

# Conceptualizing Work Integration Social Enterprises under International Human Rights Law

Sarah HOFMAYER ¶\*‡ 

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## Abstract

*This article outlines one form Work Integration Social Enterprises (WISEs) can take under international human rights law. It builds on the conviction that social enterprises, and WISEs more specifically, are compatible with the foundations and principles human rights are built on. However, there is a lack of engagement with social enterprises generally, in international human rights law. Building on the characteristics of WISEs and substantive equality theories, it is suggested that they can be conceptualized under the heading of affirmative measures. It is expected that this conceptualization can provide a starting point for increasing the visibility of the sector, while simultaneously ensuring its compliance with human rights standards, most notably under the human right to work. The article further points out WISEs and social enterprises' potential more generally, illustrating how businesses can position themselves as active agents contributing to the realization of human rights.*

**Keywords:** affirmative action, regulation, right to work, work integration social enterprise

## I. INTRODUCTION

Work Integration Social Enterprises (WISEs), as one specific type of social enterprises, have emerged in several countries over the last decades due to increasing unemployment levels and a withdrawal of the public sector as the primary provider of welfare. They aim to combat the risk of permanent exclusion from the labour market for unemployed members of marginalized groups.<sup>1</sup> Core to the philosophy of social enterprises is the pursuit of a social goal – in this case combating the unemployment of marginalized

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\* Centre for Disability Law and Policy, National University of Ireland Galway, Ireland.

‡ Sarah Hofmayer is a PhD candidate and Irish Research Council scholarship holder at the National University of Ireland (NUI) Galway. Her thesis is a comparative study of how social enterprises can further inclusive employment, as set out by the CRPD. She holds a law degree from the University of Vienna and an LL.M. in Disability Law and Policy from NUI Galway. This research and publication has not received any funding but was, however, carried out as part of Sarah Hofmayer's PhD under an Irish Research Council and Hardiman scholarship. [s.hofmayer@nuigalway.ie](mailto:s.hofmayer@nuigalway.ie)

<sup>1</sup> Jacques Defourny and Marthe Nyssens, 'Defining Social Enterprise' in Marthe Nyssens (ed.), *Social Enterprise: At the Crossroads of Market, Public Policies and Civil Society* (London; New York: Routledge, 2006) 3.

groups – through the means and logic of a business, which is part of the market economy.<sup>2</sup> Located at the intersections of the public, voluntary and business sectors, WISEs are therefore a part of the market economy.<sup>3</sup>

While they have gained increasing attention at a national level in terms of legislation,<sup>4</sup> there is still a lack of engagement in international law and human rights law specifically. Social enterprises, including WISEs, have immense potential in furthering the realization of equality, inclusion and sustainability. Considering their nature as businesses, this article emphasizes their potential to shed some light on the potential of businesses to create positive change in the human rights arena. For WISEs themselves, human rights law arguably holds the potential to provide further guidance on how to realize their goals and gain recognition.

The aim of the article is threefold. Firstly, it seeks to contribute to the visibility and recognition of WISEs and social enterprises more generally in the arena of international human rights law. Secondly, it aims to provide some clarity on where exactly WISEs are situated within the existing human rights framework. Finally, it hopes to start a wider conversation about the untapped potential of understanding businesses as contributing to the ‘fulfil’ aspect of human rights under a tripartite structure of human rights.<sup>5</sup>

Regarding the first aim, this article contends that the significance of WISEs, and social enterprises more generally, should be recognized in international human rights law, particularly in the context of business and human rights. Businesses have previously been considered mainly from the perspective of how to prevent violations of human rights.<sup>6</sup> The article will attempt to overcome the invisibility of social enterprises. Focusing on the ‘fulfil’ aspect of human rights, it will build a case for WISEs, and social enterprises generally, to be included not only explicitly in various international (soft) laws and initiatives, but also in global, regional and national networks of corporate social responsibility.

As for the second point, this article argues that WISEs are essentially implementing voluntary affirmative measures by giving preference to those especially at risk from exclusion from the labour market and redressing the market’s barriers. Where states provide (financial) support to WISEs, this amounts to affirmative action by the public sector.<sup>7</sup>

Finally, addressing the third aim, social enterprises can generally serve as a best practice for the business sector, leading to a change of thinking in general. At the same

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<sup>2</sup> J Gregory Dees and Beth Battle Anderson, ‘Framing a Theory of Social Entrepreneurship: Building on Two Schools of Practice and Thought’ in Rachel Moscher-Williams (ed.), *Research on Social Entrepreneurship: Understanding and Contributing to an Emerging Field* (Washington: Arnova, 2006) 39.

<sup>3</sup> Defourny and Nyssens, note 1.

<sup>4</sup> Carlo Borzaga et al, *Social Enterprises and their Ecosystems in Europe: Comparative Synthesis Report* (Luxembourg: European Union, 2020).

<sup>5</sup> Matthew C R Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Cambridge: Clarendon Press, 1995) 109.

<sup>6</sup> See the United Nations, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, HR/PUB/11/04 (21 March 2011).

<sup>7</sup> Sandra Fredman, ‘Substantive Equality Revisited’ (2016) 14:3 *International Journal of Constitutional Law* 712.

time, they could profit from obtaining further skills and knowledge on the business aspects of their enterprise.<sup>8</sup>

It should be noted that the examples and literature drawn upon for this article are primarily from a European context, where WISEs developed within a context of welfare states and formal economies.<sup>9</sup> The direct applicability of its findings to other contexts has therefore not been tested, although it is envisioned that several of the findings – including the potential of WISEs to act as drivers promoting a more diverse workforce – are applicable in other contexts as well.

The article begins with discussing its core concept, namely WISEs, as a sub-type of social enterprises (section II). Section III will provide an overview of the engagement of international (human rights) law with social enterprises and WISEs respectively to date. Building on the finding of a lack of substantive engagement, section IV will present suggestions of where to situate WISEs in general human rights law, by looking at general principles, specifically equality and inclusion, as well as the right to work. Section V will discuss the implications of the findings presented in the previous sections, arriving at the finding that WISEs represent various forms of affirmative action. It concludes by arguing that WISEs are currently, like social enterprises generally, overlooked in international law. The field of business and human rights holds potential for mutual learning, between both social enterprises and traditional businesses and could, in exchange, also see its focus broaden to cover the tripartite structure of human rights.

## II. WISES: A SUB-TYPE OF SOCIAL ENTERPRISE

WISEs are one specific form of a broader phenomenon, namely social enterprises and the social economy. Before taking a closer look at the characteristics and challenges of social enterprises and WISEs specifically, it is important to distinguish them from some related but distinct concepts. First, while the for-profit enterprise sector increasingly includes social and environmental considerations in strategic goals, as manifested in corporate social responsibility (CSR) programmes, these businesses are however not to be confused with social enterprises. The difference between these two concepts relates to the intent and purpose of the enterprise itself. Only social enterprises are set up exactly because of the problem they are trying to address, and their business is primarily a means to this end. This is not the case for traditional enterprises, which are set up for reasons such as generating an income and creating profit.<sup>10</sup> However, this does not mean that the two concepts are mutually exclusive; on the contrary, social enterprises can and should include corporate social responsibility approaches into their

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<sup>8</sup> Julie Battilana et al point out the challenges and risk of failure of WISEs prioritizing their social mission at the cost of entrepreneurial knowledge amongst the staff they hire: Julie Battilana et al, 'Harnessing Productive Tensions in Hybrid Organizations: The Case of Work Integration Social Enterprises' (2015) 58:6 *Academy of Management Journal* 1658.

<sup>9</sup> See Borzaga et al, [note 4](#), for an overview of the European context.

<sup>10</sup> Helen Fitzhugh and Nicky Stevenson, *Inside Social Enterprise: Looking to the Future* (Bristol: University Press, 2015) 6.

own work to ensure, for instance, that they address internal matters as progressively as their main cause.<sup>11</sup>

Second, social enterprises have to be distinguished from the Social and Solidarity Economy, which includes the concept of social enterprises, but is much broader than that. In one sentence, it is a ‘concept designating enterprises and organizations, in particular cooperatives, mutual benefit societies, associations, foundations and social enterprises, which have the specific feature of producing goods, services and knowledge while pursuing both economic and social aims and fostering solidarity’.<sup>12</sup> Without going into too much detail, this list entails some entities that do not sell goods or services on the open market.<sup>13</sup> This brief detour highlights further the hybrid nature of social enterprises and how they overlap with both the third and the business sector both in terms of organizational forms, as well as philosophy and mission.

### A. Social Enterprises

Social enterprises are a fairly new phenomenon, which have not yet been defined in a universally accepted way.<sup>14</sup> Essentially, they are businesses but with an underlying drive to create social value as the motivation for their economic activities.<sup>15</sup> They often fill gaps of services or goods that neither the private market nor the public sector can sufficiently cater for. In times of creation of welfare markets as a consequence of states withdrawing from their role as a service provider, the space for social enterprises is increasing.<sup>16</sup>

While there are numerous attempts to conceptualize and define social enterprises,<sup>17</sup> this article uses the EMES Research Network’s working criteria for guidance.<sup>18</sup> The EMES approach is preferred for two reasons. First, it focuses on the institutional and organizational features of social enterprises and their interdependence, thereby providing a useful first guidance for any attempt to codify the phenomenon. Second, the EMES criteria have been tested, re-adjusted and confirmed repeatedly by research in

<sup>11</sup> Nelarine Cornelius et al, ‘Corporate Social Responsibility and the Social Enterprise’ (2008) 81:2 *Journal of Business Ethics* 355.

<sup>12</sup> International Labour Organization, ‘Plan of Action for the Promotion of Social Economy Enterprises and Organizations in Africa’, ILO Regional Conference: The Social Economy – Africa’s Response to the Global Crisis on 19–21 October 2009. [https://www.ilo.org/wcmsp5/groups/public/—africa/—ro-abidjan/documents/publication/wcms\\_166727.pdf](https://www.ilo.org/wcmsp5/groups/public/—africa/—ro-abidjan/documents/publication/wcms_166727.pdf) (accessed 7 July 2020).

