to enable him to buy any such things as aforesaid or to obtain any such services, the society shall have a first charge upon such things or, as the case may be, upon any agricultural produce, animals or articles produced therewith or therefrom or with the aid of such money.

(2) The charge shall subsist for a period of two years from the date of supply, rendering of the services or loan, as the case may be.

49. A registered society may from time to time, with the consent of the Commissioner, charge the whole or any part of its property, if its by-laws expressly empower it to do so and to the extent to which its by-laws empower it to do so.

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(b) J. P. W. B. McAuslan, "Co-operatives and the Law in East Africa", in C. G. Widstrand (ed.), *Co-operatives and Rural Development in East Africa*, pp. 114-115:

The law provides for mortgages, charges, and confers on the mortgagee the traditional remedies of appointing a receiver of the income from the property mortgaged, leasing and ultimately sale of the mortgaged property (and equivalent remedies are provided in the Chattels Transfer Acts of Kenya and Tanzania in respect of charges over moveable property), yet because the climate of opinion in society does not appear to be geared to the social importance of repaying loans from co-operative societies or banks or governments, borrowers' legal remedies have to be put into the front line rather than kept back as a last resort, and indeed have to

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be supplemented and made easier to use, a clear indication that they are not seen as a distant threat any more. Another important factor here is that very little credit from private internal sources finds its way *via* lending agencies like the Tanzanian N.D.C.A. or the Kenyan A.F.C. into agricultural development; most of the funds come either from taxes or external loans, and where the latter are involved, latitude on repayment is severely circumscribed.

But how realistic is it to base a system of security for agricultural credit on mortgages, charges and the possibility of realising them? Is it politically feasible to foreclose on hundreds of smallholders, to sell the property of debtor primary societies, and to bankrupt co-operative unions? Kenya, it is true, has dispossessed farmers in the settlement schemes with temporarily beneficial results as regards repayment of loans, but far fewer farmers have been dispossessed than have been seriously in arrears with loan repayments. In Tanzania, the Presidential Committee reported many cases of societies heavily in debt, but

remedy was always a grant-in-aid from some Government fund and a "re-organisation" of the society; at most it might be deprived of credit from the N.D.C.A. and N.C.B. for a period. It seems that in these countries too then, despite a repayment problem and the deliberately easier availability to the lenders of remedies to realise their security, in the final analysis the remedies are not often used, and cannot often be used. Their credibility suffers accordingly. There is, too, an additional reason why these remedies are less than adequate; they are derived from a law which lays great stress on individual rights in property, yet have been grafted on to a system of co-operative credit with little or no change. A remedy which might be perfectly fair and workable when applied to an individual loan defaulter ceases to be either when applied to a society which because of defaulters amongst its members has difficulty in repaying a loan.

The position on repayment is then that there is no or no sufficient climate of opinion or communal pressure to repay loans, and the existing remedies of lenders fit uneasily into a co-operative framework and in any event are practically unusable through political factors.

* * *

(iii) *Compulsory Marketing*

- (a) Kenya, *Co-operative Societies Act*, s. 48:
- 48. (1) Upon application by any registered society

which can show that its members in the whole of Kenya, or in any particular part of Kenya, produce at least 60 per cent of all the agricultural produce of a particular kind produced in Kenya, or in that part, as the case may be, the Minister may, by notice in the *Gazette*, require that each producer of that kind of agricultural produce, in the whole of Kenya or in that part, as the case may be, shall sell such kind of agricultural produce produced by him to or through the society, whether he is a member thereof or not.

(2) Every such producer who is not a member of the society shall be subject to all such conditions and obligations to which he would have been subject if he had been a member, and the society may, and shall if so requested by the producer, deduct from any funds received or held on his account a part or the whole of a share subscription sufficient to qualify him for membership, and shall admit him to membership on the complete payment of such subscription.

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(b) O. Okereke, "The Place of Marketing Co-operatives in the Economy of Uganda", in C. G. Widstrand (ed.), *Co-operatives and Rural Development in East Africa*, pp. 160-161 (footnotes omitted):

[The Ugandan] Government's decision, since 1963, not to introduce from competition in the cotton industry has been welcomed by the Uganda Co-operative Alliance on similar grounds that "free competition would make it difficult for new entrants in the industry to operate", that experience has revealed the use of "ruthless and unethical methods in free competition".

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Co-operative unions, on their part, favour being granted monopsony rights in their respective areas as a means of ensuring greater use of their ginning capacity. This system, however, deprives growers not belonging to co-operatives in those places, of getting the benefit of higher prices inherent in situations of competitive buying, especially, as such growers are not in a position to get such other benefits as bonuses from the processors, unlike the co-operative members. By this one-channel marketing measure, the co-operative ginneries are assured not only of an increase in their throughput, but also of a greater access to the source of raw material.

The *status quo* has been altered. Yet to replace one set of monopolists/monopsonists with another set does not alter the basis of the argument against

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monopoly power. In this connection, the market structure has a racial element. It would appear that the motivation for this privileged position in which the co-operative movement has been entrenched is political, rather than economic, in terms of the economic arguments for monopoly power, and it seems to be a measure to redress the imbalance of the past. The restrictions placed in the past, by earlier colonial administration in the country, on African entry into trade and commerce, have been a source of grievance and agitation. Co-operatives are, therefore, now being used by the indigenous Government, as an institutional framework to Ugandanise the agricultural sector and thus, serve as a vehicle for the redistribution of income and economic power.

A view widely held is that the granting of the movement this monopoly power can only be justified if it is for a limited period—during the formative years of the movement—otherwise, Government becomes a kind of “Godfather” for an indefinite period, and that may stifle the initiative of the movement.

Within the movement itself, competition between the co-operative union winners would give all growers the advantage of higher prices, but since the cotton price is fixed by law, this is hardly the case.

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Note:

For a comment on the compatibility of the compulsory marketing provisions with co-operative principles, see the excerpt from the Report of the I.C.A. Commission on Co-operative Principles, set out at p. (???) *supra*.

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Problems:

- *1. The Ugandan legislation does not include a compulsory marketing provision. What reasons might a Ugandan legislator give for not including such a provision in Ugandan legislation?
- *2. Should the Registrar of Companies or the Minister to whom he is responsible be given authority in the Companies Act to grant a company or a class of companies a monopoly of a certain trade or industry? Would such power be analogous to that given the Minister under s.48 of the Kenyan Co-operative Societies Act?

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E. PROBLEMS FACING CO-OPERATIVE SOCIETIES IN EASTERN AFRICA

Complaints have been made about the operation of co-operative societies in practice. Consider the

following summaries of some of these complaints. To what extent are the complaints the result of over-ambitious programmes of co-operative development or too high expectations? How can the complaints be met by legislative or other action—or are they the result of defects inherent in co-operative enterprise? To what extent do private partnerships and companies share the problems outlined below?

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(i) Tanzania, *Report of the Presidential Special Committee of Enquiry into Co-operative Movement and Marketing Boards* (1966), pp. 9-11:

PART FIVE

THE DEFECTS OF THE CO-OPERATIVES

40. It is not surprising that growth in the number of societies, and in the volume of produce they handle, of the spectacular proportions we have seen should bring in its wake a number of deep-seated defects, of which the problems we listed in Part Two are symptoms. It is to these defects that we must address ourselves if we would alleviate the symptoms.

41. It is clear that one basic defect is that there are a great many societies whose members are uninformed about the nature of co-operatives, how they are supposed to function, the duties of the committee of the society and the powers and responsibilities of the members assembled in the general meeting. Even less is understood about the relation between the union and the various marketing boards, and between each layer and the Government. The whole structure thus rests, in many places, on a weak foundation; without an informed membership co-operatives cannot function soundly.

42. A second basic defect is the shortage of appropriate manpower to staff the co-operatives. Many hundreds of society secretaries had to be recruited in a matter of months, and required to start work with little or no training. In many cases, uninformed or unimpressed as to their own responsibilities, the committeemen of the co-operatives employed their own relatives, creating opportunities for improper use of power.

43. There are two aspects of the shortage of appropriate manpower, although they are inter-related: dishonest employees, and inadequately trained employees. With regret we must report that in a great many cases, society secretaries engage in petty thievery, often in collaboration with a corrupt committeeman and sometimes not so petty. The

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reasons, while complex, are not far to seek. Often the secretary is completely new to the concept of employment and to the handling of other people's money, and the staff of the Co-operative Development Division has been far too small in recent years to represent a credible threat of punishment for dishonesty. Again, since the societies were often organised in communities which had had inadequate education in the meaning of co-operatives, the members do not appreciate their power to rectify these situations by dismissing corrupt or complacent committeemen, and the committeemen do not see themselves as guardians of the interests of the farmers. Indeed, while corrupt committeemen are not as common as dishonest secretaries, the committeemen often contributed to the dishonestly-administered society by indulging in nepotism.

44. It is impossible to arrive at exact data as to the extent of thefts in societies, but a general indication of the order of magnitude of the problem may be inferred from two detailed studies which we made as to stock and cash losses. We studied 226 cotton societies; of them, 53 societies last year showed stock losses aggregating 0.2 per cent of the cotton handled by all 226 societies. These losses were 1 per cent of the product handled by the 53 societies. We are informed that seed cotton when stored in the society's godown absorbs moisture, and that this factor, in addition to the "broken weights" (see paragraph 14) should result in deliveries by the societies to the ginneries of 2 per cent more seed cotton than they credit to the farmers. Thus, among those 53 societies, the stock losses amount to some 3 per cent of the produce they handled. In addition, a great many of the 226 societies showed stock gains of less than $\frac{1}{2}$ per cent. All these losses can be attributed to theft or to ineptness or to some of each (although ineptness should as often result in stock gains as losses). It is a fair inference that 25 per cent of the East Lake cotton farmers suffer an income reduction averaging 3 per cent as a result of these factors, and that the remaining 75 per cent suffer reductions averaging $1\frac{1}{2}$ per cent.

45. We studied 136 cashewnut societies in similar detail. Of a group of 89 in Lindi, Mtwara, Kilwa, Masasi and Newala, 62, or 70 per cent, showed stock shortages, amounting in the aggregate to $1\frac{1}{2}$ per cent of the quantities handled, worth Shs. 410,000/-. Our study also shows that 62 of these 89 societies (but not the same 62 in all cases) incurred cash losses totalling Shs. 119,000/-. Thus, it is a fair inference that around 70 per cent of the farmers suffered

income reductions averaging close to 2 per cent. Our study further shows that of the 21 societies in Kahama the stock losses alone come to around 1 per cent, while among the 26 societies in Tabora, 15 societies incurred stock losses of nearly 4 per cent.

46. The farmers are quite aware of these situations, and ask for help in their correction. We believe that such correction is of the first importance, not only because of moral considerations, and not only because of the money involved, but also because of the harmful effect of the situation on both the morale of the people in the movement and the efficiency of the secretaries and the committeemen. This last factor should not be underestimated, secretaries and the committeemen in league with them (and perhaps related to them), interested in covering the tracks of dishonesty, are less likely to devote full attention to the proper and efficient conduct of the business of the society.

47. The shortage of appropriate manpower manifests itself not only in the dishonest employee, but also in the inadequately trained employee. We deal with this matter in Part Six (e) and (f).

48. The common thread in the manpower situation is the fact that the employees of co-operatives do not adequately regard themselves as a professional group, with ethical standards to live up to, with career possibilities and with opportunities for growth into situations of greater responsibility. On the contrary, they generally feel that they are at the mercy of uninformed and sometimes corrupt committeemen, who have the unrestrained power to employ, fix the terms of service, and discharge all employees of the co-operatives. At times the roles are reversed and a too-clever employee feels free to run the committee, playing on his literacy and greater knowledge, and secure against control by others.

49. The third basic defect we would mention is the lack of democracy at the union level. In a great many instances the farmer does not regard the union as belonging to him. Often it is thought of as an arm of the Government. Few unions have programmes designed to bring direct services to the farmer or to interpret their functions to him. The union committeeman has considerable power, but because he is elected by the general meeting of the union is often too uninformed to use his powers wisely, or unwilling to challenge the union establishment for fear of economic or political reprisals.

50. The fourth basic defect is the absence in the co-operative movement of a corps of skilled people

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who can be called upon to render advice on problems beyond the scope of members and of employees whose experience has been confined to the general in of agricultural co-operative matters. This lack has already been felt as to transportation problems, and the negotiation and drafting of contracts. As the co-operative movement grows, the lack will also be experienced in such fields as the making of feasibility studies for agricultural processing plants, the devising of financing plans and the making of efficiency by experts trained in system and methods work.

51. The fifth and final basic defect is the susceptibility of the co-operative movement of political interference. We have already mentioned the political decision to accelerate the growth of the co-operatives; this decision, however sound in intent, has been misinterpreted so as to justify exaggerated demands for the premature registration of societies, a root cause of the present problems. Political interference is also manifested in the deployment by commissioners of the scarce personnel and scarcer vehicles of the Co-operative Development Division. We should also mention the frequent political pressure to open consumer co-operatives without adequate public demand or appreciation, and the unfulfillable promises sometimes made by politicians in stimulating the formation of workers' co-operatives.

52. Apart from the basic defects within the movement, it must be appreciated that the co-operatives have enemies outside the movement—the private traders and others who have lost business. These enemies have not given up hope of ruining the co-operatives and they use devious tricks to bring about their downfall. Regretfully we must report that some TANU officials, Members of Parliament, and Regional Commissioners have allowed themselves to be used as tools by these enemies of the co-operatives, accepting directorships and financial participations in their firms, and using their influence to harm the interests of this national movement.

53. It would be unfair and incorrect to recite the basic defects of the co-operatives without emphasising that they are the problems of growth. The co-operative movement is basically sound, and the task is to overcome the defects. We have no doubt that they can and will be overcome.

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Note:

The Special Committee also reported oral complaints made to them in the course of their inquiry. Among the

grievances presented by farmers were the following (pp. 3-4):

"11. We were induced to join societies with the promise that in addition to the payment we receive when we deliver our crop to the society, we should receive a second payment when the crop is finally marketed by the board. But now we find that there is no second payment; instead we are told every year that our societies incur losses.

12. This leads us to believe that societies have been instituted not for the purpose of protecting us from the exploitation of the former middleman, but to place us under another worse type of middleman under the cloak of co-operative societies, unions and marketing boards.

13. We complain of the continuous economic plunder which we endure from the corrupted employees and committeemen of the co-operative societies and unions, whose behaviour no person on earth can long tolerate. These employees and committeemen have been completely infested with the diseases of negotism and dishonesty. We also complain that NUTA is too aggressive in protecting the employees of societies who we can see are drunk, or who we know are dishonest even though a case of these cannot be proved in court.

16. We complain of the inefficiency of most of the societies' and unions' employees and committeemen, and we do not believe they can ever do better unless they undergo thorough training in their work.

17. We further complain of the undemocratic malpractices of societies and unions' committeemen, who scramble to retain their seats in these committees, thus stopping all chances of remedying these shortcomings by substituting more enlightened committeemen.

25. Lastly, whilst we assure the President that we appreciate the desirability of substituting co-operatives for the private traders, so far we strongly object to the way in which this is being done."

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(ii) O. Okereke, "The Place of Marketing Co-operatives in the Economy of Uganda", in C. G. Widstrand (ed.), *Co-operatives and Rural Development in East Africa*, pp. 171-173.

Drawbacks of Co-operatives¹

In spite of the potential advantages of co-operative enterprise, co-operatives all over the world are faced with a number of problems. In the performance of their functions, the Uganda Co-operatives have faced a number of difficulties which constitute their drawbacks, namely, maladministration, inadequate capital resources, conflict between management and board members and disloyalty of members.

Mal-administration. The efficiency of the movement, to a very large extent, depends upon the efficiency of the staff running it. Investigations into the affairs of most co-operative unions have shown that there is a large measure of mismanagement in

1. O. Okereke, "The Strengths and Weaknesses of the Co-operative Movement in Uganda", in E. B. Riordan (ed.), *Agricultural Marketing in East Africa* (.....).

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them. The standard of management in the movement is poor owing to a number of factors:²

(a) unsatisfactory recruitment policy, whereby mediocre local personnel is preferred to outside expertise, (b) insufficient locally trained and experienced managerial staff to run the unions and societies, (c) limited training facilities for co-operative personnel, (d) growing size of the unions as business units being out of proportion to the available calibre of management, (e) lack of effective control from the Department of Co-operative Development over the movement. The recent establishment of the Ministry of Marketing and Co-operatives is aimed at increasing the supervisory role of the Government.

It must, however, be borne in mind that since entry by Africans into commercial and industrial activities was restricted in the past, it is not surprising that managerial experience is not yet developed as it should. Hence mistakes are made in running the Co-operative movement in Uganda. It is for the reason that the Uganda Government has embarked upon a wide range of training programmes for co-operatives, such as management training courses, as well as courses dealing with accounting, book-keeping and marketing methods for co-operative office bearers and board members.

Inadequate capital resources. Apart from lack of people with adequate business know-how to manage the affairs of the movement, co-operatives have insufficient capital of their own. Because of that, they depend, to a large extent, upon the Government for funds. For example, in buying cotton ginneries and coffee factories, the Government lends the movement 90 per cent and 66½ per cent, respectively, of their capital costs. In the group farm scheme, funds for credit distribution to members come largely from Government. For example in the 1966-57 crop season, the movement was only able to raise 10 per cent of the finance from its own sources, to lend to members. This financial problem is exacerbated partly by the inability and unwillingness of members to pay their dues promptly, and partly by misuse of funds in certain cases.

Conflict between the management and board members. Due to inadequate knowledge of their rights and responsibilities, board members, in some cases, tend to interfere unduly in the running of the business of the movement. Board members are supposed to confine themselves to policy-making,

while the management executes policy, but in some cases, board members want to do what the management is expected to do, such as employment of workers. Such a cleavage mars the smooth running of a society or a union. Such was the case with the Bugisu Co-operative Union, thus leading to a lot of wrangling, with a consequent fall in efficiency.

Disloyalty of members. The question of members' disloyalty is tied up with the insufficient monetary benefits they get from their societies and unions, such as lower prices, delay in repayment for crop deliveries and instances of embezzlement of funds by officials of the movement. In such situations members' loyalty has been severely strained and they tend to sell their crops to private traders for higher monetary rewards. For example, one of the reasons for the defection of the members of the Kigezi District Growers' Co-operative Union in 1965 was the fact that the union was paying its member societies a lower price for their coffee deliveries than they could obtain from private buyers. The remedy for this disloyalty has been seen to lie in giving the movement the monopsony of crop marketing in the country.

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Note:

To what extent are the drawbacks complained of the reflection of values adopted from Western concepts and imposed on traditional values? See S. E. Migot-Adholla, "Traditional Society and Co-operatives", in C. G. Widstrand (ed.), *Co-operatives and Rural Development in East Africa*, p. 34:

"Insufficient participation by peasants, represented by poor attendance at co-operative societies' meetings or non-involvement in activities other than the purely economic, may also be associated with the general level of development in the wider society. Some of the problems encountered by the co-operative movement in East Africa are due to organisational failures of a social and economic nature. Problems of the inefficiency of committees, for instance, reflect the transience of society and the low level of a kind of education that ensures informed participation. The social meaning of such inefficiency doubtless deviates from the official notion derived from Western concepts because it involves an attempt to adopt values derived from the autochthonous system in which performance is conditioned by social solidarity. These values deal with multiplex social and economic disruptions caused by the incomplete realisation of a money economy under conditions of great instability."

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(iii) P. W. Westergaard, "Co-operatives in Tanzania as Economic and Democratic Institutions", in C. G. Widstrand (ed.), *Co-operatives and Rural Development in East Africa*, pp. 147-151 (footnotes omitted):

Efficiency of co-operative societies. In a competi-

2. Republic of Uganda, the Report of the Committee of Inquiry into the Affairs of all Co-operative Unions in Uganda (1967), p. 50.

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tive economy, in which co-operatives compete with private traders, the efficiency of the co-operatives can be judged by whether they succeed in surviving or not and, if they do, by the surplus they realise, regard being given to the services rendered to the members, including the growers' prices. Under a compulsory one-channel marketing system, as in Tanzania, no competition exists and the efficiency of the co-operatives can, therefore, not be judged by whether they survive or not, as in a competitive regime. The efficiency of any one marketing organisation can be judged, however, if there are many other organisations in similar conditions. The performance of one primary society can be compared with the performance of other societies with similar turnovers and similar locations and if it is seen that there are differences in performance (measured by, e.g., the cost level), it can be concluded that there are differences in efficiency.

Quite a few comparative studies of the marketing costs of primary societies have been made in Tanzania in recent years and they do confirm that there seem to be differences in the economic performance of co-operatives which can only be explained by differences in the efficiency of the management. It is believed that differences in marketing costs can be attributed to differences in management efficiency,

question then arises how the economic performance of the badly managed societies can be improved. In those cases in which inefficient management is due to lack of skills and training education is clearly one of the ways to improve the situation. This is, of course, realised and the Co-operative College and the Co-operative Education Centre in Moshi are running extensive educational programmes. Another way of helping to keep the costs down is to increase supervision and control by co-operative inspectors and this way is also being followed at present. A third way in which management efficiency could be improved would be to introduce incentives for the management. This is, of course, not an alternative to the two other methods but rather a supplementary measure. We have seen that the Presidential Special Committee of Enquiry recommended the introduction of incentive payments to employees of the co-operative societies. The recommendation was accepted by Government and section 56 of the Co-operative Societies Act now explicitly allows such payments to be made.

An effective incentive system would relate the incentive payments directly to the economic performance of the societies. Rather than a fixed sum of

money payable under certain conditions, the incentive payments to the management should be a certain percentage of the annual net surplus. (This percentage may vary with the size of the surplus: the higher the surplus the lower the percentage. By such a system the bonuses would not be excessive, but the incentive to reduce the costs as much as possible would still be effective.) Any specific incentive system should take into consideration the specific conditions of the society and should exclude from the formula factors over which the employees have little control, such as the size of the co-operative and freight rates.

Incentives need not only be a question of money. Incentives could also be of a "moral" nature and it seems that it would be relevant to study the systems of "moral incentives" in other socialist countries.