<sup>13</sup> Jacques Defourny and Marthe Nyssens, ‘The EMES Approach of Social Enterprise in a Comparative Perspective’, EMES Working Papers no. 12/2003, <http://emes.net/publications/working-papers/the-emes-approach-of-social-enterprise-in-a-comparative-perspective/> (accessed 30 September 2016); Anca Voinea, ‘Should Co-ops Call Themselves Social Enterprises?’, *Coop News* (13 September 2016), <https://www.thenews.coop/108666/sector/community/should-co-ops-call-themselves-social-enterprises/> (accessed 20 June 2018).

<sup>14</sup> Jaques Defourny and Marthe Nyssens, ‘Fundamentals for an International Typology of Social Enterprise Models’ (2016) 33:3 *Voluntas* 2469.

<sup>15</sup> James Austin, Howard Stevenson and Jane Wei-Skillern, ‘Social and Commercial Entrepreneurship: Same, Different or Both?’ (2006) 30:1 *Entrepreneurship in Theory and Practice* 1.

<sup>16</sup> Roger Spear and Eric Bidet, ‘Social Enterprise for Work Integration in 12 European Countries: A Descriptive Analysis’ (2005) 76:2 *Annals of Public and Cooperative Economics* 195.

<sup>17</sup> See, for instance, Dees and Anderson, note 2.

<sup>18</sup> These working criteria were first published in Jaques Defourny and Marthe Nyssens (eds.), ‘Social Enterprise in Europe: Recent Trends and Developments’, EMES Working Papers no. 08/2001, [https://base.socioeco.org/docs/wp\\_08\\_01\\_se\\_web.pdf](https://base.socioeco.org/docs/wp_08_01_se_web.pdf) (accessed 28 March 2021) and subsequently redefined and rearranged.

different jurisdictions over the last twenty years.<sup>19</sup> Defourny and Nyssens categorize the nine criteria in three main groups: the economic and entrepreneurial dimension, the social dimension and the participatory governance dimension.

The economic dimension includes (a) a continuous activity producing goods and/or selling services, (b) a significant level of economic risk, and (c) a minimum amount of paid work. This dimension clearly outlines the distinctiveness of social enterprises from the traditional third sector, which would not have this amount of direct involvement in the market and usually relies more on voluntary work.<sup>20</sup>

The social dimension entails (a) an explicit aim of benefiting the community, (b) an initiative launched by a group of citizens, and (c) limited profit distribution. This dimension highlights how social enterprises differ from both traditional for-profit businesses and the public sector. As opposed to traditional enterprises, they were not set up for primarily their own benefit, and as opposed to the public sector, they were founded by individuals in their private capacity.<sup>21</sup>

The participatory dimension consists of (a) a high degree of autonomy, (b) a decision-making power not based on capital ownership, and (c) a participatory nature, which involves the persons affected by the activity. This dimension builds on the specific values of the third sector, distinguishing it once again from both public sector services, which would not have autonomy, and the private business sector, which would be more based on capital ownership and less on user involvement in the decision-making process.<sup>22</sup>

These criteria define an ideal type of social enterprise generally, although the importance given to the different criteria varies from enterprise to enterprise and also depends on the specific national context. For instance, the national conditions for funding would especially impact WISEs, which usually rely more on funding than other types of social enterprises.<sup>23</sup> Generally speaking, the boundaries between social enterprise and other forms of organizations are fluid and there is no consensus whether or not all the aforementioned criteria are constitutional for social enterprises.<sup>24</sup>

Social enterprises find themselves at the intersections of the private, public and third sector, showing hybridity in terms of their origins, resources and methods.<sup>25</sup> This hybrid nature comes with its own challenges, as Battiliana et al have explored.<sup>26</sup> Social enterprises, such as WISEs, where customers (those purchasing services or goods) are not also the beneficiaries (here employees at risk of exclusion from the labour market), have to weigh the interests of both groups and frequently end up prioritizing one over the other. Where resources are scarce, paying customers are frequently given priority,

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<sup>19</sup> Defourny and Nyssens, note 13.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Pauline O'Connor and Agnes Meinhard, 'Work Integration Social Enterprises (WISEs): Their Potential Contribution to Labour Market (Re-)Integration of at Risk Populations', Center for Voluntary Sector Studies Working Paper Series Volume 2014(2), <http://sesc.ca/wp-content/uploads/Work-Integration-and-Social-Enterprises.pdf> (accessed 28 March 2021)

<sup>25</sup> Defourny and Nyssens, note 13.

<sup>26</sup> Battilana et al, note 7.

whereas a founding team grounded in social work might neglect economic considerations.<sup>27</sup> Finally, some social enterprises, especially WISEs, find themselves closely aligned to the public sector, especially when receiving subsidies, thereby risking their autonomy.<sup>28</sup> This will have to be discussed in more detail.

## B. WISEs

WISEs have been described as one specific sub-set of social enterprises, providing employment for those at the risk of (permanent) exclusion from the labour market. While other types of social enterprises are gaining importance, including social services social enterprises, WISEs are often seen as synonymous with social enterprises, due to their dominance.<sup>29</sup> They are usually set up as a reaction to the rising rate of unemployment, especially in low skill work, based on the realization that many labour market policies fail to create the necessary links between training and employment. Another reason is the need to break the cycle of moving from a training scheme into temporary employment and again back to unemployment followed by training. In many cases, WISEs offer employment combined with on-the-job training, as opposed to formal training.<sup>30</sup>

Literature describes WISEs as tools of redistribution of both income and work opportunities, correcting market imperfections and tackling the barriers that marginalized groups face when trying to access employment, such as perceptions of the potential of these groups to work and the institutional constraints of predominant forms of employment.<sup>31</sup> While there is a wide range of WISEs in terms of funding, target groups (ranging from being for anybody who is unemployed, to specific groups such as persons with disabilities, recovering addicts, migrants, etc.), size, and duration of employment, one important categorization for a human rights approach derives from the modes of integration.<sup>32</sup>

The first category, ‘transitional occupation’, aims at providing work and on-the-job training to facilitate (re-)entry into employment for those far from the labour market by increasing their ‘employability’. Across Europe, these WISEs have been found to rely on very different resources, with some being mostly dependent on public subsidies and others not availing of them. Beneficiaries work based on formal work contracts, covered by labour law.<sup>33</sup> One example of WISEs following this approach are the so-called ‘Sozioökonomische Betriebe’ (Socioeconomic Enterprises) in Austria, which are funded

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<sup>27</sup> Ibid.

<sup>28</sup> Spear and Bidet, note 16.

<sup>29</sup> Ibid.

<sup>30</sup> Spear and Bidet, note 16, 196.

<sup>31</sup> Carlo Borzaga, Benedetto Gui and Fabrizio Povinelli, ‘Specific Role of Non-Profit Organisations in the Integration of Disadvantaged People: Insights from an Economic Analysis’ in Jacques Defourny, Louis Favreau and Jean-Louis Laville (eds.), *Tackling Social Exclusion in Europe: The Contribution of the Social Economy* (Aldershot; Burlington; Singapore; Sydney: Ashgate, 2001).

<sup>32</sup> Catherine Davister, Jacques Defourny and Olivier Gregoire, ‘Work Integration Social Enterprises in the European Union: An Overview of Existing Models’, EMES Working Papers no. 04/2004, [https://orbi.uliege.be/bitstream/2268/90492/1/Work Integration Social Enterprises in the European Union\\_An overview of existing models.pdf](https://orbi.uliege.be/bitstream/2268/90492/1/Work%20Integration%20Social%20Enterprises%20in%20the%20European%20Union_An%20overview%20of%20existing%20models.pdf)

<sup>33</sup> Davister et al, note 32.

to a large extent by the Austrian Labour Market Service and provide temporary employment opportunities alongside training and counselling for up to a year.<sup>34</sup> These WISEs are an example of the type being largely dependent on public subsidies, which are granted based on a one-year basis and with strict criteria, costing the WISEs most of their autonomy.<sup>35</sup>

The second category, entitled ‘Creation of permanent self-financed jobs’, aims to provide stable jobs for people who might otherwise face exclusion from employment opportunities.<sup>36</sup> One such example is AfB Social and Green IT, a multinational social enterprise, which operates in the sector of IT refurbishing and whose workforce consists of 45 per cent of people with disabilities, while not receiving any systemic funding by the public sector.<sup>37</sup> The idea behind these enterprises is to enable workers to ‘thrive as economic agents’. Due to their independence from subsidies, these WISEs face the highest pressure to be profitable and market-oriented, coming across as professional businesses.<sup>38</sup> This results in many cases in increased selectivity and higher productivity requirements for workers.<sup>39</sup>

WISEs focusing on ‘professional integration with permanent subsidies’ follow the same aim, but are not fully self-sustainable and rely partially on public funding.<sup>40</sup> This includes, for example, the German model of ‘Werkstatt für behinderte Menschen’, which is a form of sheltered employment, providing work and remuneration for people with disabilities who are said to not be able to work in the open labour market, while still being able to carry out some economically productive work.<sup>41</sup> These WISEs are based on the understanding that in the medium term it is difficult or nearly impossible for some people to find stable employment in the open labour market, instead offering them secure, sheltered employment and the opportunity to create a social identity.<sup>42</sup> From a human rights angle, this is already looking close to segregation, requiring a closer scrutiny of the individual settings and discussion in more detail. Furthermore, while the current labour market might in fact be excluding these employees, it appears that WISEs falling into this category do not aim to redress these inequalities.

Finally, enterprises captured under ‘socialization through a productive activity’ do not provide formal work but a daily routine and focus on social skills. In many cases, participants do not receive a salary but rely on welfare payments.<sup>43</sup> This category

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<sup>34</sup> Maria Anastasiadis, Waltraud Gspurnig and Richard Lang, *Social Enterprises and their Ecosystems in Europe: Country Report Austria* (Luxembourg: European Union, 2018).