Democracy and efficiency. I have stated earlier that the co-operative movement in Tanzania is far from alone in facing the problems of efficiency and democracy. Also these problems have been discussed under the auspices of the ICA. In his inaugural address to the 1966 congress, the President of the ICA stated: Co-operation is at one and the same time a commercial enterprise and a democratically controlled popular movement. It has, therefore, to meet a double requirement. Firstly, it must represent the highest economic efficiency in a competitive economic setting. But, secondly, it must also maintain its character of a democratically controlled self-help movement, for and by and through the people. The double task of fulfilment these two main criteria has certainly confronted co-operative organisations in practically all countries with problems which are both formidable and urgent. The problem—as stated above—is that, if a co-operative movement is too democratic, it may be too inefficient as a commercial enterprise and may, therefore, not be able to survive in a "competitive economic setting". If a co-operative is to survive the competition, it must be very efficient, but, if it is so, the risk is that it may lose some of its democratic content, as expressed in the second ("new") co-operative principle (on democratic administration).

The way the dual problem of democracy and efficiency is stated above is, however, not relevant in the Tanzanian case and this is, of course, due to the fact that the above statement refers to a "competitive economic setting", while co-operatives in Tanzania have a monopoly position (this is, of course, only true with respect to the marketing

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societies). One could actually make the point that a co-operative society in Tanzania *could* be both undemocratic *and* inefficient and still survive, because the survival is guaranteed by the institutional framework within which the co-operative operates.

The problems of democracy and efficiency, as stated by the ICA, are interrelated and the same problems are faced by Tanzania, but—it seems—in a more fortunate way than in a competitive economy. I have already quoted the Presidential Special Committee, which pointed out that without an informed membership co-operatives cannot function soundly and I have also pointed out that an important aspect of democracy is information. Growers today complain about low prices (as growers have probably always complained in any country). Why is the Government taxing us by collecting an export tax? Why did the NAPB have a surplus of cashew-nuts in 1968-69? (They seldom ask why the NAPB had a deficit on the Coast Region crop in 1967-68.) These things should be explained to them and they should be told that there is nothing they can do about, *e.g.*, getting rid of the export tax, except by lodging their complaints through the democratic channels open to them. They should also be told, however, that, if they really want to get more money from the co-operative society, there *is* one way of getting it which is to some extent under their influence and that is a lowering of the handling and administration costs of their society and hence an increase in the surplus. It should be demonstrated to them that there are some societies which are apparently managed less efficiently than they could be, judging from the performance of other similar societies. It should be suggested to them that they could decide to pay the management incentive bonuses out of the annual surplus as a means of lowering the costs of the society.

By linking the incentive bonuses directly to the surplus, there would be a built-in mechanism which—one hopes—would increase the understanding of the members of “the nature of co-operatives, how they are supposed to function, the duties of the committee of the society and the powers and responsibility of the members in the general meeting”—to repeat a quotation from the report of the Presidential Special Committee.

It seems that with proper information, as indicated above, the members would at one and the same time be given a better understanding of how the system works *and*—by focussing their attention on those elements of the marketing margin which they

can (indirectly) exert some influence on—pressure would be put on the management to be as efficient as possible, even more so if the pressure were combined with an incentive system. An incentive system could, of course, be introduced both at the primary society level and at the union level.

The fortunate thing about the interrelated problems of democracy and efficiency, as faced by Tanzania, is that it seems possible to formulate the “internal rules of the game” in such a way that the democratic machinery of the co-operative movement can be made more efficient at one and the same time as the management is made more efficient. The common denominator of an increase in management efficiency and efficiency of the democratic machinery is information, relevant information. How the relevant information can be transmitted to the members is a practical problem which should be seriously studied and experimented with.

* * *

Problem:

* Do you agree that more information is the solution to the efficiency of the co-operative societies? What does “information” include? Is the principle of information effective in increasing the efficiency of companies?

* * *

PART 2—A CONSPECTUS OF CO-OPERATIVE SOCIETIES LEGISLATION IN EASTERN AFRICA

In this Part we survey the co-operative societies legislation in force in Eastern Africa. We are concerned with those co-operative society rules which (1) implement “co-operative principles” and (2) give a different perspective on partnership and company law rules. We do not attempt to go into the details of the co-operative societies legislation, nor to call attention to all the variations in wordings of these acts: to find the answer to a specific question there is no substitute for reading the act in force in your country.

(Note: Reference to the “Tanzanian Act” are to Act No. 27 of 1968 in force in Mainland Tanzania.)

* * *

A. NATURE OF A CO-OPERATIVE SOCIETY

(i) *The Objects of a Co-operative Society*

Whereas a company may be formed “for any lawful purpose”, a co-operative society must have for its object “the promotion of the economic in-

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terests of its members in accordance with co-operative principles" (Uganda, s. 2).

eral Eastern African laws set out the objects in more detail. Article 4 of the Ethiopian Co-operative Societies Proclamation, 1966, for example, states:

Societies organised under this Proclamation shall have as their principal purposes and objects the promotion, in accordance with co-operative principles and the requirements of social justice, of better living, better business and better methods of production by such means as:

- (1) reducing the cost of credit;
- (2) reducing the cost of goods and services for production and consumption;
- (3) minimising and reducing the individual impact of risks and uncertainties;
- (4) spreading knowledge of practical technical improvements; or
- (5) may otherwise contribute to achieve the above-mentioned purposes and objects.

The Zambian Act also has a more elaborate presentation. In addition to a definition of "co-operative principles", set out at p. (??), *supra*, the Act gives a specific definition of the objects of each class of co-operative society which can be established under the Act. Section 53, for example, states the objects of a credit union:

A co-operative savings and credit society, in this Part referred to as a credit union, may be registered for the promotion of thrift among its members and the creation of a source of credit for its members at controlled rates of interest, exclusively for provident or productive purposes.

See also section 17 which prohibits dealers or traders from registering as a co-operative society:

Notwithstanding the other provisions of this Act, a group of persons who desire to associate themselves together in trade or business primarily for gain, without provision for the distribution of profits amongst customers in proportion to patronage, shall not be registered as a society.

* * *

Problems:

- *1. Which formula do you prefer, the Ugandan, Ethiopian or Zambian? What are the advantages and disadvantages of spelling out the objects of co-operative societies in great detail?
- *2. Given the social functions which co-operative societies also perform, should the Ugandan Act focus attention solely on "economic interests"? Does this phrase have any practical effect?
- *3. Should the Companies Act or Partnership Act have a more elaborate statement of the objects of a company or partnership? How might you formulate these objects?

* * *

(ii) *Classification of Co-operative Societies: Primary and Secondary Societies*

Eastern African legislation distinguishes between primary societies and secondary societies. Some Acts also divide secondary societies into co-operative unions and apex societies. The Ugandan Act, for example, defines these different classes of society in section 87:

"primary society" means a registered society under this Act, the membership of which consists of individual persons and includes other bodies approved by the Registrar under section 14 of this Act;

"co-operative union" means a registered society under this Act, the membership of which is restricted to primary societies;

"apex society" means a registered society under this Act, the membership of which is restricted to co-operative unions, and includes a society established to serve the co-operative movement by providing facilities for banking, insurance and the supply of goods and services.

The distinction between primary and secondary societies has both legal and practical consequences. Primary societies, for example, may be registered with either limited or unlimited liability whereas secondary societies must always be registered with limited liability; members of a primary society must participate in person at society meetings and each member has only one vote no matter what his capital contribution, whereas members of a secondary society participate by representatives and their votes may be weighted according to their capital contribution. More important perhaps are the differences which may arise because of the greater sophistication of the participants in secondary societies and the broader range of their activities.

When examining the rest of this Part keep the distinction in mind: does existing legislation deal adequately with the different problems raised by secondary societies?

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Note:

For a study of the operation of secondary societies, see the Ugandan Report of the *Commission of Inquiry into the Affairs of all Co-operative Unions in Uganda* (1967).

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Problem:

- * "The relation of primary society to secondary society is the same as the relation between subsidiary company and holding company. The problems which arise between primary and secondary society are the same as those which

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arise between subsidiary and holding company. Company law rules should, therefore, be applied to these problems." Comment.

* * *

(iii) Classification of Co-operative Societies by Activities Carried On

Eastern African legislation may apply special rules to co-operative societies according to what their activities are. The Ugandan Act, for example, makes two such distinctions. A registered society which has as one of its objects "the disposal of any agricultural produce" may contract with its members that they shall dispose of some or all of their produce through the society (Uganda, s. 31). The Act also provides that a registered society which has as one of its objects "the supply of commodities to its members" may not make any loans nor allow any credit without the sanction of the Minister (Uganda, s. 42 (3)).

The Zambian Act, however, sets out a non-exhaustive series of definitions of co-operative societies classified according to the activities which they carry on. Each class is subject to special rules in addition to the general rules applicable to all societies. These clauses include: societies for rural development; societies providing co-operative services for producers of natural products; building construction and housing societies; credit unions; artisans', craftsmen's and contracting societies; consumers' societies; and community service societies. The special rules governing credit unions (ss. 53-79) illustrate the Act's method. These sections provide special rules for the name of a credit union, its membership, its powers, the commencing of its lending operations, the election of its officers, their duties, loans which may be made, reports to be made, duties of supervisory committee and auditor, cash reserves, and distribution of net surplus.

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Problems:

- *1. What advantages and disadvantages are there in spelling out the rules governing each class of society?
- 2. Do the Companies Acts distinguish between companies according to the activities they carry on? What special rules might you wish to introduce?
- *3. "A Companies Act may be lengthy and complex because the persons interested in the legal rules governing companies are either sophisticated or educated enough to hire a solicitor. A Co-operative Societies Act, however, must be short and simple because the persons interested are neither educated nor do they have access to legal advice." Comment.

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(iv) Transactions with Third Parties

Co-operative societies have special privileges granted to them by law, such as exemption from the restraint of trade doctrine, special charges over members' property, and even marketing monopolies. These privileges might give co-operative societies a potential competitive advantages over companies, but the privileges are balanced to some extent by the limits placed on the transactions which co-operative societies may enter into with non-members. The Ugandan Act, for example, provides:

- 42. (1) A registered society shall not make a loan to any person other than a member. . . .
- 43. (1) A registered society shall receive deposits and loans from persons who are not members only to such extent and under such conditions as the Minister may, from time to time, in writing direct. . . .
- 44. Save as provided in sections 42 and 43 of this Act, the transactions of a registered society with persons other than members shall be subject to such prohibitions and restrictions, if any, as the Registrar may, from time to time in writing direct.

Section 44 of the Ugandan Act is supplemented by Regulation 33:

The Registrar may prohibit or restrict transactions of any registered society with non-members if in his opinion such transactions are contrary to co-operative principles or involve any abuse of any privileges accorded to registered societies.

The Kenyan Act goes into greater detail on the regulation of a societies transactions with third parties. Section 42 of that Act states:

- (1) Save as provided in sections 40 and 41 [analogous to ss. 42, 43 of the Uganda Act] of this Act, the transactions of a registered society with persons other than members shall be subject to such prohibitions and restrictions, if any, as the Commissioner may from time to time in writing direct, either generally or in any particular case.
- (2) The total value of transactions entered into by a registered society in respect of a particular kind of produce with persons other than members shall not exceed, in any one year, one-half of all transactions entered into by it in respect of that kind of produce.
- (3) The net amount of all profits accruing from transactions with persons other than members shall be credited to the society's statutory reserve fund and shall not be available for distribution among members.



By contrast with the other Acts, the *Zambian Act* sets down the general principle that it is for the members themselves to decide on the transactions of a co-operative society may enter into with third persons. Section 2 of that Act defines "non-member patron" as "a person, not being a member, who uses the services of a society to such extent as may be provided for in the by-laws".

* * *

Problem:

* Under the *Ugandan Act* what limits are placed on the discretion of the Registrar to prohibit or to restrict the transactions of a co-operative society with third persons? What is the relation between the Registrar and the Minister on this question?

* * *

B. THE SCOPE OF GOVERNMENT CONTROL

(i) Government Officials and Their Powers

The Eastern African legislation envisions at least two Government officials with extensive powers to supervise the formation and operation of co-operative societies: a Minister with ultimate control and a Registrar with day-to-day responsibility for the operation of a co-operative department. That the roles assigned to these officials or to the same official may not be always compatible is recognised by some

the Acts. The *Zambian Act*, for example, provides for a Minister (ss. 3-7), a Director (s. 8), and a Registrar (s. 9): the Director being in charge of providing services for co-operative societies while the Registrar carries out the duties imposed on him by the Act. The *Ugandan Act*, however, while recognising a distinction can be made, provides that the Commissioner of Co-operative Development shall be the Registrar of Co-operative Societies (s. 1 (1)).

The Acts grant these officials specific powers and impose specific duties in numerous provisions scattered through the Acts. In addition to these specific provisions, the Acts empower the Minister to make regulations and to exempt societies from the provisions of the Act. Section 79 of the *Ugandan Act*, for example, authorises the Minister to make regulations to carry out the provisions and purpose of the Act and sets out a detailed list of specific regulations which he may make. Section 80 (1) then states:

"Notwithstanding anything contained in this Act, the Minister may, by statutory order,

(a) exempt any registered society including any probationary society from all or any of the provisions of this Act, the regulations made

- under this Act and bye-laws subject to such conditions, exceptions or qualifications as the Minister may specify in such order; or
- (b) apply to any registered society all or any of the provisions of this Act with such modifications as the Minister may specify in such order."

Below we list the powers and duties of the Minister and Registrar in Uganda. As you study this list note the formal requirements with which these officials are required to comply when exercising certain powers and the extent to which the Registrar's decisions are subject to an appeal to the Minister.

Minister's Powers:

- s. 1 (3) by statutory order, may delegate Registrar's powers
- s. 5 approval required for registration of co-operative union and apex society
- s. 8 (8) hears appeal from Registrar on amendment of bye-laws required by Registrar
- s. 9 hears appeal from Registrar's refusal to register a society or its bye-laws
- s. 21 shall cause accounts of societies to be audited annually
- s. 23 approval required for estimates of expenditure submitted by societies annually
- s. 27 by notice published in the *Gazette*, may direct amalgamation or division of societies
- s. 41 by statutory order, may reduce or remit duties or taxes
- s. 42 (2) by statutory order, may prohibit or restrict the lending of money on a charge of immovable property by any society
- s. 42 (3) approval required for loans or credit to be extended by society among whose objects is the supply of commodities to its members
- s. 43 approval required, in writing, for a society to receive deposits and loans from non-members
- s. 45 may approve proposed investment of a society's funds in non-listed investments
- s. 49 controls National Co-operative Education Fund and determines contributions of societies to fund
- s. 51 may hold inquiry into society
- s. 52 may appoint, in writing, a supervisory manager following inquiry
- s. 53 may appoint supervisory manager without inquiry
- s. 55 may award costs of inquiry
- s. 57 (1) may order cancellation of registration in specified circumstances
- s. 57 (2) hears appeal from cancellation order of Registrar
- s. 59 by statutory order, may modify provisions of the Companies Act which apply to co-operative societies
- s. 65 hears appeal from Registrar or Liquidator in winding-up

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- s. 71 hears appeal from Registrar's order surcharging officers of a society
- s. 73 (6) hears appeal from Registrar's decision in settlement of disputes
- s. 77 (4) by order published in the *Gazette*, may declare society shall not pay remuneration in certain circumstances
- s. 78 approval required for non-society to use the word "co-operative" in its name
- s. 79 may make regulations to carry out the provisions and purpose of the Act
- s. 80 by statutory order, may exempt a society from the provisions of the Act, regulations, or bye-laws
- s. 84 may delegate his functions to Registrar
- s. 85 may give directions to Registrar or committee of a society
- s. 86 by statutory instrument, may appoint day on which Act is to come into force

Registrar's Powers:

- s. 2 must be convinced that proposed society can promote economic interests of members
- s. 4 (2) may require applicants to submit further information
- s. 5 may register society
- s. 6 may register probationary society
- s. 7 may cancel registration of probationary society
- s. 8 may register amendments to bye-laws
- s. 8 (6)-(8), may order amendment of bye-laws
- s. 12 (2) decides disputes over age of member
- s. 14 written permission required for company or unincorporated body to become member of a society
- s. 16 consent required for person to become member of more than one society with the same or similar objects
- s. 21 (6) may fix fee for inspection by public of a society's accounts
- s. 24 prior approval required for voluntary amalgamation
- s. 25 (4) hears appeal of creditor on voluntary amalgamation or transfer of assets
- s. 26 controls voluntary division of a society
- s. 28 may order society to produce cash and books for inspection
- s. 42 (1) (a) may permit society to make loans to another society
- s. 42 (1) (b) prior approval in writing required for society to stand surety for loan granted to society's employee
- s. 44 by written direction, may prohibit or restrict transactions which society may enter into with non-members
- s. 46 prior written approval required for distribution of dividend or bonus
- s. 47 (4) approval required for society to establish provident fund for pensions for employees
- s. 49 (2) prior approval required for charitable contributions
- s. 52 (6) must report to annual general meeting of

- society to which Minister has appointed a supervisory manager
- s. 54 may inspect books of indebted society
- s. 55 may apportion costs of inquiry
- s. 57 (1) may cancel registration in specified circumstances
- s. 57 (4) order required before a society can be wound up
- s. 58 by order in writing, may cancel registration when less than ten members
- s. 62 may appoint liquidator
- s. 63 may guide and control liquidator
- s. 64 (list of specific powers in liquidation)
- s. 70 may surcharge officers in specified circumstances
- s. 72 may order conditional attachment of property in specified circumstances
- s. 73 controls settlement of disputes
- s. 77 must be consulted before officer or member may receive remuneration
- Sch. 1 (duties with respect of register of charges)

* * *

At least three aspects of the complex interplay between Minister and Registrar should be noted. (1) The Minister may delegate some or all of his powers to the Registrar (Uganda, s. 84). (2) The Minister at any time may give directions to the Registrar with respect to carrying out his powers and duties and may require the Registrar to comply with these directions (Uganda, s. 85). (3) Many of the Registrar's orders and decisions are subject to an appeal to the Minister (e.g., Uganda, s. 9).

* * *

Problem:

If you were asked to review the powers of the Registrar of Companies with a view to amending the Companies Act, would you introduce any of the powers or duties given to Minister or Registrar of Co-operative Societies in Uganda?

* * *

(ii) Judicial Review of Executive Action

Judicial review of executive action under the co-operative societies legislation varies from country to country in Eastern Africa. On the one hand, some Co-operative Societies Acts grant a general right of review on points of law; on the other hand, some Acts carefully specify when an executive act is final, and when the act is subject to an appeal to a court. The Ugandan and Kenyan Acts are typical of the first group of laws, while the Tanzanian and Zambian Acts belong to the second group.

Section 75 of the Ugandan Act provides a general right of judicial review of points of law:

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- (1) Any decision of the Minister on an appeal to him from a decision of the Registrar under section 73 of this Act, or by virtue of any other provisions of this Act, shall be subject to an appeal to the court on a point of law and the decisions of the court shall be final.
- (2) The Chief Justice may make rules of court regulating the procedure and practice of the hearing of appeals by a court under this section.

By contrast, the Tanzanian Act has no general provision on review but provides a specific rule for each potential area of dispute. The refusal of the Registrar to register a society, for example, is subject to an appeal to the Minister whose decision "shall be final and shall not be subject to review in any court" (s. 10 (3)). Likewise, an officer surcharged by the Registrar may appeal to the High Court if the surcharge exceeds two thousand shillings but if it is less the right to appeal is to the Minister whose decision "shall be final and shall not be subject to review in any court" (s. 71 (2), (3)).

The Zambian Act also limits the right of appeal but does permit the Registrar to refer questions of law to a court at any time. Section 155 states:

- (1) Notwithstanding anything contained in the last foregoing section, the Registrar at any time when proceeding to a decision under this Act, may refer any question of law involved in such decision for the opinion of the High Court.
- (2) Any judge, as the Chief Justice may direct, may consider and determine any question of law so referred, and the opinion given on such question shall be final and conclusive.

* * *

Problem:

Is the right of appeal from decisions of the Registrar of Companies more or less restricted than the right of appeal from the decisions of the Registrar and Minister of Co-operative Societies?

* * *

Note:

Judicial intervention may also be possible by virtue of legislation governing civil procedure. See, for example, the *Masaka District Growers' case*, p. 222 *infra*.

* * *

C. REGISTRATION AND ITS CONSEQUENCES

(i) Registration Procedure

The conditions and procedure for registration are similar in all the Eastern Africa legislation. In Uganda, for example, to be registered a co-operative

society must: (a) convince the Registrar that it is capable of promoting the economic interests of its members (s. 2), (b) have as members at least ten qualified persons or a registered society (s. 3), (c) follow the procedure for application (s. 4), and (d) satisfy the Registrar that its proposed bye-laws are not contrary to the provisions of the Act (s. 5). Even if the application fulfils these conditions the Registrar has the discretion to deny registration (s. 5: "may, if he thinks fit, register the society and its bye-laws"), although if he does deny registration he must record his reasons for so doing (reg. 5). An appeal lies to the Minister from the Registrar's refusal to register and the decision of the Minister is final subject to the right to appeal to a court on a point of law pursuant to section 75 (s. 9).

Other legislation varies the details of the above procedure. Section 10 (1) of the Tanzanian Act suggests that Registrar *must* register a society if it complies with the Act unless he is of the opinion that:

- (a) proper provision has not been made for the financing of the society; or
- (b) there is already a society in the same locality which is performing substantially similar activities for persons of the same class or occupation and that the registration of another society would serve no useful purpose; or
- (c) the bye-laws do not contain sufficient safeguards for the proper administration of the society; or
- (d) having regard to all the circumstances it is not desirable to register the society.

Rule 4 of the Tanzanian Rules also require the formation committee to prepare a feasibility study and viability statement in consultation with the local co-operative officer.

The Zambian Act also goes into more detail on the matters which the Registrar may consider when reviewing an application. Section 14 states:

- (1) Before approving registration the Registrar may require such additional information about the proposed society as he deems necessary.
- (2) If, as a result of the information provided him under sub-section (1), the Registrar is of the opinion that the applicants for registration and other persons expected to become members require more educational and advisory work respecting co-operative principles and the organisation and operation of a society, or the expected membership appears to be too small for the satisfactory commencement of operations, or more time is necessary to raise the capital initially required, or that

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more training is advisable for persons expected to become officers, he may delay his approval of registration in order to prescribe more educational and advisory work, or discussion of the objects of the society with more educational and advisory work, or discussion of the objects of the society with more persons who could be expected to benefit from membership, or more time to raise the capital initially required, or more training, as the case may be.

- (3) If, as a result of the information provided to him under sub-section (1), or notwithstanding any action taken under sub-section (2), the Registrar is of the opinion that registration is not economically advisable or he is otherwise unwilling to approve registration, he shall give specific reasons therefor to the Minister and to the applicants for registration.
- (4) An appeal against refusal to register the society shall lie to the Minister within ninety days of such refusal.
- * * *

The scope of the Registrar's powers in registration matters is considered in the following case.

* * *

NZAH v. REGISTRAR OF CO-OPERATIVE SOCIETIES

[1972] 2 G.L.R. 103
High Court of Ghana.

EDUSEI, J.: This is an originating summons taken out by the plaintiffs for the determination of the following questions:

- (a) Whether under paragraph 4 of the Co-operative Societies Decree, 1968 (N.L.C.D. 252), the Registrar of Co-operative Societies, Accra, and the Senior Co-operative Officer, Western Region, Takoradi, have power to impose on the plaintiffs the prerequisites and pre-conditions laid down in their letters Nos. PR.1711/6 of 26th April, 1971, and WR/UCSRS/6 of 24th March, 1971, respectively?
- (b) Whether the imposition of the said prerequisites and pre-conditions are not *ultra vires*?
- (c) Whether the plaintiffs have not complied with paragraph 4 of N.L.C.D. 252, and
- (d) Whether the plaintiffs are not entitled to have their proposed society registered?

The facts leading to this application are briefly stated thus: the plaintiffs by their solicitor on 25th February, 1971, sent an application to the Senior Co-operative Officer, Takoradi, for registration of their society as a co-operative society. The senior co-operative officer wrote back on 24th March, 1971, setting out certain conditions or prerequisites which,

in his view, were essential for the registration of the plaintiffs' society. His letter (Exhibit B) reads as follows:

"Department of Co-operatives,
P.O. Box 119,
Takoradi,
24th March, 1971.

Ref. No. WR/UCSRS/6

Dear Sir,

**PROPOSED UNITY CO-OPERATIVE SPIRIT
RETAILERS' SOCIETY**

I acknowledge receipt of your letter dated 25th February, 1971, together with two copies of bye-laws and application for registration of the above-named society.

2. The application is being processed but meanwhile it has to be stressed that certain prerequisites are essential for registration of the society.

- (a) There must be a group of at least ten persons who follow as a normal means of livelihood the occupation of distillation of *akpeteshie*.
- (b) The persons must reside within or occupy lands within the area of operations as defined in the application.
- (c) The society should be existent and will be inspected by officers from this department.
- (d) Members should subscribe shares in the society.
- (e) The society must keep proper accounts for inspection by this department.

3. If the conditions above are satisfied, an economic survey will be conducted to establish the potential viability of the society. If the society is found to be an economic unit, a recommendation will be made to the Registrar of Co-operative Societies for registration of the society.

4. It would be appreciated if the points raised would be brought to the notice of your clients. I will inform you of further developments in this exercise.

Yours faithfully,
(Sgd.) D. O. A. Akuffo,
Senior Co-op. Officer
(Western Region).

Mr. James Mercer,
Bankole Chambers,
Post Office Box 26,
Sekondi.

cc: The Registrar of Co-op. Societies,
Department of Co-operatives,
Accra."

A copy of this letter was sent to the Registrar of Co-operative Societies, Accra, who in an undated letter wrote to the plaintiffs' solicitor and paragraphs 2 and 3 of his letter (Exhibit C) are relevant to this application. Paragraph 2 of Exhibit C reads as follows:

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"The penultimate line of paragraph 4 (2) of the Co-operative Societies Decree, 1968 (N.L.C.D. 252), namely: 'The application... shall furnish any information in regard to the society as the Registrar may require' empowers the Registrar to demand certain conditions, the fulfilment of which facilitates eventual registration";

and paragraph 3 is also in these words, "The preparation and production of an economic survey report prior to registration is one such vital condition".

Counsel for the plaintiffs has submitted that the conditions imposed by the senior co-operative officer and confirmed by the Registrar are *ultra vires* the two officers because such conditions are non-existent in so far as the Co-operative Societies Decree, 1968 (N.L.C.D. 252), is concerned. It does seem to me that the conditions which are to be satisfied by a proposed society before registration are contained in paragraphs 3 (1) and 34 (1) (a) of N.L.C.D. 252. Paragraph 3 (1) is as follows:

"No society, other than a society consisting of co-operative societies which are registered in accordance with the provisions of this Decree (in this Decree referred to as 'registered societies'), shall be registered unless it consists of at least ten persons qualified for membership under paragraph 34 of this Decree."

Paragraph 34 (1) also reads as follows:

"In order to be qualified for membership of a registered society a person shall be—

- (a) capable of entering into a legally enforceable contract;
- (b) resident within or in occupation of land within the area of operations of the society as defined in its bye-laws."

This clearly shows that the society must consist of at least ten members who are capable of entering into a legally enforceable contract and are resident within or in occupation of land within the area of operation of the society as defined in its bye-laws.

Again paragraph 4 (1) of N.L.C.D. 252 requires an application for registration to be made to the Registrar and such application ought to be signed by at least ten members qualified for membership as stated in paragraph 34 (1) of N.L.C.D. 252.

In their application to the Registrar sixteen members have signed and it is interesting to note that the application form itself was provided by the defendant and it is a printed form in which it is stated that the members are "Ghanaians over 21 years old of sound mind who follow as a normal means of livelihood the occupation of distillation

and retailing of *akpeteshi*". They also stipulated their area of operation to be in Takoradi. The sixteen members signed in one column, their names were written in another column and their place of abode in a third column. This means that there are only three columns shown on one side of the printed application. The three columns on the printed application do clearly comply with the requirements for registration, and there is nothing in the Decree requiring shares to be subscribed before registration can be considered, nor is it a condition precedent to registration that account books must be kept. There can be no doubt that proper accounts will have to be kept when operations of the society commence. It is equally true that shares will subsequently have to be subscribed by the members when they start distilling and retailing *akpeteshi*.

I can well imagine why the possession of account books and subscription for shares are not made pre-conditions for registration of a proposed co-operative society. The chief underlying principle of the co-operative movement in this country is to encourage and assist villagers to come together to form co-operative societies to sell their produce with a view to having for themselves the profits that will otherwise go to middlemen. In short the main object of a co-operative society is the promotion of the economic interests of its members in accordance with co-operative principles. To make it a condition for such poor villagers to subscribe shares initially before registration may be difficult for them, and they may not have money on hand to purchase account books immediately. But it is possible that the members may possess the raw materials to enable them to come together and organise themselves into a co-operative society. It is only when operations are in progress and proceeds from the sale of their produce start coming into the coffers of the society that they will have the financial capability to subscribe shares and purchase account books.

Counsel for the respondent referred the court to paragraph 4 (2) of N.L.C.D. 252 and submitted that that paragraph empowered the Registrar to ask for any information. I have no quarrel with the learned state attorney in this regard: that the Registrar has the power to ask for any information that may assist him in considering an application for registration of a co-operative society, but there is a distinction between asking for certain information from the plaintiffs and imposing conditions to be fulfilled by them before registration. Exhibit B did

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not ask for information but it imposed certain conditions to be complied with by the plaintiffs.

I think the Registrar also fell into error when he stated in Exhibit C that in view of paragraph 4 (2) of N.L.C.D. 252, he had power "to demand certain conditions, the fulfilment of which facilitates eventual registration". The preparation and production of an economic survey is not a condition imposed by the Decree either. The Registrar in preparing his economic survey, as a purely administrative or departmental exercise, may ask for certain information which will assist him in determining the economic viability of the proposed co-operative society, but the preparation of an economic survey is not a pre-condition required by law. Co-operative officers inspect societies that have been registered by the Registrar and condition 2 (c) in Exhibit B relates to acts *in futuro* and I cannot see how it must be a prerequisite to registration: *see* paragraph 47 of N.L.C.D. 252. It does seem to me, however, that condition 2 (a) and 2 (b) set out in Exhibit B have been satisfied by the plaintiffs but the so-called conditions 2 (c), 2 (d) and 2 (e) contained therein and paragraphs 2 and 3 of Exhibit C are *ultra vires* Registrar.

The plaintiffs, therefore, have complied with paragraph 4 (1) of the Decree but the Registrar may do certain things under paragraph 3 (2). If the Registrar thought these conditions as necessary prerequisites to registration, I think he should have recommended their inclusion in the Decree to the Minister responsible for the department of co-operatives. Perhaps the Registrar with his enormous experience in the field of co-operative movement in this country may consider it necessary to recommend to the appropriate authority to have the Decree amended to include such matters as would promote the advancement of the co-operative movement in the country.

The plaintiffs have asked me to decide "whether they are not entitled to have their proposed society registered". The question of registration is a matter that lies entirely within the discretion of the Registrar, for paragraph 5 of the N.L.C.D. 252 says that "if the Registrar is satisfied that a society has complied with the provisions of this Decree and that its bye-laws are not contrary to the objects thereof he may register the society and its bye-laws". (The emphasis is mine.) I can well envisage the Registrar now asking for certain information in accordance with paragraph 4 (2) of the Decree before considering the plaintiffs' application for registration,

and the court, in my view, will not be performing its function judicially and judiciously by attempting to fetter the Registrar's hands at this stage if the court directs that the society is entitled to be registered now. In any event a refusal by the Registrar to Register the society gives the plaintiffs a right of appeal to the Minister responsible for Labour and Social Welfare: *see* paragraph 5 (2) of N.L.C.D. 252.

* * *

Problem:

Does the Registrar of Companies have the discretion to refuse registration of a proposed company? May he, for example, deny registration if he believes that a proposed company is not economically viable? Should he have this discretion?

* * *

(ii) *Provisional Registration*

The Ugandan, Kenyan and Tanzanian Acts permit the provisional registration of a proposed society if it does not fulfil all the requirements for registration at the time of application. Section 6 (1) of the Ugandan Act, for example, provides:

"If the Registrar is not satisfied that a society has complied with this Act and any regulations made thereunder, or is not satisfied that its bye-laws conform with the provisions of this Act, but he is of the opinion that the non-compliance with the Act or regulations made thereunder or the lack of proper bye-laws are not fundamental to the running of the society, he may, subject to such conditions as he may specify in writing to the persons by whom or on whose behalf the application is made, register the society provisionally for a period not exceeding eighteen months."

A probationary society has the same powers as a regular society (but *see* Tanzania, s. 11 (8)) and may be registered finally by the Registrar if it satisfies him that it has complied with the conditions for full registration. As a probationary society, however, it must advertise its probationary status and is subject to cancellation at any time by the Registrar, who is not required to give reasons for cancellation.

Compare with the above provisions section 11 of the Zambian Act, the text of which is set out. The Zambian Act does not provide for a probationary society but does suggest that the Registrar should take steps to correct the causes for denying registration.

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at page 1079
supra.

Note:

J. K. Huber, "Co-operative Legislation in East Africa: A Comparative Study", *Journal of the Denning Law Society*, Vol. 2, No. 2 (1969), remarks at page 134: "In view of the complexity of the procedures which must be complied with, and the lack of training in many instances of those making application, this seems a salutary provision."

* * *

Problems:

1. "I oppose the provision allowing the Registrar to register a probationary society. If the defect in the application is minor the defect should not take long to correct and there is no need for the provision. If, on the other hand, the defect is substantial the society should not be given corporate powers. Just as you do not allow minors to drive dangerous motor cars, so you should not allow untrained persons to operate a corporate body with full powers to injure third parties." Comment.
 2. Should the Registrar of Companies be allowed to register probationary companies? Does he have sufficient information under the present registration procedure to know whether or not the applicants will be able to comply with the provisions of the Companies Act now or in the future?
- * * *

(iii) Bye-laws

The bye-laws of a co-operative society bind the society and members in the same way the memorandum and articles of association of a company bind the company and the shareholder-members. Section 30 (1) of the Ugandan Act states:

"The bye-laws of a registered society shall, when registered, bind the society and the members thereof to the same extent as if they were signed by each member, and contained covenants on the part of each member, his heirs, executors, administrators and assignees, to observe all the provisions of the bye-laws."

Bye-laws are less elaborate than the memorandum and articles of association of a company. Under the Ugandan Act the Minister may make regulations prescribing "the matters in respect of which a society may or shall make bye-laws (s. 79 (2) (b)) and the Minister has prescribed one such regulation (reg. 6):

"(1) A society shall make bye-laws providing for the following matters, that is to say,

- (a) its name;
- (b) its registered address;
- (c) the objects for which it is established;
- (d) the area within which its operations and membership shall be confined;
- (e) the qualifications for membership, the terms of admission and the mode of election of members;

- (f) the withdrawal or expulsion of members and payments, if any, to be made to such members and the time in which such payments shall be made;
- (g) the nature and extent of the liability of the members;
- (h) the transfer of shares or interest of members;
- (i) the manner of raising funds, including the fixing of the maximum rate of interest on members' deposits, if any;
- (j) general meetings, the procedure and quorum at such meetings, the powers of such meetings and representation and voting at such meetings;
- (k) the appointment, suspension and removal of members of the committee and officers of the society, and the powers and duties of the committee and officers of the society;
- (l) mode of payment of calls on shares and the financial year of the society;
- (m) the consequences of default by a member in payment of calls on shares;
- (n) the authorisation of the officers of the society to sign documents on its behalf; and
- (o) the manner in which books of account shall be kept.

(2) If the objects of the society include the creation of funds to be lent or advanced to its members, the society shall make bye-laws providing for the conditions on which loans or advances may be made to members, including,

- (a) the rate of interest;
- (b) the maximum amount which may be lent to a member;
- (c) the extension of the term of the loans or the renewal of loans;
- (d) the purpose of loans; and
- (e) the security for the payment of loans.

(3) If the members of the society are registered societies, the society shall make bye-laws providing for the following matters, that is to say,

- (a) the number of officers of each member society who shall be entitled to exercise the voting power of that society;
- (b) the terms and conditions of employment (to be approved by the Registrar) for any paid staff; and
- (c) the authority of the committee in relationship to the employees of the registered society."

Unlike the Companies Acts, the co-operative societies legislation does not set out model bye-laws in the Schedules. Some Acts, however, do not leave the applicants entirely unaided. The Zambian Act permits the Registrar, on request, to prepare bye-laws for any society (s. 159) and the Ethiopian Proclamation refers to model bye-laws ("rules") prepared by

Ministry (Article 8 (2)). The Tanzanian Act permits the Registrar to order the bye-laws to be amended before registration, which may allow mistakes to be corrected (s. 10 (2)). In any case, secondary societies and Government co-operative departments offer practical assistance to persons wishing to form a co-operative society.

As a general rule, all bye-laws, including those governing the objects and the name of the society, may be amended although the Registrar has discretion to deny registration of the amendment subject to the right of a society to appeal to the Minister. (See, for example, Uganda, ss. 8, 9.)

In addition, the Ugandan, Kenyan and Tanzanian Acts authorise the Registrar to have the bye-laws of a society amended. Section 8 (6)-(8) of the Ugandan Act, for example, provides:

"(6) If it appears to the Registrar that an amendment of the bye-laws of a society is necessary or desirable in the interests of such society, he may call upon the society, subject to any regulations made under this Act, to make the amendment within such time as he may specify.

(7) If the society fails to make the amendment within the time specified, the Registrar may, after giving the society an opportunity of being heard, himself make and register such amendment, and issue to the society a copy of such amendment, certified by him. With effect from the date of the registration of such amendment, the bye-laws shall be deemed to have been duly amended accordingly, and the bye-laws as amended shall, subject to any appeal made in accordance with the provisions of this Act, be binding on the society and its members.

(8) Any society aggrieved by an amendment of its bye-laws made and registered by the Registrar under sub-section (7) of this section may appeal against such amendment to the Minister in writing within two months of the date of issue of the copy of the amendment. The decision of the Minister on such an appeal shall, subject to the provisions of section 75 of this Act, be final."

Section 14 of the Tanzanian Act permits the Registrar to seek amendment if "necessary or desirable in the interest of a registered society or in the interest of the members of a registered society or in the public interest" (emphasis added).

Note:

The model bye-laws for Ethiopian co-operative societies have been published by the Imperial Ethiopian Ministry of National Community Development and Social Affairs in the *Co-operative Societies Manual* (Addis Ababa, 1968).

Problem:

Should the Registrar of Companies be given discretion to deny registration of a proposed amendment of a company's memorandum or articles of association? Should he be empowered to order the amendment of a company's memorandum or articles of association?

* * *

(iv) *Corporate Personality and Corporate Powers*

On registration by the Registrar, a co-operative society becomes a corporate body. Section 29 of the Ugandan Act, for example, states:

"A society on registration shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purpose of its constitution."

(Cf. Kenya, s. 28: "... all things necessary for the purpose of, or in accordance with, its bye-laws.")

The Ugandan and Kenyan Acts also lift the veil of corporate personality by incorporating by reference the Companies Act provision which penalises fraudulent trading (see Kenya Companies Act, s. 323, incorporated in the Schedule of the Co-operative Societies Act).

Co-operative societies have full powers under Eastern African legislation to achieve the objects set out in the bye-laws of the society. Regulations 32 (1) of the Ugandan Regulations makes this clear:

"The funds of the society shall be devoted only to the promotion of the stated objects of the society, the running of the society, and such other purposes as are set out in the Act, these regulations and the bye-laws of the society."

Presumably the doctrine of *ultra vires* examined in Chapter IV, will also apply to co-operative societies.

The Zambian Act distinguishes clearly between the objects of a society and its powers. By section 13 a co-operative society has the power "to do all things necessary to achieve its objects in the exercise of the powers available to it under the provisions of this Act, the rules and its bye-laws". Section 19 then goes on to state:

"Subject to this Act, the rules and the bye-laws, a society shall have, as ancillary and incidental to the object or objects set forth in its by-laws, the powers contained in the First Schedule hereto, but nothing shall preclude a society from including in its by-laws, subject to the approval of the Registrar, any powers in addition to, or from

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excluding or modifying those mentioned in the First Schedule."

Among the specific powers set out in the First Schedule are:

"For the purpose of carrying out its objects, every society shall, subject to the provisions of this Act and the rules, have the following powers unless these powers or any of them are expressly excluded or modified by its by-laws:

- (a) to purchase, take on lease or in exchange, hire or otherwise acquire and hold any movable or immovable property, and any rights and privileges the society deems necessary or convenient for the attainment of its objects;
- (b) to sell, exchange, lease, dispose of, turn to account or otherwise deal with all or any part of the property and rights of the society;
- (c) to manage, improve and develop the property of the society;
- (d) to borrow or raise money—
 - (i) by mortgage of any of the land or buildings of the society;
 - (ii) by the issue of bonds or debentures conferring no charge, or a fixed or floating charge upon all of the assets and undertakings of the society, including its uncalled capital;
 - (iii) by pledging as security the products, goods, wares, merchandise and other property vested in or acquired by the society;
- (e) to enter into any contract or arrangement whatever for or incidental to the attainment of its objects;
- (y) generally to carry on and undertake any business or service which may seem capable of being conveniently carried on in connection with the objects of the society, or calculated directly or indirectly to benefit the society and its members, and to insure against any losses, damage, risks or liabilities which the society may incur."

Note that the problem of "corporate gifts" are specifically dealt with by some of the Co-operative Societies Acts. See, for example, section 49 (2) of the Ugandan Act:

"Any registered society may, with the previous sanction of the Registrar, after such allocation has been made to the reserve fund as any regulations made under this Act or the bye-laws of the society may require, contribute an amount not exceeding ten *per centum* of the remaining nett balance to any charitable purpose."

* * *

Problems:

1. Are abuses of corporate personality where courts have intervened in the case of companies less likely to occur in the operation of co-operative societies? Would your answer be different if you were to distinguish between primary and secondary societies?
- *2. How should the objects clause of a co-operative society's bye-laws be drafted: with a simple statement of the business purposes or with a detailed list of possible business purposes and powers?
- *3. Do the reasons for the rule of *ultra vires*—protection of members and creditors—apply equally to co-operative societies and companies?
4. Are cases of *ultra vires* less likely to occur with co-operative societies than with companies?

* * *

(v) *Conversion of Company into Co-operative Society*

The Zambian and Malawi Acts permit a company to convert itself into a co-operative society. Section 14 of the Zambian Act states:

"(1) A company registered under the Companies Ordinance (or any Act which replaces it) may, by a special resolution as defined in that Ordinance (or replacing enactment), determine to convert itself into a society.

(2) Such a resolution shall be accompanied by copies of the by-laws of the proposed society therein referred to, and shall appoint ten persons, being members of the company, who together with the secretary shall sign the by-laws, and who may either be authorised to accept any alterations made by the Registrar therein without further consultation with the company, or may be required to lay all such alterations before the company in general or special meeting as the resolution may direct.

(3) A copy of such resolution, signed by the chairman of the meeting at which it was passed and the secretary, shall, with the by-laws, be sent to the Registrar, who thereupon shall deal with the resolution as an application for registration of a society under this Act.

(4) After the receipt of such resolution and such by-laws and of such information as he may require under section *eleven*, the Registrar may—

- (a) if satisfied that the company will be operated in accordance with co-operative principles, register the company as a society; or
- (b) refuse registration, giving specific reasons therefor to the company and to the Minister as required under section *eleven*.

(5) An appeal against refusal to register the company as a society shall lie to the Minister within ninety days of such refusal.

(6) (a) Upon the registration of a company as a society the Registrar shall issue a certificate of registration to the society together with a copy

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of by-laws certified by him as having been duly approved and registered.

(b) A copy of such resolution under the seal of the company together with the certificate issued as aforesaid shall be sent by the company's secretary to the Registrar of Companies and, upon his registering that resolution and certificate, the conversion shall take place; the Registrar of Companies shall notify the said secretary in writing of the date and time of this registration.

(c) The name under which any company is registered under these provisions as a society shall not include the word "company".

(d) Subject to the next following paragraph, upon the conversion of a company into a society the registration of the company as such shall become void and shall be cancelled by the Registrar of Companies.