<sup>35</sup> Arbeitsmarktservice (AMS), ‘Bundesrichtlinie für die Förderung Sozialökonomischer Betriebe (SÖB)’, BGS/AMF/0722/9950/2017, AMF/12-2017 (1 July 2018).

<sup>36</sup> Davister et al, note 32.

<sup>37</sup> AfB Social and Green IT, ‘Vision und Konzept’, <https://www.afb-group.at/ueber-uns/vision-und-konzept/> (accessed 29 June 2020) and email to author from Kurt Essler, CEO AfB, 30 July 2018.

<sup>38</sup> Davister et al, note 32.

<sup>39</sup> This was observed by the author as part of a qualitative study, including in enterprise C, Austria (Summer 2019).

<sup>40</sup> Davister et al, note 32.

<sup>41</sup> Behinderung und Beruf Integrationsämter, ‘Werkstatt für behinderte Menschen (WfbM) Integrationsämter (10 December 2018), <https://www.integrationsaemter.de/Fachlexikon/Werkstatt-fuer-behinderte-Menschen-WfbM-/77c336i1p/index.html#> (accessed 29 June 2020).

<sup>42</sup> Davister et al, note 32.

<sup>43</sup> Davister et al, note 32.

includes what is commonly known as day care or sheltered workshops for people with disabilities. They are problematic insofar as they result in exclusion from the benefits of labour law and employment opportunities as well as segregation from society.<sup>44</sup> The following sections will highlight in more detail the incompatibility of this type of setting with human rights standards.

This typology, which was developed as part of one of two large-scale research projects, has since its development been applied and tested in various research projects. These have generally upheld it, but also emphasized further the idiosyncratic nature of WISEs in terms of their financial sustainability, size, and types of employment offered.<sup>45</sup> As the brief discussion of the different types has shown, from a human rights angle the last two types have to be seen critically, which will become clearer in the following sections.

### III. WISES IN INTERNATIONAL (HUMAN RIGHTS) LAW

When trying to locate WISEs in international law, it quickly becomes clear that there is a legal vacuum. Looking for social enterprises in a human rights context, there is very little acknowledgement and guidance to be found.

#### A. Social Enterprise in International Law

International legal instruments specifically on social enterprises do not exist yet. However, the International Labour Organization has passed two recommendations on cooperatives. While the first recommendation focused on cooperatives in developing countries,<sup>46</sup> Recommendation 193 from 2002 deals with the promotion of the concept globally.<sup>47</sup> Recommendation 193 emphasizes the drive of cooperatives to fulfil social justice and to achieve full employment. It calls upon states to promote them and to level the playing field into the broader economy. However, it also emphasizes that cooperatives should not be over-regulated and turned into just another public policy tool, and instead be guaranteed the freedom to be innovative mutual care spaces of civil society.<sup>48</sup>

While both regulations do not apply to all social enterprises, as has been highlighted, their importance should not be under-estimated, as they are the closest to an international regulation of the phenomenon. However, they do not link to a human rights framework and are also soft law, therefore not legally binding. At a regional level, the European

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<sup>44</sup> For a detailed analysis of the problems such settings pose from a human rights perspective, see for instance Sabrina Ferraina, 'Analysis of the Legal Meaning of Article 27 of the UN CRPD', *EASPD* (14 March 2012), [www.easpd.eu/sites/default/files/sites/default/files/analysis\\_of\\_the\\_legal\\_meaning\\_of\\_article\\_27\\_of\\_the\\_uncrpd.pdf](http://www.easpd.eu/sites/default/files/sites/default/files/analysis_of_the_legal_meaning_of_article_27_of_the_uncrpd.pdf) (accessed 4 March 2015).

<sup>45</sup> Rosemary Lysaght et al, 'Unpacking the Foundational Dimensions of Work Integration Social Enterprise' (2018) 14:1 *Social Enterprise Journal* 60.

<sup>46</sup> International Labour Organization, *Recommendation R127: Cooperatives (Developing Countries) Recommendation* (Geneva: ILO, 1966).

<sup>47</sup> International Labour Organization, *Recommendation R193: Promotion of Cooperatives Recommendation* (Geneva: ILO, 2002).

<sup>48</sup> International Labour Organization, *The Story of the ILO's Promotion of Cooperatives Recommendation, 2002 (No. 193): A Review of the Process of Making ILO Recommendation No.193, its Implementation and its Impact* (Geneva: ILO, 2015).



Union (EU) has increasingly focused on social enterprises, most importantly in its Social Business Initiative.<sup>49</sup> Within its 11 key actions, the Social Business Initiative focuses on improving access to funding (both mainstream and tailored to the needs of social enterprises), ensuring visibility, and making legal frameworks more responsive to the unique nature of social enterprises.<sup>50</sup> While the Initiative looks at social enterprises specifically and provides practical guidelines for the EU member states, it again does not connect them to a human rights framework.

Academic literature on international law and the regulation of social enterprises, on the other hand, is critical of regulation and legislation in the first place. Utting fears that the sector's transformative potential, arising from its participatory and democratic dimension, would be restricted in favour of an increased focus on poverty reduction and employment creation. The Social and Solidarity Economy, including social enterprises, might thereby end up being just another tool of the public sector.<sup>51</sup> Salustri acknowledges these concerns and their legitimacy, highlighting however how this leads to maintaining the 'institutional gap', that is, the under-development of the sector.<sup>52</sup> Instead of avoiding utilization and regulation altogether, he therefore suggests that 'instead, when solidarity and social actions can foster the implementation of the SDGs, distortions should be punctually assessed and corrected through appropriate policies and openness should be promoted to gain benefits of mutual institutional recognition without incurring unsustainable costs of isolation'.<sup>53</sup>

In summary, while there is no international law that regulates or even explicitly mentions social enterprises, there is increasing awareness of the phenomenon, as part of the broader category of the Social and Solidarity Economy. The European Union has recognized the importance of the sector's contributions and is trying to utilize it for their purposes.

## B. Social Enterprise and Business and Human Rights

When trying to locate social enterprises more generally in the human rights framework, one would intuitively look first at the field of business and human rights. Business and human rights is a fairly young field of international law, breaking with the traditional conception of international law as only binding state-actors, and not applying directly to the private sector, including enterprises. This is of concern insofar as globalization and multinational corporations can have negative impacts on human rights.<sup>54</sup> For the purpose

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<sup>49</sup> European Commission, 'Social Business Initiative: Creating a Favourable Climate for Social Enterprises, Key Stakeholders in the Social Economy and Innovation', Communication SEC (2011) 1278 (5 October 2011).

<sup>50</sup> Ibid.

<sup>51</sup> Peter Utting, 'Mainstreaming Social and Solidarity Economy: Opportunities and Risks for Policy Change', *UNSSSE* (November 2016), <http://www.relatos.org/documentos/ESS.NUUtting.pdf> (accessed 2 December 2019).

<sup>52</sup> Andrea Salustri, 'The UN 2030 Agenda and Social and Solidarity Economy: Toward a Structural Change?' (June 2019), draft paper prepared in response to the 'UNTFSSSE Call for Papers 2018', organized by the UN Inter-Agency Task Force on Social and Solidarity Economy in 2018.

<sup>53</sup> Ibid, 4.

<sup>54</sup> Justine Nolan, 'Business and Human Rights in Context' in Dorothée Baumann-Pauly and Justine Nolan, *Business and Human Rights: From Principles to Practice* (London; New York: Routledge, 2016) 2.

of this article, there are two instruments to be considered: the Guiding Principles on Business and Human Rights, and the United Nations Global Compact.

The Guiding Principles are a legally non-binding instrument adopted by the Human Rights Council in 2011, considered ‘the most authoritative statement of the human rights duties or responsibilities of states and corporations adopted at the UN level’.<sup>55</sup> They have been described as a tool to increase the level of human rights compliance by enterprises,<sup>56</sup> as well as a ‘point of reference for corporate social policy’. Their strengths lie in them being unequivocally accepted and their ability to combine competing stakeholder interests.<sup>57</sup> They must be seen as a practical tool guiding companies towards knowing, understanding and respecting human rights.<sup>58</sup>

The focus of the Guiding Principles is on: (a) the State’s duty to protect human rights, and (b) the responsibility of businesses to respect them. Both of these aspects are strengthened in the third part of the Principles, addressing the question of remedies. The Guiding Principles expressly refer to the need for non-discriminatory implementation, taking into account the needs of vulnerable social groups.<sup>59</sup> They also highlight the role of laws and policies in shaping business behaviour (thereby not taking the economy as a force above the law), and the need to advise on appropriate methods to effectively take issues of vulnerability and marginalization into account.<sup>60</sup> However, at no point do the Guiding Principles provide guidance on how to motivate businesses to act as transformative drivers for sustainable change; instead, they focus on businesses taking responsibility for their actions and establishing boundaries. This approach is also mirrored by academic literature on the topic, which generally focuses on accountability, the prevention of human rights violations, and potential codifications of these duties.<sup>61</sup> Considering enterprises as active agents and positive drivers of realizing human rights would however have to be included in order to fully address the tripartite structure inherent to socio-economic rights. As Craven outlines, this includes not only the duty to respect (refraining from interfering with the right), and to protect (preventing third parties from interfering), but also to fulfil rights (taking the necessary steps to ensure that an individual’s claim is met).<sup>62</sup> Wettstein discusses this neglect of the ‘fulfil’, or as he calls it, ‘realize’ aspect of human rights under the need for a broader interpretation of businesses’ duties. Currently, the Guiding Principles build on an understanding of obligations being clearly distributed between states and businesses, without overlaps. Businesses are not supposed to get involved in the state’s duty (the fulfilment of socio-economic rights), as their role is understood to be purely economic. However, such an

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<sup>55</sup> Olivier De Schutter, ‘Foreword’ in Surya Deva and David Blichitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect?* (Cambridge: Cambridge University Press, 2013) xv.

<sup>56</sup> Ibid.

<sup>57</sup> Michael K Addo, ‘The Reality of the United Nations Guiding Principles on Business and Human Rights’ (2014) 14 *Human Rights Law Review* 133.

<sup>58</sup> De Schutter, note 55.