(e) The registration of a company as a society shall not affect any right or claim for the time being subsisting against the company or any penalty for the time being incurred by the company; and—

(i) for the purposes of enforcing any such right, claim or penalty the company may be sued and proceeded against in the same manner as if it had not been registered as a society;

(ii) any such right or claim and the liability to any such penalty shall have priority as against the property of the society over all other rights or claims against or liabilities of the society."

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Problem:

Should there be a provision for the conversion of a co-operative society into a company? Even without a special provision can the same end result be reached under the present laws?

* * *

D. MEMBERSHIP RIGHTS AND LIABILITIES

(i) "Open" Membership

The first of the co-operative principles adopted in 1966 by the International Co-operative Alliance (see p. (??), *supra*) reads as follows:

"Membership of a co-operative society should be voluntary and available without artificial restriction or any social, political, religious or racial discrimination to all persons who can make use of its services and are willing to accept the responsibilities of membership."

This principle is an elaboration of the traditional principle of "open" membership. The principle does mean, however, that a co-operative society must accept all applications for membership. The Com-

mission on Co-operative Principles of the International Co-operative Alliance reported in 1966 (p. 161):

"It is a mistake to interpret the rule of "open membership" in the sense that all co-operatives are obliged to enrol all persons who may apply to join them.... Nothing is to be gained and much may well be lost by bringing in a person who unsettles the cohesion of the membership. In the same order of ideas the savings and loan bank or credit union may be justified in refusing to admit an applicant known not to be creditworthy."

The Co-operative Societies Acts themselves prescribe limitations on membership.

Limitations on Physical Persons

(a) *Age.* Minors are normally not allowed to be members. Section 12 (1) (a) of the Ugandan Act requires a physical person to have attained the "apparent" age of eighteen years.

(b) *Residence.* Most of the acts impose a residence requirement. Section 12 (1) (b) of the Ugandan Act requires a physical person to be "resident within or in occupation of land within the society's area of operation as described by the relevant bye-law". Exception may be made for certain classes of society where occupation requirements may be imposed as an alternative to residence requirements. Section 6 (1) of the Tanzanian Act requires *either* a residence requirement *or* a similar occupation requirement if the object of the society is the creation of funds to be lent to its members.

(c) *Societies with unlimited liability.* A physical person is normally prohibited from being a member of more than one society with unlimited liability. See Uganda, s. 16.

(d) *Societies with similar objects.* A physical person is also normally prohibited from being a member of more than one society with the same or similar objects, except with the consent of the Registrar. See Uganda, s. 16.

Limitations on Juridical Persons

A co-operative society may itself normally become a member of another society, whether primary or secondary. A co-operative union is normally made up of only primary societies.

Companies formed under the Companies Act and unincorporated bodies are normally prohibited from becoming members of a society except with the consent of the Registrar. See Uganda, s. 14.

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Limitations Imposed by the Minister or Registrar

The Minister may be empowered to prescribe regulations authorising a society to limit the number of its members. See Uganda, s. 79 (2) (s). Pursuant to this power the Ugandan Minister, for example, has made regulation 11: "A registered society may, with the approval of the Registrar, limit the number of its members for economic reasons." Compare rule 12 of the Kenya Rules: "No registered society shall fix any limit to the number of its members."

Note that whatever the legal rule on limitations on membership there may be *de facto* limitations if the members, or a society's committee have the authority to refuse applications for membership.

Notes:

1. The Ethiopian legislation varies the above provisions on membership in two respects. First, a Ministry, chartered Government agency or other public authority may become a member of a society (Article 14 (3)). Second, a society may admit any physical or juridical person as a "nominal" member, who has the same rights and liabilities as a regular member except that he is not entitled to any share of the assets or profits of the society (Article 15).
2. Legislation which allows the Minister or Registrar to compel non-members to market their produce through a co-operative society normally provides explicitly for the obligations of non-members. Section 52 of the Tanzanian Act, for example, states:

"(1) Every producer to whom any order made under section 48 applies who is not a member of the registered society in respect of which the order is made shall, while such order applies to him, be subject to all the conditions and obligations to which he would be subject if he were a member, other than an obligation to pay any membership fee or share subscription.

(2) If any such producer wishes to become a member of the registered society, the society shall admit him to membership on payment of the share subscription sufficient to qualify him for membership and of the membership fee, if any."

Problems:

- *1. Does a person who believes his application for membership in a co-operative society has been rejected without justification have any remedy?
- *2. What "economic reasons" might the Registrar consider under the Ugandan regulations when permitting a society to limit the number of its members?
3. Do some or all of the above limitations on membership in a co-operative society apply also to membership in partnerships or companies? Should they? Should, for example, a person be prohibited from being a shareholder in more than one company with

the same or similar objects except with the permission of the Registrar of Companies?

* * *

(ii) Expulsion of Members

Co-operative Societies legislation permits societies to expel members. Section 79 (2) (n) of the Ugandan Act, for example, permits the Minister to prescribe rules for the expulsion of members. Pursuant to this power the Minister allows the by-laws of a society to provide for "the expulsion of members and payments, if any, to be made to such members and the time in which such payments shall be made" (reg. 6 (1) (f)).

Compare the elaborate provision on expulsion in the Zambian Act. Section 110 of the Act reads:

"(1) (a) Upon complaint arising against any member of a society, it shall be the duty of the secretary, upon the instructions of the board of directors, to provide the member with written notice of the particulars of the complaint and of the date, time and place of the meeting of the board of directors at which the complaint and the question of the expulsion of the member will be considered.

(b) The directors may, at such meeting duly called and at which a majority of the directors are present, having given the member against whom the complaint has been raised the opportunity to make representations or submissions orally or in writing or both, in rebuttal or in mitigation, resolve, by at least a two-thirds majority vote, that the member be expelled.

(c) The secretary of the society shall, within two weeks from the date on which the member is expelled, notify him in writing of the action of the directors.

(d) An appeal from the action of the directors may be taken by the member to the next general meeting of the society if written notice of intention to appeal is given by him to the secretary of the society within thirty days from the date of receipt of the notice mentioned in paragraph (c).

(e) At such a meeting of a majority of the members present may, after considering any written or oral representations by the member, confirm or rescind the action of the directors.

(f) If the meeting does not confirm the action of the directors in expelling the member, such expulsion shall be held to be null and void, and the member treated as if no such expulsion had occurred.

(2) Where the Registrar, after investigation, is of the opinion that a member has acted in contravention of the rules or the bye-laws of the society, or has acted in a way that is detrimental to the interests of the society and its members, he may communicate his complaint in writing to the direc-

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tors who shall thereupon proceed in accordance with the provisions of paragraphs (a) and (b) of sub-section (1).

(3) The share capital or other interest in a society held by a member who is expelled under this section shall be refunded to him as soon as funds are available.

(4) A member who has been expelled from a society under this section shall forfeit all rights to share in the nett surplus or other benefits of the society from the date of his expulsion, other than the right to have his share capital or other interest in the society refunded to him, together with such dividend as may later be declared and calculated up to the date his share capital or other interest was refunded.

(5) No person who has been expelled from a society shall be eligible for re-admission as a member within a period of one year from the date of his expulsion."

Loss of qualification for membership may also automatically terminate membership. Rule 9 of the Kenyan Rules, for example, states this explicitly:

"Any member of a registered society who ceases to qualify for membership of such society under section 14 of the Act, these rules or the bye-laws of the society, shall forthwith cease to be a member of such society and the committee shall direct the secretary to strike his name off the register of members."

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Problem:

To what extent may the articles of association of a company provide for the expulsion of a member or shareholder? Can the articles require a shareholder to have qualifications beyond mere payment for a share so that on loss of qualification a shareholder's membership terminates automatically?

* * *

(iii) Fines

Co-operative societies legislation normally authorises societies to fine members who fail to comply with the bye-laws of the societies. Section 32 (1) of the Ugandan Act, for example, states:

"The bye-laws of a registered society may, subject to the provisions of any regulations made under this Act, provide for the imposition of fines on its members for any infringement of its bye-laws but no such fine shall be imposed upon any member until written notice of intention to impose the fine and the reason therefor has been transmitted to him and he has had an opportunity of showing cause against the imposition of the fine, and, if he so desires, of being heard with or without witnesses.

Compare Kenya, s.31 (1), which requires any fine exceeding Shs. 500/- to be approved in writing by the Commissioner.

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Problem:

May the articles of association of a company authorise the board of directors to fine shareholders who do not comply with the provisions of the articles?

* * *

(iv) Limited Liability

Co-operative societies may be registered with either unlimited or limited liability. Secondary societies and primary societies carrying on certain activities (e.g., savings and loan societies) may be required to register with limited liability; some primary societies may be required to register with unlimited liability. In other cases the members of a society may choose to register the society with or without limited liability.

Section 2 of the Kenyan Act defines "limited liability" as meaning "limited by shares or limited by guarantee, according to the nature of the liability prescribed by the bye-laws of the registered society".

In any case, special rules govern the liability of persons who cease to be members of a co-operative society. Section 36 of the Ugandan Act provides:

"The liability of a past member for the debts of a registered society as they existed at the time when he ceased to be a member shall continue for a period of two years from the date of his ceasing to be a member: Provided that in the case of a society with limited liability, if the first audit of the accounts of the society after his ceasing to be a member discloses a credit balance in favour of the society, the financial liability of such past member shall forthwith cease."

See also Uganda, s. 37, which deals with the liability of estate of deceased members.

Problem:

Under what circumstances would you advise persons wishing to establish a co-operative society to register the society with unlimited liability?

* * *

(v) Limited Capital Interest

The third principle approved by the International Co-operative Alliance in 1966 stated: "Share capital should only receive a strictly limited rate of interest, if any." Eastern African legislation limits both the

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amount of capital which any one member can hold and the distribution of profits to the holder of a capital share. Section 13 of the Ugandan Act provides: "No member, other than a registered society, shall hold more than one-fifth of the paid-up share capital of any co-operative society." Section 46 (2) of the same Act fixes a maximum rate of return on a capital contribution at 10 per cent per annum, although the Minister may prescribe a lower rate (s. 79 (2) (t); reg. 39).

On dissolution of a society a contributor of capital has a right to the repayment of his capital contribution if there are sufficient funds but he does not have an automatic right to a surplus. Regulation of the Ugandan Regulations permits the members, in general meeting, to decide how the nett surplus on a winding-up is to be distributed. Compare rule 50 of the Kenyan Rules, which states that any surplus may be applied to "some object of local or public utility as may have been selected by a general meeting of the society and approved by the Commissioner". See also section 153 (3) of the Zambian Act:

Any surplus remaining after the application of the funds to the purposes specified in sub-section (1), and to the payment of any claims not cancelled under sub-section (2), shall—

- (a) be distributed amongst the members at the time of dissolution (or their legal personal representatives) in proportion to the value of the business of each such member with the society during the three years immediately preceding the date of dissolution or, if the society has not existed for such period, during the existence of the society, or if the society has done no business during these three years, then in proportion to the share capital held by them at such date;
 - (b) if it is impracticable to make a distribution in accordance with paragraph (a) whether through insufficiency of funds or otherwise, be paid, subject to the approval of the Registrar (either in whole or as to any residue of a partial distribution) to local organisations with objectives beneficial to the community."
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Problems:

If it possible for a company to provide similar limitations on the capital interest of shareholders? What practical difficulties might face a company adopting such limitations?

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(vi) Bonuses

The fourth co-operative principle adopted by the International Co-operative Alliance in 1966 states:

"Surplus or savings, if any, arising out of the operations of a society belong to the members of that society and should be distributed in such manner as would avoid one member gaining at the expense of others. This may be done by decision of the members as follows:

- (a) By provision for development of the business of the Co-operative;
- (b) By provision of common services; or,
- (c) By distribution among the members in proportion to their transactions with the society."

Patronage payments, if made, are distributed in the form of bonuses. Section 87 of the Ugandan Act defines a bonus as "a share of the surplus of a registered society divided among its members in proportion to the volume of business done with the society by them from which the surplus of the society was derived". Before the bonus is distributed the Registrar must acknowledge in writing that he has received a balance-sheet showing surplus funds (Uganda, s. 46).

Compare section 44 (1) of the Kenyan Act, which requires a bonus to be declared:

"Subject to this section, every registered society shall declare each year all bonuses due to members; but, where the bonuses are required for re-investment by the society for capital development, or for the redemption of bonus certificates, the society shall issue bonus certificates to its members in lieu of cash payments, redeemable from a revolving fund established by the society for the purpose."

See also section 30 of the Zambian Act:

"The bye-laws of a society marketing agricultural products, handling agricultural requisites or providing farming services to its members may provide that, in lieu of the payment in cash of amounts deducted from the sale or resale price of agricultural products delivered to the society, or of a patronage bonus, the society may allot to its members shares of capital, and upon such allotment each member shall be deemed to have made an application for the said shares, and agreed to pay therefor by the application of such amounts or of such bonus towards the purchase price of such shares."

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Problems:

1. Should a company with profits be required at least to declare a dividend annually even if the dividend is not immediately distributed? May the articles of association of a company require a dividend to be declared where there are profits?

- *2. Should the Registrar of Companies be required to

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acknowledge receipt of an audited balance-sheet showing a surplus before company dividends are declared?

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(vii) *Transfer of Shares or Interest*

The Co-operative Societies Acts limit the transferability of shares or interests in a co-operative society. Section 18 of the Uganda Act, for example, states:

"(1) The transfer or charge of the share or interest of a member in the capital of a registered society shall be subject to the conditions as to maximum holding for which provision is made in section 13 of this Act.

(2) In the case of a society registered with unlimited liability, a member shall not transfer or charge any share held by him or his interest in the capital of the society or any part thereof, unless,

- (a) he has held such share or interest for not less than one year; and
- (b) the transfer or charge is made to the society or to a member of the society."

The Act also regulates the transfer of a share or interest on the death of a member. Section 38 of the Ugandan Act reads:

"(1) On the death of a member, a registered society may transfer the share or interest of the deceased member to the person nominated in accordance with any regulations made under this Act, or, if there is no person so nominated, to such person as may appear to the committee of the society to be the legal personal representative of the deceased member or may pay to such nominee or legal personal representative, as the case may be, a sum representing the value of such member's share or interest, ascertained in accordance with any regulations made under this Act or the bye-laws of the society:

Provided that,

- (a) in the case of a society with unlimited liability, such nominee or legal personal representative, as the case may be, may require payment by the society of the value of the share or interest of the deceased member ascertained in the manner mentioned in this sub-section; or
- (b) in the case of a society with limited liability, the society shall transfer the share or interest of the deceased member to such nominee or legal personal representative, as the case may be, being qualified in accordance with any regulations made under the provisions of this Act and the bye-laws for membership of the society, or, on his application within one month of the death of the deceased member, to any person specified in the application who is so qualified.

(2) A registered society shall pay all other moneys due to the deceased member from the society to such nominee or legal personal representative, as the case may be.

(3) All transfers and payments made by a registered society in accordance with the provisions of this section shall be valid and effectual against any demand made upon the society by any other person."

The rules or regulations may also contain rules on the transfer of shares. *See*, for example, regulations 9 and 40 of the Ugandan Regulations:

"40. (1) Subject to the provisions of sections 13 and 18 of the Act and sub-regulation (3) of this regulation, a member may transfer his share or shares in a registered society to any other member of the society.

(2) No transfer of any share in a registered society shall be effective until such transfer has been registered by the secretary of the society.

(3) No transfer of any share in a registered society shall be effective if made by a member in debt to the society whether the debt is due for payment or not."

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Problem:

Do the above rules restricting the free transfer of shares or interests in a co-operative society more nearly resemble the rules governing shares in companies or those governing interests in partnerships?

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E. PROPERTY AND FUNDS OF CO-OPERATIVE SOCIETIES

(i) *Source of Capital*

The initial source of capital of a co-operative society is the capital contribution by each member either in the form of a membership fee or a purchase of a share. The borrowing of capital is permitted but is normally subject to regulation by the Minister or Registrar. The property of a registered society may be charged subject again to regulation by the Minister or Registrar. *See*, for example, Uganda, ss. 43, 50 and Schedule 1.

Section 46 of the Tanzanian Act regulates the raising of capital in detail:

"(1) The by-laws of a registered society shall provide for the raising of funds to finance its activities either by the issue of shares or by a cess or levy on agricultural or other produce or handicrafts marketed through the society or by a combination of any of these methods or by such other means as may be approved by the Registrar.

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(2) Where the funds of a registered society to finance its activities are obtained by the issue of shares, the following provisions shall apply:

- (a) the share capital shall not be reduced without the consent of the Registrar;
- (b) unless the Registrar otherwise in writing directs, a fund, which shall be formed and maintained to meet expenditure which may be incurred by the society in purchasing the shares of members whose membership has terminated with the consent of the committee;
- (c) no payment from the share transfer fund shall be made for the purchase of the shares of any member whose membership has terminated without the consent of the committee;
- (d) no purchase of the shares of a member whose membership has terminated by reason of any cause other than death shall be made except with monies then available in the share transfer fund;
- (e) the amount standing to the credit of a share transfer fund shall include the value of any unallocated shares purchased from members under the foregoing provisions, and such amount shall not exceed ten per centum of the subscribed share capital;
- (f) where the share of a member is purchased by the society under the foregoing provisions, the amount paid therefor shall not exceed the par value of the share, and it shall be lawful for the society to pay such less sum than the par value as it considers reasonable, regard being had to the financial position of the society at the time of purchase;
- (g) the shares of members purchased as aforesaid shall be re-issued before any new allocation of shares is made."

Note the raising capital by the issue of shares is limited by the limit (usually one-fifth) on the shareholding of any one member.

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Problems:

- *1. "The casual regulation of share capital in most of the co-operative societies laws is undesirable: creditors do not know how secure their credit is and a society will consequently find it more difficult to receive credit." Comment.
- 2. Could a partnership establish a share transfer fund? Could a company?

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(ii) Investment of Funds

A co-operative society is normally restricted in its investment of its funds. Section 45 of the Ugandan Act, for example, states:

"A registered society may invest or deposit its funds only,

- (a) in a registered co-operative bank;
- (b) in any registered company or statutory corporation approved in writing by the Minister;
- (c) in any bank or financial institution incorporated in Uganda;
- (d) in and upon such investment and securities as are by law allowed for the investment of trust funds;
- (e) in such other mode as may be approved by the Minister."

See also Uganda, reg. 32 (2).

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(iii) Reserves

A co-operative society is usually required to maintain a reserve fund from any surplus which it may make in the course of its operations. Section 47 of the Ugandan Act, for example, requires a statutory reserve and allows a society to establish provident funds:

"(1) Every society which does or can derive a surplus from its transactions shall maintain a reserve fund.

(2) A society with unlimited liability, which advances money or goods to any member in excess of money or goods deposited by him, shall carry at least one-fourth of the nett surplus in each year to the reserve fund.

(3) All societies other than societies referred to in sub-section (2) of this section shall carry to the reserve funds such portion of the nett surplus in each year as may be prescribed by and regulations made under this Act or by the bye-laws of the registered society.

(4) Every society may, with the approval of the Registrar, establish a provident fund for payment of pensions to its permanent employees at the time of their retirement."

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Problem:

Should partnerships or companies be required to maintain a reserve? What is the difference between capital and reserve funds?

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F. MANAGEMENT OF CO-OPERATIVE SOCIETIES

(i) Management Provisions

The legislator faced with regulating the management of companies or co-operative societies has at least four alternatives: (1) to set out detailed rules in a Schedule to the primary legislation and permit persons to adopt some or all of these rules; (2) to prescribe detailed rules in primary legislation; (3) to authorise a Minister to prescribe rules in sub-

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subsidiary legislation; (4) to leave the matter entirely up to private persons to arrange by agreement.

The Companies Acts rely primarily on the first alternative, while the co-operative societies legislation relies on one or another of the other alternatives. The Zambian Act, for example, sets out elaborate rules on directors (ss. 111-122) and on meetings of members (ss. 123-128), supplemented by regulations 15-57. The Ugandan Act, on the other hand, leaves these provisions to the regulations (meetings: regs. 17-23; committee and officers: regs. 24-31) or to the members in their bye-laws subject for the approval of the Registrar (reg. 6 (1) (j), (k)).

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Problems:

- *1. "Members of co-operative societies usually have had no experience in the management, democratic or otherwise, of an economic organisation. They will not understand the practical advantages of one form of management structure over another. Co-operative Societies Acts, therefore, should prescribe in detail the rules governing the management of at least primary societies, with perhaps authority in the Registrar to vary these basic rules for the more sophisticated societies." Comment.
2. Should some or all of the rules in Table A of the Companies Acts be transferred to the main body of the Act and made mandatory for some or all classes of companies?

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(ii) Management Organs

The second basic principle adopted in 1966 by the International Co-operative Alliance states:

"Co-operative societies are democratic organisations. Their affairs should be administered by persons elected or appointed in a manner agreed by the members and accountable to them. Members of primary societies should enjoy equal rights of voting (one member, one vote) and participation in decisions affecting their societies. In other than primary societies the administration should be conducted on a democratic basis in a suitable form."

The principle of democratic management is carried out in the basic pattern for the management of primary societies in Eastern Africa: (a) a general meeting of members as the supreme authority of a society, (b) a management committee to direct the affairs of the society, and (c) officers employed to carry on the day-to-day activities of the society. Special rules usually apply to the management of secondary societies.

(a) *General meeting.* Every member of a primary society has a right to attend, speak and vote at a general meeting of the members. He has one vote no matter what the size of his capital contribution or shareholding. He must exercise his vote in person, however, as proxies are not permitted. Among the duties of the annual general meeting there will normally appear the following: approve accounts, elect officers and establish maximum borrowing powers within which the officers may act.

(b) *Management committee.* The general meeting of the members elect a management committee from among the members. Strict rules on the eligibility of members to become committee members may be laid down either by law or by the bye-laws. Common provisions include rules as to age, as to whether or not he is in debt to the society, as to whether or not he competes with the society, and as to whether or not he is an undischarged bankrupt or has been convicted of an offence involving dishonesty. Although they may be re-elected, committee members usually hold office for only one year at a time and in any case they may be removed at any time by the general meeting of members. Their duties usually include the checking of accounts, the consideration of loans, the keeping of financial and other books, and the submitting of reports to the Registrar. The standard of conduct which they must meet in carrying out their duties may also be prescribed. See, for example, regulation 26 (4) of the Ugandan Regulations:

"In the conduct of the affairs of a registered society, the committee and every member thereof shall exercise the prudence and diligence of ordinary men of business and shall be jointly and severally responsible for any loss sustained by the registered society through any act which is contrary to laws, the bye-laws of the society or the directions of any general meeting."

(c) *Officers.* The management committee appoints officers to carry out the decisions of the committee or to carry out duties prescribed by law. Section 87 of the Ugandan Act defines "officer" as including "a chairman, secretary, treasurer, member of committee, employees, or other person empowered under any regulations made under the provisions of this Act or bye-laws of a registered society to give directions in regard to the business of a registered society". The duties of the chairman, secretary, and treasurer are usually defined by law. Special rules govern the delegation of powers by the committee to officers. Regulation 31 of the Ugandan Regulations states:

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"(1) A society, may, by resolution duly passed at a general meeting of the members of the society, authorise the committee, the secretary or the treasurer of such society to delegate all or any of their duties to a competent paid officer or employee of the society....

(3) Where any duty is delegated in accordance with the provisions of this regulation, the committee shall cause to be produced reports and returns by the employee or class of employee to whom such duties are delegated at intervals specified by the committee in a form determined by the committee after consultation with the Registrar."

Compare this regulation with rule 35 of the Kenyan Rules:

"(1) The committee of a registered society may delegate any of its duties to an officer or officers of the society.

(2) Nothing in this rule shall be held to absolve the committee from its responsibility for the proper and businesslike direction of the affairs of the society."

The above rules are subject to special rules for secondary societies. Although every member of a secondary society has the right to attend and speak at meetings through a representative, the votes cast by each member may be weighted to reflect the capital contributed by each member. The management committee of a secondary society may be subject to special rules. Rule 36 of the Kenya (Rifles), for example, requires a board of representatives consisting of delegates from each affiliated society and having limited powers over these affiliates. The division of functions between the committee and officers may also be prescribed in detail. Regulation 31 of the Ugandan Regulations, for example, requires the committee to specify in detail the authority of paid officers and employees:

"(1) ... in the case of a co-operative union and an apex society, the duty to sign cheques and generally to operate the bank account of such co-operative union or apex society shall be delegated to the appropriate employees."

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Problems:

- *1. Are members in a minority faction adequately protected from the power of the majority faction? Are members adequately protected from the abuse of power by the committee or the officers? Does the committee have adequate control over the officers?
2. What differences do you see between the management organs of a co-operative society and those of a company? Are the rules governing the management more

nearly like those governing partnerships, private companies, or public companies?

- *3. "Although the Co-operative Societies Acts purport to codify the law applicable to the operation of co-operative societies, anyone familiar with the infinite variety of cases dealing with the operation of companies will realise that codification is impossible. Moreover, unlike company law where there is a developed case law, the co-operative societies legislation has been the object of very few court decisions. I, therefore, recommend that company cases should be referred to as authorities whenever the Co-operative Societies Acts do not have an absolutely clear solution." Comment.

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(iii) *Accounts and Audit*

Although the Eastern African Co-operative Societies Acts all call for the keeping of accounts and a frequent audit of the financial books, these Acts vary in details. The Zambian Act (s. 139) most clearly states the obligation of a society to keep a proper set of commercial books as well as any other financial documents the Registrar may require. Under the Kenyan Act (s. 23 (1)), the Commissioner may require a society to appoint an accountant to maintain the society's books of account at the expense of the society. Most of the Acts charge the Registrar with the duty of having the accounts audited at least once annually by an auditor appointed by him, although some Acts permit the society to suggest the name of an auditor to the Registrar. The auditor's report is then submitted to both the Registrar or Minister and the society. The Tanzanian Act requires the audited accounts to be approved by both the Registrar (s. 26 (6)) and the general meeting of members (s 21 (7)). Some Acts permit the members of the public to examine the approved audited accounts upon payment of a fee. Some Acts may also prescribe professional qualifications for the auditor. During the course of the audit the auditors have full powers to examine all company documents and to summon all officers to give evidence.

Individual Acts may impose additional requirements. Section 23 of the Ugandan Act requires a society to submit an estimate of annual income and expenditure to the Minister, who must approve the estimates before any expenditure is made.

* * *

Problem:

"The Registrar of Co-operative Societies not only has the duty to ensure that a society's accounts are audited annually but also the duty to examine the results of the audit with care. The Registrar's swift action may forestall

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abuses; the threat that he will not approve accounts may even curb abuses before they appear. The Registrar of Companies has no such duty. At the very least he should be required to approve the accounts of small private companies." Comment.

* * *

(iv) Government Supervision and Intervention

Under the co-operative societies legislation the Minister and Registrar have extensive powers to supervise the management of co-operative societies, limit the courses of action open to their management, and intervene in the management where they believe this is necessary. For a representative list of these powers of supervision and intervention, see the general list of powers of the Ugandan Minister and Registrar, p. (??), *supra*.

The most common power is that of the Minister or Registrar to order an investigation into the affairs of a co-operative society. Section 51 (1) of the Ugandan Act, for example, states:

"The Minister may, of his own motion, and shall, on the application of not less than two-thirds of the members present at a general meeting of the society which has been duly advertised, hold an inquiry or direct some person authorised by him by order in writing in that behalf to hold an inquiry into the constitution, working and financial condition of a registered society."

(Compare Kenya, s. 61 (1): "The Commissioner may, of his own accord, and shall on the direction of the Minister or on the application of a majority of the committee of the society, or of not less than one-third of the members..."; also Tanzania, s. 68 (1). The officers and members of the society being investigated are required to produce all necessary documents and information to the inspectors.

If the investigation reveals that the affairs of the society are "unsatisfactory", the Minister is given authority to replace the society's committee with one or more supervising managers who are granted extensive statutory powers to carry on the society's operations. Moreover, in Uganda (s. 53), the Minister may also appoint a supervising manager without an inquiry if he is convinced that "it is in the interest of a society, its members, or it is in the public interest to do so" (s. 53 (1)).

A more limited right of inspection is authorised for the benefit of creditors under most of the co-operative societies legislation. A creditor may apply to the Registrar to have him cause the books of the debtor society to be inspected and to communicate

the results of the inspection to the creditor. Section 54 of the Ugandan Act, for example, states:

"(1). The Registrar may, if he thinks fit, on the application of a creditor of a registered society, inspect or direct some person authorised by him in writing in that behalf to inspect the books of the society: Provided that,

- (a) the applicant satisfies the Registrar that the debt is a sum then due, and that he has demanded payment thereof and has not received satisfaction within a reasonable time; and
 - (b) the applicant deposits with the Registrar such sum as security for the costs of the proposed inspection as the Registrar may require.
- (2) The Registrar shall communicate the results of any inspection to the creditor."

* * *

Problems:

- *1. Examine the provisions of the Co-operative Societies Act in force in your country which deal with the supervising manager. In what ways do the powers and duties of the supervising manager differ from those of a receiver or liquidator? Should the Companies Act provide for the replacement of boards of directors by supervising managers in certain circumstances?
2. Should the Registrar of Companies be authorised to inspect company books on the application of a creditor? How would you draft a provision authorising inspection which would adequately safeguard the interests of all parties?

* * *

PART 3—THE SETTLEMENT OF DISPUTES

In this Part we turn to the special provisions on the settlement of disputes which are found in all the Eastern African laws except the Tanzanian Act. We first examine the legislative provisions and then set out the reported court decisions involving these provisions. It is ironic that legislation intended to avoid lengthy and costly litigation has been the source of by far the greatest number of reported cases involving the operation of co-operative societies.

* * *

A. LEGISLATION

(i) Kenya, Co-operative Societies Act, s. 80.

(1) If any dispute concerning the business of registered society arises—

- (a) among members, past members and persons claiming through members, past members and deceased members; or
- (b) between members, past members or deceased members, and the society, its committee or any officer of the society; or

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- (c) between the society or its committee and any other registered society,

it shall be referred to the Commissioner.

(2) A claim by a registered society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not is a dispute for the purpose of this section.

(3) Any officer of a registered society concerned or any officer appointed under section 3 of this Act may, of his own accord, refer any dispute such as is referred to in sub-section (1) of this section to the Commissioner.

(4) The Commissioner shall, on receipt of a reference under sub-section (1) of this section, and on being satisfied that a dispute exists, refer it for determination to an arbitrator or arbitrators (as he thinks fit and appointed by him) (in this section referred to as the arbitrator) in the prescribed manner:

Provided that—

- (i) nothing in this section shall preclude the appointment as arbitrator of an officer appointed under section 3 of this Act; and
- (ii) where any of the parties insist upon being represented by an advocate, the Commissioner may refuse to act under this section, in which case the dispute shall be determined by a single arbitrator in accordance with the Arbitration Act, as though the reference under sub-section (1) of this Act were a submission within the meaning of the Arbitration Act.

(5) The Commissioner may, at his discretion, call for a deposit of money to be made by either or both parties to a dispute referred to the arbitrator under sub-section (4) of this section, that amount of such deposit being at the discretion of the Commissioner.

(6) The award of the arbitrator shall be final: Provided that any party aggrieved thereby may appeal to the Commissioner within the prescribed time and in the prescribed manner.

(7) A decision of the Commissioner under this section shall, subject to sub-section (12) of this section, be final.

(8) The arbitrator shall have the same powers as the High Court to award costs.

(9) Any costs directed to be paid under an award shall be taxable in the High Court upon production of a signed or other authenticated copy of the award.

(10) A sum directed to be paid by or under an

award shall, unless the award otherwise directs, carry interest as from the date of the award at the same rate as a judgment debt.

(11) An award or a signed copy thereof, including a statement of the costs awarded under such award shall be filed in a court and shall thereupon be enforceable as if it were a decree of the court:

Provided that an award for a sum which including costs exceeds three thousand shillings shall be filed in the High Court, whereupon —

- (i) either party may, within twenty-one days and after giving notice to the other party, show cause why judgment should not be entered in terms of the award;
- (ii) after hearing the parties to the arbitration in accordance with paragraph (i) of this proviso, the court shall enter judgment in terms of the award, or may refuse to enter judgment, as the case may be, with or without costs, as the court may determine;
- (iii) if neither party, within twenty-one days from the filing of the award, shows cause why judgment should not be entered, the court shall enter judgment in terms of the award together with the costs thereof;
- (iv) where the court enters judgment in terms of the award together with the costs thereof, it shall issue a decree thereon, which shall be enforceable as any other decree of the court.

* * *

Notes:

1. Eastern African laws other than the Kenyan Act permit the Registrar or arbitrator to refer questions of law to a court. See, for example, section 73 of the Ugandan Act, which reads in part:

"(5) If the Registrar is of the opinion that a point of law arises in a dispute he has decided to settle under paragraph (a) of sub-section (3) of this section, he may refer it to the High Court for its decision, which shall form part of the award by the Registrar.

(7) An arbitrator ... may,

(c) Refer any point of law to the High Court for its decision."

(10) Where the arbitrator refers a case to court on a point of law under paragraph (c) of sub-section (7) of this section, the court shall make its decision, and if the decision affects the amount of the award, it shall be increased or reduced, as the case may be, and the court shall execute the award as soon as possible."

Section 154 (3) of the Zambian Act is even less hostile to references to a court on legal points:

"(3) The Registrar may, on receipt of a reference under sub-section (1)—

- (a) decide the dispute himself; or
- (b) refer it for disposal to an arbitrator or arbitrators;

Provided that if the question at issue in such dispute is one involving complicated questions of law and fact, or one of the parties requests that the dispute

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be referred to a civil court, the Registrar may, in his discretion, suspend proceedings in the matter until the question has been determined by a civil suit instituted by one of the parties to the dispute; if no such suit is instituted within six months of the Registrar's order suspending proceedings, the Registrar shall take action in accordance with the foregoing provisions of this sub-section."

2. The Kenyan Act states that a decision of the Commissioner shall be final subject to sub-section (12), which does not exist in the published text. Other Acts, however, permit an appeal from the Registrar to the Minister, and from the Minister to a court on points of law. Sections 73 (6) and 75 of the Uganda Act, for example, state:

"73. (6) Any party aggrieved by the award of the Registrar or by his decision on an appeal to him under sub-section (11) of this section may appeal therefrom to the Minister within two months of the award.

75. (1) Any decision of the Minister on an appeal to him from a decision of the Registrar under section 73 of this Act, or by virtue of any other provisions of this Act, shall be subject to an appeal to the court on a point of law and the decision of the court shall be final.

(2) The Chief Justice may make rules of court regulating the procedure and practice of the hearing of appeals by a court under this section."

See also the Ethiopian law, which permits judicial review of decisions of the Registrar by a special section of the Supreme Imperial Court "in all matters of law, fact or equity, where the rules of law or the principles of equity appear from the files, exhibits or records of the... Registrar to have been erroneously determined" (Article 51 (2)).

3. In the list of disputes which are to be referred to the Registrar under section 80 (1) of the Kenyan Act, the Act is atypical in that it omits disputes between the society or its committee and any officer or past officer (usually including employees) or the society.
4. For an explanation of the origin of section 80 (2), see the opinion of Simpson, J., in the *Gatanga Coffee Growers'* case, p. (???) *infra*. Article 43 (2) of the Ethiopian law goes into greater detail than sub-section (2):

"(2) For purposes of paragraph (1) of this Article 43 the term "dispute" shall be deemed to include, in particular but without limitation, the following:

- (a) a claim by the society for any debt or demand due to it from a member or the nominee, heirs or legal representative of a deceased member;
- (b) a claim by a surety against the principal debtor where the society has received from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor; and
- (c) any dispute arising in connection with the election of any officer of the society."

In Uganda, on the other hand, the original Bill was amended in Parliament to add section 73 (13) removing certain disputes from the jurisdiction of the Registrar:

"(13) Notwithstanding the provision of this section, any debt arising out of embezzlement, loss of cash or misappropriation of a co-operative society's fund shall not be the subject of settlement by the Registrar or an arbitrator, but shall be referred by the Registrar to a competent court for settlement."

5. Not only do the Acts withdraw certain disputes from the courts but some Acts also are hostile to the lawyer. See section 80 (4) (ii) of the Kenyan Act and section 76 of the Ugandan Act:

"76. A party to a dispute under section 73 of this Act shall not engage a legal representative before the Registrar or arbitrator save on a reference to the court on a point of law or on appeal from a decision of the Minister under section 75, or at the filing of the award to the court."

The Report of the Commission of Inquiry into the Affairs of all Co-operative Unions in Uganda (1967) may explain this hostility to the lawyer in the Ugandan Act of 1970:

"3.28. A problem which has recently cropped up in the hearing of disputes has been the employment of lawyers. In a dispute between Masaka District Growers' Co-operative Union Ltd., and a number of its former members whom it had expelled, both parties employed lawyers to defend them. For nearly two years the dispute has not yet been settled and it has cost the union and the societies some Shs. 70,000/- already....

3.30. ... In our view the whole purpose of arbitration is to expedite decisions; to prevent the operations of a society from being hampered by long-drawn-out legal proceedings, to curtail expenses for all parties to the dispute, some of whom can be poor peasant farmers, and to arrive at equitable adjudication without being bogged down by legal niceties.

3.31. When an arbitrator without legal training is sitting it is particularly invidious if one of the parties is represented by a legal practitioner. We therefore, strongly recommend that the Act should contain a provision debarring representation of a party to an arbitration by a legal practitioner, save that on a reference to a court on a question of law under section 69 (1) [s. 75 (1) of the 1970 Act] a party may be represented by a legal practitioner. A lawyer may also be retained to execute an award once it has been filed in court."

6. Section 74 of the Ugandan Act protects the arbitrator from civil liability for any act done in good faith when carrying out his duties under the Act.
7. Only the Kenyan and Ugandan Acts authorise the Commissioner/Registrar to require a party to a dispute to make a deposit before he will consider a dispute. Both Acts leave the amount of the deposit to the discretion of the Commissioner/Registrar.

* * *

(ii) W. M. Craw and K. Ram, *A Guide to the Co-operative Societies Act* (Nairobi: Kenya Institute of Administration, 1969), pp. 73-75.

As a matter of policy the Act aims to have any disagreements between persons/societies mentioned in sub-section (1) settled by the Commissioner, or by an arbitrator appointed by him and not by the courts. The reason for this is that court proceedings entail expenses and delay and the courts may lack expert knowledge of the co-operative movement.

In sub-section (1) (a) examples of persons claiming through members, past members and deceased members are as follows:

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- (i) If a member offers as security for a loan given to him by his bank, payments due from the society in respect of crops delivered, or to be delivered, then the bank will have a claim against the society "through the member".
- (ii) Where a person leaves a society before the end of its financial year and, in anticipation of a bonus payment on crops delivered to the society up to the time of his resignation, he pledges the amount of bonus he expects to receive as security for a loan from his bank, the bank in such a case, has a claim against the society "through a past member".
- (iii) "A person claiming through a deceased member" would include the nominee or personal representative.

It should be noted that any dispute between an employee, and the society cannot be dealt with by the Commissioner under this section because there is no such provision in sub-section (1).

Sub-section (2) contains an extremely important check on the freedom of co-operatives to use the courts. If a co-operative is claiming any payment from a member, past member, nominee or personal representative and he refuses to make any such payment, the co-operative has no power to file a suit in court for the recovery of the sum in dispute. Debts and other sums due to co-operatives by their members must be referred to the Commissioner under sub-section (1) of this section.

In sub-section (3) any officer of a registered society, and any officer serving in the Department of Co-operative Development, is given power to refer disputes to the Commissioner. An officer of the department would, of course, have to follow normal departmental channels when referring a dispute.

Before the Commissioner refers a dispute to an arbitrator under sub-section (4) he must first satisfy himself that a dispute really exists, e.g., he may call for further evidence. Where a dispute is referred to the Commissioner it would seem to be his responsibility to notify the other party to the dispute that reference has been made to him. The manner in which the Commissioner is to make a reference to an arbitrator is prescribed in rule 53.

The Commissioner may appoint any member of his staff as arbitrator. The Commissioner may refuse to act under this section but only when any of the parties to a dispute intended to be represented by advocates. In such an event the Commissioner may decide to deal with the dispute under this section or he may invoke the Arbitration Act, Cap. 49.

Laws of Kenya. In the latter event, the dispute is taken out of the Commissioner's hands and is settled in accordance with the procedure laid down in the Arbitration Act. Although this course of action is open to the Commissioner there would appear to be no justification for the Commissioner to resort to the Arbitration Act when this section gives him all the power he needs to deal adequately with any dispute.

The power given to the Commissioner in sub-section (5) seems to be to rule out any unnecessary references of disputes. By calling for a deposit of money the Commissioner can test the genuineness of any doubtful case. Whatever sum the Commissioner fixes on as a deposit need not necessarily be the amount the party has to contribute finally to the costs of the arbitration.

Under sub-section (6) the award (decision) of an arbitrator is final, subject to an appeal to the Commissioner by any party dissatisfied by his decision. For the procedure to be followed on an appeal *see* rule 56. Because the Commissioner may be called upon to decide on such appeals this would seem to preclude him from ever acting personally as an arbitrator.

The cross-reference in sub-section (7) to sub-section (12) of this section is apparently an error as no such sub-section exists. It would, therefore, appear that the reference was intended to be to sub-section (11) which, when read with this sub-section, is relevant and makes sense.

The power given in sub-section (8) to the arbitrator not only entitles him to award the full costs against one party, but he can also apportion the costs between the parties in any manner he deems fit.

Sub-section (9) enables any party who is dissatisfied with the award of the costs to approach the High Court for deciding the matter finally. Where there is no disagreement and the parties meet costs in accordance with the arbitrator's award, there is no question of this sub-section coming into operation. When the High Court is requested to rule on the amount and apportioning of costs it is said to be "taxing" costs and usually the Registrar, or his deputy, is the taxing master" for this purpose. It should be clearly understood that the High Court has no power to go into the merits of the arbitrator's award; it may only consider the question of costs under this sub-section.

Sub-section (10) provides that anyone required to pay a sum of money, as a result of an award made against him, must pay interest on the sum

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due at the rate of 6 per cent per annum from the date of the award till the date of payment.

Sub-section (11) divides arbitrators' awards into two categories, i.e., (1) an award, including costs, for Shs. 3,000/- or less, and (2) an award including costs, for more than Shs. 3,000/-. Where the sum involved is Shs. 3,000/- or less, the decision of the Commissioner on appeal under sub-section (7) is final and is equivalent to a decree of court. If the sum is for more than Shs. 3,000/- the High Court has power, on the application of any party to examine the merits of the award in accordance with the provisions of sub-section (11) (i)-(iv). Paragraph (ii) of sub-section (11) contains the interesting provision that the High Court may confirm an arbitrator's award or reject it but cannot change it in any way.

(iii) D. N. Khanna, "Co-operative Societies and Court Jurisdiction", *E.A.L.J.*, Vol. 6 (1970), pp. 298-299.³

Section 80 (1) of the Co-operative Societies Act (Cap. 490) (K) reads as follows:

"If any dispute concerning the business of a registered society arises—

- (a) among members, past members and persons claiming through members, past members and deceased members; or
- (b) between members, past members or deceased members, and the society, its committees or any officer of the society; or
- (c) between the society or its committee and any other registered society, it shall be referred to the Commissioner."

The interpretation of this section has led to divergent views.

The problem has specifically arisen in connection with (i) a member employee's disputed claim against the society for wages or damages for wrongful dismissal and (ii) a member's claim against the society for goods sold and delivered.

The question is where such claims should be asserted—by arbitration before the Commissioner or by an action before the courts.

One view is that if a member and the society are portrayed as opposite parties to any claim, the jurisdiction of the courts is ousted. This school argues that it is part of "the business" of the society to meet the just claims of its employees and to resist

unjust claims since the administrative side of the society's "business" cannot be carried out without having employees. In relation to goods bought from members, this school also argues that for the effective carrying on of its "business", it has to buy goods, other than the commodity it is formed principally to deal in; and if any goods for its requirements are bought from a member, the member cannot sue for their price in the courts.