<sup>59</sup> UN Guiding Principles, note 6.

<sup>60</sup> Ibid, I B) 3. Commentary.

<sup>61</sup> See for instance Olivier De Schutter, ‘Towards a New Treaty on Business and Human Rights’ (2015) 1 *Business and Human Rights Journal* 41.

<sup>62</sup> Craven, note 5.

understanding of enterprises falls short of reality for several reasons. Firstly, as Wettstein points out, it does not capture the overlaps between respecting, protecting and fulfilling human rights, which is especially inherent to social and economic rights, as encapsulated by the Guiding Principles themselves.<sup>63</sup> It also seems to ignore corporate social responsibility approaches, which can and do address issues external to the organization without doing social enterprises justice. This is due to the Guiding Principles focusing on a mere ‘responsibility to respect’ instead of wider ranging duties of protecting and fulfilling (which would require more active steps). These aspects are beyond their scope and mandate. While the Principles therefore apply to social enterprises, like any other business regarding the responsibility to respect human rights, a wider approach is needed to be able to fully capture and support the nature of social enterprises.

The United Nations Global Compact predates the Guiding Principles and originated from Kofi Annan’s initiative to form a voluntary coalition of enterprises to address questions of labour market fairness, the environment and transparency.<sup>64</sup> The Global Compact has been described as providing broad guidelines of how to act responsibly as a business,<sup>65</sup> as a strategic policy initiative for businesses, and ‘an advocacy-based initiative promoting a broad concept of corporate sustainability with a particular emphasis on concrete action by businesses’.<sup>66</sup> Building on the principle of voluntary accession, it requires enterprises to provide annual reports on the progress made in realizing the goals set out by the Global Compact. However, research has shown that, in reality, enterprises are in a position to select which areas they prioritize at the neglect of others, and that many are merely interested in adding their name to the list for good publicity, thereby not leading to overall compliance with the standards set out.<sup>67</sup> Of special importance are the various regional and local networks which facilitate mutual learning between members.<sup>68</sup> Numerous manuals and guidance on various topics have been created by these networks and for their purposes. These include guidance by the International Labour Organization on the implementation of the Labour Principles entailed by the Global Compact. This guide entails for instance the recommendation to ‘establish programs to promote access to skills development training and to particular occupations’ in the context of eliminating discrimination,<sup>69</sup> an approach core to WISEs, as described before. While initially the Global Compact was criticized for neglecting certain social groups, such as women,<sup>70</sup> these topics have been addressed by the networks

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<sup>63</sup> Florian Wettstein, ‘Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment’ (2015) 14:2 *Journal of Human Rights* 162.

<sup>64</sup> Robert W Nason, ‘Structuring the Global Marketplace: The Impact of the United Nations Global Compact’ (2008) 28:4 *Journal of Macromarketing* 418.

<sup>65</sup> Guido Orzes et al, ‘United Nations Global Compact: Literature Review and Theory-Based Agenda’ (2018) 177 *Journal of Cleaner Production* 633.

<sup>66</sup> Ursula A Wynhoven, ‘The Protect-Respect-Remedy Framework and the United Nations Global Compact’ (2011) 9 *Santa Clara Journal of International Law* 81.

<sup>67</sup> Nason, note 64.

<sup>68</sup> Wynhoven, note 66.

<sup>69</sup> International Labour Organization and UN Global Compact, *The Labour Principles of the United Nations Global Compact: A Guide for Business* (Geneva: ILO, 2008).

<sup>70</sup> Maureen A Kilgour, ‘The UN Global Compact and Substantive Equality for Women: Revealing a “Well Hidden” Mandate’ (2007) 28:4 *Third World Quarterly* 751.

and manuals and other materials have been published on how to include women – amongst other marginalized groups within the business world – in businesses’ work on the Global Compact’s principles.<sup>71</sup> Finally, the Global Compact has engaged with the concept of social enterprises, considering them a necessary addition to governmental and philanthropical approaches towards addressing societal challenges. However, a closer look shows that the guidelines are not set out for social enterprises but instead for traditional businesses on how to nurture social enterprises and on questions of impact investment. They also repeatedly refer to the potential of social enterprises to create profits, further deepening the impression that the interest in the sector is more about the business opportunities than their social missions.<sup>72</sup>

It can therefore be said that while the Global Compact is aware of social enterprises and their potential, it has yet to fully embrace their unique and hybrid nature and provide regulatory and policy guidance for them. In the meantime, social enterprises could still profit from joining the Global Compact, not only in terms of creating beneficial contacts and networks, but also in terms of contributing to learning on aspects of their social mission, and gaining knowledge and experience on other aspects that are not core to their mission and therefore not necessarily on their agenda yet. As Cornelius et al have explored, corporate social responsibility approaches are often needed for the internal aspects of social enterprises whose mission does not primarily relate to their employees.<sup>73</sup> Here the Global Compact’s aforementioned experience on gender issues could, for instance, be useful. Nevertheless, there is still some work to be done before the Global Compact is ready to fully include social enterprises.

### C. Social Enterprise in International Human Rights Law

When looking at sources of human rights law more generally, a good starting point are the sustainable development goals (SDGs). Their aim is to eradicate poverty, ensure dignified lives in peace and sustainable resource management to protect the environment. To do this, governments have to balance the ‘three dimensions of sustainable development: the economic, social and environmental.’<sup>74</sup> Focusing on empowering people and societies, the SDGs include a shift away from direct funding, towards measures that enable them to achieve the goals as active agents.<sup>75</sup>

They therefore have to combine, similar to social enterprises, social and economic aspects, potentially leading to a high compatibility of the two concepts. Just like social enterprises, the SDGs focus on a wide, comprehensive range of societal issues to address, including not only poverty and inequality, but also questions regarding climate action.<sup>76</sup>

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<sup>71</sup> UN Women, *Women’s Empowerment Principles: Equality Means Business* 2nd edn (New York: UN Women, 2011)

<sup>72</sup> United Nations Global Compact and Rockefeller Foundation, *A Framework for Action: Social Enterprise & Impact Investment* (New York: United Nations and the Rockefeller Foundation, 2012).

<sup>73</sup> Cornelius et al, note 11.

<sup>74</sup> UN General Assembly Res 70/1 on Transforming our World: The 2030 Agenda for Sustainable Development, UN Doc A/Res/70/1 (adopted on 25 September 2015, entered into force on 21 October 2015).

<sup>75</sup> Nikolaos Apostolopoulos et al, *Entrepreneurship and the Sustainable Development Goals* (Bingley: Emerald Publishing, 2018).

<sup>76</sup> SDG Goal 13.

This comprehensive approach, targeting the most pressing societal issues in a combined effort, mirrors the approach of social enterprises. For WISEs more specifically, Goal 8 on decent work and economic growth is of special importance, particularly 8.5, which tells states: ‘By 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value’.<sup>77</sup> This goal is arguably furthered by the work of WISEs, as described in Section II of this article.

Unfortunately, social enterprises have been largely ignored during the development of the SDGs, despite their potentially important role for the realization of the SDGs.<sup>78</sup> The International Labour Organization sees the reason for the sector being overlooked – in the context of cooperatives – as a lack of understanding at an international level, as social enterprises operate primarily at the local level and are therefore often missing at international fora.<sup>79</sup> Similarly, Littlewood and Holt explain the fact that social enterprises were not taken into account, with the SDGs’ focus on traditional enterprises, as well as with the SDGs generally not having focused enough on the role that businesses, including small ones, will have to play in the realization of the goals.<sup>80</sup> However, Utting points out that the SDGs still have the potential to increase the visibility of the sector and consequently the support it receives. However, this must not affect its transformative potential, which has to be protected when regulating social enterprises.<sup>81</sup>

#### IV. GENERAL HUMAN RIGHTS LAW AND WISES

Acknowledging the lack of directly applicable international law, the next step should be to situate WISEs within general human rights law. In doing so it will become clear that social enterprises and specifically WISEs fit well into a human rights context. Apart from equality – both a right and a principle of human rights<sup>82</sup> – which will be discussed in detail in a dedicated section (as will be the right to work), it is worth looking briefly at the three principles of inclusion, dignity and autonomy in this context.

Dignity, together with equality, is seen as one of the core foundations of human rights law, as manifested in Article 1 of the Universal Declaration of Human Rights already, which states: All human beings are born free and equal in dignity and rights.<sup>83</sup> However, the exact meaning and contents of dignity are disputed. According to Botha, dignity

<sup>77</sup> Ibid, Goal 8.5.

<sup>78</sup> United Nations Inter-Agency Task Force on Social and Solidarity Economy, *Social and Solidarity Economy and the Challenge of Sustainable Development: A Position Paper by the United Nations Inter-Agency Task Force on Social and Solidarity Economy (TFSSE)* (Geneva: TFSSE, June 2014).

<sup>79</sup> International Labour Organization and International Co-operative Alliance, ‘Cooperatives and the Sustainable Development Goals: A Contribution to the Post-2015 Development Debate’ (2014), [http://www.ilo.org/wcmsp5/groups/public/—ed\\_emp/documents/publication/wcms\\_240640.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_emp/documents/publication/wcms_240640.pdf) (accessed 2 December 2019).

<sup>80</sup> David Littlewood and Diane Holt, ‘How Social Enterprises Can Contribute to the Sustainable Development Goals (SDGs) – A Conceptual Framework’ in Nikolaos Apostolopoulos et al, *Entrepreneurship and Sustainable Development Goals* (Bingley: Emerald Publishing, 2018)33.

<sup>81</sup> Utting, note 51.

<sup>82</sup> The CRPD for instance entails the principle of equality, underlying the substantive rights, in its Article 3 and the right to equality in Article 5.