A second school of thought holds that a member is not obliged under the bye-laws of the society to take up employment with the society, and if he does, he does not do so as a member, and can sue for wages or damages for wrongful dismissal before the courts, because membership is merely incidental to the claim. However, if the principal object of the society is to deal in coffee, for example, then the member cannot sue for the price of coffee before the courts, because under the bye-laws the member is obliged to sell to the society and not to anyone else. On the other hand, if the society lays down a quota for the member and frees him from the obligation of selling to the society above the quota, then the member can sue in the courts for the price of coffee sold to the society above the quota. Further, if the member sells to such society items other than coffee, he can sue the society in the courts for the price of such goods.

A third school of thought also exists. It contends that only where membership is germane to the cause of action asserted by a member against the society is the jurisdiction of the courts ousted. An obvious example of this would be a claim by a member against the society for dividends. Further, the sale price of coffee sold by a member to a coffee co-operative society, it is contended, is on a par with recovery of dividends by a member from the society. The argument is that a member under the bye-laws is obliged to sell his coffee to the society, therefore membership is a vital ingredient of his claim to recovery of the price of the coffee.

With respect, there is some confused thinking here. Membership is a vital consideration only to the enforcement of the obligation to sell to the society. Membership is incidental to the recovery of the price of the coffee. It is not a necessary ingredient of the claim, as it is in the case of a claim for recovery of dividends.

It is submitted that the second school of thought is in conformity with the extent of protection needed by co-operative societies and intended by the legislation. But in any event the conflict between these

3. The author of this comment was counsel for the respondent in the *Gatanga Coffee Growers* case, p. 999 *infra*. Reconsider this comment after reading the court's decision in that case. Do you agree with the learned author that the case was wrongly decided?

three schools of thought should be resolved by either a clear court decision or an amendment to section 9 (1).

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B. CASES

(i) WAKIRO AND WANDA v. COMMITTEE OF BUGISHU CO-OPERATIVE UNION LTD.

[1968] E.A. 523

High Court of Uganda.

RUSSELL, J.: This is an appeal on questions of law by Messrs. C. M. Wakiro and J. F. Wanda (hereinafter called "the appellants") who were formerly officers of the Bugishu Co-operative Union Ltd. (hereinafter called "the society") pursuant to s. 69 (1)⁴ of the Co-operative Societies Act (Cap. 93) (hereinafter called "the Act"), from the decision of the Registrar of Co-operative Societies dated 23rd December, 1966, on appeal from the award of an arbitrator dated 7th November, 1966, to whom the Registrar had referred a dispute notified to him by the said officers in their letter dated 12th May, 1966.

Section 68⁵ of the Act provides that if any dispute touching the business of a registered society arises between the society or its committee and any officer of the society, such dispute shall be referred to the Registrar for decision. The Registrar, on receipt of such reference, may either decide the dispute himself or refer it for disposal to an arbitrator. Any party aggrieved by the decision of such arbitrator may within two months of the date of the award appeal to the Registrar, and the decision of the Registrar, on appeal or otherwise, is final, subject to a right to appeal to the court. A "court" is defined in s. 2 of the Act⁶ in relation to a registered society of the

4. S. 69: "(1) Any decision of the Registrar under section 68 of this Act or any decision of the Minister on an appeal to him from any decision of the Registrar by virtue of any provisions of this Act, and notwithstanding such provisions, shall be subject to an appeal on a question of law to the court whose decision shall be final."

See Uganda (1970) Act, s. 75 (1).

5. S. 68: "(1) If any dispute touching the business of a registered society arises—

(c) between the society or its committee and any officer of the society... such disputes shall be referred to the Registrar for decision."

Cf. Uganda (1970) Act, s. 73:

"(1) If any dispute touching the business of a registered society arises—

(c) between the society or its committee and any officer or past officer of the society... such dispute shall be referred to the Registrar for decision" (emphasis added)."

6. See Uganda (1970) Act, s. 87.

IT: as MEANING "a subordinate court presided over by a Magistrate"

first class... and in relation to a union of two or more "registered societies" as meaning "the High Court"....

Before dealing with the issues of law raised in the memorandum of appeal, it is necessary to mention briefly the facts as far as they are relevant to this appeal.

The appellants were employed by the society on similar written agreements, incomplete copies of which were admitted at the hearing before the arbitrator. Those agreements cancelled all or any previous agreements and provided that the appellants should devote the whole of their time and ability to serving the society at such places in Uganda or other part of the world as the society might from time to time require. The appellants covenanted to abide by and carry out the reasonable instructions and regulations of the society from time to time in force, and there was a specific stipulation as to the right of the society to terminate the employment of the appellants in cl. 10 (A) (1), reading as follows:

"(A) The union may terminate the employment of the employee—

(1) by giving the employee one month's or three months' notice in writing or without previous notice by crediting him/her in account in its books with one month's or three months' salary as laid down in cl. 11 below."

Clause 11 stipulated that in the case of the appellants their salary scale entitled them to three months' notice or pay in lieu of notice.

Although the service agreements are silent as to the specific duties to be performed by the appellants, they were, in fact, appointed to the posts designated secretary/manager and assistant secretary/manager respectively. According to the Co-operative Societies Rules (Cap. 93), r. 26 (1)⁷ and the society's bye-laws (bye-law 45 was exhibited in the arbitrators' file but not numbered) the society was obliged to appoint a secretary but had discretionary powers to delegate powers of management to a manager or general manager (r. 30⁸ and bye-law 47).

7. R. 26: "(1) The committee of a registered society shall appoint a secretary to the society who may be either a member of the committee or a paid employee of the society provided that in the latter case he shall not become a voting member of the committee."

See Uganda (1971) Regulations, reg. 27 (1).

8. R. 30: "(1) A society may, by a resolution duly passed at a general meeting of the members of the society, authorise the committee, the secretary or the treasurer of such society to delegate all or any of their duties to a competent paid officer or employee of the society."

See Uganda (1971) Regulations, reg. 31.

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It appears to me obvious that although the committee of the society were not empowered to abolish the office of secretary, they were at liberty to dismiss from their employment the individual who had been appointed to that office or to transfer him to some other post in their organisation. They were also at liberty to enlarge or withdraw from the secretary or a manager any delegated powers of management. The designation "secretary/manager" was, therefore, merely a convenient method of signifying that the person so designated was not only the secretary but was also exercising managerial powers. The same principles apply to the assistant to the secretary/manager.

By a letter dated 29th March, 1966, the committee notified the appellants and others that there had been a reorganisation of administrative arrangements and that, as far as relates to this appeal, the offices of secretary/manager and assistant secretary/manager had been abolished with effect from 1st May, 1966. Mr. E. K. Ginadu was to replace Mr. Wakiro as secretary, and Mr. Wakiro was to be appointed coffee manager. Later Mr. Wanda was offered a post as the coast representative at Mombasa, and Mr. Wakiro was offered the post of general manager. The salaries and benefits of the appellants were not in any way affected.

On 30th April, 1966, the appellants and others who were affected by the reorganisation wrote to the society that their posts had been abolished and, in effect, stating that this could not be done without their consent and amounted to a breach of their service agreements. Alternatively, they contended they should have been given three months' notice of termination of their services.

By a letter dated 12th May, 1966, the appellants notified the Registrar of a dispute. In the preamble they accused the members of the committee of having attempted to get rid of them by devious means in general, and in particular by "abolishing their posts" and virtually compelling them to resign. They set out the points of dispute as follows:

- "(a) That some members of the committee have on several occasions gone out to societies and to the public at large and made various baseless allegations verbally, by circulars and by other means, with the purpose of discrediting some members of the union staff in the eyes of the public, and that this practice has resulted in the present tension and muddle which exists between the committee and the staff concerned; and further that this practice cease forthwith and that the allegations made

be withdrawn in writing, as the committee members concerned are responsible for the defamatory damage that has been done to the various members of the union's management.

- (b) That the recent decision of the committee adopted in their meeting of 29th April, 1966, of arbitrarily and unilaterally abolishing the posts of secretary/manager, assistant secretary/manager and information secretary with effect from 1st May, 1966, is invalid.
- (c) That the unilateral abolition of the above posts without due notice to the employees concerned is a breach of service contracts entered into by the Bugishu Co-operative Union Ltd. and the several members of staff concerned, and therefore unlawful.
- (d) That the unilateral introduction of a new administrative set-up has lowered the status of the posts of accountant and mill manager liquorer, and is, therefore, a breach of their service contract with the union.
- (e) That the unilateral declaration of the assistant secretary/manager, Mr. Wanda, as 'redundant' is a breach of service contract entered into between him and the union.
- (f) That, in conducting themselves as indicated above, the committee have not exercised the prudence and diligence of ordinary men of business, by creating a muddle in the administration and management of the business of the union."

By a letter dated 18th May, 1966, the society informed Mr. Wakiro that the society had decided to designate him "General Manager" with effect from that date, but after various meetings and negotiations he refused to accept the post. The society then, by its letter dated 19th July, 1966, formally notified him that his employment was terminated forthwith pursuant to the said cl. 10 (A) (1) and paid him his three months' salary and fringe benefits in lieu of notice.

By a similar letter dated 26th May, 1966, the society terminated the employment of Mr. Wanda, and he also was paid three months' salary and fringe benefits. He had refused to accept the post of coast representative.

At the termination of the arbitration proceedings the arbitrator, Mr. B. B. Codda, in a lengthy award dealt with each of the points of dispute in detail, and then came to the conclusion that the appellants had been legally dismissed by the society pursuant to their written service agreements, and ordered them to pay the costs of the arbitration. The appellants filed a lengthy memorandum of appeal to the Registrar, who in an admirably concise and carefully worded

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decision upheld the conclusion of the arbitrator but set aside the order as to the payment of the costs by the appellants. It is from that decision that the appellants have filed the instant appeal on questions of law.

It has been conceded by Mr. Nabudere [counsel for the appellants] that the appellants were, in fact, dismissed and paid in full pursuant to the terms of their written service agreements. There is, and was at the time the arbitrator made his award, no question of a claim for wrongful dismissal or damages, and all that the appellants could have asked for was some form of declaratory judgment. But as they were no longer officers or employees of the society a declaratory judgment could not have served any useful purpose, even though it may have been some solace to the appellants' injured feelings.

It has been consistently held by the courts, and presumably should be so held by analogy by an arbitrator in settling disputes, that they will not make a declaratory judgment unless it will serve some effective purpose: see *Bennett v. Chappell* ([1966] Ch. 391). It is obvious that no useful purpose could have been served by making a declaration as sought by the appellants, and no order could be made restraining the committee from making false statements about the appellants in relation to the posts they no longer held. Although the reasons adduced by the arbitrator for ruling against the appellants on all six points of dispute were in several instances wrong in law, he was undoubtedly correct in his final conclusions.

This would be sufficient to dispose of the appeal, but as the arbitrator and others do not appear to appreciate correctly the rights of reference under the said s. 68 of disputes to the Registrar, a few comments thereon may not be out of place.

In disposing of the first point of dispute the arbitrator stated:

"I am inclined to believe that the only disputes the Registrar can entertain between an employee and his society are those which involve financial loss and can be determined by reference to the terms and conditions of the service contract or other arrangement between the employee and the society. The plaintiffs did not show that the alleged defamation resulted in any financial loss on their part."

The words "dispute touching the business of a registered society" have not been defined in the Act nor in the comparative s. 68 of the English Friendly Societies Act, 1893, or the Indian Co-

operative Societies Act, 1912. It appears, however, to be generally accepted that even though the words must be strictly construed as s. 68 of the Act ousts the jurisdiction of the courts, the word "disputes" includes all matters which could form the subject of civil litigation, and "touching the business of the society" is not confined to disputes regarding the internal management of the affairs of the society or disputes in regard to the principles which would regulate the conduct of business. It would include, for example, a dispute as to whether the election of certain persons as members of the committee was legal, but it would not include purely personal claims such as a claim for defamation of character by an officer against the committee. The arbitrator does not appear to have been justified in restricting the words to disputes involving financial loss although he would have been justified in confining them to disputes involving legal loss or liability.

In disposing of the sixth point of dispute the arbitrator stated:

"Secondly, as long as the terminations of service were effected under cl. 10 (A) (1) of the service agreement referred to above, the employees were entitled to three months' notice, during which time they would, in my opinion, continue to be union officers. This privilege would, in my opinion, not be invalidated by the fact that three months' pay was given in lieu of such notice. The employees continue to have the privileges of union officers for three months beyond the date of termination of service and could, in my opinion, sue the committee during that time."

It is clear that the appellants' employment was terminated the moment they received the letters of dismissal, and they then ceased to be officers of the society or have any rights as such to refer any disputes to the Registrar pursuant to s. 68 of the Act. It would have been otherwise if they had been given three months' prior notice of termination, as they would in such event have continued to be officers of the society until the period of the notices had expired.

For the above-mentioned reasons the appeal is dismissed. At the time when the Registrar recorded his decision he was obviously not entitled to make a declaratory ruling or issue a mandatory injunction in relation to matters which had ceased to have any practical importance and he rightly dealt with the appeal on the basis that the appellants' only subsisting complaint was that they had been wrongfully dismissed by the society. The appellants have persisted in appealing despite the eminently sound

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decision of the Registrar, and I can see no reason why I should depart from the normal rule of awarding the costs of the appeal to the successful party. The appellants will, therefore, have to pay the respondent's costs of this appeal.

* * *

Problems:

*1. The judgment states that appellants Wanda and Wakiro were dismissed by the respondent society on 26th May and 19th July, 1966, respectively. The appellants notified the Registrar of "a dispute" with the society on 12th May, 1966. The judgment does not state when the Registrar appointed an arbitrator. Is this date important? If the appointment occurred after 19th July was there a dispute over which the Registrar has jurisdiction under s. 68? Under s. 73 of the revised Uganda Act? (See footnote 1 at p. ??? supra.) If the appointment was effective before 26th May does the effective dismissal of the employees remove the dispute from the jurisdiction of the arbitrator under ss. 68 or 73? Could the appellee society seek an order prohibiting the Registrar from performing his duties as soon as the society had dismissed appellants? (See the *Masaka District Growers' Co-operative Union Ltd.* case, *infra* immediately below.)

2. Did the letter of 12th May, 1966, from appellants to the Registrar set out allegations which the Registrar should have investigated under s. 47 (now s. 51)? Section 47 states:

"(1) The Registrar may, of his own motion, ... hold an inquiry or direct some person authorised by him, by order in writing in that behalf to hold an inquiry into the constitution, working and financial condition of a registered society."

What is the difference between "investigation" under s. 47 and arbitration under s. 68?

*3. Do you agree that arbitration under the Co-operative Societies Act is confined to disputes "involving legal loss or liability"? Can the arbitrator act to conciliate the parties to a dispute over "muddled management"?

* * *

(ii) MASAKA DISTRICT GROWERS CO-OPERATIVE UNION LTD. v. MUMPIWAKOMA GROWERS CO-OPERATIVE SOCIETY LTD.

1968 (2) ALR Comm. 81

*Court of Appeal for East Africa,
on appeal from Uganda.*

SPRY, J.A.: This is an appeal from an order of the High Court of Uganda dismissing an application for an order of prohibition.⁹

The appellant is a co-operative society which processes coffee on behalf of its members. Its members

9. The judgment of Sheridan, J., in the High Court of Uganda is reported in [1968] E.A. 630; 1968 (2) ALR Comm. 37.

are also co-operative societies, formed of growers. It would appear that in 1964 some of the member societies expressed dissatisfaction with the management of the appellant, whereupon the appellant expelled one of the member societies and suspended seven others. This is said to have been done in exercise of powers contained in the bye-laws of the appellant.

The societies which had been so expelled or suspended appear to have referred the matter, through their advocates, by letter dated 12th January, 1965, to the Registrar of Co-operative Societies. It is perhaps unfortunate that this letter is not on the record, so that we do not know what action the Registrar was asked to take. The action that he did take was to write a letter, on 16th January to a Mr. V. T. Mitala, a senior co-operative officer, as follows:

"Appointment of an arbitrator Dispute between Masaka District G.C. Union Ltd. and expelled societies

In pursuance of the powers conferred upon me by s. 68 of the Co-operative Societies Act, I hereby appoint you arbitrator of the dispute between Masaka District G.C. Union Ltd. and the societies which have been expelled and others which have complaints with the union.

2. Some of the societies concerned are: Kitibwa Kya Buganda, Anascera Ababe, Kabwangu, Kyamusoke, Manyi, Kyayagaliza Embazzi and Mumpiwakoma.

3. As there is some urgency in this matter, will you please start the work of arbitration with the minimum of delay. Please do inform me of your findings in due course."

On 12th February, Mr. Mitala wrote to the appellant, stating that he had been appointed to settle the dispute between "the expelled societies" and the appellant and fixing 22nd February as the date when he could hear the dispute.

On 15th February, Messrs. Kiwanuka & Co. wrote to Mr. Mitala, drawing his attention to the provisions of r. 42 (2) of the Co-operative Societies Rules (Cap. 93),¹⁰ and asked, if there had been compliance with those provisions, that Mr. Kiwanuka should receive a copy of the order of reference.

10. R. 42: "(1) Where [the Registrar] decides to refer a dispute to arbitration such decision shall be embodied in an order of reference under his hand.

(2) Every order of reference under this rule shall—

(a) specify the name, surname, place of abode and occupation of the arbitrator;

(b) set out the dispute and full particulars thereof; and

(c) limit the time within which the award shall be forwarded by the arbitrator...."

See Uganda (1971) Regulations, regs. 45, 47.

Also on 15th February, the Registrar wrote to Mr. Mitala quoting the summary of the dispute contained in the letter of 12th January. This is as follows:

"Dispute between Masaka District G.C. Union Ltd. and expelled and suspended societies"

Further to my letter No. 389/X.II dated 16th January, 1965, I quote here below the summary of the dispute put forward by the expelled and suspended societies through their lawyers, Messrs. Mayanja, Clerk and Company, in their letter of 12th January, 1965.

(a) Our clients allege that the affairs of the union are being or have been mismanaged, and particularly that the amount of coffee sold to the Coffee Marketing Board in the 1962-1963 season was greater than the amount shown in the union's balance-sheet for that year. Our clients further challenge the balance-sheet for that season on several other important items on which they are ready and willing to give evidence.

(b) Our clients complain that when, in accordance with the union's bye-laws, they drew attention to the matters stated in (a) above, the union retorted by expelling Mumpiwakoma and suspending seven other primary societies. The expulsion and suspension, it is contended, were harsh and illegal in that they were contrary to the rules of natural justice."

The letter also contained the names of the societies that had been expelled or suspended, including the four respondent societies. Mr. Mitala sent a copy of this letter to Messrs. Kiwanuka & Co., the advocates for the appellant, on 10th March.

Meanwhile, on 9th March, Messrs. Binaisa, Mboijana & Co., who had then been instructed to act for what, for convenience, I shall refer as to the expelled societies, wrote to the Commissioner for Co-operative Development, who is also the Registrar of Co-operative Societies, pointing out that, in appointing an arbitrator, he had failed to define the disputes to be determined, and offering to assist in framing terms of reference. He also objected to the choice of arbitrator, saying that the members of the Co-operative Department were too closely involved in all these matters, and asking for the appointment of an independent arbitrator.

On 11th March, Messrs. Kiwanuka & Co. wrote to Mr. Mitala saying that it could seem that there had been no order of reference as envisaged by r. 42 (1) of the Co-operative Societies Rules, adding that full particulars of the dispute had to be given.

On 17th March, Mr. Mitala wrote to Messrs. Binaisa, Mboijana & Co. and in the course of his letter remarked:

"You will note that the Registrar of Co-operative Societies only furnished me with the summary of the dispute, but not the full details. But now Messrs. Kiwanuka & Co. want to know (and I feel they are rightly entitled to know) the details and particulars of the summary of the dispute as contained in the Registrar's letter."

Messrs. Binaisa, Mboijana & Co. replied on 6th April, setting out five matters on which information was sought regarding the receipts and expenditure of the appellant.¹¹

Many other letters were exchanged, but I think those I have cited are sufficient for the purposes of this appeal. In spite of the objections that had been taken, Mr. Mitala sat on various dates, at wide intervals, and heard evidence and argument.¹² As

11. The opinion of Sheridan, J., sets out the following: "Mr. Mboijana's letter to Mr. Mitala, dated 6th April, 1965, copy to Mr. Kiwanuka, the relevant part of which reads:

"The following are some of the specific issues which will be raised at the hearing:

- (a) The disbursement of Shs. 313,988/38 by the union by way of wages and allowances required full explanation by the union management, and the societies were entitled to query this expenditure and ask for full particulars and the powers under which the union management acted in incurring such an expenditure.
- (b) The societies were entitled to know and would like to know the proceeds realised from the triage, taking into account the coffee tonnage produced during the period in question.
- (c) The societies were entitled to know and would like to know how and on what consideration did the union management organise the transportation of the union's coffee from Masaka to the Coffee Marketing Board. And further they would like to know how the transport proceeds paid by the Coffee Marketing Board were disbursed by the union management. The societies complained and will contend at the hearing that the union management showed favouritism and deviated from past practice, thus causing loss to both the union and component societies.
- (d) The societies were entitled to dispute and disagree with the misleading statements contained in the chairman's report for the period from March, 1963, to March, 1964, particularly in regard to grading and prices of the union's coffee. And the union management was wrong in rejecting the societies' contentions, which were supported by figures from the Coffee Marketing Board.
- (e) The union was and is entitled to know why there was a difference in tonnage of coffee between the figures given in the balance-sheet and the figures of the Coffee Marketing Board of approximately 265 tons.

The above are some of the issues the societies intend to raise at the hearing. These issues have been the subject-matter of dispute between the union, officials and the respective societies. The union's advocate should or ought to have been sufficiently briefed on them. They cover items (a), (b) and (c) in paragraph 4 of your letter. All the accounts touching the matters in dispute are in the custody of the union; the societies would like to have these accounts produced at the hearing, particularly detailed account in touching the statements contained in (a), (b) and (c) above." (Ed.)