<sup>83</sup> Universal Declaration of Human Rights UNGA Res 217 A(III), (adopted 10 December 1948), art 1.

requires the equality of every person, thereby outlawing discrimination. It also entails (at least) autonomy, social recognition and a minimum of material security.<sup>84</sup> In the context of work and employment, dignity has been frequently referred to by trade unions.<sup>85</sup> Goldman describes ‘worker social dignity’ as ‘a person’s employment-related opportunity to develop her or his unique attributes and relationships, maintain a sense of substantial self-worth, enjoy at least a moderate degree of financial security and participate in shaping her or his own and communal destinies’.<sup>86</sup> As a consequence, he argues that these conditions require the regulation of labour and the market to ensure they are fulfilled.<sup>87</sup>

Autonomy – or self-determination as it is also referred to – is the freedom to ‘govern ourselves’, and to make life choices based on a mixture of rational and irrational, intuitive choices.<sup>88</sup> Building on feminist theory, I understand autonomy as ‘relational autonomy’, acknowledging its social and relational dimensions, as nobody makes decision in a vacuum but instead based on their life circumstances.<sup>89</sup>

Finally, recalling the ultimate goal of WISEs to facilitate meaningful employment in the open labour market, it is important to take a closer look at the principle of inclusion. Inclusion is not as widely discussed in human rights literature as autonomy or dignity, which can be partially explained with it being a fairly new principle. The Convention on the Rights of Persons with Disabilities has led to an approach within the disability context that sees integration merely as a step on the way to the ultimate goal of inclusion. Inclusion does not differentiate between different groups, or categories, as integration would do. It does not expect the individual to adjust to the dominant norm but for society to accommodate the individual.<sup>90</sup> From this disability perspective, integration has been criticized as focusing primarily on the built environment, on everyone being in the same building, even though no meaningful interaction results from this and underlying obstacles, such as curricula at school, or work culture in employment, are not tackled.<sup>91</sup> Inclusion targets these systemic structures and aims to transform them, to make society responsive, based on an understanding that full and equal participation in all aspects of society is a human right.<sup>92</sup> In other contexts, especially when talking about migration, integration is still used as the dominant policy objective. Official use of the

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<sup>84</sup> Henk Botha, ‘Human Dignity in Comparative Perspective’ (2009) 20 *Stellenbosch Law Review* 171.

<sup>85</sup> Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19:4 *The European Journal of International Law* 655.

<sup>86</sup> Alvin L Goldman, ‘Cultural and Economic Perspectives Concerning Protection of Workers’ Social Dignity’ in Roger Blanpain (ed.), *Labour Law, Human Rights and Social Justice* (The Hague: Kluwer, 2001) 11.

<sup>87</sup> *Ibid.*

<sup>88</sup> Gerard Quinn, ‘Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD’, paper presented at the Harvard Law School Project on Disability conference, organized by Harvard Law School on 20 February 2010.

<sup>89</sup> Lucy Series, ‘Relationships, Autonomy and Legal Capacity’ (2015) 40 *International Journal of Law and Psychiatry* 81.

<sup>90</sup> Markus Scholz, ‘Integration und Inklusion – zwischen theoretischem Anspruch und Realität’, *bidok* (2007), <http://bidok.uibk.ac.at/library/scholz-integration.html> (accessed 19 September 2017).

<sup>91</sup> Lise Vislie, ‘From Integration to Inclusion: Focusing Global Trends and Changes in the Western European Societies’ (2003) 18:1 *European Journal of Special Needs Education* 20.

<sup>92</sup> Viola B Georgi, ‘Integration, Diversity, Inklusion’ (2015) 2 *Die Zeitschrift* 25.

word ‘integration’ in this context promises to bring about social participation. However, critics have pointed out that this treats migrants as a homogenous group and expects them to integrate themselves into society, by adapting to the existing standards and norms and consequently giving up parts of their own identity.<sup>93</sup> More nuanced approaches acknowledge that integration does not happen within the overall society but in several smaller aspects of it, such as employment, which is called the core integration drive.<sup>94</sup> Integration has to be seen as a societal process, which also constantly changes society. Its goal is to reach as much equality of opportunity as possible.<sup>95</sup> Such an approach brings the concept of integration closer to the understanding of inclusion entailed by the Convention on the Rights of Persons with Disabilities but is not the way it is predominantly understood.

The language of integration falls short of the Convention on the Rights of Persons with Disabilities’ requirements in two ways. First, it does not seem to include an overall right to full and equal participation. Second, it seems to be grounded in assimilationist approaches of expecting the minority group to adjust to the majority’s norm. By contrast, the Convention on the Elimination of Racial Discrimination, does not include the word ‘inclusion’ at all but uses the word ‘integrationist’ when talking about setting up organizations to eliminate barriers between races.<sup>96</sup> Similarly, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families speaks of integrating the children of migrant workers in local schools.<sup>97</sup> It thus becomes clear that different protection is offered to different groups under the UN human rights framework. While states parties must at least fulfil the requirements of the conventions, they can guarantee rights to a fuller extent on a voluntary basis. If they were to adopt the goal of inclusion for other marginalized groups beyond people with disabilities, they would ensure coherence of diversity policies, transparency and clarity for the various actors. However, this overview has also shown that literature and research are currently still following different parameters depending on whether the context is disability or migration. Generally speaking, therefore, governments could also resolve confusion over the values and goals of their society.

WISEs, with their specific focus on ‘integration’, will therefore have to follow the relevant standard of inclusion for people with disabilities and incorporate its philosophy into every aspect of their enterprise, if they want to be human rights compliant and active agents furthering their realization. In other contexts, it is up to WISEs to determine whether they want to follow an inclusion or integration approach. This is of especial importance for WISEs that do not focus on one specific group at risk of exclusion from the labour market, if they do not want to establish different standards within their enterprise

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<sup>93</sup> Ibid.

<sup>94</sup> Sachverständigenrat deutscher Stiftungen für Integration und Migration, ‘Einwanderungsgesellschaft 2010: Jahresgutachten 2010 mit Integrationsbarometer’, [https://www.stiftung-mercator.de/content/uploads/2020/12/SVR\\_Jahresgutachten\\_2010.pdf](https://www.stiftung-mercator.de/content/uploads/2020/12/SVR_Jahresgutachten_2010.pdf) (accessed 4 December 2019).

<sup>95</sup> Ibid.

<sup>96</sup> International Convention on the Elimination of All Forms of Racial Discrimination, (adopted 21 December 1965, entered into force on 4 January 1969), article 2.1.e).

<sup>97</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, A/RES/45/158 (adopted 18 December 1990, entered into force 1 July 2003), art 45.2.

which would result in different levels of support and potentially affect the quality and outcomes for different beneficiaries. Furthermore, as intersectionality gains increasing attention,<sup>98</sup> a distinction between these concepts and who they are applied to will not be sustainable in the long run. By following an overall inclusion framework, WISEs may become a good practice example of how to unify integration and inclusion approaches and lead to an increased interaction of the concepts generally, in line with their social mission rather than mere human rights compliance.

Overall, WISEs have to abide by these general principles of human rights law and incorporate them in their own foundations if they want to be seen as actors of transformative change and setting affirmative action. While inclusion is yet to be fully embraced, autonomy is already included in the participatory dimension of social enterprises as outlined in Section II, highlighting the compatibility of the concepts. However, these human rights principles do not provide much in terms of substantiating the concepts of social enterprises and WISEs under binding international law. It will therefore be necessary to look more closely at substantive human rights and the tools they entail and allow for us to realize them. Two human rights are of particular relevance here: the right to work and the right to equality.

### A. The Human Right to Work

As the main focus of WISEs is to ensure access to employment for those at risk of exclusion from the labour market, they arguably fall within the remit of the right to work. Sarkin and Koenig highlight that the right to work captures what is really a set of inter-related rights, which cover both quantitative aspects (providing enough jobs for everyone looking for employment) and qualitative aspects (ensuring that work is meaningful and dignified).<sup>99</sup> These two aspects are supplemented by the liberty dimension, referring to the right to refuse to take certain jobs, to be free from forced labour.<sup>100</sup> The qualitative dimension is also referred to as the ‘rights at work’, or in other words labour law, which has to be considered when designing labour market policies to promote the right to work.<sup>101</sup>

The exact meaning and content of the core right to work is, however, highly disputed. A subjective right to employment, manifested in an enforceable claim to be given a job, has mostly been rejected, based on the realization that full employment is not sustainable in a market-based economy.<sup>102</sup> Other concerns include who would have to provide and guarantee these jobs, given that the private sector, as the supplier of most jobs, is not usually bound by international law. In general, the right to work is interpreted as a policy

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<sup>98</sup> See for instance Committee on the Rights of Persons with Disabilities, General Comment Number 3 on Women and Girls with Disabilities, CRPD/C/GC/3 (25 November 2016).

<sup>99</sup> Jeremy Sarkin and Mark Koenig, ‘Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy’ (2011) 33:1 *Human Rights Quarterly* 1.

<sup>100</sup> Guy Mundlak, ‘The Right to Work: Linking Human Rights and Employment Policy’ (2007) 146 *International Labour Review* 189.

<sup>101</sup> Marita Körner, ‘Das internationale Menschenrecht auf Arbeit: Völkerrechtliche Anforderungen an Deutschland’, *Deutsches Institut für Menschenrechte* (2004), [https://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/studie\\_das\\_internationale\\_menschenrecht\\_auf\\_arbeit\\_01.pdf](https://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/studie_das_internationale_menschenrecht_auf_arbeit_01.pdf) (accessed 3 December 2019).

<sup>102</sup> *Ibid.*



goal and principle, guiding legislative and budgetary decisions.<sup>103</sup> The measures taken can therefore be tested in court against the duties contained in a human right to work.<sup>104</sup>

While there are several codifications of the right to work in specific contexts,<sup>105</sup> the International Covenant on Economic Social and Cultural Rights addresses the general right to work.<sup>106</sup> Its Article 6 on the right to work in the aforementioned narrow sense, states:

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.<sup>107</sup>

In its General Comment number 18, the Committee on Economic Social and Cultural Rights set out the four essential elements of Article 6, which have to be realized. Firstly, ‘availability’ includes offering specialized employment services for job seekers, while ‘accessibility’ refers to ensuring that the labour market is open to everyone. The employment options have to be acceptable for the job seeker in question, and be of decent quality, so that one can be truly free in choosing which work to accept.<sup>108</sup>

Some conventions on specific minority groups expand on what is required to ensure the right to work for everyone on an equal basis. Equality is in this context to be understood as an underlying legal principle<sup>109</sup> that informs the content and interpretation of the substantive human right in question, the right to work. This is framed as equality of opportunity by the Convention on the Rights of Persons with Disabilities.<sup>110</sup> Article 27 of the Convention on the Rights of Persons with Disabilities explicitly mentions the tool of affirmative action programmes along with incentives and other measures as a way of promoting the employment of people with disabilities.<sup>111</sup> Similarly, Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women explicitly outlines the concept of a right to access to (re)training, (advanced) vocational training and

<sup>103</sup> Philip Harvey, ‘Benchmarking the Right to Work’ in Shareen Herteil and Lanse Minkler (eds.), *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge: Cambridge University Press, 2007) 115.

<sup>104</sup> Ibid; James W Nickel, ‘Giving Up on the Human Right to Work’ in Virginia Mantouvalou (ed.), *The Right to Work* (Oxford: Hart Publishing, 2015) 137.

<sup>105</sup> For instance, in the context of the rights of persons with disabilities in Article 27 CRPD.

<sup>106</sup> International Covenant on Economic, Social and Cultural Rights, UN Doc 993 UNTS 3 (adopted 16 December 1966, entered into force 3 January 1976).

<sup>107</sup> Article 6 ICESCR.

<sup>108</sup> Committee on Economic, Social and Cultural Rights, ‘General Comment No 18: The Right to Work’, E/C.12/GC/18 (24 November 2005).

<sup>109</sup> See Charilaos Nikolaidis, *The Right to Equality in European Human Rights Law* (London; New York: Routledge, 2015) 14.

<sup>110</sup> Article 3 CRPD.

<sup>111</sup> Article 27 h) CRPD.

promotions as an aspect of the right to work,<sup>112</sup> thereby highlighting that some people have interruptions in their professional careers, as well as the importance of advancing women's careers, and ensuring opportunities for promotion.

Arguably, WISEs further both the quantitative and qualitative elements of the right to work, the former by providing additional jobs, and the latter by focusing on empowerment and enhancing the person's competitiveness in the labour market so that they can obtain the jobs they want. They are also compatible with all four of the essential elements outlined by General Comment number 18. With regard to availability, they have been set up for the unemployed, so are fully in line with the requirement. WISEs work to ensure an accessible labour market, offering acceptable and high-quality jobs for their beneficiaries, while providing these jobs themselves in the meantime. They can therefore be seen as fully in line with the requirements set out by the right to work in the International Covenant. Insofar as many WISEs focus on specific or all socially marginalized groups, aiming to ensure equality of opportunity in employment for them by providing work experience and targeted training, they also fall within the remit of the other conventions mentioned above. Accordingly, as will be discussed in Section III, WISEs could be seen as a form of affirmative action, which is found in various conventions. It is therefore important to consider what international law says regarding this concept, before reaching a definitive answer.

Summing up, this section has shown that while WISEs are starting to gain more attention on an international platform, this process is only just starting. WISEs and social enterprise more generally have not been codified in international law and international human rights law, both binding and soft law. It is yet to explicitly embrace and include them in their work as active agents on an equal basis with other businesses. In the meantime, general human rights law provides some guidance for WISEs not only on how to ensure they are fully human rights compliant by avoiding violations of rights, but also on how to contribute to the development and realization of equality of opportunity in employment for everyone as well as to a move from integration to inclusion within a human rights framework generally. However, these provisions are primarily applying to certain aspects of WISEs and social enterprises, leaving the need for a general international framework, accommodating them from a human rights perspective. In the meantime, affirmative action is the measure with the potential to provide the most comprehensive support and guidance.

## **B. Substantive (Transformative) Equality**

Equality holds a prominent position in international human rights law. It is to be understood as a core principle – like dignity – underlying the understanding and implementation of all the rights, as well as a right in itself. It has to be understood as a right in itself, according to Nikolaidis, as it entails correlating duties for states.<sup>113</sup> To be

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<sup>112</sup> International Convention on the Elimination of All Forms of Discrimination against Women, UN Doc 1249 UNTS 13 (adopted 18 December 1979, entered into force 3 September 1981), art 11.

<sup>113</sup> Nikolaidis, note 109.

effective, such a right to equality has to entail affirmative measures.<sup>114</sup> The exact meaning and contents of such a right to equality are, however, not always clear.

Equality may be described as a qualitative relationship between two subjects that have the same qualities with regard to a relevant aspect, in a specific context, although not in every aspect.<sup>115</sup> The details of what aspects are considered relevant and what equality contains are a topic of continuous debate.<sup>116</sup> In a human rights context, this question was answered to a certain extent by the Committee on the Rights of Persons with Disabilities, in its General Comment No. 6 on Equality.<sup>117</sup> The Convention on the Rights of Persons with Disabilities is one of the most recent human rights conventions<sup>118</sup> and can therefore be considered as framing the current understanding of equality in a comprehensive manner. General Comment No. 6 builds essentially on Fredman's concept of substantive equality, although under the new terminology of inclusive or transformative equality.<sup>119</sup>

Substantive equality, acknowledging the disadvantage attached to certain characteristics, aims to overcome the shortcomings of a system by acknowledging that different treatments can be required to achieve actual equality. However, its core contents and exact meaning are still the subject of considerable disagreement. MacKinnon argues that substantive equality focuses on lived realities and the way these are determined by historical and prevailing disadvantage. Inequalities must therefore to be addressed in a systematic, asymmetrical way, not based on identical treatment, that challenges existing power structures.<sup>120</sup>

However, it is important to note that there is not just one approach of substantive equality, but several. MacKinnon and Fredman, often referred to as the founders of substantive equality, disagree on whether substantive equality is to focus solely on redressing power inequalities and resulting hierarchies of domination<sup>121</sup> or has to be understood as a multifaceted approach, focusing not just on power but also on questions of redressing stigma, accommodating difference and participation. Fredman sees hierarchies of domination as part of the bigger, interlinked challenge.<sup>122</sup> She acknowledges the ambiguous nature of substantive equality but identifies consensus between the different proponents of the model. These include an understanding of the group aspects of discrimination, and the need for states to respond to inequalities actively by providing measures to combat disadvantage. However, this active aspect entails

<sup>114</sup> The Equal Rights Trust, 'Declaration of Principles on Equality', *Equal Rights Trust* (2008), <https://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf> (accessed 9 January 2021).

<sup>115</sup> Stanford Encyclopedia, 'Equality', <https://plato.stanford.edu/entries/equality/> (accessed 22 November 2019).

<sup>116</sup> *Ibid.*, for an overview of the different approaches.

<sup>117</sup> Committee on the Rights of Persons with Disabilities, 'General Comment No 6 on Equality and Non-Discrimination' CRPD/C/GC/6 (26 April 2018).

<sup>118</sup> It was passed in 2006, like the International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>119</sup> GC/6, note 117.

<sup>120</sup> Catherine A MacKinnon, 'Substantive Equality Revisited: A Reply to Sandra Fredman' (2016) 14:3 *International Journal of Constitutional Law* 739.

<sup>121</sup> *Ibid.*

<sup>122</sup> Fredman, note 7.

questions of resource allocation, situating equality uneasily between policy and law.<sup>123</sup> Others, including Degener, have suggested that substantive equality was a step towards other models, such as transformative equality.<sup>124</sup> She refers to MacKinnon and her discussion of power or the use of affirmative action, and Fredman's concept respectively, as a means to redress disadvantage and power imbalances, to give her model content. Transformative equality thereby appears more like a variation of the existing substantive equality concept. One version of substantive equality that is frequently referred to, including in the United Nations Convention on the Rights of Persons with Disabilities, is equality of opportunity.<sup>125</sup> Equality of opportunity has been described as aiming to equalize the starting point, so that everyone within society can compete on equal terms and under fair conditions. Factors beyond the person's control have to be eliminated in order to ensure that everyone can compete on an equal basis.<sup>126</sup>

Affirmative action is one 'active' tool used to realize substantive equality.<sup>127</sup> It is sometimes referred to as 'positive measures', 'positive action' or 'positive discrimination', although the last term has been increasingly rejected, as affirmative action does not constitute discrimination but on the contrary aims to eliminate its occurrence.<sup>128</sup> It is defined in different conventions as steps taken to ensure the advancement of the human rights of a specific social group (including racial minorities, people with disabilities, women and girls) which faces systemic disadvantages, taking into account power relations.<sup>129</sup> As the Committee on the Elimination of Racial Discrimination clarifies in its General Comment on affirmative action, these measures are situated within a substantive equality framework, which does not expect equal treatment when there are 'significant differences in situation'. On the contrary, treating everyone the same in a situation like this would amount to discrimination. To make this clear and avoid misunderstandings, affirmative action, which can include the full span of legislative, budgetary, policy and preferential measures, should have the sole purpose of ensuring equal enjoyment of a specific right made apparent in its design.<sup>130</sup> While the Committee on the Elimination of All Forms of Discrimination against Women emphasizes that affirmative action must not lead to the maintenance of separate rights and therefore has to be discontinued once the goals have been achieved,<sup>131</sup> the Committee on the Rights of Persons with Disabilities – while in general agreeing – points out that, in a disability context, permanent measures might

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<sup>123</sup> Sandra Fredman, 'Providing Equality: Substantive. Equality and the Positive Duty to Provide' (2005) 21:2 *South African Journal on Human Rights* 163.

<sup>124</sup> Theresia Degener, 'Disability in a Human Rights Context' (2016) 5 *Laws* 35.

<sup>125</sup> See Article 3 CRPD.

<sup>126</sup> Fredman, note 7, 723.

<sup>127</sup> Fredman, note 123.

<sup>128</sup> Committee on the Elimination of Racial Discrimination, 'General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination' (August 2009) CERD/C/GC/32, para 12.

<sup>129</sup> Degener, note 124.

<sup>130</sup> CERD/C/GC/32, note 128.