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NOTE: footnote 12
APPEARS ON NEXT PAGE

the arbitration developed. Messrs. Binaisa, Mboijana & Co. appear to have made various requests for particulars. Most of them relate to accounting matters, but in addition, among other matters, there was a request for the production of all minutes of general meetings of the appellant since its incorporation and for: "Particulars of the houses or premises purchased by the union and tenants now in occupation and the rents realisable therefrom." This immediately led to a complaint by Messrs. Kiwanuka & Co. that the original issues were being ignored and new issues introduced. However, after more correspondence, the Registrar, on 10th July, wrote to the manager of the appellant in purported exercise of the powers conferred on him by s. 24 of the Co-operative Societies Act (Cap. 93)¹³ requiring him to produce various documents and particulars to Messrs. Binaisa, Mboijana & Co. This order was not complied with, and after more correspondence Messrs. Binaisa, Mboijana & Co., on 19th November, issued a notice to Messrs. Kiwanuka & Co. requiring them to produce the documents and particulars to

12. The opinion of Sheridan, J., sets out the following facts:

"On 9th April, 1965, Mr. Mitala sat for the first time, but I am informed that the proceedings were confined to a discussion about the procedure to be adopted. The next hearing did not take place until 25th and 26th January, 1966. Meanwhile, there was a considerable wrangle between the parties, as reflected in further letters, with the applicants showing reluctance to produce all their books, including the balance-sheet, and with Mr. Kiwanuka threatening to remove the matter to the High Court but not, in fact, doing so. The copy of the minutes of the second hearing records Mr. Kiwanuka as saying at the outset:

'Mr. Kiwanuka quoted the Co-operative Societies Rules (Cap. 93), r. 42 (2) (b), which provides that—"every order of reference under this rule shall... (b) set out the dispute and full particulars thereof..." Mr. Kiwanuka said that there had been no reference complying with this rule and the particulars were not known. The arbitrator did not agree to the reference given to them by the Registrar and they had already participated in this arbitration. Mr. Kiwanuka said that it was a statement which he had made.'

Mr. Kiwanuka, having made his protest, seemed content to continue to participate in the arbitration. In fact, it was not until the fourth hearing, on 13th to 15th September, by which time the typewritten copy of the proceedings had run to nearly 200 pages, that Mr. Kiwanuka, objecting to an order to produce books about a building which the applicants had erected in Masaka brought the proceedings to a halt by applying for the order of prohibition." (Ed.)

13. S. 24: "Any officer, agent, servant or member of a registered society who is required by the Registrar or any person authorised in writing by the Registrar, so to do, shall, at such place and at such time as the Registrar may direct, produce all moneys, securities, books, accounts and documents the property of or relating to the affairs of such society which are in the custody of such officer, agent, servant or member and which are under his control."

See Uganda (1970) Act, s. 28.

Mr. Mitala. It is not clear from the record what happened during the ensuing months, but it appears that on 14th September, 1966, Mr. Mitala made an order directing the appellant to produce books and papers relating to a house in Masaka alleged to have been purchased by the society. Messrs. Kiwanuka & Co. then applied, under the Law Reform (Miscellaneous) (Rules of Court) Rules (Cap. 74), for leave to apply for an order of prohibition, and this was granted on 17th September, 1966. The relief sought was an order stopping Mr. Mitala from performing the duties of arbitrator or, in the alternative, an order prohibiting him from introducing new matters over and above those mentioned in the letter of 16th January, 1965, from the Registrar.

The application was heard and dismissed by Sheridan, J., who held, first that the letter of 16th January, 1965, read with the subsequent correspondence, "sufficiently defined the dispute"; secondly, that even if the arbitrator permitted the introduction of matter not strictly within the order of reference, that was a matter that could be cured on appeal; and, thirdly, that while the order of reference did not limit the time within which an award should be made, as it should have done, the proper remedy was by way of appeal, not prohibition.

At the hearing of the appeal, Mr. Kiwanuka, who appeared for the appellant, submitted that, as there never was an order of reference which complied with r. 42, Mr. Mitala never had jurisdiction to act as an arbitrator and, therefore, an order of prohibition should have issued as of right. Mr. Kiwanuka pointed out that objection had been taken from the start, and he argued that the participation of the parties in the subsequent proceedings could not give jurisdiction where none existed.

Mr. Mboijana, for the respondents, argued that the requirements of r. 42 serve two purposes: in the first place, they enabled the appointment of arbitrators, and, in the second, they clarify the issues in the absence of pleadings. He submitted that the letter of 16th January, 1965, effected the appointment of Mr. Mitala as arbitrator and that that letter, read with the letter of 15th February, 1965, constituted the order of reference. The other correspondence was intended to narrow the field of dispute, was procedural and could, therefore, be agreed. Mr. Mboijana conceded that r. 42 (2) (c) had not been complied with, but argued that this was an irregularity not going to jurisdiction.

I am reluctant to criticise the Registrar, who is not a party to the appeal and has not had the

with Mr. Kiwanuka's statement, because both parties had agreed

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opportunity to defend his actions; but I cannot but think that much of the difficulty that has arisen is due to his failure at the start to consider sufficiently whether this was a case for arbitration and, if so, whether he had the material to make an order of reference. This is particularly unfortunate in that the attention of the Registrar and that of Mr. Mitala were expressly drawn, by both sides, to the requirements of an order of reference. It is true that s. 68 of the Act is expressed in wide terms, but it relates only to disputes and in this context a dispute can, I think, only exist where one party is averring something which is denied by the other. I think there may have been a dispute in this sense in the present case as to whether the respondents had properly been expelled or suspended from the union, although even here the issue was never clearly defined. A balance-sheet was also challenged, but this would seem to have been a complaint calling for an investigation rather than a dispute capable of being determined by arbitration. Indeed, I cannot help thinking that the Registrar did not clearly distinguish between his powers under s. 47 and those under s. 68.¹⁴

However that may be, the main question that we have to consider is whether or not there was a valid appointment of an arbitrator. If there was, an application for prohibition would be in the discretion of the court, and having regard to the long acquiescence by the appellant in the arbitration proceedings, I would think that the learned judge was right to refuse the application in the exercise of that discretion. If, however, the appointment was had and there can be said to be a patent lack of jurisdiction, the appellant is entitled to an order as of right (see

Farguharson v. Morgan ([1894] 1 Q.B. 552) and no amount of acquiescence will affect that right (see *Buggin v. Bennett* ((1767) Byn. 2035; 98 E.R. 60). Incidentally, there is no presumption of jurisdiction (see *Christopher Brown Ltd. v. Genossenschaft Oesterreichische Waldbesitzer Holz-Wirtschaftsbetriebe GmbH* ([1954] 1 Q.B. 8).

In my view, where there is a statutory power to appoint an arbitrator, there must be reasonably strict compliance with the statutory requirements, and in default the arbitrator has no jurisdiction.

Taken by itself, the letter of 16th January, 1965, could not possibly be regarded as an order or reference, and even read with the letter of 15th February, 1965, it still, in my opinion, falls far short of what is required. Rule 42 (2) (b) requires an order of reference to "set out the dispute and full particulars thereof". All that was furnished to Mr. Mitala was a statement of vague allegations, such as "mismanagement". Even if one were to take the view that the dispute was as to the propriety or otherwise of the expulsion and suspension of the societies, it could not be said that "full particulars" were given. The letter does not even give the grounds on which the appellant purported to expel and suspend member societies. Furthermore, there was no compliance with r. 42 (2) (c), which requires an order of reference to limit the time within which the award is to be made. I am inclined to agree with Mr. Mboijana that failure to comply with paragraph (c) would not of itself be fatal, because it is a matter which could so easily be put right, but the failure to comply with paragraph (b) goes, in my opinion, to the root of the matter. I cannot agree with Mr. Mboijana that the appointment of the arbitrator and the particulars of the dispute are severable. It is the order of reference that constitutes the appointment and an order of reference which does not specify the dispute is, in my opinion, a nullity.

It is unfortunate that so much time and money has been wasted, but that cannot influence the decision. If, as I think, there never was an order of reference, the appeal must succeed. The fact that the appellant appeared, under protest, before Mr. Mitala cannot have given him jurisdiction under the Act, nor can a submission under the Arbitration Act (Cap. 55) be implied, since Mr. Mitala clearly purported to act under the Co-operative Societies Act (Cap. 93). That being so, I think Mr. Kiwanuka was entitled to ask for an order of prohibition as of right. It is, therefore, unnecessary to consider the alternative submission.

14. S. 47: "(1) The Registrar may, of his own motion, and shall on the direction of the Minister or on the application of a majority of the committee, or of not less than one-third of the members present at a meeting of the society which has been duly advertised, hold an inquiry or direct some person authorised by him by order in writing in that behalf to hold an inquiry into the constitution, working and financial condition of a registered society." [Emphasis added.]

S. 68: "(1) If any dispute touching the business of a registered society arises—

... such disputes shall be referred to the Registrar for decision.

(3) The Registrar may, on receipt of a reference under sub-section (1) of this section—

(a) decide the dispute himself; or
(b) refer it for disposal to an arbitrator or arbitrators.

(5) Any party aggrieved by the award of an arbitrator may appeal therefrom to the Registrar within two months of the date of the award." [Emphasis added.]

See Uganda (1970) Act, ss. 51, 73.

I would allow the appeal, set aside the order of the High Court and substitute an order prohibiting Mr. Mitala from proceeding in the matter of the purported arbitration. I would award the appellant the costs of the appeal and its costs in the High Court. We were not asked to make any order as to the costs of the abortive proceedings before Mr. Mitala, and I would make none.

DE LESTANG, V.-P.: I have had the advantage of reading in draft the judgment of Spry, J.A., and I agree with it. I only wish to add a few words of my own.

The question in this appeal is whether the reference to the arbitrator was a nullity, in which case prohibition would issue *ex debito justitiae*, or a mere irregularity curable by acquiescence, in which case prohibition would be discretionary. An arbitration of the kind under reference is a statutory arbitration governed by s. 68 of the Co-operative Societies Act (Cap. 93) and rr. 42 and 43 of the Co-operative Societies Rules made under the Act. By s. 68 of the Act it is provided that any dispute touching the business of a registered society shall be referred to the Registrar for decision, and the Registrar is given a discretion either to decide the dispute himself or refer it for disposal to an arbitrator. Rule 42 provides that if the Registrar decides to refer the dispute to arbitration, his decision shall be embodied in an order of reference under his hand, and that—

"Every order of reference under this rule shall—

- (a) specify the name, surname, place of abode and occupation of the arbitrator;
- (b) set out the dispute and full particulars thereof; and
- (c) limit the time within which the award shall be forwarded by the arbitrator...."

The Registrar's letter of 16th January, 1965, purporting to refer to an arbitrator a dispute between the respondents and the appellant, complies with none of the requirements of r. 42. It does not state the place of abode of the arbitrator, which is required in paragraph (a); it does not say what the dispute is about, which is required by paragraph (b); and it does not limit the time within which the award shall be made, as required by paragraph (c). *The failure strictly to comply with paragraphs (a) and (c) is probably not fatal, but the failure to comply with paragraph (b) is a fundamental omission going to the root of the arbitrator's jurisdiction.* Accordingly, if the letter of 16th January, 1965, is alone to be looked at, the reference is, in my view, clearly a nullity as it fails to state what the dispute

is which the arbitrator must decide. Is the position any different if it is read with the letter of 15th February 1965? That letter purports to give a "summary of the dispute", while r. 42 requires the reference to "set out the dispute and full particulars thereof". The summary itself is of the vaguest nature, and it is this vagueness which is directly responsible for the long delays which have occurred and which eventually led to the application to the court for an order of prohibition. The only matter referred to in that letter which could possibly qualify as a dispute between the member societies and their union is that concerning their expulsion or suspension, as the case may be, from the union, but even this is linked up with the allegation of mismanagement which, in the words of the learned judge below, "covers a multitude of sins". So even if both letters are read together, still, in my view, they do not constitute a proper reference, because paragraph (b), a fundamental requirement of r. 42, has not been complied with. *It seems to me that the respondents' complaints were matters more proper for investigation than for arbitration.* In any case it was impossible for the arbitrator to know exactly what was in dispute between the parties, and as a result he seems to have thought that he had unlimited powers to enquire into every aspect of the affairs of the union which the member societies might challenge under the umbrella of mismanagement. This is a direct result of the failure of the Registrar to comply with the rules.

I would accordingly hold that the reference is a nullity and that prohibition should issue. There will be an order in the terms proposed by Spry, J.A.

LAW, J.A.: The facts are fully set out in the judgment of Spry, J.A., and need not be repeated. It is unfortunate that the question whether prohibition would lie in this case was not fully canvassed either in the High Court or before us. At first sight it appeared to me that prohibition would not lie to an arbitrator (*see Turner v. Kingsbury Collieries Ltd.* ([1921] 3 K.B. 169) but the position in Uganda is governed by s. 34 of the Judicature Act, 1967. By sub-s. (1) of that section: "The High Court may make an order... of... (b) prohibition, prohibiting any proceedings or matter..." It is difficult to imagine wider or more general words, and there would appear to be no reason why, in Uganda, prohibition should not issue to prohibit proceedings before an arbitrator in a proper case. The question then arises whether the appellant was entitled to an order of prohibition as of right, or whether Sheridan,

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J., had a discretion in the matter. This depends on whether the proceedings were a nullity *ab initio*. Mr. Kiwanuka for the appellant submitted that the order of reference was so defective as to result in a total absence of jurisdiction. By r. 42 (2) of the Co-operative Societies Rules an order of reference shall—

- “(a) specify the name, surname, place of abode and occupation of the arbitrator;
- (b) set out the dispute and full particulars thereof; and
- (c) limit the time within which the award shall be forwarded by the arbitrator....”

As to (c), the reference only says that the matter is urgent and that the work of arbitration should be started without delay. This is not a sufficient compliance with the rule, but I agree with Spry, J.A., that this defect is not fundamental and does not go to jurisdiction. The appellant's objection under paragraph (b) is much more substantial. The arbitrator is merely asked to inquire into a dispute which is not particularised at all, and the parties to the dispute are not correctly described. Had matters stood there, I have no doubt that the order of reference would have been a nullity. Some particulars of the dispute, and a correct description of the parties, were however supplied later by the Registrar at the request of all the parties. These provided a basis upon which the arbitrator was able to start work, and he, in fact, sat on several occasions with representatives of the appellant and respondents present and participating. In these circumstances the irregularities in the original order of reference have to some extent been cured, and I see no reason to differ from the learned judge's decision to treat the matter as one within the scope of the exercise of his discretion. In the words of McCardie, J., in *Turner v. Kingsbury Collieries Ltd.* ([1921] 3 K.B. 169 at 182):

“Upon the whole I come to the conclusion, though not without doubt, that upon the circumstances of the present case the grant of a writ of prohibition would be discretionary part from the preliminary point. No error is here, I think, apparent on the face of the record within the technical meaning of those words.”

One of the factors which caused McCradie, J., to exercise his discretion against ordering prohibition was that the legislation he was considering provided for a right of appeal from the decision of the arbitrator. In the same way Sheridan, J., in the case now under consideration, had in mind, in

exercising his discretion, that by s. 68 (5) any party aggrieved by the award of an arbitrator may appeal therefrom to the Registrar, and by s. 69 a further right of appeal is prescribed to the court on points of law [see Uganda (1970) Act, ss. 73, 75]. Sheridan, J., was also influenced in deciding how to exercise his discretion by the fact that so much work had been done and time expended by the arbitration, with the participation of the parties. It has not been shown to my satisfaction that he wrongly exercised his discretion in refusing to order prohibition.

I would dismiss this appeal.

* * *

Note:

On the question whether or not prohibition would lie in this case, Sheridan, J., stated in the court below:

Prohibition lies only for excess or absence of jurisdiction. It does not lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings: see *11 Halsbury's Laws of England* 3rd Edition, at 114, paragraph 213. I do not agree with Mr. Kiwanuka's submission that it lies as of right, as there is no defect of jurisdiction apparent on the face of the proceedings: *ibid.* at 115, paragraph 214. It is a discretionary remedy, and the court may decline to interpose by reason of the conduct of the party. Mr. Kiwanuka relies on *Farquharson v. Morgan* ([1894] 1 Q.B. 552) as authority for the proposition that acquiescence in the exercise of jurisdiction by the inferior court is no bar to the issue of prohibition, but in that case there was a total absence of jurisdiction apparent on the face of the proceedings, which is not the case here.

On the other hand, in *Mouflet v. Washburn* ((1886) 54 L.T. 16), Hannen, P., following Erle, J., in *Jones v. James* ((1850) 14 L.T.O.S. 424) decided that the defendant, by once appearing before the county court judge, had waived the right of examining into the process by which he had been summoned to appear, and that a subsequent application by such defendant for a writ of prohibition to prevent the judge of the county court from proceeding in such suit must be refused. A court may also decline to interpose if there is a doubt, in fact, or law whether the inferior tribunal is exceeding its jurisdiction or acting without jurisdiction: *11 Halsbury's Laws of England*, 3rd Edition, at 116, paragraph 215. I entertain such a doubt.

The only other matter is that the order of reference did not limit the time within which the award should be forwarded by the arbitrator, as is made mandatory by r. 42 (2) (c) of the rules. I agree that it should have done so, but the applicants' proper remedy was to appeal, and not to apply for a prohibition.

Note how Sheridan, J., distinguishes *Farquharson v. Morgan* and compare his opinion with that of Spry, J.A.

* * *

Problems:

1. What steps should the Registrar have taken on receiving the appellee's letter of 12th January?
- *2. What should counsel for the respondent have done when he realised that the Registrar's order of reference of 16th January was probably a nullity? What steps could counsel have taken before 16th January to forestall the problem which arose in this case?

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3. Does De Lestang, V.-P., agree with Spry, J.A., that "an order of reference that constitutes the appointment and an order of reference which does not specify the dispute is... a nullity"? Do De Lestang, V.-P., and Law, J.A., agree that the letter of 15th February could cure the earlier defect and disagree only on whether or not this later letter spelled out the dispute in sufficient detail? If so, what is the holding of the Court of Appeal?

*4. Why should failure to comply with r. 42 (2) (a) or (c) "probably" not be fatal, while failure to comply with r. 42 (2) (b) is "fundamental"? Is it not just as easy to "put right" the omission of the full particulars of the dispute as the omission of the "place of abode" of the arbitrator or the time within which he should give his award?

5. What happened to the Registrar's order of 10th July under s. 24 of the Uganda Act (now s. 28) requiring the officers of the appellant to produce documents in their custody? Does the arbitrator's lack of jurisdiction excuse the appellant's officers from their failure to comply with this order?

*6. Did the presence of lawyers prolong this dispute?~

* * *

(iii) **REPUBLIC v. CO-OPERATIVE
DEVELOPMENT COMMISSIONER**

EX PARTE KABUTHI

[1969] E.A. 168

High Court of Kenya.

TREVELYAN, J.: This is an application by Stanley M. Kabuthi and James K. Gatimu (whom I shall refer to as "the applicants" for Muthii Mithamu is now dead) that an order for mandamus shall go to the Commissioner for Co-operative Development directing him to exercise his powers under s. 80 of the Co-operative Societies Act (Cap. 490) either to appoint an arbitrator or arbitrators to determine the disputes which they say exist between them and a certain co-operative society, or to refuse to make such appointment. (I shall refer to the Commissioner as "the Commissioner" and to the Act as "the Act".)

A reference was submitted to the Commissioner on 10th August, 1967, but though on 26th April, 1968, he wrote to say that an order appointing a certain advocate in respect of it had that day been signed and forwarded to him, that, says learned Senior State Counsel, is not so. Why the letter was written, and in what circumstances, I do not know, but that the Commissioner allowed the matter to drag on for months is, to my mind, indefensible. He thought he had a duty to perform and it is for comment that instead of doing what he thought the law required, him to do he felt it necessary to

oppose this application instead. But he has opposed the application, and, as will appear, he has (subject as will be stated) succeeded in his opposition.

It has been argued on the authority of *R. v. Reg. of Joint Stock Companies* ((1889) 21 Q.B.D. 131) that mandamus ought not to be granted where another remedy is provided which is not less convenient, beneficial and effectual. I agree. There are, indeed, other authorities to the same effect. But no other remedy exists to make the Commissioner carry out his statutory duties if he refuses to perform them. State Counsel referred to Short and Mellor's *The Practice of the Crown Office*, 2nd Edition, at p. 202 (1908), where it says:

"It is somewhat difficult to reconcile all the cases on this point, although it seems that the general principle running through all of them is, that where in the absence of any other equally appropriate remedy, a statutory obligation is cast upon servants of the Crown to do some ministerial act necessary to enable a claimant to make good his claim to relief, mandamus will issue, but it must clearly appear that the statute imposing the obligation does create a duty towards the applicant."

At all events I am dealing with the application.

Section 80 (4) of the Act provides that:

"The Commissioner shall, on receipt of a reference under sub-section (1) of this section, and on being satisfied that a dispute exists, refer it for determination to an arbitrator or arbitrators... in the prescribed manner: Provided that—

...
(ii) where any of the parties insist on being represented by an advocate, the Commissioner may refuse to act under this section..."

He received a reference and thought that a dispute existed. Apart from the delay, though he now tries to explain it away and to say that he did not refuse to act, his affidavit states that the claims made by the applicants are made by them as employees rather than as members of the society as such, so that "... the same are not a dispute as defined in section 80 of the said Act". Strictly speaking, therefore, as he received a reference, knew that the parties insisted on representation and was satisfied that a dispute existed, he was duty bound to refer it to arbitration or to say that he would not do so, which he did not do, and when one also bears in mind the contents of his affidavit it is idle for him to contend that he did not refuse to act.

Section 80 (1) and (6) of the Act provide: "(1) If any dispute concerning the business of registered society arises—... (b) between members... and the

society... it shall be referred to the Commissioner... (6) The award of the arbitrator shall be final..." The applicants say that there are disputes within (b) aforesaid, but they recognise that some of their claims are by themselves as employees rather than as members of the society. It must, then, first be decided what disputes are within the contemplation of the Act.

Various authorities were referred to the court and these, and others, have I consulted though, in the end, it is the language of the Act that must be interpreted. Moreover it must not be forgotten that, except for one decision, that of my brother Mosdell, J., to which I shall again be referring, the others are upon different enactments. In relation to Friendly Societies, 18 Halsbury's Laws of England, 3rd Edition, at pp. 64 and 65, states:

"121. Provisions in rules for settling disputes... Every dispute falling within certain categories must be decided in the manner directed by rules of the society...."

123. Classes of dispute... Such dispute must have relation to the membership of the member. ... Disputes between a society and a member not in his capacity as member, for example, a claim by a society against one of its officers for misappropriation of funds... are not disputes within this case...."