<sup>131</sup> *Ibid.*, para 19.

sometimes be required based on the specific impairment or societal barriers. It also mentions targeted recruitment as one example of affirmative action. However, it reiterates that affirmative action must not result in a perpetuation of isolation and segregation.<sup>132</sup>

Looking at academia, Fredman describes affirmative action as entailing the duty of whoever is best suited to address inequalities to identify and address it proactively.<sup>133</sup> O’Cinneide defines positive action broadly as ‘all measures which seek by means of positive steps to alter existing social practices so as to eliminate patterns of group exclusion and disadvantage’.<sup>134</sup> Unlike anti-discrimination laws, which provide remedies in situations where discrimination has occurred, affirmative action aims to prevent discrimination from being repeated in the first place.<sup>135</sup> To achieve this goal, social change has to happen and discriminatory attitudes overcome. An individual system, such as anti-discrimination legislation, can only achieve this goal to a limited extent.<sup>136</sup>

Affirmative action can include a variety of policies and measures, which McCrudden has categorized in five basic groups in the context of employment.<sup>137</sup> Firstly, positive measures to combat discrimination entail steps taken to end any policies that result in discrimination. Secondly, there are inclusive policies, which are neutral on the surface but benefit certain minorities disproportionately. Thirdly, outreach programmes aim to attract qualified members of minority groups for specific employment or training opportunities. Fourthly, preferential treatment measures explicitly adopt criteria that give preference to members of a certain minority group, by reserving certain positions or establishing tie-breaker rules, for instance. Finally, the fifth category aims at redefining what we understand by ‘merit’. Here, the criteria employees have to fulfil are re-evaluated for their necessity and adjusted to make the jobs more accommodating.<sup>138</sup> Reskin outlined in the American context various origins and types of affirmative action in employment, such as in the public sector or court ordered measures as a response to past discrimination cases. Most importantly for the context of WISEs is the category of voluntary affirmative action, which entails affirmative action developed and implemented by private actors, employers, based on their own initiative and interest in contributing to equality of opportunity in employment.<sup>139</sup>

Under McCrudden’s categories of affirmative action,<sup>140</sup> WISEs that offer jobs to the (long-term) unemployed generally fall under the second category of inclusive policies, while those that target a specific group of people at risk of exclusion from the labour market or reserve a certain percentage of jobs for them, fall under the third or fourth

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<sup>132</sup> GC/6, note 117.

<sup>133</sup> Fredman, note 123.

<sup>134</sup> Colm O’Cinneide, ‘Positive Action’, *ERA* (2014), [http://www.era-comm.eu/oldoku/SNLLaw/04\\_Positive\\_action/2014\\_April\\_Cinneide\\_Paper\\_EN.pdf](http://www.era-comm.eu/oldoku/SNLLaw/04_Positive_action/2014_April_Cinneide_Paper_EN.pdf) (accessed 6 February 2020).

<sup>135</sup> Barbara F Reskin, *Affirmative Action in Employment* (American Sociological Association, 1998) 86.

<sup>136</sup> O’Cinneide, note 134.

<sup>137</sup> Christopher McCrudden, ‘Rethinking Positive Action’ (1986) 15:4 *Industrial Law Journal* 219.

<sup>138</sup> Guiding Principles, note 6.

<sup>139</sup> Raskin, note 135, 15.

<sup>140</sup> McCrudden, note 137.

category. However, they also redefine the job requirements and the concept of merit in a way that caters for the situations of their employees, therefore also falling under the fifth category. This brief overview leads therefore to the initial observation that WISEs could potentially be called a form of affirmative action, a point which will be picked up again in the following section.

## V. IMPLICATIONS FOR WISES

### A. WISEs and Affirmative Action

The question arising from the overview of the human right to work and under a substantive equality lens is whether WISEs can be framed under the concept of affirmative action. The concepts of substantive equality and WISEs interrelate quite well at a theoretical level, even though this seems to happen unconsciously. WISEs consciously hire unemployed people facing specific obstacles, rather than taking a merely meritocratic approach, which would ignore the underlying power imbalances. It thereby contributes to an attempt to equalize opportunities within the labour market. Young describes social enterprises as promoting a rights-based approach, and bringing about systemic change, which ‘transform(s) the architecture of how things work’.<sup>141</sup> She thereby links social enterprises not only to substantive equality but also to a human rights perspective, an idea of entitlement to the services or goods social enterprises provide. Similarly, Teasdale et al build their analysis of changemakers on Wright’s so-called utopian thinking of transforming the market’s power relations, which would bring more democracy to the market sector.<sup>142</sup> This idea of transforming power relations largely mirrors MacKinnon’s understanding of substantive equality but also recalls Holloway’s suggestion of creating small alternative spaces of other-doing, defying the dominant logic of the market, thereby creating what he calls ‘cracks’ in the system with the potential to create impact and transformation beyond their own, small systems.<sup>143-144</sup>

However, given that WISEs as social enterprises are generally initiatives launched by civil society with a high degree of autonomy, the answer has to differentiate between affirmative measures taken by the state and those undertaken by private actors. Affirmative action, as previously described, is a tool to ensure the realization of human

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<sup>141</sup> Rowena Young, ‘For What It Is Worth: Social Value and the Future of Social Entrepreneurship’ in Alex Nicholls (ed.), *Social Entrepreneurship: New Models of Sustainable Social Change* (Oxford: Oxford University Press, 2006) 56.

<sup>142</sup> Simon Teasdale et al, ‘Everyone a Changemaker? Exploring the Moral Underpinnings of Social Innovation Discourse through Real Utopias’ (2020) *Journal of Social Entrepreneurship*.

<sup>143</sup> John Holloway, *Crack Capitalism* (Chicago: Pluto Press, 2010).

<sup>144</sup> It has to be added at this point that what is considered transformative in this context does not necessarily constitute transformative change for everyone. This term, just like ‘affirmative’, is loaded with meanings and context specific. Nancy Fraser for instance distinguishes between affirmative measures (corrective measures, not entailing system change) and transformative measures (addressing the underlying system), which does not mirror the human rights terminology entirely (Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Colombia: Colombia University Press, 2008)). It has to be noted that many WISEs are not in a position to redress the underlying structures consistently and while aware of them, work on a small scale, creating what Holloway (note 143) calls a ‘crack’ in the system, counting on a snowball effect creating further opportunities. Improving the situation for those excluded from opportunities, in line with Fraser’s affirmative dimension, does not mean they are not aware of the wider societal issues, as the author of this article has repeatedly observed during field work.

rights, and specifically of equality of opportunity, for all members of society, including marginalized groups. WISEs are third sector initiatives, which give preference – and thereby implement affirmative action measures – to certain groups of society especially at risk from exclusion from the open labour market. They can therefore not be claimed by the state as part of their public sector measures. In this context, it is also important to note the statement of the Committee on Economic, Social and Cultural Rights in its General Comment Number 5, that citizen initiatives do not exempt the state parties from their duties to guarantee human rights.<sup>145</sup>

However, the General Comment does also acknowledge the role private initiatives play in a neoliberal world, where services are increasingly market-based. It is then the state's duty to provide appropriate regulations to guarantee compliance with human rights standards.<sup>146</sup> Despite the aim of this article to promote the potential and contributions of WISEs and social enterprises generally, it is important to avoid the potential risk of businesses becoming 'private governments' – in other words, taking over the role of the state in addressing welfare issues, without the legitimacy of states.<sup>147</sup>

Where states do regulate WISEs, they often also provide funding and other forms of support, to promote their contribution to labour market policies. WISEs thereby lose a certain amount of their autonomy and move closer to the public sector.<sup>148</sup> At the same time, the government is taking initiative, as part of their duties under international law, and furthering the rights of certain groups of the population (the target groups of the funded WISEs, which can be very specific as mentioned before) by allocating resources and promoting social enterprises. These steps then, as opposed to the WISEs themselves, are an affirmative measure taken by the state. However, as outlined by Davister et al and discussed in Section II, the degree of autonomy as well as the economic independence and inclusion of WISEs in the business sector varies greatly, with only category 2, 'Creation of permanent self-financed jobs', being explicitly independent from systemic funding.<sup>149</sup> In some countries with an established funding scheme for WISEs, sometimes requiring specific legal forms and business models, these enterprises are set up in response to the funding.<sup>150</sup> It could be argued that in this case, the WISEs themselves – which are moving ever closer to the public sector and are losing some of the features of an ideal-type social enterprise – are to be understood directly as affirmative action measures by the state and less as parts of the economy.

These cases, particularly the last example of enterprises set up in response to funding, seem to confirm the concerns of Utting amongst others: that the innovative and autonomous potential of social enterprises is reduced in favour of promoting certain

<sup>145</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 5: Persons with Disabilities (9 December 1994) E/1995/22, para 12.

<sup>146</sup> Ibid, para 11.

<sup>147</sup> For a critical stance on the potential of corporations to address questions of power and privilege, thereby undermining their own foundations, also in the context of social enterprises, see Anand Giridharadas, *Winners Take All* (New York: Alfred A Knopf, 2018) 13–34.

<sup>148</sup> Defourny and Nyssens, note 1.

<sup>149</sup> Davister et al, note 32.

<sup>150</sup> In the Irish context see for instance Mary O'Shaughnessy and Patricia O'Hara, 'Social Enterprise in Ireland – Why Work Integration Social Enterprises (WISEs) Dominate the Discourse' (2016) 7:4 *Nonprofit Policy Forum* 461.

policies, which are considered important by government. Furthermore, when funding is available, social enterprises can be seen adjusting their services to fit into a scheme, thereby potentially abandoning their business orientation as well as their original mission.<sup>151</sup> In line with Salustri, however, this article argues that such developments need to be monitored, evaluated and corrected – for instance, in the context of funding, by ensuring there is a more generic funding stream for social enterprises generally, alongside one that favours WISEs. It is exactly the international legal system and its analysis by academia that can provide the guidance and awareness needed for states to do this.

Having established that the promotion and funding of WISEs is a form of affirmative action, what practical implications follow from this? As previously discussed, affirmative action measures are generally supposed to be temporary. They are therefore subject to regular evaluation and must be discontinued once the desired goal has been achieved.<sup>152</sup> Consequently, governments must tailor their supports in a way that can achieve their desired goal – in this case fulfilling the right to work for those at risk of exclusion from the labour market without these supports becoming a permanent alternative. They are also limited in which target groups they support, as these measures are intended to achieve substantive equality for social groups that have been systematically advantaged. Consequently, the beneficiaries of affirmative action are specific groups protected by non-discrimination legislation.

WISEs then face a situation where they can receive (financial) support from the public sector, but cannot count on this as a permanent source of resources, as the government might periodically reallocate resources to more promising measures or discontinue them when they consider the goal achieved. From the perspective of trying to maintain their autonomy and economic viability, this can be seen as the necessary incentive to strive for economic independence from subsidies. This, however, is only possible where the regulatory framework accompanying the financial supports allows for long-term financial planning. For instance, the aforementioned Austrian ‘Sozioökonomische Betriebe’ have no option to create reserves, operate on one-year plans, and can only work in so-called ‘niche’ professions.<sup>153</sup> It is therefore almost impossible for them to reach economic viability and gain further autonomy from the public sector. They are therefore an example of overbearing regulation, resulting in the WISEs being effectively not a business any more but a labour market policy and has to be viewed with concern.

From a right to work perspective, such restrictive regulations limiting the entrepreneurial nature of WISEs are unnecessary. On the contrary, having to work in a niche profession to obtain work experience and training is not helpful for subsequently finding employment on the open labour market. It is questionable if the qualitative element of the right to work and its accessibility criterion are complied with in these situations. While financial supports by the state must be monitored to ensure they are used

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<sup>151</sup> Ibid.

<sup>152</sup> CERD/C/GC/32, note 127, para 36.

<sup>153</sup> Arbeitsmarktservice (AMS), ‘Bundesrichtlinie für die Förderung Sozialökonomischer Betriebe (SÖB)’, BGS/AMF/0722/9950/2017, AMF/12-2017 (1 July 2018).



appropriately and evaluated in terms of their potential to achieve their purpose, any further regulations limiting the autonomy of WISEs would have to be critically analysed. As previously outlined, human rights compliance is a legitimate concern, and WISEs, as a form of social enterprise with a social mission, can be expected to do more in terms of setting active steps to realize human rights. Regulations targeting entrepreneurial freedom are based on a different logic and are usually based on the idea of non-interference with the free economy. Such regulations lead, however, not only to an increased dependence on subsidies and lack of autonomy of the WISEs, but potentially also to a work environment that does not mirror the work environment of the open labour market for beneficiaries. Such regulations are not required from a human rights perspective and, considering the interest of WISEs as a form of social enterprise, should be rejected based on the need to maintain maximum autonomy for WISEs.

Human rights requirements should result in ending certain approaches, such as what is called by Davister et al 'Socialisation through a productive activity',<sup>154</sup> as they entail human rights violations and consequently must not be supported by states.<sup>155</sup> From a human rights perspective, such a limitation of the otherwise very productive innovative freedom of social enterprises is actually very welcome. Inclusion of people with disabilities has to be the rule in every sector of society, and social enterprises as innovators should be at the forefront of this development and not maintain outdated practices.

If international law were to embrace social enterprises as tools to be promoted as a form of affirmative action, it could provide the clarity needed for social enterprises to position themselves as best practices in terms of inclusivity and accommodating diversity, thereby raising awareness within the market economy and potentially starting a snowball effect.

## B. WISEs and Business and Human Rights

The previous sections have shown that WISEs and social enterprises have generally been largely overlooked in the context of business and human rights. Where they have been discussed, this was from the angle of corporate social responsibility investments. This article suggests that this should change for several reasons.

Firstly, social enterprises, including WISEs, could benefit greatly from networks such as the Global Compact, and the resources it offers. As discussed, many find it hard at times to combine the social and the business side and consequently lack certain business skills or neglect governance aspects.<sup>156</sup> In addition, it has to be pointed out that even WISEs, as socially and sustainably responsible enterprises, are in need of regulation or oversight regarding their human rights compliance, especially when it comes to people with disabilities and the right to work, to guarantee they are not segregated and denied their labour rights. Like any other businesses, WISEs should therefore incorporate corporate

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<sup>154</sup> Davister et al, note 32.

<sup>155</sup> For a detailed discussion of sheltered workshops, the prevalent version of this type, under human rights law, see Charlotte May-Simera, 'Reconsidering Sheltered Workshops in the Light of the United Nations Convention on the Rights of Persons with Disabilities (2006)' (2018) 7:6 *Laws*.

<sup>156</sup> Cornelius et al, note 11.

social responsibility practices, ensure they are complying with labour law and generally respect human rights beyond their core mission, which aims at promoting and fulfilling the right to work, sometimes alongside other human rights. Finally, being included in the field of business and human rights will further strengthen the view of WISEs as businesses, which can potentially strengthen their position against economically restrictive regulations. On the other hand, traditional enterprises could learn from social enterprises, in how to address societal concerns proactively as part of a financially sustainable business approach. By including social enterprises as their members, these networks would also gain further legitimacy in a human rights context. It would arguably be an opportunity for them to shift the narrative from its currently predominant focus of corporations as a threat to human rights, towards a more nuanced image. WISEs can therefore be seen as both contributing to learning and being in need of a business network, in their quest to become a comprehensive driver for human rights promotion and compliance within the market.

Given that the hybrid nature of social enterprises and WISEs, combining elements of the third, public and private sector, has so far often led to confusion regarding their status as professional, trading and income-creating actors on the market, an explicit inclusion in international law would contribute to resolving these issues, in addition to adding visibility to the sector and its contribution at an international level. This is to be seen in addition to an engagement of the field of business and human rights with social enterprises. As this article has shown, international law is well able to include WISEs in their framework, as suggested via the principle and right to equality and specifically in the form of affirmative action. An explicit acknowledgement is therefore required for reasons of clarification primarily and with the hope of adding visibility to the contributions the sector already makes. This acknowledgment might even address the social and solidarity economy generally. It might also lead to further dedicated regulations as a consequence.

In summary, it can therefore be said that while the social and solidarity economy, with social enterprises as part of them, are to be embraced by international human rights law in the context of business and human rights, the focus should arguably be on social enterprises. This would bring mutual learning and opportunities both for social enterprises and traditional businesses.

## VI. CONCLUSION

This article has initiated a discussion of WISEs, as a sub-type of social enterprise, under the international human rights framework. It has highlighted how WISEs, as innovative, autonomous citizen initiatives, try to promote access to the open labour market for marginalized groups. They use the market economy for the fulfilment of their social missions and aim to achieve systemic change. In this way, they have the potential to change and broaden our understanding of capitalism. To achieve substantive equality, we will have to overcome the current understanding of businesses and the market, which is built primarily on profit-generation. Social enterprises demonstrate that this does not have to be the case, and that businesses can incorporate social and sustainable aspects into their

core missions.<sup>157</sup> Applied to the context of the right to employment, this means that it is possible to promote an understanding of equality of opportunity for everyone and diversity in the labour force by questioning dominant hiring policies and understandings of merit.

The international human rights framework and international law in general have yet to acknowledge and embrace the contributions and importance of social enterprises, including WISEs. This article has argued that, until this happens, WISEs can be situated in the existing human rights framework under affirmative measures to promote the right to work. Where this is done with state support, regulation will become unavoidable, which must be balanced against the interest of the sector in maintaining its autonomy and innovative potential. From a human rights perspective, a certain amount of regulation is, however, desirable to ensure full compatibility with the requirements of human rights law, and this does not have to impact the entrepreneurial autonomy of WISEs. Secondly, WISEs themselves can be seen as private actors, namely civil society businesses, setting voluntary affirmative action measures themselves, by using hiring policies that promote a more inclusive, diverse workforce.

What is the significance of these conclusions? At the international level it is primarily a call to embrace the concept of social enterprises and WISEs more specifically in the legal human rights framework. Literature has been calling for the recognition of the sector's contributions for a while.<sup>158</sup> A systematic, in-depth study of the contributions to the realization of human rights in general would add to the legitimacy and visibility of the sector. As a second step, guidance should be provided to states on how to offer support to the sector and regulate it without taking away its unique features and making it just another form of public policy.

At a national level, governments can – in the absence of international regulations – take matters into their own hands. By acknowledging that policies and funding of the sector constitute affirmative action, governments can rely on established guidelines regarding the legitimacy of measures, monitoring requirements and their temporary nature and ensuring that no forms of segregation will result from social enterprises.

Finally, WISEs themselves do not have to wait for legislation but can take existing human rights law, jurisprudence and analysis into account when planning or evaluating their work, to ensure they are as progressive, innovative and democratic as possible. By joining corporate social responsibility networks at national and international level, such as the Global Compact, they can profit from the experience of others and share their own knowledge, while creating professional networks generally and increasing their visibility. By doing so they have the potential to promote even more change, in a holistic manner.

For the field of business and human rights, social enterprises could be a way to move beyond seeing businesses merely from a 'respect' angle when it comes to human rights law and its tripartite structure. Social enterprises are businesses with a social drive, actively promoting sustainability and the right to work amongst potentially other human rights. They could also be a good example for the economy as such, leading to

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<sup>157</sup> Muhammad Yunus, 'Social Business Entrepreneurs are the Solution' in Nicholls, note 141, 43.

<sup>158</sup> See for instance Littlewood and Holt, note 80.

a new understanding of social responsibility, diversity and inclusion amongst enterprises, and resulting in further voluntary efforts to contribute to the fulfilment of human rights. Business and human rights can thereby also open up to the interconnectedness of human rights and their tripartite structure, seeing how social enterprises focus on many different causes apart from employment, ranging from recycling to childcare and advocacy.<sup>159</sup>

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<sup>159</sup> For an overview see for instance Carlo Borzaga and Jacques Defourny, *The Emergence of Social Enterprise* (London; New York: Routledge, 2004).