In *Morrison v. Glover*, Pollock, C.B., had this to say ((1849) 4 Ex. 430 at 444; 154 E.R. 1281 at 1287):

"On consideration we are of the opinion, that if any other rule be established than this, that matters in difference between the society and its members, in the character of members, can alone be referred to arbitration; if we go one step beyond that, then extraneous matters of any kind, which may happen to be in dispute between the society and any of its members, ought to be the subject of a reference. It appears to us, therefore, that the words 'matters in dispute' must be real matters in dispute between the society and its members as members, and not in any other capacity. Such being our opinion, this plea, which sets up the necessity of a reference to arbitration as a bar to the whole of the plaintiffs' cause of action (part of which clearly was not a matter in dispute between the society and the defendant as a member, if the rest was) is a bad plea. The demurrer must, therefore, be allowed, and the plaintiffs are entitled to judgment."

In those days rules of pleadings were more strict than in this day and age, and where some claims in a reference are "disputes" and some are not an application for mandamus would not today fail simply because of that. It was, however, argued

before me that as multiplicity of proceedings is for avoiding, if there be disputes both within and without the Act, then all of them should be tried in the ordinary way before the courts. In support of this contention I was referred to *Turnock v. Sartoris*, where Cotton, L.J., said ((1889) 43 Ch.D. 150 at 156):

"Then it was contended that at all events the question arising under the lease was the principal matter in dispute, and that it ought to be referred, leaving the action to proceed only as to matters not arising under the lease. I think that such a course would not be right. It cannot be right to cut up this litigation into two actions, one to be tried before the arbitrator, and the other to be tried elsewhere."

The facts of that case were, however, very different from those before this court. There was a lease and not all the disputes arose out of it, so that it was, with respect, right to cut the litigation up. But where a statute says that certain matters are to be dealt with in a certain way, that is how they are to be dealt with and there must be a separate trial for extraneous disputes.

Not a great deal of help is to be got from *Western Suburban & Notting Hill Permanent Benefit Bldg. Socy. v. Martin* ((1886) 17 Q.B.D. 609). The word "dispute" was statutorily defined. But it is worth quoting something said by Fry, L.J. (at p. 617):

"There are three sorts of disputes which may occur between a building society and one of its members; first, disputes arising out of the social contract; secondly, disputes collateral to the social contract, such as those arising out of mortgages between the society and its members; and thirdly, disputes entirely extraneous to the social contract, such as a dispute in respect of work done by a member for the society."

The case of Mosdell, J., to which I have referred is *Kavoloto v. Lukenya Ranching & Farming Socy. Ltd.*,¹⁵ which was a claim for damages for wrongful dismissal. In it the learned judge said:

"The plaintiff is suing the defendant society not as a member but as an ex-employee, his status of member, *qua* the suit, being in my opinion, merely co-incidental.

Lastly, I am doubtful if a dispute between an ex-

15. High Court of Kenya, Civil Case No. 931 of 1966, Unreported. The decision of the Court of Appeal in that case is reported in [1970] E.A. 414. See the Note following the *Gatanga Coffee Growers' Co-operative Society Ltd.* case, p. (???) *infra*.

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employee and the defendant society can be 'a dispute concerning the business of a registered society'. The business of the defendant society appears to me to be concerned with farming and its produce and not with the terms of the plaintiff's contracts of employment with the defendant society."

It is my view that the language of Pollock, C.B., in *Morrison v. Glover* is particularly for adoption. Section 80 (1) (b) of the Act refers to disputes between members (and past or deceased members) and, not merely the society, but its committee or any officer of the society as well. It seems to me that the sort of dispute which it contemplates (which must "concern the business of" the society) must be of a domestic nature, i.e., between a member as such member and the society, its committee or officers as such society, committee or officers respectively. Moreover, by s. 80 (2) a claim by a society for a debt or demand due to it from a member or past member, etc., is declared to be a dispute. This, I think, goes to show that (save as provided for) debts and demands due are not disputes within the Act.

Applying the foregoing to the five heads of reference, none is a dispute within the meaning of the Act. The applicants admit that three of them are made as employees, or rather ex-employees, rather than as members, another is for dues for coffee, which is, therefore, in respect of a debt or demand, and the fifth, which reads "Generally but without prejudice to the foregoing. The manner in which the society's business is being run by the committee", does not seem to me to be a "dispute" at all.

There was a time when the Commissioner, having had the reference and being satisfied that a dispute existed, should have appointed or refused to appoint an arbitrator or arbitrators, but later he had second thoughts about it and now I have found that no dispute exists. The order is, therefore, discharged. Each party will bear its own costs. The applicants sent their reference to a public officer whom they were entitled to assume knew his duties. He, apart from the great and unwarranted delay, led them to believe that they had taken the right course. They then took what appeared to be the only procedure open to them, after which the Commissioner, for the first time, took the point that there was no dispute within the Act.

* * *

Problems:

1. Are the applicants now without a remedy in their dispute?
- *2. If there had been a dispute within s. 80 should a writ of mandamus have been issued? What test would the court have applied?
- *3. If the Commissioner had acted promptly and the arbitrator given an award could the losing party raise the issue of lack of jurisdiction? Where would he raise this issue? Would it matter that he had participated willingly in the arbitration?
4. If the parties could show that the Commissioner had, in fact, written a letter appointing an arbitrator, would this affect the decision given?
- *5. Do you agree that, except as provided in s. 80 (2), debts and demands due by members to the society are not disputes within the Act? What rule of legislative construction is being applied by the court? (See the opinion in the *Gatanga Coffee Growers' Co-operative Society Ltd.* case, p. ??? *infra*.)
6. What is the relevance of s. 80 (4) (ii) to the argument of Trevelyan, J.?
7. Why should a dispute between members and a society be of a "domestic nature" as long as the dispute concerns the "business" of the society? Is this because courts will construe narrowly any legislative attempt to oust their jurisdiction? What should the legislature do to clarify the scope of jurisdiction granted to the Commissioner and arbitrators?

* * *

Note:

In *Williams v. Mekanjuola and others* (unreported, High Court, Osgobo Judicial Division, Western State, Nigeria. Suit No. MOS/23/70) plaintiff, a dismissed manager of a co-operative society, sought an order restraining defendants from taking any further steps under s. 51 of the Co-operative Societies Law (the equivalent of Kenya, s. 80). At the time the motion was filed the Registrar (first defendant) had already appointed an arbitrator. The court found that there was nothing left for the Registrar to do once he had appointed an arbitrator so that there was no act which the court could restrain. (But *quære*: could the court restrain the Registrar from acting under s. 51 (4), which states: "The Registrar may of his own motion or on the application of a party to a reference, revise any decision thereon by an arbitrator to whom it was referred"?). The court also dismissed the motion as to the other defendants. The second and third defendants, officers of the co-operative society, had no functions to perform under either the law or the regulations; the fourth defendant, the co-operative society, should not be restrained from proceeding with the arbitration because it ran a greater risk of damage than the plaintiff. The plaintiff's case against the Registrar was that it was against the law and natural justice for the Registrar to be present at the meeting of the society during which the plaintiff was dismissed. The court found no provision in the law on whether or not the Registrar could attend meetings and in respect of the claim on natural justice the court stated:

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"As for his presence being against the rule of natural justice this may be so only if he influenced the declaration of the dispute and later sits in judgment to decide it. In the instant case, the minutes of the meeting, though showing him to be present, does not show him as having taken part in the decision to declare a dispute. I have no doubt, however, that being present he must have listened to all the discussions. But this, in my view, is not a violation of the rule of natural justice.

I cannot also see any evidence of bias. In fact, though the first defendant/respondent has the right under section 51 (2) (a) of the law to decide the dispute himself, he rather referred it to an arbitrator. If anything, I consider this to be evidence that the first defendant/respondent does not intend to be unfair to the applicant. The allegation of bias and undue influence is, in my view, unfounded.

But whether his presence was against the rule of natural justice or not, is not the point now under consideration because I am not being asked to nullify an act contrary to the rule of natural justice but to restrain the doing in future of a contemplated act."

(Quære whether plaintiff could still seek relief "undoing" the steps already taken by defendants under s. 51.)

* * *

(iv) **GATANGA COFFEE GROWERS'
CO-OPERATIVE SOCIETY LTD.**

v. GITAU

[1970] E.A. 361

High Court of Kenya.

SIMPSON, J.: The appellant, the Gatanga Coffee Growers' Co-operative Society Limited, deduced from sums due to the respondent, a member of the society, in respect of coffee sold and delivered to it by him the sum of Shs. 2,186/07 being one-half of a deficiency in the society's funds for which it held the respondent and his successor in the office of treasurer to be responsible.

The respondent sued the society for this amount in the Resident Magistrate's Court in Nairobi being simply a claim for the balance due in respect of coffee sold and delivered by him to the appellant.

The society pleaded lack of jurisdiction and this was argued as a preliminary point. Having decided this against the society the magistrate proceeded to give judgment for the respondent.

It is against this judgment that the appellant now appeals solely on the grounds of jurisdiction and relying on the provisions of s. 80 (1) and (2) of the Co-operative Societies Act (Cap. 490)....

The magistrate based his decision on the form of the pleadings. In its defence the appellant had denied liability on the ground that it had rightly set off against his claim the loss for which it held the respondent responsible. The magistrate held that as this loss could not be pleaded by way of set-off there was no defence on the pleadings to the plaintiff's claim. If there was no defence there was no

dispute. If there was no dispute s. 80 was not applicable.

I think with respect that the magistrate misdirected himself. The validity or otherwise of the defence can hardly be material to the question whether or not a dispute exists. Moreover, he appears to have overlooked the fact that the defence included a denial that any balance was due by the society.

On behalf of the respondent it was strongly contended that there was no dispute within the meaning of s. 80 of the Co-operative Societies Act.

As I understand counsel his contention was that if a plaintiff claims a sum of money and the defendant admits the facts giving rise to the claim there is no dispute even though the defendant files a defence denying liability.

There may be no dispute as to the facts on which the claim is based but clearly there is a dispute as to liability to pay.

The word "dispute" is not defined in the Act. It is not a technical term and must be given its ordinary, natural meaning.

In this case the plaintiff claims Shs. 2,186/07 "being the balance due in respect of coffee sold and delivered to the defendant company by the plaintiff at the defendant company's request and on its behalf" and states:

"Despite demand and the plaintiff's written intimation of his intention to sue in default of payment the defendant company refuses and/or neglects to pay."

The mere filing of this plaint raises an inference that there is a dispute between the plaintiff and the society. It is hardly likely that the society is a consenting but impecunious debtor against whom the plaintiff is seeking to obtain a judgment.

I am not, however, restricted to an examination of the plaint. It is conceded that the whole of the pleadings may be looked at.

In its statement of defence the society states:

"... the committee of the defendant society after investigation found the plaintiff liable for Shs. 2,186/07 and which sum the defendant society deducted as a set-off... from the price of the coffee sold and delivered by the plaintiff to the defendant society and which sum is claimed by the plaintiff in paragraph 1 of the plaint and in the premises the defendant society denies its liability to the plaintiff in the sum of Shs. 2,186/07 as claimed in the first paragraph of the plaint or in any sum at all."

Although by implication it is admitted that Shs. 2,186/07 was due to the plaintiff by the society

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liability to pay this sum is denied. Whether or not the defence is a valid one there is clearly a dispute.

Two requirements are necessary to satisfy the provisions of s. 80 (1) of the Co-operative Societies Act.

The dispute must be

- (a) one concerning the business of the society; and
- (b) between the persons specified in paragraph (a), paragraph (b) or paragraph (c) of sub-s. (1).

For the respondent it was contended that the "business of the society" must mean the internal management of the society.

I can see no justification for adopting so restricted an interpretation. In *Wakiro and Another v. Committee of Bugisu Co-operative Union* [1968] E.A. 523, at p. 527, Russell, J., considered this expression:

"It appears, however, to be generally accepted", he said, "that even though the words must be strictly construed as s. 68 of the Act ousts the jurisdiction of the courts the word 'disputes' includes all matters which could form the subject of civil litigation and 'touching the business of the society' is not confined to disputes regarding the internal management of the affairs of the society or disputes in regard to the principles which would regulate the conduct of business."

"Section 68 of the Act" refers to s. 68 of the Co-operative Societies Act (Cap. 93) of Uganda, sub-s. (1) and (2) of which are substantially the same as sub-s. (1) and (2) of s. 80 of the Kenya Act.

The expression "business of the society", in my opinion, covers every activity of the society within the ambit of its bye-laws and rules.

According to bye-law 3 the objects of the Gatanga Coffee Growers' Co-operative Society include the disposal of coffee produced by members in the most profitable manner.

Under bye-law 6 only *bona fide* licensed coffee growers owning coffee trees within the area of operations of the society are eligible for membership.

Bye-law 39 (c) enables the committee to make rules prescribing the conditions on which coffee shall be accepted from members and the times and places at which delivery shall be made.

Bye-law 40 reads as follows:

"40. No member shall without the written consent of the committee, sell or otherwise dispose of any of his coffee to any company, society or person other than the society, or an authorised agent of the society.

Any member who infringes this bye-law shall pay into the reserve fund of the society a fine not

exceeding 50 per cent of the value, as estimated by the committee, of the produce so disposed of."

It is apparent that members must be coffee producers and must deliver their produce to the society which in its turn disposes of the coffee in the most profitable manner. It follows I think that the business of the society includes the purchase of coffee from members and payment therefor.

The dispute in question is one concerning the business of the society.

It was accepted by counsel for the appellant that "member" in the context of sub-s. (1) means a member in his capacity as member.

This was the opinion of Mosdell, J., in the unreported case of *Benjamin Kavoloto v. Lukenya Ranching and Farming Co-operative Society Ltd.* (Nairobi High Court Civil Case No. 931 of 1966) in which he held that the plaintiff was suing not as a member but as an ex-employee and his status of member was merely coincidental.

A similar view was taken by Trevelyan, J., in *Republic v. The Commissioner for Co-operative Development ex p. Kabuthi and Others* [1969] E.A. 168.

For the purposes of the present case it is unnecessary to consider whether this interpretation may perhaps be unduly restrictive.

The respondent is a member of the appellant society. As such he was bound to sell his coffee to the society. The transactions giving rise to the dispute were carried out by him in compliance with the bye-laws of the society in his capacity as member. The dispute was, therefore, in my opinion between a member in his capacity as member and the society thus falling within paragraph (b) of sub-s. (1) of s. 80.

It is I think immaterial that the appellant did not specifically sue the respondent as a member. It is immaterial also that since the society is apparently not debarred from buying coffee from non-members the membership of the respondent was not, so far as the society was concerned, an essential element in the transaction.

I take the foregoing view notwithstanding the provisions of s. 80 (2). Counsel for the respondent submitted that on reading sub-s. (2) together with sub-s. (1) debts and demands were by implication not disputes within the meaning of sub-s. (1). In support of this submission he referred us to the judgment of Trevelyan, J., in *Republic v. The Commissioner for Co-operative Development ex p.*

Kabuthi and Others, to which I have already referred. In the course of this judgment (at p. 171) the judge says:

"Moreover, by s. 80 (2) a claim by a society for a debt or demand due to it from a member or past member, etc., is declared to be a dispute. This, I think, goes to show that (save as provided for) debts and demands due are not disputes within the Act."

He concluded that a dispute in respect of dues for coffee being in respect of a debt or demand was not a dispute within the meaning of the Act.

I regret that I find myself unable to agree with this view.

If all debts and demands due to members by a society are to be excluded by implication the effect would be to remove from the ambit of s. 80 (1) not only claims for coffee sold and delivered but also claims for dividends, bonuses, interest and deposits held by the society which I feel could not have been the intention of the legislature.

Full weight must, I think, be given to the words "whether such debt or demand is admitted or not".

The Co-operative Societies Act has its source in Indian legislation.

Calvert in the *Law and Principles of Co-operation* (5th Edition), at p. 302, makes the comment that in Bengal and Burma it was held that a debtor has only to admit the debt and it ceased to be a dispute.

None of the Indian legislation in question is available here but it would appear according to Calvert that for the removal of doubt or by way of illustration some states inserted a provision similar to sub-s. (2) of s. 80.

I am of the opinion that the main if not the sole object of the legislature in adding sub-s. (2) was the removal of any doubts which might be thought to exist that claims by a registered society for a debt or demand admitted by a member were disputes within the meaning of sub-s. (1).

It was apparently considered unnecessary to make similar provision for the benefit of members in respect of debts or demands admitted by the society.

A dispute within the meaning of sub-s. (1) includes a claim for an unadmitted debt or demand and sub-s. (2) must be read not as restricting the meaning of sub-s. (1) but as extending it to include claims for admitted debts and demands due by a member to a society.

A final submission by counsel for the respondent that if s. 80 ousts the jurisdiction of the court it is *ultra vires* the constitution appeared to be an after-

thought and was unsupported by argument. I do not feel called upon to adjudicate upon it. The section of the constitution referred to, s. 60, deals with the jurisdiction of the High Court. We are here concerned with the jurisdiction of a subordinate court.

The appeal is allowed with costs in this court to be taxed on the higher scale and in the court below. The court below having had no jurisdiction to try the suit its judgment is set aside and the suit is dismissed.

HARRIS, J.: I agree that, for the reasons given in the judgment which has just been delivered, this appeal should be allowed, but as we are differing not only from the decision of the court below but also from the view expressed by this court in *R. v. Commissioner for Co-operative Development ex p. Kabuthi and Others*, at p. 171, I feel that I should state shortly my opinion in my own words.

The substantial issue for determination is as to the meaning of the expression "any dispute concerning the business" of a registered society in s. 80 (1) of the Co-operative Societies Act. The appellant society, which was the defendant in the lower court, relies upon the provisions of this section in support of its contention that the magistrate had no jurisdiction to entertain the claim and that the suit should have been dismissed. For the respondent it is argued that the expression in question means a dispute of a purely domestic character between a registered society and one of its members in which the fact of his membership is material, and that a claim by a member against his society which can be asserted without his necessarily establishing his membership, as in the present case, does not fall within the section.

Considering in the first place the word "dispute" as so used, the construction put forward by the respondent is, in my view, in conflict with the manifest intention of the sub-section. Although we are not concerned here with paragraph (c) of the sub-section, it is clear that, at least *prima facie*, whatever meaning is to be given to the word "dispute" for the purpose of the sub-section as a whole must accord with the terms of each of the three paragraphs (a), (b) and (c). Paragraph (c) has no application to members as such with the result that, in its reference to disputes concerning the business of the society, the sub-section, it seems to me, should not be construed as contemplating only disputes involving members. Likewise, as to the suggested domestic character which it is said must attach to a dispute to permit it being brought within

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s. 80, I can see no reason for ascribing to the word "dispute", which is not defined in the Act and is not a term of art, a meaning in any way less general than it receives in current usage, which is certainly wide enough to embrace a controversy such as that existing in this case.

Turning to the word "business", which also is undefined, the appellant society by its by-laws includes among its objects the processing and marketing of coffee produced by its members. The respondent is a member of the society and his claim is for the recovery of money stated to be due to him by the society for coffee sold and delivered to it but for which he says in his plaint the society has refused to pay. The dispute, then, is as to the legal liability of the society to meet this claim and, therefore, on its face, is clearly one concerning the carrying on by the society of one of the facets of the very business authorised by its bye-laws.

It is contended for the respondent, however, that this is not enough to bring the case within s. 80 and that the society must show that the respondent's claim is made by him specifically in capacity of member. I do not think that this contention is correct. In my opinion a person who, having applied for and accepted membership of a society registered under the Act, which is a purely voluntary exercise on his part, subsequently in enjoyment of his rights and in compliance with his obligations as a member concludes a sale of his agricultural produce to the society and later raises a claim against the society for the recovery of monies alleged to be due in respect of that sale, cannot be permitted to shed or waive his status of member at will in order to deprive the society of the protection expressly conferred upon it by s. 80 in relation to the determination of such claim. That he should not be so permitted seems to me to be implicit in the language of the section whereby each reference to "members" is made to include past and deceased members.

The respondent relies also to some extent upon the terms of sub-s. (2) of s. 80 as supporting by inference his submissions in regard to sub-s. (1). I do not think that the language of sub-s. (2) bears the implication which he suggests, and its impact on sub-s. (1) is very limited. Thus it can never apply to a claim falling within either paragraph (a) or paragraph (c) of sub-s. (1) and it relates only to

claims within paragraph (b) which are put forward by a registered society itself (and even then not to all such claims) but not to claims within that paragraph which are raised against a society.

For these reasons I am of the opinion that the appellant society is entitled to the protection of the section, that the court below had no jurisdiction to entertain the suit, and that the appeal must succeed.

The order of this court will be in the terms indicated to the judgment of Simpson, J.

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Notes:

1. For a comment on the fact situation examined by the court in this case written by counsel for respondent, see p. (??) *supra*. (1038)
2. In *Lukenyia Ranching and Farming Co-operative Society Ltd. v. Kavaloto* [1970] E.A. 414, the Court of Appeal at Nairobi held that the courts had jurisdiction in a dispute between a member, who was an ex-employee, under either s. 55 (1) of the old Kenya Act or s. 80 (1) of the 1966 Act. The member was not an "officer" because he had not been empowered "to give directions in regard to the business of a registered society" (evidence showed only that he was employed as a "farm manager") and, as he was suing as an ex-employee, his membership in the society was merely coincidental. Lutta, J.A., stated in the course of his opinion that "the word 'dispute' is not defined in either Act nor is it a term of art. It must, therefore, be given its primary or ordinary meaning. Thus it would mean no more than 'a controversy' or 'a quarrel'."

* * *

Problems:

- *1. Does the respondent still have a remedy? If the appellant had lost the appeal would it still have a remedy? What practical difficulties might it face if it had lost the appeal?
- *2. If s. 80 (2) were not in the Act would you agree with Simpson, J., that s. 80 (1) included cases where a member admitted his debt to the society? If you were a legislator would you have supported the inclusion of s. 80 (2) (2)? How might you have worded this sub-section to avoid the problems raised in this case?
- *3. Does "current usage" of the word "dispute" limit the meaning of the word to disputes where there may be "legal loss or liability"? (See the opinion in the *Wakiro and Wanda* case, p. (??), *supra*.) (1039)
- *4. Should the constitutional argument suggested by counsel for respondent be dismissed without careful examination even if counsel does not argue this contention fully? How might the argument be developed? Does the argument have any validity?

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